**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**CIV 2012-409-000972**
**[2012] NZHC 2156**

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| BETWEEN | ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED<br>Appellant |
| AND | BULLER COAL LIMITED<br>First Respondent |
| AND | SOLID ENERGY NEW ZEALAND LIMITED<br>Second Respondent |
| AND BETWEEN | WEST COAST ENT INCORPORATED<br>Appellant |
| AND | BULLER COAL LIMITED<br>First Respondent |
| AND | SOLID ENERGY NEW ZEALAND LIMITED<br>Second Respondent |

Hearing: 30 July 2012

Counsel: T Bennion and P D Anderson for Royal Forest and Bird Protection Society
D M Salmon for West Coast ENT Inc
J E Hodder and B G Williams for Buller Coal Limited
M R Christensen and S Hutchings for Solid Energy Limited
J M van der Wal for Buller District Council and West Coast Regional Council

Judgment: 24 August 2012

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**JUDGMENT OF WHATA J**

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[1] Buller Coal Limited ("BCL") and Solid Energy New Zealand Limited ("Solid Energy") mine coal. The Royal Forest and Bird Protection Society[1] and West Coast ENT Incorporated ("West Coast ENT") are advocates for the environment. They oppose coal mining proposals by Solid Energy and BCL because the coal produced when burnt will omit more than 20 Mt of $CO_2$ in total. $CO_2$ is a greenhouse gas. Declarations were sought in the Environment Court as to whether the effect of the combustion of this coal on climate change is a relevant consideration under s 104(1)(a) of the Resource Management Act 1991 ("RMA"). That section states:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; ...

[2] The Environment Court said, in short, that it was not a relevant consideration, because the Resource Management (Energy and Climate Change) Amendment Act 2004 removed regulation of climate change from local authority control.[2] The key issue before me is whether the Environment Court was correct.

## The issues

[3] The appellants identified the following questions of law to be resolved:

> Whether or not, when considering Buller Coal Limited's applications for consents for coal mining activities at the Escarpment Mine including applications for land use, the decision maker must:
>
> a) under section 104(1), consider the contribution that the subsequent discharges into air from the combustion of the coal will have towards climate change; and
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> b) under section 7(i) have particular regard to the effects of climate change, including the contribution that the subsequent discharges into air from the combustion of the coal will have towards the effects of climate change.

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1 Royal Forest and Bird Protection Society of New Zealand Incorporated.

2 *Re Buller Coal Ltd* [2012] NZEnvC 80 at [53].

[4] BCL and Solid Energy seek confirmation of the following declaration:[3]

> In considering BCL's applications for consents for coal mining activities at the Escarpment Mine including applications for land use and Solid Energy's applications for consents for coal mining activities at the Mt William North mining area including applications for land use, but neither including any applications to discharge contaminants to air from the combustion of coal to be mined, the decision maker cannot have regard to the effects on climate change of discharges into the air of greenhouse gases arising from the subsequent combustion of the coal extracted in reliance on those consents, either where:
>
> (a) any discharge of greenhouse gases associated with the end use of the coal occurs outside New Zealand territorial boundaries; or
>
> (b) any discharge of greenhouse gases associated with the end use of coal occurs in New Zealand.

[5] Taken together, the ultimate issue in the case is whether the Resource Management (Energy and Climate Change) Amendment Act 2004 ("the Amendment Act 2004") removed the jurisdiction of consent authorities to consider the effects on climate change of the discharge of greenhouse gas emissions from the end use of coal.

**Agreed facts**

[6] The parties agree the following:

> ...
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> 2. On 26 August 2011, independent Commissioners appointed by the West Coast Regional Council and the Buller District Council granted consents to BCL associated with the construction and operation of an open cast mine on the Denniston Plateau ("the Escarpment Mine"). The consents granted included a land use consent to mine coal and associated land disturbance activities.
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> 3. West Coast ENT and Forest and Bird appealed that decision on grounds including that the Commissioners erred in not having regard to the effects of the Escarpment Mine applications on climate change.
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> 4. The resource consents, if upheld on appeal, will authorise BCL to remove up to 6.1 million tonnes of coal on the Denniston Plateau over a period of 5-12 years. The coal is intended to be exported to

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[3] Application for declaration, at [1].

customers in India and China for use in the steel manufacturing industry.

5. BCL's applications are set out in Schedule A and include applications for land use consents for coal mining and associated activities. BCL was not required to and did not apply for a discharge permit relating to the discharge of greenhouse gases.

6. On 12 December 2011, Solid Energy lodged with the West Coast Regional Council and Buller District Council applications for resource consents to carry out mining activities at the Mt William North mining area.

7. The resource consents, if granted, will authorise Solid Energy to mine approximately 5 million tonnes of coal in the Mt William North mine over a period of approximately 12 years. This will provide approximately 4.1 million tonnes of marketable coal, all of which will be exported. This coal is intended to be exported to customers in India, China, Japan, Brazil and South Africa for use in the steel manufacturing industry.

8. Solid Energy's applications are set out in Schedule B and include an application for land use consent for coal mining and associated activities.

9. Solid Energy was not required to and did not apply for any discharge permit relating to the discharge of greenhouse gases.

10. Solid Energy's applications to the consent authorities were publicly notified on 10 February 2012. Submissions on the applications close on 19 March 2012.

11. BCL, West Coast ENT and Forest and Bird all intend to lodge submissions in relation to the Mt William North applications.

