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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA704/2022
[2023] NZCA 264

BETWEEN	PETER RAIKES AND CAROLINE RAIKES Applicants
AND	HASTINGS DISTRICT COUNCIL Respondent
AND	MAUNGAHARURU-TANGITŪ TRUST Interested Party

Court:	French and Goddard JJ
Counsel:	J W Maassen for Applicants M E Casey KC and A J Davidson for Respondent K M Anderson and M J Dicken for Maungaharuru-Tangitū Trust
Judgment: (On the papers)	29 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicants must pay costs to each of the respondent and the interested party for a standard application on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Goddard J)

The application for leave to bring a second appeal

[1] The applicants, Mr and Mrs Raikes, seek leave to appeal against a decision of the High Court[1] determining an appeal on questions of law from the Environment Court.[2] The Environment Court decision concerned eight sites categorised as wāhi taonga in the proposed Hastings District Plan (Proposed Plan). The appeal to the High Court concerned only one of those sites, known as Tītī-a-Okura, insofar as that site affected land owned by the applicants. That site is referred to in the Proposed Plan as MTT88.

[2] The application for leave to appeal to this Court is opposed by the Hastings District Council, and by the Maungaharuru-Tangitū Trust (MTT), which appeared as an interested party in the High Court.

Background

[3] MTT88 comprises approximately 70 hectares of rural land, part of which is owned by the applicants.

[4] MTT88 was not originally identified as a wāhi taonga site in the Proposed Plan. MTT appealed to the Environment Court against the decision of the Hastings District Council not to include a number of sites on the list of wāhi taonga in the Proposed Plan, including MTT88. The Environment Court issued an interim decision on that appeal on 28 May 2018.[3] That interim decision was the subject of appeals to the High Court by both MTT and the applicants. Cooke J allowed the appeals and remitted the matter back to the Environment Court for determination.[4] The parties had

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1 *Raikes v Hastings District Council* [2022] NZHC 3075, (2022) 24 ELRNZ 598 [Second High Court judgment].

2 *Maungaharuru-Tangitū Trust v Hastings District Council* [2021] NZEnvC 98 [Revised Environment Court decision].

3 *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79.

4 *Maungaharuru-Tangitū Trust v Hastings District Council* [2019] NZHC 2576 [First High Court judgment].

agreed that the appeal should be allowed, and the matter sent back to the Environment Court for further consideration, as it was common ground that the interim decision had erred in law in a number of respects.[5] The Judge concurred: he considered that the Environment Court had not engaged in the required analysis for the purpose of reaching its conclusions.[6]

[5] In July 2021 the Environment Court issued a revised decision, in which it held that site MTT88 should be identified as a wāhi taonga. The Environment Court considered that the level of protection and control over the site proposed by the Council was sufficient to provide for MTT's relationship with the site. The more stringent draft rules proposed by MTT for this site would be an unreasonable interference with the rights of the landowners.[7]

[6] The applicants appealed the revised decision to the High Court on a number of questions of law under s 299 of the Resource Management Act 1991 (RMA). They argued that the site should not have been identified as a wāhi taonga. They also argued that, in the event that determination was upheld, the extent of the site should be limited. They did not challenge the rules that would apply to the site if it was included in the list of wāhi taonga in the Proposed Plan.

[7] The Council took a neutral stance on this appeal to the High Court. The appeal was opposed by MTT as an interested party. In November 2022 Grice J delivered the second High Court judgment, in which she dismissed the applicants' appeal.

The test for grant of leave to bring a second appeal

[8] The application for leave to appeal to this Court against the second High Court judgment is brought under s 308 of the RMA, which provides that appeals against decisions of the High Court determining appeals on questions of law are to be dealt with under subpt 8 of pt 6 of the Criminal Procedure Act 2011 (CPA) as if the High Court decision had been a first appeal on a question of law under s 300 of

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5 At [1] and [63].
6 At [63]–[65].
7 Revised Environment Court decision, above n 2, at [81].

the CPA. Section 303(2) of the CPA, which applies to such appeals, provides that this Court must not give leave for a second appeal unless it is satisfied that:

(a) the appeal involves a matter of general or public importance; or

(b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[9] A second appeal on a question of law must raise one or more questions of law that are capable of bona fide and serious argument.[8] The appeal must involve interests of sufficient importance to outweigh the cost and delay of a further appeal.[9]

Questions of law identified by the applicants

[10] The applicants have framed the questions of law that they wish to pursue on appeal in a number of ways. In their submissions they say the relevant questions of law can be summarised as follows:

(a) Was the High Court correct in its interpretation and application of the provisions of pt 2 of the RMA, as relied on by MTT and the Environment Court?

