

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

**CIV-2012-425-000405
[2013] NZHC 815**

BETWEEN	QUEENSTOWN CENTRAL LIMITED Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
AND	FOODSTUFFS (SOUTH ISLAND) LIMITED Applicant
AND	SHOTOVER PARK LIMITED Associated Respondent

Hearing: 12-14 February 2013
(Heard at Queenstown)

Appearances: J Young for Shotover Park Limited
J Gardner-Hopkins and E Matheson for Queenstown Central Limited
T Ray and J Macdonald for Queenstown Lakes District Council
N Soper and A Ritchie for Foodstuffs (South Island) Limited
G Todd for Cross Roads Properties Limited

Judgment: 19 April 2013

RESERVED JUDGMENT OF FOGARTY J

Solicitors:
Russell McVeagh, Auckland – bron.carruthers@russellmcveagh.com and james.gardner-hopkins@russellmcveagh.com
Anderson Lloyd, Queenstown – nic.soper@andersonlloyd.co.nz
Macalister Todd Phillips, Wanaka – tray@mactodd.co.nz
Brookfields, Auckland – youngj@brookfields.co.nz

Contents

<i>Road map</i>	[1]
Introduction and summary of both the Foodstuffs and the Cross Roads appeals decision	[2]
Section 104D issues	[21]
<i>The context</i>	[21]
<i>Preliminary observations</i>	[31]
<i>Foodstuffs decision</i>	[42]
<i>Cross Roads decision</i>	[55]
<i>Does Hawthorn apply to the application of s 104D(1)(a), in the context of this case?</i>	[61]
<i>Conclusion</i>	[84]
<i>Did the Environment Court err in its interpretation and application of “minor” when applying the alternative numeric analysis, which does take into account and recognise the presence of PC19(DV)? Did the Environment Court err in law when defining a 20% threshold for “minor” effects?</i>	[86]
<i>Did the Environment Court err in law in considering all undeveloped industrial land in Queenstown/Wakatipu was the appropriate base against which to measure the loss of industrial land in relation to the Foodstuffs application?</i>	[116]
General conclusion on error of law in the Foodstuffs application on the evaluation that the Foodstuffs application could be no more than a “minor” adverse effect, and was not contrary to objective 10 of PC19(DV).....	[128]
Materiality of error of law	[129]
Other issues	[141]
<i>Should the Environment Court have adjourned the hearings?</i>	[141]
<i>Was the Court prejudiced by an error of law classifying QCL as a trade competitor? Did this materially affect the decision?</i>	[144]
<i>Result</i>	[164]

Road map

[1] *There are two resource consent applications at issue: one application by Foodstuffs to build a Pak'nSave at Frankton Flats, and another by Cross Roads Properties to build a Mitre 10 Mega, also at Frankton Flats. Queenstown Lakes District Council (QLDC) declined the Foodstuffs application. The Cross Roads application went directly to the Environment Court. The Environment Court granted both applications. Now the Environment Court's decisions have been appealed to the High Court. The High Court is releasing two separate decisions, one for each application.¹ This is necessary as there are separate rights of appeal. Both decisions need to be read together.*

Introduction and summary of both the Foodstuffs and the Cross Roads appeals decision

[2] This summary endeavours to collect in one place the reasoning of both decisions.

[3] The Resource Management Act 1991 requires applications for consent to be processed promptly; even on the eve of a proposed plan for the locality becoming operative; even when the applications are in conflict with what is being proposed.

[4] There is a tension, not resolved by a rule, rather guided by standards, between the consent authority's duty to process the applications and the duty to do so having regard to the proposed plan for the locality.

[5] In 2012, the Environment Court was seized with two applications for consent to establish a Pak'nSave supermarket and a Mitre 10 Mega on the Frankton Flats, being undeveloped land adjacent to the airport at Queenstown. These were significant applications, taking up about 4 hectares of a 42 hectare

¹ This decision and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

area of undeveloped rural zoned flat land. The land is identified for urban development in objective 6 of the operative district plan. To implement objective 6, including to provide for industrially zoned land, there is a proposed plan, PC19. The Council had heard submissions for and against it, and reached a decision. There have been numerous appeals against that decision, and those appeals were pending before another division of the Environment Court, already part heard. Neither the Pak'nSave nor the Mitre 10 Mega proposals are permitted in the proposed plan change.

[6] The two applications for consent were for two large scale retail developments, Foodstuffs, 2.8 hectares, and Cross Roads, 1.82 hectares, to be located in the proposed E1 and E2 zones, but located significantly in the E2 zone, abutting the eastern access road and partly encroached on the pure industrial zone E1. E2 is for light industrial activities with some provision for retail. As PC19(DV) stood at the time, area E, including E1 and E2, provided for industrial activities with limited retail activities. These applications were not permitted by proposed plan PC19.

[7] The Council, via a Commissioners' decision, had declined the Pak'nSave application. On appeal, the Environment Court, by a majority, held that a Pak'nSave would have only "minor" adverse effects on the environment, and, unanimously, would not on the whole be contrary to the objectives and policies of PC19. Having gone on to consider the merits of the application, having regard to the proposed change, the Environment Court granted the application.² Commissioner Fletcher dissented from the finding that the Pak'nSave proposal would have only a "minor" adverse effect. He considered the loss of future supply of industrially zoned land to be an adverse effect that was more than "minor". He otherwise agreed with the decision. The Environment Court similarly split on adverse effect in the Cross Roads

² *Foodstuffs (SI) Ltd v Queenstown Lakes District Council* [2012] NZEnvC 135 (*Foodstuffs*).

application for a Mitre 10 Mega.³ Here though, Commissioner Fletcher completely dissented. That application was heard directly by the Environment Court.

[8] Both decisions are appealed and were heard by this Court together. The issues in both appeals centre upon whether and how the Environment Court should have considered PC19 providing for the development of Frankton, when considering whether or not the two applications would have adverse effects on the environment. For the purposes of s 104D analysis, there is no material difference between the Foodstuffs and Mitre 10 Mega proposals.

[9] It is the scheme of the RMA that there is always an operative plan, and often a proposed plan. Before any consents are granted, the operative plan has to be applied, and regard must be had to the proposed plan, s 104. The jurisprudence is that the closer the proposed plan comes to its final content, the more regard is had to it. Consent has to be given under both plans.

[10] Within this basic scheme there is a sliding scale of analysis of the merits of applications, depending on the degree of conformity or departure from the operative and proposed plans. Those are ss 104 and 104A-D. This case concerns principally the application of s 104D.

[11] Section 104D provides:

104D Particular restrictions for non-complying activities

- (1) Despite any decision made for the purpose of [section 95A(2)(a) in relation to adverse effects], a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
 - (a) the adverse effects of the activity on the environment (other than any effect to which [section 104(3)(a)(ii)] applies) will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of—

³ *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177 (Cross Roads).

- (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
 - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
 - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
- (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(Emphasis added)

[12] In both cases, the Environment Court, by a majority, applying s 104D(1)(a), was satisfied that the adverse effects of the separate proposals on the environment will be “minor”. The Court found the proposals will have only a “minor” effect in two different ways:

- (i) By ignoring the proposed change PC19 completely, and effectively assuming as a fact that the Frankton Flats area was going to remain undeveloped;
- (ii) In case (i) was wrong: By taking the proposed change into account and finding that “minor” could be any loss less than 20%, arguing that using a number scale was “no more arbitrary” than the statutory standard “minor”, and finding the loss of industrial land was less than 5%, and so “minor”.

[13] The assumption in (i) of a rural undeveloped environment is contrary to objective 6 and policies 6.1 and 6.2 of the operative district plan and to the current contest between property developers for the most valuable commercial development of Frankton Flats which is the remaining undeveloped flat land in Queenstown. There is no prospect of the land remaining undeveloped. While the Environment Court was right not to focus on the specifics of PC19(DV)’s content, it should have recognised:

- that the future environment of Frankton Flats was urban, consistent with objective 6 and its policies;
- the sites of the proposals were located within the last area of Frankton Flats to be rezoned urban;
- There was competition for development of that land and a pending plan change (PC19).

[14] As to (ii), it is not permissible to substitute a numeric test for the statutory test. The application of that test oversimplified the task set by law in subsection (1)(a).

[15] These two errors undermine both judgments of the Environment Court, for they had the consequence that the gatekeeping section, s 104D(1)(a), was not applied correctly. Inasmuch as the Environment Court may have considered its s 104 analysis led to satisfaction of s 104D(1)(b), as an alternative to (1)(a), it was also in error of law.

[16] There is a real prospect that had s 104D been applied correctly, both these applications would have been dismissed at either of the two s 104D thresholds. Therefore the errors are material. It is not the task of the High Court on appeal to apply s 104D.

[17] Accordingly, both appeals have to be allowed. The applications remain on foot, and can be pursued, but will be examined now against the latest decision on the proposed change, which was released by another division of the Environment Court on 12 February 2013.⁴

[18] There were other arguments presented to the Court, contending other errors of law on the part of the Environment Court. Because of the Court's findings on the application of the gateway section 104D, these issues are of

⁴ *Queenstown Airport Corporation Ltd and Anor v Queenstown Lakes District Council* [2013] NZEnvC 14 (QAC v QLDC).

lesser importance to this Court. In case, however, this matter goes on to the Court of Appeal, the two judgments identify these other issues of law, and give summary reasons as to the Court's findings, both on error and on materiality.