**Climate change**

12. The appellants to the Escarpment Mine consents consider that both the Escarpment Mine and Mt William North Mine applications raise the issue of whether the effects on climate change of the subsequent combustion of coal mined at the sites are able to be given regard to by decision makers under the RMA.

13. The parties are all in agreement that the Court can assume, for the purposes of these proceedings:

    a. Climate change is a serious global issue.

    b. The coal mined at the sites will probably result in the subsequent discharge of carbon dioxide from the combustion of that coal.

    c. Carbon dioxide is a known greenhouse gas.

**The Mt William North and Escarpment Mine**

14. The parties agree that:

    a. Mt William North is expected to produce approximately 4.1 million tonnes of marketable coal;

    b. Of that coal, 100% is expected to be burnt overseas, producing approximately 11.5Mt of $CO_2$ in total.

    c. The Escarpment Mine is expected to produce approximately 4.3 million tonnes of marketable coal;

    d. Of that coal, 100% is expected to be burnt overseas.

**Treatment of greenhouse gas emissions**

15. Both Solid Energy (and BCL if the Escarpment Mine is consented) are mandatory participants in the stationary energy sector of the Emissions Trading Scheme ("ETS") (enacted under the Climate Change Response Act 2002) because they carry out the activity of mining over 2000 tonnes of coal in a year. The ETS requires coal mining participants to monitor and report emissions in New Zealand and to surrender emission units to cover their relevant emissions in New Zealand. This includes a requirement for Solid Energy (and BCL) to surrender emission units for carbon emissions from coal sold to domestic customers (except larger customers who "opt in" to the ETS and take responsibility for their own carbon emissions).

16. Coal mining participants are not required to surrender units for carbon dioxide emissions from any coal that is exported. Units must, however, be surrendered for any fugitive emissions of methane released to the atmosphere during mining activities (including for coal that is exported).

## Submissions for the appellants

[7] The appellants were separately represented by Mr Salmon for West Coast ENT and Messrs Bennion and Anderson for Royal Forest and Bird. Mr Salmon focused on effects considerations within New Zealand. Mr Bennion adopted a supporting role on that topic, while also dealing with extra-territorial discharges. Nevertheless I think it is fair to say that they collectively submit:

(a) Section 104(1)(a) should be given its plain and ordinary meaning, informed by the purpose of sustainable management with the result that effects on climate change of discharges of greenhouse gases caused by the end use of coal are a mandatory relevant consideration.

(b) The Amendment Act 2004 circumscribes consideration of the effects of greenhouse emissions in a precise and specific way, amending only the provisions regarding discharge permits, but not other applications subject to s 104(1)(a).

(c) The Environment Court Judge erred by incorporating the purpose of the Amendment Act 2004 (set out at s 3) into the RMA. Rather that purpose was given vent to in the careful drafting of ss 70A and 104E and directed solely at discharge rules or discharge permit applications.

(d) To the extent that it is necessary to review the legislative history, there are clear statements that the legislation would still enable councils to consider the effects on climate change in their wider planning decisions. On the first reading of the Amendment Bill, the co-leader of the Green Party, Jeanette Fitzsimons, who also chairs the Select Committee on the Bill, stated:[4]

> ... The bill specifically provides that councils should still consider the effects on climate change of their other decisions. Those decisions are legion. When a supermarket wants to locate a long way from town, the council has the right to consider how many more vehicle kilometres will have to be travelled for people to get to that supermarket if it is away from where people live and away from public transport routes. A council can take climate change into account in its responsibilities for providing for public transport and in its responsibilities to design more sensible urban form whereby land-use activities are located close to public transport corridors and public transport nodes in order to reduce the need for travel, and also in its provision of facilities for walking and cycling, in order to reduce greenhouse emissions from burning fossil fuels.

(e) The *Greenpeace* decision[5] specifically relates to applications for discharge under s 104E, and statements regarding the purpose of the Amendment Act 2004 and its interface with the RMA relate to that specific context only.

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4 (5 August 2003) 610 NZPD 7596.

5 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2009] 1 NZLR 730 (SC).

(f) The decision of the Environment Court would prevent local authorities from having regard to greenhouse emissions in the context of the performance of their primary functions including management of land use, subdivision, land transport and urban design. But there is nothing in the specific amendments to the RMA directed to fettering the performance of those primary functions in that way.

(g) Such a fetter, by implication, is contrary to New Zealand's commitment to international convention dealing with the management of climate change, particularly if the coal is used overseas, because potentially it will not then be subject to any climate change regulation.

(h) This Court should be slow to infer an intention by Parliament to preclude public consideration via RMA processes of significant environmental issues, such as the effects of greenhouse emissions, except where the statutory language is clear.

(i) The location of the emissions is immaterial - climate change affects New Zealand, as s 7(i) confirms. The relevance of global effects and the global environment is also affirmed by the call in provisions, namely s 142(3)(a)(i), (iv) and (v) which provide for call in in relation to matters of widespread concern including effects on the global environment. And the Select Committee also recommended removal of the reference to "in New Zealand" in a proposed clause dealing with the ambit of their environmental effects assessment under the proposed ss 104E and 70A.[6]

(j) Furthermore, a residual discretion to consider effects on climate change is a logical adjunct to the mandatory requirement to consider the benefits of renewable energy and the effects of climate change also introduced by the Amendment Act 2004.

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6 Resource Management (Energy and Climate Change) Amendment Bill 2003 (48-2) (select committee report) at 6.

