IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV-2013-476-000311
[2014] NZHC 2616

BETWEEN	FEDERATED FARMERS OF NEW ZEALAND (INC) MACKENZIE BRANCH Appellant
AND	MACKENZIE DISTRICT COUNCIL Respondent

Hearing: 25 and 26 June 2014

Appearances: M Casey QC and J Derry for Appellant
D C Caldwell and Ms McCallum for Respondent
J Maassen for Meridian Energy Ltd

Judgment: 23 October 2014

JUDGMENT OF GENDALL J

Table of Contents

Introduction

[1] The appellant (Federated Farmers) appeals against three decisions of the Environment Court dated 1 November 2013 (*Sixth Decision*),[1] 5 November 2013 (*Seventh Decision*),[2] and 23 December 2013 (*Eighth Decision*).[3] All of these decisions concern, to a greater or lesser extent, decisions made by the respondent in respect of Plan Change 13 (PC13) to its Mackenzie District Plan (the District Plan) pursuant to the Resource Management Act 1991 (RMA).

[2] Though the Mackenzie District Council (the Council) is described as the respondent in this appeal and Mr Caldwell appeared as its counsel throughout, in essence it is not challenging major aspects of the substance of these appeals. Simply put, it takes the position that it supports the appeals insofar as it wishes the Environment Court decisions to be correct jurisdictionally, although it does take issue with some aspects of those appeals.

[3] Meridian Energy Limited (Meridian) originally opposed these appeals in part. However, shortly before the hearing (but after filing submissions) Meridian advised that it no longer opposed the appeals and that it would abide the decision of this Court. At Meridian's request, its submissions have not been considered and play no part in this judgment. For completeness I simply observe that although Meridian withdrew, Mr Maasen nevertheless appeared before me as its counsel throughout the hearing, simply with a watching brief.

Background

[4] The background facts in this case and the planning history concerning the District Plan and PC13 are complex. It is useful here to set these out in some detail. They will assist in understanding the issues facing the Council with its District Plan and the extent of change to the then-existing position proposed by PC13.

---

1 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council (No 6)* [2013] NZEnvC 257, (2013) 17 ELRNZ 402 [*Sixth Decision*].

2 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council (No 7)* [2013] NZEnvC 258 [*Seventh Decision*].

3 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2013] NZEnvC 304 [*Eighth Decision*].

[5] The District Plan promulgated by the Council became operative on 24 May 2004. The proposed Plan Change in question, PC13, relates to the Mackenzie Basin subzone of the District Plan. The Mackenzie Basin subzone comprises a large area of central South Island high country from the Northern Shores of Lake Ohau in the south, to the mountains north of Lake Tekapo in the north, and from the Southern Alps including Aorangi/Mt Cook to the west to the small towns of Twizel and Tekapo in the east. Within the subzone are 25 farms and stations which are the major proportion by far of its occupied land. Of these farms and stations, 22 are members of the appellant Federated Farmers Mackenzie Branch.

[6] Special zoning in the District Plan within the Mackenzie Basin also accommodates major hydro electric operations owned by Meridian and Genesis Energy Limited including dams, storage areas, lakes, power stations and an extensive canal and road network.

The Mackenzie District Plan

[7] As the genesis of the present appeals before this Court lies in the District Plan and PC13 it is useful to review the provisions of these instruments in some detail.

[8] The District Plan came into force on 24 May 2004. Section 7 of the District Plan covers the rural zone. It included under "Issue 7 – Landscape Values" a comment that the landscapes of the Mackenzie District are of significant value. The District is said to contain three basic landscape units. These are essentially the mountainous chain of the main divide, vast tussock grasslands of the Mackenzie Basin and the more intensively farmed and settled farmland east of the Two Thumb, Albury and Dalgety Ranges.

[9] The majority of the Mackenzie Basin is described as being regionally outstanding. On this aspect, Issue 7 in the District Plan records that:

> The challenge is to find an appropriate balance between land uses and activities and the maintenance of outstanding landscape qualities.

[10] The District Plan also emphasised under "Rural Objective 3 – Landscape Values" the need for:

> Protection of outstanding landscape values, the natural character of the margins of lakes, rivers and wetlands and of those natural processes and elements which contribute to the District's overall character and amenity.

[11] Appropriate development particularly in the high country and the Mackenzie Basin was to have an overriding regard to these wider visual and landscape considerations.

[12] A range of other relevant policies were included in the District Plan. Amongst other things these covered concerns to avoid or mitigate the effects on lakeside landscapes by controlling the scale, appearances and location of buildings, concerns as to earthworks in the Basin, attempts to limit structures and tall vegetation within scenic viewing areas, to avoid or mitigate the effects of subdivision, uses or development which might impinge on aspects including important landscapes, concerns to control the spread of wilding trees in the District, to generally encourage guidelines for siting and design of buildings, structures, tracks, roads and the like and agreed colour schemes, and to encourage land use activities which sustain or enhance the ecosystem functions and natural values of the High Country.

[13] The Council through its District Plan, had thus identified a range of landscape issues and endeavoured to address these through objectives and policies in the Plan. However, it seems some of the rules in the District Plan were permissive, with buildings in the rural zone generally permitted, as long as they achieved a number of minimum standards.

[14] With regard to subdivision, there were no specified minimum allotments in the rural zone, with allotment size (in relation to the ability to provide onsite sewage disposal) being the only element of control. In essence therefore, as long as onsite sewage disposal could be achieved without adverse effects, there was no practical limit on allotments that could be created in the rural zone and therefore no real limit on how dense residential or built development could potentially become in most areas of this zone.

[15] Mr Caldwell for the Council noted that, while the District Plan did recognise that houses could be built within the rural area, the Council did not anticipate the recent scale of lifestyle development which has occurred within the Mackenzie Basin and particularly the growth of retirement and holiday homes.

[16] It had become apparent he said that the controlled activity status for subdivisions and the permitted activity for dwelling houses was now not appropriate to ensure the protection of landscape values generally. Thus, after obtaining reports and recommendations, in June 2006 a decision was made by the Council to prepare a Plan Change. This resulted in PC13, the pertinent provisions of which are annexed hereto marked "A".

[17] The District Plan had remained in force since its inception, until the Council made this decision that steps needed to be taken to alter the Plan. The reason for this was outlined in a report of Mr Graham Densem, dated November 2007:

> 1.10 The Operative Mackenzie District Plan incorporates various measures for managing development and conservation in the Mackenzie Basin. These were extensively discussed between residents, interested parties and the Council during the Plan review, and were either accepted by them or at least are an agreed balance between the various interests.
>
> 1.11 However *problems have developed for the Council in the unforeseen numbers of applications for subdivision and housing in rural parts of the Basin, and further pending applications it is aware of. Also, the unforeseen number of tenure review applications that potentially could change the balance established under the existing Plan mechanisms, which were established generally with the leasehold farming system in mind*. The Council therefore is considering what measures it may need to add to or amend in the Plan in view of these changes.
>
> 1.12 The Council recognises the existing Plan represents a considerable energy input of [sic] from various groups and individuals. It has not embarked on the current review lightly. However it is satisfied that the magnitude of the pressures justifies the further effort.
>
> (emphasis added)

[18] Similarly, in a document entitled "Public Notice of Proposed Change 13 (Rural Zone – Mackenzie Basin) to the Mackenzie District Plan", dated 19

December 2007, Mr Craig Lyon and Mr Glenn Innes (on behalf of the Council), stated as follows:

> The Mackenzie District Council has prepared Proposed Plan Change 13 Rural Zone – Mackenzie Basin to the Mackenzie District Plan. *The primary purpose of this Plan Change is to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use. To achieve this greater acknowledgment of outstanding natural landscapes and features within the District is provided* through objectives, policies and rules, particular [sic] as they apply to the Mackenzie Basin.
>
> (emphasis added)

[19] The 'preamble' to the proposed Plan Change of the same date states:

> The Council is aware that the Mackenzie Basin contains values found nowhere else in New Zealand and that retaining those values is important to the long term economy of the region as well as being a responsibility under the Resource Management Act 1991. *There has been considerable subdivision and development pressure for the past five or so years, particularly for residential purposes and particularly within the Mackenzie Basin. Currently the District Plan provides little or no control over such development, creating considerable potential for adverse effects of sporadic subdivision to occur.*
>
> …
>
> *The Plan Change is therefore based on the general principle that residential use and subdivision should follow the current land use patterns of the Basin…The Plan Change also addresses the visual impact of irrigation structures and covered feed in the vicinity of roads by proposing guidelines for landowners.*
>
> (emphasis added)

Plan Change 13 (PC13) (as notified)

[20] On 19 December 2013 the Council publicly notified PC13. It is helpful to set out in full that part of the notified version dealing with the primary purpose of PC13 which stated:

> *The primary purpose of this Plan Change is to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, development and use*. To achieve this, greater acknowledgment of outstanding natural landscapes and features within the District is provided through the objectives, policies and rules, particularly as they apply to the Mackenzie Basin. The landscape assessment of the Mackenzie Basin recently undertaken, which also draws on previous assessments, acknowledges the outstanding natural landscape values of the Basin. It also

> assesses the characteristics of the landscape that have resulted from its use for pastoral farming including the placement of homestead and farm buildings within that landscape. The assessment concludes that the homestead clusters or nodes of farm buildings are generally well located and fit into the landscape, being relatively inconspicuous due to topography, set-back or screening. They are also limited in number within the general landscape areas of the Basin, such that they do not adversely affect the overall character of those areas.
>
> The Plan Change is therefore based on the general principle that residential use and subdivision should follow the current land use patterns of the Basin, namely being limited to either existing towns or existing clusters of buildings usually associated with homesteads. Provision is also made for the establishment of new clusters where they meet stringent standards and have the ability to replicate existing clusters or nodes. The Plan Change also addresses the visual impact of irrigation structures and covered feed in the vicinity of roads by proposing guidelines for landowners.
>
> (emphasis added)

[21] PC13 introduced an additional statement under the section "Rural Issue 7 – Landscape Values". This identified a concern that, if rural lifestyle and residential development around existing towns was too extensive or in the wrong location, it could have the potential to alter the wide open character offered by much of the Mackenzie Basin. It recognised also that breaking up of farmland through subdivision could result in loss of the former high county ethos and landscape pattern and might result in more intensive use of the remaining farmed areas. The particular landscape values which could be degraded by inappropriate development were described. These were to include visual openness, a sense of naturalness, a sense of landform continuity, the existence of small well separated towns and spectacular views such as iconic lake views particularly at Tekapo and Pukaki and the loss or degradation of views from iconic tourist highways. Significantly, this additional wording in PC13 also noted another issue concerning retaining of the values of the Mackenzie Basin. This was a concern described specifically as the extent to which additional irrigation will "green" the Mackenzie Basin and change land use patterns.

[22] PC13 also deleted Objective 3 in the District Plan relating to landscape values. Instead, it added two new objectives – Objective 3A which focused on outstanding natural landscapes and Objective 3B which addressed landscape values.

[23] Objective 3A dealing with "Outstanding Landscapes" provided that its intention was:

> To protect and sustain the outstanding natural landscapes and features of the District for present and future generations.

[24] The explanation to this Objective 3A noted the obligations on the Council under s 6 of the RMA to recognise and provide for the protection of Outstanding Natural Features and Landscapes. It went on to note that it was appropriate that development particularly in the Mackenzie Basin should have an overriding regard to wider visual and landscape considerations.

[25] PC13 also introduced a new Policy 3A which related to recognition of the natural landscape of the Mackenzie Basin. It stated specifically that this was:

> To recognise the Mackenzie Basin as an Outstanding Natural Landscape and through the Mackenzie Basin Sub zone within the Rural Zone, to protect the Basin from inappropriate subdivision, use and development.

[26] The explanations regarding Policy 3A recognised the distinctive Mackenzie Country character and stated that virtually the entire Mackenzie Basin remained outstanding in terms of landscape values because of its uniqueness and the natural and visual qualities of the entire environment, its lakes, landforms, extensive and dramatic vistas, its land use, community and the general Mackenzie identity. It noted further that this uniqueness was to be protected from inappropriate subdivision, use and development.

[27] PC13 also introduced a suite of policies additional to Policy 3A which were broadly described as follows:

(a) Policy 3B – Economy, Environment and Community:

> To encourage a healthy productive economy, environment, and community within, and maintain the identity of, the Mackenzie Country.

(b) Policy 3C – Adverse Effects of Sporadic Development:

> To avoid the adverse effects on the environment of sporadic development and subdivision.

(c) Policy 3D – Adverse Impacts on Buildings and Earthworks:

To avoid the adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from buildings, domestication, structures, earthworks, tracks and roads.

(d) Policy 3E – Limitations on Residential Subdivision and Housing:

To only provide for residential subdivision and housing development within the identified urban areas of the Basin (Twizel and Lake Tekapo) and within identified or approved building nodes.

(e) Policy 3F – Landscape Carrying Capacity

To recognise the diversity of physical settings and landscapes within the Mackenzie Basin and the varying capacity of these to absorb built development.

(f) Policy 3G – Approved Building Nodes

New building modes will only be granted as "approved building nodes" where the Council is satisfied of a detailed range of requirements.

(g) Policy 3H – Extensions to Existing Identified Nodes

Extensions to existing identified building nodes will only be granted where the Council is satisfied that all matters listed in Policy 3G are satisfied other than items 8 and 13, and that there is no longer sufficient land available within the identified node for the operational requirements of the property.

(h) Policy 3I – Farm and Non-Residential Buildings

Farm and other non-residential buildings, other than farm buildings that require a remote location, are required to locate within identified or approved building nodes.

(i) Policy 3J – Remote Farm Buildings

To recognise that some farm buildings are required because of their function to locate away from building nodes and to provide for these buildings subject to location, design and external appearance control.

(j) Policy 3K – Lakeside Areas

> To avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins.

(k) Policy 3L – Subdivision

> (a) To provide for subdivision of land for non-residential purposes only where this subdivision does not have the potential to impact on the landscape values and character of the immediate and wider area, and will not diminish the sustainability of existing and likely future productive use of farm buildings.
>
> (b) To only provide for subdivision for residential purposes within identified or approved building nodes.

(l) Policy 3M – Manuka Terrace – Rural Residential Zone

> To manage the adverse effects of existing and further subdivision and development on Manuka Terrace, Lake Ohau through the Rural Residential Manuka Terrace zone.

(m) Police 3N – Design and Appearance of Buildings

> To control the design, appearance and location of all buildings within the Mackenzie Basin, to avoid or mitigate adverse impacts on landscape values of the Basin Sub Zone.

(n) Policy 3O – Views from Roads

> To manage landscape change so that the outstanding natural landscape values and features are protected and the screening of distinct views is avoided when viewed from public roads.

[28] As to policy 3O above, the specific explanations and reasons for this policy identified that structures such as large irrigators and storage on farms of polythene-wrapped feed, amongst others, could impact on views and the experience of road users. It was therefore appropriate to encourage sensitive placement of structures including setbacks from road frontages, particularly state highways. Implementation methods for this were provided at page 12 of PC13 with the following words:

> To encourage placement of various temporary farm structures such as irrigators and wrapped feed back from roads and state highways, through preparation and distribution of guidelines to landowners and managers.

[29] PC13 as notified also introduced a new Rural Objective, 3B which provided:

> Objective 3B – Landscape Values
>
> Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the District's overall character and amenity.

[30] PC13 provided for a number of permitted activities including farm accessory buildings located within approved building nodes, subject to compliance with certain standards. It introduced a new controlled activity relating to remote farm accessory buildings in the Mackenzie Basin zone and a restricted discretionary activity status for non-farm buildings within identified building nodes, subject again to compliance with standards.

[31] It also introduced as a category of non-complying activities, non-farming buildings not within an identified or approved building node and certain other farm accessory buildings. In addition it introduced controlled activity status in relation to earthworks and tracking and provided for discretionary activities for the establishment of approved building nodes and the like.