[19] The first of these arguments is that the Environment Court should not have heard the appeal against the *Foodstuffs* decision or the original application in respect of *Cross Roads Properties Ltd* until the decision of the other division of the Environment Court on PC19(DV). The second argument is that the Court wrongly classified Queenstown Central Limited (QCL) as a trade competitor, with improper motives, with the result that it did not give QCL a fair hearing. The third argument is that the Court misinterpreted objective 10 of PC19(DV).

[20] This Court is releasing separate judgments on each appeal. However, there is significant cross-referencing. Effectively, both decisions have to be read, to collect the complete reasoning. The reason for separate judgments is to allow the parties to each appeal to make separate decisions to seek leave to appeal or not.

Section 104D issues

The context

[21] Queenstown is a resort town with an international appeal. The resort town proper is built right on the edge of the lake, at the head of Frankton Arm. Its centre is a bustling resort town, a mix of retail, restaurants, bars, backed by hotels, motels and apartments.

[22] The area suitable for industrial land is at the head of Frankton Arm, on flat land known as the Frankton Flats. The Frankton Flats are significantly developed. The airport is there. There is also industrially zoned land called Glenda Drive. There is also a large area of undeveloped land, not yet built upon, a good part of which is the subject of this litigation.

[23] The Council notified its district plan under the Act in 1995. It was declared partially operative in 2003 and fully operative in 2009. Frankton Flats was given a Rural General zoning; however, the district plan recognised that eventually it would become urbanised. Under the heading in the section of the operative district plan dealing with “District Wide Issues” “Urban Growth” the following appears:

Objective 6 – Frankton

Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.

Policies:

- 6.1 *To provide for the efficient operation of the Queenstown airport and related activities in the Airport Mixed Use Zone.*
- 6.2 *To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.*

[24] Part of Frankton Flats is developed; another part (FFA) remains undeveloped, but for a large excavation undertaken by a failed developer. The rezoning of the balance of Frankton Flats, known as FFB, is the purpose of plan change 19 (PC19). It was first notified back in July 2007. After hearing submissions, the Council released what is known as PC19 (Decision Version) (“PC19(DV)”).

[25] PC19(DV) has as its overall purpose the completion of the rezoning of Frankton Flats for urban activities, implementing objective 6 and policies 6.1 and 6.2 of the operative district plan. The mix of activities includes education, residential, visitor accommodation, commercial, industrial, business and recreation. It covers an area of approximately 69 hectares; 38-42 hectares, variously described, which provide for industrial uses.⁵ It provides for a village centre, generally towards the west end of the area, being itself a mix of

⁵ See *Foodstuffs* at [100]. See *QAC v QLDC*, at [28], (numbers are hectares) – D-7.95, E1-20.39, E2-9.37, E4-1.62.

commercial, business, residential, visitor accommodation and retail. Generally to the south and near the airport, it provides for industrial and yard-based activities, with minimum lot sizes and more limited site coverage, with no residential or visitor accommodation and limits on retail. Generally, to the east it provides for industrial activities, with no residential or visitor accommodation and retail prohibited. This land to the east abuts existing industrial zoned land known as Glenda Drive. This proposed plan reflects the usual urban separation of residential activities from unsuitable commercial and industrial activities, made to avoid nuisance, or, in current RMA language, to avoid reverse sensitivities.

[26] The Council's decision on the proposed change, PC19(DV), was the subject of a number of appeals. While these appeals were pending, Foodstuffs applied to the QLDC to construct a supermarket, to be a Pak'nSave, in the area of PC19(DV). Likewise in PC19's area, Cross Roads Properties Limited applied for consent to erect a Mitre 10 Mega alongside the Pak'nSave, both businesses sharing a large car park.

[27] Because the operative zoning of the land for both the Foodstuffs and the Cross Roads applications is Rural General, the proposed uses were non-complying against the operative district plan.

[28] Both the Foodstuffs and the Cross Roads proposals were inconsistent with PC19(DV). Section 87B(1)(c) of the RMA requires that as the rules proposed by PC19 are not yet operative, any application must be treated as an application for a discretionary activity. The Pak'nSave proposal was located mostly within the E2 activity area, where all activities are prohibited unless an outline development plan had been approved. Inasmuch as Pak'nSave was located in area E1, it was a prohibited activity.

[29] In the case of Cross Roads, it was located principally in the E1 industrial zone, and in that regard is a prohibited activity. But for the same reason, it is treated as a discretionary activity by application of s 87.

[30] To obtain consent therefore the two proposals needed to get past the gateway of s 104D and then survive analysis under s 104. The first way that both applications could get to s 104 was if the consent authority (here the Environment Court) would be satisfied that the effects on the environment of the Pak’nSave proposal, and separately, the Mitre 10 Mega proposal, would not be more than “minor”.

Preliminary observations

[31] The Environment Court framed the application of s 104D(1)(a) in the following way, in [71] of its *Foodstuffs* decision:

[71] Similarly, the resources or people against which or on whom possible effects are assessed to ascertain whether they are adverse (and, if so, more than minor) are identified either in principles in Part 2 of the RMA, or in operative objectives and policies, or in proposed objectives and policies in a proposed plan (change) that are beyond challenge. In our view they do not include the objectives and policies of a proposed but challenged plan (or plan change). Where the provisions of a proposed plan (change) are under challenge then they are not reasonably foreseeable as settled in that form for the purposes of section 104D(1)(a) of the RMA. It is worth noting that while permitted activities under a proposed district plan (or plan change) are not relevant to the first gateway test, proposed objectives and policies are still relevant under the second gateway test (and under section 104(1)(b) if we reach that far). In summary:

- (1) the first gateway (section 104D(1)(a)) is concerned with the adverse effects of a proposal on the existing and likely (reasonably foreseeable) future environment as explained in *Hawthorn*;
- (2) the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;
- (3) the second gateway (section 104D(1)(b)) is concerned principally with the adverse effects of a proposal on the future desired environment (even if, in the case of a proposed plan (change) that may be unlikely).

[32] The issues on this appeal principally concern the legality of subparagraphs (1) and (2). I observe, however, that this judgment should not be taken in any way as an endorsement of (3). Because both appeals turn on the application of the first gateway threshold, and because I have not had full

argument on the framing of the second gateway test (3), this judgment does not discuss that framing. It is sufficient to say that I think (3) is inconsistent with s 104D(1)(b). The objectives and policies of plans are not confined to avoiding adverse effects.

[33] As a preliminary to more detailed analysis of the first gateway, I briefly introduce the issue by way of reference to the arguments that I heard. I do not intend, however, to attempt to summarise all the arguments from the five sets of counsel. That would unduly burden the judgment, without assisting the comprehension of it. It is, however, important to signal at the outset that this Court's judgment as to the application of the first gateway test does not coincide with any one of the five arguments received. It also does not wholly reject the approach of the Environment Court. The Environment Court rightly observed that PC19(DV) was under appeal in many respects, and so it was difficult to forecast what its ultimate shape and content would be.

[34] Mostly, counsel before me presumed that the task of applying the standard "will be minor" in the first gateway test involved examining the effects of each proposal on the future environment as provided for in PC19. In that regard, I heard a great deal of detailed argument as to the distinctions between the industrial E1 zone, the mixed industrial commercial and retail E2 zone, and the potential alignments of the Eastern Access Road.

[35] The Environment Court correctly identified, and all counsel agreed, that one of the ultimate issues was whether or not there was an adverse effect of the loss of industrial land. The first gateway test s 104D(1)(a), of being satisfied that the proposed activity's effects on the environment will be "minor", does not refer in any way to the operative or proposed plans. By contrast, the second gateway test s 104D(1)(b) does refer to operative and proposed plans, but only to their objectives and policies. For reasons which I detail hereafter, I am of the view that the first gateway test is a forward looking judgment as to whether or not the proposed activities may cause an adverse effect more than "minor" on the existing and future environment. That judgment can be made, and must be made, with regard to the provisions of the operative plan, existing

resource consents, commercial activity competing for use of the subject and surrounding land, and associated regulatory initiatives by way of proposed change. But the judgment is not made in any static setting, for example, examining PC19(DV) as though it will remain unchanged.

[36] Second, I observe that the cornerstone material fact in the application of the first gateway test is that there is an operative district plan which contains objective 6, which provides for the urbanisation of this area to accommodate residential, commercial and industrial activity. I note that in [71] of the Environment Court’s framing, it has correctly included in the consideration of whether effects are adverse and, if so, more than “minor”, “operative objectives and policies”.⁶ However, I go on to reason that in fact it did not do this when applying the first gateway test. This is because, in my respectful view, it got sidetracked by the decision of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd*.⁷

[37] Overall, the Environment Court was looking at these two applications, in the context of a plan change promulgated by the Council to give effect to the operative district plan objective 6, policies 6.1 and 6.2 and implementation methods, in accordance with the “Explanation and Principal Reasons for Adoption”. It was a zone with multiple uses, endeavouring thereby to accommodate a residential village, shopping for the residents and to provide for additional commercial, industrial and yard-based activities.

[38] This is all in a setting where optimal growth of Queenstown makes it desirable to make provision for a low cost residential community and, second, for more industrial activity which, in the nature of things, is easier located on flat land. Flat land was scarce. This is the remaining flat land within the urban boundaries of Queenstown not yet developed. None of these facts are in dispute. All are common knowledge, and the stuff of regular debate in the local community.

