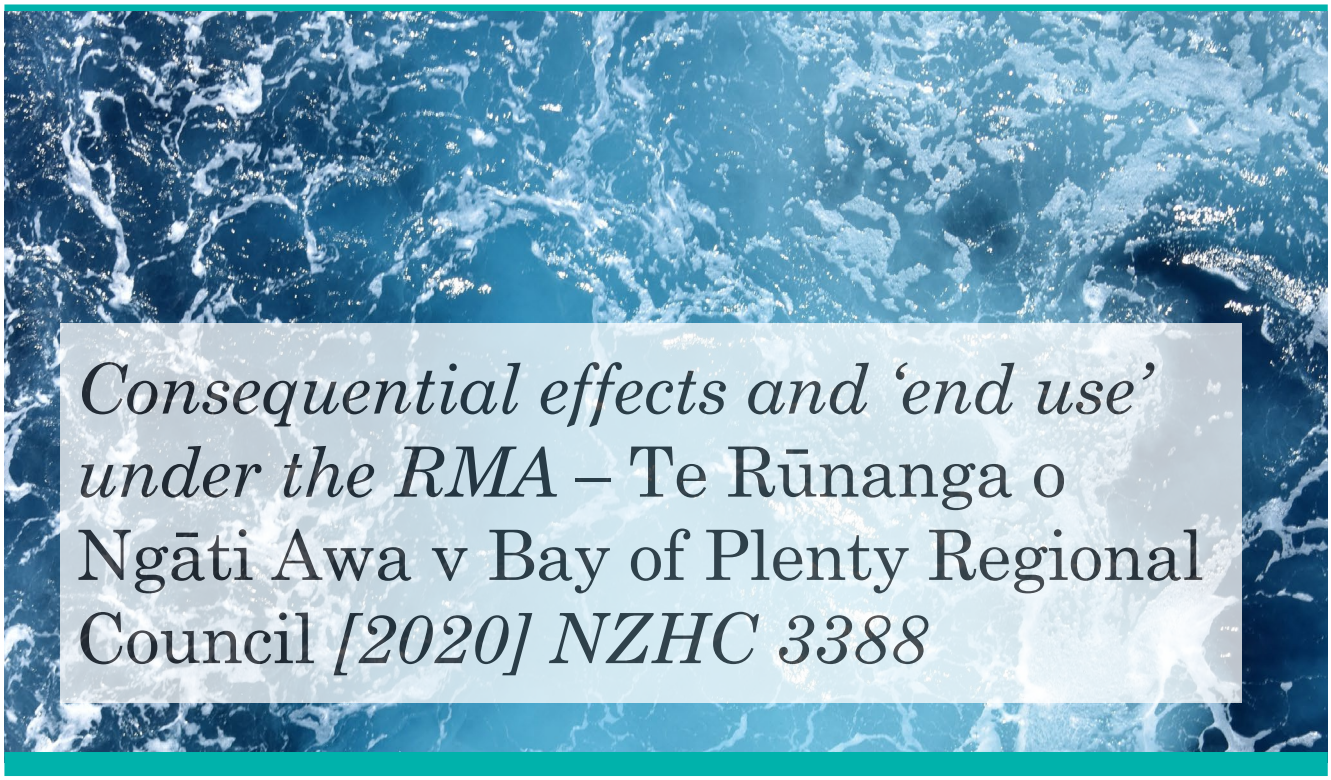

Consequential effects and 'end use' under the RMA – Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council *[2020] NZHC 3388*

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INTRODUCTION

In *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, the High Court upheld the decision of a majority of the Environment Court to dismiss appeals against the grant of consents authorising a large-scale water bottling plant at Otakiri, in the Bay of Plenty. (That Environment Court decision was summarised in the April 2020 issue of RMJ).

Te Rūnanga o Ngāti Awa (Te Rūnanga) and Sustainable Otakiri Incorporated (Sustainable Otakiri) had appealed decisions of the Bay of Plenty Regional Council and the Whakatāne District Council to grant a new water take permit and a variation to an existing land use consent (respectively) to Creswell NZ Limited (Creswell). These resource consents would enable the large-scale expansion of an existing water take and bottling operation.

One of the key legal issues for both Courts was the extent to which the decision maker was permitted or required to consider the environmental effects associated with exporting the water, and in plastic bottles, once it was taken. These aspects of the overall proposal did not themselves require resource consent but were seen as consequential or 'end use' effects of the applications being made.

