Annexure 1: The Law

[1] Following recommendations made by the Minister for the Environment,[1] the Regional Council prepared and notified a change to the Regional Plan: Water for Otago (PC7). The Minister subsequently called in the plan change and referred the matter to the Environment Court for determination (RMA, s 142(2)).[2]

[2] The Minister found that PC7 is part of a proposal of national significance and directed the matter be referred to the Environment Court for decision because:

a) Calling in the plan change as part of a proposal of national significance would:
   i. assist the Otago Regional Council by allowing its staff to focus on developing a new Land and Water Regional Plan; and
   ii. avoid potential delays associated with the Schedule 1 process of the RMA that could complicate the development of a new Land and Water Regional Plan.

b) The current COVID-19 situation would make the appointment of suitable members to a board of inquiry difficult in a short timeframe whereas the Environment Court process would provide surety in terms of progressing a decision on the matter.

[3] In October 2020 the Environment Court accepted lodgement of PC7 for decision.[3]

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[1] Letter from Hon D Parker (Minister for the Environment) to Hon M Hobbs and Councillors (Otago Regional Council Chair and Councillors) regarding Section 24A Report: Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under section 24A of the Resource Management Act at CB: Vol 5, Tab 12C.

[2] Ministerial Direction of David Parker (Minister for the Environment) to refer the Otago Regional Council's proposed Plan Change 7 – Water Permits to its Regional Plan to the Environment Court (8 April 2020) at CB: Vol 5, Tab 12A.

[3] See RMA s 149T and Minute 'Notice Of Motion And Lodgement And Service of Documents' dated 23 October 2020.

[4] When considering any matter referred to it, the Environment Court must:[4]

(a) have regard to the Minister's reasons for making a direction in relation to the matter; and

(b) consider any information provided to it by the EPA under s 149G; and

(c) act in accordance with s 149U(6).

[5] Section 149U(6) provides:[5]

> (6) If considering a matter that is … a change to a regional plan, the court—
>
> (a) must apply clause 10(1) to (3) of Schedule 1 as if it were a local authority; and
>
> (b) may exercise the powers under section 293; and
>
> (c) must apply sections 66 to 70, 77A, and 77D as if it were a regional council.[6]

[6] Schedule 1, referred to in the section above, addresses the contents of the decision to be made. In summary, while the court is not required to give a decision that addresses each submission individually, we must give a decision on the provisions and matters raised in submissions, including reasons for accepting or rejecting the submission. The decision must include a further evaluation of the proposed change in accordance with s 32AA (RMA, Schedule 1, cl 10(1) to 10(3)).

[7] We turn next to ss 66 – 70, 77A and 77D of the Act, also referred to above.

[8] Pursuant to s 66, the plan change must be prepared in accordance with:[7]

(a) the Regional Council's functions under s 30;

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[4] RMA, s 149U.

[5] Only relevant matters are listed.

[6] For completeness, we record pt 11 of the Act also applies to this proceeding, except if inconsistent with any provision of s 149U (RMA, s 149U(8)). Part 11 contains provisions specifically relating to the Environment Court.

[7] RMA, s 66.

(b) the provisions of pt 2; and

(c) any national policy statement and national planning standards

– among other requirements.

[9] These proceedings concern a change to a regional plan. A regional plan is a planning instrument that states the objectives for the region, the policies to implement the objectives and finally, rules (if any) to implement the policies (RMA, s 67(1)). A regional plan must give effect to any national policy statement, national planning standard and regional policy statement (RMA, s 67(3)).

[10] While a regional plan must give effect to a regional policy statement, the Act defines 'regional policy statement' as meaning an operative regional policy statement approved by the Regional Council; the definition does not include a proposed policy statement.[8] Even so, when preparing or changing a regional plan, the Regional Council (here, the court) is to have regard to any proposed regional policy statement (RMA, s 66(2)(a)).

[11] A Regional Council may allocate the taking or use of water (RMA, s 67(5)).

