BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 35

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal under section 120 of the Act
	BETWEEN	INFINITY INVESTMENT GROUP HOLDINGS LIMITED
		(ENV-2015-CHC-92)
		Appellant
	AND	CANTERBURY REGIONAL COUNCIL
		Respondent

Court: Environment Judge J R Jackson
(under section 279(1)(c) of the Act)

Hearing: In Chambers at Christchurch on the papers
(Final submissions received 7 February 2017)

Written submissions received from:

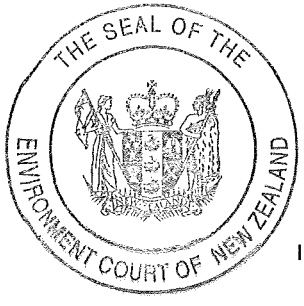
R J Somerville QC for Infinity Investment Group Holdings Limited
L F de Latour for Canterbury Regional Council
P Steven QC for Waitaki Irrigators Collective Limited and others (section 274 parties)
M Baker-Galloway for Fish and Game (section 274 party)

Date of Decision: 17 March 2017

Date of Issue: 17 March 2017

PROCEDURAL DECISION

A: Under section 279(1)(e) of the Resource Management Act 1991 the Environment Court rules in relation to application CRC155773 by Infinity Investment Group Holdings Limited to take water from the main stem of the Hakataramea River lodged with the Canterbury Regional Council on 25 October 2013:



(1) that resource consent is not now required under the pre-Plan Change 3 ("PC3") version of the Waitaki Catchment Water Allocation Regional Plan ("WCWARP");

(2) as for the consent required under the WCWARP with PC3 ("the Allocation Plan"), the proposed water permit to take is a discretionary activity.

B: Costs are reserved as costs in the substantive proceeding.

REASONS

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A. Introduction

[1] The primary issue for this procedural decision is whether the status of a proposed take of water from the Hakataramea River is a non-complying or discretionary activity. Because there is a plan change to the relevant regional plan, a related issue is whether that status of the activity is affected by section 88A of the Resource Management Act 1991 ("the RMA" or "the Act").

[2] Section 88A states:

> **88A Description of type of activity to remain the same**
>
> (1) Subsection (1A) applies if —
>
> (a) an application for a resource consent has been made under section 88 or 145; and
>
> (b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made under section 87B, is altered after the application was first lodged as a result of—

(i) a proposed plan being notified; or

(ii) a decision being made under clause 10(1) of Schedule 1; or

(iii) otherwise.

(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.

(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section 104(1)(b).

...

[3] The application of section 88A has led to some results which are at first sight surprising notably in *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council*[1] *("Ngāti Rangi")* where water takes that were ostensibly controlled activities at the time of the Environment Court hearing were held by the High Court to be non-complying because that was their status under a (by then) inoperative regional plan.

B. Background: the application, the rules and the arguments

The application to take water for the Hakataramea River

[4] Taking of water from the Hakataramea River is not a permitted activity under the relevant regional plans. A permit is required[2] before water can be taken from the river. Consequently by application dated 25 October 2013 Infinity Investment Group Holdings Limited ("Infinity") sought water permits from the Canterbury Regional Council to take 93 litres per second ("L/s") from the main stem of the Hakataramea River (a tributary of the Waitaki River). The application was originally given the reference CRC144934 by the Council.

[5] After judicial review of the Council's original decision not to notify the application – see *Sutton v Canterbury Regional Council*[3] – the application was amended by a letter from Infinity's agent Mr T Heller on 5 March 2015, reducing the proposed take to 68 L/s. Dr Somerville QC submitted[4] that Infinity lodged a new application in 2015. That submission is incorrect because it is clear from the express words of Infinity's agent's letter to the Council that Infinity was intending to amend its 2013 application, not make a new one. The letter from Environmental Associates Ltd states: "The

1 *Ngāti Rangi Trust v Manawatu-Whanganui Regional Council* [2016] NZHC 2948.
2 Section 14(2) RMA.
3 *Sutton v Canterbury Regional Council* [2015] NZHC 313; [2015] NZRMA 93; (2015) 18 ELRNZ 774.
4 R J Somerville submissions 30 January 2017 at para 26(e) [Environment Court document 38].

Applicant wishes to amend application CRC 144934 … All amendments are within the scope of the application as originally lodged." One reason for that approach may have been not to lose priority for the application.

[6] The application was renotified (twice[5]) as CRC155773 and it then went to a hearing. By decision dated 4 September 2015 Independent Hearing Commissioners Emma Christmas and Hugh Thorpe declined consent. Infinity appealed to the Environment Court under section 120 of the Resource Management Act 1991 ("the RMA" or "the Act").

[7] The appeal was joined by two submitters as section 274 parties: The Waitaki Irrigators Collective Ltd ("the Collective") and the Central South Island Fish and Game Council of New Zealand Inc ("Fish and Game"). Both support the Council's position.

[8] The operative regional plan when the water permit was sought was the Waitaki Catchment Water Allocation Regional Plan ("the WCWARP") which became operative in July 2006 under the Resource Management (Waitaki Catchment) Amendment Act 2004 ("the 2004 Act"). That plan is[6] the regional plan "for the allocation of water in that part of the Waitaki Catchment that is within the Canterbury region" under section 14 of the 2004 Act.

[9] On 28 June 2014 the Canterbury Regional Council ("the CRC") notified Plan Change 3 ("PC3") to the WCWARP. The process of submissions, further submissions and a hearing under Schedule 1 to the RMA followed. The recommendations of the Hearing Commissioners on PC3 were adopted by the CRC on 18 June 2016 and the plan change became operative on 8 September 2016. I will call the version of the WCWARP which includes the operative PC3 (and earlier changes 1 and 2) the "Allocation Plan".

5 For a second time on 21 March 2015 and for a third time, due to an error in the second notice, on 2 April 2015: see the Independent Commissioners' Decision 4 September 2015 at [13].

6 By resolution dated 25 August 2016.

[10] The timing of events is shown in this chronological table which compares relevant dates in relation to the WCWARP, PC3, and Infinity's application:

	WCWARP	**PC3**	**Infinity application**
July 2006	Operative		
25 October 2013			Lodged
28 June 2014		Notified	
27 February 2015			High Court decision[7] quashed grant
5 March 2015			Application amended
2 April 2015			Notified (again)
4 September 2015			CRC decision (refusing consent)
8 September 2016	Inoperative (as provisions amended by PC3)	Operative	

[11] Because the Allocation Plan became operative while the court was deliberating on its substantive decision, by Minute dated 6 December 2016 the court asked for further submissions on the status of Infinity's application and on the effects of the changes made by PC3. Submissions from all parties have now been received.