[8] Overall, the appellants contend that their approach better accords with orthodox principles of statutory interpretation, namely "to begin ... with the words of the statute, interpreted in accordance with the scheme and purpose of the legislation".[7] Here s 104(1)(a) contains no fetter against consideration of effects on climate change, and the purpose, scheme and policy of the Act is to allow full consideration of effects on the environment. Any fetter is limited only to air discharge applications, as expressly provided for in ss 104E and 70A.

**The respondents' submissions**

[9] The respondents were also separately represented, but I understand them to be collectively contending that:

(a) The appeal involves the narrow question of whether the relevant local authority can or cannot take into account greenhouse gas discharges by end users of coal when considering a land use consent application.

(b) The Environment Court was correct when it observed:

> [53]. ... the whole of the Amendment Act, but particularly section 3, point strongly to a finding that regulatory activity on the important topic of climate change is taken firmly away from regional government, and made the subject of appropriate attention from time to time by central government by way of activity at a national level.

(c) The *Genesis Power* decision of the Supreme Court made it plain that:[8]

> The underlying policy of the [2004] Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis ...

(d) The jurisdiction to consider the effects of greenhouse gases on climate change arises only in the context of application for discharges which are to air, and that jurisdiction was removed with the Amendment Act

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7 Citing *R v Aylwin* [2008] NZCA 154 at [58].

8 *Genesis Power Ltd v Greenpeace New Zealand* Inc, above n 5, at [55].

2004.

(e) The entire purpose of the Amendment Act 2004 was to "remove" climate change as a consideration from local authority functions and shift that issue to the national level.[9] That intention is expressly recorded at s 3 of the Amendment Act 2004, which is incorporated into the primary Act via s 23 of the Interpretation Act 1999.

(f) Jurisdiction then to consider the effects of greenhouse gas emissions on climate change in the context of land use consents, at a local level, would make a nonsense of the Amendment Act's exclusions and related amendments to the RMA.

(g) In contrast, Parliament used the very specific phrase at s 7(i) – the effects *of* climate change, as a matter of mandatory consideration.

(h) In any event, the activity of coal mining does not involve discharges of greenhouse gases for the purposes of the present appeal, with the result that greenhouse gas emissions from end uses are simply not a relevant consideration under s 104(1)(a).

[10] Mr Hodder for BCL emphasised that the Amendment Act 2004 wrought structural change, with climate change matters removed from a local or regional level to a national level assessment. That structural change is not amenable or reconcilable with a residual ability on the part of local authorities to engage in assessments of effects on climate change. If necessary the jurisdiction at s 104(1)(a) to consider such effects must be excised by necessary implication in order to maintain the integrity of this structural change. Contrary to what may have been said on the first reading of the Bill,[10] this does not permit assessment of either negative or positive effects on climate change at a local level.

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9 Resource Management (Energy and Climate change) Amendment Bill 2003 (48-1) (explanatory note) at 1.

10 Refer [7](d) above.

[11] Mr Christensen submitted that the "end use" of coal mining is not part of the application for consent and is a separate activity. He identified anomalies (as did other counsel) that would arise by conflating the activity for which consent is sought with end use activities. He noted for example that an application for a hydro scheme that proposes to supply renewable energy to an activity that discharges greenhouse gases may be assessed for the effects of those discharges, while the end user is immune from such an assessment. He nevertheless accepted the residual possibility of consideration of effects on climate change, but not where the assessment relates to the effects of air discharges. For example, consideration given to the climate change benefits of biodiversity offsets or the adverse effects of removing such an offset might be legitimate. But any incursion into the national level regulation of effects of air discharges on climate change is precluded for any purpose.

[12] Mr Van der Wal observed that coal mining activity is only amenable to the jurisdiction of local authorities because that activity contravenes a rule or rules in a plan. Those rules are tailored to the activity of extraction, not end use; and any discretion dealing with the assessment of the activity should be linked back to those rules (without suggesting that consideration of effects is limited to those matters unless expressly so). As the jurisdiction to make rules to regulate the effects of air discharges on climate change has been removed except in accordance with national regulation, any rule requiring consent cannot then be directed to that effect except as provided by that regulation. The merits of coal extraction are not otherwise an RMA matter, but rather subject to the Crown Minerals Act 1991.[11] Practical issues arising for local authorities are also helpfully identified.

**Approach to interpretation**

[13] Plainly the primary interpretative task commences with the words or text used, informed by purpose[12] and context,[13] including the scheme of the Act.[14]

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11 Referring to s 5(2)(a) of the RMA and the exclusion of minerals from the meaning of resources subject to sustainable management under that Act.

12 Interpretation Act 1999, s 5; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [24].

13 *McQuire v Hastings District Council* (2002) 8 ELRNZ 14 (PC) at 18-19.

Anomaly or absurdity is to be avoided where possible. But it is not part of the judicial task to re-script clear statutory language.[15]

[14] An amending enactment is part of the enactment it amends.[16] The purpose of an amending Act is not directly incorporated into the primary Act except by way of express provision. But, in any event, an amending enactment should carry a meaning that is consistent with that purpose.[17]

[15] I am not attracted to interpretation based on the, at times, contradictory statements[18] of parliamentarians unless they help resolve ambiguity, and are clear and authoritatively on point.[19] Even then the respective texts, purposes and schemes of the Acts should assume primacy.

**The text, purpose and scheme**

[16] Section 104(1)(a) states:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; ...

