

**BEFORE THE FRESHWATER HEARINGS PANEL CONVENED BY THE CHIEF
FRESHWATER COMMISSIONER**

IN THE MATTER

of the Proposed Otago Regional Policy Statement
2021

MEMORANDUM ON BEHALF OF THE OTAGO REGIONAL COUNCIL

Dated 25 July 2022

ROSS DOWLING MARQUET GRIFFIN
SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
Facsimile: (03) 477 6998
PO Box 1144, DX YP80015

Solicitor: SJ Anderson

MEMORANDUM ON BEHALF OF THE OTAGO REGIONAL COUNCIL

May it please the Panel:

High Court Judgment

- 1 The High Court has given its judgment in the declaratory judgment proceedings concerning this freshwater planning process.
- 2 The judgment is **attached**.
- 3 At paragraph [231] of the judgment the Court has made declarations as follows:
 - (a) *The Otago Regional Council's determination that the whole of the proposed Otago Regional Policy Statement 2021 is a freshwater planning instrument under s 80A(1)–(3) of the Resource Management Act 1991 was in error and not in accordance with the requirements of s 80A.*
 - (b) *The Otago Regional Council must now satisfy itself as to which parts of the proposed regional statement relate to freshwater and so constitute a freshwater planning instrument through giving effect to the National Policy Statement for Freshwater Management 2020 or otherwise relating to freshwater.*
 - (c) *Following its determination as to that, the Otago Regional Council must continue with the preparation of those parts of the plan that are not part of the freshwater planning instrument, in accordance with the process set out in pt 1, sch 1 of the RMA.*
 - (d) *Those parts of the proposed regional statement that are determined by the Otago Regional Council to be parts of a freshwater planning instrument are to be publicly notified as a freshwater planning instrument, and are to be subject to the freshwater planning process in subpt 4 of pt 5 and pt 4 of sch 1 of the RMA 1991.*

Consequences

- 4 The judgment has immediate effect, notwithstanding that it may be appealed.
- 5 The freshwater planning process before this Panel is therefore at an end.
- 6 The constitution of this Panel is also at an end.

7 After declaration (d) is implemented by Otago Regional Council the resulting freshwater planning documents will need to be submitted to the Chief Freshwater Commissioner afresh, and a new freshwater hearings panel will then need to be convened.

Submission

8 Otago Regional Council submits that it would be appropriate for the Panel to issue a minute to the submitters recording:

8.1 the declarations made by the High Court; and

8.2 that this freshwater planning process, and the constitution of the Panel, is at an end.

The Non-Freshwater Parts of the PRPS

9 After Otago Regional Council has determined which parts of the proposed regional policy statement relate to freshwater it will contact submitters regarding continuation of the process under Part 1 of Schedule 1 of the RMA for the remainder of the proposed regional policy statement.



Simon Anderson
Counsel for Otago Regional Council
25 July 2022

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE**

**CIV-2021-412-000089
[2022] NZHC 1777**

BETWEEN OTAGO REGIONAL COUNCIL
Plaintiff

AND ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Defendant

Hearing: 8 February 2022

Appearances: A J Logan for the Otago Regional Council
P D Anderson and M Downing for Royal Forest and Bird
Protection Society of New Zealand Inc
L A Andersen QC for Port Otago Limited
P E M Walker and S W Christensen for Oceana Gold (New
Zealand) Ltd
M R Garbett and R A Kindiak for Dunedin City Council and
Waitaki District Council
J M Derry and R G Muston for Minister for the Environment
P A C Maw and K T Dickson for Canterbury Regional Council
S J Scott for Queenstown Lakes District Council and Central
Otago District Council
S R Gepp for Rayonier Matariki Forests Limited and Ernslaw One
Limited
K L Hockly for Te Rūnanga o Ngāi Tahu
M A Baker-Galloway for Otago Fish & Game Council –
appearance excused

Judgment: 22 July 2022

JUDGMENT OF NATION J

Introduction	3
Background	14
The relevant legislation	27
Integrated management, the fundamental concept of Te Mana o te Wai and ki uta ki tai	28
Submissions in support of the whole of the proposed regional statement being a freshwater planning instrument.	35
<i>Otago Regional Council</i>	35
<i>Ngā Rūnanga</i>	53
<i>Canterbury Regional Council</i>	63
Submissions of parties who argued the ORC’s decision that the proposed regional statement, as a whole, was a freshwater planning instrument was not open to it on a correct interpretation of s 80A of the RMA	74
<i>The Minister for the Environment</i>	75
<i>Forest and Bird</i>	78
<i>Oceana Gold</i>	80
<i>Port Otago Ltd</i>	86
<i>Dunedin City Council and Waitaki District Council</i>	88
<i>Central Otago District Council and Queenstown Lakes District Council</i>	95
<i>Rayonier Matariki Forest Ltd and Ernslaw One Ltd</i>	105
The interpretation of s 80A of the RMA	108
<i>Legal principles</i>	108
<i>Why the meaning of the legislation is not clear</i>	111
<i>Legislative process</i>	117
<i>Interpretation of s 80A</i>	148
<i>Conclusion as to how s 80A must be read</i>	165
Why the ORC’s interpretation and application of s 80A of the RMA was in error	169
The Court’s task	173
The Court’s view as to how the words “relates to freshwater” are to be interpreted and applied	183
What, if any, declarations should be made in light of the earlier conclusions in this judgment?	211
Costs	232
Concluding summary	233

[1] In 2020, through an amendment to the Resource Management Act 1991 (RMA), Parliament introduced a new freshwater planning process for regional plans or policy statements, or parts of them, that are freshwater planning instruments as defined in the Act.

[2] Through these proceedings, the Court must decide whether there was an error of law in the Otago Regional Council (ORC) deciding that the whole of its proposed regional statement was a freshwater planning instrument and so subject to the freshwater planning process.

Introduction

[3] The purpose of the RMA is to promote the management of the use, development and protection of natural and physical resources to enable people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while protecting the environment.¹

[4] Under the RMA, the Minister for the Environment can and has issued national policy statements stating objectives and policies for matters of national significance relevant to achieving the purpose of the RMA.² Territorial authorities, including regional councils³ and district councils, must consider and give effect to those statements in preparing their policy statements and plans.⁴

[5] Regional councils must have a regional policy statement in accordance with their functions under s 30 of the RMA and other RMA provisions.⁵ The purpose of a regional policy statement is to achieve the purpose of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.⁶

¹ Resource Management Act 1991 [RMA], s 5.

² Sections 45 and 45A.

³ A number of unitary authorities also have the functions of both regional councils and district councils. When referring to regional councils, I am also referring to unitary authorities insofar as they are exercising regional council functions.

⁴ RMA, ss 62(3), 67(3)(a) and 75(3)(a).

⁵ Sections 60 and 61.

⁶ Section 59.

[6] The functions of regional councils include:

- (a) preparation of objectives and policies as to any actual or potential effects of the use, development or protection of land which are of regional significance;⁷
- (b) preparation of objectives and policies to ensure there is sufficient development capacity in relation to housing and business lands to meet the expected demands of the region;⁸
- (c) control of the use of land for the purpose of maintaining and enhancing the quality and quantity of water in water bodies and coastal water;⁹ and
- (d) control of discharges of contaminants into or onto land, air or water and discharges of water into water.¹⁰

[7] District councils must have district plans to assist them in carrying out their functions in order to achieve the purpose of the RMA.¹¹ They are required to give effect to national planning documents and any regional policy statement, and have regard to proposed regional policy statements.¹²

[8] Under the RMA, interested parties can make submissions to regional councils as to proposed regional statements. Councils can then decide what should be in their regional statements.¹³ Submitters who are dissatisfied with the regional council's decision can appeal to the Environment Court.¹⁴ This is a specialist tribunal with expertise as to environmental and planning issues. The Environment Court can then consider the issues afresh with all the same powers the regional council had.¹⁵ The parties to an appeal to the Environment Court have rights of appeal to the High Court but only as to errors of law.¹⁶

⁷ Section 30(1)(b).

⁸ Section 30(1)(b)(a).

⁹ Section 30(1)(c)(ii) and (iii).

¹⁰ Section 30(1)(f).

¹¹ Section 72.

¹² Sections 75(3)(c) and 74(2)(a).

¹³ Schedule 1 cl 10.

¹⁴ Schedule 1 cl 14.

¹⁵ Section 290(1).

¹⁶ Section 299.

[9] On 1 July 2020, through the Resource Management Amendment Act 2020 (the Amendment Act), the RMA was amended to establish a new freshwater planning process to deal with freshwater issues in regional plans and policy statements.

[10] The Amendment Act required submissions on freshwater issues to be considered by a separate freshwater hearings panel. That panel then makes recommendations to a regional council. The regional council can accept or reject any recommendation.¹⁷ Submitters have a right of appeal to the Environment Court but only if the recommendation of the freshwater hearings panel has not been accepted.¹⁸ Submitters can appeal to the High Court if the regional council accepted the recommendation of the freshwater planning hearings panel but only on questions of law.¹⁹

[11] The Minister for the Environment issued a national policy statement for freshwater management in 2014. This was amended in 2017. The purpose and effect of that statement is to require territorial authorities, including regional and district councils, to improve their management of and carry out their functions to improve the quality of freshwater in all parts of New Zealand/Aotearoa.²⁰

[12] In September 2020, that National Policy Statement was replaced by the National Policy Statement for Freshwater Management 2020 (National Freshwater Policy).

[13] In 2021, the ORC notified that it had prepared a new Proposed Otago Regional Policy Statement June 2021 (proposed regional statement) and had decided the whole of the statement was a freshwater planning instrument so had to be subject to the freshwater planning process.

¹⁷ Resource Management Amendment Act 2020 [Amendment Act], s 22; RMA, s 80A.

¹⁸ Amendment Act, s 103(3); RMA, sch 1 cl 55.

¹⁹ Amendment Act, s 103(3); RMA, sch 1 cl 56.

²⁰ As seen in the preamble to the National Policy Statement for Freshwater Management 2014 (amended 2017) at 4.

Background

[14] On 1 October 2019, Professor Peter Skelton produced a report for the Minister for the Environment reviewing the freshwater management and allocation functions at the ORC.

[15] On 18 November 2019, the Minister for the Environment, under s 24A of the Act, recommended the ORC undertake a complete review of its regional policy statement with the intention that it be made operative by 31 December 2023. The ORC accepted that recommendation and embarked on the significant task of reviewing its partially operative regional policy statement.

[16] The National Planning Standards of November 2019 require a regional policy statement to have chapters and sections on various subjects including integrated management, land and freshwater, tangata whenua/mana whenua, air, coastal environment, energy infrastructure and transport, and historical and cultural values.

[17] On 1 July 2020, through the Amendment Act, Parliament introduced a new subpt 4 of pt 5 of the RMA. The amendments provided for the separate planning process for proposed regional statements that give effect to any national policy statement for freshwater management and/or that relate to freshwater. Such a document is described in subpt 4 as a freshwater planning instrument.

[18] The National Freshwater Policy took effect on 3 September 2020. It established Te Mana o te Wai as its fundamental concept. This concept refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and wellbeing of the wider environment. The objectives of the National Freshwater Policy include, first, ensuring natural and physical resources are managed in a way that prioritises the health and wellbeing of water bodies and freshwater ecosystems.²¹ Amongst other matters, regional councils are required to adopt an integrated approach, ki uta ki tai, as required by Te Mana o te Wai to recognise the interconnectedness of the whole environment.²² Every regional

²¹ National Policy Statement for Freshwater Management 2020 [National Freshwater Policy], pt 2, objective 2.1.

²² Clause 3.5.

council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of the use and development of land on freshwater and on receiving environments.²³

[19] On 11 September 2020, the Minister for the Environment wrote to the ORC. He recognised the significant progress it had made in acting on his earlier recommendation but agreed to an extension to allow the ORC to have regard to the National Freshwater Policy.

[20] On 16 June 2021, the proposed regional statement was presented to the ORC. With the proposed statement was a detailed evaluation report prepared under s 32 of the RMA. The report identified that “[t]he integrated management of the natural and physical resources of the Otago region is at the heart of the planning approach to resource management, as expressed in the [proposed regional statement]”.

[21] At its meeting on 16 June 2021, the ORC confirmed that the whole of the proposed regional statement was a freshwater planning instrument as defined in s 80A(2) of the RMA.

[22] On 24 June 2021, the defendant (Forest and Bird) wrote to the ORC. They said:

In principle we support the desire and need for more integrated management. However, the wording of s 80A (3) of the RMA is quite clear that only the parts of freshwater instruments that relate to freshwater can go through the freshwater planning process. That’s what it’s designed for.

[23] While Forest and Bird supported moves to improve the proposed regional statement, especially with regard to freshwater, they considered there was a risk that:

... due to an inadequate and arguably unlawful process, the [proposed regional statement] in its entirety could be successfully appealed at the end of the process by parties who are not happy with it. This would mean a waste of a huge amount of time, money and effort by everyone who engages in it.

[24] The ORC publicly notified the proposed regional statement on 26 June 2021. The notice said the entirety of the proposed regional statement was a freshwater

²³ National Freshwater Policy, cl 3.5(2).

planning instrument and therefore subject to the freshwater planning process. The notice also called for submissions, which were due by 3.00 pm on 3 September 2021.

[25] On 3 September 2021, the ORC filed an application under the Declaratory Judgments Act 1908 for a number of declarations. I refer to these in detail later in the judgment.²⁴ First and foremost, the ORC sought a declaration that the whole of the proposed regional statement is a freshwater planning instrument.

[26] On 21 September 2021, Associate Judge Paulsen directed the proceedings be served on all primary submitters to the proposed regional statement and there be public notice of the proceedings in the Otago Daily Times. The parties heard in these proceedings were those who filed statements of defence or notices of appearance for ancillary purposes.

The relevant legislation

[27] Section 80A of the RMA states:

80A Freshwater planning process

- (1) The purpose of this subpart is to require all freshwater planning instruments prepared by a regional council to undergo the freshwater planning process.
- (2) A **freshwater planning instrument** means—
 - (a) a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management;
 - (b) a proposed regional plan or regional policy statement that relates to freshwater (other than for the purpose described in paragraph (a));
 - (c) a change or variation to a proposed regional plan or regional policy statement if the change or variation—
 - (i) is for the purpose described in paragraph (1); or
 - (ii) otherwise relates to freshwater.
- (3) A regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1. However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—

²⁴ See [211] below.