[12] A regional council may include rules in a regional plan for the purpose of carrying out its functions under the Act and also for achieving the objectives and policies of the plan (RMA, s 68(1)). When making a rule, a regional council is required to have regard to the actual or potential effect on the environment of activities, including any adverse effects (RMA, s 68(3)). Rules may apply to different classes of activity and may be subject to different conditions (RMA, s 77A). Finally, rules may specify activities for which applications for resource consent are to be notified (including limited notification) or in relation to which notification is precluded (RMA, s 77D).

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[8] RMA s 43AA 'policy statement' means a 'regional policy statement'. See also the definition of 'proposed policy statement', 'regional policy statement' and 'operative'.

National Policy Statements

[13] The three national policy statements that the plan change must give effect are as follows:

(i) National Policy Statement for Renewable Electricity Generation 2011 (NPS-REG);
(ii) National Policy Statement for Freshwater Management 2020 (NPS-FM 2020); and
(iii) National Policy Statement on Urban Development 2020 ('NPS-UD').

[14] An important issue in this case is whether a change that is for administrative purposes gives effect to the NPS-FM 2020.[9]

Regional Policy Statements

[15] There are two relevant Regional Policy Statements:

(i) partly operative Regional Policy Statement; and
(ii) proposed Otago Regional Policy Statement 2021.

[16] For present purposes, the partly operative regional policy statement is operative in all key respects. It is common ground that this policy statement gives partial effect to the NPS-REG 2011 but does not give effect to the NPS-FM 2020 or NPS-UD 2020 (or their predecessors).

[17] The Regional Council notified its proposed policy statement in June 2021, some 18 months after the notification of PC7. This is a planning instrument that the court is to have regard to, however not all of the issues that are identified by counsel for the court's determination in relation to the proposed policy statement

[9] Legal submissions on behalf of the Otago Water Resources User Group, 28 July 2021 ('OWRUG, supplementary submissions (July)') at [20].

are matters that we need to decide.[10] That said, to 'have regard to' a matter requires that the court gives the proposed policy statement genuine attention and thought.[11]

Preliminary points of law

[18] We turn next to issues/topics raised by Otago Water Resources User Group ('OWRUG') and others, dealing with them as preliminary points of law which, if successfully argued, would or could result in a decision to reject the plan change. Those issues/topics concern:

(i) whether the plan change is 'permissible';[12]
(ii) the Report of Honorary Professor P Skelton;
(iii) the Ministerial recommendations issued under s 24A of the Act; and
(iv) the sufficiency of the s 32 Report.

Issue: is the plan change 'permissible'?

[19] OWRUG submits s 67(3) requires a change to a regional plan to give effect to the NPS-FM 2020. Acknowledging that the obligation to give effect is limited by the scope of the plan change,[13] they submit the plan change is not *permissible* because its purpose is simply to delay the substantive implementation of the NPS-FM 2020.

[20] In addition, OWRUG argues cl 3.17(3)(a) of the NPS-FM 2020 requires that a regional plan identify flows and levels at which taking is restricted or no longer allowed. They say this requirement exists independently of the development of regional plans under the National Objectives Framework ('NOF')

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[10] ORC memorandum 'Issues for the Court's determination in respect of the proposed Otago Regional Policy Statement' dated 9 July 2021. An example of a matter we will not decide is whether the proposed policy statement gives effect to the national policy statements.
[11] *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].
[12] OWRUG, supplementary submissions (July) at [20].
[13] Legal submissions on behalf of OWRUG, 23 March 2021 ('OWRUG, opening submissions') at [5].

processes.[14] In not introducing minimum and residual flows for water bodies, OWRUG submits that the plan change does not prioritise the health and well-being of water bodies and freshwater ecosystems.[15]

[21] PC7 is also said to be fundamentally flawed in that:[16]

(a) it does not give effect "sufficiently to Te Mana o te Wai compared with not adopting plan change 7 (the section 32 test);" and
(b) it does not require the consent authority to "test"[17] resource consent applications directly against Te Mana o te Wai.

[22] Evidently, OWRUG's discretionary pathway was intended to address the alleged flaws, by providing applicants an opportunity to apply for long-term water permits which, if consented, may lead to improved outcomes for the environment.[18]

Discussion

[23] OWRUG accepts that the obligation to give effect to the NPS is limited by the scope of the plan change.[19] The challenge facing the Regional Council and the parties is what to do in the interregnum when hundreds of permits will expire, but the new integrated regional planning framework is not in place.