Submissions on PC13 and the Commissioners' decision

[32] Following public notification of PC13, 134 submissions were received by the Council. Hearing of submissions took place over some eight days in September and November 2008 and May 2009 before Commissioners appointed by the Council for this purpose pursuant to s 34A of the RMA. Following these hearings, the Commissioners issued their recommendations, adopted by the Council on 1 September 2009 and publicly notified shortly thereafter.

[33] The Commissioners' decision incorporated a number of changes to PC13 as notified. PC3 as amended by the Commissioners, is generally set out at annexure B of this judgment However, the key changes included the following:

(a) The activity "approved building nodes" was removed and renamed as "Farm Base Areas" and provided for all buildings within those areas as permitted activities and subdivisions as controlled activities.

(b) Outside these Farm Base Areas, the decision made all farm buildings controlled activities, non-farming buildings discretionary activities, subdivision for farming purposes restricted discretionary activities, and subdivision for non-farming purposes discretionary activities.

(c) They included residential units and accommodation for farm workers and their families within the definition of "farm buildings".

(d) They provided specifically for farming type buildings.

(e) They reintroduced the lakeside protection area with non-complying status for buildings and subdivision.

(f) They removed certain areas to the west and south of Twizel from the Mackenzie Basin sub zone.

[34] In addition the Commissioners made certain amendments to the wording of Objective 3A to now read:

> Objective 3A – Distinctive and outstanding landscapes
>
> To protect and sustain the distinctive and outstanding natural landscapes and features of the District ~~for present and future generations~~ from subdivision and development that would detract from those landscapes.

[35] In addition, Policy 3A was amended to read:

> Policy 3A – Recognition of the Mackenzie Basin
>
> To recognise the Mackenzie Basin as having a distinctive and highly valued landscape containing ~~an~~ outstanding natural landscapes and through the Mackenzie Basin Sub zone within the Rural Zone, to protect the Basin from inappropriate subdivision, use and development.

[36] The Commissioners also amended certain explanations and reasons with respect to Policy 3A and introduced further explanations in relation to the integrity of the values associated with the Mackenzie Basin.

[37] The Commissioners then introduced Policy 3B – Landscape Diversity. This read as follows:

> To recognise the diversity of physical settings and landscapes within the Mackenzie Basin and the varying capacity of these to absorb further subdivision, buildings and domestication, and in particular to recognise the suitability of existing farm base areas to accommodate and absorb additional buildings.

[38] A further policy change was made to "Policy 3O – Views from Road" noted at [27](n) above. This was to the effect that it was now to read:

> To require buildings to be set back from roads, particularly state highways, and to encourage the sensitive location of structures such as large irrigators to avoid or limit screening of views of distinctive and outstanding landscapes of the Mackenzie Basin.

[39] And, the Commissioners referred to concerns raised by some farmer submitters that PC13 might inhibit diversification of farming and held:

> 134. While the Plan Change 13 rules would not directly inhibit diversification such as irrigation, there are indications in the background landscape assessment that the "*greening*" of the Basin is seen as undesirable in landscape terms. That may be the case, but in the face of strong evidence that diversification is necessary for the viability of the total farming systems, including the control of rabbits, wilding trees, and soil loss through wind erosion, we consider some detriment to the landscape may have to be accepted. As Mr John Murray noted when summing up for Federated Farmers, negative effects of farming activities on the landscape may be the "*lesser of two evils*".
>
> 135. A key to diversification appears to be irrigation. The sustainability of irrigation in the long term has been raised however as Plan Change 13 does not address land use other than subdivision and building, we do not need to make a finding on the merits or otherwise of the impact of irrigation-based development on the Basin.
>
> (emphasis added)

[40] In addition, at para 184 the Commissioners, I understand in dealing with a submission seeking that dairying be prohibited or made a discretionary activity, said:

> 184. We are aware of the concerns relating to the greening of large swathes of land and the introduction of large irrigators and the impact this could have on the distinctive and outstanding landscapes of the Basin…However we note that the Plan Change is primarily focused on controlling residential subdivision and development and that the Council have chosen not to control general land use, including farming, through the Plan Change. We consider that matters associated with intensive farming activities are not ones that

> can be addressed through this Plan Change and therefore recommend that these submissions be rejected.

(emphasis added)

[41] Consistent with these comments, and in accordance with a request made in submissions by a Federated Farmers High Country Industry Group, the Commissioners deleted the proposed final sentence of the Statement of Issues before it, para 1.1, being the sentence that read:

> Another issue associated with retaining values of the Basin is the extent to which additional irrigation will "green" the Basin and change land use patterns.

Appeals from the Commissioners' decision

Introduction

[42] Following the release of the Commissioners' decision, multiple appeals were filed in the Environment Court. Nine notices of appeal were put before the Court. They are summarised below. The importance of these appeals, and what they disclose, will become apparent later in this judgment.

High Country Rosehip Orchard Ltd and Mackenzie Lifestyle Ltd

[43] This notice of appeal, dated 6 October 2009, was concerned with the decision of the Commissioners in its entirety. In essence, the appeal asserts:

(a) The refusal by the Commissioners to rezone the appellants' land and the comments of the Commissioners stating that there is insufficient evidence to warrant rezoning the land.

(b) The decision of the commissioners refusing the appellants' submission that PC13 and the s 32 RMA analysis were flawed and should be redrafted.

(c) Generally failing to give effect to the appellants' submissions (primarily concerning zoning of the appellants' land).

[44] It sought relief relating specifically to its own land or, alternatively, abandonment of PC13 altogether.

Mackenzie Properties Ltd

[45] This notice of appeal, dated 16 October 2009, appeals against:

> Those parts of the decision that relate to the boundaries for the Manuka Terrace Rural Residential Zone.

The grounds relied on are:

(a) Prior to PC13 being notified, the appellant applied to subdivide part of land it owns (the Ohau Block) into 49 residential lots and a balance. This application was a non-controlled activity and was therefore non-notified. A decision has not been provided at the time the appeal was filed. PC13 will alter the status of subdivision of that land. The appellant claims that it is not a sustainable use of resources for there to be a possibility that consent will be refused.

(b) It is inequitable for a plan change to frustrate the use of land granted by a resource consent (here a subdivision) by altering the use to which that land may be put (i.e. restricting building activities). Further, that the Ohau Block does not sit well within the Manuka Terrace Rural Residential Zone.

(c) And generally, that the s 32 report is inadequate and that the decision upon the appellant's original submission is contrary to Part 2 of the RMA.

[46] Mackenzie Properties Ltd sought relief relating specifically to its land, and rezoning in particular.

Meridian Energy Ltd

[47] This notice of appeal, dated 19 October 2009, sought to appeal against Objective 3A, Policy 3A, Policy 3C, Policy 3D and Policy 3(H)(X). The generalised "crux" of Meridian's concern, as identified by it, is that:

> …PC13 appears to have gone further than intended, by seeking to control all "non-farming" uses, and failing to appropriately recognise that utilities would also fall within the category of "non-farming" uses. Utilities should simply not be subject to the same issues, objectives, policies and rules as residential and domestic activities. Importantly, no consideration has been given to, or assessment made of, the effects arising from applying such provisions to utilities and the Waitaki Hydro-Electric Power Scheme (*HEPS*) in particular.

[48] Meridian further detailed its grounds of appeal in the body of its notice of appeal, and, with more specificity, in a schedule annexed to the appeal.

[49] Meridian sought wide ranging relief, and other relief consequential to that. For present purposes, the precise nature of that relief sought does not need to be further detailed.

Mount Gerald Station Ltd

[50] This notice of appeal, dated 19 October 2009, disclosed various grounds of appeal, which are generalised as follows:

(a) Not all areas of the Mackenzie Basin meet the definition of "outstanding natural landscape" in terms of the RMA definition.

(b) Mount Gerald, at a general level, recognises the need to control sporadic subdivision but, at the same time, has concerns regarding the Commissioners' decision. In particular, the scope of the background reports were inadequate, all matters identified in ss 5 – 7 RMA have not been appropriately weighed, and the recommendations and amendments are inconsistent with the RMA.

[51] The notice of appeal then sets out proposed amendments to PC13 as recommended by the Commissioners, along with reasons for the course proposed by the appellants.

[52] The relief sought here was framed by reference to specific objectives and policies raised in its appeal, and other relief as may be necessary consequential to that specific relief sought. Again, it is not necessary to set this out in any detail here.

Federated Farmers of NZ Mackenzie Branch

[53] This notice of appeal, dated 20 October 2009, sought to appeal the whole of the Commissioners' decision. However, it particularly focused on (but was not limited to) five discrete aspects of PC13 as amended by the Commissioners. The grounds on which the notice of appeal proceeded can be summarised as follows:

(a) The objectives and policies contained within the amended PC13 were not justified and did not accord with ss 5 and 6 RMA.

(b) In submissions, Federated Farmers sought less controls and restrictions on farm buildings and their location, and the protections sought to be imposed by PC13 were said to be too wide ranging and unduly restrictive on the farming community.

(c) PC13 was ambiguous and the s 32 report upon which the Commissioners' decision proceeded was inadequate.

(d) The Commissioners' decision failed to give adequate reasons for either accepting or rejecting various submissions.

(e) Federated Farmers claimed a more flexible approach to wilding trees and reflectivity restrictions imposed on structures was required.

[54] Federated Farmers sought specific relief to give effect to these discrete concerns.

Fountainblue Ltd, Southern Serenity Ltd and Pukaki Downs Tourism Holdings Partnership

[55] This notice of appeal, dated 21 October 2009, sought to appeal against the Commissioners' decision in its entirety and, more specifically, "those parts of the decision that either specifically or effectively reject Fountainblue's submissions and relief sought." The (abridged) reasons for the appeal are set out below:

(a) The Commissioners erred in finding that PC13 should not be abandoned.

(b) The Commissioners erred in not taking account of Fountainblue's existing application for a controlled activity subdivision consent, which must eventually be granted.

(c) The Commissioners erred in rejecting an expanded 'existing farm base' at Pukaki Downs Station. Fountainblue alleges that its proposed existing farm base has not been treated equally by the Council.

(d) The Lakeside Protection Zone should not have been reinstated by the Commissioners as it represents an "undue restriction on Fountainblue's use of Pukaki Downs Station".

(e) Overall, PC13 is not the most appropriate forms of achieving the aims of the Council.

[56] These appellants also sought quite specific relief but, in the alternative, sought the withdrawal of PC13 so a new investigation could be conducted and a new plan change notified.

Haldon Station

[57] This notice of appeal, dated 22 October 2009, appealed against the whole of the commissioners' decision. Quite relevantly, the notice of appeal states that the "appeal also relates to all consequential and related aspects of the plan, which may affect, or be affected by, this appeal." Haldon then stated that it "sought that various

changes be made to the Plan to reflect its interests particularly in respect to property it owns at Haldon Station." It then stated it sought:

(a) Expansion of the 'node' that applies to its land, to ensure it incorporates any and all buildings that comprise Haldon's activities. It also desired to create an additional node.

(b) That ancillary farm buildings be permitted to be located outside of nodes where they are a component of a primary activity of a property.

(c) To oppose the requirement that consent may be required to maintain or upgrade farm tracks or roads, the requirement that farm buildings were to be a minimum of 100 metres from non-farm buildings other than homesteads, and certain other requirements.

[58] Haldon too sought relief specific to its complaints, and other consequential relief.

Rhoborough Downs Ltd, Robert Preston, Roberta Preston and Sarah Preston

[59] This notice of appeal, dated 22 October 2009, appealed against the whole of the decision of the Commissioners, but in particular it appealed against:

(a) *The amendments to Objective 3A and associated policies* and methods of implementation.

(b) The removal of provision for identified building nodes.

(c) Blanket discretionary activity status for all buildings other than farm buildings outside of existing farm base areas.

(d) The inclusion of inappropriate assessment criteria associated with discretionary activities.

(e) Non-complying activity status for all buildings or extensions to buildings within the Lakeside Protection Areas.

(f) The failure to include special provision for land owned by the appellant.

(g) The deletion of an "*Are for lifestyle subdivisions (no nodes)*".

(emphasis added)

[60] The grounds for the appeal were several and need not be traversed in any detail here. However, for completeness, they *included* breach of natural justice through the appellant not being heard, PC13 not being the most appropriate means of achieving the purpose of the RMA, PC13 being not the optimal planning solution, PC13 incorporating excessive regulation which is inefficient and ineffective, the landscape analysis underpinning the Commissioners' decision said to be inadequate, insufficient acknowledgement of landowners' need to provide for their economic well-being, and inadequate reasons given for the amendments proposed by the Commissioners. As to this last point, the appellants expressly stated:

> This is particularly inappropriate when changes have been made to a number of objectives and policies including, for example, Objective 3A, Policy 3A and Policy 3B without any apparent jurisdiction.

[61] The Rhoborough Group sought that PC13 be abandoned in its entirety. Alternatively, they sought that further analysis and investigation be undertaken and amendments made. They also sought any necessary consequential relief.

The Wolds Station Ltd

[62] This notice of appeal appealed against the whole of the decision of the Commissioners. However, it was particularly addressed towards three points: (a) the aspects of the decision concerning reflectivity; (b) the decision concerning amenity tree planting; and (c) the decision to leave out part of the appellants' property from the farm base area. The grounds advanced included:

(a) The landscape assessment was incomplete and flawed.

(b) The RMA had been incorrectly applied, which included an incorrect s 32 analysis.

(c) The Commissioners failed to give adequate reasons for rejecting submissions.

(d) The reflectivity standard was too high, and the tree planting policies were too onerous.

[63] The Wolds Station sought specific relief, abandonment of PC13 or:

> …such further or other relief as may be rational and applicable having regard to all the circumstances and to achieve a rational zone change.

Environment Court decisions

First Interim Decision

[64] This decision (*Interim Decision*) issued on 14 December 2011 is somewhat of a tome, running to just shy of 500 paragraphs, and over 170 pages (including annexures).[4] However, the Interim Decision is not the subject of this appeal. Indeed, it has previously been the subject of an earlier appeal to this Court by the appellants in this proceeding, Federated Farmers.[5] That appeal was heard in this Court by Williams J and is referred to herein as the *Interim Decision Appeal*.

[65] I do not propose to consider the *Interim Decision* in any detail here. However, a cursory review is prudent as it does form part of the essential background to these proceedings in their entirety. First, it is useful to set out the issues which the Environment Court saw to be outstanding in the then extant appeals:[6]

> The remaining appeals by the named appellants raise issues about:
>
> - The existence and extent of outstanding natural landscapes within the Mackenzie Basin subzone;

---

4 *High Country Rosehip Orchard Ltd & Ors v Mackenzie District Council* [2011] NZEnvC 387 [*Interim Decision*].

5 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2013] NZHC 518 [*Interim Decision Appeal*].

6 Interim Decision, above n 4 at [11].

- The Rural objective(s) as to landscape;
- The implementing policies and landscape;
- Hazard provisions;
- Some of the implementing rules in section 7 of the district plan, especially in relation to reflectivity and wilding trees;
- Land use practices and sustainability;
- Specific farm base areas and/or rules;
- Proposed new Rural-Residential and Tourist Resort zones.

[66] Next, and helpfully for present purposes, the judgment included a "conclusions and outcome section".[7] It is from this section I now replicate certain aspects:

> **8. Conclusions and outcome**
>
> 8.1 Summary
>
> [458] The basic fact underpinning this decision is that the Mackenzie Basin is one huge open tussock-dominated landscape surrounded by mountains including Aoraki… The elected representatives of the district notified Plan Change 13 on the foundation that the Mackenzie Basin was an outstanding natural landscape. Applying a high standard of "outstandingness" we have found on the evidence that is correct.
>
> [459] As we have pointed out the operative district plan and PC13 between them identify a number of issues (the place of buildings, exotic wildings, intensive agriculture) in respect of sustainable management… However, the district plan and PC13 between them only purport to settle objectives and policies for one of them – buildings in the landscape and zone. The other important issues are left hanging. That is of real concern because not only are there matters of national importance involved, but several of the core elements of sustainable management are also.
>
> 8.2 The problems with PC13
>
> [460] The fact that these proceedings are about an outstanding natural landscape is crucial because recognising and protecting it from inappropriate development is stated by Parliament to be a matter of national importance…
>
> [461] It appears to us that all … [the matters referred above at [460]] should have been addressed by the Mackenzie District Council because they all relate to or are "on" the subject of PC13 – the landscape of the Mackenzie Basin. However, the amended and/or additional policies and methods we have proposed in the evidence probably go beyond the submissions and do go further than the appeals on the plan change. Consequently those changes

[7] At [458] – [494].