- (a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and
 - (b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.
- (4) A regional council must—
- (a) publicly notify the freshwater planning instrument; and
 - (b) if the purpose of the freshwater planning instrument is to give effect to the National Policy Statement for Freshwater Management 2020, publicly notify the freshwater planning instrument by 31 December 2024; and
 - (c) no later than 6 months after it has publicly notified the freshwater planning instrument, submit the documents required by clause 37(1) of Schedule 1 (the **required documents**) to the Chief Freshwater Commissioner; and
 - (d) at least 20 working days before submitting the required documents, provide to the Chief Freshwater Commissioner in writing—
 - (i) its notice of intention to submit those documents; and
 - (ii) the regional council and local tangata whenua nominations for appointment to the freshwater hearings panel required by clause 59(1)(b) and (c) of Schedule 1.
- ...
- (8) In subsection (2), a proposed regional plan does not include a proposed regional coastal plan or a change or variation to that plan.
- ...

Integrated management, the fundamental concept of Te Mana o te Wai and ki uta ki tai

[28] The way the ORC gave effect to integrated management, Te Mana o te Wai and ki uta ki tai was integral to their decision to treat the whole of the proposed regional statement as a freshwater planning instrument.

[29] A regional council's functions under s 30(1)(a) of the RMA include the establishment, implementation and review of objectives, policies and methods to achieve integrated management of the natural and physical resources of the region.

[30] The purpose of a regional policy statement includes achieving integration across policies so that, for example, policy or decisions on water issues should be made

in conjunction with policy on land matters that affect water or links that might need to be made to the policy on natural hazards.²⁵

[31] The fundamental concept of Te Mana o te Wai is described in the National Freshwater Policy as follows:

1.3 Fundamental concept – Te Mana o te Wai

Concept

- (1) Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.
- (2) Te Mana o te Wai is relevant to all freshwater management and not just to the specific aspects of freshwater management referred to in this National Policy Statement.

[32] Subpart 1 of pt 3 of the National Freshwater Policy sets out approaches to implementing the National Freshwater Policy.

[33] In that regard, every regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region.²⁶ To implement and give effect to Te Mana o te Wai, regional councils must also adopt an integrated approach, ki uta ki tai, to the management of freshwater.²⁷

[34] Clause 3.5 of the National Freshwater Policy states:

3.5 Integrated management

- (1) Adopting an integrated approach, ki uta ki tai, as required by Te Mana o te Wai, requires that local authorities must:
 - (a) recognise the interconnectedness of the whole environment, from the mountains and lakes, down the rivers to hāpua (lagoons), wāhapū (estuaries) and to the sea; and

²⁵ As discussed in Derek Nolan *Environmental and Resource Management Law*, (7th ed, LexisNexis, Wellington, 2020) at [2.5]; and as illustrated by the decision of the Environment Court in *Clutha District Council v Otago Regional Council* [2020] NZEnvC 194; upheld by the High Court in *Clutha District Council v Otago Regional Council* [2022] NZHC 510.

²⁶ National Freshwater Policy, cl 3.2(1).

²⁷ Clause 3.2(2)(e).

- (b) recognise interactions between freshwater, land, water bodies, ecosystems, and receiving environments; and
 - (c) manage freshwater, and land use and development, in catchments in an integrated and sustainable way to avoid, remedy, or mitigate adverse effects, including cumulative effects, on the health and well-being of water bodies, freshwater ecosystems, and receiving environments; and
 - (d) encourage the co-ordination and sequencing of regional or urban growth.
- (2) Every regional council must make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of:
- (a) the use and development of land on freshwater; and
 - (b) the use and development of land and freshwater on receiving environments.
- (3) In order to give effect to this National Policy Statement, local authorities that share jurisdiction over a catchment must co-operate in the integrated management of the effects of land use and development on freshwater.
- (4) Every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), or urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.

Submissions in support of the whole of the proposed regional statement being a freshwater planning instrument.

Otago Regional Council

[35] Mr Logan for the ORC summarised the ORC's position as follows:

The [proposed regional statement] is, in its entirety, a freshwater planning instrument. That statement seems counterintuitive. A regional policy statement must cover many subjects. But when [the proposed regional statement] is carefully considered, freshwater is woven into its fabric. There is no severable part which neither gives effect to the [National Freshwater Policy] nor relates to freshwater in some other way.

[36] The ORC was advised that two issues arose for it to consider in deciding whether it was satisfied the proposed regional statement (as a whole or in part) could be a freshwater planning instrument:

First, does the proposed regional statement give effect to any [National Freshwater Policy]; and secondly, does the proposed regional statement relate to freshwater?

[37] The ORC was advised that significant parts of the proposed regional statement:

... are clearly able to be classified as a freshwater planning instrument, either because they are designed to give effect to a national policy statement for freshwater, or because they are a matter that relates to freshwater. For other parts it is less straightforward.

[38] The ORC was advised the proposed regional statement as a whole should be considered a freshwater planning instrument to recognise the fundamental philosophy of the RMA of integrated management and the concept of ki uta ki tai. The integrated management chapter of the proposed regional statement was drafted so conflicts between demands for resources could be resolved with an interconnected approach.

[39] The report to the ORC purported to summarise the consequences of not recognising the proposed regional statement in its entirety as a freshwater planning instrument. That summary suggested the overall integrity of the statement would likely be undermined if there were two parallel hearing processes with differently constituted hearing panels. Having two panels would result in delays and would not achieve the best environmental outcome for Otago. The authors of the report considered the proposed plan should be managed post-notification as a single integrated planning instrument.

[40] In essence, the recommendation to the ORC was that the whole of the proposed regional statement should be treated as a freshwater planning instrument because this would be conducive to managing natural and physical resources in an integrated way; it would recognise that freshwater, in rivers, underground, in the air and in the ocean, is connected and what occurs in the headwaters and on land will have an impact in the ocean. The report stated that “[t]he integrated management of the natural and physical resources was at the heart of the planning approach to resource management in Otago as expressed in the [proposed regional statement]”.

[41] In its public notification of the proposed statement, the ORC said the proposed regional statement:

... is considered to meet the requirements of Section 80A(2)(a) and 80A(2)(b) of the Resource Management Act 1991 because the Chapters of the [proposed regional statement] are either giving effect to any national policy for freshwater management or relate to freshwater.

[42] The notice also stated that the purpose of the RMA of promoting the sustainable management of natural and physical resources could only be achieved through an integrated approach to the task of managing those resources. The proposed regional statement had been prepared to achieve that outcome. To not have it considered a freshwater planning instrument would be to defeat that purpose.

[43] The ORC submitted:

- (a) A freshwater planning instrument includes a planning document which gives effect to the National Freshwater Policy including the fundamental concept of Te Mana o te Wai. The sole objective of the National Freshwater Policy is “to ensure that natural and physical resources are managed in a way that gives effect to those priorities”.²⁸ “Natural and physical resources” is defined in s 2 of the RMA as including “land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”.
- (b) Clause 3.5 of the National Freshwater Policy required the ORC to manage freshwater in an integrated way.²⁹
- (c) Accordingly, the threshold for the proposed regional statement to qualify as a freshwater planning instrument could be met if the whole of it was for the purpose of giving effect to the National Freshwater Policy. It does so because of the way it achieves integrated management and gives effect to ki uta ki tai and Te Mana o te Wai.
- (d) “To give effect to”, as referred to in s 80A(2), means to implement.³⁰

²⁸ National Freshwater Policy, objective 2.1.

²⁹ See [34] above.

³⁰ With reference to *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593, [2014] NZSC 38 at [77].

- (e) Section 80A(2)(a) and (b) contemplate that the whole of a proposed regional plan or policy statement may be a freshwater planning instrument. The only way Parliament could have contemplated such an outcome was through understanding that this could be appropriate, adopting the integrated management approach to planning.
- (f) The second threshold for the proposed regional statement to be treated as a freshwater planning instrument is if it “relates to freshwater” as stated in s 80A(2)(b). The words “relates to” are not qualified. Reading in a qualifier is not permissible. The words bear their natural and ordinary meaning. A connection to freshwater is sufficient.³¹
- (g) In response to submissions from Port Otago that the coastal environment chapter was not capable of relating to freshwater, the ORC submitted it was. The National Freshwater Policy states:³²

This National Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments (which may include estuaries and the wider coastal marine area).

- (h) The ORC submitted coastal waters are a receiving environment for freshwater and for the contaminants carried by freshwater. The ORC also submitted the chapter both implements the National Freshwater Policy and is related to freshwater because of the need for integrated management and to give effect to *ki uta ki tai*.
- (i) If links could be made between the freshwater chapter of the proposed regional statement and other specific resource management chapters, namely, air, management of infrastructure and transport resources, and parts of historical and cultural values, natural features and landscapes, and urban form and development, then those chapters relate to freshwater.
- (j) Section 80A(3) simply recognises there may be freshwater planning instruments that only partially relate to freshwater.

³¹ With reference to the definition in the *Oxford Learner's Dictionary*: “relate” Oxford Learner's Dictionary <www.oxfordlearnersdictionaries.com>.

³² National Freshwater Policy, cl 1.5.

[44] The ORC acknowledged that its decision as to whether the proposed regional statement or parts of it were a freshwater planning instrument was not conclusive. The correctness of its decision is a question of law to be determined by applying s 80A, properly construed. It thus said a detailed consideration of the regional planning statement was required to see whether there was some distinct part which does not give effect to the National Freshwater Policy or which does not relate to freshwater.

[45] The ORC then addressed in detail the various chapters in the proposed regional statement. The proposed regional statement separated into various chapters with chapters on air, coastal environment including a section on the coastal marine area, geothermal, and land and freshwater. The ORC said this structure was required by the National Planning Standards 2019 as required by ss 61(1)(da) and 62(3) of the RMA. It submitted adherence with the standards tended to create the appearance of subject matter silos with seemingly discrete treatment of individual topics. This superficially concealed the way in which freshwater was integrated into all parts of the proposed regional statement.

[46] The ORC drew attention to specific references to freshwater in those various chapters but also other statements that, it submitted, were connected to freshwater which meant they should be regarded as giving effect to the National Freshwater Policy or as being related to freshwater. Mr Logan also acknowledged there were parts that did not refer to freshwater. For instance, he noted there were many definitions in the definition section that do not relate to freshwater, but some do.

[47] As an example of a provision related to freshwater, the ORC referred to the proposed regional statement identifying one of the issues for the region as being:

Poorly managed urban and residential growth affects productive land, treasured natural assets, infrastructure and community well-being. Demand for the supply of water, adverse effects on waterways and disposal of contaminants to water are described as potential adverse effects.

[48] As another example, it discussed the chapter on air. The ORC submitted water means water in all its physical forms.³³ This definition encompasses water vapour.

³³ RMA, s 2.

Water vapour is a contaminant when discharged to air. The discharge of contaminants to air is regulated by the RMA. It said discharges to air can have adverse effects on receiving environments, including freshwater, for example through spray drift. The regional statement stipulates for controls to manage these effects so provisions in this chapter contribute to implementing the National Freshwater Policy and relate to freshwater.

[49] As to the coastal environment, the ORC said freshwater does relate to the coastal environment because the coastal environment extends landward of the coastal marine area and includes freshwater bodies, rivers, lakes, wetlands, aquifers and springs. The proposed regional policy describes how coastal waters are a receiving environment for freshwater gravel, sediment and other contaminants from terrestrial activities.

[50] In the chapter as to transport, the ORC said the first objective is an integrated air, land and sea transport network that is effective, efficient and safe, connects communities and activities, and is resilient to natural hazards. It submitted this chapter triggers the application of infrastructure provisions in the proposed regional statement which implement the National Freshwater Policy because there are freshwater hazards that threaten the resilience of the transport systems and public transport can include a service for the carriage of passengers by vehicle, rail or ferry.

[51] In responding to submissions from other parties, the ORC submitted the words “relates to freshwater” embraces provisions that relate to freshwater “but are focused on outcomes broader than just freshwater”. It submitted that outcome is not surprising. Freshwater underpins life. To promote sustainable management and achieve integrated management of natural and physical resources, it is necessary to make, at every step, decisions which relate to freshwater.

[52] Mr Logan said, if there had to be a qualification on the phrase “relates to”, the most preferable qualification would require a cause or connection to freshwater in the manner submitted in accordance with the submissions made for the Waitaki District and Dunedin City Councils.

Ngā Rūnanga

[53] Submissions were made on behalf of Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga, and Te Rūnanga o Ngāi Tahu (collectively Ngā Rūnanga). Te Rūnanga o Ngāi Tahu is the statutorily recognised representative tribal body of Ngāi Tahu Whānui. The others are four of the 18 Papatipu Rūnanga of Ngāi Tahu Whānui that are statutorily recognised under the Te Rūnanga o Ngāi Tahu Act 1996 and are mana whenua within the Otago region.

[54] Ngā Rūnanga supported the ORC's position. Ngā Rūnanga summarised their position in these proceedings as being to ensure appropriate provision is made for the recognition of the relationship of Ngāi Tahu Whānui with their ancestral lands, waters and other taonga in the process of the hearing and decision-making on the proposed regional statement. They said this is to be achieved by way of an integrated approach to management of the Otago regions resources under the RMA.

[55] Ngā Rūnanga made the following submissions:

- (a) The proposed regional statement met the definition of a freshwater planning instrument because it is a regional planning statement for the purpose of giving effect to a national policy statement for freshwater management. Correctly interpreted, the words "relates to freshwater" in s 80A(3) could encompass all parts of freshwater planning instruments that are for the purpose of giving effect to the National Freshwater Policy.
- (b) The ORC correctly interpreted s 80A(3) when it came to the view that the entirety of the proposed regional statement relates to freshwater in the context of:
 - (i) the history of the reviews that had led to the proposed regional statement;
 - (ii) the directions in the National Freshwater Policy; and
 - (iii) the ORC's duty to take an integrated planning approach under the RMA.