The rules

[12] The rules governing the status of the taking of water include (relevantly):

> **Rule 15** Any activity that complies with Rules 2, 6 and 7, and is not subject to Rule 15A is a discretionary activity.
>
> ...
>
> **Rule 16** Any activity which contravenes any of Rules 2, 6 or 7 is a non-complying activity. In considering an application to which this rule applies the consent authority will have regard, among other matters, to all the policies of this Plan.
>
> ...

[7] *Sutton v Canterbury Regional Council* above n 3.

[13] These rules refer back to rules 2 and 6 (7 is irrelevant to this proceeding). Activities that comply with both rules 2 and 6 of the Allocation Plan are discretionary activities (rule 15). In contrast, activities which do not comply with either rules 2 or 6 (or both) under the Allocation Plan are non-complying (rule 16).

[14] Before PC3 became operative, rule 2 provided (relevantly):

> **Rule 2**
>
> (1) Except as provided in (2) and (3) no person shall take, use, dam or divert surface water or ground water unless:
>
> ...
>
> b. the amount taken or diverted from the relevant river or stream is for a replacement consent or in combination with the amount of water authorised to be taken **or diverted** by existing resource consents, does not exceed the allocation limits in Table 3; and ...

[15] The allocation limit for the Hakataramea River main stem was 500 L/s.

> "Allocation limits" was defined as:
>
> The limits on the cumulative rate of taking **and diverting** of water that are established by this Plan and are specified in rule 2 of this Plan. (emphasis added)

[16] The reference to a diversion of water in rule 2 is important because the evidence is that 472 L/s of the 500 L/s limit had already been allocated. The figure of 472 L/s counted 150 L/s for the "Davenport" diversion, rather than merely the 110 L/s for the associated "Davenport" take[8]. Consequently, Infinity's proposed take was non-complying when lodged in October 2013.

[17] PC3 removed the words "or diverted" from rule 2(1)(b) and removed the words "and diverting" shown in bold from the definition of *Allocation limits* above[9]. It follows that diversions are no longer counted in the allocation limit when determining whether there is available allocation under the environmental flow and level regimes for the Hakataramea River in Table 3 of the WCWARP (now Table 3B of the Allocation Plan) and whether the overall allocation is exceeded in Table 5 of the plans (discussed next).

8 J A Todd evidence-in-chief paras 13 and 55 [Environment Court document 9].
9 See chapter 10 Definitions and abbreviations of the Allocation Plan.

[18] Consequently Infinity's proposal to take 68 L/s complies with the allocation limit in Table 3B and is discretionary under rule 2 of the Allocation Plan.

Rule 6 (and Table 5)

[19] Rule 6 in the Allocation Plan relates to the total annual allocation for all abstraction from the Waitaki catchment below the Waitaki Dam. The relevant part of rule 6 of the Allocation Plan now reads (relevantly):

> (1) Except as provided in (2), no person shall take, use, dam or divert water, if the take, by itself or in combination with any other take, results in the sum of the annual volumes authorised by those resource consents, exceeding the annual allocation to that activity in Table 5.
>
> ...
>
> (Underlining in the original)

It was the same for all relevant purposes in the WCWARP. What has changed is the way in which the volumes are calculated. As explained above "diversions" no longer count, and Table 5 as referred to in the rule has been amended.

[20] The relevant part of Table 5 is (v) because the Hakataramea River is within that part of the Waitaki catchment described as "downstream of Waitaki dam but upstream of Black Point". The table reads:

Table 5: Annual allocations to activities
Note: units = millions of m^3 per year.

	Town and Community water supplies	Industrial and commercial activities (outside municipal or town supply areas)	Tourism and recreational facilities	Agricultural and horticultural activities	Any other activities	Hydro-electricity generation
...						
v Downstream of Waitaki Dam but upstream of Black Point	3	1	2	~~150~~ **200**	16	All other flows except the flows that must remain in the rivers, pursuant to the environmental flow regimes

[21] The difference between the WCWARP and the Allocation Plan is that the former had an annual allocation to agricultural and horticultural activities of 150 x 10^6 cubic metres of water each year (shown as struck through in Table 5), whereas PC3 increased that to 200 x 10^6 cubic metres (shown in **bold** in Table 5). PC3 also changed how the volumes were calculated by excluding diversions from the allocation limits.

[22] Under the WCWARP Infinity's application was non-complying, because the annual allocation for the Lower Waitaki catchment was already exceeded[10]. Under PC3 and now under rule 15 of the Allocation Plan, the application is, at first sight, for a discretionary activity.

[23] Infinity relies on a proposed condition linking the take to an existing consent so that the proposed take would not, in theory, increase the annual volumes taken from the river. However, even if that is correct and workable (and in this decision I make no findings on either point) the fact is that the annual limit from under Table 5 (as it was at the date of Infinity's application) of the WCWARP was already exceeded so Infinity's application was still non-complying.

The arguments

[24] Ms Baker-Galloway, counsel for Fish and Game, submits[11] that since the application was lodged under the WCWARP, the activity must, under section 88A RMA, continue to be assessed as a non-complying activity. She submits that two lines of authority have developed as to the application of section 88A RMA. The first set of cases states that the new activity status (introduced in a new plan or plan change) applies if the relevant rule has legal effect or has become operative at the time of the decision. This line includes *Canterbury Regional Council v Christchurch City Council*[12]; *Campbell v Napier City Council*[13]; *Batten v Rodney District Council*[14] and *Royal Forest and Bird Protection Society Inc v Whakatane District Council*[15].

10 J A Todd evidence-in-chief para 21 [Environment Court document 9]; EJC Soal evidence-in-chief para 28 [Environment Court document 10].

11 M Baker-Galloway supplementary legal submission 22 December 2016 [Environment Court document 37].

12 *Canterbury Regional Council v Christchurch City Council* (2001) 7 ELRNZ 97 at [41] and (2001) 7 ELRNZ 113.

13 *Campbell v Napier City Council* (EC) W067/2005 at [17] et ff.

14 *Batten v Rodney District Council* (EC) A66/2009.

15 *Royal Forest and Bird Protection Society Inc v Whakatane District Council* [2012] NZEnvC 38 at [7].

[25] The second set of cases holds that the activity status as at the date of the application applies even if the new rule is effective or operative. This set includes:

- *Calder Stewart Industries Ltd v Christchurch City Council*[16];
- *Mapara Valley Preservation Society Inc v Taupo District Council*[17];
- *Bradford v Rodney District Council*[18];
- *Eades Land Partnership v Ruapheu District Council*[19].

[26] There are also two recent decisions of the High Court. The first is *Macpherson v Napier City Council*[20]. That is a land use case where Duffy J commented that:

> Section 88A saves applications from the effect of changes to a District Plan that become effective after an application has been lodged. However what is saved is the application either as it was first lodged, or as it was treated as being for at the time it was first lodged.