> cannot be made without giving both the parties and other potentially interested persons an opportunity to be heard…
>
> 8.3 The court's powers to amend district plans
>
> [462] The Environment Court has powers to amend subordinate legislation contained in a district plan. The justification for these powers appears to be in one of the very few exceptions to the cornerstone principle that legislation should be enacted by elected representatives…
>
> …
>
> 8.4 Can and should we exercise our powers under section 293?
>
> [471] We consider we have jurisdiction to consider the issues raised but not dealt with by PC13(C) – as we have pointed out they all relate to the protection of the outstanding natural landscape which is the Mackenzie Basin from inappropriate subdivision, use and development.
>
> …
>
> 8.5 Outcome
>
> [484] This decision in [sic] final in respect of our finding that the Mackenzie Basin as a whole (excluding Twizel and Tekapo townships, Mr Densem's landscape unit 54 west of Twizel, and the Dobson river catchment) is an outstanding natural landscape. All other determinations or judgments are interim…

[67] The above is not, and does not purport to be, anything but the most cursory of overviews of what is a very thorough judgment. Annexed hereto marked "**C**" is a copy of the changes proposed to be made in the Interim Decision, (as outlined in the Schedule to the Interim Decision) which were expressly stated not to be final.

[68] It is also worthwhile pausing for a moment to consider the *Interim Decision Appeal* of Williams J referred to at [64] above. This too informs the procedural history of these proceedings in their entirety and, more relevantly, how the present appeals came to exist. In that Interim Decision Appeal, Williams J observed first that the Environment Court's Interim Decision had proposed to introduce new controls relating to the following matters:[8]

> (a) pastoral intensification (greening, cultivation and large farm buildings) made possible by the introduction of large scale irrigation;
>
> (b) on farm retirement subdivisions;

[8] Interim Decision Appeal, above n 5 at [2].

(c) restrictions on the location of "farm bases" to address potential inundation hazards arising from the presence within the district of hydroelectric infrastructure owned by Meridian Energy Limited; and

(d) the spread of wilding pines.

(footnotes omitted)

Federated Farmers and others had appealed to the High Court among other matters challenging the way in which the Environment Court had proposed to rely on s 293 RMA to introduce these controls.

[69] Williams J acknowledged that the Environment Court's decision "does not purport to be final", but noted that it does record that the Environment Court was "strongly of the inclination" that it ought to invoke s 293 of the RMA.[9] Williams J then stated:[10]

> In my view, the most important question in this appeal is how far an interim decision can go before it loses that character and becomes, in substance, a final decision.

[70] After discussing the background to the appeal,[11] Williams J turned to consider the appeal itself, which advanced four points.[12] However, it was noted that shortly before the hearing, Federated Farmers and Meridian filed a consent memorandum which settled one of the grounds of appeal which was, perhaps ironically, the only aspect of the interim decision expressly stated to be final. This was the finding of the Environment Court that the Mackenzie Basin subzone is, in its entirety, an outstanding natural landscape.[13]

[71] From that point forward Williams J identified, correctly in my view, that the primary issue that remained on foot before the Court was whether the *Interim Decision* was appealable at all.[14] Williams J discussed this issue in some detail,[15] before he reached the conclusion that:[16]

---

9 At [5].
10 At [6].
11 At [7] – [14].
12 At [15].
13 At [18] – [20].
14 At [22] – [23].
15 At [24] – [39].
16 At [40] – [41], [43], [45], [48].

> In my view, the inevitable conclusion is that no appealable decisions have yet been made in respect of the issues still in play and the appeal is therefore not properly brought.
>
> Just as in the *AMP* case, the best that can be said for the appellant is that the Environment Court *might* make an error or errors of law if it continues along the path that it has signalled…
>
> …
>
> That said, I have some sympathy for the position Federated Farmers find themselves in. The Environment Court in this case has gone much further in setting out a potential final view on the issues promoted than any Environment Court or Planning Tribunal decision brought to my attention in argument. Not only has that court communicated its strong inclination to use s 293, but it has also drafted its proposed changes both in relation to policies and some rules…
>
> …
>
> I am, in short, not prepared to find that, in breach of natural justice and contrary to its own protestations, the Environment Court has predetermined the outcome in this case.
>
> …
>
> I am, however, prepared to reaffirm that no aspect of the interim judgment is final except that relating to the spatial extent of the Mackenzie Basin as an outstanding natural landscape, and that all remaining matters involving substantive merits or jurisdiction must be approached by that court with a genuine open mind as to outcome…

[72] In my view the *Interim Decision Appeal* very clearly highlights the difficulties which not only the parties, but also this Court, were having with the strongly phrased *Interim Decision*, a decision which it might be said was heading towards a final determination of the matter. Williams J had some concerns with the jurisdiction of the Environment Court to tread the path it signalled it would and remitted the matter back to the Environment Court. It is to the subsequent decisions of the Environment Court which found this appeal, and which address these very issues, I now turn.

Sixth Decision

[73] In this decision the Environment Court began with the following:[17]

---

[17] *Sixth Decision*, above n 1, at [1] – [2].

> This decision is about the jurisdiction of the Environment Court to make the orders proposed in the First (Interim) Decision of the court in these proceedings. The proceedings concern the Mackenzie District Council's Plan Change 13 ("PC13") which was notified on 19 December 2007. The history of PC13 is described in the First (Interim) Decision.
>
> Various appellants have raised issues as to the court's jurisdiction under the Resource Management Act 1991 ("the RMA" or "the Act"). A further hearing was held to resolve those and some consequential issues. The questions are:
>
> (1) are the remedies proposed by the court 'on' PC13?
>
> (2) what are the normal powers of the court after hearing appeals on plans and plan changes?
>
> (3) are the proposals in the First (Interim) Decision within the section 290 jurisdiction?
>
> (4) what are the court's powers under section 293 of the RMA as amended in 2005? And
>
> (5) do any (further) proposals of the court come within those powers?
>
> Questions (4) and (5) are separate and consequential so I will deal with those in a further decision.

[74] The Court then briefly discussed PC13,[18] which was followed by an essay of some relevant submissions. On the submissions it had received the Court observed:[19]

> The court has always regarded the submission and appeal by The Wolds as key documents because they raise three important issues – first, how much of (and where are) the outstanding natural landscapes of the Mackenzie Basin; second, that policies (including their "controls" in the language of the Wolds' documents) should distinguish different areas in the Basin rather than apply uniformly across the whole of the Mackenzie subzone; and thirdly, that questions of fairness to all parties and to persons not before the court are very important.

And, on the submissions generally, the Court remarked:[20]

> The court always needs to bear in mind (even if not expressed specifically) that granting relief on any one set of appeals might have effects on the others. A feedback loop is implicit in the court's suggested orders in the First (Interim) Decision…

---

18 At [6] – [9].
19 At [15].
20 At [23].

[75] Following this the Court began reviewing the "scheme of the RMA" in relation to preparation of plan changes, submissions on plan changes, and appeals from decisions in respect of plan changes.[21] This review was substantial. I do not propose to set out that discussion in any detail. Rather, I outline below what I see to be pertinent points elucidated from that discussion:

(a) Schedule 1 of the RMA contains provision for the "preparation and change" of plans and proposed plans. Schedule 1, cl 6 enables the persons identified in sch 1, subcls (2) to (4) to make submissions that are "on" a proposed plan change. This is important as "[a] territorial authority can choose the scope of its own plan changes."[22]

(b) After receiving submissions and any further submissions (pursuant to sch 1, cl 8) the local authority is bound to issue a decision in accordance with sch 1, cl 10. Schedule 1, cl 11 provides for notification of decisions.

(c) Schedule 1, cl 14 provides for appeals to the Environment Court against decisions issued pursuant to sch 1, cl 10. Schedule 1, cl 15 then sets out some mechanics of the hearings by the Environment Court. Subclause (2) states that "if the court gives directions (under s 293(1) RMA) to the local authority, then the local authority must comply." No other direct powers are given to the Environment Court in relation to amending district plans or changes under Schedule 1.

(d) Section 290 sets out the "[p]owers of [the] Environment Court in regard to appeals and inquiries". By s 290(1) the Environment Court has "the same power, duty, and discretion in respect of a decision appealed against" as the local authority. In the *Sixth Decision* it was noted that this "has both substantive and procedural implications".[23] Section 290(2) enables the Environment Court to "confirm, amend or cancel a decision to which an appeal relates". The meaning of subs

---

21 At [24] – [51].
22 At [24] – [25].
23 At [34].

(2) was the subject of consideration by the Environment Court.[24] Section 290(4) states that nothing in s 290 affects "any specific power or duty" of the Environment Court. The Court stated it would return to s 290(4) later.[25]

(e) Section 290A "requires the Environment Court to have regard to the decision of the local authority".[26]

(f) The Court expressly recorded that it would discuss the "meaning and application" of s 293 in more detail in the next decision.[27] However, it was recorded that the s 293 powers appear to be discretionary and complementary to the s 290 powers.[28]

[76] The Court then provided a summary in the following terms:[29]

> The effect of the 2005 Amendment Act appears to be that there is now a two stage process:
>
> (1) the court decides whether to confirm, amend, or cancel the decision or the provision or matter appealed. Cancellation appears to have the effect of reinstating the council's notified provision or of inserting a provision sought by a submission, and appeal, or of deleting a provision as sought by a submission and appeal. As a part of that the court may be able to exercise a clause 10(2) power to amend a local authority decision?
>
> (2) if the court decides that the outcome of the first stage is not the most appropriate provision under section 32, then it may exercise its discretion under s 293 to direct the council to come up with amendments that are. Such directions are not necessarily alternatives to the section 290 orders but may be supplementary to it.

[77] The Court next turned its mind to consider whether the "objectives and policies proposed in the First (Interim) Decision [were] 'on' PC13".[30] In its analysis, the Court referred to several decisions promulgating what it termed "[t]he legal

---

24 At [35] – [38].
25 At [39].
26 At [41].
27 At [44].
28 At [44].
29 At [50].
30 At [52] – [79].

tests" before engaging in the substantive discussion.[31] The Court then turned to consider what aspects of Objective 3B, as proposed by the *Interim Decision*,[32] are 'on' PC13. Objective 3B as proposed is set out in **Annexure "D"** for convenience.

[78] In terms of this, the Court held that Objectives 3B(1), (2) and (3)(a) to (c) are 'on' PC13, as they are all consequential and implementing policies, except those related to the spread of wilding pines. The Court then held that objective 3B(3)(d) however is not 'on' PC13.

[79] The Court went on to consider whether it ought to utilise its discretion pursuant to s 290 to amend or cancel the decision of the Commissioners, or any aspect thereof.[33] In this respect, the Court addressed the issue of 'greening' which is, of course, of central import to Federated Farmers' appeal against this decision. The Court stated:[34]

> I shortly turn to itemise what orders the court can and should make under s 290 of the Act. However, before I do, there is a preliminary point. The Commissioners' Decision purported to amend PC13(N) by deleting some words in the statement of issues which read:
>
> > *Another issue associated with retaining values of the Basin is the extent to which additional irrigation will "green" the Basin and change land use patterns.*
>
> I hold that the decision of the Commissioners to amend the statement of issues is *ultra vires*. An issue once notified … cannot … be added to or deleted from a notified plan change. That is because the public relies on the statement of issues (when identified) when making decisions as to whether or not to lodge submissions. Accordingly the statement of issues in PC13(N) should be reinstated. The court has power to make that change under section 290(2) or (possibly) 292 of the RMA.

[80] This finding lead the Court to make an order (order 6A) which recorded:

> Under section 290(2) of the Resource Management Act 1991, the Environment Court cancels the decision of the Mackenzie District Commissioners at its Annexure C paragraph 1 where it purported to delete from Plan Change 13 the words:

---

31 At [54] – [64], citing *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP/34/02, 14 March 2003; *Beach Road Preservation Society Inc v Whangarei District Council* (2000) 7 ELRNZ 1, [2001] NZRMA 176 (HC) at [39]; *Option 5 Inc v Malborough District Council* (2009) 16 ELRNZ 1 (HC).

32 *Interim Decision*, above n 4, at [151].

33 *Sixth Decision*, above n 1, at [80] – [92].

34 At [84].

> Another issue associated with retaining values of the basin is the extent to which additional irrigation will "green" the Basin and change land use patterns…

– to the effect that those words are reinstated in the plan change.

[81] I have in this section outlined a relatively large portion of the decision. This is because the entirety of the decision forms the narrative of this proceeding. Of course, the appeal is really against order 6A (and the relevant aspects of the judgment set out above), and it is on those aspects of the decision that the discussion below will focus.

Seventh Decision

[82] Federated Farmers appeals against the *Seventh Decision* in its entirety. The Court in its judgment rather helpfully sets out what this decision intended to resolve:[35]

> This decision considers the various submissions on the jurisdiction and merits of the proposed orders under section 293 of the Resource Management Act 1991 as outlined in the First (Interim) Decision of the Court in these proceedings. The questions to be decided here are:
>
> (1) do the remaining orders proposed in the First (Interim) Decision come within section 293 and, if so:
>
> (2) should the court exercise such powers?

[83] After again briefly setting out the background to the proceeding,[36] the Court turned to consider the interpretive issue in earnest.[37] This discussion is not fully traversed here, other than to note that the following observations of broad application were made:

(a) Because PC13 was notified in 2007, this proceeding fell to be considered pursuant to the provisions of the RMA after it was amended in 2005[38] but before it was amended again in 2009[39] and

---

35 *Seventh Decision*, above n 2, at [2].
36 At [4] – [6].
37 At [8] – [46].
38 Resource Management Amendment Act 2005.
39 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

2013.[40] I note here that this interpretation of the transitional nature of the 2009 and 2013 amendments has not been raised by counsel and this judgment proceeds on the basis that that interpretation is correct.[41]

(b) By the Interpretation Act 1999, the primary guide to interpretation is the words of the relevant sections themselves in their immediate context, along with the purpose of the section in which they are couched. Resort to other guides as to meaning may be had where appropriate.[42]

[84] Rather, the summary provided by the Court, as replicated below, is relied upon:[43]

> [47] The primary jurisdiction – to make orders under section 290 – arises if there has been compliance with clause 14 of Schedule 1. That is, a person can only appeal on a matter or provision that meets the criteria listed in clause 14(1), and if they referred to that matter or provision in submission. Further, as I set out in the Sixth Decision, in the case of a plan change the submission must have also been 'on' the plan change: *Clearwater Resort Ltd v Christchurch City Council* and *Option 5 Inc v Malborough District Council*.
>
> [48] Section 293 gives the court powers to resolve the situations where if, after considering all the relevant factors, it becomes apparent on the evidence and/or on the face of the local authority's decision that:
>
> - in order to achieve the purpose of the RMA an objective not sought in any appeal is the most appropriate objective in terms of section 32 RMA because that objective recognises and provides for a section 6 matter of national importance or takes account under section 8 of the principles of Te Tiriti o Waitangi;
>
> - a policy not sought by any appeal is most appropriate in order to implement an objective having regard to its efficiency and effectiveness compared with the alternatives including the status quo;
>
> - an objective may have been amended under section 290(2) but then consequential amendments to policies and methods (not sought by any submission but related to it) may be found by the court to be the most appropriate solutions under section 32 of the Act.