⁶ See third and fourth lines.

⁷ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

[39] At the time that the Environment Court heard both applications for resource consent, in July and August 2012, PC19(DV) was under appeal. As already noted, there were numerous submissions for change, and the different zone boundaries and policies were very much under challenge. There was, however, no suggestion that the area of Frankton Flats B would remain undeveloped as rural general land. On the contrary, there is going to be intensive development, and the setting was one of making planning decisions to accommodate all the proposed activities, including a large area of industrial activity onto this area.

[40] There is very little land zoned industrial in the operative plan which remains undeveloped. It is all at Glenda Drive. In 2006, it amounted to 6.2 hectares.⁸ There were competing estimates by the experts as to how much industrial zoned land Queenstown needs. The estimates vary between a low of 60 hectares and a high of 100 hectares. It was common ground that Queenstown is short of industrial land.⁹ The Frankton Flats B zone, under PC19(DV), is approximately 69 hectares, of which 38-42 hectares provided for industrial (not exclusively) activities. Hence the important conclusion by the Environment Court, at [100] of the *Foodstuffs* decision:

[100] ...Indeed, providing a maximum of some 42 hectares within Frankton Flats B is not going to meet all the need identified [for industrial land], no matter which numbers are used.

[41] The next part of this decision summarises the reasoning in the *Foodstuffs* and the *Cross Roads* decisions, before returning to the issue as to whether or not that reasoning was in error of law. Both judgments of the Environment Court are detailed and very long. I am indebted to Mr Todd for his summary of the Environment Court's reasonings in both decisions, when applying s 104D(1)(a).

⁸ *Foodstuffs* at [107].

⁹ *Foodstuffs* at [63], [291], [298].

Foodstuffs decision

[42] The Court noted that a resource consent was required under both the operative plan and under the proposed plan.¹⁰ It noted the extended definition of “effect” in s 3 of the RMA.¹¹ It set out the wide definition of “environment” in s 2 of the Act.¹² It is appropriate to set out both of those definitions now.

[43] Section 2 contains a broad definition of “environment”; it provides:

Environment includes—

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[44] Section 3(a) of the RMA provides:

3 Meaning of “effect”

In this Act, unless the context otherwise requires, the term effect ... includes—

- (a) Any positive or adverse effect; and

...

[45] The Court then went on to find that the meaning of “environment” was explained by the Court of Appeal in *Hawthorn*, setting out [42] of that decision:¹³

[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe “ecosystems” in a way which focused on the state of an ecosystem at any one point in time. Apart from any other

¹⁰ At [23].

¹¹ At [66].

¹² At [67].

¹³ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial.

[46] The Environment Court then went to apply what it considered the Court of Appeal's conclusion was:

[84] In summary... in our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach.

[47] Then in [69] of its judgment, the Environment Court recognises that the Frankton Flats was generally undergoing major changes, and these were all about changes "to one of the few as yet un-urbanised areas remaining on the flats". It then observed that just about everything about PC19(DV) had been challenged on appeal. It then moved on to [71], as we have seen.

[48] In the *Foodstuffs* decision, the Environment Court was satisfied that the adverse effects of the activity of a Pak'nSave supermarket on the environment would be "minor". It reached this decision by firstly finding that the landscape in the area had already been modified by the adjoining urbanisation of the Frankton Flats. That part of the decision is not under challenge. Second, and more pertinently, it found:

[104] ...By analogy with *Hawthorn* where the Court of Appeal held that possible applications for resource consents were not part of the reasonably foreseeable environment, we hold that a possible exclusively industrial zoning for the site under the unresolved (and challenged) PC19(DV) is not part of the reasonably foreseeable environment.

[105] ...Consequently the potential effect of removing possible exclusively industrial land from use as such within the potential Frankton Flats B zone is not an effect on the “environment” within the meaning of section 104D(1) of the RMA.

[49] By these two findings, the Environment Court removed from the future environment the possibility of industrial zoning. As will become apparent, the qualifier “exclusively” was not relevant; it is not used again in the Court’s reasoning. The effect of these two findings is that it did not consider either the subject site or the receiving environment as a place where industrial activity might occur in the future. This is contrary to objective 6, which we have seen expressly provides for industrial activity on the Frankton Flats generally, and specifically in policy 6.2 for expansion of the industrial zone at Frankton. Effectively, the Environment Court used [84] of *Hawthorn* to remove consideration of objective 6 of the operative district plan when examining the future environment of the Frankton Flats.

[50] In case that reasoning was wrong as a matter of law, the Court went on to examine the receiving environment in the context of the planned development of Frankton Flats B for urban activities, including industrial land. In this alternative analysis it substituted the test of “minor” for a test of a 20% or less loss of potentially industrial land. It set “minor” alongside the complementary concept of “major” to arrive at the 20% figure. It then found that the potential loss of industrial land was less than 5%. It used this finding to find that quantitatively and qualitatively the effect would be “minor”.

[51] Therefore, on two alternative bases the Court was satisfied that the adverse effects on the environment would be “minor”, and so was satisfied that s 104D(1)(a) applied. That enabled the application for a non-complying activity to proceed to s 104 analysis.

[52] I note that in the *Foodstuffs* analysis the Court also considered the question of an adverse effect on the amenities of the future Eastern Access Road and another road, Road 2, and adverse effects on the future of urban structure on the Frankton Flats. It came to the conclusion that both effects were “minor”. These aspects of the decision were not the focus of the appeal.

[53] The appeal by QCL against the *Foodstuffs* decision did not contend that the Environment Court also cleared the Foodstuffs application under the second gateway test, subsection (1)(b). However, it is arguable it did. At [119], the Court found:

[119] Since we have found that any adverse effects of the proposal on the environment are not more than minor, the first gateway under section 104D(1)(a) of the RMA is passed and we do not have to consider the second, that is whether the proposal is contrary to the objectives and policies of either the outline development plan or of the PC19(DV). However, out of an abundance of caution and in the light of Mr Gardner-Hopkins' submission that consent cannot be granted because both gateway tests are failed, we will consider each of the objectives and policies to which the proposal by Foodstuffs is said to be contrary, after we have discussed them below under section 104(1)(b) of the Act.

[54] In its s 104 analysis, the Environment Court did find that the Pak'nSave proposal was consistent with objective 10 of the proposed change, when considered as a whole. In the companion *Cross Roads* decision of the Environment Court, it came to a similar position. The appeal point was taken principally in the *Cross Roads* appeal. In that decision, I find that there were several errors by the Environment Court in the construction of the objectives and policies. For the purposes of this judgment it is sufficient to say that my conclusion in that regard in *Cross Roads* is of equal application to *Foodstuffs*. So that if the Environment Court did clear the *Foodstuffs* application under the second gateway that was an error of law. I also observe that it is important in regulatory statutes to ask the right question at the right time. If the second gateway test of s 104D(1)(b) was going to be examined in *Foodstuffs*, it should have been before considering the criteria under s 104(1)(b). As under s 104, the issue is not "will not be contrary" to the objectives and policies, for even if there is a conflict a proposal may be granted.

Cross Roads decision

[55] The *Cross Roads* decision was released after the *Foodstuffs* decision. It followed the analysis on the law in *Foodstuffs*, particularly as applying to the application of *Hawthorn* and as to the substitution of a numeric test for the

statutory test of “minor”. Like *Foodstuffs* it started with a landscape “minor” effect analysis, which does not concern us on this appeal.

[56] On the *Hawthorn* point, the Environment Court said, at [59]:¹⁴

[59] The short answer is that, adopting the analysis in *Foodstuffs*, as a matter of law the supply of possible industrially zoned land under proposed PC19(DV) is not part of the (future) environment for the purposes of section 104D. We acknowledge that the *Foodstuffs* analysis was dealing with the E2 area, while this case is about E1. However, we were advised that in the PC19(DV) appeal hearings SPL is seeking that the site be part of a proposed “E3” area, in which a range of other activities including “trade and home improvement retail” would be enabled. Obviously, the future environment under PC19 is very unpredictable. Thus we consider the *Foodstuffs* analysis still applicable.

[57] Then it moved on to the alternative analysis:

[60] In case we are wrong about that, we proceed to consider whether the removal of 1.8 hectares of industrial land would be only minor or not...

[58] The Environment Court then reached its conclusion:

[65] ...Taking all those matters into account, we are satisfied that to lose 5% (cumulatively up to 5.6%) of the only land that is proposed by PC19(DV) to be protected for “true” industrial uses would be an effect on the PC19(DV) environment that is only minor.

[59] It then dealt with adverse effects on the Eastern Access Road and Road 2.

[60] It then, again similarly to *Foodstuffs*, appeared to have deferred the second gateway test until after consideration of s 104, as in the last sentence of

[71] it said:

[71] ...We consider the extent to which the proposal implements (or fails to implement) the relevant objectives and policies of PC19(DV) in part 3 of this decision.

¹⁴ *Cross Roads Properties Ltd v Queenstown Lakes District Council* [2012] NZEnvC 177.

Does Hawthorn apply to the application of s 104D(1)(a), in the context of this case?