- (c) This interpretation would best give effect to Parliament's intention as it would allow all parts of regional policy statements and plans that are for the purpose of giving effect to the National Freshwater Policy to be included in the streamlined freshwater planning process, so as to enable the relevant councils to give effect to the National Freshwater Policy fully and quickly.
- (d) This interpretation would also give effect to provisions of the RMA that provide for the integrated management of the natural and physical resources of the region. The National Freshwater Policy recognises the importance of integrated management through Te Mana o te Wai and ki uta ki tai.
- (e) The Environment Committee report on the Resource Management Amendment Bill 2019 made it clear that the intent of the freshwater planning process was to assist regional and unitary councils to meet the deadline for implementing the requirements of the National Freshwater Policy. The process was intended to achieve this purpose through implementing a streamlined one-step process with limited rights of appeal.
- (f) The implication of Forest and Bird's interpretation of s 80A(3) would be that decision-making on the proposed regional statement would become fragmented, making it more difficult for the ORC to achieve the freshwater outcomes required by the National Freshwater Policy.
- (g) The freshwater hearings panel includes two persons nominated by the relevant regional council and one person nominated by local tangata whenua. The panel would have the ability and expertise to ensure there is a proper hearing of all submissions as to the proposed regional statement under the freshwater planning process, particularly because expert evidence and reports could be part of the process.
- (h) There was an expressed intention for the proposed regional statement to give effect to the National Freshwater Policy in the council officer's report of 6 June 2021 and s 32 report. These set out why the ORC considered the proposed regional statement gives effect to the National Freshwater

Policy. Ngā Rūnanga acknowledged the proposed regional statement gives effect to other national policy statements but submitted this did not prevent the proposed regional statement from falling within the definition of a freshwater planning instrument in s 80A(2)(a) of the RMA.

- (i) The use of the word “satisfied” in s 80A(3) conferred a merits decision on the relevant council. It was for the ORC to review the freshwater planning instrument and satisfy itself whether only parts of it relate to freshwater or whether the instrument relates to freshwater in its entirety. Once it was established the ORC had carried out an assessment of the proposed regional statement and come to the view it was satisfied the proposed regional statement relates to freshwater in its entirety, the merits of that decision could not be the subject of declaration proceedings.

[56] Ngā Rūnanga’s position was supported by an affidavit from Edward Weller Ellison, Upoko of Te Rūnanga o Ōtākou.

[57] In his affidavit Mr Ellison spoke with obvious authority but also as someone whose identity and whakapapa are closely tied to the Otago region, ki uta ki tai, from the mountains to the sea. He spoke of the Kāi Tahu understanding of the central importance of wai Māori (freshwater) and its interconnectedness to the other parts to te taiao (the natural world), and the importance of mana whenua involvement in decision making about wai māori and te taiao more broadly.

[58] Mr Ellison said Kāi Tahu ki Otago has consistently advocated for a more holistic and integrated approach to planning that recognises the connections between land, freshwater, coastal waters and indigenous biodiversity, and for better recognition of the relationship of Kāi Tahu o te taiao. He spoke to the importance of rakatirataka (having the mana/authority to give effect to Kāi Tahu culture in the management of the natural world) and kaitiakitaka (the right and responsibility to care for the environment passed through generations) to Te Mana o te Wai for Kāi Tahu.

[59] Mr Ellison said the narrow approach that had been taken to freshwater management in Otago had led to the profound loss of mahika kai resources due to the

drainage of wetlands, and the degrading of the quality of wetlands, rivers, estuaries, harbours and coastal demands.

[60] Sandra Jean McIntyre is an experienced planner. She had a leading role in providing input on behalf of Kāi Tahu ki Otago to the proposed regional statement. In her affidavit, she agreed with the ORC that the proposed regional statement as a whole gives effect to the National Freshwater Policy or relates to freshwater planning. She considered the proposed regional statement had to be an “integrated package” to be effective. She considered there would be a real risk it would not be an “integrated package” if there was a segregated decision-making process, where different parts of the proposed regional statement would be considered through different processes and at different times.

[61] Ms McIntyre considered “there are clear connections to freshwater planning throughout the [proposed regional statement]”. She had not undertaken a comprehensive review of all provisions in the proposed regional statement but gave examples of connections to freshwater planning across the proposed regional statement.

[62] Ngā Rūnanga thus supported the ORC’s application for declarations that the ORC had decided correctly that the whole of the proposed regional statement was a freshwater planning instrument.

Canterbury Regional Council

[63] In its pleading, the Canterbury Regional Council (CRC) asserted that whether the proposed regional statement as a whole is a freshwater planning instrument was a question of law. In submissions, it said the CRC did not take a position as to whether the whole of the proposed regional statement was a freshwater planning instrument.

[64] Nevertheless, in an affidavit for the CRC, its regional planning manager Mr Parish said that the CRC was reviewing its current regional policy statement, as the RMA required of it every 10 years.³⁴ He said the CRC’s current policy statement

³⁴ RMA, s 79.

provided the strategic framework for all resource management issues in the region, it was anticipated much of the document would “relate to freshwater” such that it should proceed through the freshwater planning process set out in the RMA. The CRC anticipated there may be parts of their policy statement and regulatory framework as a whole that would not relate to freshwater, but it was currently unclear where the line should be drawn to determine which provisions relate to freshwater “given the integrated management philosophy underpinning the RMA and the CRC’s approach to planning processes”.

[65] Mr Parish said that, in Canterbury and Otago, the integrated management policy has more recently been expressed through the concept of ki uta ki tai.

[66] Mr Parish stated the concept of Te Mana o te Wai, as referred to in the National Freshwater Policy, demonstrates that a broad range of activities can be considered to relate to freshwater. He said that required local authorities to recognise the interconnectedness of the whole environment – from the mountains and lakes, down the rivers to hapua lagoons (lagoons or hapū estuaries) and to the sea.

[67] Mr Parish said planning consistent with ki uta ki tai required the CRC to ensure the effects of activities are managed holistically and to recognise the interconnectedness of the environment as a whole. This meant some activities (although they may not seem, on their face, to relate to freshwater) do have impacts on freshwater. As such, he anticipated it would be difficult to determine specifically which parts of a document such as a regional policy statement “relate” to freshwater within the terms of the RMA.

[68] Mr Parish said, accordingly, CRC sought further clarity as to how to determine whether a document (or part of a document) “relates” to freshwater such that it can be considered a freshwater planning instrument.

[69] The CRC also sought guidance as to whether determination as to which parts of a planning instrument do not relate to freshwater should be on a chapter-by-chapter basis or on a provision-by-provision basis.

[70] Through the submissions of Mr Maw, the CRC said it had “some reservations as to how a regional policy statement could be effectively split between two planning processes”. It said the key issues to this included:

- (a) how submissions as to further integration between provisions are to be considered if relevant provisions are required to be considered under two separate planning processes;
- (b) the extent of the Council’s discretion in terms of satisfying itself that the planning instrument “relates to freshwater”; and
- (c) the risks of splitting up provisions to proceed through separate planning processes, both as to considering objectives separately from other objectives and considering policies separately from their associated objectives.

[71] The CRC submitted:

- (a) The definition of a freshwater planning instrument included either:
 - (i) a planning document for the purpose of giving effect to any national freshwater statement; or
 - (ii) a planning document that relates to freshwater (other than for the purpose of giving effect to a national policy statement for freshwater management).
- (b) “Relates to freshwater” means something different than giving effect to the National Freshwater Policy, but there is no guidance in the legislation itself to determine how a council is supposed to decide what “relates” to freshwater.
- (c) In order to give effect to the concept of integrated management (or ki uta ki tai) and the fundamental principle of Te Mana o te Wai, councils would have to consider a range of matters:

... that may not be traditionally thought of (especially in a Western sense) as relating to freshwater such that they are required to give

effect to the [National Freshwater Policy]. This can include aspects such as the co-ordination and sequencing of regional or urban growth.

- (d) This would make it even more difficult to determine which provisions of a planning document are for the purpose of giving effect to the National Freshwater Policy or which otherwise relate to freshwater, or are unrelated such that they should proceed through the usual pt 1 of sch 1 process.
- (e) Section 80A(3) applies only if the regional council is satisfied that only part of the instrument relates to freshwater. This ultimately leaves a relatively broad discretion in the council's hands to determine which parts of the plan give effect to the National Freshwater Policy or otherwise relate to freshwater, such that they should proceed through the freshwater planning process.
- (f) There are ways risks as to integrated management could be reduced if different parts of the instrument go through different processes. For instance, councils could nominate people to be members of both freshwater hearings panels and panels dealing with other matters. It nevertheless submitted there is still a need for:

... some level of clarity regarding which provisions were to proceed through which process in order to determine whether an appeal on the merits of the decision is available or not.

[72] The CRC suggested several principles should be recognised in determining the approach councils should take in deciding whether a document or parts of a document are a freshwater planning instrument.

[73] The first suggested principle was that the Court should err on the side of having more parts of the proposed regional statement go through the freshwater planning process rather than less, to allow submissions to be considered through the same hearings process. Another was that, in order to achieve integrated management of the natural and physical resources of the region, the provisions with relationships to each other should proceed through the same planning process as far as practicable and, "where provisions relate to freshwater but also other matters, they should proceed through the freshwater planning process".

Submissions of parties who argued the ORC's decision that the proposed regional statement, as a whole, was a freshwater planning instrument was not open to it on a correct interpretation of s 80A of the RMA

[74] My later analysis sets out how s 80A is to be interpreted and applied.³⁵ In considering its purpose, I refer in detail to relevant aspects of the legislative background as were brought to my attention in submissions for various parties. In the interests of economy, I do not repeat them in detail here.

The Minister for the Environment

[75] The Minister for the Environment, through counsel, submitted:

- (a) The determination required under s 80A was not what is excluded from the freshwater planning process but what had to be included. The starting point is the normal pt 1 of sch 1 process with the full submitter participatory rights.
- (b) Further, just as it is mandatory for a freshwater planning instrument to go through the freshwater planning process,³⁶ it is also mandatory that those parts of a plan or policy statement that are not related to freshwater do not.³⁷ As the requirements of s 80A(3)(a) and (b) are mandatory, the test must be rigorously applied.
- (c) The RMA recognises that everything in the natural world is, to some extent, connected to everything else. Recognising the need for an integrated approach, it was best in draft plans and policy statements to properly recognise and plan for interdependencies, co-dependencies and interconnectedness. Nevertheless, it is possible to divide topics administratively for hearing, as most councils do, so splitting some topics to go down a different track would be similar.

³⁵ See [117]-[147] below.

³⁶ Section 80A(3).

³⁷ Section 80A(3)(b).

[76] Counsel referred to the Minister's statement in introducing the Resource Management Amendment Bill 2019 (the Amendment Bill) in September 2019 and other aspects of the legislation process.³⁸

[77] Counsel referred to the Departmental Report on the Amendment Bill (the Report) prepared by the Ministry for the Environment of March 2020. The Report referred to submissions that had been made to the Environment Committee in the context of integrated management that advocated the fast track should apply to all planning documents. The submissions were rejected on the basis that such a change would interfere with the expedited process for freshwater.

Forest and Bird

[78] Forest and Bird submitted:

- (a) The scope of what might be a freshwater planning instrument is determined by s 80A(3). Section 80A(3) directs that provisions that do not relate to freshwater cannot come within the definition of a freshwater planning instrument and cannot be subject to the freshwater planning process.
- (b) Accordingly, provisions that give effect to broad directions in the National Freshwater Policy such as integrated management cannot, by reason only of this, be subject to the freshwater planning process. They must also relate to freshwater. Put another way, provisions unrelated to freshwater cannot be subject to the freshwater planning process simply because they need to be integrated with freshwater management matters.
- (c) This interpretation of s 80A is consistent with the general scheme and purpose of the RMA and the manner in which it, in a number of instances, separates freshwater from other natural and physical resources.
- (d) The intended distinction between freshwater and other resources was put beyond doubt by the legislative history of the Amendment Act. The

³⁸ See [130] below.

intention behind the freshwater planning process was to introduce an expedited process to address freshwater quality decline.

- (e) Given the stringent timeframes required by the freshwater planning process, freshwater hearings panels should not be burdened with additional matters that are unrelated or only remotely related to freshwater. Those are more appropriately dealt with through the standard process in pt 1 of sch 1. The ORC's approach would frustrate the intent behind the freshwater planning process of putting in place a streamlined process intended to expedite protection and restoration of freshwater.
- (f) The scope of what "relates to freshwater" must be capable of pragmatic assessment that is consistent with the RMA's careful and deliberate separation of decision-making procedures for natural and physical resources.
- (g) Where in a chapter there was only a limited reference to a freshwater issue, adopting a pragmatic approach, the better course was to exclude the whole of that chapter as not relating to freshwater.
- (h) There was guidance in s 30 of the RMA as to what parts of a policy statement would relate to freshwater with the reference to functions that could be seen as clearly relating to freshwater, namely:
 - (i) controlling the use of land for the purpose of the maintenance and enhancement of the quality or quantity of water in water bodies in s 30(c)(ii) and (iii); and
 - (ii) in relation to any bed of a water body, the control of planting any plant in, on or under that land for the purpose of maintaining and enhancing the quality and quantity of water in that water body in s 30(1)(g)(ii) and (iii).
- (i) The hearings panel must have two freshwater commissioners who have expertise in relation to freshwater quality, quantity and ecology, Te Mana o te Wai and water use in the local community. There is no express

requirement for panel members to have expertise in matters such as air quality, marine ecology or other aspects of the environment. This demonstrates the freshwater planning process was not tailored for wider resource management matters. Where provisions require expertise outside the scope of the panel members, such as the ecosystems and indigenous biodiversity chapter, those provisions should go through the standard process in pt 1 of sch 1.

- (j) The land and freshwater domain chapter should be the only freshwater planning instrument. There may be particular matters in other parts of the proposed regional statement that relate to freshwater, but it would be inappropriate to include every provision in that particular domain or topic chapter as being related to freshwater. Adopting a practical approach, such isolated matters should not be subject to the freshwater planning process.
- (k) Section 80A is concerned with freshwater. Freshwater is defined in s 2 as meaning “all water except coastal water and geothermal water”. Coastal water is defined in s 2 as:
 - ... seawater within the outer limits of the territorial sea and includes—
 - (a) seawater with a substantial freshwater component; and
 - (b) seawater in estuaries, fiords, inlets, harbours or embayments[.]
- (l) The RMA makes clear distinctions between areas where freshwater is present and areas where coastal water is present. The use of the term “freshwater” in s 80A(3) indicates a deliberate choice to confine the freshwater planning process to freshwater issues, rather than collateral issues relating more broadly to other resources.
- (m) Only one provision in the coastal environment domain chapter refers to freshwater. The policy CE-P4(1)(c) requires the identification of “areas and values of high and outstanding natural character which may include matters such as: ... natural landforms such as headlands, peninsulas, cliffs, dunes, *wetlands*, estuaries, reefs, *freshwater* springs and *surf breaks*”.³⁹

³⁹ Emphasis in original.