[17] Read literally, s 104(1)(a) compels an authority to consider an apparently unqualified range of "actual and potential effects ... of allowing the activity." But the

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14 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC) at [6].

15 J F Burrows and R I Carter, *Statute Law in New Zealand*, (4th ed, LexisNexis, Wellington, 2009) at 226; see also *Commissioner of Inland Revenue v Auckland Harbour Board* [2001] 3 NZLR 289 (PC); *Robinson v Accident Compensation Commission* [2007] NZAR 193 (CA).

16 Interpretation Act 1999, s 23.

17 Interpretation Act 1999, s 5(1); refer also *R v Aylwin* [2008] NZCA 154 at [61]; see also J F Burrows and R I Carter, above n 15, at 222-223.

18 Compare the statements during the Bill's first reading: (5 August 2003) 610 NZPD 7583 and 7596.

19 *Genesis Power Ltd v Greenpeace New Zealand* Inc, above n5, at [62]; refer also J F Burrows and R I Carter, above n 15, at 282-283.

scope of the assessment is subject to a number of express and implied limitations.[20] First, it is subject to Part 2 and the requirement of functionaries to achieve integrated management.[21] Second, it is subject to an assessment of the effects of "allowing the activity". Third, it is subject to the limitations specified at s 104(3), namely a consent authority must not have regard to trade competition or the effects of trade competition, or any effect on a person who has given written approval to the application.[22] Fourth, the scope of any consideration of effects might be limited by the classification of the activity as a controlled or limited discretionary activity, where the assessment of effects is restricted to identified assessment criteria.[23] Fifth, a consent authority may disregard the adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.[24] Sixth, a consent authority must disregard effects that already form part of the existing or future environment.[25] Seventh, and specifically relevant to this case, ss 104E and 104F prohibit, in relation to applications for air discharges, consideration of the effects of discharges of greenhouse gases on climate change other than in accordance with national environmental standards.[26]

[18] Section 104(1)(a) is then set within a broader legislative frame commencing with the overarching statutory purpose, namely:

> **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

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20 *Arrigato Investments Ltd v Auckland Regional* Council [2002] 1 NZLR 323 (CA); *Dye v Auckland Regional* Council [2002] 1 NZLR 337 (CA); *Canterbury Regional Council v Newman* [2002] 1 NZLR 289 (CA); Compare *Westfield (New Zealand) Ltd v North Shore City Council* [2005] 2 NZLR 597 (SC) at [180]-[183], per Richardson J, stating that the qualifiers under the s 3 limit consideration [of potential effects ] to "(e) Any potential effect of high probability; and (f) Any potential effect of low probability which has a high potential impact."

21 Resource Management Act 1991, ss 30(1), 31(1).

22 Ibid, s 104(3).

23 See below at [26].

24 Resource Management Act 1991, s 104(2).

25 Refer *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA) at [65].

26 Resource Management Act 1991, ss 104E, 104F.

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.

[19] Under Part 2, in achieving that purpose, RMA functionaries are then implored to recognise and provide for specified matters of national importance,[27] to have particular regard to specified matters, including the effects of climate change,[28] and then to take into account the principles of the Treaty of Waitangi.[29] Part 3 then prescribes duties and restrictions relating to types of resource use, dealing first with restrictions on the use of land.[30] Section 9 prohibits the use of land that contravenes a national environmental standard, a regional rule or a district rule unless expressly allowed by a resource consent, or where relevant by ss 10 (Existing Uses), 10A (Existing Water Activities) or 20A (Certain Existing Lawful Activities Under an Operative Plan). Similar but not identical restrictions are placed on the use of the coastal marine area,[31] uses of beds of lakes and rivers,[32] use of water,[33] and discharges of contaminants into the environment.[34] This latter control is particularly relevant to this case and is stated at s 15 as follows:

**15 Discharge of contaminants into environment**

(1) No person may discharge any-

(a) Contaminant or water into water; or

(b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant

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27 Ibid, s 6.
28 Ibid, s 7, and 7(i).
29 Ibid, s 8.
30 Ibid, s 9.
31 Ibid, s 12.
32 Ibid, s 13.
33 Ibid, s 14.
34 Ibid, s 15.

emanating as a result of natural processes from that contaminant) entering water; or

(c) Contaminant from any industrial or trade premises into air; or

(d) Contaminant from any industrial or trade premises onto or into land-

unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a national environmental standard unless the discharge-

(a) is expressly allowed by other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

(2A) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a regional rule unless the discharge-

(a) is expressly allowed by a national environmental standard or other regulations; or

(b) is expressly allowed by a resource consent; or

(c) is an activity allowed by section 20A.

...

[20] For present purposes therefore contaminants from any industrial or trade premises into air are prohibited unless allowed by national regulations (including a standard) or a rule in a regional plan or proposed regional plan or by resource consent. Other discharges of contaminants to air are permitted unless regulated by an environmental standard or a regional plan.

[21] Responsibility for developing relevant regulations, environmental standards and rules is divided among the Act's functionaries at a national, regional and local level.[35] The Minister for the Environment has the function of making

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[35] Part 4.

recommendations in relation to national policy statements and national environmental standards, and to make directions or intervene in matters that are considered to be part of a proposal of national significance.[36] National standards may be prescribed in relation to any matter referred to in ss 9-15, including contaminants and air quality.[37] The Minister also has oversight of regional and local authorities[38] and may direct the preparation of a plan, or a change or variation to a plan.[39] Specialist functions are conferred upon the Minister of Conservation and the Minister of Aquaculture in their respective fields of interest, but these are not relevant to these proceedings. Regional councils then have the function, among others, of promulgating objectives, policies and methods to achieve the integrated management of natural and physical resources of a region, and in relation to actual and potential effects of regional significance.[40] Of particular relevance to this case, a regional council has the following function for the purpose of giving effect to the RMA in its region:

> **30 Functions of regional councils under this Act**
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
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> ...
>
> (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:
>
> ...