[61] The Court in *Foodstuffs* approached s 104D(1)(a) by identifying the range of alleged adverse effects. The alleged adverse effects identified by the evidence were:¹⁵

- (i) effects on the landscape;
- (ii) effects on industrial land supply;
- (iii) effects on the amenity of the neighbourhood and in particular on the Eastern Access Road and Road 2;
- (iv) effects on “urban structure”.

[62] The practical consequence of applying [84] in *Hawthorn* literally, however, is that the Court is not allowed to examine the effects of the Foodstuffs and Cross Roads proposals on the future environment. Rather, applying [84] of *Hawthorn* to s 104D(1)(a), requires adopting the unreal prospect that the undeveloped land will continue to be the activity on the receiving environment. Likewise, housing, retail, etc, is excluded from consideration by the application of [84]. Or to use the drier phrasing of the Environment Court, in [71], cited above at [30]:

[71] ...

- (2) *the reasonably foreseeable environment does not include permitted activities in a proposed but challenged plan or plan change;*

...

[63] The Environment Court found effectively that *Hawthorn* prevented it from taking into account the reality that there was a demand for more industrial land for Queenstown, which had been recognised in the operative district plan as an objective to be provided in the future, and that the only available flat land will be used at least in part for that industrial activity.

¹⁵ *Foodstuffs* at [65].

[64] Paragraph [84] is a summary of paragraphs [34]-[83]. In the core of its analysis, the Court of Appeal endorsed a future orientated assessment of the environment, in [53] and [54],:

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes, and in many cases future effects will not be effects on the environment as it exists on the day that the council or the Environment Court on appeal makes its decision on the resource consent application.

[54] ...It would be surprising if the Act, and in particular s 104(1)(a), were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[65] *Hawthorn* also recognised that these standards have to be applied in context:

[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur...

That was not the context of *Hawthorn*.

[66] I think [84] of *Hawthorn* was read literally as applying to any context. I do not think the Court of Appeal intended it to be read this way. To read [84] as a rule applying to this context was an error of law. The context of this case is materially different from the context in *Hawthorn*. The Court of Appeal in *Hawthorn* did embrace a future environment as the consideration in s 104D (s 105(2A) previously) and s 104. For these combinations of reasons, it does not govern the application of these facts. It does, however, support relying upon objective 6 and policies 6.1 and 6.2 as reliably informing the assessment of "minor" effect on the future environment.

[67] In *Hawthorn* the applicant applied for consent to subdivide 33.9 hectares into 32 separate lots, and for consent to erect a residential unit on each lot. The proposal required consent as a non-complying activity under the operative district plan and as a discretionary activity under the proposed district plan, so it did engage the predecessor to s 104D, s 105(2A).

[68] It is very material when comparing the context of *Hawthorn* to this case that the following relevant resource consents already existed in the *Hawthorn* baseline and receiving environment:

- (a) An unimplemented consent to subdivide the subject site into 8 blocks of approximately 4 hectares each; (baseline)
- (b) Building consents in respect of a 166 hectare triangle, which included the subject site, for 24 houses already erected and a further 28 consented to, but not yet built; (part baseline, part receiving) and
- (c) Consents in respect of a further 35 building platforms outside the area of the triangle (receiving).

[69] This large number of existing consents meant that there was no issue, but that the environment would have a rural/residential quality. Furthermore, the applicant developer in *Hawthorn* had proffered as a condition of its application not to intensify the residential quality, by not making any further application for subdivision within the receiving environment. It is not surprising that consent was granted, and not disturbed on two appeals.

[70] None of the baseline or receiving environment cases has ever been deployed before to rule out consideration by a consent authority of the prospect that an application would impede an established objective in the operative plan. Given objective 6 and its policies 6.1 and 6.2, and recognising Queenstown's needs, it is inevitable that the Frankton Flats will be urbanised and used in part for industrial activities. "Will be" is the language used in s 104D(1)(a).

[71] The predecessor of s 104D was s 105(2A). It has been considered by the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council*¹⁶ and in *Dye v Auckland Regional Council*.¹⁷ They also are distinguished by

¹⁶ *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

¹⁷ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

context. Like *Hawthorn*, they were subdivision applications into relatively stable existing environments.

[72] There is no doubt that a Pak'nSave supermarket and/or a Mitre 10 Mega would have major effects on the future environment. They involve the erection of very large buildings, putting in place a large number of car parks, and will generate tens of thousands of vehicle movements each week. They would enhance the economic wellbeing of the community by delivering the benefits of competition in the marketplace.

[73] The question is not whether the Foodstuffs (or Cross Roads) proposal would affect the environment. But the question is whether it will be an adverse effect, and if so, can the consent authority be satisfied it will be less than minor.

[74] All counsel agreed that utilisation of scarce land for an inappropriate use can be an adverse effect. This is because Part II of the Act, particularly s 5(2), includes consideration of meeting community needs, in the future.

[75] Section 5 provides:

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 well-being 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.

[76] The consent authority cannot consider any adverse effect on the community of using land for retail activities, which is suitable for industrial activities, if the s 104D(1)(a) analysis is done without the Court being able to have regard to the future needs of Queenstown for industrial land, and the objective in the operative district plan to provide more industrial land at Frankton Flats.

[77] The sort of issues that had to be confronted in *Foodstuffs* simply were not in play in *Hawthorn*. One cannot say with confidence how the Court of Appeal in *Hawthorn* would have analysed the material facts of this case. For these reasons, I do not consider that the Environment Court or this Court are bound by [84] in *Hawthorn*.

[78] Furthermore, the finding at [84] of *Hawthorn* was a non-binding observation that I erred, when I suggested, obiter, that the effects of resource consents that might in future be granted should be brought into account in considering the likely future state of the environment. The Court of Appeal endorsed the Environment Court's approach, which had taken a more restricted view. But the Court still answered the question in the negative, meaning that they did not think there was a material error in the High Court judgment, and no error in the Environment Court judgment.

[79] When the RMA had its genesis, it was intended by many of the promoters to introduce effects based decision-making. Activities which did not generate adverse effects should not be regulated, was the attractive goal. That idea has never been completely lost. The Act did finally embrace the inevitability of plans, but not the inevitability of rules. Plans were to have objectives, policies to implement them, and those policies might or might not have rules: ss 30(1)(a) and 31(1)(a). But alongside that was the understanding that if an activity was innocuous (had no significant adverse effect on the environment), it did not need to be regulated or controlled by the RMA.

[80] That, in my view, is the natural context of s 104D(1)(a). If the activity is non-complying but has only “minor” (no need to be bothered about) adverse effects, then, even though it is non-complying, consent can be considered under s 104.

[81] There are a number of Environment Court decisions which examine the meaning of “minor” in s 104D(1)(a). They were not cited in argument.

[82] Section 104D(1)(a) is a section intended to impose a further restraint on consents being granted for non-complying activities under either an operative plan or a proposed plan, and activities which are inconsistent with the proposed plans, unless they have only a “minor” effect. It is a very small eye in the needle. It can be contrasted with ss 104A-C. I develop this point later in this judgment, when considering the numeric substituted test for “minor”.

[83] There was no dispute to the proposition of fact that each activity, the Pak’nSave and Mitre 10 Mega, considered separately would have the adverse effect of a loss of land for industrial use. There was evidence before the Environment Court of a shortage of industrial land – quite independent of PC19(DV)¹⁸. That assessment can be made without regard to the operative plan. But, in fact, it is reinforced by objective 6, and its policies of the operative plan.

Conclusion

[84] The context of this case was materially different from *Hawthorn*. That decision recognised the importance of context. Read as a whole, it endorses having regard to objective 6 and its policies as a guide to the future environment. [84] was a summary only, and itself should not be read out of context. It is an observation which does not bind this Court in this case.

¹⁸ *Foodstuffs* at [63], [291] and [298].

[85] Section 104D, and indeed the RMA as a whole, calls for a “real world” approach to analysis, without artificial assumptions, creating an artificial future environment. Read as a whole, *Hawthorn* endorses having regard to objective 6 and its policies. The current development of the Frankton Flats, of which these applications are only part, was inconsistent with the plain statutory injunction imposed on the consent authority to consider the adverse effects on the future environment, contained in the phrase “will be”. To read down s 104D(1)(a) so that the judgment is will be “minor” if established in an undeveloped environment, was contrary to the operative plan and the facts, and so thwarted the intention of Parliament. It was a significant error of law in the *Foodstuffs* decision, and likewise in *Cross Roads*.

Did the Environment Court err in its interpretation and application of "minor" when applying the alternative numeric analysis, which does take into account and recognise the presence of PC19(DV)? Did the Environment Court err in law when defining a 20% threshold for "minor" effects?

[86] In the alternative to applying *Hawthorn*, the Environment Court, in case it was wrong, went on to consider whether the effect of granting consent to the retail use of a Pak'nSave would be more than "minor". The Court considered four possible areas against which the Foodstuffs area could be "measured":¹⁹

- (1) The activity areas proposed to be zoned industrial under PC19(DV) (42 hectares);
- (2) All undeveloped industrial land in the Queenstown/Wakatipu area;
- (3) The quantity of industrial land demanded in the district;
- (4) The total area of industrial zones plus proposed industrial zones within the district.

¹⁹ *Foodstuffs* at 106.