They submitted, while there is a reference to freshwater, it relates to the natural character of the coastal environment and cannot easily be tied back to freshwater quality, quantity or ecology.

- (n) As examples of provisions in the coastal environment that are *spatially distinct* from freshwater and water bodies, they referred to statements as to protection of nationally significant surf breaks, maintaining or enhancing public access to and along the coastal marine area, provisions as to activities that only occur in the coastal marine area, the reference to aquaculture, which does not relate to freshwater, and to reclamation which, by its very nature, can only occur in the coastal marine area.
- (o) Several parts of the proposed regional statement did not claim to be related to freshwater. The proposed regional statement contains a natural landscape and features topic chapter which says it implements ss 6(b) and 7 of the RMA, without reference to the National Freshwater Policy or integrated management.

The policies in this chapter are designed to require outstanding and *highly valued natural features and landscapes* to be identified using regionally consistent attributes, then managing activities to either protect outstanding natural features and landscapes in accordance with section 6(b) of the RMA 1991 or *maintain highly valued natural features or landscapes* in accordance with section 7 of the RMA 1991.

(emphasis in original)

This policy relates to landscape without any freshwater function.

- (p) It is not tenable for the urban form and development chapter to “relate to” freshwater when it makes no substantive reference to it. The proposed regional statement states:

The policies in this chapter are designed to facilitate the provision of sufficient housing and business capacity and ensure all of the region’s *urban areas* demonstrate the features of *well-functioning urban environments* and meet the needs of current and future communities.

(emphasis in original)

[79] Forest and Bird acknowledged that, in the proposed regional statement, in a separate chapter and in various other chapters, there is reference to mana whenua. Forest and Bird said it deferred to mana whenua on those sections.

Oceana Gold

[80] Oceana Gold owns and operates New Zealand's largest gold and silver mine. The company holds more than 220 resource consents, mostly granted by the ORC. The mine is located in east Otago around Macraes township. It is within a special-purpose zone in the operative Waitaki District Plan which recognises the significance of the mine to the Waitaki District. It operates in a negative water balance environment, which means that Oceana Gold imports more water onto the site for processing purposes than is discharged into the receiving environment.

[81] As with Forest and Bird, Oceana Gold submitted the key provision driving the appropriate classification of the proposed regional statement is s 80A(3) and what "relates to freshwater" means in that provision. They submitted, if the proposed regional statement comprises parts which relate to freshwater and parts which do not relate to freshwater, it is only those parts relating to freshwater that follow the freshwater planning process. The parts that do not relate to freshwater must follow the standard process in pt 1 of sch 1. They submitted that "relates to freshwater" requires there be something more than a connection with freshwater.

[82] Oceana Gold submitted:

- (a) The proposed regional statement was not for the purpose of giving effect to any national policy statement for freshwater management because:
 - (i) the proposed regional statement was prepared for the purpose of complying with the Minister for the Environment's directions of 18 November 2019, not to give effect to the National Freshwater Policy;
 - (ii) the proposed regional statement does not mention the National Freshwater Policy or any other national policy statement by name, and neither "water" nor "freshwater" appear in its purpose; and

- (iii) there had been no active consideration given to the council’s role of “satisfying” itself as to the subject matter of the instrument and what parts could be held to relate to freshwater in the advice given to the ORC.
- (b) The legislation contemplated there could be parts of a freshwater planning instrument that “relate to freshwater” and parts that do not. They accepted that all resources are interconnected and must be managed in an integrated way. However, it does not follow that everything “relates to” freshwater for the purposes of s 80A. That would be inconsistent with the Ministry for the Environment’s technical guidance from September 2020 and the purpose of s 80A.⁴⁰
- (c) If the interconnectedness of resources and need for integrated management mean that “relates to freshwater” is synonymous with “some connection to freshwater”, then s 80A(3) would not have any practical application.
- (d) For parts of the proposed regional statement to be subject to the freshwater planning process, they must “relate to freshwater” and that meant they had to be provisions which implement a regional council function regarding freshwater quality, quantity or ecology.
- (e) The legislation requires a regional statement to set out and have regard to the range of matters referred to in the RMA. Because of this, the proposed regional statement is concerned with much more than just the management of freshwater resources.
- (f) If the Court were to make a declaration that the proposed regional statement in its entirety relates to freshwater and so is a freshwater planning instrument, the consequence would be that all regional policy statements would be freshwater planning instruments and thus be subject to the freshwater planning process. It would further mean that, if any change or variation to the proposed regional statement was required to give effect to any new or changed national instruments would “be related

⁴⁰ *A new Freshwater Planning Process: Technical guidance for councils* (Ministry for the Environment, September 2020).

to freshwater” and subject to the freshwater planning process. This would be an absurd result and not what Parliament intended.

[83] Oceana Gold submitted the proposed regional statement contains provisions that “at best have a tenuous connection with freshwater” and are instead directly related to other important regional resource management issues such as urban development, identification and protection of land for primary production, energy, transportation, infrastructure, and the protection and maintenance of biodiversity.

[84] As to those matters, they submitted the freshwater planning process was poorly suited to be the process for developing regional policy. The standard plan-making process has the benefits of the availability of appeal rights and specialist judicial oversight. They submitted that, with s 80A, Parliament decided the urgency of achieving better freshwater management outweighed those benefits. Oceana Gold accordingly submitted the Court should be cautious in allowing s 80A to be utilised in a way that would allow topics to be subject to the freshwater planning process in ways Parliament had not clearly identified as being subject to that process.

[85] The Court had the assistance of an affidavit from Claire Hunter, a resource management consultant. She helpfully summarised the legislative context in which regional plans are prepared. There was also an affidavit from Alison Paul, Oceana Gold’s general manager of corporate and legal affairs. Through their affidavits, Oceana Gold highlighted matters in the proposed regional statement that had been of concern to them and which they suggested were not related to freshwater issues. Those concerns related to the lack of recognition of the significance of the mining and extractive sectors and the lack of a policy recognising the locational constraints and functional needs of mining because mining can only happen where minerals naturally occur.

Port Otago Ltd

[86] Port Otago Ltd operates international ports at Port Chalmers and Dunedin.

[87] Port Otago submitted:

- (a) Section 80A(3) is the driving consideration of what is a freshwater planning instrument in terms of s 80A, so only the parts of the instrument that relate to freshwater can be subject to the freshwater planning process.
- (b) Consistent with the opinion of Ms van der Spek for the Waitaki District Council, forcing all resource management issues into a process that was intended for freshwater issues would not be an integrated approach nor would it allow for appropriate consideration of all aspects of sustainable management. Rather, it would cause all issues to be seen through the lens of freshwater management and be dealt with only in that context.
- (c) The proposed regional statement was not a freshwater planning instrument in its entirety because it includes provisions relating to coastal water such as the main domain “CE – Coastal environment” and policies relating to seawater. Freshwater is defined in the RMA and in the proposed regional statement to specifically exclude coastal water. Proposed regional coastal plans are also excluded from the definition of freshwater planning instruments by s 80A(8). The freshwater planning process is inappropriate for an issue as complex as the application of the New Zealand Coastal Policy Statement.
- (d) The recommendation to the ORC that the whole of the proposed regional statement could be considered a freshwater planning instrument had failed to inform the ORC of the definition of “freshwater” and the exclusion of seawater from consideration under the freshwater planning process.
- (e) Because the ORC failed to identify those parts of the proposed regional statement that were not related to freshwater, the process followed by ORC in notifying the whole of the proposed regional statement as a freshwater planning instrument was invalid.

Dunedin City Council and Waitaki District Council

[88] Mr Garbett appeared as counsel for the Dunedin City Council and Waitaki District Council. He said those councils supported the submissions for Forest and Bird

in full, although the councils considered more chapters of the proposed regional statement to substantially relate to freshwater.

[89] The Dunedin City Council's opposition was supported by an affidavit from Dr Anna Johnson, the city development manager. She identified that the Council's key concern with the proposed regional statement centres around how and whether it gave effect to the National Policy Statement for Urban Development and adequately provided for housing, and infrastructure to support housing in Dunedin. She said the council's submission to the ORC on the proposed regional statement "covered a broad range of issues with a focus on topics related to growth and infrastructure, which are distinct topics from freshwater or freshwater management".

[90] Dr Johnson was concerned that, if the entirety of the proposed regional statement went through the streamlined freshwater planning process, it would not be a fair process and the regional statement would inadequately address issues relating to urban development. She said:

Based on my previous experience with the 2015 [proposed regional statement], the appeal process (and the opportunities it created for mediation between the parties) was essential for creating a more workable [proposed regional statement]. Those opportunities would not be afforded where appeals are only allowed on points of law.

[91] The Waitaki District Council's opposition was supported by an affidavit from its executive officer, Victoria van der Spek. In her affidavit, she identified key issues the Waitaki District Council had with the proposed regional statement that she said did not directly relate to freshwater management. These issues related to concerns about coastal erosion, the lack of recognition of carbon forestry as a significant resource management issue in the Otago region with regard to its effects on pastoral farming, the impact of such forestry on rural economies, loss of historically "productive land", negative impacts on local employment and agricultural services, reverse sensitivity effects, issues with fire risk, wilding tree spread and issues with site rehabilitation. In a response to the proposed regional statement, the Council had submitted there was inadequate recognition of the Macraes mining operation and inadequate recognition of certain social and civil buildings (including schools, churches, civil and public buildings as historic heritage buildings).

[92] Mr Garbett accepted that the ORC had satisfied itself that the whole of the proposed regional statement related to freshwater and thus was a freshwater planning instrument. He submitted the ORC's decision had to be available to it in terms of either s 80A(2)(a) or (b). He submitted that the whole of the proposed regional statement had to be for the purpose of giving effect to the National Freshwater Policy or it had to entirely relate to freshwater. He submitted that only parts of the proposed regional statement gave effect to the National Freshwater Policy and only parts relate to freshwater.

[93] The Dunedin City Council and Waitaki District Council submitted the term "relates to" should be to require "a cause or connection between". They submitted that, given the context in which s 80A was enacted and Parliament's intention to establish a streamlined planning process for freshwater instruments, the phrase "relates to" was intended to apply to those instruments, or parts of them, that relate directly to freshwater, and maintaining its quality and quantity.

[94] Mr Garbett was critical of the submission for the ORC that if freshwater is mentioned in a chapter in the proposed regional statement then the whole of that chapter should qualify as a freshwater instrument.

Central Otago District Council and Queenstown Lakes District Council

[95] The Central Otago District Council and the Queenstown Lakes District Council's (QLDC) positions were consistent with those of the Waitaki District Council and Dunedin City Council.

[96] For Central Otago District Council and the QLDC, Ms Scott acknowledged that parts of the proposed regional statement directly relate to freshwater. Nevertheless, consistent with the submissions for Oceana Gold, Ms Scott submitted that for the Court to find the National Freshwater Policy requires an integrated approach to be taken so the entire proposed regional statement is a freshwater planning instrument under s 80A(2)(a) would effectively render s 80A(2)(b) obsolete.

[97] These councils adopted Forest and Bird’s submissions on interpretation principles and the primacy of s 80A(3) but emphasised that the interpretation of s 80A(3) is to be approached with two principles of interpretation in mind:

- (a) the meaning of a statutory provision is to be ascertained from text in light of purpose and context;⁴¹ and
- (b) Parliament is presumed to legislate in a manner that produces a practical, workable and sensible result.⁴²

[98] These councils submitted it is overly simplistic to say, if there is any connection with freshwater in a chapter regardless of proximity or centrality, then the whole chapter or topic will relate to freshwater for the purposes of s 80A. This interpretation ignores Parliament’s intention in s 80A(3) that parts of a proposed regional policy statement that do not relate to freshwater are to go through the standard process in pt 1 of sch 1.

[99] The QLDC’s position was supported by an affidavit from its manager of planning policy, Alyson Hutton. She said the QLDC’s interest in the case was that the proposed regional statement addresses a broad range of matters which she and the QLDC considered do not relate to freshwater. The QLDC opined that, to ensure good planning outcomes, those provisions required examination through a broader resource management lens rather than with a focus on freshwater issues. In that regard, for the Central Otago District Council and the QLDC, the absence of merits-based appeals as to non-freshwater issues was a further and significant concern.

[100] It was Ms Hutton’s opinion that a provision in the proposed regional statement must “relate to freshwater in a more than tangential way” for it to be treated as part of a freshwater planning instrument.

[101] Ms Hutton referred to the QLDC’s interest in the natural features and landscape section of the proposed regional statement. This relates to the management of features or landscapes identified as an outstanding natural feature or outstanding natural

⁴¹ Legislation Act 2019, s 10.

⁴² *R v Salmond* [1992] 3 NZLR 8 (CA) at 13, per Cooke P.

landscape. The QLDC was critical of the ORC's submission that the chapter in the proposed regional statement as to outstanding natural features and landscapes could be treated as relating to freshwater because these features included certain areas of freshwater, for example a river. The QLDC said that submission ignored the reality that a significant number of such features have no relationship to freshwater whatsoever.

[102] An affidavit was filed for the Central Otago District Council by its principal policy planner, Ann Rodgers. Ms Rodgers identified that the majority of the District Council's areas of interest on the proposed regional statement focused on issues other than freshwater management.

[103] An example she referred to was Central Otago experiencing some of the coldest temperatures in the country during the winter months and the potential for the timing of the phasing out of non-compliant wood burners to adversely affect the health of communities who may not be able to replace their heating.

[104] Consistent with affidavit evidence from other planners, she expressed a concern that, with the freshwater hearings panel's emphasis on freshwater expertise, there would be a risk that the final regional policy statement might continue to give inadequate attention to the National Policy Statement on Urban Development and issues related to growth. Having those matters go through the streamlined freshwater planning process would not be a fair process for the District Council and would be unlikely to deliver the quality of decision-making it expects on non-freshwater matters. She noted the District Council's appeal rights as to such matters would be severely limited if that is how these issues are to be dealt with.