[22] Territorial (district) authorities are then responsible for the establishment, implementation and review of objectives, policies and methods to achieve the integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district.[41] They also have the function of controlling the actual and potential effects of the use, development or protection of land and associated resources of the district.[42] The content of the

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36 Ibid, s 24.
37 Ibid, s 43
38 Ibid, s 25.
39 Ibid, s 25A.
40 Ibid, s 30(1)(a).
41 Ibid, s 31(1)(a).
42 Ibid, s 31(1)(b).

effects subject to their management is not prescribed by s 31, except by necessary implication insofar as is necessary to achieve consistency between planning instruments.

[23] Part 5 of the RMA deals with the task of producing standards, policy statements and plans. The functional separation of responsibility is then carried through into this part, so that each level of responsibility is subject to its own statutory requirements. The national, regional and district hierarchy is entrenched with primacy given to national environmental standards and the requirement for local authority recognition of those standards.[43] National policy statements are also produced by the Minister, and sit alongside national environmental standards in the hierarchy of control. The purpose of a national policy statement is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of sustainable management.[44] Most relevant to this case, the Act confers a discretion on the Minister to determine whether it is desirable to prepare a national policy statement, and in doing so the Minister may have regard to:

> **45 Purpose of national policy statements (other than New Zealand coastal policy statements)**
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> ...
>
> (2) In determining whether it is desirable to prepare a national policy statement, the Minister may have regard to-
>
> (a) The actual or potential effects of the use, development, or protection of natural and physical resources:
>
> (b) New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment:
>
> ...

[24] As with national environmental standards, a local authority must, where relevant, recognise a national policy statement and must give effect to the objectives and policy specified in the statement.[45] As is to be expected, regional policy statements and regional plans are to be promulgated by regional councils. Their pith

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[43] Ibid, s 44A.
[44] Ibid, s 45(1).
[45] Ibid, s 55(1)-(2).

and substance is directed to achieving sustainable management, via an overview of the significant resource management issues, policies and methods for the region.[46] While regional policy statements provide normative guidance, regional plans assist regional councils to carry out their more specific functions.[47] The regional plan then defines the objectives, policies and rules of a region having identified the issues of concern.[48] And the rules provide the detailed framework for a regional council for the purpose of carrying out its functions under the Act[49] and achieving the objectives and policies of the plan. There are specified limitations on the scope of such rules, including that stated at s 70A as follows:

> **70A Application to climate change of rules relating to discharge of greenhouse gases**
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> Despite section 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either-
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

[25] This must be read in tandem with s 70B which states:

> **70B Implementation of national environmental standards**
>
> If a national environmental standard is made to control the effects on climate change of the discharge into air of greenhouse gases, a regional council may make rules that are necessary to implement the standard, provided the rules are no more or less restrictive than the standard.

[26] A similar purposive framework is imposed in respect of the promulgation of district plans which are the primary instrument available to district councils to implement their functions and to respond to district level issues.[50] Any district plan must be amended if necessary to give effect to a regional policy statement.[51] A

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46 Ibid, ss 59, 63.
47 Ibid, s 63.
48 Ibid, s 67.
49 Other than those described in paragraphs s 30(1)(a)-(b).
50 Ibid, ss 72 - 74.
51 Ibid, s 73(4).

district plan must not be inconsistent with a regional plan for any matter specified in s 30(1), including s 30(1)(f).[52] Section 82 provides a mechanism for resolving disputes about inconsistencies between national, regional and district planning instruments.

[27] Part 6 of the RMA deals with the classification of activities for consenting purposes, including the nature of the use consent (whether land, subdivision, coastal, water or discharge) and the classes of the activities including: permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited. As the classes suggest, there are varying degrees of discretion conferred upon councils under the relevant classes for the purpose of grant. The classes are determined by the Act and regulations, including national and environmental standards, plans or proposed plans.

[28] Detailed processes are laid out for the purposes of processing and notification of the activity depending on the class of that activity, the scale of its effects, and whether there are any affected persons in relation to the activity.[53] In particular, s 95D relates to deciding if adverse effects are likely to be more than minor (for the purpose of notification):[54]

> **95D Consent authority decides if adverse effects likely to be more than minor**
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> A consent authority that is deciding, for the purpose of section 95A(2)(a), whether an activity will have or is likely to have adverse effects on the environment that are more than minor-
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> ...
>
> (b) may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect; and
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> (c) in the case of a controlled or restricted discretionary activity, must disregard an adverse effect of the activity that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion; ...

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52 Ibid, s 75(4).

53 Ibid, ss 95A, 95B.

54 See also s 95E where a similar process is adopted in relation to affected persons.

...