(b) Was the High Court correct to conclude that the outcome and reasoning of the Environment Court's decision met appropriate standards of rationality, considering the RMA scheme and requirements?

[11] In short, the applicants intend to argue that it is not open to a council to impose controls on the use of private land by designating that land as a wāhi taonga, and providing for certain activities to be restricted discretionary activities, on the basis of:

(a) spiritual or metaphysical associations with the land; or

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8 *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZCA 398 at [19][20].

9 *Te Whare o Te Kaitiaka Ngahere Incorporated Society v West Coast Regional Council* [2015] NZCA 356 at [23].

(b) historical use of the land by tangata whenua (in this case, as a trail and for seasonal hunting of tītī (mutton birds)), where those past activities have left no tangible artifacts or other physical traces on the land.

[12] The applicants say that the spiritual and cultural values invoked as grounds for identifying MTT88 as wāhi taonga are "beyond reason, being metaphysical through cultural associations between places and gods or concerning mythical acts".

[13] The applicants describe the grounds referred to in [11(b)] as relating to "matters of cultural memory only", which they say are not and cannot be part of the existing environment because they are purely historical.

[14] The applicants also argue, in reliance on the first High Court judgment,[10] that the Environment Court did not perform the task it was directed to perform. They say the first High Court judgment required a "particularised analysis of the nexus and the method of rational assessment concerning [the applicants'] anticipated activities and effects on [the cultural values of the land]". They identify this ground as both a question of law and as giving rise to a potential miscarriage of justice because, they say, the second High Court judgment failed to ensure that the earlier directions in the first High Court judgment were performed.

Discussion

[15] We agree that the question whether it is open to a council to identify land as a wāhi taonga, and impose controls designed to protect Māori cultural connections with that land, in the circumstances described at [11] above is a question of public or general importance. But we do not consider that this question is capable of bona fide and serious argument.

[16] Section 6(e) of the RMA expressly refers to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga. All decision-makers under the RMA are required to recognise and provide for that matter. Section 7 of the RMA requires decision-makers to have

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10 First High Court judgment, above n 4, at [42] and [47].

particular regard to (among other matters) kaitiakitanga. The spiritual element of kaitiakitanga has been recognised in decisions of this Court and of the Supreme Court.[11] Section 8 of the RMA requires decision-makers to take into account the principles of the Treaty of Waitangi | Te Tiriti o Waitangi. It is, we think, self-evident that these provisions require decision-makers to have regard to, and provide for, connections between hapū and their ancestral lands of a cultural, spiritual and historic nature as well as other more tangible connections.

[17] The applicants' criticism of the rationality of the decisions of the Environment Court and High Court is misconceived. The question of whether tangata whenua have a cultural, traditional and/or spiritual connection to particular land that is sufficient to justify protection of that land in a district plan is a matter that can be established by evidence. A finding that cultural, traditional and/or spiritual connections exist does not involve any finding about the "correctness" of any spiritual or metaphysical beliefs relevant to those connections. The susceptibility of the "correctness" of such beliefs to determination on the basis of evidence is a red herring: it is the existence and significance of the beliefs that a court can, and must, consider. The courts below did precisely that in the present case. It is not the role of this Court on a second appeal to revisit the assessment of the evidence by the Environment Court and (so far as appropriate) the High Court.

[18] Similarly, the existence of cultural and traditional connections based on historical uses of the land before that land was acquired by the Crown and sold to private owners can be established by evidence. It is not seriously arguable that the RMA permits a council to provide for protection of a site as wāhi taonga in a district plan on the basis of historical uses and their cultural and traditional significance if and only if there are tangible artifacts or other physical traces of those uses on the land.

[19] We do not consider that there is any appearance of a potential miscarriage of justice: the second High Court judgment carefully analysed the Environment Court

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[11] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [12(c)] and [172]–[174]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [160]–[161] per William Young and Ellen France JJ.

decision, and concluded that the Environment Court had carried out the more detailed analysis required by the first High Court judgment.

[20] We accept the submission by the Council and by MTT that identification of the site as a wāhi taonga in the proposed plan does not prevent future development on the site, contrary to the applicants' claim. The applicants will be required to seek resource consent for certain specified activities on the site: any application for consent will fall to be determined by reference to the provisions of the RMA and the Proposed Plan (when operative). To the extent that the proposed appeal seeks to challenge the restrictions on activities on the site contained in the Proposed Plan, we accept the submission of the Council and MTT that the proposed rules to apply to the site were not challenged in the courts below, so cannot be the subject of a (new) challenge on a second appeal to this Court.