Rayonier Matariki Forest Ltd and Ernslaw One Ltd

[105] Rayonier Matariki Forests Ltd (Rayonier) is a forestry company owning or managing over 70 forests located throughout New Zealand, including 7,780 ha of predominantly pinus radiata in the Otago region. Ernslaw One Ltd (Ernslaw) is a forestry company managing up to 130,000 ha throughout New Zealand. This includes 20,360 ha of pinus radiata and Douglas fir in the Otago region.

[106] Rayonier and Ernslaw asserted parts of the proposed regional statement, including parts relating to “coastal water”, are not for the purpose of giving effect to the National Freshwater Policy nor do they otherwise relate to freshwater.

[107] As to the interpretation of s 80A, Ms Gepp for Rayonier and Ernslaw submitted:

- (a) If Parliament intended regional plans to be freshwater planning instruments in their entirety, there would have been no need to introduce and define “freshwater planning instruments”. Parliament could have simply said the freshwater planning process would apply to regional policy statements and regional plans.
- (b) The expertise of the commissioners making up the freshwater hearings panel would be focused on “freshwater quality, quantity and ecology” with broader expertise on judicial process, the RMA, and tikanga Māori and mātauranga Māori.⁴³ The ability for additional members to be appointed to extend the expertise would not be enough to ensure the panel is equipped to deal with regional plan provisions that do not squarely relate to “freshwater”. The composition of the hearings panel is consistent with Parliament intending that the emphasis in the freshwater planning process would be on freshwater considerations.
- (c) Parts of the proposed regional statement that are for the purpose of giving effect to the National Freshwater Policy will qualify as a freshwater planning instrument but only insofar as they give effect to the freshwater focus of the National Freshwater Policy. In applying s 80A(2), there had to be a “causal connection” in both the National Freshwater Policy and the proposed regional statement to freshwater. She submitted, if the connection was only through some general interconnectedness of the environment, it would be too “remote” or “obscure” to meet the threshold for treatment as a freshwater planning instrument as provided for in s 80A(2).

⁴³ RMA, sch 1 cls 59(6) and 64.

- (d) The freshwater planning process strained the concept of integrated management because it provided for separate processes to develop parts of the plan that were to give effect to the National Freshwater Policy and which related to freshwater from those parts which did not do so. This was the consequence of s 80A.
- (e) The establishment of the freshwater planning process to deal with freshwater issues did not have to be completely at odds with integrated management. Having different planning processes to deal with different parts of a regional policy statement does not prevent integrated management of natural and physical resources. Regional coastal plans and regional plans can and do address other regional council functions separately.⁴⁴ It will be mandatory for the freshwater hearings panel to “be sure” that its recommendations comply with the statutory requirements that apply to the regional council’s preparation of the plan.⁴⁵
- (f) In terms of legislative requirements, s 80A is specific and later in time than the sections requiring integrated management, so s 80A should prevail where the provisions conflict.
- (g) Treating the whole proposed regional statement as a freshwater planning instrument would curtail appeal rights in respect of all resource management matters under the proposed regional statement. The legislative history, as detailed later in this judgment, shows that Parliament intended the streamlined process with limited appeal rights would have limited reach.
- (h) The implementation of other RMA instruments, including the National Environmental Standards for Plantation Forestry would be undermined if the entire proposed regional statement is a freshwater planning instrument. Those standards are intended to provide a set of nationally consistent rules to manage the environmental effects of plantation forestry. There would be significant consequences for the efficiency and effectiveness of forestry

⁴⁴ Section 64.

⁴⁵ Sch 1 cl 50(d).

operations if that is undermined through the freshwater hearings panel recommending rules more stringent than would be permitted by the National Environmental Standards for Plantation Forestry.

- (i) Where the phrase “relates to” is intended to capture multiple environmental domains elsewhere in the RMA, this is expressly stated. For example, per s 86B(3)(a), a rule in a proposed plan has immediate legal effect if it “protects or relates to water, air, or soil (for soil conservation)”.
- (j) The requirement for a regional council to be satisfied as to whether a regional policy statement is or is not a freshwater planning instrument does not mean that a council’s decision as to this is immune from challenge. It must make its decision by applying the correct legal test. Here, the ORC had applied the incorrect legal test and was in error in classifying the whole of the proposed regional statement as a freshwater planning instrument.

The interpretation of s 80A of the RMA

Legal principles

[108] The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.⁴⁶

[109] In *Commerce Commission v Fonterra Co-operative Group Ltd*, Tipping J for the Supreme Court said:⁴⁷

[22] ... The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose ... In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

...

⁴⁶ Legislation Act 2019, s 10(1).

⁴⁷ *Commerce Commission v Fonterra Co-operative Group Ltd*, [2007] NZSC 36, [2007] 3 NZLR 767. Footnotes omitted.

[24] Where, as here, the meaning is not clear on the face of the legislation, the Court will regard context and purpose as essential guides to meaning.

[110] In *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, Arnold J for the Supreme Court stated:⁴⁸

The starting point for the court’s consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing interpretations against the statute’s purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While we accept Mr Jagose’s point that the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

Why the meaning of the legislation is not clear

[111] Here, the meaning of various provisions in s 80A is not clear.

[112] On its face, s 80A would appear to be about freshwater issues as if they are distinct from other aspects of the environment. The heading to subpt 4 of pt 5 is “Freshwater planning process”. Section 80A refers to a “freshwater planning instrument” and the “freshwater planning process”. Associated with this was the establishment of a “freshwater hearings panel” and the appointment of “freshwater commissioners” under pt 4 of sch 1.

[113] Section 80A(2)(a) defines a freshwater planning instrument as meaning “a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management”. It does not say whether it will be sufficient if a regional policy statement gives effect *in any way* to such a national policy statement. It does not say whether it is, there, referring to those parts of a national policy statement for freshwater management that relate directly to the management of freshwater. It does not say whether, if a regional policy statement is giving effect to a national policy statement, it is the whole of the regional policy statement that will qualify as a freshwater planning instrument or whether it will be only those parts that give effect to such a national policy statement.

⁴⁸ *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [65].

[114] Section 80A(2)(b) extends the definition of a freshwater planning instrument beyond what is captured by s 80A(2)(a) to include an instrument that “relates to freshwater”. This must be other than for the purpose of giving effect to a national policy statement for freshwater management, but s 80A(2)(b) does not otherwise say what “relates to freshwater” means.

[115] There is then the limitation in s 80A(3). It says:

However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—

- (a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and
- (b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1 or, if applicable, subpart 5 of this Part.

[116] Section 80A(3) does not state that, where a proposed regional plan or policy statement has been prepared for various purposes or pursuant to various functions, the regional council *must satisfy* itself which parts of the instrument relate to freshwater. It is also not clear whether the proviso in s 80A(3) applies only to the way in which an instrument would qualify as a freshwater planning instrument as referred to in s 80A(2)(b). Does s 80A(3) also require a regional council to decide what parts of a national policy statement for freshwater management relate to freshwater for the purpose of deciding whether an instrument is a freshwater planning instrument because it gives effect to a national policy statement for freshwater management?

Legislative process

[117] As most parties acknowledged, and the select committee (the Environment Committee) recognised,⁴⁹ it is not clear from the wording of s 80A what constitutes a freshwater planning instrument. It is accordingly necessary and appropriate to consider the context in which the legislation was enacted and its purpose, as apparent from the legislative process.

[118] On 19 June 2019, the Ministry for the Environment prepared a policy document for Cabinet seeking a decision to amend the RMA by introducing a new

⁴⁹ Resource Management Amendment Bill 2019 (180-1) (select committee report) at 5-6.

planning process for freshwater. The document was headed “Impact Statement: A new planning process for freshwater” (the Policy Document).

[119] In *R v Howard*, the Court of Appeal referred to a tendency for judgments to refer to commission and committee reports.⁵⁰ The Court of Appeal said, where the language in relevant legislation was clear, such reports would not be of value in construing the relevant phrase but “[i]t would be otherwise if the language were ambiguous”.⁵¹ The Court referred to cases where such reports offered an aid to the interpretation of legislation which was unclear on its face.⁵²

[120] In *Minister of Conservation v Mangawhai Harbour Restoration Society Inc*, Campbell J said there was doubt over the extent to which Cabinet papers can be used in the interpretation of Acts of Parliament.⁵³ He referred to the Court of Appeal’s judgment in *Sky City Auckland Ltd v Gambling Commission*.⁵⁴ The Court of Appeal’s reservation there was as to reliance or reference to papers that had been prepared for Cabinet where their intention at the time of the relevant Cabinet meeting may be different from Parliament’s intention when passing the Amendment Bill into law.⁵⁵ These papers were distinguished from materials that were put before Parliament or were part of the Parliamentary processes, for example, a select committee report or explanatory notes.

[121] The Policy Document is consistent with the Amendment Bill finally presented to and approved by Parliament. It was advice prepared by the Ministry for the Environment and presented to Cabinet by the Minister for the Environment. It was this Minister who introduced the Amendment Bill to Parliament on its various readings. He was also responsible for the coming into force of the National Freshwater Policy to which the Amendment Act related.⁵⁶

⁵⁰ *R v Howard* [1987] 1 NZLR 347 (CA) at 352.

⁵¹ At 353.

⁵² At 352.

⁵³ *Minister of Conservation v Mangawhai Harbour Restoration Society Inc* [2021] NZHC 3113 at [105].

⁵⁴ *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182.

⁵⁵ At [40]-[41].

⁵⁶ RMA, s 52(2).

[122] The explanatory note to the Amendment Bill when it was first introduced under the heading “Regulatory impact assessments” stated:⁵⁷

The Ministry for the Environment produced regulatory impact assessments in June and September 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

Copies of these regulatory impact assessments can be found at—

- ...
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

[123] Through that link, Parliament was referred to the Policy Document.

[124] The Policy Document identified that the problem requiring Government intervention was the continuing decline in freshwater quality, and the current regulatory system was not producing outcomes fast enough. It said the best option would be to assist in councils implementing the National Freshwater Policy by 2025. This would be done by introducing a “new, faster process for planning for freshwater under the RMA” with a “central panel of suitably experienced freshwater hearing commissioners ... to convene local panels to hear and make recommendations on freshwater plan changes”.

[125] The Policy Document identified that the key problem to be addressed in order to enable faster and improved implementation of national policy statements for freshwater management was the statutory planning processes under the RMA. To address that key problem, the Policy Document referred to its proposed approach being “mandatory new planning process for freshwater plan changes only”. The purpose was not to mandate a new freshwater planning process for all new regional policy statements or changes to regional policy statements. As to that, the Policy Document said:

It is proposed that the process is restricted to policy statement or plan changes that relate to freshwater, and would apply from the point of public notification of the change. ... It is intended that the process would include regional plan changes that relate directly to water quality and quantity, and also to the control of land use for the purpose of the maintenance and enhancement of water quality and quantity, recognising the impact the control of land use can have on freshwater management. Plan changes this would capture could

⁵⁷ Resource Management Amendment Bill 2019 (180-1) (explanatory note) at 6.

include, for example, changes to regional plans to set limits on water use or discharges, such as nitrogen, or provisions to identify outstanding water bodies to ensure the protection of these.

...

Despite difficulties councils may face in separating out freshwater related plan changes, a clear requirement to use the process removes a perceived avenue for challenge over the choice of process and makes it more likely that the [National Freshwater Policy] timeframes will be met, a key objective of the proposal. It is considered that requiring water related plan changes, which can include regional land use rules, is the most effective in terms of integrated management. Only requiring freshwater related plan changes to progress through the process will limit the impact of the proposal on other aspects of the resource management system, meaning that implementation should be more straightforward. There will also be greater consistency in decision-making regarding freshwater management throughout the country, through standardised procedures.

[126] In advising on key groups that were likely to be interested in the proposal, the Policy Document noted:

[A]ll tangata whenua have a special interest in and relationship with water. The comprehensive review of the resource management system, and the Essential Freshwater programme will more comprehensively consider tangata whenua perspectives.

(emphasis in original)

[127] The Policy Document mentioned an alternative approach of providing further implementation support and the use of existing tools under the RMA to strengthen implementation of the National Freshwater Policy. The Policy Document stated that the alternatives available would:

... not sufficiently address the overarching problem that councils are struggling to implement the [National Freshwater Policy] in a timely manner. On the other hand, the proposed approach would enable a more effective and co-ordinated approach to freshwater planning nationally, and provide a more fit for purpose process for freshwater, which recognises the litigious, complex and costly nature of freshwater planning.

[128] The Policy Document also referred to the option of a new planning process for a wider variety of plan changes. It said there needed to be more analysis to determine

what other resource management issues might be appropriate for the proposed freshwater planning process. As to that potential, the Policy Document said:⁵⁸

This widening in scope would however make the proposal less feasible. It is already anticipated that the pool of freshwater commissioners will need to schedule and hear approximately 10-20 freshwater plan changes a year initially, and cover a wide skill set between them. If further topic areas were available for consideration through this process, this could increase the cost, and feasibility of enabling the timely implementation of the [national policy statements for freshwater management], given that resource would be diverted to these other topic areas.

It is considered that any wider changes to the planning process should be considered in a more integrated way, as part of the more comprehensive review of the resource management system.

[129] The Amendment Bill was presented to Parliament by the Minister for the Environment for its first reading on 26 September 2019.⁵⁹

[130] In introducing the Amendment Bill, the Minister said:⁶⁰

Changes are ... necessary to support the delivery of the Essential Freshwater action plan, which is currently out for consultation. The Government's committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. Key to achieving this will be a new National Policy Statement for Freshwater Management under the RMA ... However, we already know that the majority of councils will not be fully implementing even the 2017 national policy statement (NPS) until 2030 or later. That 13-year delay makes it clear that the standard RMA planning process is too slow to implement the new freshwater NPS. So to ensure that necessary plan changes are made by 2025, after which time the NPS will have prospective effect, the bill introduces a new specialised planning process for freshwater plans ...

[131] The explanatory note which accompanied the Amendment Bill included these statements:⁶¹

⁵⁸ At the time this proposal was formulated, the proposal was referring to the National Policy Statement–Freshwater Management 2014 which was subsequently amended in 2017. The Minister was working on a new National Policy Statement for Freshwater Management which took effect on 3 September 2020.

⁵⁹ Resource Management Amendment Bill 2019 (180-1).

⁶⁰ (26 September 2019) 741 NZPD 14222.