[29] Sections 100-103A deal with the processes of hearing. Coming full circle, ss 104 through 104F, as I have said, identify the scope of the discretionary assessments conferred upon consenting authorities to determine the application. Of particular relevance to this case is s 104E, which states:

> **104E Applications relating to discharge of greenhouse gases**
>
> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either-
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

[30] This must be read together with s 104F, which in turn provides:

> **104F Implementation of national environmental standards**
>
> If a national environmental standard is made to control the effects on climate change of the discharge into air of greenhouse gases, a consent authority, when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B,-
>
> (a) may grant the application, with or without conditions, or decline it, as necessary to implement the standard; but
>
> (b) in making its determination, must be no more or less restrictive than is necessary to implement the standard.

***Genesis Power Ltd v Greenpeace New Zealand Inc***

[31] The Court of Appeal and the Supreme Court in *Greenpeace*[55] decided that the renewable energy exception stated in ss 70A and 104E only applied in the case of an application involving the use of renewable energy production. Plainly the question before me is different. The relevance of those decisions lies in the explication of the amended statutory scheme and policy.

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[55] *Genesis Power Ltd v Greenpeace New Zealand Inc*, above n 5.

[32] The Court of Appeal stated that under the new scheme regulatory standards associated with emission of greenhouse gases are to be set nationally (see s 70B of the Act).[56] The Court then refers to s 9 of the Amendment Act 2004 which provides:

> **9 Transitional provision relating to rules made before commencement of Act**
>
> On the commencement of this Act, an existing rule or part of a rule in a regional plan that controls the discharge into air of greenhouse gases solely for its effects on climate change is revoked.

[33] It is then observed that the legislation does envisage that regional government will be involved in the implementation of national standards once they have been promulgated.[57]

[34] On the critical issue of whether or not the exception stated in s 104E related to renewable energy, the majority in the Supreme Court reached the same conclusion, and broadly on the same basis. More specifically the majority observed:[58]

> [55] Section 3(b) of the Amendment Act requires local authorities, as one of the purposes of the legislation, "to plan for the effects of climate change", but "not to consider the effects on climate change of discharges into air of greenhouse gases". To like effect, the legislation amended s 7 of the principal Act to require all those exercising powers and functions under it to have "particular regard" to the "benefits to be derived from the use and development of renewable energy". The underlying policy of the Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis while enabling the positive effects of the use of renewable energy to be assessed locally or regionally.
>
> [56] That policy is best promoted by construing ss 70A and 104E in a way that permits the benefits of the use of renewable energy to be considered only in the context of applications based on the use and development of renewable sources because, as we have indicated, it is only these applications that are capable of resulting in a reduction in the discharge of greenhouse gases. Accordingly, to paraphrase the words of this Court in [*Commerce Commission v Fonterra Co-operative Group* Ltd [2007] 3 NZLR 767 (SC)] text and purpose both support the interpretation that the exception

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56 At para 19.

57 Refer paras 20 and 23.

58 *Genesis Power Ltd v Greenpeace New Zealand Inc*, above n 5.

in ss 70A and 104E applies only to applications which are founded on the use and development of renewable energy.

[35] Wilson J delivering the decision for the majority observed that:

> [62] ... Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so when making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy.

[36] Elias CJ dissented, but even so observed:

> [41] This interpretation does not undermine the setting of national emissions standards for greenhouse gases. Nor does it lead to "duplication of effort" as between national and regional government. I agree with the Court of Appeal that a regional consent authority must not "assess the extent to which GHG emissions associated with the proposal would have an effect on climate change". Such measurement is not permitted. Indeed, it would be impossible to undertake in any particular case. That is so equally where there may be detriment (as in the case of greenhouse gas-producing energy sources) or where there is benefit (as where non-greenhouse gas-producing renewable energy is proposed). Instead, the regional consent authority must accept the national greenhouse gas emission standards. Compliance with any such standard does not mean the application must be granted. It is still necessary for the consent authority to determine the application, applying the mandatory considerations in the Resource Management Act consistently with the overall purpose of the legislation. One of those mandatory considerations is the extent to which using renewable energy will enable a reduction in greenhouse gas emissions when compared with the use of non-renewable energy. The only climate change effect that can be taken into account is the extent to which "the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases", either absolutely or by comparison with the use of non-renewable energy. But it is a mandatory consideration.

**Environment Court decision**

[37] Acting principal Environment Court Judge Newhook, echoing the statements in the Court of Appeal and the Supreme Court in *Greenpeace*, concluded as he did in *Greenpeace New Zealand Inc v Northland Regional Council*:[59]

> [53] ... that the whole of the Amendment Act, but particularly section 3, point strongly to a finding that regulatory activity on the important topic of climate change is taken firmly away from regional government, and made

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[59] *Greenpeace New Zealand Inc v Northland Regional Council* EnvC Auckland A094/06, 11 July 2006.

the subject of appropriate attention from time to time by central government by way of activity at a national level.[60]

[38] He observed further that:

> [54] ... it is not correct to contend that s 7(i) and s 104(1)(a) can be interpreted to cut down the clear underlying policy of the 2004 Amendment so as to permit or even require local authorities or the Environment Court on appeal to determine applications concerning extraction of coal (with or without associated applications for permits to discharge greenhouse gases) by reference to effects on climate change.

**Assessment**

[39] I do not consider that the assessment of effects under s 104(1)(a) in this case includes consideration of the effects on climate change of the discharge of greenhouse gases from the end use of coal. My reasons follow.