---

40 Resource Management Amendment Act 2013.
41 *Seventh Decision*, above n 2, at [7].
42 At [9].
43 At [47] – [55].

Usually the answer is that a differently worded objective or policy will come within the range of possibilities permissible under the "fair and reasonable in all the circumstances" principle set out by the Full Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* and extended slightly with the addition of clause 10(2) to the RMA in 1996. But the section 293 powers are very useful especially where there are concerns over the fairness of the process.

[49] Another situation where section 293 may be used is where the local authority has made an error of law or has substantially failed to carry out one of its duties under the RMA or under a statutory instrument. Examples of such an error or failure might be:

- failure to consider a relevant National Policy statement (or any of the other instruments referred to in section 293(2)); or

- misapplication of section 32 by comparing incorrect options (e.g. not comparing the effects of the proposed change's provision with the effects of the status quo).

[50] If the court calls for and receives submissions on the issue and is persuaded that there is indeed such an error or failure, does the fact that the error of law has not been raised in any appeal mean that the court can give no directions under section 293 as to how to fix the problem? One possibility is to recommend that the local authority pursue a variation under clause 16A. I consider section 293 provides another.

[51] When section 293 is read as a whole in the scheme of the RMA, I hold that there is also a limited jurisdiction given to the Environment Court where the court identifies, or finds, that a duty of the local authority in respect of a relevant issue has not been adequately complied with. In that case, provided there is a rational connection between the issue which is the subject of the plan provision or the plan change and the matter identified by the court, the court has jurisdiction under section 293 to give directions about the matter, notwithstanding that it was not raised in an appeal.

…

[54] In summary, the tests for whether directions are within jurisdiction are:

(0) in the case of a plan change are the directions about amending the provision 'on' the issue(s) raised by the plan change? And

(1A) do the directions fairly and reasonably address a matter or provision which is the subject of an appeal (and the submission on which it is based)? Or

(1B) do the directions address a "consequential alteration arising out of … any other matters the court considered relating to matters raised in submissions raised in submissions? Or

(1C) do the directions fairly and reasonably flow from a direct breach of a nationally important statutory duty or a departure from a higher statutory instrument? And

(2) are fairness and participation issues fairly and reasonably resolvable by consultation and notification?

(citations omitted)

[85] After this, the Court turned its mind to consider whether pursuant to s 293 it had jurisdiction to make the alterations to the policies and objectives as proposed in the *Interim Decision*. In this respect, the thrust of the judgment here, appears to contain a finding that Objectives 3B(1), (2) and (3)(a) – (c), as proposed in the *Interim Decision*, are within the scope of the appeals and that there is a sufficient nexus between those appeals and PC13 as notified.[44]

[86] An express finding was made that objective 3B(3)(d), which related to exotic wildings, was beyond jurisdiction.[45] The Court then considered the policies it proposed (attached to this judgment as Annexure C) and commented:

(a) Suggested policy 3B1 is within jurisdiction except to the extent that the words "or carbon forestry under an Emissions Trading Scheme" should be deleted from 3B1(a).[46]

(b) Suggested policy "3B(5)" is beyond jurisdiction.[47]

(c) Suggested policy 3B8(c) and (d) are within the jurisdiction of s 293 due to the operation of s 6(b) RMA, (as matters of national importance relating to the protection of outstanding natural

---

44 At [59] – [65].

45 At [66].

46 At [70].

47 At [71] – [72]. I note that suggested policy 3B5 as set out in the *Interim Decision* does not relate to Wilding Trees. In fact, there is no policy "3B(5)" in the *Interim Decision*. There is a policy 3B5, which relates to development in farm base areas. Additionally, there is a policy 3B15, which deals with Wilding Trees. In light of this confusion, I am unable to ascertain precisely what was being referred to. However, given that the discussion centres on Wildings, I am inclined to the view that this discussion was a reference to policy 3B15, but express no definitive view one way or another.

landscapes) while policies 3B8(a) and (b) are "within the basic scope of section 292".[48]

(d) Suggested policy 3B12 is within jurisdiction.[49]

(e) Suggested policy 3B13 is within jurisdiction, despite an acknowledgement by the Court that "no submissions or appeals sought restrictions on the location, density, design, external appearance and [size] of farm buildings."[50]

(f) Suggested policies 3B14(a) and (b) are beyond the jurisdiction of the Court and, while policy 3B14(c) may be within jurisdiction, is rendered redundant by policy 3B8, so no directions can (or should) be given in this respect.[51]

(g) As to policy 3B16, only suggested policies 3B16(1) and (2) are within jurisdiction; policies 3B16(3) – (5) are either beyond jurisdiction or are covered elsewhere.[52]

[87] The Court was then positioned to contemplate the directions it might give to the Council pursuant to s 293. On this aspect it commented as follows:

(a) **Policy 3B1**: "A new policy should be written which recognises that within the Mackenzie Basin's outstanding natural landscape there are some areas where different types of development and use … are appropriate, identifies these areas; and recognises that there are areas where use and development beyond pastoral activities on tussock grasslands is either generally inappropriate or should be avoided…"[53]

---

48 At [79].
49 At [82].
50 At [83] – [84].
51 At [87].
52 At [88].
53 At [106].

(b) **Policy 3B8**: the Council should write and consult on policies which: (i) avoids building or growing structures adjacent to State Highway 8; (ii) requires buildings to be set back from roads (particularly State Highway 8); and (iii) manages the sensitive location of structures which detract from the landscape.[54]

(c) **Policy 3B12**: the Council should write a new policy "encouraging traditional pastoral farming so as to maintain tussock grasslands", subject to Policy 3B8 (as developed by the Council in accordance with the above directions).[55]

(d) **Policy 3B13**: The Council should write a policy for farm buildings which avoids farm buildings in lakeside areas, scenic viewing areas and along tourist roads, whilst managing farm buildings elsewhere in terms of location, design and placement.[56]

(e) **Policy 3B16**: It would be useful for the Council to consider a policy dealing with non-encouragement of subdivision, except in specified areas, and specifying a minimum lot size of 200 hectares (except in farm base areas).[57]

(f) **Policy 3B14**: proposed policy 3B14(1) is too general and probably unhelpful and policy 3B14(2) is beyond the scope of PC13. However, policy 3B14(3) would be a useful backstop, and the Council should prepare a policy along its lines.[58]

Eighth Decision

[88] The relevant point emerging from this decision can be addressed via reference to two paragraphs of this *Eighth Decision*:[59]

---

54 At [111].
55 At [112].
56 At [113].
57 At [115].
58 At [119].
59 *Eighth Decision*, above n 3, at [35] – [36].

> The court could order that Objective 3B(1) and (2) should be considered under section 293, but that would be to waste a huge amount of effort on the only substantive matter that was actually decided in the First Decision – that the greater part of the (upper) Mackenzie Basin is an outstanding natural landscape which should be recognised and protected as a matter of national importance. If this issue was fairly and reasonably before the court and on the plan change – and I have held it was both – then there should be some finality to the litigation on this issue at least (subject to the qualifications in the Sixth Decision about variations).
>
> Exercising the court's powers under section 290, I consider that the court should cancel the decision of the Mackenzie District Council's Commissioners and should substitute Objective 3B(1) and (2) as set out above because they are the most appropriate objectives for achieving the purpose of the Act for the reasons stated in the First (Interim) Decision.

[89] The orders then made had the effect, inter alia, of deleting Objective 3B in the Commissioners' decision and substituting in its stead the following replacement objective 3B:[60]

> **Objective 3B – Activities in Mackenzie Basin's outstanding natural landscape**
>
> (1) Subject to (2)(a), to protect and enhance the outstanding natural landscape of the Mackenzie Basin subzone in particular the following characteristics and/or values:
>
> (a) the openness and vastness of the landscape;
>
> (b) the tussock grasslands;
>
> (c) the lack of houses and other structures;
>
> (d) residential development limited to small areas in clusters;
>
> (e) the form of the mountains, hills and moraines, encircling and/or located in, the Mackenzie Basin;
>
> (f) undeveloped lakesides and State Highway 8 roadside;
>
> (2) To maintain and develop structures and works for the Waitaki Power Scheme:
>
> (a) within the existing footprints of the Tekapo-Pukaki and Ohau Canal Corridor, the Tekapo, Pukaki and Ohau Rivers, along the existing transmission lines, and in the Crown-owned land containing the Lakes Tekapo, Pukaki, Ruataniwha and Ohau and subject only (in respect of landscape values) to the objectives, policies and methods of implementation within Chapter 15 (Utilities) except for management of exotic tree species in respect of which all

[60] At Order 8C.

objective (1) and all implementing policies and methods in this section apply;

(b) elsewhere in the Mackenzie Basin subzone so as to achieve objective (1) above.

[90] For completeness, the *Eighth Decision* also deleted objective 3A in the Commissioners' decision and renamed objective 3C to be new objective 3A, the first six words of which now read:[61]

> **3A Landscape Values**
>
> Protection of the outstanding landscape values…

The three appeals

[91] I turn now to consider the grounds advanced by Federated Farmers with respect to each of the three appeals that are before me. The appeals are broad with ten alleged errors of law advanced.

Appeal against the Sixth Decision

[92] In respect of this decision, Federated Farmers appeals against:

> The decision of the Environment Court (as set out in Order 6A) of the Sixth (Procedural) Decision to cancel the decision of the Mackenzie District Commissioners to delete from PC13 the following words:
>
> > *Another issue associated with retaining values of the Basin is the extent to which additional irrigation will "green" the Basin and change land use and patterns* [*("Greening Issue")*].
>
> To the effect that those words are reinstated in the plan change.

[93] The errors of law said to found this appeal are outlined in the Notice of Appeal as follows:

> 3. The Environment Court erred in law in deciding that an issue once notified cannot be deleted from a notified plan or plan change. (First Error of Law)
>
> 4. The Environment Court erred in failing to have regard to the decision of the Mackenzie District Commissioners to delete the Greening Issue from the Statement of Issues… (Second Error of Law)

[61] At Order 8B.

[94] The grounds advanced by Federated Farmers for the appeals in respect of each error of law are addressed below:

> *First Error of Law*
>
> 21. The Council must give a decision on provisions or matters raised in submissions (Clause 10, Schedule 1, Resource Management Act 1991). The submissions included a request that the final sentence of the paragraph to be added to Rural Issue 7 – Landscape Values be deleted (i.e. the "Greening Issue"). The Commissioners accepted this request and deleted the Greening Issue. As this relief was accepted in a submission, the decision to make this deletion from the Statement of Issues was within the jurisdiction of the Commissioners.
>
> *Second Error of Law*
>
> 22. Section 290A requires the Environment Court, in determining an appeal, to have regard to the decision that is the subject of the appeal. In cancelling the decision of the Mackenzie District Commissioners to delete the Greening Issue from the Plan the Environment Court failed to have regard to the decision of the Commissioners, including the reasons the Commissioners gave for not including references to "greening" of the Basin in the District Plan (as set out at paragraphs 81 and 134 of the Commissioners' Decision).

Appeal against the Seventh Decision

[95] In respect of this decision, Federated Farmers appeals against the decision in its entirety. The errors of law claimed to found this appeal as outlined in the Notice of Appeal are several:

> 5. The Environment Court developed and applied a wrong legal test for determining the Environment Court's jurisdiction under section 293 of the Resource Management Act 1991. (Third Error of Law)
>
> 6. The Environment Court applied a wrong legal test in determining that objective 3B(1) and 3B(3)(a) – (c), and other policies and methods proposed in the First (Interim) Decision are 'on' PC13. (Fourth Error of Law)
>
> 7. The Environment Court, in directing the Council to prepare a new objective 3B(3) and policies that address pastoral intensification (greening of the basin, size and density of farm buildings, and pivot irrigators) went beyond its role as appellant body and its jurisdiction under section 293. (Fifth Error of Law)
>
> 8. The decision of the Environment Court to remove provision for retirement subdivision went beyond its role as appellant body and its jurisdiction under section 293. (Sixth Error of Law)

9. The Environment Court erred in law in determining that objective 3B(1) and 3B(3)(a) – (c) are fairly and reasonably within the scope of the appeals, and sufficiently connected to PC13 as notified. (Seventh Error of Law)

10. The Environment Court erred in law in determining that the policies 3B1 and 3B8 are within jurisdiction on the basis that they implement Objective 3B. (Eighth Error of Law)

11. The Environment Court erred in law in determining that Policies 3B1, 3B8, 3B12 and 3B13 respond to the submissions and appeals. (Ninth Error of Law)

[96] The grounds of appeal for each of these alleged errors of law are replicated below:

Third Error of Law

23. The finding of the Court at paragraph [23] of the Seventh (Procedural) Decision that section 293 contemplates directions about any aspect of the plan or plan change before the Court, rather than a specific provision referred to in a notice of appeal, is contrary to the correct interpretation of section 293, and results in the Court going beyond its role as an appellant body.

24. The tests formulated by the Court as summarised at paragraph [54] of the Seventh (Procedural) Decision are contrary to the requirement that there be a proper nexus between the appeals and the matters proposed to be addressed under section 293; and incorrectly apply a different test where the Court considers there has been a breach of duty under sections 6 and 8 of the Resource Management Act 1991.

25. The Environment Court was wrong in law in rejecting the argument advanced by the Appellant that *"it is not for the Court, in the context of relatively narrow appeals on what was itself a focused plan change to conduct a broad ranging enquiry into what it considers to be the gaps in the plan*."

Fourth Error of Law

26. Objective 3B(1) and 3B(3) and policies relating to pastoral intensification are not "on" the plan change, in that PC13 as notified did not amend or insert any objectives, policies or rules relating to pastoral intensification.

27. The Environment Court erred in law in finding at paragraph [64] of the Seventh (Procedural) Decision that:

> *Because the issue of "…the extent to which additional irrigation will 'green' the Basin and change land use patterns' [sic] was specifically raised, I hold that objective 3B(3)(a) was 'on' PC13 under the first limb of the Clearwater test."*

28. Although greening was referred to in the Statement of Issues in PC13 (as notified) this was removed in the Commissioners' Decision, and in any event was not an issue sought to be controlled by the Plan Change in that this was not incorporated in any objectives, policies or rules.

Fifth Error of Law

29. There is no nexus between the appeals and objectives and policies proposed by the Court relating to pastoral intensification (greening of the basin; size and density of farm buildings; and pivot irrigators), nor is pastoral intensification "on" the plan change. As such the Environment Court had no jurisdiction to address these issues under section 293, and in doing so has stepped beyond its role as an appellant body.

30. The decision of the Court to use section 293 to introduce provisions relating to "greening" of the basin is contrary to the finding of the Court at paragraph [79] of the Seventh (Procedural) Decision that none of the submissions or appeals raised these issues.

Sixth Error of Law

31. There is no nexus between the appeals and the decision of the Environment Court to remove provision for retirement subdivision, and in doing so the Court has stepped beyond its role as an appellant body, and its jurisdiction under section 293.

Seventh Error of Law

32. The Court was wrong in law to find that:

    32.1 Objective 3B(1) and 3B(3)(a) – (c) are fairly and reasonably within the scope of appeals;

    32.2 Objective 3B(3)(a) – (c) was responsive to appeals that were concerned that the objective was to apply in an undifferentiated way to the Mackenzie Basin zone as a while [sic]; and

    32.3 That objective 3B(3)(b) is a "logical consequence" of the submissions and appeals by The Wolds Station Limited and Fountainblue and others.

33. The appeals by Wolds Station Ltd and others do not raise the issue of pastoral intensification, nor do they seek controls in relation to this issue. The appeals therefore do not permit the Court to propose provisions relating to this matter.

34. The Court's finding that this objective is within the scope of the appeals is contrary to the Environment Court's findings as paragraph [79] of the Seventh (Procedural) Decision.

Eighth Error of Law

35. It was not open to the Court to rely on a broad landscape objective (Objective 3B(1)) to support a finding that the policies addressing pastoral intensification were within scope.

Ninth Error of Law

36. The Court was wrong in law to find that:

    36.1 Policies 3B1, 3B8 and 3B12 are within jurisdiction because they respond to the submissions and appeals, such as the appeal by The Wolds which seeks that undifferentiated policies not be applied to the whole Mackenzie Basin.