The second is *Ngāti Rangi*[21] which I have already referred to and will discuss shortly. Neither was referred to by counsel.

[27] The Regional Council submits that the first line of cases identified above is correct but does not discuss them or any others.

[28] The Collective disagrees with Fish and Game's position. Ms Steven submits[22] that section 88A(2) requires regard to be had to any plan that "exists" when the application is considered. She said that the WCWARP no longer exists (because it is inoperative, presumably) and therefore need not be applied. However, while that may be correct, it is not because of section 88A(2). That subsection is only there to ensure that when carrying out a section 104(1)(b) evaluation all relevant provisions are considered. Section 88A(2) does not affect the status of an application: that is determined under section 88A(1) and (1A).

[29] For Infinity Dr Somerville observes that the RMA was amended by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 ("the Simplifying

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16 *Calder Stewart Industries Ltd v Christchurch City Council* (EC) C017/2006 – (this case was decided before section 88A was amended in 2003) at [42].
17 *Mapara Valley Preservation Society v Taupo District Council* (EC) A82/09 at [28].
18 *Bradford v Rodney District Council* [2010] NZEnvC 318 at [12].
19 *Eades Land Partnership v Ruapehu District Council* [2012] NZEnvC 255 at [73].
20 *Macpherson v Napier City Council* [2013] NZHC 2518 at [47].
21 *Ngāti Rangi,* above n 1.
22 P Steven submissions in reply 7 February 2017 para 6 [Environment Court document 40].

Act") which came into force on 1 October 2009. It introduced sections 86A to 86G, and 87A and 87B, and in reliance on these, he submits[23] that the principle[24] that general provisions do not derogate from specific ones applies. He submits that "section 86B contains clear and explicit provisions as to when rules that protect or relate to water have legal effect and so must be compiled with. The clear intent is that they have legal effect immediately upon notification. … Parliament would not have intended that they could be overridden by recourse to the more general provisions in section 88A." Further he submits that the purpose of section 88A is to protect an applicant, not, in effect, to penalise them.

C. The application of section 88A before the Simplifying Act

Sections 9 and 14(2) RMA

[30] The primary obligations to obtain resource consents are imposed by Part 3 ("Duties and Restrictions") of the RMA. It is worth noting that section 88A (quoted above[25]) may operate differently for resource consents under sections 9 and 14(1) of the RMA than it does for consents under sections 11, 12, 14(2), 15 and 15A RMA.

[31] To understand why and for comparative purposes, it is useful to set out section 9 of the RMA which relates to the use of land. It states (relevantly):

> **9 Restriction on use of land**
>
> …
>
> (2) No person may use land in a manner that contravenes a regional rule unless the use —
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (3) No person may use land in a manner that contravenes a district rule unless the use —
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is allowed by section 10; or
>
> (c) is an activity allowed by section 10A.
>
> …

23 R J Somerville submissions 30 January 2017 para 38 [Environment Court document 38].

24 Referring to the discussion by J F Burrows and R I Carter *Statute Law in New Zealand* (5th edition LexisNexis, Wellington, 2015) at 475-478.

25 At para [2].

[32] Section 9 is generally regarded as permissive – *Nga Puawaitanga (Meremere) Ltd v Waikato District Council*[26] – in that land can be used as owners like unless and until some aspect (manner) of its use contravenes a regional or district rule[27] in which case it can only be used if that manner of use is expressly allowed by a resource consent[28] or is an existing use[29]. In passing I note that in *Macpherson v Napier City Council*[30] Duffy J wrote (obiter) of section 9 that "[t]he overall effect of the Act is to prohibit uses of land that are not specifically permitted under its provisions[31]. In my view the preferable view is exactly the other way around. As Dr Ceri Warnock and Ms Maree Baker-Galloway record in *Focus on Resource Management Law*[32], in the third parliamentary reading on the Resource Management Bill, the Hon Simon Upton, then Minister for the Environment said[33]:

> Current law presumes that one can use land only in accordance with the provisions of the Law. Clause 7 [now s 9] intentionally reverses that presumption. That was a very important reversal that the authors of the Bill made right at the outset – that is, people can use their land for any purpose they like. The law should restrain the intentions of private land-users only for clear reasons and through the use of tightly targeted controls that have minimum side effects.

[33] The meaning of "district rule" (which includes a proposed rule) in section 9 has the effect that consents for land uses are needed under both an operative and a proposed plan if each has a relevant rule: *Bayley v Manukau City Council*[34], as followed in *Stokes v Christchurch City Council*[35] (approved in *O'Connell Construction Limited v Christchurch City Council*[36] *("O'Connell")*). In *Bayley*[37], Blanchard J wrote for the Court of Appeal:

> ... Applications can be made under s 88(3) for a consent "under a plan or proposed plan". Naturally, where two such district plans co-exist a consent under one will be of no immediate practical use if there is still a need for a consent under the other. But there is no good reason for adding to the complexity of the legislation a further complication. ... [by requiring] all applications at the same time. That course may be preferable as a matter of practice, but in our view the Act does not impose any such requirement. ...

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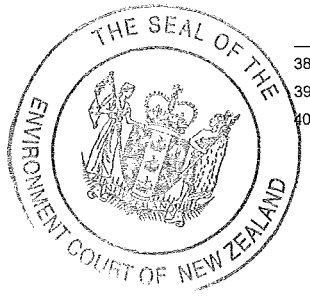
26 In *Nga Puawaitanga (Meremere) Ltd v Waikato District Council* (1998) 4 ELRNZ 480 at 490 (HC).
27 Or a national environmental standard: section 9(1) RMA.
28 Sections 9(2) and 9(3) RMA.
29 Sections 9(1)(b)-(d), 9(2)(b), 9(3)(b) and (c) RMA.
30 *Macpherson v Napier City Council* above n 20 at [13].
31 *Macpherson v Napier City Council* above n 20 at [13].
32 C Warnock and M Baker-Galloway *Focus on Resource Management Law* LexisNexis (2015) at 122.
33 [(4 July 1991) 516 NZPD 3018-3020 at 3020].
34 *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 581; [1998] NZRMA 513 at 526 (CA).
35 *Stokes v Christchurch City Council* [1999] NZRMA 409 (EC) at 416.
36 *O'Connell Construction Limited v Christchurch City Council* [2003] NZRMA 216 (HC) at [79]-[81].
37 *Bayley,* above n 34 at 581 and 526 respectively.

[34] In contrast a resource consent to take fresh water[38] is needed because section 14 RMA states (relevantly):

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

The scheme of the RMA for fresh water is that – subject to some relatively minor[39], but vitally important, exceptions for basic needs (drinking water, stock water, fire fighting) in section 14(3)(b) to (e) – the taking of water is prohibited by the Act unless it is expressly allowed by a rule in a regional plan and in any proposed regional plan or by a resource consent.