ENVIRONMENT COURT'S APPROACH

The Environment Court majority had addressed this issue early in its decision, as part of what it called a "Jurisdictional Overview" (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196). Its reasoning included that:

- The consent authority *could* have regard to consequential effects of granting the consents sought but only "within the ambit of the RMA and subject to limits of nexus and remoteness" (where nexus refers to "the degree of connection between the activity and the effect" and "remoteness refers to the proximity of such connection" – both in the sense of the causal legal relationship rather than in physical terms) (at [59]–[61]);

- While the end use of the water take (i.e. in plastic bottles) was foreseeable and the effects were potentially adverse, "refusing consent to the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported" (at [64]);
- It was not open to the Court in relation to a proposed water take to "effectively prohibit either using plastic bottles or exporting bottled water". Instead, "[s]uch controls would require direct legislative intervention at a national level" (at [65]).

Accordingly, the majority of the Environment Court concluded its "Jurisdictional Overview" by stating (at [66]):

> *… in this case, the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water from the aquifer under s 104(1)(a) RMA.*

Despite this, after hearing competing evidence as to cultural effects, the majority later found that (at [156]):

> *… there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used.*

HIGH COURT'S DECISION – RESULT

The High Court summarised the appeals as being about the relevance of 'end use' in the consideration of resource consent applications, and in particular, the relevance of (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 at [1]):

> *(a) the export of bottled water in terms of negative effects on te mauri o te wai and the ability of mana whenua to be kaitiaki, and*
>
> *(b) the use of plastic bottles.*

Ultimately, the High Court dismissed the appeal on the basis that the Environment Court had not made any (material) errors of law in coming to its decision. However, the High Court's reasoning was somewhat different to that of the Environment Court, which means that both categories of effect could be live issues in future cases. Its findings with respect to the two categories of effect are explored below.

HIGH COURT'S APPROACH – CULTURAL EFFECTS

The High Court considered the established legal principles and authorities as to 'end use' that were discussed by the Environment Court, and at that general level did not "discern any error" with the majority's analysis. It summarised the legal position as follows (at [82]):

> *Limitations of nexus and remoteness must apply when assessing which effects on the environment of allowing the activity are relevant under s 104(1). It was common ground that the two concepts of nexus and remoteness are separate albeit there is some overlap. The complexity lies in the application of these concepts of nexus and remoteness in a case such as this …*

However, the High Court "[did] not favour a legal proposition of general application that the effects of exporting water are too remote or otherwise beyond the scope of consideration in any application for resource consent to take water". Instead, remoteness was an issue of fact and degree that was not "capable of such a statement of law in the abstract" (at [142]).

The High Court also considered that there was "a nexus between the water take and the export of bottled water in this case" (at [140]). Thus, the Court did not accept that the effects of exporting bottled water were "too remote from, or insufficiently connected to, the activity of extracting it from the ground – at least when those effects are cultural effects occurring in New Zealand" (at [141]). As a result, the High Court found that the majority's conclusion in its "Jurisdictional Overview" that exporting bottled water is (always) beyond the scope of consideration in an application for resource consent to take water "went too far" (at [142]).

Despite this, the High Court also found that any error on the part of the majority in this regard was not material (at [119] and [208]) because the majority had gone on to make factual findings that there was no loss of mauri, and that the project would not unreasonably prevent the ability of Ngāti Awa to be kaitiaki (at [142]). While the majority's approach in reaching that finding was itself criticised by the parties on appeal, the High Court observed that as a

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finding of fact, it was not susceptible to challenge under s 299 of the RMA (at [123] and [142]).

HIGH COURT'S APPROACH – USE AND DISPOSAL OF PLASTIC BOTTLES

The environmental impact of plastic bottles was not raised by either Te Rūnanga or Sustainable Otakiri in their arguments in the Environment Court, but instead was raised by Commissioner Kernohan when questioning witnesses (at [89]). However, because the Environment Court did address the impact of plastic bottles in its majority judgment, the High Court considered the appellants were able to pursue this issue in appearing before it (at [54] and [89]).