[21] The other criticisms advanced by the applicants of the Environment Court decision and the second High Court judgment do not raise any issues of public or general importance: they are specific to this case.

Result

[22] The application for leave to appeal is declined.

[23] The applicants must pay costs to each of the respondent and the interested party for a standard application on a band A basis, with usual disbursements.

Solicitors:
Sainsbury Logan and Williams, Napier for Applicants
Hastings District Council, Hastings for Respondent
DLA Piper, Wellington for Maungaharuru-Tangitū Trust

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA573/2018
[2020] NZCA 86

BETWEEN	TRANS-TASMAN RESOURCES LIMITED Appellant
AND	TARANAKI-WHANGANUI CONSERVATION BOARD, CLOUDY BAY CLAMS LIMITED, FISHERIES INSHORE NEW ZEALAND LIMITED, GREENPEACE OF NEW ZEALAND INCORPORATED, KIWIS AGAINST SEABED MINING INCORPORATED, NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN INCORPORATED, SOUTHERN INSHORE FISHERIES MANAGEMENT COMPANY LIMITED, TALLEY'S GROUP LIMITED, TE OHU KAI MOANA TRUSTEE LIMITED, TE RŪNANGA O NGĀTI RUANUI TRUST, THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED AND THE TRUSTEES OF TE KAHUI O RAURU TRUST First Respondents
AND	ENVIRONMENTAL PROTECTION AUTHORITY Second Respondent

Hearing: 24–26 September 2019

Court: Kós P, Courtney and Goddard JJ

Counsel: J B M Smith QC and V N Morrison-Shaw for Appellant
J D K Gardner-Hopkins for Taranaki-Whanganui Conservation Board

R A Makgill and P D M Tancock for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd, Talley's Group Ltd
D M Salmon, D A C Bullock and D E J Currie for Greenpeace New Zealand Inc and Kiwis Against Seabed Mining Inc
R J B Fowler QC and H K Irwin-Easthope for Te Ohu Kai Moana Trustee Ltd
R J B Fowler QC and J Inns for Te Rūnanga o Ngāti Ruanui Trust
M C Smith and H E McQueen for The Royal Forest and Bird Protection Society of New Zealand Inc
R J B Fowler QC for Te Kahui o Rauru Trust
V E Casey QC and C J Haden for Second Respondent

Judgment: 3 April 2020 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed. The High Court's decision to allow the first respondents' appeal and quash the decision of the Decision-making Committee is upheld on other grounds.

B In so far as the first respondents' cross-appeal seeks the appellant's application for a marine consent and marine discharge consent to be declined, that cross-appeal is dismissed.

C The appellant's application is referred back to the Environmental Protection Authority to be considered in light of this judgment.

D We award costs as follows:

(a) We award one set of costs to Te Rūnanga o Ngāti Ruanui Trust, the Trustees of Te Kahui o Rauru Trust, Te Ohu Kai Moana Trustee Ltd, Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd, Talley's Group Ltd and the Taranaki-Whanganui Conservation Board for a complex appeal on a band B basis. We certify for two counsel with usual disbursements.

(b) **We award costs to The Royal Forest and Bird Protection Society of New Zealand Inc for a complex appeal on a band B basis, for one counsel only, with usual disbursements.**

(c) **We award one set of costs to Kiwis Against Seabed Mining Inc and Greenpeace of New Zealand Inc for a complex appeal on a band B basis, for one counsel only, with usual disbursements.**

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REASONS OF THE COURT

(Given by Goddard J)

[1] The United Nations Convention on the Law of the Sea (LOSC) provides that New Zealand has a duty to protect and preserve the marine environment.[1] New Zealand has the sovereign right to exploit the natural resources of its exclusive economic zone (EEZ) pursuant to New Zealand's environmental policies, and in accordance with that duty. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) provides for the use of the natural resources of New Zealand's EEZ in a manner that is consistent with New Zealand's

1 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

international law obligations, including the LOSC duty to protect and preserve the marine environment.[2]

[2] The Treaty of Waitangi (the Treaty) requires the Crown to respect the interests of iwi in relation to the marine environment and its resources, including (as we explain below) the kaitiakitanga relationship between iwi and the marine environment. The EEZ Act provides for decisions to be made about the use of the natural resources of the EEZ in a manner that recognises and respects the Crown's responsibility to give effect to the principles of the Treaty.[3]

[3] This judgment is concerned with the consistency of decisions made by the Environmental Protection Authority (EPA) and the High Court with the provisions of the EEZ Act. That inquiry must be informed by the principles of international law to which the EEZ Act is intended to give effect, and by the principles of the Treaty as they apply to decisions made under the EEZ Act.