⁶¹ Resource Management Amendment Bill 2019 (180-1) (explanatory note) at 5 and 7.

Improving freshwater management

New specialised planning process for freshwater

To support the urgent need to improve freshwater management, the Bill provides a new plan making process that councils must use for proposed regional policy statements of regional plans (or changes) for freshwater. The Bill requires that councils notify changes to their regional policy statements and regional plans to implement the [National Freshwater Policy] no later than 31 December 2023, and make final decisions by 31 December 2025.

...

Clause 13 repeals subpart 4 of Part 5, which relates to the collaborative planning process, and replaces it with a new subpart that establishes the freshwater planning process. Regional councils must comply with the freshwater planning process when preparing a freshwater planning instrument. A freshwater planning instrument means a proposed regional plan, regional policy statement, or change or variation that—

- gives effect to the National Policy Statement for Freshwater Management 2020; or
- otherwise relates to freshwater.

[132] In its report on the Amendment Bill, the Environment Committee said that a significant reform from the Amendment Bill would be the introduction of a new freshwater planning process for regional or unitary councils carrying out regional freshwater functions.⁶² Those councils would be required to follow the new freshwater planning process for proposed regional policy statements and regional plans (including changes to them) containing provisions that give effect to the National Freshwater Policy or otherwise relate to freshwater. The new freshwater planning process would assist councils to meet the 2025 deadline for implementing the requirements of the National Freshwater Policy.

[133] The Environment Committee referred to the then proposed s 80A(2) and its statement as to the meaning of “freshwater planning instrument”. The Committee reported:⁶³

We recognise that what constitutes a “freshwater planning instrument” may not be clear-cut, and that some planning instruments may have some provisions that relate to freshwater, and other provisions that do not.

⁶² Resource Management Amendment Bill 2019 (180-1) (select committee report) at 4.

⁶³ At 5-6.

New s 80A(4)(a) would require a regional council to notify the public of the new freshwater planning instrument. Some of us think that, at that stage, the council should provide a statement about whether the whole instrument will undergo the freshwater planning process (under Part 4 of Schedule 1), or if only part of it will. The part that does not would undergo the standard planning process (under Part 1 of Schedule 1). Some of us believe this approach would provide greater transparency and reduce confusion.

To effect this change, we recommend amending new section 80A(3) and inserting new clause 72(1)(A) which would insert new clause 5(2A) into schedule 1 of the RMA.

(emphasis added)

[134] Before the Environment Committee reported back, s 80A(3) in the Amendment Bill had stated only “[a] regional council must prepare a freshwater planning instrument in accordance with this subpart and Part 4 of Schedule 1”.

[135] The Environment Committee added the following to s 80A(3) in the Amendment Bill reported to Parliament:⁶⁴

However, if the council is satisfied that only part of the instrument relates to freshwater, the council must—

- (a) prepare that part in accordance with this subpart and Part 4 of Schedule 1; and
- (b) prepare the parts that do not relate to freshwater in accordance with Part 1 of Schedule 1.

[136] The version enacted into law included the words “or, if applicable, subpart 5 of this Part” in s 80A(3)(b).

[137] The Ministry for the Environment prepared the Report on the Amendment Bill in March 2020. The Report referred to and considered submissions made to the Environment Committee. It was made available to Parliament at the same time as the Environment Committee reported back to Parliament and before the second reading of the Amendment Bill began on 27 May 2020.

[138] In describing the broader context of the Amendment Bill, the Ministry said:

⁶⁴ Resource Management Amendment Bill 2019 (180-2), cl 13.

There has been growing criticism that decisions under the RMA have not resulted in positive outcomes for the natural environment. Freshwater, biodiversity and the marine domain are facing pressures from human activities, and in many places ecosystems are in decline. Meanwhile the cost and complexity of RMA processes can form a barrier to delivering efficient social and economic outcomes (eg affordable housing). There is widespread agreement that substantial reform of the RMA is needed. To address this, the Government has embarked on a two-staged review of the resource management system. This Resource Management Amendment Bill comprises stage one.

[139] Stage two referred to the review of the RMA by a panel chaired by a retired Court of Appeal Judge, Tony Randerson.

[140] The Report said the objectives of the amendments proposed in the stage one Amendment Bill were to:

- A. reduce complexity in existing RMA processes, increase certainty for participants, and restore previous opportunities for public participation
- B. improve existing resource management processes and enforcement provisions, and
- C. improve freshwater management.

In relation to the third objective, proposals in this Bill are in support of the Government's *Essential Freshwater* programme ...

[141] As to the freshwater planning process, the Report stated:

The Government is committed to improving New Zealand's freshwater quality by stopping further degradation and loss, and reversing past damage. Key to achieving the freshwater goals is a new NPS-FM [national policy statement for freshwater management] which is expected to be in place by mid-2020. This needs to be implemented by regional councils in a timely way if it is to be effective.

As previous noted, recent reporting from councils to the Ministry has shown that the majority of regional councils are unlikely to meet the existing deadline of fully implementing the 2017 NPS-FM by 2025 and are likely to take until 2030 or later (the deadline can currently be extended to 2030 in certain circumstances). The Government's view is that such delays are unacceptable and risk further degradation of rivers, lakes and aquifers.

The reasons for delay are varied but include slow standard RMA plan-making processes. The freshwater planning process would require plans to be in place by 2025 which the Government sees as an essential first step.

[142] The Report noted that council submitters and others had questions on the scope of what is captured by the freshwater planning process. Some submitters suggested the scope was too wide, whereas others suggested it was too narrow because it was limited to freshwater. The Report said some submitters were concerned about the separation of freshwater from other aspects of councils' planning functions. The submitters said, in that way, the Amendment Bill discouraged integrated management across, for instance, freshwater and coastal boundaries. The Report referred to the ORC submitting that to isolate the development of freshwater planning was contrary to good integrated plan-making and resource management.

[143] In its analysis of submissions, the Report said:

Clarity around the scope of matters captured by freshwater planning process and integrated management

The phrase “giving effect to the NPS-FM” [National Policy Statement for Freshwater Management], captures all requirements that arise from the NPS-FM. This includes the NPS-FM requirements to consider and recognise Te Mana o te Wai and to recognise the interactions of Ki uta ki tai between the ecosystems of freshwater, land and sensitive receiving environments including the coast. Planning content will also be driven by regional council functions under section 30(1)(c) to *control the use of land for the purpose of the maintenance and enhancement of the quality of water and water bodies and coastal water and the maintenance of the quantity of freshwater.*

The phrase “or otherwise relates to freshwater” is intended to be a catchall for any water related matter that might not be captured under the NPS-FM. For example, to manage structures in the beds of rivers/lakes or flood management policy/rules. This seeks to avoid a situation where a matter that is clearly water related cannot go through the freshwater planning process because it is not captured by the NPS-FM.

Extending scope beyond freshwater (regional plans and unitary plans)

Many councils want the process to be extended to capture *all* regional council functions. Marlborough District Council, Tasman District Council and others seek to combine regional and district plan provisions in a single process.

We acknowledge the efficiencies that this may bring, but this must be considered against the key driver of the policy change, which is to have freshwater planning instruments in place by 2025. Councils have told us that reaching that date will already be a challenge. Including additional RMA matters that need to be developed and notified by 2023 would add further to the burden of reaching the notification date and ultimately may risk not having freshwater plans in place by 2025. We do not recommend a change to allow the hearings panel to address wider regional matters or district plan provisions at this time.

Relationship to other plan reviews

We acknowledge the points made about integrated plans, integrated catchment management and efficient processes. However the policy directive to have plans notified by 2023 makes this change impracticable at this time. Councils may be able to have members in common for freshwater hearings panels and panels dealing with other matters.

(emphasis in original)

[144] Similarly, the Report referred to submitters' concerns as to notification timeframes for freshwater planning instruments but emphasised the Government's desire to have all instruments notified by 31 December 2023 to halt freshwater degradation and start to improve water quality.

[145] In its definition of "freshwater planning instrument" in s 80A(2)(a), the Amendment Bill referred to a proposed regional plan or regional policy statement for the purpose of giving effect to the National Freshwater Policy.⁶⁵ The Report recommended Parliament proceed with s 80A(2)(a) as in the Amendment Bill but with the removal of the 2020 date.

[146] The Report referred to s 80A(3) in the Amendment Bill as requiring regional councils to prepare freshwater planning instruments in accordance with pt 4 of sch 1. It said no issues had been raised in relation to this section and they recommended Parliament proceed with s 80A(3) as drafted.

[147] In introducing the Amendment Bill for the third reading on 24 June 2020, the Minister for the Environment, David Parker, said:⁶⁶

The bill we are considering today includes provisions to improve freshwater quality. The bill introduces a new freshwater planning process that ensures regional council plans are updated as soon as possible and in a manner consistent with Te Mana o te Wai.

Interpretation of s 80A

[148] The above aspects of the legislative process indicate that, with the Amendment Act, Parliament was neither intending nor contemplating that the whole of a regional

⁶⁵ Resource Management Amendment Bill 2019 (180-1), cl 13.

⁶⁶ (24 June 2020) 747 NZPD 19015.

policy statement which dealt with matters other than freshwater management would be subject to the freshwater planning process.

[149] Rather, the background, wording and references to freshwater in s 80A were all consistent with Parliament contemplating that issues relating to freshwater could be identified as discrete matters and only such matters would be subject to the freshwater planning process. The possibility of widening the scope of matters that might be considered through the freshwater planning process was brought to the attention of Cabinet and Parliament through the Ministry's initial Policy Document and to Parliament through the Report after the Environment Committee process. That option was expressly rejected primarily because it would delay progress in improving the quality of freshwater management which the Government was committed to.

[150] The ORC and Ngā Rūnanga argued that the purposes of integrated management, the fundamental concepts of Te Mana of te Wai and ki uta ki tai required the ORC to recognise that all aspects of the environment and all aspects of human activity are interconnected and relate to freshwater. So, everything in the proposed regional statement could properly be determined to give effect to the National Freshwater Policy or relate to freshwater.

[151] When the Amendment Act was passed in 2020, the need for an integrated approach to the management of natural resources was already in the RMA. If adherence to the principle of integrated management could justify the whole of a proposed regional policy statement or plan being treated as a freshwater planning instrument under s 80A(2)(a), there would have been no need for the particular provision in s 80A(2)(b) or the qualification referred to in s 80A(3).

[152] If Parliament had intended s 80A(3) to be a qualification only as to the way and extent to which a regional statement might qualify as a freshwater planning instrument under s 80A(2)(b), it could reasonably have been expected to say so. It could also have been expected that, if the qualification applied only to the definition in s 80A(2)(b), it would have appeared immediately adjacent to s 80A(2)(b) rather than as s 80A(3) where logically it could relate to both s 80A(2)(a) and (b).

[153] Significantly, the qualification to the definition of freshwater planning instrument in s 80A(3) was added only when the Environment Committee reported back and was not included when s 80A(2)(b) first appeared in the Amendment Bill.

[154] Regional councils, including the ORC, submitted to the Environment Committee that splitting the planning processes for regional plans would make it more difficult to provide for the integrated management of natural resources. The Ministry's Policy Document outlined that timely compliance and progress in accordance with the National Freshwater Policy was the primary objective of the policy changes.

[155] The Amendment Act established the freshwater hearings panel.⁶⁷ It required freshwater hearings panels to include five members who, collectively, have expertise in freshwater management issues.⁶⁸ Although it left final decisions to the regional council, it transferred significant decision-making ability on freshwater issues to the freshwater hearings panel and reduced the scope of potential appeals to the Environment Court on freshwater issues.⁶⁹ I consider the Amendment Act contemplated that the focus of freshwater hearings panels would be on protecting and improving the quality of freshwater in New Zealand and, in particular, giving effect to national policy statements on freshwater management by 2025. There is potential for members with other areas of expertise to be appointed to hearing panels.⁷⁰ Nevertheless, I agree that Parliament contemplated the focus of the freshwater planning process would be narrower than the purpose of the RMA generally.

[156] Regional councils must prepare regional policy statements consistently with the purpose of the RMA, which is to promote the sustainable management of natural and physical resources.⁷¹ Sustainable management means:⁷²

... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

⁶⁷ Amendment Act, s 103; RMA, sch 1 pt 4.

⁶⁸ Amendment Act, s 103; RMA, sch 1 cls 59 and 65.

⁶⁹ Amendment Act, s 22; RMA, s 80A(5)(d) and sch 1 cls 54-56.

⁷⁰ RMA, sch 1 cl 59.

⁷¹ Section 61(1)(b).

⁷² Section 5.

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[157] To interpret s 80A in a way that would allow the whole of a plan or policy statement to be subject to the freshwater planning process would likely result in all aspects of that instrument being considered primarily from a freshwater perspective. The legislative history indicates this is not what Parliament intended with the introduction of s 80A.

[158] I accordingly do not consider that the ORC's function of achieving integrated management of natural and physical resources and the requirement to recognise and give effect to the fundamental concepts of Te Mana o te Wai and ki uta ki tai required or allowed it to treat the whole of its proposed regional statement as a freshwater planning instrument so as to subject it to the freshwater planning process.

[159] In reaching that determination, I have not sought to minimise the importance of integrated management or Te Mana o te Wai in dealing with all resource management issues which have to be dealt with in the proposed regional statement. Te Mana o te Wai remains the fundamental concept in the National Freshwater Policy.

[160] A regional council, in preparing regional policy statements and their hearing panels in reviewing the statements, or freshwater hearings panels, will all have to give effect to the principles of Te Mana o te Wai and of Te Tiriti o Waitangi in their consideration of all matters they are separately concerned with.⁷³

[161] It will be only those parts of a proposed regional policy statement that relate to freshwater that can be part of a freshwater planning instrument. All other parts of a regional policy statement will remain subject to the normal planning process set out in pt 1 of sch 1 of the RMA. As the affidavits from Mr Parish for the CRC and Mr

⁷³ RMA, s 61(1)(b) and (da) and sch 1 cl 50(d).

Ellison for Ngā Rūnanga demonstrated, regional councils must and do work in partnership with local iwi in carrying out all their functions under the RMA. They will have to continue doing this when dealing with those parts of the regional policy statement that are not subject to the freshwater planning process.

[162] How councils do this and the decisions they make will be subject to review by interested parties, with the full rights of appeal to the Environment Court which they currently have. They will not have the same rights of appeal as to matters that are subject to the freshwater planning process.