    36.2 Directions along the lines of Policy 3B13 are consequential relief in that they meet the differentiation principle sought by The Wolds.

37. The appeals by Wolds Station Ltd and others do not raise the issue of pastoral intensification, nor do they seek controls in relation to this issue. The appeals therefore do not permit the Court to propose provisions relating to this matter.

Appeal against the Eighth Decision

[97] In respect of this decision, Federated Farmers appeals against:

> …The decision to cancel the decision of the Commissioners in respect of Objective 3B of Plan Change 13 (Decision 8A); and to amend the District Plan by deleting Objective 3B in the Commissioner's version of PC13; and substituting this with a new Objective 3B(1) (Decision 8C) in reliance on section 290 of the Resource Management Act 1991.

[98] The error of law said to found this appeal is that:

> The Environment Court erred in law in confirming Objective 3B(1) in reliance on section 290 in advance of any process to be followed pursuant to section 293 to introduce objectives, policies and rules in relation to pastoral intensification? [(Tenth Error of Law)].

[99] The ground on which this appeal is based is that:

> [*Tenth Error of Law*]
>
> 5. Objective 3B(1) forms part of a package of objectives and other provisions, and those provisions should be considered together in a comprehensive way. Where those provisions include matters requiring consideration under section 293 (i.e. pastoral intensification) then Objectives forming part of that package of provisions should not be confirmed separately under section 290.

[100] I have read and received the submissions of both parties in full. I do not propose to replicate significant tracts of those submissions in a discrete section. Rather, as I discuss each of the four issues identified below, I will refer to the submissions of counsel as and when appropriate.

The issues

[101] It seems to me that the crux of this appeal requires resolution of four discrete interpretive issues. As I perceive the pleadings, these are:

(a) Can an issue, once notified, be deleted from a plan change? Or does sch 1, cl 10 of the RMA, which requires a decision to be made on each matter raised in submissions, confer upon the Commissioners the power to so delete?

(b) To what extent is the Environment Court required to have regard to the decision of the Council/the Commissioners pursuant to s 290A?

(c) What is the Environment Court's jurisdiction pursuant to s 293 – in other words, what is the scope of its statutory power under s 293? And, on this question, is the Court required to address when an issue will be considered to be "on" a Plan Change?

(d) Can the Environment Court, in reliance on s 290, cancel a decision of the Council/the Commissioners in advance of following the process contemplated by s 293?

And I am satisfied here that the central issue as outlined at (c) above relates also to the extent (if any) that the Environment Court might be constrained by the appeals before it when invoking s 293, especially where the Court considers the planning instrument before it fails to satisfy a duty it has under s 6 RMA.

[102] I now turn to consider the legislative regime applicable to this appeal before returning to a discussion of the above issues. The resolution of these four issues and

particularly the questions outlined at [101](c) above will ultimately inform the outcome of the ten claimed errors of law.

Legislative regime

Appeals

[103] The approach of this Court to appeals from the Environment Court is well rehearsed. It was traversed in my earlier judgment *Simons Hill Station Ltd v Royal Forest & Bird Protection Society of New Zealand Inc*,[62] which I repeat below:[63]

> This appeal is governed by s 299 of the RMA, which provides:
>
> > **299 Appeal to High Court on question of law**
> >
> > (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.
> >
> > (2) The appeal must be made in accordance with the High Court Rules, except to any extent that those rules are inconsistent with sections 300 to 307.
>
> Therefore, if an appeal discloses no discernible question of law, it is not to be entertained by this Court. The principles applicable to RMA appeals can be summarised as follows:
>
> > (a) Appeals to this Court from the Environment Court under s 299 are limited to questions of law.
> >
> > (b) The onus of establishing that the Environment Court erred in law rests on the appellant: *Smith v Takapuna CC* (1988) 13 NZTPA 156 (HC).
> >
> > (c) In *Countdown Properties (Northland) Ltd v Dunedin City Council* [[1994] NZRMA 145 at 153] it was said that there will be an error of law justifying interference with the decision of the Environment Court if it can be established that the Environment Court:
> >
> > > (i) applied a wrong legal test;
> > >
> > > (ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come;

---

62 *Simons Hill Station Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2014] NZHC 1362.

63 At [18] – [19].

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(d) The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for reconsideration by the High Court as a question of law: *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

(e) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law: *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna CC* HC Auckland M456/88, 7 August 1989.

(f) This Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Environment Court's decision: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81 – 82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

Substantive provisions

[104] This appeal involves several provisions of the RMA (as it stood in 2007). For convenience at this point I replicate what I see as the most important aspects of the provisions below:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

…

(b) *The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development*:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

…

31 Functions of territorial authorities under this Act

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

(b) the control of any actual or potential effects of the use, development, or protection of land…

32 Consideration of alternatives, benefits, and costs

(1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—

…

(c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1); or

(d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of the Schedule 1.

(2) A further evaluation must also be made by—

(a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and

…

(3) An evaluation must examine—

(a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

73 Preparation and change of district plans

(1) There shall at all times be one district plan for each district prepared by the territorial authority in the manner set out in Schedule 1.

(1A) A district plan may be changed by a territorial authority in the manner set out in Schedule 1.

(1B) A territorial authority given a direction under section 25A(2) must prepare a change to its district plan in a way that implements the direction.

(2) Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in Schedule 1.

(3) A district plan may be prepared in territorial sections.

(4) A local authority must amend a proposed district plan or district plan to give effect to a regional policy statement, if—

(a) the statement contains a provision to which the plan does not give effect; and

(b) 1 of the following occurs:

(i) the statement is reviewed under section 79 and not changed or replaced; or

(ii) the statement is reviewed under section 79 and is changed or replaced and the change or replacement becomes operative; or

(iii) the statement is changed or varied and becomes operative.

(5) A local authority must comply with subsection (4)—

(a) within the time specified in the statement, if a time is specified; or

(b) as soon as reasonably practicable, in any other case.

74 Matters to be considered by territorial authority

(1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, a direction given under section 25A(2), its duty under section 32, and any regulations.

(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to—

(a) Any—

(i) Proposed regional policy statement; or

(ii) Proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part 4; and]

(b) Any—

(i) Management plans and strategies prepared under other Acts; and

(ii) Repealed.

(iia) Relevant entry in the Historic Places Register; and

(iii) Regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing),—

to the extent that their content has a bearing on resource management issues of the district; and

(c) The extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.

(2A) A territorial authority, when preparing or changing a district plan, must—

(a) take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on resource management issues of the district; and

…

(3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition.

75 Contents of district plans

(1) A district plan must state—

(a) the objectives for the district; and

(b) the policies to implement the objectives; and

(c) the rules (if any) to implement the policies.

(2) A district plan may state—

(a) the significant resource management issues for the district; and

(b) the methods, other than rules, for implementing the policies for the district; and

(c) the principal reasons for adopting the policies and methods; and

(d) the environmental results expected from the policies and methods; and

(e) the procedures for monitoring the efficiency and effectiveness of the policies and methods; and

(f) the processes for dealing with issues that cross territorial authority boundaries; and

(g) the information to be included with an application for a resource consent; and

(h) any other information required for the purpose of the territorial authority's functions, powers, and duties under this Act.

(3) A district plan must give effect to—

(a) any national policy statement; and

(b) any New Zealand coastal policy statement; and

(c) any regional policy statement.

(4) A district plan must not be inconsistent with—

(a) a water conservation order; or

(b) a regional plan for any matter specified in section 30(1).

(5) A district plan may incorporate material by reference under Part 3 of Schedule 1.

290 Powers of Environment Court in regard to appeals and inquiries

(1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.

(2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.

(3) The Environment Court may recommend the confirmation, amendment, or cancellation of a decision to which an inquiry relates.

(4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation

290A Environment Court to have regard to decision that is subject of appeal or inquiry

In determining an appeal or inquiry, the Environment Court must have regard to the decision that is the subject of the appeal or inquiry.

293 Environment Court may order change to policy statements and plans

(1) After hearing an appeal against, or an inquiry into, the provisions of any policy statement or plan that is before the Environment Court, the Court may direct the local authority to—

(a) prepare changes to the policy statement or plan to address any matters identified by the Court:

(b) consult the parties and other persons that the Court directs about the changes:

(c) submit the changes to the Court for confirmation.

(2) The Court—

(a) must state its reasons for giving a direction under subsection (1); and

(b) may give directions under subsection 1 relating to a matter that it directs to be addressed.

(3) Subsection (4) applies if the Environment Court finds that a policy statement or plan that is before the Court departs from—

(a) a national policy statement:

(b) the New Zealand coastal policy statement:

(c) a relevant regional policy statement:

(d) a relevant regional plan:

(e) a water conservation order.

(4) The Environment Court may allow a departure to remain if it considers that it is of minor significance and does not affect the general intent and purpose of the policy statement or plan.

(5) In subsections (3) and (4), **departs** and **departure** mean that a policy statement or plan—

(a) does not give effect to a national policy statement, the New Zealand coastal policy statement, or a relevant regional policy statement; or

(b) is inconsistent with a relevant regional plan or water conservation order.

Schedule 1

Preparation, change, and review of policy

Statements and plans

…

Part 1

Preparation and change of policy statements

And plans by local authorities

…

14 Appeals to Environment Court

(1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—

(a) a provision included in the proposed policy statement or plan; or

(b) a provision that the decision on submissions proposes to include in the policy statement or plan; or

(c) a matter excluded from the proposed policy statement or plan; or

(d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.

(2) However, a person may appeal under subclause (1) only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.

(a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and

(b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

(3) The following persons may appeal to the Environment Court against any aspect of a requiring authority's or heritage protection authority's decision:

(a) any person who made a submission on the requirement that referred to that matter:

(b) the territorial authority.

(4) Any appeal to the Environment Court under this clause must be in the prescribed form and lodged with the Environment Court within 30 working days of service of the notice of decision of the local authority under clause 11 or service of the notice of decision of the requiring authority or heritage protection authority under clause 13, as the case may be.

(5) The appellant must serve a copy of the notice in the prescribed manner.

15 Hearing by the Environment Court

(1) The Environment Court shall hold a public hearing into any provision or matter referred to it.

(2) If the Environment Court, in a hearing into any provision of a proposed policy statement or plan (other than a proposed regional coastal plan), directs a local authority under section 293(1), the local authority must comply with the Court's directions.

(3) Where the Environment Court hears an appeal against a provision of a proposed regional coastal plan, that appeal is an inquiry and the Environment Court—

(a) Shall report its findings to the appellant, the local authority concerned, and the Minister of Conservation; and

(b) May include a direction given under section 293(1) to the regional council to make modifications to, deletions from, or additions to, the proposed regional coastal plan.

(emphasis added)

Discussion

Introduction

[105] I need to make it abundantly clear at the outset that I am not here concerned with any factual findings made by the Environment Court to the extent that they do not disclose an error of law. This is an appeal on *questions of law* alone.

[106] I intend to resolve the four discrete issues I have identified above at [101] and then apply those resolutions to the ten grounds of appeal raised by Federated Farmers. However, the reality is that the issues raised herein are, for the most part, interpretive issues bearing upon the jurisdiction of the Environment Court and its constituent Judge(s) and Commissioner(s).

Plan changes generally

[107] Given that this entire proceeding concerns, to varying degrees, the roles of the Council and the Courts in respect of changes to district plans, it is appropriate to briefly discuss the plan change regime under the RMA. An appropriate starting point is to repeat the purpose of the RMA, as set out in s 5:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[108] Sections 6 – 8 set out respectively, "matters of national importance" (which includes the protection of outstanding natural features and landscapes), "other matters" and the "Treaty of Waitangi". The matters identified in those sections are afforded particular status by the RMA, which inform the purpose in s 5. I note for clarity that ss 5 – 8 collectively comprise Part 2 of the RMA.

[109] The "functions, powers, and duties of local authorities" are set out at ss 30 – 36AA of the RMA. Section 31 is relevantly set out above, which sets out the functions of a territorial authority, the purpose of which being to give effect to the RMA.[64] Section 32 imposes certain obligations upon a local authority to prepare evaluative reports when proposing an activity for which such a report is required. Sections 39 – 42 then set out the "powers and duties in relation to hearings".

[110] The purpose of district plans is described by s 72:

---

[64] Resource Management Act 1991, s 31(1)(a) and (b).

72 Purpose of district plans

The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

[111] By s 73, the local authority is obliged at all times to have a district plan, prepared in accordance with schedule 1,[65] which may be changed in the manner prescribed by the same.[66] A district plan may also be prepared in territorial sections.[67] When preparing or changing a district plan, a local authority must do so in accordance with:[68]

(a) its functions under section 31; and

(b) the provisions of Part 2; and

(c) a direction given under section 25A(2); and

(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and

(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and

(f) any regulations.

In addition, it must have regard to, inter alia, proposed regional policy statements, proposed regional plans, management plans and strategies prepared under other acts, relevant entries in the historic places register and certain regulations.[69]

[112] The contents of district plans are governed by s 75, which mandates, as noted above at [104], that the district plan is to state the objectives for the district, the policies to implement the objectives and the rules (if any) to implement the policies.[70] There are also the range of permissible matters that a district plan may state:[71]

(a) the significant resource management issues for the district; and

---

65 Section 73(1).
66 Section 73(2).
67 Section 73(3).
68 Section 74(1)(a) – (f).
69 Section 74(2).
70 Section 75(1).
71 Section 75(2).

(b) the methods, other than rules, for implementing the policies for the district; and

(c) the principal reasons for adopting the policies and methods; and

(d) the environmental results expected from the policies and methods; and

(e) the procedures for monitoring the efficiency and effectiveness of the policies and methods; and

(f) the processes for dealing with issues that cross territorial authority boundaries; and

(g) the information to be included with an application for a resource consent; and

(h) any other information required for the purpose of the territorial authority's functions, powers, and duties under this Act.

A district plan is also required not to be inconsistent with certain other planning documents.[72] By section 76 a local authority is also empowered to make certain rules to accompany the district plan.

Issue (a) – ability to delete a notified issue

[113] In my view this issue can be disposed of expeditiously. Federated Farmers and the Council are in general agreement on this point. They say that the Environment Court has formed an erroneous view of the law, and has sought to impose an artificial limit on the powers of Commissioners in circumstances such as this. I agree. This approach, quite simply, is unfounded in terms of both the statutory provisions and prior case law.

[114] This point of law in my view could be disposed of on the sole ground that the provisions of the RMA are not qualified in the manner contended for by the Environment Court. The mandatory and permissible contents of district plans are set out in s 75. A statement of significant resource management issues may be included.[73] By sch 1, cl 6 of the RMA a person is permitted to make submissions on the proposed plan as notified. This is expressed in unqualified terms and, in the absence of clear language or Parliamentary intent to the contrary, there is no need to

---

[72] Section 75(3) – (4).
[73] Section 75(2)(a).

read into this qualifications as to the scope or content of submissions. Finally, by a combination of sch 1, cls 8B and 10 the local authority is required to hold a hearing into those submissions and provide a decision with reasons for accepting or rejecting such submissions (again in their entirety). The logical result is that the Council (and its Commissioners) are not only permitted to consider submissions on such 'issue statements', but are obliged to give reasons for accepting or rejecting such submissions.

[115] In addition, counsel for both Federated Farmers and the Council have directed me to authorities in which the precise course of action described as "*ultra vires*" by Judge Jackson has been pursued by the Courts, and thereby implicitly endorsed.[74] While these are all Environment Court decisions, they are entirely consistent with the view I have formed in relation to this matter and therefore reinforce my conclusion.

[116] Federated Farmers succeed on their first error of law. I find that the Environment Court was wrong to hold that "an issue once notified cannot be deleted from a notified plan or plan change". This however in my view is not the death knell of the greening issue. The finding on this ground simply records that the specific method used to achieve reinsertion was unavailable as a matter of statutory construction. Whether other means may be available, or indeed whether this is a real concern here to any major extent, are other matters. As will appear later in this judgment, my finding on this question does not affect substantively the ultimate outcome of this appeal.