In terms of the effects associated with the use of plastic bottles (as opposed to the effects of exporting water in and of itself), the High Court found that:

- Insofar as the plastic bottles are exported, the effects of discarding them occur overseas. As such, the effects were too remote and outside the scope of the RMA, just as overseas discharges were considered too remote in *Royal Forest and Bird Protection Soc of NZ Inc v Buller Coal Ltd* [2012] NZHC 2156, (2012) 17 ELRNZ 220 (at [149]). As such, the remainder of the High Court's analysis was confined to local (New Zealand) effects.
- Insofar as the discarding of plastic bottles occurs in New Zealand, it was not inevitable that every plastic bottle would be improperly discarded, and disposal facilities require separate approval under the RMA (at [150]).
- While littering was itself unlawful, and thus could be said to be independent from the grant of water take consent, "the fact that something is unlawful and primarily the responsibility of another person does not necessarily preclude nexus – sometimes there can be more than one effective cause" (at [151]).
- In considering indirectness or independence of effects, it was also relevant to consider whether discarding plastic bottles was separately controlled under the RMA. The Court observed that the adverse effects of discarding bottles were not direct effects of allowing the water take activity for which consent was sought. Instead, they were "downstream effects, which normally would only be taken into account if the relevant activity – discarding plastic bottles – is not subject to regulation under the RMA" (at [153]).
- In relation to the use of plastic bottles (rather than cultural effects), the extent of the effect associated with this application relative to other instances raised a similar 'tangibility' issue to that in *Buller Coal*, involving "consideration of whether restricting the water take using plastic bottles would make any appreciable difference to the overall use of plastic bottles and have any perceptible adverse effect on the environment" (at [134]). However, there was limited evidence (i.e. as to the scale of other bottling operations) which "did not enable the effects to be ignored on (in)tangibility grounds" (at [134] and [155]).
- Importantly, with respect to the extent to which the disposal of bottles from the facility would lead to adverse effects, the High Court found that there was evidence of the scale of the bottling operation, but "no evidence as to the scale or adverse effects of plastic bottles from the operation being discarded in the (regional) environment" (at [156]).

In light of this assessment, the High Court concluded that (at [156]):

> *… as a matter of fact and degree, the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration in Creswell's application for resource consent to take water from the aquifer.*

Accordingly, the High Court did not consider the Environment Court majority erred in law when it concluded in its "Jurisdictional Overview" that the effects on the environment of using plastic bottles were beyond the scope of consideration in relation to Creswell's application to take water (at [157]). However, the Court was quick to emphasise that it was "not saying that as a matter of law the effects of plastic bottle or other plastic disposal will always be too remote to warrant consideration (nor suggesting that councils cannot address such effects in their planning documents)" (at [157]).

COMMENT

This case raises a number of fascinating issues in relation to end use effects, particularly effects that are diffuse and somewhat intangible. With respect to future 'water bottling' cases, there are perhaps three direct implications of the High Court's approach:

- Environmental effects that might occur overseas associated with the use of plastic bottles are too remote to be considered as part of a water take application.
- However, cultural effects associated with the export of water will be relevant effects to consider, because they occur in New Zealand. The extent to which they are given weight will depend on the evidence before the decision-maker; and
- While it will be a matter of fact and degree in each case, effects within New Zealand associated with the use and disposal of plastic bottles are capable of being a relevant consideration under the RMA (with sufficient evidence as to 'nexus and remoteness', and perhaps also subject to hurdles as to 'tangibility' or materiality).

While the High Court considered its conclusion was consistent with that in the recent case of *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, it would appear that the Court took slightly different approaches in the two cases, given in that case it was accepted that the "effects of plastic bottles are a consequential effect outside of what could be considered on a consent application" (*Aotearoa Water Action Inc* at [252]).

It seems clear that if submitters are to succeed with arguments about the effects of plastic bottles in the future they will need to provide clear evidence of the scale and adverse effects of bottles being discarded from the particular operation. In addition, the Court's discussion of the 'tangibility' issue suggests it may also be necessary to show that the proposed operation will materially add to the quantity of plastic bottles that are already in circulation. It follows that applicants may be able to argue that any such effects can be ignored, because they will "make no appreciable difference to the overall use of plastic bottles and have no perceptible adverse effects on the environment" (see *Te Rūnanga* (HC) at [155]).

While this discussion could be read as an argument as to futility (i.e. that there is no point in declining an activity if its adverse effects will just occur elsewhere), it is perhaps better framed in terms of the evidential challenge in showing perceptible adverse effects. In most RMA cases the adverse effects are somewhat localised and emanate directly from the proposed activity, but for water bottling, any effects associated with plastic bottles are diffuse and arise (if at all) where bottles are sold. An apt comparison might be the difference between localised air pollution and activities that contribute to (global) climate change. Once the problem is no longer localised then the environmental effects of any individual contributor will almost always be *de minimis* and so effective regulation (if it is to occur under the RMA) will require clear policy guidance.

Finally, it is suggested that this case illustrates yet another instance of uncertainty as to the kinds of effects or activities that can properly be regulated under the RMA – the current reform process is an opportunity to secure greater certainty as to the scope of relevant adverse effects in the future.

We understand that an application for leave to appeal has been filed in the Court of Appeal.