[35] So there are (at least) two important contrasts between the regime of the RMA in relation to land use and water[40] taking. The first is that, as discussed earlier, section 9 RMA leaves the property privileges and powers of the common law extant unless and until they are managed by rules, whereas section 14(2) of the Act manages all water takes (diversions, etc.) other than for basic needs. Second, by itself (I will consider the scheme of the Act later), the wording of section 14(2) suggests that because taking of water is binary – a volume of water is either abstracted or not – only one consent is



38 As opposed to coastal water which is subject to section 14(1) RMA.
39 In a volumetric sense.
40 Other than coastal water to which section 14(1) applies.

necessary for a fresh water take whereas for land use under section 9 two consents will be required: one under a rule in an operative plan and one under a rule (in legal effect) in a proposed plan if the latter exists at the relevant time. Further in *Re Waiheke Marinas Limited*[41] the Environment Court suggests that applications for land use consent are often for consent to the manner of use (i.e. specific "elements and activities")[42] managed by plans (or proposed plans) rather than for a "use"[43] as defined in the Act. That means that the operative and proposed plans may be managing different activities as manners of use: *Shell Oil NZ Ltd v Rodney District Council*[44]. (Although see *Arapata Trust Limited v Auckland Council*[45] ("*Arapata*") – a costs decision – for a different view).

[36] In any event a water permit[46] is a resource consent required by section 14(2) of the RMA, not by a regional plan or proposed plan. A regional plan can at most permit a take (although few plans do), or it may alter the default status[47] from discretionary, or particularise the matters to be considered upon an application. Consequently since only one resource consent need be obtained (under Part 3 RMA anyway) and if at the time of an application there is a rule in a proposed plan, or even if one takes legal effect later (before the water permit "commences"[48]) the effect of section 88A RMA (quoted above) has been that the status of the proposed activity has been determined under the previously operative regional plan.

Ngāti Rangi

[37] As I said at the outset a striking example of the application of section 88A in that way is the recent High Court decision in *Ngāti Rangi*[49]. In that case NZ Energy Ltd ("NZEL") had applied on 18 June 2007 for two water permits (to replace expired water permits for the Raetihi hydroelectricity scheme)[50]. On 22 September 2011 NZEL applied[51] for associated discharge permits. Later again, but before the Environment Court hearing, it also varied its take applications.

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41 *Re Waiheke Marinas Limited* [2015] NZEnvC 218.
42 *Re Waiheke Marinas Limited,* above n 41 at [22].
43 While "use" in relation to section 9 is defined in section 2 RMA by some basic identified activities, the key point is that "use" also means "(v) any other use of land".
44 *Shell Oil NZ Ltd v Rodney District Council* (1993) 2 NZRMA 545 (PT) at 550.
45 *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236. There is also a question whether a simpler solution to the difficulty in *Arapata* was to be found in section 10B RMA.
46 Section 86 RMA.
47 Section 87B(1) RMA.
48 Under section 116 RMA.
49 *Ngāti Rangi,* above n 1.
50 *Ngāti Rangi,* above n 1 at [13].
51 *Ngāti Rangi,* above n 1 at [15].

[38] It is unclear when the application was notified. What is clear is that on 31 May 2007, less than a month before the application was lodged, a new combined regional policy statement and regional plan ("the One Plan") had been notified[52] by the Manawatu-Whanganui Regional Council ("the MWRC"). After submissions and hearings it became operational[53] on 19 December 2014.

[39] Resource consent for each take was required under the MWRC's operative regional plan as a discretionary activity. At the hearing before the Environment Court six different "scenarios" (which seem to be suggested flow regimes for the rivers from which water was to be taken) were put forward by the parties. Only two seem to have been acceptable to the applicant NZEL – the first and sixth scenarios. The Environment Court recorded that "in a final twist"[54] NZEL submitted that if scenarios one or six were not to be granted, NZEL's fallback position was for its current consents to be renewed as a controlled activity at the same rate and flows. That was accepted by the Environment Court with the result that consent could not be refused, and was granted on amended conditions.

[40] As to the status of the water take applications in *Ngāti Rangi*, on appeal, the High Court wrote[55]:

> [23] It appears to have been accepted by the parties in the Environment Court that:
>
> ...
>
> (2) Had NZEL applied for its proposed water takes under the One Plan, they would have been non-complying activities.
>
> (3) Similarly, had NZEL applied for consents under the One Plan on the basis they were "like-for-like" to its existing take consents, then, NZEL's application would have to have been assessed as controlled activities under the One Plan.

[41] In relation to the Environment Court's conclusions on NZEL's fallback position the High Court held[56]:

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52 *Ngāti Rangi*, above n 1 at [11].
53 *Ngāti Rangi*, above n 1 at [11].
54 *Ngāti Rangi*, above n 1 at [24].
55 *Ngāti Rangi*, above n 1 at [23].
56 *Ngāti Rangi*, above n 1 at [46]-[48].

> [46] NZEL's 2007 application for a resource consent was lodged under the then extant Land and Water Regional Plan, which specified the taking of more than 15 m^3 of surface water a day was a discretionary activity.
>
> [47] Under s 88A of the Act, where an application for a resource consent has been lodged it continues to be dealt with as an application for the type of activity that applied at the time the application was lodged. NZEL's application was therefore, in relation to a discretionary activity.
>
> [48] The Trust and Regional Council are therefore correct when they say the Environment Court erred in law when it said that it was able to "consider renewal of the current consents as controlled activities".

[42] There were additional difficulties[57] with the Environment Court's decision including that the other parties had no opportunity to respond to NZEL's fallback position, but it is the High Court's conclusions above that are relevant here. What is of particular interest is that the High Court held that the status of the activity under the new operative plan was as described in a rule in a replaced plan which was, by the time of the Environment Court's decision, inoperative.

[43] I note that the original applications in *Ngāti Rangi* were made before the Simplifying Act came into force and thus the amendments did not apply[58]. The application had to be determined as if the Simplifying Act had not been made. That is important because the 2009 Amendment made significant changes to the consenting regime. Consequently I have not sought submissions on *Ngāti Rangi* from the parties. In any event there was no discussion by the High Court of why section 88A should be applied as it was so there is little more to say about it.

[44] The approach taken by the High Court in *Ngāti Rangi* for a take of water under section 14(2) RMA also applied for consents under sections 11, 12, 13, 15 and 15B. For example in *Eades Land Partnership v Ruapehu District Council*[59], the Environment Court was concerned with an application for subdivision consent which was lodged in early 2008, (although not notified[60] until February 2010) and therefore section 87A RMA as added by the Simplifying Act did not apply.[61] It appears the Environment Court regarded the plan change as "... to all intents and purpose ... operative"[62]. The Court

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57 *Ngāti Rangi,* above n 1 at [49] et ff.
58 Section 160 Simplifying Act 2009.
59 *Eades,* above n 19.
60 *Eades,* above n 19 at [6].
61 Section 160 Simplifying Act 2009.
62 *Eades,* above n 19 at [9].

simply held[63] that section 88A RMA "operates so that the proposal lodged in March 2008 continues to have the status which it had at that time, namely discretionary ..." (rather than non-complying under the effectively "operative" plan).