[24] While the NPS is to be given effect as soon as reasonably practicable, if changes to regional policy statements and regional plans are required to achieve

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[14] NPS-FM, pt 3, subpart 2. OWRUG, opening submissions at [20]–[21].
[15] Transcript Dunedin WKS 1-3 (Page) at 920-925; OWRUG, opening submissions at [12]–[13], [16] where OWRUG likens minimum flows as being an "allocation of water for fresh water ecosystems", OWRUG's submissions on cl 3.12, 3.19 and cl 3.20(1), are with similar effect although they do not go as far as saying these obligations exist independently of the NOF processes. NPS-FM 2020, cl 3.19 and 3.20 deals with the assessment of trends in attribute states; degraded or degrading waterbodies.
[16] Legal submissions on behalf of OWRUG, 5 July 2021 ('OWRUG, closing submissions') at [15].
[17] By *"testing"* we presume OWRUG means under RMA, s 104(1)(b).
[18] OWRUG, closing submissions at [1]–[3], [15]-[17].
[19] OWRUG, opening submissions at [5].

this, these are to be notified by 31 December 2024.[20] However, in the case of Otago, the Minister for the Environment has recommended, and the Regional Council agrees, that a new regional plan will be notified by December 2023.

[25] OWRUG did not make a submission on the plan change seeking amendments to its provisions. Even so, OWRUG would see PC7 amended to include a relief for discretionary activities by creating an exception to the policies on duration. Whether there is scope for this and other relief is challenged by the Regional Council but for reasons that we give elsewhere we have declined to give a ruling.[21]

[26] OWRUG presented no authority for its submission that the plan change is fundamentally flawed in that it does not require the consent authority to *test* resource consent applications directly against Te Mana o te Wai. We also struggled with the sense of the submission that the plan change is in some way *impermissible*. Our decision follows comprehensive analysis of the plan change under RMA, ss 32 and 32AA. Importantly, we have found that the plan change objective, which is to facilitate the efficient and effective transition from the operative freshwater planning framework to a new integrated regional planning framework, is giving effect to the concept of Te Mana o te Wai and therefore to the NPS-FM 2020.

NPS-FM 2020, cl 3.17(3)(a)

[27] We turn now to address OWRUG's submission that cl 3.17(3)(a) of the NPS-FM 2020 is a mandatory requirement to be given effect to by this plan change.[22] This is OWRUG's interpretation of the NPS-FM 2020.

[28] The interpretational issue OWRUG identifies is whether 'flows and levels' (cl 3.17(3)) are to be read consistently with 'environmental flows and levels' (cl

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[20] See NPS-FM 2020, pt 4 and RMA, s 80A.
[21] Annexure 2: Scope Challenges.
[22] OWRUG, opening submissions at [21].

3.17(1)). It is OWRUG's case that the phrases are not to be interpreted consistently. Two reasons are given:

(a) the phrases 'environmental flows and levels' and 'flows and levels' are (literally) different; and

(b) clause 3.17(1) commences "in order to meet environmental flows and levels, every regional council…" whereas cl 3.17(3) commences "Where a regional plan or any resource consent allows taking [etc], the plan or resource consent must identify the flows and levels at which: (a) the allowed taking [etc] is no longer allowed;"[23]

– while important to OWRUG's submission, the argument was largely undeveloped.

[29] As OWRUG is interpreting the NPS-FM 2020, s 5 of the Interpretation Act is relevant and provides that the meaning of an enactment is to be ascertained from its text and in the light of its purpose. As always, it is the court's task to interpret the text of the legislation and not to rewrite it; the court is not to give the text meaning that it is incapable of bearing. It is important that the meaning of words under consideration be read in the context of other words of the section in which it appears. The general rule being that the meaning of words is known by the company that they keep; per *Burrows and Carter Statute Law in New Zealand.*[24]

[30] Clause 3.17(1) requires the Regional Council to identify take limits for each Freshwater Management Unit ('FMU') and include them as rules in a regional plan. A 'take limit' is defined as the limit on the amount of water that can be taken from a FMU, as set under cl 3.17.[25] Take limits are to meet 'environmental flows and levels' (cl 3.17(1)) and achieve the outcomes listed (cl 3.17(4)).