[40] First, the express purpose of the Amendment Act 2004 was to require local authorities to plan for the effects of climate change, but not to consider the effects on climate change of discharges into air of greenhouse gases.[61] As between local authorities, regional councils carry the primary function of managing discharges of contaminants to air. The Amendment Act 2004 sought to achieve its purpose by specifically removing the power from regional councils to consider effects on climate change of greenhouse gas emissions, except in accordance with a national environmental standard. Hence regional councils are now prohibited from considering such effects at the formative rule making stage as well as at the evaluative resource consenting stage pending the promulgation of a relevant standard. I agree with the Environment Court Judge that the unambiguous policy of these amendments is to secure coherent regulation of greenhouse gas emissions at a national level and subject to national instruments.

[41] Second, while s 104(1)(a) is not literally subject to an amending enactment, it is subject to the scheme of the RMA, as amended by the Amendment Act 2004. The

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60 *Re Buller Coal Ltd*, above n2.

61 Resource Management (Energy and Climate Change) Amendment Act 2004, s 3. "Local authority" is defined in s 2(1) of the Resource Management Act 1991 as meaning a regional council or territorial authority.

statutory function of allowing or controlling the discharges of contaminants to air reposes in the Minister and/or regional councils by virtue of the combined effect of ss 15(1), (2) and 2(A), 30(1)(f), 66 and 68 RMA, as amended by ss 70A, 70B, 104E and 104F. In the result, no regional rule can control or require consent for a discharge into air of greenhouse gases solely for its effects on climate change, except in accordance with a national environmental standard. There is no other express method by which a local authority may require consent for those discharges. The jurisdiction therefore to consider the effects of air discharges under s 104(1)(a) must be implied and collateral to the exercise of other local authority functions. Given the unambiguous policy of the Amendment Act 2004 just mentioned, this Court must be slow to imply such collateral jurisdiction.

[42] Third, as I have said, jurisdiction under s 104(1)(a) is expressed to be limited to assessing the actual and potential effects of "allowing the activity", in this case coal extraction. Taken literally, industrial discharges of contaminants, including greenhouse gases to air caused by the end use of coal, will not be allowed by the grant of the land use consent. Those discharges will either need to be allowed by an environmental standard, a regional plan rule or by separate air discharge resource consent.[62] The effects of those discharges in New Zealand therefore are presumptively irrelevant to the s 104(1)(a) assessment of the application to extract coal, unless that extraction involves a discharge. (I examine extra-territorial discharges below at [50]-[54]).

[43] I accept that it is common for consent authorities to take into account the effects of downstream activities, for example increased vehicle traffic and associated pollution arising from allowing a development. This type of diffuse or non point pollution is not normally amenable to regulation by way of air discharge consenting. Regional and district policies and rules will often contemplate district level management of diffuse emissions, through urban form planning strategies. This overlapping jurisdiction is concordant with the Act's promotion of integrated management, with the result that the reach of s 104(1)(a) is extended by the policy

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[62] Resource Management Act 1991, s 15(1)(c).

framework to consider such effects. It may be this type of effect that the Chairperson of the Select Committee had in mind. Nothing I say at [41] seeks to derogate from this dynamic. But where, as in this context, regional jurisdiction to control the effects of greenhouse gases has been conditionally removed by Parliament, the normative basis for ongoing district level management of industrial discharges is weak. Conversely the legislatively enforced absence of supportive regional policies and rules is a strong factor against treating consequential industrial discharges as a justiciable effect of "allowing the activity" of coal extraction in this case.

[44] Fourth, Mr Salmon nevertheless contends that the language of s 104(1)(a), informed by the purpose of sustainable management, confers a broad or unfettered discretion on consenting authorities to consider the effects of land use activities, including the greenhouse gas effects of related secondary uses (in this case the end users of coal). This is intuitively attractive given the primacy afforded to sustainable management in the Act. But ongoing district level management of greenhouse gas effects (absent a national environmental standard and related regional rules) via consenting processes would jar heavily against the carefully constructed framework of the Act dealing with air discharges and undermine the methods overtly preferred by Parliament for achieving sustainable management of resources in relation to air discharges and related effects on climate change.

[45] More specifically, an overt feature of the RMA is that the sustainable management purpose is to be achieved by national, regional and district level functionaries with carefully scripted, overlapping and interlocking functions. This is overlaid by the policy of the Act to achieve integrated management of resources.[63] As explained above, local authorities must give effect to or maintain consistency with decisions made by the Minister. District Councils are similarly bound to adhere to the decisions of regional councils. This is particularly so where a decision concerns matters within the specific jurisdiction of the higher ranking decision makers; in this case the national or regional function of control of discharges to air.[64]

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63 Resource Management Act 1991, ss 30(1)(a), 31(1)(a), 59.

64 Ibid, s 15(1)-(2), 30(1)(f).

The primacy of regional plans over district plans in control of air discharges is then confirmed by s 75(4). By contrast, the control of air discharges is not listed as one of the specific functions at s 31 of district councils. Accordingly the RMA envisages achieving sustainable control of discharges of contaminants to air via regional policy statements and regional plans and now, in respect of the effects on climate change of discharges of greenhouse gases, only in accordance with a national environmental standard. Ongoing or residual district level control of greenhouse gas emissions via consenting processes, without national and then regional policy guidance, is not reconcilable with this detailed framework.