[45] What *Ngāti Rangi* and the second line of cases identified by Ms Baker-Galloway show is that section 88A RMA was important when consent was sought under sections 11, 12, 13, 14(2), 15 and 15B because it resolved a potential problem: if consent was needed under one of those sections, but the status of the activity was described differently in an operative plan and a proposed plan, which status controlled the one consent required?

[46] What counsel other than Dr Somerville have rather overlooked is the effect of the changes to the RMA made by the Simplifying Act in 2009, and I now turn to those.

D. The amendments in the Simplifying Act

The new definitions introduced by the Simplifying Act in 2009

[47] The restrictions (including sections 9 and 14) in Part 3 of the Act were themselves amended by the Simplifying Act. They are also now affected by later provisions of the Act introduced by the Simplifying Act. Section 2 RMA was also amended and now states that "plan" and "rule" have the meaning given in section 43AA of the RMA; "proposed plan" has the meaning given in section 43AAC.

[48] The new definitions in the Simplifying Act include (relevantly):

> **43AA Interpretation**
>
> In this Act, unless the context requires another meaning, –
>
> **change** means –
>
> (a) a change proposed by a local authority to a policy statement or plan under clause 2 of Schedule 1; and
>
> (b) a change proposed by any person to a policy statement or plan by a request under clause 21 of Schedule 1
>
> **district plan** –
>
> (a) means an operative plan approved by a territorial authority under Schedule 1; and
>
> (b) includes all operative changes to the plan (whether arising from a review or otherwise)

63 *Eades,* above n 19 at [7].

operative, in relation to a policy statement or plan, or a provision of a policy statement or plan, means that the policy statement, plan, or provision –

(a) has become operative –

(i) in terms of clause 20 of Schedule 1; or

(ii) under section 86F; and

(b) has not ceased to be operative

plan means a regional plan or a district plan

...

regional plan –

(a) means an operative plan approved by a regional council under Schedule 1 (including all operative changes to the plan (whether arising from a review or otherwise)); and

(b) includes a regional coastal plan

regional policy statement –

(a) means an operative regional policy statement approved by a regional council under Schedule 1; and

(b) includes all operative changes to the policy statement (whether arising from a review or otherwise)

rule means a district rule or a regional rule

variation means an alteration by a local authority under clause 16A of Schedule 1 to –

(a) a proposed policy statement or plan; or

(b) a change.

43AAB Meaning of district rule and regional rule

(1) In this Act, unless the context otherwise requires, district rule means a rule made as part of a district plan or proposed district plan in accordance with section 76.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

(3) In this Act, unless the context otherwise requires, regional rule means a rule made as part of a regional plan or proposed regional plan in accordance with section 68.

(4) Subsection (3) is subject to section 86B and clause 10(5) of Schedule 1.

43AAC Meaning of proposed plan

(1) In this Act, unless the context otherwise requires, **proposed plan-**

(a) means a proposed plan, a variation to a proposed plan or change, or a change to a plan proposed by a local authority that has been notified under clause 5 of Schedule 1 but has not become operative in terms of clause 20 of Schedule 1; and

(b) includes a proposed plan or a change to a plan proposed by a person under Part 2 of Schedule 1 that has been adopted by the local authority under clause 25(2)(a) of Schedule 1.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

[49] Important aspects of this suite of definitions are, first, section 43AA – which defines the meaning of "operative" – contemplates a plan (or provision) becoming inoperative when it describes the meaning as including that the plan or provision in a plan:

> … (b) has not ceased to be operative.

Second, a rule (whether district or regional) at first sight includes a rule in a proposed plan. However, that is expressly qualified by section 86B (and by clause 10(5) of Schedule 1) to be discussed shortly. Third, in most contexts a proposed plan includes[64] not only, as one would expect, a proposed (district or regional) plan but also a variation and a proposed plan change that has been notified[65].

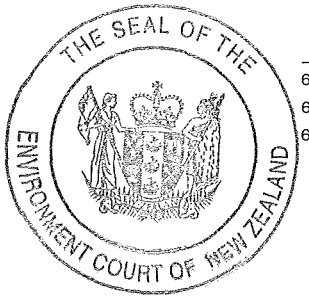
Legal effect of rules

[50] When new rules are proposed for a district or regional plan there is a question as to whether and, if so, when the proposed (as opposed to operative) rules have any effect. Under the RMA before 1 October 2009 any rule about an activity in a proposed plan determined the status of the activity as from the date of notification of the proposed plan. In 2009 the former sections 19 and 20 as to when rules become operative were repealed[66] by the Simplifying Act and replaced by a fuller set of provisions in Part 5 of the Act under the heading *Legal effect of rules.*

[51] To save space I will not set out sections 86A to 86G in full here. They provide an important part of the scheme of the Act in that they are a detailed mini-code as to when proposed rules may have legal effect even though they are not yet operative (and may never become so).

[52] Relevantly section 86B states:

> **86B When rules in proposed plans and changes have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if —
>
> (a) subsection (3) applies; or



64 Section 43AAC(1) RMA.
65 Obviously a proposed plan or variation would have to have been notified too.
66 Section 68 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

(b) the Environment Court, in accordance with section 86D, orders the rule to have legal effect from a different date (being the date specified in the court order); or

(c) the local authority concerned resolves that the rule has legal effect only once the proposed plan becomes operative in accordance with clause 20 of Schedule 1.

(2) However, subsection (1)(c) applies only if —

(a) the local authority makes the decision before publicly notifying the proposed plan under clause 5 of Schedule 1; and

(b) the public notification includes the decision; and

(c) the decision is not subsequently rescinded (in which case the rule has legal effect from a date determined in accordance with section 86C).

(3) A rule in a proposed plan has immediate legal effect if the rule —

(a) protects or relates to water, air, or soil (for soil conservation); or

(b) protects areas of significant indigenous vegetation; or

(c) protects areas of significant habitats of indigenous fauna; or

(d) protects historic heritage; or

(e) provides for or relates to aquaculture activities.

(4) For the purposes of subsection (2)(c), a decision is rescinded if—

(a) the local authority publicly notifies that the decision is rescinded; and

(b) the public notice includes a statement of the decision to which it relates and the date on which the decision was made.

(5) For the purposes of subsection (3), **immediate legal effect** means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.

(6) *[Repealed]*

(emphasis added)

[53] It seems to be common ground in this case that the rules in PC3 had immediate legal effect[67] upon notification under section 86B(3)(a) RMA since it concerns rules relating to water.