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[23] Transcript Dunedin WKS 1-3 (Page) at 923ff.

[24] R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 329.

[25] NPS-FM 2020, cl 1.4 Interpretation.

[31] 'Environmental flows and levels' are set at levels that achieve the environmental outcomes for the FMUs and relevant long-term visions (cl 3.16(2)). The Regional Council must include rules in its regional plan that set 'environmental flows and levels' for each FMU and may set different 'flows and levels' for different parts of an FMU (cl 3.16(1)). We understand the setting of different 'flows and levels' in different parts of an FMU, is to manage (for example) tributary flows or secondly, flows along the reach of a river mainstem. These 'flows and levels' are a component of broader sets of 'environmental flows and levels', which are set to achieve the outcomes for the values relating to that FMU (or relevant parts).[26]

[32] Take limits and environmental flows and levels are correlated in that the former (take limits) are set to meet environmental flows and levels (see cl 3.17(1)) and flows and levels at which taking is no longer allowed (cl 3.17(3)).

[33] Clause 3.17(1) and (3) differ in that cl 3.17(1) is prescribing methodology giving effect to environmental flows and limits set under cl 3.16, whereas cl 3.17(3) is a direction to Regional Councils that regional plans and resource consents are to identify flows and levels at which taking (etc) is restricted or no longer allowed. This is belt and braces drafting that identifies first, the methodology and then second, requires its adoption.

[34] For completeness, we note, the phrases 'environmental flows and levels' and 'flows and levels' are used elsewhere within the same clause (see cl 3.16(1) and 3.16(3)(a)).

[35] The setting of take limits and environmental flows and limits are NOF processes and are referred to as such in cl 3.7(2)(e) and (f).[27] We find that cl 3.17(3) does not impose an obligation on Regional Councils to set environmental flows

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[26] NPS-FM 2020, cl 3.16(2).

[27] At paragraph [21(e)] of OWRUG, opening submissions, cl 3.19 and cl 3.20(1) were also noted with similar effect. While counsel acknowledged these are requirements of the NOF processes, they submitted it was contrary to Te Mana o te Wai for the Regional Council to "do nothing" about degraded or degrading FMU.

and levels separately/apart from the NOF process either in a change to a regional plan or on determination of individual resource consent applications.

Issue: report of Honorary Professor P Skelton and the Ministerial recommendation given under s 24A of the Act

[36] Extensive evidence was led by OWRUG and others concerning the report of Honorary Professor P Skelton ('Skelton Report')[28] and the recommendations of the Minister for the Environment to the Regional Council.

[37] Professor Skelton was appointed by the Hon David Parker, Minister for the Environment, acting under s 24A of the Act, to investigate whether the Regional Council is adequately carrying out its functions under s 30(1) of the Act, including the implementation of the NPS-FM 2014 (amended 2017).

[38] The Minister subsequently gave three formal recommendations to the Regional Council pursuant to s 24A. Those are (in summary):[29]

(a) the Regional Council takes all necessary steps to develop a fit-for-purpose freshwater management planning regime giving effect to the national instruments;
(b) the Regional Council develops and adopts a programme of work to:
    (i) by November 2020, review the (partially operative) regional policy statement;[30]
    (ii) by December 2023, (notify) a new land and water plan; and
(c) by 31 March 2020, the Regional Council is to prepare a plan change

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[28] Peter Skelton *Investigation of Freshwater Management and Allocation Functions at Otago Regional Council – Report to the Minister for the Environment* (Ministry for the Environment, 1 October 2019).

[29] Letter from Hon D Parker (Minister for the Environment) to Hon M Hobbs and Councillors (Otago Regional Council Chair and Councillors) regarding Section 24A Report: Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under section 24A of the Resource Management Act at CB: Vol 5, Tab 12C.

[30] At that time there were two Regional Policy Statements; an operative RPS and secondly a partially operative proposed RPS. We assume what is intended is a review of the partially operative RPS to give effect to the higher order planning instruments.

> to provide an adequate interim planning and consenting framework to manage freshwater.