The appeals before this Court

[4] The appellant, Trans-Tasman Resources Ltd (TTR), proposes to mine iron sands in an approximately 66 km^2 area of the seabed in New Zealand's EEZ, offshore from Taranaki. TTR holds a mining permit issued under the Crown Minerals Act 1991 in respect of its proposed seabed mining activities. In order to carry out those activities TTR also requires marine consents and marine discharge consents under the EEZ Act.[4]

[5] In August 2017 TTR was granted marine consents and marine discharge consents by a Decision-making Committee (DMC) appointed by the EPA. The DMC received 13,733 submissions on the proposal. It sought additional information from TTR and from a number of other parties. It held a hearing which ran for 22 days over a three-month period. The four-person DMC was equally divided on whether the consents should be granted: the consents were granted as a result of the casting vote of the DMC Chair.

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2 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 11 [EEZ Act].

3 EEZ Act, s 12.

4 EEZ Act, s 20; and Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015.

[6] The consents granted by the DMC permit TTR to extract up to 50 million tonnes of seabed material per annum, and process that material on an Integrated Mining Vessel (IMV). Some 10 per cent of the seabed material extracted would be retained to be further processed into iron ore concentrate. The remaining material would be returned to the seabed. The "plume" of suspended sediment that would result from this discharge from the IMV is a discharge of harmful substances for the purposes of the EEZ Act, in respect of which TTR requires a marine discharge consent.[5] The likely environmental effects of the sediment plume were a central focus of the DMC assessment of TTR's application. Other significant environmental effects would include the direct effect of mining on the seabed floor and benthos in the 66 km^2 mining area, and the effect on marine mammals and other fauna of the noise generated by the mining activities.

[7] The first respondents, who we will refer to simply as "the respondents", participated in the hearing before the DMC and made submissions opposing the grant of the consents. They appealed to the High Court, arguing that the DMC decision was wrong in law on a number of grounds. The appeal was successful on one ground: the High Court held that the consents adopted an "adaptive management approach", which the EEZ Act does not permit in relation to marine discharge consents.[6] The High Court quashed the DMC decision, and referred TTR's application back to the DMC to consider in light of the High Court judgment.

[8] TTR appeals from the High Court judgment, arguing that the consents do not adopt an adaptive management approach and should not have been quashed.

[9] The respondents seek to uphold the High Court decision. The respondents filed cross-appeals arguing that there were other errors of law in the DMC decision. They say the High Court should have set the DMC decision aside for those reasons also. They seek an order dismissing TTR's application for consents under the EEZ Act, rather than referring it back to the DMC.

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5 EEZ Act, s 20C.

6 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 at [404] [High Court decision].

[10] The respondents' challenges to the decisions of the DMC and the High Court raise a number of interrelated issues. The arguments at the forefront of their cross-appeal are that:

(a) The DMC and the High Court failed to correctly identify the statutory purpose in relation to marine discharge consents, which is set out in s 10(1)(b): protecting the environment from pollution caused by marine discharges. The DMC and the High Court failed to treat that purpose as the relevant decision-making criterion for TTR's application for a marine discharge consent in relation to the sediment plume.

(b) The DMC failed to give effect to the information principles in ss 61 and 87E of the EEZ Act, and in particular, the requirement that where the information available is uncertain or inadequate the EPA must favour caution and environmental protection.

(c) The DMC failed to have regard to the principles of the Treaty, and failed to have regard to the effects of the proposal on the existing interests of iwi Māori as required by s 59(2). In particular, the DMC failed to have regard to the effects of the proposal on the kaitiakitanga relationship between tangata whenua and the marine environment and its resources, and on the commercial fishing interests of Māori.

(d) The DMC failed to have regard to the nature and effect of relevant marine management regimes as required by s 59(2), in particular the New Zealand Coastal Policy Statement (NZCPS) issued under the Resource Management Act 1991 (RMA).

(e) The High Court erred in law in rejecting these (and other) arguments, and in declining to make an order dismissing TTR's application.