[54] The Simplifying Act expressly introduces the concept of a rule becoming inoperative (it was only implicit earlier). I have already referred to the definition of "operative"[68] including the concept of ceasing to be operative. Section 86F adds to that by stating that:

67 As defined by section 86B(5) RMA.
68 Section 43AA.

> **86F When rules in proposed plans must be treated as operative**
>
> A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule, —
>
> (a) no submissions in opposition have been made or appeals have been lodged; or
>
> (b) all submissions in opposition and appeals have been determined; or
>
> (c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.
>
> (Underling added)

The important aspect of this provision is that a previously operative rule "must be treated" as "inoperative".

Resource consents

[55] Part 6 of the RMA sets out the process for application for and grant of resource consents and this too was amended by the Simplifying Act which introduced[69] sections 87A and 87B. These identify when resource consents are required. Section 88 and the sections which follow set out the process.

Classes of activities

[56] The first relevant provision is section 87A (amended subsequently[70]). This section is important because it relates to the status of activities. It now states (relevantly)[71]:

> **87A Classes of activities**
>
> ...
>
> (4) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a discretionary activity, a resource consent is required for the activity and —
>
> (a) the consent authority may decline the consent or grant the consent with or without conditions; and
>
> (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

69 Section 69 Simplifying Act 2009.
70 By (inter alia) section 19 Resource Management Amendment Act (No 2) 2011.
71 I have only included the provisions for discretionary and non-complying activities but there are similar provisions for the other nominated classes.

(5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—

(a) decline the consent; or

(b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

...

Section 87A now appears to require two consents – one under an operative plan and one under proposed plan where both exist at the date of an application for consent.

[57] For completeness it should be noted that a rule controlling an activity described in sections 11, 12, 13, 14(2), and 15 may not exist. To manage these situations where an application for resource consent is made for an innominate category[72] section 87B provides that the application must be treated[73] as a discretionary activity. This section only applies to these innominate activities if there is no rule in a plan or proposed plan. If there is, as stated above, section 87A applies. Section 87B also governs the situation where a proposed plan (change) is to prohibit[74] an activity.

[58] Section 88 (also as amended in 2009 by the Simplifying Act) now states:

88 Making an application

(1) A person may apply to the relevant consent authority for a resource consent.

(2) An application must—

(a) be made in the prescribed form and manner; and

(b) include the information relating to the activity, including an assessment of the activity's effects on the environment, as required by Schedule 4.

(2A) An application for a coastal permit to undertake an aquaculture activity must include a copy for the Ministry of Fisheries.

(3) A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not—

(a) include the information prescribed by regulations; or

(b) include the information required by Schedule 4.

(3A) The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination.

72 Under sections 11, 12, 13, 14(2) and/or 15.
73 Section 87B(1)(a) RMA.
74 Section 87(1)(c) RMA.

(4) If, after an application has been returned as incomplete, that application is lodged again with the consent authority, that application is to be treated as a new application.

(5) Sections 357 to 358 apply to a determination that an application is incomplete.

[59] The section refers to the information which Schedule 4 of the Act requires that the proposed activity is assessed against "any relevant objectives, policies or rules in a document referred to in section 104(1)(b) [RMA]" which includes "a proposed plan". Obviously a proposed plan needs to exist (and have legal effect under e.g. section 86B RMA) for that to occur.

[60] Looking at section 88 by itself a proposed plan comes into legal effect before a resource consent, or certificate of compliance is obtained under an operative plan, then in theory – and probably this would be good practice too[75] – section 88 seems to support a separate application being required. In that fresh application an assessment of the activity against the objectives, policies and rules of the proposed plan can be carried out. In fact, it seems to be common practice for regional councils to treat an application under an operative plan as being for the activity generally, rather than for the activity as referred to in an operative or proposed plan. Notionally the application is sometimes split into two, one under the operative plan, and one under the proposed plan.

E. One consent or two?

[61] If at the date an application is made or later, a proposed plan (including a plan change) is notified and a rule in it with legal effect (either at notification or later) states that the activity sought by the consent is discretionary (limited or fully) or non-complying, then a crucial question is whether consent also needs to be obtained under the proposed plan in addition to and separately from any consent needed under an operative plan.

[62] In Part 3 of the RMA, sections 11, 12, 13, 14(2), 15 and 15A suggest that only one consent is required under the Act. Section 87A suggests that separate consents are needed under two plans – the operative plan and the proposed plan – where the latter exists. So the question arises: Is one consent required or two?

75 *Bayley,* above n 34 at 581 and 526 respectively.

[63] In contrast sections 9 and 14(1) RMA suggest that two consents are needed: one under the operative plan and one under the proposed plan. There is no apparent conflict with section 87A here, although in fact even sections 9 and 14(1) raise problems with the application of the latter provision.

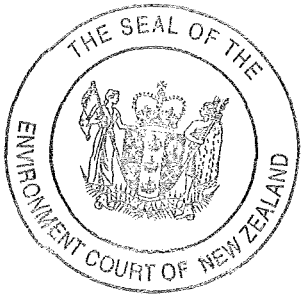
[64] Factually at least five situations may arise in relation to an activity to which section 87A would apply. These scenarios differ in the timing of events especially in relation to the date that a rule in a proposed plan has legal effect. They are:

(1) a resource consent for an activity (under an operative plan or its predecessor) has been granted and has been "given effect to"[76] when a proposed plan ("PP") has "legal effect"[77] and introduces an activity which requires consent (the "Effective Consent Scenario");
(2) a resource consent for an activity has been granted[78] and/or "commenced"[79] but has not yet given effect to[80] when a (rule in a) proposed plan starts to have legal effect (thus requiring a further consent) (the "Granted Consent Scenario");
(3) an operative plan applies and so does a proposed plan with legal effect (the "Two Plans Scenario");
(4) an operative plan applies but before a consent is granted and/or commenced, a proposed plan starts to have legal effect ("Later Proposed Plan Scenario");
(5) (uncommonly) an ODP applied when a application was made, and a proposed plan then or subsequently had legal effect, but by the time a final decision is made the ODP is inoperative because it is superseded by a newly operative (formerly proposed) plan ("Inoperative Plan Scenario").

(1) <u>The Effective Consent Scenario</u>

[65] Read literally, section 87A applies to any activity that requires a resource consent under a proposed plan even if that activity is being lawfully carried out. Clearly that is inconsistent with Part 3 of the RMA. Section 87A must be read as subject to

76 Section 124 RMA.
77 Under section 86B RMA.
78 Section 113 RMA.
79 Section 116 RMA.
80 Section 124 RMA.



Part 3 of the Act so that if, for example, an activity comes within an existing use[81] a resource consent is not required under the proposed plan (as it is not required under the operative plan). Similarly if a resource consent has been granted under an operative plan and is being given effect to[82] (exercised) it would defy Part 3 and the scheme of the RMA if a further consent was required because a proposed plan had been notified and had legal effect.

