Implications of the decision of the Supreme Court in *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] for processing applications to take and/or use water

Disclaimer: This technical advice note does not constitute legal advice and should not be relied upon as such. Please seek specific legal advice if you have legal questions or issues.

Executive summary

The Supreme Court has confirmed the 2022 decision of the Court of Appeal regarding how to interpret and apply rules in the Canterbury Land and Water Regional Plan (LWRP) related to the taking and using of water. This provides clarity on that it is not possible to consider the take and use of water separately under the LWRP except where specifically provided for. This means where water is fully or over-allocated it is not currently possible to apply for a new take and/or use of water unless provided for by a specific rule. This includes situations where a consent holder wishes to add or change a use of water to an existing water permit.

Introduction

On 20 November 2023, the Supreme Court released its decision of *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153. This decision was on an appeal of the Court of Appeal's decision in *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325.

The Supreme Court dismissed the appeal of Cloud Ocean Water Limited (Cloud Ocean) having reached the same conclusions as the Court of Appeal[1]. In coming to that conclusion, the Supreme Court noted in its summary that:

- Section 14 (and s30) of the Resource Management Act 1991 (RMA) do not require that the **take** [of water] must be read conjunctively with the **use** [of water] but that this does not mean that they must always be considered separately[2];
- There is nothing in the LWRP that suggests that "take and use" consents would be divisible into separate "take" and "use" permits[3]; and
- That the practical issues highlighted in Environment Canterbury's Technical Advice Note on the Court of Appeal decision[4] are not so significant as to indicate that the Court of Appeal erred in its decision[5].

[1] *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153 at [78]

[2] *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153 at [32] and [77(a)]

[3] *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153 at [77(d)]

[4] *Environment Canterbury Technical Advice Note. Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents (19 August 2022)*

[5] *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153 at [77(f)]

This decision confirms the approach Environment Canterbury has taken in implementing the Canterbury Land and Water Regional Plan (LWRP) post the Court of Appeal decision[6]. This approach (and its implications) was previously outlined in the Technical Advice Note on the Court of Appeal decision[7], but is summarised below for assistance.

This analysis does not constitute legal advice and consent holders are encouraged to seek their own advice relevant to their own circumstance.

The LWRP rule framework

The LWRP envisions some situations where there may be a take of water, but no associated use (or vice versa). These situations have been addressed through the provision of specific "take or use" rules (e.g. rules 5.121 (permitted) and 5.122 (discretionary) for the take or use of water from irrigation or hydroelectric canals, or from water storage facilities).

Where there is no specific activity rule however, the Supreme Court has confirmed the Court of Appeal position that it is not possible to 'disaggregate' a take from a use of water under the LWRP. Therefore, where an activity to take and/or use water is to be consented under the LWRP and is not managed under an activity specific rule (e.g. for community supply, dewatering etc.), it must (except in rare cross-plan or cross-jurisdictional situations) be considered under the general "take and use" rules i.e.:

- Rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; and
- Rules 5.128 – 5.132 in the LWRP for takes and uses of groundwater; or
- A relevant sub-regional rule where it prevails over the regional-wide rules.

Repercussions for new activities / potential applications

In cases where there is allocation available (or where allocation can be made available, see below) there is unlikely to be an impediment to making an application for new activities under these rules in the LWRP.

In fully or over-allocated allocation zones however, it is typically prohibited under the LWRP to apply for a (consumptive) "take and use" and therefore no application can be made except for replacement of existing activities affected by the provisions of s124-124C (i.e., which are not increasing or changing in scope) or where a specific exemption applies (e.g., for community supply purposes).

In some situations, it may be possible for an applicant to surrender sufficient existing allocation to 'free up' space in an allocation block. Where this would bring the cumulative allocation below the allocation limit, an application could then be made for the quantum of water available below the limit, subject to meeting the necessary conditions of the rule.

Site-to-site transfers (s136(2)(b)(ii) RMA)

While the LWRP rules provide for the transfer of a "take or use", the Supreme Court has confirmed the Court of Appeal's decision that the "take and use" under the LWRP cannot be disaggregated under the LWRP. While it is arguably possible to transfer a take, or a use, in isolation from the other aspect of an existing consent, in practice once transferred there is no mechanism to apply for the other component of an activity in a fully or over-allocated water allocation zone, i.e. if you applied to transfer a take to a new site, without the existing use, you couldn't then apply for a new use at the new site as it wouldn't be a replacement application affected by the provisions of s124-124C (as the take and use are linked and s124-124C apply to the activity as a whole, not the respective 'take' and 'use' components).

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[6] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325

[7] *Environment Canterbury Technical Advice Note. Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents (19 August 2022)*

In practice therefore, most site-to-site transfers in over-allocated zones are effectively limited to transfers of both the take and use. The exception would be where the transfer would enable an activity managed under a "take or use" rule (or where it is not prohibited to apply for new allocation e.g., community supply).

Repercussions for applications in process

A few applications lodged under the 'catch-all' rule 5.6 prior to the Court of Appeal decision in 2022 were unable to progress given the need to be considered against the generic 'take and use' rules in the LWRP and a prohibited activity status (due to an allocation being fully or over-allocated). Knowing that there was a live appeal to the Supreme Court however, some applicants have been understandably reluctant to withdraw those applications.