[11] This Court granted TTR's application for leave to appeal and the respondents' application for leave to cross-appeal in a Minute dated 19 December 2018.

Summary of outcome

[12] We consider that there were multiple overlapping errors of law in the approach adopted by the DMC. The High Court erred in law in failing to identify these defects in the DMC decision. In particular:

(a) The DMC failed to address the central question of whether granting a marine discharge consent would be consistent with the objective set out in s 10(1)(b) of the EEZ Act in relation to discharges of harmful substances: protecting the environment from pollution. The DMC erred in focusing on the sustainable management objective that applies to all marine consents under the EEZ Act, and failing to give separate and explicit consideration to the environmental bottom line of protecting the environment from pollution caused by discharges of harmful substances.

(b) The information before the DMC about the environmental effects of the proposal was not sufficient to enable the DMC to grant consents on the broad terms it approved, consistent with the statutory requirement that where the information available is uncertain or inadequate the EPA must favour caution and environmental protection. The DMC attempted to fill critical gaps in the information available about likely environmental effects by requiring the necessary information to be gathered after the consents were granted, before mining commenced and while it was under way. That approach was inconsistent with the EEZ Act.

(c) The DMC was required to have regard to the effect of the activity on existing interests. As we explain below, the kaitiakitanga relationship between tangata whenua and the marine environment and its resources is a relevant "existing interest". That kaitiakitanga relationship includes, but is not limited to, the stewardship and use of natural resources such as kai moana. The cultural and spiritual elements of kaitiakitanga must also be considered. The DMC erred in failing to

address the effects of TTR's proposals on kaitiakitanga in that broader sense, and in failing to adopt an approach to those effects that was consistent with the Treaty principles that the relevant provisions of the EEZ Act are intended to ensure the Crown recognises and respects.

(d) The DMC was required to have regard to the nature and effect of the RMA and the NZCPS, which are identified as relevant marine management regimes for the purposes of the EEZ Act. Many of the effects of the proposed mining activity will occur within the coastal marine area (CMA) to which the RMA and NZCPS apply. The DMC needed to consider the objectives of the RMA and NZCPS, and the outcomes sought to be achieved by those instruments, in the area affected by the TTR proposal. It needed to consider whether TTR's proposal would produce effects within the CMA that would be inconsistent with the outcomes sought to be achieved by those regimes. In particular, the DMC needed to consider whether TTR's proposal would be inconsistent with any environmental bottom lines established by the NZCPS. The DMC failed to address these important questions.

[13] For these and other reasons, we uphold the decision of the High Court to allow the appeal from the DMC and quash the DMC decision.

[14] We do not consider that the DMC decision adopted an adaptive management approach. The features of the consent that were seen by the High Court as constituting an adaptive management approach are better understood as a reflection of the more fundamental problem that the inadequate information before the DMC about the effects of the proposal meant that consents could not lawfully be granted on such broad terms. The High Court's reason for allowing the appeal from the DMC and quashing the DMC decision was not in our view correct. But the result arrived at reflected a well-founded concern about the scope and terms of the consents, and the mechanisms approved by the DMC for gathering information about the effects of the consented activities after the consents had been granted, in circumstances where that information was necessary to enable the DMC to understand and assess the impact of the proposed activities on the environment before consents could be granted.

[15] We have considered whether in these circumstances TTR's application for a marine consent and a marine discharge consent should be dismissed. But we cannot rule out the possibility that consents for more limited activities, or on different terms, might properly be granted by the DMC. We therefore refer TTR's application back to the DMC to be considered in light of this judgment.

The structure of this judgment

[16] The appeal and cross-appeals before this Court raise a wide range of issues about the operation of the EEZ Act, and the approach adopted by the DMC. Many of those issues are interrelated. The relevant provisions of the EEZ Act need to be read and understood in the context of the wider statutory scheme and the purpose of the legislation. We therefore begin by reviewing the scheme of the EEZ Act and identifying some important features of the statutory framework for decision-making by the EPA in relation to applications for marine consents and marine discharge consents.

[17] In light of that discussion, we turn to consider the issues raised by the appeal and the cross-appeals. In relation to each issue we consider the approach adopted by the DMC and the terms of the consents granted, the High Court decision, and the various criticisms of that decision advanced by the parties to this appeal. We conclude by addressing the question of relief raised by the cross-appeals.