(2) The Granted Consent Scenario

[66] Similarly and more generally if a resource consent is held (to use a broad term which may mean "granted"[83] and/or "commenced"[84]) under an operative plan but not yet "given effect to"[85] then even if a proposed plan appears to require consent for the same activity and in relation to land use activities in particular that may be quite problematic. As *Re Waiheke Marinas* Ltd[86] shows section 87A needs to be read in a qualified way.

[67] Kirkpatrick E J had this scenario before him (although indirectly – the case actually concerned costs) in *Arapata*[87]. The applicant held a resource consent to carry out renovations when the proposed plan introduced a rule which made renovations on the applicant's site a discretionary activity. It is difficult to tell from the decision but the activity in the operative plan ("renovations") seems to have been the same in the proposed as he wrote:

> ... if the Council's approach were narrowed to apply only to the holders of unimplemented resource consents, it will still mean, as this case demonstrates, that a person who had obtained a resource consent and, on the basis of that consent, entered into binding arrangements with a bank, a builder and tenants, would then be subject to the risk, almost completely beyond their control, of being told they require some further resource consent at any stage of the development up until the original resource consent had been given effect to. Given the many different ways in which the implementation of consents may lawfully occur, or how existing use rights might arise, it is difficult to see how such an approach could be justified in pursuit of the purpose of the Act or on any other principled basis of avoiding, remedying or mitigating any adverse effects of the already consented activity on the environment.

81 Under sections 10 or 10A RMA.
82 Within the meaning of section 124 RMA.
83 Under section 113 RMA.
84 Under section 116 RMA.
85 Under section 124 RMA.
86 *Re Waiheke Marinas Ltd,* above n 41 at [22].
87 *Arapata,* above n 45 at [40].

Kirkpatrick E J did not refer to section 87A but his approach is likely to apply even when section 87A is taken into account (at least for consents under sections 9 and 14(1) RMA).

[68] To reconcile section 87A with Part 3 of the RMA, it appears to me that, section 87A(4) RMA, for example, would need to be read as follows:

> (4) If an activity is described in ... a proposed plan as a discretionary activity, then [unless a resource consent for the same activity is already "held"[88] under the operative plan or a previous plan] a resource consent is required for the activity and ...

Similar qualifications need to be read into the other subsections of section 87A.

(3) The Two Plans Scenario

[69] This is the scenario in which a proposed plan has legal effect at the date of the application for resource consent. Sections 87A and 87B appear to have legislated the principle in *Bayley v Manukau City*[89] by expressly requiring that resource consents are required under both an operative plan and a proposed plan for all consents (not only for consents required under sections 9 and 14(1) RMA). Since two consents are now always needed under this scenario it is difficult to see how the status of an activity is altered in a way that triggers section 88A RMA.

[70] If there is a potential conflict where the consent authority considers that resource consent might be granted under one plan but not the other, then the principles in the well-known Auckland cases including *Burton v Auckland City Council*[90] can be applied as explained in *Stokes v Christchurch City Council*[91].

(4) Later Proposed Plan Scenario

[71] Scenario (4) is where the application is lodged but then a proposed plan is notified at some later stage before a resource consent is held. It was to cover this situation that section 88A was originally enacted[92] in 1997. As outlined earlier section

88 See my qualifications above.
89 *Bayley*, above n 34 at [526].
90 *Burton v Auckland City Council* [1994] NZRMA 44?? (HC).
91 *Stokes v Christchurch City Council* [1999] NZRMA 409 (EC).
92 Section 18 Resource Management Act 1997 (1997 No. 104).

88A has been held for some years to keep the status of the application as it was in the operative plan, being the only plan as at the date of the application e.g. *Ngāti Rangi*[93].

[72] In relation to land use activities, the position under the Simplifying Act appears to be that, even after an application is lodged with a local authority and not yet decided (and any appeals resolved), if a relevant proposed plan is notified and a relevant proposal rule has legal effect, then a separate resource consent is needed under that rule (again at least in relation to land uses).

[73] As for the wider range of activities covered by sections 11, 12, 13, 14(2) and 15 RMA an application now needs to be made under, for example, section 87A(4) RMA for a discretionary activity if an activity is described as such in either "... a plan, or a proposed plan", it appears that separate consents are now needed under section 87A RMA for such an activity also. Therefore if a proposed plan is notified and has legal effect before a consent is at least granted under an operative plan then an application and consent will be needed under the proposed plan also.

[74] In practice, especially for an activity such as a water take which is binary – a given volume of water is either taken or it is not – it appears that local authorities tend to treat one application as being for both consents. In other words the application for consent under the proposed plan is purely nominal because local authority accepts the original application as an application under the plan change. I will not comment on the legality of that practice but I do observe that it may cause practical problems: first, the Schedule 4 requirements may not be met for the "second" application; further the status of the second – nominal – application appears to be at the date the relevant proposed rule has legal effect. There are also potential priority of application issues which I will not attempt to resolve here.

(5) <u>The Inoperative Plan Scenario</u>

[75] One other situation can arise: where a proposed plan is to replace an operative plan and between lodgement of the applications for resource consent and issue of the decisions on them, a proposed plan becomes operative (with a change of activity status). The question is "how does a change of status in the new plan affect the former operative plan?" The answer is that it does not, directly. Rather section 86F RMA

93 *Ngāti Rangi,* above n 1.

simply operates to make the former rule inoperative. Consent is no longer required under it.

F. The operation of section 88A since the Simplifying Act

[76] I turn to ascertain how section 88A now operates in the context of those scenarios.

The meaning of section 88A

[77] Under section 5 Interpretation Act 1999 the meaning of section 88A is to be ascertained by having regard to its text in context and to its purpose. I may also have regard to the scheme[94] of the RMA.

The words in context

[78] Read literally, if consents are needed for an activity under both an operative plan and under a proposed plan then section 88A(1)(b)(i) cannot apply to the activity sought under the operative plan because the status of the activity under an operative plan does not change even for activities governed by sections 11, 14(2) etc of the RMA.

[79] One way around this would be to read section 88A as if the word "altered" in section 88A(1)(b) means "nominally altered" because the status of an activity is not altered substantively until the relevant rule has "... ceased to be operative" in terms of the definition of "operative" in section 43AA RMA. Whether that is required depends on the purpose of section 88A and the scheme of the Act.