Issue (b) – the obligation under s 290A

[117] Section 290A RMA is mandatory and requires the Environment Court in determining an appeal to have regard to the decision appealed against. Issue (a) noted at [113] above related to the decision of the Environment Court with respect to 'greening'. Namely, Federated Farmers sought to question the *Sixth Decision* of the Environment Court in reinstating the reference to 'greening' in the issues statement.

---

[74] *Minister for the Environment v Hurunui District Council* EnvC Christchurch C110/99, 15 June 1999; *Cammack v Kapiti Coast District Council* EnvC Wellington W082/2009, 16 October 2009; *Carter Holt Harvey Forests Ltd v Tasman District Council* (1998) 4 ELRNZ 93 (EnvC).

The present issue concerning s 290A also relates solely to that aspect of the *Sixth Decision* concerning 'greening'. Because of the decision reached above in respect of issue (a), and the decision that is to follow on issue (c) (discussed below at [119] and following) I need not reach a conclusion on this, and do not do so. I do however make several observations of general application concerning the s 290A obligation:

(a) The decision that is the subject of the appeal must be given genuine attention and thought, and accorded weight as is appropriate. However, such consideration does not mean the appellate body is in any way beholden to the decision appealed from; it is entitled to depart when appropriate.[75] It has been said that the decision under appeal is not "some sort of arresting anchor point" and that it is "a counsel of efficiency rather than obedience".[76]

(b) There is no presumption that the Environment Court on appeal will follow the decision appealed from.[77] Commonsense dictates that if that were the case it would be quite antithetical to the de novo role of the Environment Court on appeal. Similarly, the requirement, imposed as it is on the Environment Court, the appellate body, places no onus on the appellant to demonstrate the first instance decision was not correct.[78] It is trite law however, that a de novo appeal has never warranted an appellate body proceeding in ignorance of the decision appealed from.[79]

(c) The appellate body is not obliged to give reasons for departure from the decision appealed from, though the requirement expressed at [117](a) above would normally be manifest in a requirement that an explanation be given as to why the Environment Court is so

---

75 *Man O'War Station Ltd v Auckland Regional Council* [2011] MZRMA 235, (2011) 16 ELRNZ 475 (HC) at [65].

76 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2014] NZHC 2492 at [40].

77 *Blueskin Bay Forest Heights Ltd v Dunedin City Council* [2010] NZEnvC 177 at [53]; *Waterfront Watch Inc v Wellington City Council* [2012] NZEnvC 74 at [146].

78 *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 298, [2014] NZRMA 181 at [30].

79 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [29].

departing.[80] As a matter of practice, reasons for departure from the first instance decision should be given.

[118] The s 290A obligation is not onerous. The first instance decision simply assumes the mantle of another element of the factual matrix which the de novo decision of the Environment Court must take into account in reaching its determination. Many previous decisions purport to fulfil this obligation via a single paragraph which simply records that the Environment Court has had regard to the decision appealed against. While this may fulfil the requirement of having regard (or at least making it clear that such regard has been had), the obligation to provide reasons for departure must still be borne in mind.

Issue (c) – Jurisdiction pursuant to s 293

Introduction

[119] As I have previously signalled, this question formed the central issue for determination in this appeal. Perhaps more importantly, this is an issue of some moment in terms of jurisdictional limits and the extent to which the Environment Court may theoretically assume a planning role. However, because of the conclusion I have reached in respect of issue (a) above the importance of this issue might be said perhaps to have reduced to some extent. This is because from one perspective it could be argued that the Environment Court might only be able to exercise its jurisdiction in terms of s 293 as a result of its finding that the deletion of the greening issue was ultra vires. That finding as I have noted above was incorrect. It could be argued therefore it naturally follows that, to whatever extent the jurisdiction under s 293 relied upon the reinsertion of the greening issue, at least on the basis of vires, the decision to give effect to that statement through objective 3B was equally flawed.

[120] But, for present purposes I disagree with that proposition, for reasons which I will now outline regarding s 293. I leave that aspect on one side and turn to consider the fundamental purpose of s 293 here. On its face, section 293 is broadly worded.

---

[80] At [67], citing *H B Land Protection Society Inc v Hastings District Council* EnvC Wellington W57/2009, 28 July 2009.

It contains no statutory restrictions on the Court's discretion to direct that changes be prepared to a local authority's district plan to address "any matters" identified by the Court. The fundamental purpose of s 293 is to give the Court power to direct changes to a proposed plan (or plan change), which are not otherwise within the Court's jurisdiction due to the scope of the appeal before it.

[121] But the Courts have consistently held that this power is not unlimited. Section 293 is to be exercised cautiously and sparingly as:

(a) It deprives potential parties or interested persons of the right to be heard by the local authority;

(b) The Court is to discourage careless submissions and references; and

(c) The Court has to be careful not to step unnecessarily into the planning arena.

[122] The discretion must be exercised in a manner consistent with the Environment Court's role as a judicial body with appellate jurisdiction given it by statute.

[123] In *Mawhinney v Auckland City Council*,[81] Wylie J stated:

> I must however express reservations about the process followed by the Environment Court. The Court's jurisdiction on an appeal under cl 14 of the Act is not unlimited. As is noted in "*Environment and Resource Management Law*", the Court is primarily a judicial body with appellate jurisdiction. It is not a planning authority with executive functions. When it is dealing with an appeal in relation to a plan change, it must consider whether any proposed amendment goes beyond what is reasonably and fairly raised in the original submission and the notice of appeal. After hearing the appeal, the Court may, instead of allowing or disallowing the appeal, exercise its discretion under s 293 to direct the local authority to prepare changes to the plan to address matters identified by the Court. It cannot go beyond that.

---

81 *Mawhinney v Auckland City Council* (2011) 16 ELRNZ 608 at [111].

Interpretation of the Statute

[124] The starting point must of course be the plain words of s 293,[82] as informed by the plain words of the RMA, read in light of its purpose.[83] In addition, it is permissible to refer to "indications" in the enactment to further inform the ascertainment of meaning where appropriate.[84] I pause here for a moment to consider the proper approach to this interpretive exercise.

[125] In *Parris v Television New Zealand Ltd*,[85] Baragwanath J stated:[86]

> The exercise [of statutory interpretation] begins with the language used by Parliament in enacting the particular measure and consideration of the facts in its light. Where that yields no clear answer the Court will have recourse to well-settled techniques of statutory interpretation. Their purpose is to determine what result best squares with the policy of the measure insofar as that can be deduced from any pointers provided by Parliament, including the specific measure, the Interpretation Act 1999, and if necessary analogous legislation and the presumptions of the common law. With their aid the Court's function is to make a practical judgment as to how the classification is to be made.

[126] In the context of the RMA, but in relation to s 322, the decision of Greig J in *Zdrahal v Wellington City Council*,[87] is helpful:[88]

> The provisions of s 322 are to be given a fair, large and liberal construction to ensure the object and the purposes of the Act as a whole and it is not to be narrowly construed as by a pedantic grammarian.

This passage followed the replication of the oft-cited passage of Greig J in another RMA context from *NZ Rail Ltd v Malborough District Council*:[89]

> [Part 2]…of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a

---

82 *A-G v Associated Newspapers Ltd* [1994] 1 all ER 556 (HL) at 561; *CIR v Alcan NZ Ltd* [1994] 3 NZLR 439 (CA) at 443.
83 Interpretation Act 1999, s 5(1).
84 Section 5(2).
85 *Parris v Television New Zealand Ltd* (1999) 14 PRNZ 172 (CA).
86 At [11].
87 *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC).
88 At 706.
89 *NZ Rail Ltd v Malborough District Council* [1994] NZRMA 70 (HC) at 86.

> general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

[127] I therefore repeat that the starting point is always the plain words. Where there is no ambiguity, there is little issue. However, it is vital that the plain words are still cross-checked against the purpose of the Act "in order to observe the dual requirements of s 5."[90] I now turn to consider the plain words of s 293, the purpose of the RMA Act and previous case law.

The plain meaning of s 293

[128] On its face s 293 seems to establish a bipartite regime. The first aspect consists of subss (1) and (2) and permits the Environment Court, after hearing the appeal (or inquiry) into the provisions of the plan, to direct the local authority to prepare changes to the plan to address "any matters" identified by the Court, "to consult the parties and other persons that the court directs about the changes", and to require the local authority to "submit those changes back to the Court for confirmation". Reasons must be given for such a direction. However, there is no indication that the s 293 jurisdiction can only be invoked at the behest of a party to an appeal (or hearing), as opposed to the Court which happened here.

[129] The second aspect of s 293 is comprised of subss (3) – (5). In essence, this regime permits minor departures from various national planning documents to remain if the minor departure does not affect the general intent and purpose of the plan.

[130] Without more, the first aspect of s 293 appears to confer upon the Environment Court a power to assume a quite significant planning role.[91] The power to direct changes is qualified only by the fact that the matters directed must be "identified by the Court". The issue in the present case, as contended for by both Federated Farmers and the Council, is whether that broad prima facie jurisdiction is

---

90 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

91 However, as noted above it has been previously stated that "the [Environment] Court is primarily a judicial body with appellate jurisdiction. It is not a planning authority with executive functions.": *Mawhinney v Auckland City Council* (2011) 16 ELRNZ 608 (HC) at [11].

curtailed by either or both of (a) the subject of the appeals to the Environment Court; or (b) the subject of the Plan Change.

In light of the purpose

[131] First, the purpose of the Act, here the RMA, is plainly set out by s 5 which I have outlined at [107] above.

[132] This purpose is informed and guided by ss 6 – 8, which detail matters to which the Court must have regard. This relationship was recently framed in succinct terms by the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*:[92]

> [26] Section 5 sets out the core purpose of the RMA — the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. *As between ss 6 and 7, the stronger direction is given by s 6 — decision-makers "shall recognise and provide for" what are described as "matters of national importance"*, whereas s 7 requires decision-makers to "have particular regard to" the specified matters. The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. *The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management*. The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).
>
> …
>
> [28] It is significant that three of the seven matters of national importance identified in s 6 relate to the preservation or protection of certain areas, either absolutely or from "inappropriate" subdivision, use and development (that is, ss 6(a), (b) and (c)). Like the use of the words "protection" and "avoiding" in s 5, the language of ss 6(a), (b) and (c) suggests that, within the concept of sustainable management, *the RMA envisages that there will be areas the natural characteristics or natural features of which require protection from the adverse effects of development*. In this way, s 6 underscores the point made earlier that protection of the environment is a core element of sustainable management.
>
> (Emphasis added)

---

92 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442 at [26].

[133] Next, the purpose of district plans is expressly stated in s 72 of the RMA:

> The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions *in order to achieve the purpose of this Act*
>
> (Emphasis added).

[134] So, the ultimate purpose of district plans is to achieve the purpose of the RMA, as set out above. As a matter of logic, if a district plan is not achieving the purpose of its existence, then it would be absurd to let that plan (or plan change) stand undisturbed by the limited planning role explicitly conferred upon the Environment Court. However, I also accept that the plan change regime created by the RMA is such that it was originally envisaged that substantive decisions relating to planning documents are to be subject to the regimented processes constituted by the RMA,[93] not amenable to alteration at the whim of the Environment Court for the present time sitting.

[135] A purposive analysis does little to narrow the ambit of the prima facie broad powers conferred on the Environment Court on appeal, or to resolve the apparent tension between these two principles which might be seen to be in conflict. I turn now to review the role of the Environment Court on appeal.

The role of the Environment Court on appeal

[136] It is trite law that the Environment Court's role is a judicial one, and does not ordinarily intrude into the realm of planning, a domain generally the sole occupation of the local authority.[94] This is important as it highlights the benefit of having matters of wide ranging import subject to the regimented and rigorous processes constituted by the RMA,[95] being attended to by the 'at source'[96] authority, rather than a Court divorced from the minutiae of public sentiment and consciousness. In

---

93 *Re Thames-Coromandel District Council* EnvC Wellington W034/09, 15 May 2009 at [17].

94 *Mawhinney v Auckland City Council* (2011) 16 ELRNZ 608 (HC) at [11]; *Auckland Council v Byerley Park Ltd* [2013] NZHC 3402 at [21].

95 *Re Thames-Coromandel District Council* EnvC Wellington W034/09, 15 May 2009 at [17].

96 *Kaitiaki Tarawera Inc v Rotorua District Council* (1998) 3 ELRNZ 181 (EnvC), citing *Green & McCahill Properties Ltd v North Shore City Council* (1991) 15 NZTPA 79 (PT).

fact, it has been expressly stated that s 293 does not entitle the Environment Court to shed itself of its appellate role and step into a planning role.[97]

[137] In a slightly different context, the Supreme Court, in *Waitakere City Council v Estate Homes Ltd*,[98] said:[99]

> The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision to the extent that it is in issue on appeal. Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal. In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.

[138] However, as I have noted above, there is a clear tension between these judicially enunciated principles concerning the dichotomy between appellate judicial functions and planning functions, and the plain fact that Parliament has vested in the Environment Court, as an appellate body, what appears at first blush to be broad planning powers. What therefore falls for determination is how these two concepts come together to ensure the interpretation afforded to s 293 is congruent with clear judicial comment and an equally clear statutory provision enacted by Parliament. I consider this interplay in the discussion on the s 293 jurisdiction below. However, because this issue was raised before me as having some relevance here, I first set out the test for determining whether a submission is 'on' a plan change.

The test for determining whether a submission is 'on' a Plan Change

[139] This issue was recently the subject of detailed consideration by Kós J in *Palmerston North City Council v Motor Machinists Ltd*.[100] His Honour broke the analysis down into a review of the leading cases,[101] which was followed by a

---

97 *Canterbury Regional Council v Apple Fields Ltd* [2003] NZRMA 508 (HC) at [45], citing, inter alia, *Leith v Auckland City Council* [1995] NZRMA 400 (PT); *Hardie v Waitakere City Council* EnvC Auckland A69/2000, 7 June 2000; *Haka International NZ Ltd v Rodney District Council* EnvC Auckland A109/2001, 19 October 2001.

98 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

99 At [29].

100 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [46] – [83].

101 These included *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003; *Option 5 Inc v Malborough District Council* (2009) 16 ELRNZ 1 (HC); *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC). In addition the decision in *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* EnvC Christchurch C49/2004, 23 April 2004 was considered and discounted by Kós J as being

detailed discussion. The following broad principles can be elucidated from His Honour's decision and the cases cited therein:

(a) From the *Clearwater* discussion:[102] the question of whether a submission is 'on' a plan change is one of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case". The approach adopted by William Young J was one that focuses on the extent to which the variation in question alters the proposed plan. In adopting this approach William Young J adopted a two-pronged framework:

(i) A submission is only 'on' a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo".

(ii) If the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a "powerful consideration" militating against a finding that the submission was truly 'on' the plan change.

(b) From the *Halswater* discussion:[103] Kós J noted here that William Young J drew on *Halswater* in formulating the above test in *Clearwater*. The crux of *Halswater* is the comment to the effect that if a submitter seeks a remedy that is much beyond what is contemplated by the plan change, they will have to resort to alternate avenues to achieve that remedy. The Environment Court in that case made the specific comment that "submissions on a plan change cannot seek a rezoning … if a rezoning is not contemplated by a plan change."

---

incorrect to the extent it sought to depart from *Clearwater*.

102 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [48] – [57].

103 At [58] – [65].

(c) From the *Option 5* discussion:[104] the proposition put forward in this case is reducible to the principle that simply because a matter is proposed in a plan change does not mean that a submission seeking to extend that proposal will be 'on' a plan change. In *Option 5* it was said that an approach such as this would be "too crude" and that ultimately the *Clearwater* test needs to be applied.