The EEZ Act

International law context for New Zealand's EEZ Act

[18] A coastal State may claim an EEZ extending beyond its territorial waters to a distance of up to 200 nautical miles (NM) from the coastline.[7] The EEZ is a recent innovation in the international law of the sea. In 1977 New Zealand claimed a 200 NM EEZ.[8] The claim was made in accordance with emerging principles of customary

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7 Donald R Rothwell and Tim Stephens *The International Law of the Sea* (2nd ed, Hart Publishing, Oxford, 2016) at 85.

8 In 1977 New Zealand enacted the Territorial Sea and Exclusive Economic Zone Act 1977, which in 1996 was renamed the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.

international law, which were subsequently recognised and given clear expression in the LOSC.[9] The text of the LOSC was finalised in December 1982. The Convention came into force in 1994.[10] New Zealand became a party to the LOSC in 1996. The LOSC is now widely ratified, with 168 parties as at the date of this judgment.

[19] The LOSC sets out the rights and duties of a coastal State that claims an EEZ. In its EEZ New Zealand has:[11]

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction in relation to the protection and preservation of the marine environment, among other matters; and

(c) certain other rights and duties set out in the LOSC.

[20] New Zealand's duties in relation to its EEZ include the duties in relation to protection and preservation of the marine environment set out in pt XII of the LOSC. Article 192 provides that States have an "obligation to protect and preserve the marine environment". Article 193 provides that States "have the sovereign right to exploit their natural resources pursuant to their environmental policies *and in accordance with their duty to protect and preserve the marine environment*" (emphasis added).

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9 Rothwell and Stephens, above n 7, at 85–86.

10 One year after deposit of the sixtieth instrument of ratification or acceptance: United Nations Convention on the Law of the Seas, art 308; and see Rothwell and Stephens, above n 7, at 18–19.

11 United Nations Convention on the Law of the Seas, art 56.

[21] Article 194 provides:

Article 194
Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

…

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

…

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

[22] Article 208 goes on to provide that coastal States must "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction".

[23] The RMA applies to activities carried out in New Zealand, including activities carried out in New Zealand's territorial sea — that is, out to the 12 NM limit where the territorial sea ends and the EEZ begins. The RMA does not apply directly to activities in the EEZ.[12] Activities carried out in the EEZ are regulated by the EEZ Act, which implements New Zealand's obligations under art 208 of the LOSC and certain other LOSC provisions that apply to the EEZ.[13]

[24] A number of other international instruments have implications for New Zealand's regulation of activities in the EEZ, including:

(a) The Convention on Biological Diversity of 1992 (the Biodiversity Convention).[14] The objectives of the Biodiversity Convention include the conservation of biological diversity and the sustainable use of its components.[15] These objectives are relevant to a wide range of activities in the EEZ, including marine discharges.

(b) The International Convention for the Prevention of Pollution from Ships (MARPOL).[16] MARPOL contains a number of provisions relating to marine discharges, primarily from ships.

(c) The Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (London Convention), and the 1996 Protocol to the London Convention (1996 Protocol).[17] The London Convention

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12 The relevance of the RMA to decision-making under the EEZ Act is addressed in more detail below.

13 Regulations to give effect to those obligations are also contemplated by s 27 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act. The regulation-making powers under s 27 are available where no other provision is made by any other enactment for the relevant purposes. However, those powers had not been exercised to regulate activities affecting the marine environment in the EEZ prior to the enactment of the EEZ Act: see *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422.

14 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).

15 Article 1.

16 International Convention for the Prevention of Pollution from Ships 1340 UNTS 184 (signed 17 February 1973, entered into force 2 October 1983) [MARPOL].

17 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120 (opened for signature 29 December 1972, entered into force 30 August 1975) [London Convention]; and Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 17 November, entered into force 24 March 2006) [1996 Protocol].

governs the deliberate disposal of waste or other matter at sea, but does not extend to discharges from the normal operation of ships. It also does not apply to the disposal of waste as a result of seabed mining activities.

[25] MARPOL sets international standards for control of vessel-source pollution. Its objective is to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances, and the minimisation of accidental discharge of such substances.[18] MARPOL applies to the discharge of all harmful substances except those from dumping (within the meaning of the London Convention), seabed exploration, exploitation, and legitimate scientific research into pollution abatement.[19]

[26] The London Convention regulates the dumping of waste and other substances at sea. The 1996 Protocol adopts a more stringent approach than the original 1972 Convention. Under the 1996 Protocol, the dumping of any substance is generally prohibited unless it can be demonstrated that the substance is not harmful to the marine environment. The Protocol requires parties, including New Zealand, to apply "a precautionary approach to environmental protection from dumping … whereby appropriate preventative measures are taken when there is reason to believe that wastes … are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects".[20]

[27] The EEZ Act as originally enacted in 2012 did not apply to marine discharges and dumping. Those matters continued to be governed by the Maritime Transport Act 1994. In 2013 the EEZ Act was amended to bring marine discharges and dumping under that Act, and shift regulatory responsibility for those matters from Maritime New Zealand to the EPA. Those amendments came into force on 31 October 2015. Thus the EEZ Act now also gives effect to New Zealand's international obligations under MARPOL and the London Convention in respect of activities in the EEZ.