The purpose of section 88A

[80] The primary purpose for section 88A RMA is to protect applicants by avoiding retrospective effect of rules with legal effect in proposed plans, as far as is consistent with the rest of the RMA. The principle against retrospective application of laws is set out in section 7 Interpretation Act 1999. For an example how section 88A gives effect to that principle, consider the situation where an application is made for consent for an activity which is discretionary in a proposed plan (and has immediate effect for example under an order[95] of the Environment Court) but the activity becomes non-complying when the Council makes its decision about the rule in the proposed plan under clause

94 Section 5(2) refers to the "organisation and format of the enactment".
95 Under section 86D RMA.

10 of Schedule 1. The effect of section 88A(1) is that the activity should continue to be treated as discretionary despite the change in status.

[81] The next question is whether the purpose of section 88A requires that works both ways: if the status is non-complying in a proposed plan to start with and then as a result of a clause 10 decision it becomes controlled, must it still be treated as the former? One answer for an applicant in this situation is to withdraw their application and re-apply for a controlled use – provided that does not have effects on their standing in any argument as to priority of applications. But that seems unnecessarily cumbersome, especially if they have (at least nominally) two applications before the local authority anyway.

[82] Applying section 88A both ways – i.e. where the status of an activity becomes easier – would "protect" a local authority from applications gaining a lower status under a proposed plan. However, the local authority does not need such protection for two reasons. First, the local authority is (usually) promoting the plan (change) to start with, so presumably it considers the lower threshold of the status of the activity is a good idea even if it has not finally decided that yet[96]. Further, it has the controls in sections 86B to 86D RMA to prevent the relevant rules having legal effect if it wishes. In that case a second resource consent would not be required unless and until the proposed plan actually became operative.

The scheme of the RMA

[83] As discussed in part D of this decision, important parts of the scheme of the RMA are sections 86A to 86G (legal effect of rules) and sections 87A and 88 (which introduces the requirements in Schedule 4 RMA). In particular sections 87A and 88 both contemplate separate applications under an operative plan and a proposed plan. Once those requirements[97] of the RMA are recognised, the scope of section 88A can be outlined. While separate consents have always been needed for activities managed by a plan and a proposed plan under sections 9 and 14(1) RMA the position was less clear for other resource consents until 1 October 2009 the Simplifying Act changed that.

96 Under clause 10 of Schedule 1 to the RMA.
97 Qualified where a resource consent is already held when a proposed plan has legal effect.

[84] Since 2009, the application for and grant of consents under sections 11, 12, 13, 14(2), 15 and 15A RMA under a proposed plan need to be considered separately from any application under an operative plan. As a consequence, it now appears that section 88A has little (if any) application to an operative plan.

[85] There is a potential objection for this to lead to different results under the operative and proposed plans. For example in the *Ngāti Rangi*[98] situation (before the One Plan's rules became operative) the regional council could have in respect to a like-for-like (renewal) application:

- refused consent for the discretionary activity under the operative plan;
- granted consent to the controlled activity under the One Plan.

[86] That is similar to the potential problem with land use consents in the relatively unusual situation in which an application under a proposed rule is both for an identical activity or manner of use as in the operative plan and that proposed rule has legal effect. In that situation the priority between plans needs to be considered having regard to the factors identified in *Burton v Auckland City Council*[99]. If the consent authority considers (overall) that consent should not be granted then it could refuse the discretionary application while granting (as it must) the controlled activity application. The applicant could not exercise the latter unless and until the operative district plan becomes inoperative.

[87] Other aspects of the RMA lead to the same conclusion as to the relatively minor role of section 88A. Subsection 88A(2) ensures that regardless of the status of an activity under each plan, the objectives and policies of the other one are to be considered.

[88] The primacy of Part 3 of the Act is reinforced by the fact that offences (in Part 12 RMA) are constituted[100] by non-compliance with sections 9 to 15 RMA but not by anything in section 87A or section 88A. The latter are merely machinery provisions.

98 *Ngāti Rangi,* above n 1.
99 *Burton v Auckland City Council* [1994] NZRMA 544.
100 Section 338(1) RMA.

[89] I accept that the Environment Court has power to make an enforcement order requiring a person to cease[101] an activity that contravenes a rule in a proposed plan, or to do something[102] (e.g. make an application) to ensure compliance with such a rule. Those powers appear superficially apt to ensure compliance with the directions of section 87A RMA. However, any such powers need to be read in the light of the necessary qualifications suggested earlier that make section 87A subject to, in the case of a rule in a proposed plan, any activity operating under an existing resource consent (or, of course, an existing use).

Summary

[90] In re *Waiheke Marinas Ltd*[103] the Environment Court described section 88A as a shield. I respectfully agree. It is not a boomerang which can be turned back on an applicant if a proposed plan makes the status of an activity more difficult than the status in the operative plan. Consequently the words of section 88A should now be read literally, consistent with the purpose and scheme of the RMA so that they are applied separately to the application under the operative plan and then in turn to the proposed plan with legal effect.

[91] Consequently I hold that section 88A now appears to work as follows:

(1) the provisions in section 88A apply to a consent sought under an operative plan as if the word "altered" in section 88A(1)(b) reads "nominally altered";

(2) section 88A also applies to a proposed plan (change) sequence in Schedule 1 RMA of:

- a decision being made under clause 10 – section 88A(1)(ii);
- otherwise e.g. a plan becoming operative under clause 20 – section 88A(2)(iii).

(3) section 88A(1A) needs to be read by adding at the end of the subsection: "… unless the previously operative plan has become inoperative".

101 Section 314(1)(a)(i) RMA.
102 Section 314(1)(b)(i) RMA.
103 *Re Waiheke Marinas Ltd,* above n 41 at [24].

Result

[92] This case comes within scenario (5) in Part E. I hold that *Ngāti Rangi*[104] can be distinguished on the grounds that it was decided before the Simplifying Act came into effect. While *Macpherson v Napier City Council*[105] was apparently decided under the RMA in its post-Simplifying Act form, section 88A was not crucial to the outcome in that Duffy J found that the original application under the operative district plan was wrongly treated as controlled, and that consequently, the status of the proposed (land use) activity was the same under both plans. Her remark about section 88A was therefore obiter when deciding – on a judicial review – to set aside the decision to grant consent on a non-notified basis for a multi-unit development opposite the applicants' property. It appears the question whether two consents might be needed – one under the proposed plan in addition to that in the operative plan appears not to have been raised.

[93] In contrast this proceeding is about an application for a water take under section 14(2) and section 87A RMA as added by the Simplifying Act. The effect of section 87A (as added in 2009) on this proceeding is that separate consents were needed under the WCWARP and the Allocation Plan. However, section 88A RMA is not relevant now because consent is not required under the WCWARP as that is inoperative. Under the Allocation Plan, the application to take has always been discretionary under that plan as notified and as (now) operative. Accordingly I will rule that is the status of the activity. The court will issue its substantive decision shortly.

J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

104 *Ngāti Rangi*, above n 1.
105 *Macpherson v Napier City Council*, above n 20.