[140] Ordinarily this issue will arise where a party is attempting to make submissions on a plan change which are beyond the scope of what was intended by the local authority. In such cases, the submissions are moot because they seek to address an issue which was not 'live'. I take it that Federated Farmers and the Council here are making the related point that the Environment Court cannot invoke the s 293 jurisdiction of its own motion to equally address an issue that is not live. However, that does ignore the prima facie position that the raison d'être of s 293 is, to some extent, to alter the initial reference by directing that changes be made. Implicit in this concept is the possibility that an issue that was once not 'live', could so become as a result of the jurisdiction.

[141] I would be willing to accept as a proposition of general, but not universal, application that the s 293 jurisdiction should ordinarily be invoked only to address live issues, and not to create them. However, at least to a significant extent, that distinction can be put to one side. I am of the view that in the present case this issue, is to a large degree, a question of fact, not one of law. I accept for the purposes of this present appeal that the issue of greening (and thereby pastoral intensification) was 'on' PC13 for the following reasons:

(a) PC13 as notified made express and unequivocal reference to the issue of greening as associated with increased irrigation. This reference was introduced at the behest of the local authority and marked a clear deviation from the status quo.

(b) The purpose of PC13 was stated to be to protect the "Mackenzie Basin from inappropriate subdivision, development and use." Quite

[104] At [66] – [68].

clearly issues associated with farming (including pastoral intensification) are capable of falling within the scope of that purpose.

(c) Submitters were alive to this issue as the Commissioners saw fit to pass comment on the matter on the basis of submissions on point. There is therefore no question that this was not an issue ventilated and contemplated by either the parties making submissions or the Commissioners.

[142] Having made express reference to these issues in PC13, the local authority cannot subsequently seek to disavow itself of the implications in this proceeding. I am reinforced in this view by the general pragmatism adopted by the Courts in determining whether a matter has been disclosed by a submission,[105] which is applicable by analogy to the approach taken to what a plan change itself (or an appeal) discloses.

[143] It therefore follows that Federated Farmers are not successful in terms of its Fourth error of law.

Jurisdiction under s 293

[144] The principles applicable to jurisdiction pursuant to s 293 are well rehearsed. However, their application is not so simple in this case as the Environment Court has invoked the jurisdiction of its own motion, rather than following the receipt of an application to do so would be more typical.

[145] As best I can tell, before me there was no real dispute between the parties as to the correct approach to be taken to s 293, so I record the principles succinctly:

(a) The primary purpose of s 293 is, in appropriate cases, to expand the "nature and extent of relief sought beyond the scope of the reference", though such relief must be referable to, and arise from, the original

---

[105] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 413; *Option 5 Inc v Malborough District Council* (2009) 16 ELRNZ 1 (HC at [15].

reference.[106] It has been said that "there must be a nexus between the reference itself and the changed relief sought".[107] Put simply, the matters must be within the scope of the plan change.

(b) Where the use of s 293 would have substantial consequences on persons who would have a "vital interest",[108] resort ought not to be had to the section lightly. This issue is particularly acute where the invocation of s 293 would have impacts on geographical regions outside the original contemplation of the plan change[109] or on subject matters not within its original contemplation.[110] In the latter two situations, it is likely that granting such relief would be beyond its jurisdiction.[111]

(c) Though the power conferred upon the Environment Court by s 293 is prima facie very broad, it does not confer a general discretion; it must be exercised judicially in accordance with the overall regime created by the RMA, and does not entitle the Environment Court to make planning decisions where it simply disagrees with decisions made by a planning authority.[112]

(d) In the case of s 293 relief sought by a party to an appeal, that relief must relate to the subject matter of the appeal and the original relief sought "as a matter of discretion".[113] Though the jurisdiction "is not limited to the express words of the reference", the relief sought must be a foreseeable consequence of the changes proposed in the

---

106 *Hamilton City Council v New Zealand Historic Places Trust/Pouhere Taonga* [2005] NZRMA 145 (HC) at [25].

107 At [25].

108 *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5-76].

109 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 at [468], citing *Hamilton City Council v New Zealand Historic Places Trust* [2005] NZRMA 145 (HC).

110 At [468]. See too *Friends of Nelson Haven and Tasman Bay (Inc) v Tasman District Council* EnvC Auckland A078/08, 16 July 2008 at [25].

111 *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZEnvC 224, citing *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [32] and [65].

112 *Auckland City Council v Byerley Park Ltd* [2013] NZHC 3402, [2014] NZRMA 124 at [21].

113 *Gardez Investments Ltd v Queenstown Lakes District Council* EnvC Queenstown C95/05, 4 July 2005 at [56]

reference.[114] The overarching consideration is one of procedural fairness.[115]

(e) Even where the Court has jurisdiction to resort to s 293, that does not mean it should so resort; it is a power that should be used sparingly.[116]

(f) Where the discretion is exercised, the Court cannot go beyond directing the local authority to prepare changes to the plan to address the matters identified by the Court.[117]

[146] The vast majority of cases contemplate the situation in which a party to an appeal invites the Court to invoke s 293 as a method of altering the original reference. However, in the present case, it seems that the Environment Court has invoked the jurisdiction of its own motion. This might be somewhat unusual, but nonetheless it is a situation contemplated by s 293.

[147] In this light, I am satisfied that it was open to the Environment Court to utilise s 293 in the way it did. Though I agree with this approach in substance, I am not in agreement with the test that was formulated by the Environment Court. Though I need not record a final position on this, aspects of a potentially correct test require that the matter(s) sought to be addressed with s 293 must ordinarily:

(a) be 'on' the plan change.

(b) be within the scope of submissions to the local authority (and therefore form part of its decision).

(c) be within the scope of the appeals and the relief sought.[118] In determining whether this requirement has been met, the Court will

---

114 *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [73].

115 At [74].

116 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 at [469], citing *Re an application by Vivid Holdings Ltd* (1999) 5 ELRNZ 264 (EnvC). See too *Gordon v Auckland City Council* [2010] NZEnvC 163 at [14], where Judge Newhook stated that the utilisation of s 293 is a step "not lightly taken".

117 *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [111].

118 *Briggs v Christchurch City Council* EnvC Christchurch C045/08, 24 April 2008 at [253].

> take a broad and pragmatic approach, unbridled by legal nicety. However, an unduly broad approach is equally inappropriate. Any 'matter' identified must be within the general tenor of the appeal.[119]

[148] However, there may be some narrow exceptions to this general approach in circumstances including but not limited to situations where there is:

(i) an inadequate s 32 report.

(ii) a failure to comply with s 74 (including preparation in accordance with the provisions of Part 2).

(iii) a more than minor deviation from one of the matters referred to in s 293(3), whether or not raised on appeal.

[149] Any exception would normally be a condition precedent to validity of a plan change. In these situations, where the failure has a material bearing on the plan change, I am of the view that there would "be some appropriate basis for the Court to determine to exercise its discretion."[120] Moreover, in circumstances falling within that narrow exception it would be inappropriate to hold that the Environment Court did not have jurisdiction to redress a failure at planning level to comply with a mandatory obligation. In my view, this is a case falling within such an exception. The reasons for this finding are:

(a) There has been a positive and unchallenged final decision that the Mackenzie Basin is an outstanding natural landscape. This is a finding from PC13. Section 6(b) RMA not only requires, but mandates, that all persons exercising functions and powers under the Act shall recognise and provide for the "protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development."

---

[119] For example, if a party appeals against the decision of a local authority in relation to density of residential subdivision, the appeal is naturally constrained to that point. The Environment Court would not have jurisdiction to address all land use issues, or even all subdivision, or all density issues.

[120] *Thacker v Christchurch City Council* EnvC Christchurch C026/09, 6 May 2009 at [91].

(b) Quite apart from the issue of greening, at a minimum, Policy 3A of PC13 recorded that one of its purposes was to recognise the Mackenzie Basin as an outstanding natural landscape and to protect the *zone* from inappropriate subdivision, use and development. These words are verbatim replications of the s 6 test. Broad protection was therefore squarely at the fore in PC13.

(c) Similarly, the intention of Objective 3A was to "protect and sustain the outstanding natural landscapes and features of the district for present and future generations".

[150] The issue therefore seems to be that the Mackenzie District Council saw fit to embark on a course of action with a substantially broad remit, but arguably it failed to specifically implement that broad aim. Put simply, the broad purpose was to protect the Mackenzie Basin. The specific policies and objectives crafted to meet that aim, it could be said, were inadequate. In large part they sought to deal principally with housing and other related development. Arguably, that is not congruent with the wider purpose of seeking to recognise the region as an outstanding natural landscape. This recognition has since occurred. Once that did happen, the Environment Court was required by the mandatory direction in s 6, to recognise and provide for its protection.

[151] I am reinforced in this conclusion by the wide ranging nature of the appeals which were lodged here against the Commissioners' decision. In many cases the appeals were said to be against the entirety of the decision. Where a party drafts broadly in this manner, but actually may intend only to appeal certain parts, then there can be no complaint that its imprecise language has led to an unintended consequence. In this regard, I note that the prayer for relief in the Wolds' appeal recorded, inter alia:

> Such further or other relief as may be rational and applicable having regard to all the circumstances and to achieve a rational zone change.

[152] This is extremely broad. It must be remembered, that the Environment Court, on appeals from local authorities, can face wide-ranging contentions, between which

it must seek to do justice. I am therefore inclined to the view that the notices of appeal were sufficiently broad to confer upon the Environment Court jurisdiction to consider matters in the round, including the deleted issue.

[153] While I am in significant agreement with the general substantive outcome reached by the Environment Court, there are still cogent objections to the manner in which it deployed the s 293 jurisdiction here. On this aspect I find:

(a) The Environment Court may have stepped beyond its role pursuant to s 293 by drafting the proposed changes. The jurisdiction is to direct that changes be made, not to make the changes and direct that they be implemented.

(b) The Court was ill-equipped to carry out the s 32 analysis of the proposed changes given their extent. Further, where significant changes are proposed by the Environment Court, the Council should be directed to publicly notify the changes so comment is sought and received on each issue.

[154] In my view, this is a case where the changes proposed by the Environment Court were so wide ranging and of such import that I consider the summary process adopted by the Court for dealing with the proposed changes was inadequate. Thus, I think the appropriate course here is to refer the matter back to the Environment Court with the following directions:

(a) Given that the main issue here is a failure to consider specific policies and objectives for addressing the broad prohibition on inappropriate subdivision, use and development contained in both PC13 and s 6(b) RMA, it is this broad failure that must be addressed by the Council. The specific changes proposed by the Environment Court should assume the position of recommendations.

(b) A new s 32 report will be necessitated in order to enable full consideration of when the "most appropriate" threshold will be met.

This is particularly so in light of the finding that the Mackenzie Basin is an outstanding natural landscape.

(c) Any changes prepared by the Council should be publicly notified. These are matters of vital importance to the region, which need to be engaged by the public. In fact, once the changes are made, the entire plan change should again be notified.

[155] The practical result of the findings I have reached on this issue resounds across almost all grounds of appeal. In fact, in many ways it is a substantial resolution to them, For that reason, as is reflected in my conclusions on each claimed error of law, I need not specifically address each error.

Summary of findings

[156] This has been a complex issue. For brevity, I record the most important aspects of my findings on the s 293 jurisdiction. First, I have found that the orthodox test is that the matter sought to be addressed must be 'on' the plan change, within the scope of submissions to the council, and be within the scope of the appeals to the Environment Court and the relief there sought. However, this orthodox position is not without exception.

[157] Applied to the present case, I have reached a view that quite apart from the deletion of the 'greening' issue, PC13 is broader in scope than that contended for by either party. It sought to protect what is, now certainly, an outstanding natural landscape from inappropriate subdivision, use and development. The failure here was by the Council to not include sufficient policies and objectives to meet that aim. Not only was this an aim of PC13, but doing so is rendered obligatory by s 6(b) RMA. There are also a suite of provisions which require the Council to consider s 6. I consider they failed properly to do so here.

[158] Moreover, apart from that basis for my findings, I am satisfied that the appeals to the Environment Court were sufficiently broad to enable it to pursue the course it ultimately elected.

[159] Notwithstanding my agreement with the substantive decision reached by the Environment Court, there were procedural deficiencies that require rectification.

Issue (d) – Interrelationship between ss 290 and 293

[160] It is my understanding that this issue was effectively abandoned by counsel for the parties at the hearing before me. I do not therefore need to consider this issue further. However, if I am wrong as to this aspect, I reserve leave to the parties to file memoranda, and I will deal with this issue on the papers as an addendum to this judgment.

Result

First error of law

[161] Federated Farmers succeeds on this ground of appeal. The Environment Court was incorrect to hold that an issue, once notified, cannot be deleted from a plan change. It therefore follows that, on this basis, the Environment Court had no jurisdiction to address the issue of greening of the Mackenzie Basin.

Second error of law

[162] I reach no conclusion on this ground of appeal as the practical effect of Federated Farmers succeeding on the first ground of appeal renders this ground redundant.

Third error of law

[163] Federated Farmers fails on this ground of appeal. This is a rare case where the Environment Court was, broadly speaking, entitled to pursue the course of action it did.

Fourth error of law

[164] Federated Farmers fails on this ground of appeal. The legal test it advocates for is not directly transferrable to the issue in question. In any event I find that the

Environment Court was entitled, as a matter of fact, to find that the issue of greening (and thereby pastoral intensification) was 'on' PC13.

Fifth, sixth, seventh, eighth and ninth errors of law

[165] Because of the findings I have reached in terms of the third claimed error of law, these grounds of appeal almost wholly fall away. These matters will again be addressed by the Environment Court and the Council in accordance with the directions to the Environment Court that will accompany this decision.

[166] In addition, on many of the remaining claimed errors of law, there were either mixed issues of law and fact, or wholly factual disputes.

Tenth error of law

[167] At the hearing this ground of appeal was effectively abandoned and I therefore do not need to consider it further. If I am wrong on this aspect as I have noted, I reserve leave to the parties to file further submissions on this point and I will determine it on the papers.

Costs

[168] Though there was no substantial contradictor in this case, each party has had some measure of success on appeal. I am inclined to the view that costs should lie where they fall. If the parties disagree and costs are sought, then I direct:

(a) The party or parties claiming costs shall file and serve submissions within twenty working days of this judgment being released.

(b) The other party shall file and serve response submissions within fifteen working days following receipt of the other party's submissions.

(c) I will then deal with the issue of costs on the papers.

Relief

[169] While I acknowledge that this Court is seized of the ability, in appropriate circumstances, to substitute the decision that should have been made by the Environment Court,[121] this is not in my view, such a case. That is particularly so given the allegations of inadequacy in terms of s 32.[122] This is a case where it is appropriate to refer the matter back to the Environment Court for determination in light of the findings made here on the points of law.[123]

[170] I therefore make the following orders–

(a) The appeal against the *Sixth Decision* is allowed. The decision of the Environment Court is quashed to the extent it found that the deletion of the 'greening' issue was ultra vires.

(b) The appeal against the *Seventh Decision* is substantively dismissed, though procedurally it succeeds to a limited point. I therefore quash the *Seventh Decision* and refer it back to the Environment Court for reconsideration with the following directions:

(i) Section 293 was able to be utilised. A more appropriate test is set out in this judgment.

(ii) The directions to the Council should be to prepare changes, not to implement already prepared changes.

(iii) In light of the Environment Court's finding that the true scope of PC13 is determined to be much broader than originally thought by the Council, a new s 32 Report is required and will need to be commissioned by the Council to address the changes and matters identified by the Environment Court.

---

121 *Landrover Owners Club (Otago) Inc v Dunedin City Council* (1998) 4 ELRNZ 252 (HC).
122 *Taylor v Hahei Holidays Ltd* [2006] NZRMA 15 (CA).
123 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010] NZRMA 477 (HC).

(iv) The entire varied plan change should again be publicly notified by the Council to enable the community to be consulted and to engage with what is being proposed.

(v) Following consultation, the Council should submit the final changes to the Environment Court for confirmation.

.....
Gendall J

Solicitors:
Duncan Cotterill, Christchurch
Tavendale and Partners, Christchurch
Cooper Rapley, Lawyers, Palmerston North

Annexure A

Objective 3A – Outstanding Landscapes

To protect and sustain the outstanding natural landscapes and features of the District for present and future generations.