[87] The Court opened its discussion of the alternative application of the standard "minor" in s 104D(1)(a), as follows:

[72] Counsel did not refer to authorities on what "minor" means. The dictionary definitions suggest it means comparatively small or unimportant or lesser in number, size or [extent]. Based on normal usage "minor" seems to come between minimal on one side, and more than minor and then major on the other side of a scale of effects. Further, the concepts of size and importance seem to have both quantitative and qualitative dimensions. Accordingly, whether adverse effects are "minor" or "more than minor" depends on the circumstances and context. For example, where a significant habitat of a threatened indigenous species is at risk in a region where the species' population has already reduced to 20% of its former population, even a small (say 1%) reduction in its habitat or population may be more than minor. It depends on the species, the factors on which its population viability depend and the margins of error in the analysis.

[73] We are also acutely conscious of the "One Percent Problem" "... where small contributors account for so much of a ... problem that the social goal cannot be met without regulating many one percent sources".²⁰ Even very minor effects which may happen have the potential to lead to adverse accumulative effects ...

[74] We return to the assessment of other adverse effects, including any strict cumulative effect - an effect that is at least reasonably likely to happen if a proposal gains consent and if it is implemented. The situation that most often arises with predicting such an effect is that the consent authority (or on appeal the Environment Court) is faced with making an unscientific qualitative prediction on evidence that gives no margin of error or confidence limits. A further complication is that in *Westfield*²¹ Blanchard J approved an Environment Court decision in which the court placed "significant" somewhere in the scale, at least where there are possible trade effects (which must be disregarded under (now) section 104(3)(a)(i)). For the purposes of this decision we ignore any complexities introduced by *Westfield* and apply the first gateway test in the standard way. We hold that any adverse effect which changes the quantity or quality of a resource by under 20% may, depending on context, be seen as minor.

[88] It may be noted that no authority is cited for the last sentence. The last sentence has to be read as justified by the preceding analysis. That analysis starts with reference to the "dictionary definitions" and "normal usage". It is not referenced to the function of s 104D in the scheme of the RMA.

²⁰ Citing an article by K M Stack and M P Vandenberg *The One Percent Problem* (2011) 111 Columbia Law Review 1385 at 1388.

²¹ *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

[89] When it came to applying the standard against the key issue on appeal, whether the loss of potential industrial land is an effect on the environment, as we have seen, the Court identified a loss of about 5% of the proposed supply of scarce industrial land. It recognised this as a distinct adverse effect, but concluded it was only minor:

[110] ...However, in these particular circumstances we are satisfied that it is quantitatively and qualitatively only minor (and at the lower end of minor too).

[90] No counsel defended the proposition that any adverse effects which change the quantity or quality of a resource by under 20% may, depending on context, be seen as "minor". Rather, counsel supporting the decision emphasised that the Court was relying on a much lower percentage of 5%.

[91] The context is the unchallenged common assumption by the Environment Court under appeal and all counsel before me that land suitable for industrial activities is a resource and is necessarily limited within the urban area of Queenstown. Moreover, there is competition for land suitable for industrial activities, to be used for other, here retail, activities. In this context, loss of land for industrial activity can be an "adverse effect" on the environment. The definition of environment is engaged under s 2(a), (b) and (d), set out above in [43].

[92] I do not think it is possible to ignore the Court's approach to the application of "minor" by its substitution of a 20% test. This is for two reasons. Firstly, it is a substitution of one standard, a statutory one, by another. Second, by identifying 20% as a demarcator between "minor" and "not minor", the Court is creating an anchoring effect on reasoning. Setting up the break line at 20% facilitates and indeed encourages a judgment that a loss of 5% will be "minor". This is even though there are qualifying passages in the Court's judgment saying that a significant 1 % loss could be "minor".

[93] The legal method deployed by the Environment Court in its analysis is a traditional legal method known as "literal" or "black letter". This is the method of reading a provision in isolation, as a businessman would, giving the words in the provision their usual meaning and then applying them to the facts.

[94] This legal method can apply quite satisfactorily when the provision is a rule. A rule can be applied without the need to understand why the rule is there, and without the need to understand the other body of rules surrounding it. So, for example, we are all familiar with driving to a strange city and immediately becoming familiar with the parking prohibitions around our hotel. It is not necessary to understand the policy or purpose behind why there is a no stopping sign and yellow lines painted in a particular part of a particular street. The signs and the yellow lines send a clear and unmistakeable communication.

[95] This black letter method cannot apply reliably, however, when the statutory provision is not a rule but a standard. When the statutory provision contains a term like "minor", that is a standard, application of which requires resolution of a question of degree. There is no bright line distinction between "minor" and "not minor". There is always room for two persons to honestly disagree in good faith on the application of a standard.

[96] It is not possible to apply standards in any way consistently without the persons who are applying them examining and agreeing on the policy or reason why the standard has been imposed, rather than a rule made. Standards are usually imposed when the task is of such complexity that it is simply not possible for it to be regulated by precise rules. In such situations it is necessary to apply the standard against the purpose for which it is applied. This is the classic situation where s 5 of the Interpretation Act 1999 applies. Section 5(1) provides:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[97] The operative standard in s 104D(1)(a) is:

A consent authority may grant a resource consent for a non-complying activity only if it is satisfied that ... the adverse effects of the activity on the environment ... will be minor.

[98] It is not simply an application of a standard of "minor". It requires a positive satisfaction on the part of a consent authority that the adverse effects of the activity on the environment in the future will be "minor".

(Emphasis added.)

[99] Coming to this standard for the first time, the consent authority should ask: "Why is it here?" The reason is not hard to find. It is an amendment to the RMA, introduced to elaborate upon s 104. Section 104 is the cornerstone section which sets out the criteria that a consent authority must have regard to when considering any application for a resource consent. Sections 104A, B, C and D amplify s 104 by distinguishing separate criteria for applications for controlled activities s 104A (which "must" be granted), and discretionary or non-complying activities s 104B, restricted discretionary activities s 104C, and non-complying activities s 104D, (all of which "may" be granted).

[100] It also needs to be appreciated that s 104D(1)(a), treated as a threshold, is plainly intended to be applied without the obligation to have regard to either the operative district plan or proposed district plan. In context, it may be appropriate, and was here, to recognise that there was a plan change in process implementing objective 6 and policies 6.1 and 6.2. That exercise must be done when applying s 104D(1)(b) and, later, s 104(1)(b).

[101] In this context, it becomes clear that the purpose of s 104D(1)(a) is to allow applications for non-complying activities which may or will be contrary to the objectives and policies of an operative district plan or proposed district plan where the adverse effect is so "minor" that that is likely not to matter. It presents a picture where non-complying activities are unlikely to get consent under an operative district plan, let alone under a proposed district plan, but they will be considered if the adverse effects will be "minor".

[102] In that context, it can be understood immediately that "minor" here is very much at the lower end of adverse effect. That it is quite wrong to approach "minor" as indicating something of the order of 20% of loss. So that if something is lost by a proposal, one can tolerate it if it is merely 20%.

[103] Secondly, by a different line of critique, the jurisprudence is full of cases which constantly warn against the dangers of substituting the statutory test with another. In the *Cross Roads* decision, the Environment Court said of the 20% demarcator:

[39] ...We accept that 20% is an arbitrary figure when compared with the range of figures from 15 to 25%, but it is not unreasonable. All we are trying to do is set an approximate upper limit beyond which we would, in most reasonably foreseeable circumstances, not be able to find that an adverse effect was only minor. Nor do we think such an approximate test is any more arbitrary than the words "minor" used in section 104D of the RMA or "significant", often used in this context.

[104] Embedded in that last sentence is the notion that the very deployment by Parliament of the "minor" standard in s 104D(1)(a) is "arbitrary". That is not intended as a complimentary term. The Courts must take statutes as they are enacted. A test cannot be dropped because it is perceived as arbitrary, and replaced by a Judge made "better" test.

[105] However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term "minor". It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a "minor" adverse effect on the environment but are for other reasons non-complying an opportunity to be approved. It fits in as part of a statutory policy that otherwise non-complying activities which are contrary to the policies and objectives of plans and proposed plans simply will not be approved, s 104D will stop the application even being considered under s 104. In that regard, non-complying activities are close to but fall short of being prohibited activities. There is nothing "arbitrary" in this graduated scale of the classification of activities from permitted through to prohibited. To be sure, the application of the standard calls for judgment and it is always

possible for decision-makers to disagree on these questions of degree, but, when inculcated into the scheme of analysis and the values to be applied, such disagreement tends to be minimised.

[106] In [74] of the *Foodstuffs* judgment, cited above,²² the Court distinguished approval by Blanchard J, in *Discount Brands Ltd v Westfield (New Zealand) Ltd*,²³ of the use of the synonym "significant" in the context of applying the test of "minor" as it appeared, a provision dealing with applications not requiring public notification. Section 94A provides:

94A Forming opinion as to whether adverse effects are "minor" or more than "minor"

When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—

- (a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and
- (b) for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity[; and]
- (c) must disregard any effect on a person who has given written approval to the application.

[107] This provision has since been repealed. Blanchard J said:²⁴

[119] An important matter which the council's Regulatory and Hearings Committee needed to inform itself upon was the effect which the activity proposed by Discount Brands might have on the amenity values of the existing centres - on the natural or physical qualities and characteristics of those areas that contributed to people's appreciation of their pleasantness, aesthetic coherence, and cultural and recreational attributes. The committee was required to disregard the effects of trade competition from the Discount Brands centre, since competition effects would have to be disregarded upon the substantive hearing of the resource consent application. But, as Randerson J said, significant economic and social effects did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by

²² At [99].