[163] In their submissions for the Minister, counsel referred to a statement from the Environment Court in *Bay of Islands Maritime Park Inc v Northland Regional Council*.⁷⁴ The Environment Court said it was the intent of the National Freshwater Policy and of the relevant legislation to provide an integrated approach to freshwater management:⁷⁵

The objective was not to subsume the entire environment including the [coastal marine area] and land use within the purview of the freshwater regulations or freshwater regime set up under s 80A. To do so would be anathema given the requirement to develop the regional plans and regional coastal plans separately to those for freshwater. Having said that, we acknowledge that it is intended that the [National Freshwater Policy] should work together with other documents including the [New Zealand Coastal Policy Statement] regional policies and plans and regional coastal plans to create a seamless whole.

[164] My interpretation of s 80A recognises that Parliament established a separate planning process for those parts of a proposed regional statement that relate to freshwater. That being the case, those involved with both the freshwater planning process and the normal process in pt 1 of sch 1 will have to be fully informed as to how matters are developing or are decided through each process to achieve the integrated management of resources and the fundamental concept of Te Mana o te Wai and ki uta ki tai.

⁷⁴ *Bay of Islands Maritime Park Inc v Northland Regional Council* [2021] NZEnvC 6, [2021] NZRMA 256 at [32].

⁷⁵ At [32].

Conclusion as to how s 80A must be read

[165] I have concluded that s 80A(2)(a) should be interpreted and applied as if it reads “a freshwater planning instrument means a proposed regional plan or regional policy statement for the purpose of giving effect to any national policy statement for freshwater management, subject to s 80A(3)”.

[166] Section 80A(3) establishes a mandatory obligation for a regional council to prepare the parts of instruments that relate to freshwater through the freshwater planning process, and all other parts through the standard process in pt 1 of sch 1.

[167] That wording is consistent with the submission made by Forest and Bird and supported by a number of parties that s 80A(3) drives what will qualify as a freshwater planning instrument, either in whole or in part.

[168] I thus conclude that only those parts of the proposed regional statement which relate to freshwater could be treated as a freshwater planning instrument and so be subject to the freshwater planning process.

Why the ORC’s interpretation and application of s 80A of the RMA was in error

[169] It was for the ORC to make decisions as to which parts of the proposed regional statement relate to freshwater on a correct interpretation of s 80A.

[170] I am satisfied the ORC did not do so. They considered the requirement for integrated management of resources and Te Mana o te Wai allowed them to determine that everything in their proposed regional statement related to freshwater or was to give effect to the National Policy Statement. For the reasons discussed, that was an error and not an approach they were permitted to take.

[171] I am not satisfied on the evidence that the ORC adequately considered what parts of the proposed regional statement related to freshwater and which parts did not, as s 80A(3) required them to do.

[172] I am also not satisfied that the whole of the proposed regional statement was prepared to give effect to the National Freshwater Policy or the 2014 National Policy Statement on Freshwater Management as amended in 2017. This is not surprising. The ORC had committed to significant work, consultation and investment in preparing a new proposed regional statement on the recommendation of the Minister for the Environment in November 2019. Nevertheless, they were aware of the Amendment Bill and a new freshwater planning process as they made submissions to the Environment Committee in 2019.⁷⁶ They were aware of the National Freshwater Policy that came into effect on 3 September 2020.

The Court's task

[173] A number of parties, including the ORC, presented submissions on the basis the Court would effectively review in detail the whole of the proposed regional statement and decide which parts could be treated as a freshwater planning instrument.

[174] That would have been a daunting task. The proposed regional statement is 220 pages long, has five parts and covers nine domains and topics.

[175] In its submissions, the CRC acknowledged:

... the issues raised in this case require a detailed understanding of the function and design of regional planning documents, and deal with difficult tensions between many different interests.

[176] Rayonier and Ernslaw submitted it is for the ORC to review the regional policy statement and determine which provisions meet the requirements of s 80A(2) correctly applied and which do not. They submitted this is because the process is likely to be a highly technical and detailed one. They submitted it might also necessitate some restructuring of the proposed regional statement or rewriting of certain provisions.

[177] In essence, the ORC, in these proceedings, sought a declaration as to how s 80A is to be interpreted and applied. Section 80A(3) makes it clear that the regional council must satisfy itself which parts of its proposed planning document relates to freshwater in applying s 80A.

⁷⁶ See above at [142].

[178] Appeals from Environment Court decisions come to the High Court as to alleged errors of law.⁷⁷ There is limited scope under the RMA for decisions made by regional councils or other territorial authorities to come before the High Court through judicial review.⁷⁸ In such proceedings, it is well established that it will not be for the High Court to make decisions as to the merits of the council's decision on the particular issue before it. The High Court's function is to identify whether there has been an error of law. If there has been an error, the High Court may remit the issue back to the territorial authority that made the relevant decision or to the Environment Court so they can make a decision on the merits applying the law correctly.

[179] That is the approach which should be adopted in this case. It is the ORC, not this Court, who must exercise their statutory obligation to determine which parts of the proposed regional statement relate to freshwater under a correct interpretation of s 80A.

[180] Most of the parties however made it clear that, through these proceedings, they are wanting the Court to provide clarity as to how s 80A is to be applied, clarity which is lacking in the legislation as it stands.

[181] The key issue is what "relates to freshwater" means and how is that qualification to be met.

[182] As referred to earlier, through their differing submissions, a number of parties suggested different ways in which the words "relates to freshwater" might be interpreted by regional councils in formulating their plans or policy statements and deciding what parts should be part of a freshwater planning instrument and so subject to the freshwater planning process.

⁷⁷ RMA, s 299.
⁷⁸ See s 296.

The Court’s view as to how the words “relates to freshwater” are to be interpreted and applied

[183] In the *New Zealand Oxford Dictionary*, “relate to” is said to mean “have reference to; or concern;⁷⁹ and “concern” means be relevant or important to, relate to, or be about.⁸⁰

[184] Because the meaning of the legislation is unclear, the interpretation cannot be based on just what might be considered the ordinary meaning of “relate to”.

[185] In *Auckland Harbour Board v NZ Harbours IUOW*, the Court of Appeal, on a case stated, had to decide whether a dispute over manning levels in tugs was “related to” a collective agreement under s 116(1)(b) of the Industrial Relations Act 1973 and so within the jurisdiction of the Arbitration Court.⁸¹

[186] The Court of Appeal said:⁸²

So far as a paraphrase of the words “related to” in the particular context may be of any help, we think that they require a sufficiently direct connection between any matter of dispute and matters dealt with in the award or collective agreement. Very often it can only be a question of fact and degree. This head of jurisdiction is obviously wider than mere interpretation of the instrument, which is separately referred to in the standard dispute of rights clause.

[187] Of significance, the Court of Appeal decided the dispute did relate to the collective agreement, not just by deciding how “related to” might be paraphrased but by considering the issue in relation to the facts before it.

[188] In *Mercury NZ Ltd v The Waitangi Tribunal*, the High Court was concerned with a judicial review challenge to a preliminary determination of the Waitangi Tribunal proposing to exercise the resumption power as to two significant areas of land.⁸³ Section 8A(2) of the Treaty of Waitangi Act 1975 provided that the Waitangi Tribunal can recommend that land or an interest in land transferred to a State enterprise

⁷⁹ Graeme Kennedy and Tony Deverson (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 948.

⁸⁰ At 225.

⁸¹ *Auckland Harbour Board v NZ Harbours IUOW* (CA217/86), 28 October 1987.

⁸² At 969.

⁸³ *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142.

be returned to Māori ownership where a claim *relates in whole or in part* to land or an interest in land to which the section applies. In the High Court, Cooke J said the Waitangi Tribunal had analysed the requirement that a well-founded claim “relates to” land covered by these provisions in detail. The Tribunal referred to previous dicta to the effect that legislation concerning the Treaty should not receive a narrow interpretation. It concluded the provisions gave a broad jurisdiction to provide a remedy for the adverse consequences of all land-based claims, whether or not the well-founded claims concerned the land in question.⁸⁴

[189] In discussing how the words “relates to” were to be considered, Cooke J said:

[69] I accept without hesitation that the provisions should receive a broad and unquibbling interpretation. The dicta along these lines strike me as a manifestation of the requirement that the text of an enactment should be interpreted in light of its purpose. It can be presumed that Parliament intended to give full effect to the principles of the Treaty when enacting Treaty-related provisions, particularly provisions intended to remedy Treaty breaches. The ultimate question is what the particular purpose of these provisions is in light of that presumption.

[70] One begins with the text of the enactment. On its natural reading the requirement that the claims “relates to” the land means that the claims *concern* that land. Moreover, the fact that the enactment directs the “return” of the land would suggest that the claim concerning the land would be about the circumstances under which the land left the possession of Māori, thus providing the justification for the land to be returned. The requirement that the claim be “well-founded” essentially means that the Tribunal is upholding the claim giving rise to the remedy of return of the land. The three concepts – “well-founded” claims, “relates to”, and “return” – are inherently interlinked.

...

[72] ... I do not agree that the true scope of the provisions turns on the literal interpretation of the words that have been concentrated upon. I do not agree that the words “relates to” mean something substantially different from “in respect of” as the Tribunal held, and as the Muriwhenua Land Tribunal said. There are various verbal formulations that could have been used: “relates to”, “in respect of”, “concerning,” “over” or even just “about”. All these phrases have somewhat elastic meanings that depend on the circumstances of their use to gain any more precise content. It is the circumstances of their use in these provisions in light of the other words of the sections and the purpose of the provisions as a whole that is decisive in my view.

(footnotes omitted)

⁸⁴ At [52].

[190] Cooke J then discussed various aspects of the background to the passing of the relevant legislation including other legislation which led him to the conclusion that, for land to be caught on the basis it was related to a claim before the Tribunal, it had to have been land that was wrongly taken from the Māori owners by the Crown. This judgment illustrates how the meaning of “relates to” has to be established in light of the purpose and context in which the words were used and, importantly, the factual context of the case.

[191] The words “relates to freshwater” must be interpreted having regard to the purpose for which s 80A was enacted. That purpose was to address the decline in freshwater quality in New Zealand.⁸⁵

[192] Section 80A(3) drives the interpretation of s 80A. Because of this, parts of a regional policy statement will qualify to be part of a freshwater planning instrument pursuant to either s 80A(2)(a) or (b) if they directly relate to the maintenance or enhancement of the quality or quantity of freshwater.

[193] In accordance with s 80A(2), parts of the proposed regional statement may relate to freshwater management in the manner required to be part of a freshwater planning instrument either through the way those parts give effect to the National Freshwater Policy or through otherwise relating to freshwater. Parts that give effect to the National Freshwater Policy will only qualify if they are giving effect to those parts of the National Freshwater Policy that directly relate to the maintenance or enhancement of freshwater quality or quantity.

[194] As to this, the ORC will have to first determine which parts of the National Freshwater Policy are directly concerned with the quality or quantity of freshwater as defined in s 2 of the RMA. The ORC’s concern will be with those parts of the policy which relate directly to matters impacting on the quality or quantity of freshwater, including groundwater, in lakes, rivers, wetlands or in estuaries that are part of the receiving environment.

⁸⁵ See above at [126]; Resource Management Amendment Bill 2019 (180-1) (explanatory note) at 5.

[195] A number of provisions in the National Freshwater Policy do not relate directly to the quality or quantity of freshwater. A number of provisions are aspirational in referring to the benefits that might be obtained from improving freshwater quality, for example, reference to the obligations in Te Mana o te Wai to prioritise the health and wellbeing needs of people.⁸⁶

[196] There are parts of the National Freshwater Policy, particularly the fundamental concept of Te Mana o te Wai and ki uta ki tai, that refer to the values tangata whenua attach to the quality of freshwater and the need for those values to be recognised in the management of freshwater issues.⁸⁷

[197] There are parts of the National Freshwater Policy that impose administrative obligations on regional councils that will assist in maintaining water quality but which might not have to be referred to in a regional policy statement.⁸⁸

[198] There are parts of the National Freshwater Policy that, on their face, do not purport to be directly related to maintaining or improving water quality or quantity.⁸⁹

[199] Conversely, parts of the National Freshwater Policy do clearly relate directly to freshwater quality and require regional councils to maintain and enhance the quality of freshwater. For instance, the establishment of freshwater management units for its region⁹⁰ and the ensuing provisions as to how these units are to operate and be utilised to maintain and improve water quality.⁹¹ There can be little doubt that the Minister, in recommending to the Governor-General that the National Freshwater Policy be published in September 2020, intended that regional councils would give effect to such parts of the National Freshwater Policy to facilitate that happening without delay. Insofar as a regional policy statement does so, those parts would be subject to the freshwater planning process.

⁸⁶ National Freshwater Policy, cl 1.3(4).

⁸⁷ Clause 3.2.

⁸⁸ See cls 3.23 (mapping and monitoring of natural inland wetlands); 3.27 (monitoring primary contact sites); 3.29 (setting up freshwater accounting systems) and 3.30 (assessing and reporting).

⁸⁹ For example, cl 3.33 applies only to specified vegetable growing areas as identified in an appendix to the National Freshwater Policy.

⁹⁰ National Freshwater Policy, cl 3.8.

⁹¹ Clauses 3.7(2), 3.9–3.17, 3.22–3.24, 3.28 and 3.32.

[200] The National Freshwater Policy is concerned with the quality of freshwater and the effects on the receiving environment of freshwater on a whole of catchment basis. This does not mean that any part of a regional policy statement concerned with the catchment for or receiving environment from freshwater will relate to freshwater for the purpose of s 80A. It will be only to the extent parts of the proposed regional statement regulate activities in the catchment or receiving environment, because of their effect on the quality or quantity of freshwater, that policies or objectives for the catchment or receiving environment will relate to freshwater for the purposes of s 80A.

[201] It is not for this Court, in the context of these proceedings, to decide which parts of the National Freshwater Policy relate to freshwater management in the manner required for the purposes of applying s 80(2). The ORC will however have to make that determination when considering whether any particular part of the proposed regional statement relates to freshwater through the way it gives effect to the National Freshwater Policy.