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18 MARPOL, preamble.
19 Article 2(3)(b).
20 1996 Protocol, art 3(1).

[28] MARPOL is not directly relevant to the consents sought by TTR, as the discharges in respect of which TTR seeks consent are discharges resulting from seabed exploitation. But the interpretation of the provisions of the EEZ Act concerned with marine discharges and dumping must take into account the Act's objective of giving effect to New Zealand's obligations under MARPOL.

[29] Similarly, the London Convention (including the 1996 Protocol) is not directly relevant to the consents sought by TTR which do not relate to marine dumping. But the interpretation of the provisions of the EEZ Act concerned with marine discharges and dumping must take into account the Act's objective of giving effect to New Zealand's obligations under the London Convention, including the 1996 Protocol. That objective will be achieved only if those provisions effectively prohibit marine pollution by dumping and adopt a precautionary approach in relation to dumping.

The EEZ Act

[30] The EEZ Act was extensively amended by the Resource Legislation Amendment Act 2017 with effect from 1 June 2017. TTR's application was made on 23 August 2016. The application falls to be determined under the EEZ Act as it stood in August 2016, without reference to the 2017 amendments.[21] All references in this judgment to the EEZ Act are references to the Act as at August 2016, unless otherwise noted.

[31] The purpose of the EEZ Act is set out in s 10, which provides:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting

21 EEZ Act, s 7B and sch 1 as inserted by the Resource Legislation Amendment Act 2017.

the discharge of harmful substances and the dumping or incineration of waste or other matter.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

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

(b) safeguarding the life-supporting capacity of the environment; and

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

(3) In order to achieve the purpose, decision-makers must—

(a) take into account decision-making criteria specified in relation to particular decisions; and

(b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

[32] Paragraph (b) of s 10(1) was inserted in 2013, when marine discharges and dumping were brought within the scope of the EEZ Act. Paragraph (a) is relevant to all applications under the EEZ Act for marine consents and marine discharge and dumping consents. Paragraph (b) is of particular relevance to applications for marine discharge consents and marine dumping consents. Where a marine discharge consent is sought, both limbs of s 10(1) are relevant, and as we explain below, each must be separately addressed by the EPA.

[33] The use of the term "sustainable management" in s 10 was intended to align the purposes of the EEZ Act with the purpose of the RMA. As the then Minister for the Environment explained at the committee of the whole house stage:[22]

> We have decided that it makes better sense to have a purpose clause incorporating the principle of sustainable management. … The changes are reflecting the fact that we do see considerable benefit for all stakeholders in having a regime of sustainable management that is well defined in case law, that parties do understand, and that, importantly, provides a consistency of

[22] (16 August 2012) 682 NZPD 4492.

> approach between matters within the 12-mile limit and those outside that limit, between the 12 and 200-mile limit. We can certainly see benefit in applications that will have impact on both sides of that 12-mile limit by having some consistency of approach.

[34] There are some differences in the wording of the definition of "sustainable management" in s 10(2) of the EEZ Act and in s 5(2) of the RMA, reflecting differences in the contexts in which the two statutes operate. But the central concept is the same.

[35] Section 10(3) makes it clear that in order to achieve the purpose of the EEZ Act, decision-makers must take into account any specified decision-making criteria, and must apply the information principles set out in ss 61 and 87E, which we discuss below. However, that does not exhaust the relevance of the statutory purpose statement. Rather, s 10(1) sets out the principal criteria by reference to which powers must be exercised under the EEZ Act. Indeed when it comes to the grant of marine consents and marine discharge consents under pt 3, s 10 provides the only decision-making criteria in the EEZ Act and must be the touchstone of the EPA's analysis. We return to this below.