²³ *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

²⁴ At [119]-[120].

trade competition. To take a hypothetical example, suppose as a result of trade competition some retailers in an existing centre closed their shops and those premises were then devoted to retailing of a different character. That might lead to a different mix of customers coming to the centre. Those who had been attracted by the shops which closed might choose not to continue to go to the centre. Patronage of the centre might drop, including patronage of facilities such as a library, which in turn might close. People who used to shop locally and use those facilities might find it necessary to travel to other centres, thereby increasing the pressure on the roading system. The character of the centre overall might change for the worse. At an extreme, if the centre became unattractive it might in whole or part cease to be viable.

[120] The Court of Appeal considered that only "major" effects needed to be considered, since only then would the effect on the environment be more than minor, in terms of s 94(2)(a). But in equating major effects with those which were "ruinous" the Court went too far. A better balance would seem to be achieved in the statement of the Environment Court, which Randerson J adopted, that social or economic effects must be "significant" before they can properly be regarded as beyond the effects ordinarily associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[108] The standard of "minor" applies within a particular statutory provision when applied to a particular context. Just as it is wrong to go to the dictionary, so also it is wrong, as I have noted, to take the meaning given to a standard in a statutory provision dedicated to another purpose and assume it has the same reference in a different provision, with a different purpose.

[109] What I do take from the judgment of Blanchard J, approving the judgment of Randerson J in the High Court, is the standard "significant" used as a synonym to "minor" was used as part of a purposive explanation of the appropriate reach and application of s 94(2).

[110] I am satisfied that it was an error of law for the Environment Court to use the standard of 20%, albeit with all its qualifications.

[111] There are additional reasons why it was an error of law, which have some pertinence to the judgments that have to be made. The first is that, as the Environment Court recognised, analysis of adverse effects is both a qualitative

and quantitative exercise. It is impossible to use an arithmetical measure of quality. Land developers and planners are very aware, acutely aware, of the distinction between the quantity of land and the quality of land for particular activities. So are businessmen who understand the market. Take the position that pertains in Queenstown as an example. Most of the industrial land is located on flat land in the village of Frankton, which is at the end of Frankton Arm. The resort town proper, right on the edge of the lake, at the head of Frankton Arm, is built on the slopes at the head of Frankton area. It is also now filled with a busy town centre, all the accoutrements of a village, and surrounded by hotels and apartment complexes. It is not an industrial area. It is also folded around hills. The northern exit from this village goes almost immediately into very high quality landscape, which is not suitable for an industrial sprawl.

[112] Reducing the adverse effects of the Pak'nSave proposal to 5% or less does not give one the answer as to whether that will be a "minor" non-complying activity. This is for two reasons. Firstly, the Environment Court has already been anchored by the proposition that anything less than 20% may well be "minor". 5%, of course, is much lower than 20%. That was a mental distraction, a legally irrelevant consideration. Second, the percentage does not really tell the consent authority anything about the quality of the land for industrial uses. It might be not only land that is intended to be zoned industrial, but land which the marketplace will find is highly desirable as industrial land, rather than land for some other activity. It may also have other desirable qualities, namely for commercial use. That will pose a difficulty for the decision-makers who will have to decide how tightly to define the range of activities on that piece of land, depending on what goal they are trying to achieve.

[113] The areas suitable for industrial land, within the bounds of the town, are the Frankton Flats, upon which are located the airport and a significant area of operatively industrially zoned land in Glenda Drive. But because of the high demand for flat land for commercial as well as industrial uses, a lot of the Glenda Drive industrial land is in fact occupied by non-industrial uses. As the

Environment Court has had occasion to recognise in its *Foodstuffs* judgment, this is because of market forces which tend to place on land activities which obtain the highest value for the land. To be sure, you can categorise the land as "land zoned industrial", but, if the zoning also allows some commercial or retail activities, everybody knows that the land may be lost to industrial use. A substantial town like Queenstown requires industrial land to meet its needs. Industrial land has to be found. This is why a plan may have to secure land for industrial activity, in order to prevent market forces putting it to more remunerative activities.

[114] It follows that for the development of a town and its ongoing growth, the critical issue is what industrial land is available, or is potentially available, and what is its quality, rather than the total of land zoned industrial in the operative plan. The Court was told from the bar that Remarkables Park retail zone was considered as a site for Mitre 10 Mega, but it is not flat.

[115] For all these reasons, the Environment Court fell into error of law, when treating the statutory test as arbitrary, and when substituting a numerical percentage loss for the "satisfied will be minor" test.

Did the Environment Court err in law in considering all undeveloped industrial land in Queenstown/Wakatipu was the appropriate base against which to measure the loss of industrial land in relation to the Foodstuffs application?

[116] This is a subsidiary ground of appeal. The issue falls out of the four possible areas against which loss of industrial land could be measured, set out above in [98]. The Environment Court had selected option 2 (all undeveloped industrial land in the Queenstown/Wakatipu area). It was alleged by QCL that that was an error of law. That the focus should have been on the Frankton Flats area.

[117] As Mr Soper for Foodstuffs pointed out, however, the framing of the question: of "all undeveloped industrial land in the Queenstown/Wakatipu area" was not in fact widening the focus away from the Frankton Flats. For all

undeveloped land suitable for industrial uses was located on the Frankton Flats and was a combination of the land to be developed under PC19(DV) and the undeveloped but currently zoned industrial land in Glenda Drive, which is nearby and on the Frankton Flats. Mr Soper argued the frame of reference of the inquiry by the Environment Court was correctly in the sensitive area, being the land proposed to be zoned industrial under PC19 and the adjacent industrially zoned land in Glenda Drive. This Court agrees.

[118] That frame of reference led to the following analysis in the *Foodstuffs* decision:

[107] We know that it is proposed there be some 42 hectares on which industrial activities will be permitted under PC19(DV). As of 2006 when the CLNA was prepared, there were 6.2 hectares of land undeveloped in Glenda Drive. We do not know how much remains undeveloped at Glenda Drive, but it must be a maximum of 6.2 hectares. Thus the proposed Pak 'N Save will use for retail purposes between 4.5% and 5.2% of the proposed future supply of industrial/business land under PC19(DV).

[108] We can also test the qualitative (or policy) importance of losing industrial land. Since, on the hypothesis, we are looking at the possible outcomes of PC19 (even though we believe that to be incorrect under *Hawthorn*), we can look at how PC19(DV) rates the importance of losing industrial land. The answer appears to be that it is important but compromise is possible - without needing to have regard to the importance of industrial land supply. That is because PC19(DV) contemplates that within Activity Area E2 as shown on the structure plan, "Showroom Retail with a gross floor area more than 500 m² per retail outlet" is a limited discretionary activity and all other retail is discretionary. So PC19(DV) seems to consider that all retail and even large retail will not be an adverse effect on the supply of industrial land anywhere in E2. No reason is put forward either in PC19(DV) or in the evidence in this proceeding as to why other proposed retail (such as the Pak 'N Save) would have an adverse effect on industrial land supply when PC19(DV) implies that showroom retail would not. In fact, the scheme of PC19(DV) shows that the effects on industrial land supply of using it for retail are irrelevant: "Showroom retail" in an area identified as E2 on a structure plan - because it is a limited discretionary activity - goes with a list of matters to which the council has restricted its discretion. None of those matters relates to the effect of the proposal on the supply of industrial land - see proposed rule 12.20.3.3i and iv.

[109] Potentially it is possible for the whole of the E2 subzone under PC19(DV)'s structure plan to be developed for Showroom retail as a series of limited discretionary applications. That is, an area of 10.62 hectares could be removed from the industrial land supply. That can only be justified on the basis that either the adverse effect on industrial

land supply is minor, or that the land is more valuable for (showroom) retail. Either way, the same justification applies (absent reference to the proposed policies) to other retail such as a supermarket.

[119] I remind myself the issue here is not whether this is a meritorious evaluation, but whether there is any error of law embedded in this evaluation. I have already found that it is an error of law to depart from the "satisfied will be minor test" and going to the 20% loss threshold, and pursuing a numeric evaluation for both quantitative and qualitative analysis. The question now becomes whether there is any additional error of law in the analysis in [107] through to [109].

[120] The appellant, QCL, submitted that the appropriate basis upon which to measure the loss of industrial land supply is the type of industrial land that PC19 intended for the Pak'nSave site. QCL submitted that Area E2 was intended for "light industry" and, as the AAE2 borders the Eastern Access Road, development is to be higher amenity, good quality urban design with activities including higher quality showroom-type uses and other premier businesses who can exploit the passing trade the Eastern Access Road will provide.

[121] One can immediately see that QCL's argument tries to narrow the area of loss to equate in fact the total area of loss. Assessed against the area of land for E2 as it was under PC19(DV), the level of loss for industrial land is in fact a loss of nearly 21 %. Secondly, in evaluating the issue of "minor" or not, in [108] we can see that the Environment Court replied on the retail aspects as to uses available in the E2 zone. This is developed in [109].

[122] Mr Soper for Foodstuffs submitted the Environment Court was entitled to find it was unlikely that the Foodstuffs site would be used for industrial purposes in the near future. Secondly, the decision to adopt all undeveloped industrial land as an appropriate base was a judgment issue, a matter of fact, and not a question of law.