Now that the Supreme Court has upheld the Court of Appeal's decision, and there is no possibility of further appeal, these applications will need to be withdrawn or returned as Environment Canterbury cannot process those applications. Applicants will need to re-consider their proposals to see if they can be structured or redesigned in such a way that they can be progressed without the need for a prohibited take and use of water.

Repercussions for consents granted prior to the Court of Appeal decision

Environment Canterbury has no power to revisit or cancel the grant of applications granted prior to the Court of Appeal decision in 2022. Resource consents granted under that approach are considered lawful unless they are specifically challenged and decision on those consents quashed by the Court (i.e., in the event there is a challenge to the grant of a consent under rule 5.6, if the challenge is successful the Court may or may not cancel the consent. This is likely to depend on the specific circumstances of the case).

As such, unless the consent is cancelled by the Court, applications to vary or 'renew' (i.e. applications made under s127, or affected by s124 through s124C) water permits granted under the previous approach should be processed under the relevant provisions of the RMA and LWRP. For example, an application to 'renew' an existing water permit for a 'stand-alone use' for dairy shed use, that is linked to an existing 'take and use' permit for irrigation, should be considered collectively as a combined take and use (affected by provisions of s124, s124A-C RMA) for all composite parts (i.e. as a take and use for irrigation and dairy shed use) under the relevant rule.

Other regional plans

The advice above is written regarding implementation of the LWRP and is not necessarily applicable to other Canterbury catchment-specific plans. These plans (e.g., the Waimakariri River Regional Plan (WRRP) or the Hurunui Waiau River Regional Plan (HWRRP)) have their own specific rules which need to be applied on a case-specific basis. The below discussion provides our current guidance on how to apply those provisions.

The Hurunui and Waiau River Regional Plan (HWRRP) and the Waipara Catchment Environmental Flow and Water Allocation Regional Plan (Waipara Plan)

Like the LWRP, the HWRRP and the Waipara Plan include rules governing the "take and use" of water. In general applications should be therefore considered in the same way as the LWRP e.g., rule 6.1 of the Waipara Plan refers to the *"take and use of groundwater"* [emphasis added], and as such take and use must be considered together.

This approach is complicated however, as some rules combine all four verbs (i.e. take, use, dam, divert) from section 14 of the RMA e.g. rule 2.3 of the HWRRP refers to the *"taking, diverting, using and discharging"* of surface water. In this situation, the rule should be read in a way that where consent is required for multiple activities (listed in the rule) to operate the proposal, then they should be applied for together under the rule. This includes situations where applicants may already hold one or more consents for part of a proposal (e.g. for an existing diversion or take), and want to change another aspect of the existing consent (e.g. a new use).

For example, if an activity required a resource consent for a take and discharge to operate e.g. for a stormwater wetland that intercepts groundwater), or a diversion and use (e.g. for in-stream hydroelectricity generation), then these activities should be applied for and considered together. Changes to part of an existing authorisation, e.g. an expansion of irrigated area without changing the take, would be required to be considered as a new application for the "take and use" of water, even though the existing take is not changing.

Waimakariri River Regional Plan (WRRP)

The WRRP seeks to manage *inter alia* water takes and uses affecting the Waimakariri River and its tributaries. Unlike the LWRP however, the WRRP separates the take and use activities into separate rules. For example:

- Rule 5.1 of the WRRP manages the taking of surface water or from hydraulically connected groundwater within the Waimakariri River Catchment "below Woodstock" but does not manage the use of water.
- Rule 5.2 manages the use (and diversion and damming) of water in the Waimakariri River or its tributaries (except where now incorporated into the LWRP by Plan Change 7 LWRP / Plan Change 2 WRRP) but does not manage the use of water outside these waterbodies.

The WRRP does not manage the use of water outside the waterbodies. These uses were, prior to the LWRP, managed under a separate rule for the "use of water" in the Natural Resources Regional Plan (NRRP). When the NRRP was replaced by the LWRP, the "use of water" rules were replaced by the current suite of "take and use" and "take or use" rules in the LWRP.

The LWRP states however that where the WRRP manages the same activity, it prevails over the LWRP. This creates an unusual situation where the WRRP applies to the take and in-stream use of water, but the LWRP applies to the out-of-stream use.

In considering the application of the Supreme Court (and previous Court of Appeal) decision to this situation, we recognise it is quite different to the situation subject of this decision given the WRRP has no equivalent "take and use" rules and specifically does not cover out-of-stream uses. Equally the LWRP specifically states it does not apply to takes managed under the WRRP (c.f. section 2.8 LWRP). As such, the LWRP "take and use rules" cannot apply and using rule 5.6 of the LWRP[8] to consider an out-of-stream "use" remains valid.

Waitaki Catchment Water Flow and Allocation Regional Plan (WCWARP)

The WCWARP uses "take or use" rules for consumptive takes of water. As such it is possible to continue to process separate take or use applications under this plan.

[8] *Where there is no relevant "take or use" rule in the LWRP.*