[39] The Minister declined Professor Skelton's recommendation that the RMA be amended to change the date for expiry of the deemed permits from 1 October 2021 to 31 December 2025 (31 December 2025 being the date that a new regional plan is expected to be operative).

[40] In line with the Minister's recommendations, the Regional Council agreed to prepare and notify a change to the operative Regional Plan: Water for Otago (i.e. PC7). The focus of the change was to be the processing of water permits, including those to replace deemed permits.[31]

[41] We will not essay the criticism levelled at the Skelton Report, nor the recommendations given by the Minister for the Environment. It is unclear how this criticism is relevant to our consideration of the plan change. If it is to emphasise the view that consenting of long-term water permits may benefit the environment, the court heard this submission.[32] With that said, the correct forum to challenge the exercise of a Ministerial power is the High Court.

Issue: adequacy of the s 32 Report

[42] In March 2020, the Regional Council released its s 32 Report on PC7.[33] That report was challenged by Mr G Martin and others who would have the court reject the plan change in its entirety because of what they contend are defects in

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[31] Letter from Office of the Chairperson (Otago Regional Council), to Hon D Parker (Minister for the Environment) regarding Investigation of Freshwater Management and Allocation Functions at Otago Regional Council under section 24A of the Resource Management Act 1991: Otago Regional Council Response to Recommendations (16 December 2019). CB Vol 5: Tab 12E.

[32] See OWRUG, opening submissions at [25]–[32] and OWRUG, closing submissions at [21]–[26].

[33] Otago Regional Council *Section 32 Evaluation Report: Proposed Plan Change 7 to the Regional Plan: Water for Otago* (18 March 2020). CB Tab 11.

the Regional Council's processes, including the content of the s 32 Report.

[43] A challenge to any of the provisions of a proposal[34] may be made in a submission under Schedule 1 or – as is the case here where the proposal has been called in – pursuant to ss 149E and 149F of the Act.[35] The challenge being made does not prevent the persons hearing the submission on a proposal from having regard to the matters stated in s 32.[36]

[44] The leading decision on challenging a s 32 Report, is *Kirkland v Dunedin City Council.*[37] Here the Court of Appeal was considering challenges made under s 32(3); the Act was subsequently amended in 2003.[38] Nevertheless, the Court's observations remain pertinent; namely a submitter may legitimately seek to bolster their attack on the provisions by highlighting the failure to carry out a s 32 analysis.[39] When considering the merits of the proposal, the decision-maker may be influenced by an absence of a proper analysis or deficiency in some other way.[40] The decision-maker cannot, however, act as if it were judicially reviewing the process adopted by the Regional Council under s 32 and direct that it withdraw the plan change and recommence the process.[41]

[45] It is not suggested that the Regional Council made no effort to comply with s 32. Rather, the main concern is whether the Regional Council considered measures other than recommended by the Minister.[42] We find that the Regional Council did consider alternatives in its report.

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[34] In s 32A(3) a 'proposal' means a proposed plan change for which there must be an evaluation report or further evaluation report.
[35] RMA, s 32A(1).
[36] RMA, s 32A(2).
[37] *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (CA).
[38] The relevant provision when considering an alleged failure to carry out a s 32 evaluation, is RMA s 32A.
[39] *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (CA) at [11].
[40] *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (CA) at [21].
[41] *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (CA) at [22].
[42] See, for example, Martin, EiC dated 5 February 2021 at [48].

[46] The problem being addressed by the plan change concerns the reconsenting of hundreds of water permits expiring between December 2019 and December 2025 under a regional plan that does not give effect to the NPS-FM (any version); and does not deal adequately with environmental effects nor contain effective measures to reduce over-allocation and drive efficient resource use (among other matters).[43] The report writer evaluates a short-term controlled activity (six years) and alternatives that provide for longer-term permits (15 years).[44] The author does not evaluate the status quo option; namely the consideration of applications to reconsent existing permits under the operative regional plan as they did not regard this to be a viable option.[45]

[47] Many submitters/parties do regard the operative regional plan as an alternative to PC7 and we have considered their submissions when making our decision.

[43] Section 32 Report, 12-14.
[44] Section 32 Report, 15-17.
[45] Section 32 Report, 14.