Policy 3A – Recognition of Mackenzie Basin

To recognise the Mackenzie Basin as an outstanding natural landscape and through the Mackenzie Basin Subzone within the Rural Zone, to protect the Basin from inappropriate subdivision, use and development.

Policy 3B – Economy, Environment and Community

To encourage a healthy productive economy, environment, and community within, and maintain the identity of, the Mackenzie Country.

Policy 3C – Adverse Effects of Sporadic Development

To avoid the adverse effects on the environment of sporadic development and subdivision.

Policy 3D – Adverse impacts of Buildings and Earthworks

To avoid adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from buildings, domestication, structures, earthworks, tracks and roads.

Policy 3E – Limitations on Residential Subdivision and Housing

To only provide for residential subdivision and housing development within identified urban areas of the Basin (Twizel and Lake Tekapo) and within identified or approved building nodes.

Policy 3F – Landscape Carrying Capacity

To recognise the diversity of physical settings and landscapes within the Mackenzie Basin and the varying capacity of these to absorb built development.

Policy 3G – Approved Building Nodes

New building nodes will only be granted as "approved building nodes" where the Council is satisfied [of various matters].

Policy 3H – Extensions to Existing Identified Nodes

Extensions to existing identified building nodes will only be granted where the Council is satisfied that all the matters listed above in Policy 3G are satisfied other than items 8 and 13, and that there is no longer sufficient land available within the identified node for the operational requirements of the property.

Policy 3I – Farm and Non-Residential Buildings

Farm and other non-residential buildings, other than farm buildings that require a remote location, are required to locate within identified or approved building nodes.

Policy 3J – Remote Farm Buildings

To recognise that some farm buildings are required because of their function to locate away from building nodes and to provide for these buildings subject to location, design and external appearance controls.

Policy 3K – Lakeside areas

To avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins,

Policy 3L – Subdivision

(a) *To provide for subdivision of land for non-residential purposes only where this subdivision does not have the potential to impact on the landscape values and character of the immediate wider area, and will not diminish the sustainability of existing and likely future productive use of farm holdings.*

(b) *To only provide for subdivision for residential purposes within identified or approved building nodes.*

Policy 3M – Manuka Terrace Rural-Residential Zone

To manage the adverse effects of existing and further subdivision and development on Manuka Terrace, Lake Ohau through the Residential – Mauka Terrace Zone.

Policy 3N – Design and Appearance of Buildings

To control the design, appearance and location of all buildings within the Mackenzie Basin to avoid or mitigate adverse impacts on the landscape values of the Basin Subzone.

Police 3O – Views from Roads

To manage landscape change so that the outstanding natural landscape values and features are protected and the screening of distinct views is avoided when viewed from public roads.

Objective 3B – Landscape Values

Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the District's overall character and amenity.

Annexure B

Objective 3A – Distinctive and Outstanding Landscapes

To protect and sustain the distinctive and outstanding natural landscapes and features of the District from subdivision and development that would detract from those landscapes.

Policy 3A – Recognition of Mackenzie Basin

To recognise the Mackenzie Basin as having a distinctive and highly valued landscape containing outstanding natural landscapes, and through the Mackenzie Basin subzone within the Rural Zone, to protect the Basin from inappropriate subdivision, use and development.

Policy 3B – Landscape Diversity

To recognise the diversity of physical settings and landscapes within the Mackenzie Basin and the varying capacity of these to absorb further subdivision, buildings and domestication, and in particular to recognise the suitability of existing farm base areas to accommodate and absorb additional buildings.

Policy 3C – Adverse impacts of Buildings and Earthworks

To avoid adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from residential, buildings, domestication, structures, earthworks, tracks and roads.

Policy 3D – Adverse Effects of Sporadic Development

To control non-farming buildings and subdivision in the Mackenzie Basin (outside of existing farm base areas) to ensure adverse effects on the environment of sporadic development and subdivision are avoided and to sustain existing and likely future productive use of farm holdings.

Policy 3E – Limitations on Residential Subdivision and Housing

To provide for residential subdivision and housing development in the Mackenzie Basin only within identified urban areas of the Basin (Twizel and Lake Tekapo), within the special zone for a possible small settlement at Lake Pukaki and within identified farm base areas.

Policy 3F – Design and Appearance of Buildings

To control the design, scale, appearance and location of residential buildings, and other buildings where reasonable, with regard to the purpose of the buildings, within the Mackenzie Basin to avoid, remedy or mitigate adverse impacts on the landscape and heritage values of the Basin Subzone.

Policy 3G – Lakeside areas

To avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins.

Policy 3H – Views from Roads

To require buildings to be set back from roads, particularly state highways, and to encourage the sensitive location of structures such as large irrigators to avoid or limit screening views of distinctive and outstanding landscapes of the Mackenzie Basin.

Policy 3I – Manuka Terrace Rural-Residential Zone

To avoid, remedy or mitigate the adverse effects of existing and further subdivision and development on Manuka Terrace, Lake Ohau through the Rural Residential – Manuka Terrace Zone.

Policy 3J – Renewable Energy

To recognise and provide for the use and development of renewable energy generation and transmission infrastructure and operations while, as far as practicable, avoiding, remedying or mitigating significant adverse effects on the outstanding natural landscapes and features of the Mackenzie Basin.

Objective 3B – Economy, Environment and Community

To encourage a healthy productive economy, environment, and community within, and maintain the identity of, the Mackenzie Country.

Policy 3K – Farming Buildings and Subdivision

To enable productive use of the land of the Mackenzie Basin and in particular farming use, by providing for farming buildings and subdivision to facilitate farming, while limiting their potential adverse impacts on important landscape values.

Objective 3C – Landscape Values

Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the District's overall character and amenity.

Policy 3L – Important Landscapes and Natural Features

To limit earthworks on steeper slopes, high altitude areas, and on land containing geopreservation sites to enable the landforms and landscape character of these areas to be maintained.

Policy 3M – Scenic Viewing Areas

To limit structures and tall vegetation within scenic viewing areas to enable views of the landscape to be obtained within and from these areas.

Rural Policy 3N – Impacts of Subdivision Use and Development

Avoid or mitigate the effects of subdivision, uses or development which have the potential to modify or detract from areas with a high degree of naturalness, visibility, aesthetic value, including important landscapes, landforms and other natural features.

Policy 3O – Tree Planting

To control the adverse effects of siting, design and potential wildling tree spread of tree planting throughout the District, to enable forestry to be integrated within rural landscapes and to avoid screening of distant landscapes.

Rural Policy 3P – In Harmony With The Landscape

To encourage the use of guidelines for the siting and design of buildings and structures, tracks, and roads, tree planting, signs and fences.

To encourage the use of an agreed colour palette in the choice of external materials and colours of structures throughout the district, which colours are based on those which appeal in the natural surroundings of Twizel, Tekapo and Fairlie.

Annexure C

A : SCHEDULE OF POLICIES 3B1 TO 3B16

Policy 3B1 – Recognition of the Mackenzie Basin's distinctive characteristics

To recognise that within the Mackenzie Basin's outstanding natural landscape there are:

(a) some areas where different types of development and use (such as irrigated pastoral farming or carbon forestry under an Emissions Trading Scheme) and/or subdivision are appropriate, and to identify these areas; and

(b) many areas where use and development beyond pastoral activities on tussock grasslands is either generally inappropriate or should be avoided.

– while encouraging a healthy productive economy, environment, and community within, and maintaining the identity of, the Mackenzie Country.

Policy 3B2 – Adverse Impacts of Buildings and Earthworks

To avoid adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from residential buildings, domestication, structures, earthworks, tracks and roads except in particular areas under policies below, and to remedy or mitigate the adverse effects of farm buildings and fences.

Policy 3B3 – Adverse effects of Sporadic Subdivision and Development

To control buildings and subdivision in the Mackenzie Basin Subzone (outside of approved farm base areas and other than for activities provided for in [the Renewable Energy] Policy 3B9 and subject to lesser controls on buildings and subdivision in areas of lower visual vulnerability) to ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated and to sustain existing and likely future productive use of land.

Policy 3B4 – Limits on subdivision and housing

(1) Subject to (2) below, to enable residential or rural residential subdivision and housing development in the Mackenzie Basin Rural subzone only within identified farm base areas;

(2) To encourage new residential or rural residential subzones in areas of low or medium vulnerability provided:

(a) objectives 1, 2, 4, 7, 8 and 11 of the Rural chapter are achieved; and

(b) the new subzones satisfy policy 3B6 below;

(3) To strongly discourage residential units elsewhere in the Mackenzie Basin.

Policy 3B5 – Development in farm base areas

(1) Subdivision and development of farm base areas which are in areas of high vulnerability to development shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:

(a) confining development to areas where it is screened by topography or vegetation or otherwise visually inconspicuous, particularly from public viewpoints and from views of Lakes Tekapo, Pukaki and Benmore provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Road

(b) integrating built form and earthworks so that it nestles within the landform and vegetation

(c) planting of local native species and/or non-wilding exotic species and management of wilding tree spread

(d) maintaining a sense of isolation from other development

(e) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing

(f) mitigating, the adverse effects of slight spill on the night sky.

(g) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(h) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access;

(2) Subdivision and development in farm base areas which are in areas of low or medium vulnerability to development shall:

(a) restrict planting to local native species and/or non-wilding exotic species

(b) manage exotic wilding tree spread

(c) maintain a sense of isolation from other development

(d) mitigate, the adverse effects of light spill on the night sky

(e) avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(f) install sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

3B6 – Potential residential and visitor accommodation activity subzones

(1) To mitigate the effects of past subdivision on landscape and visual amenity values and to encourage appropriate rural residential activities in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options (such as Rural-Residential) in areas of low or medium vulnerability to development where there are demonstrable advantages for the environment;

(2) where such subzones are located wholly or partly in areas of medium vulnerability then any development within shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:

(1) confining development to areas where it is visually inconspicuous, particularly from public viewpoints and from views up Lakes Tekapo and Pukaki provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Arm Road

(2) integrating built form and earthworks so that it nestles within the landform and vegetation

(3) planting of local native species and/or non-wilding exotic species and management of wilding tree spread

(4) maintaining a sense of isolation

(5) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing

(6) mitigating, the adverse effects of light spill on the night sky

(7) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance

(8) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access

Policy 3B7 – Lakeside protection areas

(c) To recognise the special importance of the Mackenzie Basin's lakes, their margins, and their settings in achieving Objective 3B.

(d) Subject to (c), to avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins.

(e) To avoid, remedy or mitigate the adverse impacts of further buildings and structures required for the Waitaki Power Scheme on the landscape values and character of the Basin's lakes and their margins.

(Note: Policy (c) has different objectives to achieve dependent on whether Rural Objective (7)3B or Utilities objective (Section 15)3 is being implemented.)

Policy 3B8 – Views from State Highways and Tourist Roads

(a) To avoid all buildings other structures, exotic trees and fences in the scenic grasslands listed in Appendix X and in the scenic viewing areas shown on the planning maps;

(b) To Require buildings to be set back from roads particularly state highways, and to manage the sensitive location of structures such as large irrigators to avoid or limit screening of views of the outstanding natural landscape of the Mackenzie Basin.

(c) To avoid clearance, cultivation or oversowing of all tussock grasslands adjacent to and within the foreground of views from State Highways and the tourist roads;

(d) To minimise the adverse effects of irrigation of pasture adjacent to the state highways or the tourism roads.

Policy 3B9 – Renewable Energy

To recognise and provide for the use and development of renewable energy generation and transmission infrastructure and operations within the footprint of current operations or on land owned by infrastructure operators as at 31 October 2011 while, as far as practicable, avoiding, remedying or mitigating significant adverse effects on the outstanding natural landscape and features of the Mackenzie Basin.

Policy 3B10 – Reverse sensitivity

To avoid, remedy or mitigate adverse reverse sensitivity effects of non-farm development on rural activities such as power generation, transmission infrastructure, state highways and the Tekapo Military Training Area.

Policy 3B11 Hazards

To avoid hazards caused by activities such as power generation; and water transport by canal and aqueduct on non-farm development and activities.

Policy 3B12

Traditional pastoral farming is encouraged so as to maintain tussock grasslands, subject to achievement of the other Rural objectives and to policy 3B8.

Policy 3B13 Farm Buildings

(1) Farm buildings should be avoided in lakeside areas, scenic viewing areas and scenic grasslands.

(2) Elsewhere in the Mackenzie Basin subzone farm buildings should be managed in respect of location, density of buildings, design, external appearance and size except in areas of low visual vulnerability where only density and size are relevant.

Policy 3B14 Pastoral intensification

(1) To ensure areas in the Mackenzie Basin which are proposed for pastoral intensification meet all the other relevant objectives and policies for the Mackenzie Basin subzone (including Rural Objectives 1, 2 and 4 and implementing policies);

(2) To link management of new areas of pastoral intensification with management of wilding exotic trees and other weeds;

(3) To avoid pastoral intensification in sites of natural significance, scenic viewing areas and scenic grasslands.

3B15 Wilding trees

To manage wilding tree spread by:

(a) confining it to areas of low or medium vulnerability as showing on Map [-];

(b) requiring landowners to remove wildings of identified tree species from their land (outside of areas identified in (a) before they seed.

3B16 Landscape aspects of subdivision

(1) In order to minimise its adverse effects, subdivision in the Mackenzie Basin Rural subzone will not be encouraged except:

- in farm base areas;
- in areas of low visual and/or ecological vulnerability;

(2) there should be a minimum lot size of 200 hectares (except in farm bases);

(3) further subdivision of lakeside protection areas (except for existing farm bases), scenic viewing areas and scenic grasslands will not be allowed;

(4) all lots in a subdivision shall be linked by mutually enforceable convenants and conditions (also enforceable by the Council) to remove exotic wildings from each other lot unless the trees are in an approved forest area;

(5) All subdivision should have regard to topographical and ecological restraints.

Annexure D (proposed objective 3B)

Objective 3B – Activities in Mackenzie Basin's outstanding natural landscape

(1) Subject to (2)(a), to protect and enhance the outstanding natural landscape of the Mackenzie Basin subzone in particular the following characteristics and/or values:

(a) the openness and vastness of the landscape;

(b) the tussock grasslands;

(c) the lack of houses and other structures;

(d) residential development limited to small areas in clusters;

(e) the form of the mountains, hills and moraines, encircling and/or located in, the Mackenzie Basin;

(f) undeveloped lakesides and State Highway 8 roadside;

(2) To maintain and develop structures and works for the Waitaki Power Scheme:

(a) within the existing footprints of the Tekapo-Pukaki and Ohau Canal Corridor, the Tekapo, Pukaki and Ohau Rivers, along the existing transmission lines, and in the Crown-owned land containing Lakes Tekapo, Pukaki, Ruataniwha and Ohau and subject only (in respect of landscape values) to the objectives, policies and methods of implementation within Chapter 15 (Utilities) except for management of exotic tree species in respect of which all objective (1) and all implementing policies and methods in this section apply;

(b) elsewhere within the Mackenzie Basin subzone so as to achieve objective (1) above.

(3) Subject to objective (1) above and to rural objectives 1, 2 and 4:

(a) to enable pastoral farming while limiting buildings, fencing and shelterbelts;

(b) to enable pastoral intensification including cultivation and/or direct drilling and high intensity (irrigated) farming in appropriate areas south and east of State Highway 8 except adjacent to, and in the foreground of views from, State Highways and tourist roads;

(c) to enable rural residential subdivision, cluster housing and farm buildings preferably around existing homesteads (where they are outside hazard areas) or in the areas of low visual vulnerability shown on map Z in the district plan;

(d) to enable carbon forests and production forests in:

- The Twizel River landscape unit;
- The area between Hayman Road east to approximately 650 masl contour on the Mary Range;
- Mid and lower Tekapo and Pukaki River flats;
- Around identified existing farm bases

– whilst ensuring exotic wildings do not escape from those areas and managing a transfer to non-weed species.