[202] In accordance with s 80A(2)(b), there may potentially be other ways in which provisions in the proposed regional statement can qualify to be part of a freshwater planning instrument. For that to be so, the ORC will have to satisfy itself that those parts relate directly to matters that will impact on the quality and quantity of freshwater, including groundwater, lakes, rivers and wetlands. The ORC will also have to satisfy itself that the parts are not concerned with sea water or are part of a proposed regional coastal plan or a change or variation to that plan.⁹²

[203] Consistent with the purpose of the Amendment Act and participatory rights under the RMA, in applying s 80A, the starting point must be that all of the proposed regional statement will be subject to the normal planning process set out in pt 1 of sch 1 of the RMA. It will be only those parts of the proposed regional statement that directly relate to freshwater management, in the manner just discussed, that can be parts of a freshwater planning instrument and so subject to the freshwater planning process.

⁹² With reference to s 80A(8) of the RMA.

[204] With such an approach, the ORC could not decide that, because there is a provision that relates to freshwater within a specific chapter, the whole of that chapter should be treated as relating to freshwater. Conversely, there may be a chapter which, to a significant extent, relates to freshwater. That is likely to be true as to the chapter on land and water. Nevertheless, there may be policies, objectives or rules in a land and water chapter that do not relate to freshwater. Such parts of that chapter, in terms of s 80A, could not be treated as part of a freshwater planning instrument.

[205] The national planning standards require that there be a chapter in a proposed regional statement on urban form and development. In that chapter there may be objectives, policies or rules that are directly for the purpose of managing freshwater. It will be only those parts of a topic chapter on urban form and development that relate directly to freshwater management that can be part of a freshwater planning instrument.

[206] Parts of a proposed regional statement cannot be treated as parts of a freshwater planning instrument simply because there is some connection to freshwater through the concepts of Te Mana o te Wai, ki uta ki tai or the integrated management of natural and physical resources. To hold otherwise would be contrary to Parliament's intention in s 80A and pt 4 of sch 1 to establish a dual planning process where only parts of a regional policy statement directly relating to freshwater would be subject to the freshwater planning process.

[207] This does not mean that the fundamental concept of Te Mana o te Wai, ki uta ki tai and integrated management of natural resources can be disregarded either in the planning process in pt 1 of sch 1 or in the freshwater planning process.

[208] They will be fundamental to regional councils in the formulation of a proposed regional policy statement and to the Environment Court when it might have to consider issues arising out of a regional policy statement on appeal. To the extent those principles are relevant to matters that are not part of the freshwater planning process, those who consider such principles have not been adequately recognised by a regional council will have full rights of appeal to the Environment Court. That Court is a specialist tribunal, well equipped to recognise the importance of integrated

management of natural and physical resources and the fundamental concept of Te Mana o te Wai. Submitters would not have such rights of appeal if the matters they are concerned with are to be subject to the freshwater planning process.

[209] It will be for the ORC to decide, in the particular circumstances it faces and with the report it has already prepared, how it recognises s 80A(3) and prepares those parts that do relate to freshwater as a freshwater planning instrument.

[210] As the Ministry for the Environment foreshadowed, it may be that some regional councils will prepare a specific regional freshwater plan or a plan change that only gives effect to the National Freshwater Policy so that all provisions in such documents will go through the freshwater planning process.⁹³

What, if any, declarations should be made in light of the earlier conclusions in this judgment?

[211] In its statement of claim, the ORC sought the following declarations:

1. The Proposed Otago Regional Policy Statement 2021 is a freshwater planning instrument under section 80A(1)–(3) of the Resource Management Act 1991.
2. The Otago Regional Council may continue to prepare the Proposed Otago Regional Policy Statement 2021 in its entirety under the freshwater planning process in Subpart 4 of Part 5 and Part 4 of Schedule 1 of the Resource Management Act 1991.
3. In the alternative to (1) and (2), if the Court finds that Otago Regional Council may not continue to prepare part of the Proposed Otago Regional Policy Statement 2021 under the freshwater planning process in Subpart 4 of Part 5 and Part 4 of Schedule 1 of the Resource Management Act 1991, then:
 - (a) That part must be prepared in accordance with Part 1 of Schedule 1 of the Resource Management Act 1991; and
 - (b) That part must be removed from the freshwater planning process in Subpart 4 of Part 5 and Part 4 of Schedule 1 of the Resource Management Act 1991 and further prepared in accordance with Part 1 of Schedule 1 of the Resource Management Act 1991; and
 - (c) That part need not be re-notified under Schedule 1 of the Resource Management Act 1991; and

⁹³ *A new Freshwater Planning Process: Technical guidance for councils*, above n 40, at 13.

- (d) The remainder of the Proposed Otago Regional Policy Statement 2021 must continue to be prepared, and need not be re-notified under the freshwater planning process in Subpart 4 of Part 5 and Part 4 of Schedule 1 of the Resource management Act 1991.

4. Such or further order as the Court thinks fit.

[212] In its submissions, the ORC sought the declarations in 1 and 2. With this judgment, the Court will not make those declarations. The ORC did not present detailed submissions in support of the latter alternative declarations.

[213] Forest and Bird submitted that “the declaration sought by ORC” be declined. They submitted only part of the proposed regional statement that related to freshwater was the land and freshwater domain chapter. The balance of the proposed regional statement, they submitted, had to go through the process in pt 1 of sch 1.

[214] Port Otago submitted that the response to questions formulated by the ORC should be:

- (a) The proposed regional statement is not a freshwater planning instrument. It contains policies that do not relate to freshwater, including policies relating to coastal water.
- (b) The parts of the proposed regional statement that are not a freshwater planning instrument are those parts which either:
 - (i) are not for the purpose of giving effect to a national policy statement for freshwater management; or
 - (ii) do not otherwise relate to freshwater.

[215] Oceana Gold submitted the Court should make a declaration that the proposed regional statement was a freshwater planning instrument under s 80A(2)(b) and not s 80A(2)(a), and should identify, as required by s 80A(3), those parts of the proposed regional statement that relate to freshwater and are therefore to proceed under the freshwater planning process, and those that do not must be progressed using the standard process.

[216] The QLDC submitted the first and second declarations should be declined. It submitted the third declaration should also be declined given the ORC had provided no details on what statutory process would be followed.

[217] The Dunedin City Council and Waitaki District Council submitted that “the declaration” sought by the ORC should not be issued. They submitted the Court could declare that only the parts of the proposed regional statement which they had referred to relate to freshwater, and the balance of the proposed regional statement needs to follow the normal pt 1 of sch 1 procedure in the RMA for its development.

[218] Rayonier and Ernslaw submitted that declarations 1 and 2 should be declined. They supported declaration 3 with the proviso that, if changes were to be made to the part of the proposed regional statement that is a freshwater planning instrument, then that must be publicly notified in accordance with s 80A(4)(a) of the RMA. If changes are made to that part of the proposed regional statement that is not a freshwater planning instrument, then that must be publicly notified in accordance with cl 5 of sch 1 of the RMA.

[219] Ngā Rūnanga submitted only declarations 1 and 2 should be made.

[220] The CRC, given its neutral position, said it was not making any submissions as to the merits (or otherwise) on the declaration sought.

[221] The Minister, also adopting a neutral position, made no submissions as to what, if any, declarations might be appropriate.

[222] The submissions as to declarations from a number of parties were premised on the basis the Court would be deciding which parts of the proposed regional statement related to freshwater and which did not. That task remains with the ORC.

[223] Advice to the ORC from its officers for the meeting where they considered the status of the proposed regional statement and whether it should be publicly notified was that “[w]hen the [proposed regional statement] is publicly notified, the public notice must state whether Council [sic] is satisfied that the document is a freshwater

planning instrument. This dictates the process or processes used for hearing and determining submissions on the document.”

[224] The proposed regional statement was publicly notified on Saturday 26 June 2021. The notice advised that submissions could be made but had to be received by 3.00 pm on 3 September 2021. Submissions were received from 1,463 parties. In her affidavit, the manager of policy and planning for the ORC advised the primary submissions covered “every aspect of the proposed regional statement” and there are multiple parties who have submitted in support or opposition to the proposed regional statement in its entirety.

[225] A summary of decisions requested was notified on 30 October 2021. A further 59 submissions were received as to the summary of decisions requested.

[226] On 11 November 2021, the ORC advised the Chief Freshwater Commissioner of the names of its two nominees for appointment to the freshwater hearings panel. On 17 December 2021, the Chief Freshwater Commissioner appointed four of the five members of the freshwater hearings panel. The fifth member, the tangata whenua nominee, was unavailable to be appointed at that time and was appointed on 17 January 2022.

[227] Section 80A(3) requires the ORC to prepare the parts that do not relate to freshwater in accordance with pt 1 of sch 1. This process has time limits for steps that have to be taken in the planning process. The ORC does have power to extend time limits, as provided for in ss 37 and 37A of the RMA.

[228] In accordance with this judgment, only parts of the proposed regional statement that are to be a freshwater planning instrument will be subject to the freshwater planning process.

[229] The ORC will now have to reconsider and decide which parts of the proposed regional statement relate to freshwater for the purposes of s 80A. Section 80A(3)(a) requires that those parts must be prepared in accordance with subpt 4 of pt 5 and pt 4 of sch 1 of the RMA. Section 80A(4) requires the regional council to publicly notify

the freshwater planning instrument. The freshwater planning process begins with public notification of the freshwater planning instrument.⁹⁴

[230] There has been no valid determination as to which parts of the proposed regional statement are parts of a freshwater planning instrument so there has been no notification of a freshwater planning instrument to begin the freshwater planning process set out in pt 4 of sch 1. Those parts of the proposed regional statement that will not be part of a freshwater planning instrument have been publicly notified, and do not need to be re-notified. They have not been processed in accordance with the normal pt 1, sch 1 process because of the ORC's decision to treat the whole of the proposed regional statement as a freshwater planning instrument, and because of the uncertainty associated with these proceedings.

[231] The declarations I make are as follows:

- (a) The Otago Regional Council's determination that the whole of the proposed Otago Regional Policy Statement 2021 is a freshwater planning instrument under s 80A(1)–(3) of the Resource Management Act 1991 was in error and not in accordance with the requirements of s 80A.
- (b) The Otago Regional Council must now satisfy itself as to which parts of the proposed regional statement relate to freshwater and so constitute a freshwater planning instrument through giving effect to the National Policy Statement for Freshwater Management 2020 or otherwise relating to freshwater.
- (c) Following its determination as to that, the Otago Regional Council must continue with the preparation of those parts of the plan that are not part of the freshwater planning instrument, in accordance with the process set out in pt 1, sch 1 of the RMA.

⁹⁴ RMA, sch 1 cl 37.

- (d) Those parts of the proposed regional statement that are determined by the Otago Regional Council to be parts of a freshwater planning instrument are to be publicly notified as a freshwater planning instrument, and are to be subject to the freshwater planning process in subpt 4 of pt 5 and pt 4 of sch 1 of the RMA 1991.

Costs

[232] The ORC brought these proceedings to obtain clarification from the Court as to whether the basis on which it had determined the whole of its proposed regional statement as being a freshwater planning instrument was in accordance with s 80A of the RMA. They did this because of the acknowledged lack of clarity in the legislation as to how it was to be applied. A number of the parties acknowledged the responsible way the ORC had put the matter before the Court for consideration and did not seek costs. The proceedings are such that costs should lie where they fall.

Concluding summary

[233] On 26 June 2021, the Otago Regional Council notified the whole of its proposed regional statement as a freshwater planning instrument to be subject to the freshwater planning process which became part of the RMA in 2020. It made this determination to achieve integrated management of all natural resources and in accordance with the concept of Te Mana o te Wai and ki uta ki tai in the National Policy Statement for Freshwater Management that came into effect in September 2020. The council's determination was supported by Otago iwi. It was challenged by a number of district councils, Forest and Bird, Port Otago, Oceana Gold and two major forestry companies.

[234] In this judgment I have held that, with the 2020 amendment to the Resource Management Act, Parliament contemplated there would be dual planning processes as to matters that the Otago Regional Council had to deal with in its proposed regional statement. Only those matters that relate to freshwater would be subject to the freshwater planning process with the more limited rights of appeal associated with such a process.

[235] With the legislation, there is uncertainty as to what “relates to freshwater” means and thus uncertainty as to which parts of the proposed regional statement could be a freshwater planning instrument and so subject to the freshwater planning process.

[236] In this judgment I have held it is only those parts of the proposed regional statement that relate directly to the maintenance or enhancement of freshwater quality or quantity that can be treated as parts of a freshwater planning instrument. The whole proposed regional statement could not be treated as a freshwater planning instrument and so subject to the freshwater planning process on the basis this was necessary to achieve integrated management of resources or recognition of Te Mana o te Wai and ki uta ki tai. There was thus an error of law in the Otago Regional Council deciding that the whole of its recently notified proposed regional statement was a freshwater planning instrument to be dealt with under the freshwater planning process.

[237] The Otago Regional Council had notified the whole of its proposed regional policy statement in the manner required by the RMA. There have been a great number of submissions to the regional council about many aspects of the regional policy statement. I have held that the council need not renotify those parts of its proposed regional statement which, on reconsideration in accordance with this judgment, it decides are not parts of a freshwater planning instrument. Those parts will be subject to the normal planning process provided by the RMA with existing rights of appeal to the Environment Court.

[238] The Court has made declarations that:

- (a) the Otago Regional Council’s determination, that the whole of its proposed regional policy statement was a freshwater planning instrument, was in error;
- (b) the Otago Regional Council must now reconsider the proposed regional policy statement and decide which parts of it do relate to freshwater in the way the legislation requires for those parts to be subject to the freshwater planning process; and

- (c) the Otago Regional Council will then have to notify those parts of the proposed regional statement which are to be treated as a freshwater planning instrument and begin again the freshwater planning process as to those parts.

Solicitors:

Ross Dowling Marquet Griffin, Dunedin
P D Anderson, Royal Forest and Bird Protection Society of New Zealand
L A Andersen QC, Barrister, Dunedin
P E M Walker, Environment Law, Dunedin
S W Christensen, Barrister, Dunedin
M R Garbett and R A Kindiak, Anderson Lloyd, Dunedin
J M Derry, Ministry for the Environment, Wellington
R G Muston, Crown Law Office
P A C Maw, Wynn Williams, Christchurch
K T Dickson, Wynn Williams, Christchurch
S J Scott, Simpson Grierson, Christchurch
S R Gepp, Barrister, Nelson
K L Hockly, Lane Neave, Queenstown-Lakes
M A Baker-Galloway, Anderson Lloyd, Queenstown-Lakes.