[123] I consider that the QCL argument is too specific for an inquiry under s 104D(1)(a), as to potential loss of industrial land. I heard a lot of argument, getting into the niceties of the distinctions between E1 and E2 industrially zoned land in PC19(DV). But the Environment Court was right not to get bogged down in the detail of these zones, which could change as a result of the appeals, and did. Section 104D(1)(a) analysis is not against the specific content of proposed plans. That is subsection (1)(b), (where it is confined to objectives and policies). The subsection (1)(a) analysis is properly considered in terms of the very preceding words of s 104D, as an inquiry into whether or not the Court can be satisfied that there will be no more than a "minor" effect on the environment in the future. That involves envisaging what the future environment may be. That is a broader lens than focussing on the specifics of the current proposed change, which is under appeal.

[124] I do not agree with Mr Soper's submission that the Environment Court was entitled to find it unlikely that the Foodstuffs site would be used for industrial purposes. That is not the s 104D(1)(a) test. Second, the final content of PC19 could not be predicted at that time.

[125] In the *Cross Roads* decision, I have addressed the arguments that the Environment Court was in error of law when interpreting objective 10 of PC19(DV). That reasoning is to be read as adopted in this judgment.

[126] Applying s 104D(1)(b), a consent authority could not be satisfied that the Pak'nSave supermarket in the E1 and E2 zones will not be contrary to objective 10 of PC19(DV).

[127] If the Environment Court did so find, this was a material error of law. For, had the decision gone the other way, these applications would not have got past s 104D.

General conclusion on error of law in the Foodstuffs application on the evaluation that the Foodstuffs application could be no more than a "minor" adverse effect, and was not contrary to objective 10 of PC19(DV)

[128] For these reasons, I am of the view that it is clear that the *Foodstuffs* analysis was in error of law on the gateway issues. The principal error of law was to ignore the facts: that the Frankton Flats was suitable for industrial activities, was inevitably going to be urbanised, and was intended to be for activities including industrial, by objective 6 of the operative plan. Second, it was to depart from the "minor" test, both in turning to the dictionary meaning and implicitly contrasting it with major; and using a numeric standard as a substitute when it is not. Third, it erred when interpreting objective 10 of PC19(DV). The resultant consequence was that the Environment Court lowered the threshold enabling applicants for non-complying activities to get past the gate, set up to prevent non-complying activities from even being considered for consent unless the effects will be "minor". If it did make a decision on s 104D(1)(b), it was in error to find that it was satisfied that the application would not be contrary to objective 10.

Materiality of error of law

[129] This Court only intervenes where there are material errors of law. In this case, the question divides into two parts.

[130] The first question is whether the judgment on the first gateway might have been different had the Environment Court not applied *Hawthorn* and had not substituted the numeric standard for the "minor" standard. For a number of reasons, I think that it is likely that the judgment would have been different.

[131] On the gateway issues, Commissioner Fletcher dissented in both the *Foodstuffs* and the *Cross Roads* decisions. His reasons can be summed up in *Foodstuffs*, by his two paragraphs [291], [292] and the opening sentence of [293].

[291] Further, I consider there is evidence of a scarcity of industrial land. The evidence of scarcity in the CLNA is that "the supply of commercial land is likely to be exhausted in the near future" (p. 1) and table 4 showing that as of 2006 out of 120 hectares of commercial land there is only 30 (25%) hectares vacant, and that within this there is 54 hectares of industrial land, of which only seven hectares (13%) is vacant. As well, we have the parties' acceptance of the "fact that there is a shortage of land for these types of activities". The impending shortage is due to the lack of land zoned industrial (and perhaps that that which is so zoned is not exclusively so). Scarcity would normally push up prices (which it has) which would bring more supply into the market, which can only happen if there is land available and it is zoned accordingly. The parties agree that:

The Frankton Flats is the last remaining greenfields site within the Urban Growth boundary of Queenstown south of the State Highway.

There is no more land available in Queenstown suitable to be zoned industrial.

[292] I consider the loss of around 5% of the future supply of industrially zoned land to a supermarket to be [an] adverse effect that is more than minor.

Qualitatively

[293] I disagree with my colleagues about the policy importance of losing industrial land...

[132] I do not set out the rest of the qualitative analysis. It is closely related to a proposed rule in PC19(DV) and an objective. We then come to his conclusion:

[294] Both quantitatively and qualitatively the effect of losing 2.2 hectares of future industrial land to a supermarket would be more than minor in my judgment.

[133] In the *Cross Roads* decision, Commissioner Fletcher's reasoning was similar:

[196] As to the first, I consider that the 5.6% loss in proposed industrial land would be a more than minor adverse effect. This would be relevant under section 104D if the industrial protection of area E1 under PC19(DV) was part of the (future) environment, and will be relevant under section 104(1)(a) of the Act.

...

[201] I agree with the majority that resource consent(s) should be granted to CRPL under the operative district plan. However, in relation to PC19(DV) I disagree with my colleagues on this point. In my view

not only is the loss of future industrial land an effect in terms of section 104(1)(a) that is more than minor, but there is more to the issue. The proposal not only does not give effect to, but is contrary to objective 10, and specifically policies 10.1 and 10.11 of PC19(DV). I would refuse consent under PC19(DV).

[134] The reasoning of Commissioner Fletcher is close to the reasoning in this judgment.

[135] The second part of the materiality reasoning is the decision of Judge Borthwick's division on the PC19 higher order issues, released on 12 February.²⁵ This decision was released at the beginning of the oral hearing of this case. But, at my request, it was not examined until the last day, after the appeal had been argued on the facts as they presented to the Environment Court of Judge Jackson. This decision of the Environment Court was written after having a resumed hearing on 7 November 2012, which was after the release of the *Foodstuffs* and *Cross Roads* decision by Judge Jackson's division.

[136] Judge Borthwick's division's decision did not amend PC19 to accommodate the Pak'nSave and Mitre 10 Mega proposals. The zone plan is now little different from PC 19(DV), as it was before the Environment Court on these consent applications. The Pak'nSave site is affected, however, in a significant way, in that the E2 zone on the eastern side of the Eastern Access Road is reduced in width, so that the Pak'nSave site is now located as to one-third in E2 and two-thirds in E1. As to the Mitre 10 Mega site, there is no change; it remains squarely within E1. Judge Borthwick's division endorsed the E1 zone as an area for industrial activities.²⁶ The Court granted leave to the parties “to review and propose a revised version of the objectives and policies, but subject to their overall direction being maintained”.²⁷

[137] I have not lost sight also of the fact that the Commissioners' decision rejected the Foodstuffs application. The Commissioners decided that the

²⁵ *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZEnvC 14.

²⁶ At [656].

²⁷ At [662].

proposal failed both gateways under s 104D.28 They held that the adverse effects on the rural environment would be significant,²⁹ that the adverse effects in terms of urban design would be significant,³⁰ and made more general findings that the proposal would have significant adverse effects on the environment.³¹ They also found that the Pak'nSave proposal would be contrary to the objectives of PC19(DV) and undermine the integrity of the plan change.

[138] Accordingly, I come to the general conclusion that the errors, when applying s 104D(1)(a), are material.

[139] Inasmuch as there might have been findings in respect of the second gateway issue (1)(b) of lack of material conflict with objective 10, those errors also are material, in both applications. My reasoning in this regard is to be found in the *Cross Roads* decision.

[140] It follows that the two consents must be set aside.

Other issues

Should the Environment Court have adjourned the hearings?

[141] Counsel for QCL argued that, because there was an imminent decision by another division of the Environment Court on PC19(DV), this division of the Environment Court should have deferred its decision on the consent application. The submission was that it was an error of law, because the circumstance meant that Judge Jackson's division could not reasonably have proceeded with either of its decisions, and/or, in doing so, the Environment Court did not appreciate the consequence of doing so, and have regard to relevant considerations.

²⁸ *Foodstuffs* at [260].

²⁹ At [258].

³⁰ At [259].

³¹ At [260].

[142] The argument did not rely on provisions of the RMA. Nor could it, because they are the other way. Both appeals had to be heard; ss 87I(1)(c), 101(2), 272.

[143] Rather, the argument went to the inherent power of the Environment Court to schedule its hearings. It is long established that the High Court is loathe to interfere with scheduling decisions of any statutory Court. The decision to proceed with these hearing applications did disrupt the decision-making processes of the other division. It had an additional hearing on 7 November 2012 to consider the consequences of the grants of consents for the Pak'nSave and the Mitre 10 Mega. However, in my view, given the clear scheme of the statute which allows for applications to proceed in the face of plan changes, and indeed requires applications to be dealt with promptly, I do not consider that the decision of Judge Jackson's division to continue was an error of law. Whether or not it was meritorious is a different question. But it is not one within the jurisdiction of this Court limited on appeal to errors of law.

Was the Court prejudiced by an error of law classifying QCL as a trade competitor? Did this materially affect the decision?

[144] I address this issue less summarily, as it may have ongoing relevance to these parties. The RMA is the fourth planning statute in our legislative history. As part of the reforms it allows any person to make submissions or applications, whether or not they own land, and whether or not they are adversely affected by other activities nearby, s 96(2). So a concerned environmental activist in Kaitaia can make a submission against the development of opencast coalmining in Southland. A person can apply for consent for an activity on another person's land, even though the applicant does not even have a conditional agreement to purchase that land. A concerned activist in Kaitaia can take an interest in the amenity values of the suburb of Sydenham in Christchurch, and file a submission in opposition to an application for consent for a retail activity in the Sydenham shopping centre.