[46] Fifth, the appellants' concern that this outcome would unduly inhibit the ability of district councils to mitigate the effects on climate change of greenhouse emissions via comprehensive urban planning and transportation strategies is misplaced. Significantly, the Amendment Act 2004 did not remove consideration of those effects from the RMA. Rather it accorded primacy to national regulations by requiring regional policies on discharges to align with national environmental standards. Once those national environmental standards are in place, regional councils and then district councils must develop rules that are consistent with those standards. Furthermore, the Amendment Act 2004 removed the jurisdiction to consider the effects of discharges to air of greenhouse gases[65] on climate change. It did not remove from consideration the effects of diffuse air pollution at a localised scale. As I have said, to the extent that regional rules contemplate management of such pollution at a regional or district scale, then the management of, for example vehicle emissions, via controls on land use is not precluded by the amendments, provided that the reason for regulation does not relate solely to the effects on climate change of discharge of greenhouse gases.

[47] Accordingly, whatever route is employed, literal, purposive, or a combination of both, consenting authorities may not have regard to the effects on climate change of discharges to air of greenhouse gases for the purpose of an assessment of a land

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[65] Defined in Annex A of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998).

use consent under s 104(1)(a) except as provided by a national environmental standard or by a rule in a regional plan subject to such a standard.

**Section 7(i)**

[48] The appellant's second declaration seeks to enable local authorities to consider the effects of greenhouse gas emissions on climate change in the context of s 7(i). This section states:

> **7 Other matters**
>
> 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 have particular regard to-
>
> ...
>
> (i) the effects of climate change:
>
> ...

[49] I join with the Environment Court in finding that this section does not derogate from the policy of the Amendment Act 2004. It can be read sensibly in harmony with that policy, as it is directed to the consequences of climate change, not to the effects on climate change.

[50] I am unable to extend the reach of s 7(i) to include the effects on climate change of discharges of greenhouse gases from coal use for the same reasons I have expressed in relation to s 104(1)(a). The legislative frame, as amended by the Amendment Act 2004, makes it plain that consideration of those effects must await the introduction of a national environmental standard.

**Overseas discharges**

[51] The issue with overseas discharges of greenhouse gases from the use of coal extracted in New Zealand is more complex. Such discharges cannot be subject to national environmental standards, with the result that unless regulated at the point of extraction, they will not be subject to assessment under the rubric of sustainable management. Given the global reach of climate change effects, as evident from

s 7(i), it cannot be said that the adverse effects of greenhouse gases on climate change are irrelevant to the exercise of functions under the RMA. Nor are coal mining participants required to surrender units for carbon dioxide emissions from burning of exported coal. The parties also agree the coal mined will probably result in subsequent discharge of carbon dioxide from the combustion of coal. An interpretation therefore that best secures sustainable management would presumptively favour, in the unusual circumstances of this case, assessment of those effects under s 104(1)(a).

[52] The short answer might be that such effects are simply too remote. But there is a more fundamental objection. The central question remains whether the discharges and their effects are subject to the jurisdiction of a local authority. The starting point must be s 15, as this section controls the need or otherwise to obtain consent. Given that s 15 cannot apply outside of New Zealand's territorial boundary, there is no remit to require consent for overseas discharges. Accordingly the discharge can only be amenable to oversight by way of collateral jurisdiction. But where there is no primary jurisdiction to regulate activities extra-territorially (and nothing in ss 30 or 31 confers such jurisdiction), there can be no collateral jurisdiction to do so. Any endeavour to regulate those activities by the side route of s 104(1)(a) could not have been within the contemplation of the legislators and, in my view, must be impermissible.

[53] This arguably literal and narrow interpretation of the reach of the RMA might be said to be discordant with the breath of the sustainable management purpose. But this jurisdictional objection runs in tandem with the implausibility of applying sustainable management principles to overseas jurisdictions. In short, in order to form an accurate view as to whether the overseas discharges are adverse and contrary to the sustainable management purpose, an authority would need to assess the management of those effects in those overseas jurisdictions. One leviathan of environmental law (ie the RMA) is more than enough for lawyers, experts, environmental managers, planners, the local authorities and the Courts of this country. The prospect of a district council assessing whether an end use of coal (or other greenhouse gas emitting resources) is subject to sustainable environmental policy, regulatory control, mitigation or compensation in Cambodia or a province in

China, in Japan or Brazil, Zimbabwe or Kenya, or other foreign jurisdictions is palpably unattractive. I do not think it is a matter that is properly justiciable under the RMA in accordance with acceptable judicial method.

[54] It is apt to record that I am not suggesting that the effects of an activity, located within New Zealand, that extend beyond New Zealand's territorial boundary are not capable of assessment. That is simply an issue of scale, not jurisdiction or justiciability.

[55] Therefore, to the extent that there is a gap, it is not to be filled by the s 104(1)(a) assessment.

**Result**

[56] The Resource Management (Energy and Climate Change) Amendment Act 2004 removed the jurisdiction of local authorities to consider the effects on climate change of the discharge of greenhouse gas emissions from the end use of coal until a national environmental standard addressing those emissions has been produced. Once that standard has been produced it will be for the local authorities to determine whether and in what way policies and rules will be employed to control greenhouse gas emissions in a manner consistent with that standard.

[57] The declarations sought by BCL and Solid Energy are confirmed subject to the factual assumptions recorded at [6].

[58] I leave open the question as to whether diffuse, non point emissions of greenhouse gases are amenable to district level control. Given that such emissions are not normally subject to rules requiring consent, it may be available to contend that the policy of the Amendment Act 2004 is not infringed. But that will depend on the facts of the particular case and the policy framework under consideration. Similarly, whether the beneficial effect of land use management might be relevant is something that will need to be determined in light of the facts and policy frame under specific consideration.

[59] Accordingly, the Environment Court was correct and the appeals are dismissed.

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