[145] Businesses competing in trade, unrelated to competition to purchase land and develop it, began to take an interest in RMA disputes. It became the practice for many years for supermarket operators to take a very keen interest in attempts by rivals to locate in their customer catchment. Typically, the competing supermarket retained lawyers, planners and other experts to run sophisticated planning arguments as to why consent should not be granted for another supermarket within their customer catchment. Of course, the arguments did not say they were worried about trade competition. But it was commonly thought by participants in the process and obviously in the end by Parliament that this participation was motivated by the fact they were in competition in trade.

[146] As a result of amendments to the RMA in 2003, trade competitors are now the only class of person who must have a legitimate RMA reason for participating in an RMA process.

[147] The relevant provisions now are:

96 Making submissions

- (1) If an application for a resource consent is publicly notified, a person described in subsection (2) may make a submission about it to the consent authority.
- (2) Any person may make a submission, but the person's right to make a submission is limited by section 308B if the person is a person A as defined in section 308A and the applicant is a person B as defined in section 308A.

In Part 11A, ss 308A and 308B provide:

308A Identification of trade competitors and surrogates

In this Part,

- (a) person A means a person who is a trade competitor of person B:
- (b) person B means the person of whom person A is a trade competitor:
- (c) person C means a person who has knowingly received, is knowingly receiving, or may knowingly receive direct or

indirect help from person A to bring an appeal or be a party to an appeal against a decision under this Act in favour of person B.

308B Limit on making submissions

- (1) Subsection (2) applies when person A wants to make a submission under section 96 about an application by person B.
- (2) Person A may make the submission only if directly affected by an effect of the activity to which the application relates, that
 - (a) adversely affects the environment; and
 - (b) does not relate to trade competition or the effects of trade competition.
- (3) Failure to comply with the limits on submissions set in section 149E or 149O or clause 6(4) or 29(1B) of Schedule 1 is a contravention of this Part.

[148] Foodstuffs South Island Limited was the applicant for the Pak'nSave supermarket. Queenstown Central Limited owns part of the land in PC19. It does not own land over which the Pak'nSave supermarket would be operated. Shotover Park Limited (SPL) is another property owner, over whose land Foodstuffs' Pak'nSave would operate. Cross Roads Properties Limited is a subsidiary of the leading South Island retailer, H W Smith Limited, who operate Mitre 10s in the South Island. Queenstown Gateway Limited (QGL) owns land adjacent to PC19, which has a consent for the establishment of a Countdown supermarket. QGL and QCL are managed by the same company. But there is no common shareholding.

[149] At [37] of the *Foodstuffs* decision, the Court made five points on what it saw as the trade competition complexities of the case:

[37] The proceeding is fraught with trade competition complexities:

- Foodstuffs owns the Pak 'N Save and New World supermarket brands. There is a New World at the Remarkables Park shopping centre on the south side of the airport. It is easy to see that Foodstuffs would not want to have their Pak 'N Save in close proximity to its sister brand;

- conversely, Foodstuffs may like to place the Pak 'N Save in close proximity to the Countdown supermarket proposed to be built on land in Frankton Flats A, immediately to the west of the PC19 land. The Countdown brand is owned by Progressive Enterprises, Foodstuffs' main rival in the supermarket trade in New Zealand;
- the Countdown supermarket is proposed to be built on land owned by Queenstown Gateway Limited ("QGL"). It is obvious that QGL may not want a Pak 'N Save in close proximity to the proposed Countdown supermarket. We understand QGL is a sister company of QCL, with related ownership. The management of the QGL land and the QCL land in the C1 area of PC19(DV) is done by the same company, the Redwood Group Limited ("RGL");
- the Remarkables Park shopping centre is on land owned by Remarkables Park Limited ("RPL"), which we understand is a related company to Shotover Park Limited, sharing common ownership.
- RPL and SPL on one side are trade competitors with QCL and QGL on the other side.

[150] The appellant argues that the Environment Court found that QCL was a sister company of Queenstown Gateway Limited (QGL) and a trade competitor, without giving QCL the opportunity to address the issue further, in breach of natural justice. Secondly, having found QCL to be a trade competitor, the Environment Court took that into account when making its substantive assessment. This finding altered the weight it gave to evidence from witnesses from QCL, and its refusal to stay its consideration of the applications and await the higher order decision on PC19 from Judge Borthwick's division.

[151] For Foodstuffs, Mr Soper submitted that the appellant's arguments were misconceived, and misinterpreted the Environment Court's reasoning. That the Court did not find, for the purposes of the Pak'nSave application, that QCL was a trade competitor. Mr Soper argued that QCL has overstated the position when saying that there was prejudice occasioned by error of law as to whether or not QCL was a trade competitor.

[152] As to the Environment Court taking the perception that QCL was a trade competitor, there are two dimensions to the analysis which need to be separated. One is the meaning of trade competitor, and the second is the Court's evaluation of the relationship between QCL and QGL.

[153] Mr Soper, supported by Mr Todd for Cross Roads, denied vigorously that the Court had made a finding that QCL was a trade competitor.

[154] I am quite satisfied that the Court did regard QCL as a trade competitor with QGL, as it states so simply in the last bullet point at [37]. Mr Soper submits that that last phrase is confined to the PC19 proceedings. I agree. As a matter of fact there is no doubt that QCL and SPL are in competition for the best uses of appropriately zoned land in the Frankton area. QCL is the owner of around about 23 hectares of land.

[155] QCL and SPL are disagreeing on the appropriate zoning of their respective parcels of land. Let us allow that to be described as a form of competition or competing with each other. It does not follow they are in trade competition.

[156] In the absence of a statutory definition of "trade competitor", the qualifier "trade" can be understood by taking into account the mischief which was perceived to be afoot, as outlined above.

[157] There is no doubt that the Environment Court was perfectly aware that neither SPL nor QCL were directly active as retailers. It dubbed them as trade competitors by their association with Foodstuffs and with Progressive. SPL and QCL are property developers. Property developers develop property with an eye to the market for that property. That does not make them participants in the trade of the use to which the property is likely to be put. There is nothing in Part 11A of the RMA to suggest such an extended definition.

[158] Keeping in mind the overall policy of the RMA to allow all-comers to participate, there is no justification for extending the phrase "trade competitors" to property developers competing for the best use of land. I am satisfied that the Environment Court was in error of law in categorising SPL and QCL as trade competitors.

[159] Competition between land developers is an inevitable ongoing phenomenon. As the Environment Court had occasion itself to observe, if the market is left unregulated, land will trend towards its most valuable use.³² It is the purpose of regulation of use of the land to prevent that. This is discussed very clearly in the dissent of Commissioner Fletcher, in *Foodstuffs*. The RMA is a mixture of statutory reform of the common law of nuisance, and providing for national, regional and local regulations of use of natural resources.

[160] Where the total amount of land is a limited resource, choices have to be made. The situation in Queenstown is a classic example of that. There is a very limited amount of flat land available in the Queenstown urban environment. There is a contest for the use of that land. There is a community interest to build a significant amount of low cost housing to enable workers to live in Queenstown and not have to commute all the way from Cromwell. There is a need for retail and commercial activities to support that residential population. But on top of this, there is a recognised and overall shortage in Queenstown of industrial land. If it was entirely left to market forces the local authority could not be sure that all those needs would be catered for on the Frankton Flats. In the long run, that would be to the overall detriment of the economic welfare and growth of the town. Hence, the Council, in its plan, has endeavoured to meet needs for all of those activities. It is in this context that owners of land located in Frankton Flats compete to get their land zoned for the highest valued use. That is not trade competition, as that word is used in the RMA. If it were, numerous planning disputes would be wrongly categorised as trade competition.

³² *Foodstuffs* at [102].

[161] Rather, trade competition presents as the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share in unrelated markets. So a supermarket as a trade competitor stops a rival building another supermarket in its customer catchment, and uses every available RMA argument to do so. This is a wholly different game from property owners competing for the best use of their land.

[162] In [263] of the *Foodstuffs* decision, the Court said:

[263] ...Quite apart from our duty to issue a decision as soon as practicable, the strong flavour of anti-competitive behaviour by QCL suggests a decision should be issued sooner not later.

[163] While it was unfortunate that the Environment Court labelled QCL as a trade competitor, and criticised its behaviour, I do not think it was an error of law which had material consequences. There is no evidence, beyond QCL's genuinely held perception, however, that the characterisation of QCL as a trade competitor influenced the decision, except possibly the decision to hear these applications, notwithstanding the commencement of the proceedings before the other division of the Environment Court in respect of PC19.

Result

[164] The appeal is allowed, for the reason that the decision has material errors of law, summarised at the beginning of this judgment. The case is remitted back to the Environment Court. In case there be any doubt, the application now requires re-evaluation against the current terms of PC19, as they have been amended by the February 2013 decision.

[165] Costs are reserved. If the parties cannot agree costs, I require counsel to circulate draft submissions on costs, not extending beyond five pages each. After that process, file the submissions. I will deal with these submissions on the papers unless there is a request for an oral hearing. Leave to apply in that regard is reserved.