[36] The term "environment" which appears in s 10 and elsewhere in the EEZ Act is defined in s 4:

> **environment** means the natural environment, including ecosystems and their constituent parts and all natural resources, of—
>
> (a) New Zealand:
>
> (b) the exclusive economic zone:
>
> (c) the continental shelf:
>
> (d) the waters beyond the exclusive economic zone and above and beyond the continental shelf.

[37] The term "natural resources" as it relates to the EEZ is defined to include "seabed, subsoil, water, air, minerals, and energy, and all forms of organisms (whether native to New Zealand or introduced)".[23]

[23] EEZ Act, s 4.

[38] Section 11 records that the EEZ Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment. It provides:

> **11 International obligations**
>
> This Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment, including—
>
> (a) the United Nations Convention on the Law of the Sea 1982:
>
> (b) the Convention on Biological Diversity 1992:
>
> (c) the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL):
>
> (d) the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972 (the London Convention).

[39] Section 11 sends a clear signal to decision-makers that the legislation is intended to implement New Zealand's obligations under the instruments to which it refers, and thus that those instruments are relevant to the interpretation of the provisions of the legislation.[24]

[40] As the courts have recognised since the seminal decision in *Huakina Development Trust v Waikato Valley Authority*, environmental regulation is a sphere in which the Crown's obligations under the Treaty are of particular importance.[25] Section 12 of the EEZ Act provides:

> **12 Treaty of Waitangi**
>
> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
>
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise the Environmental Protection Authority so that decisions made under this Act may be informed by a Māori perspective; and

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24 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J.

25 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

(b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and

(c) sections 33 and 59, respectively, require the Minister and the EPA to take into account the effects of activities on existing interests; and

(d) section 45 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

[41] The relevance of the Treaty to EPA decision-making in relation to consent applications is discussed in more detail at [133]–[180] below.

[42] Part 2 of the EEZ Act is headed "Duties, restrictions, and prohibitions". Subpart 1 is concerned with activities other than discharges and dumping. Section 20 provides:

20 Restriction on activities other than discharges and dumping

(1) No person may undertake an activity described in subsection (2) in the exclusive economic zone or in or on the continental shelf unless the activity is a permitted activity or authorised by a marine consent or section 21, 22, or 23.

(2) The activities referred to in subsection (1) are—

(a) the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed:

(b) the construction, placement, alteration, extension, removal, or demolition of a submarine pipeline on or under the seabed:

(c) the placement, alteration, extension, or removal of a submarine cable on or from the seabed:

(d) the removal of non-living natural material from the seabed or subsoil:

(e) the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil:

(f) the deposit of any thing or organism in, on, or under the seabed:

(g) the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine species or their habitat.

(3) No person may undertake an activity described in subsection (4) in the sea of the exclusive economic zone unless the activity is a permitted activity or authorised by a marine consent or section 21, 22, or 23.

(4) The activities referred to in subsection (3) are—

(a) the construction, mooring or anchoring long-term, placement, alteration, extension, removal, or demolition of a structure, part of a structure, or a ship used in connection with a structure:

(b) the causing of vibrations (other than vibrations caused by the propulsion of a ship) in a manner that is likely to have an adverse effect on marine life:

(c) the causing of an explosion.

(5) However, this section does not apply to—

(a) the discharge of harmful substances; or

(b) the dumping of waste or other matter; or

(c) lawful fishing for wild fish under the Fisheries Act 1996.

[43] Subpart 2 of pt 2 is headed "Restrictions and prohibitions on discharges and dumping". Section 20A describes how the discharge of harmful substances is regulated under the EEZ Act and the Maritime Transport Act. As the provision explains, sub-pt 2 of pt 2 of the EEZ Act regulates discharges into the EEZ and into or onto the seabed below it from certain sources, including mining discharges from ships. Other discharges from ships into the EEZ continue to be regulated under the Maritime Transport Act.

[44] Section 20C is concerned with mining discharges from ships. It provides:

20C Restriction on mining discharges from ships

(1) No person may discharge a harmful substance (if the discharge is a mining discharge) from a ship—

(a) into the sea of the exclusive economic zone or above the continental shelf beyond the outer limits of the exclusive economic zone; or

(b) into or onto the continental shelf.

> (2) However, a person may discharge the harmful substance in the circumstance described in subsection (1) if the discharge is a permitted activity or authorised by a marine consent or section 21, 22, or 23.

[45] Subpart 3, which is concerned with existing activities and planned petroleum activities, is not directly relevant in this case. Subpart 4 imposes certain general obligations on persons operating in the EEZ,[26] and confirms that compliance with the EEZ Act does not remove the need to comply with all other applicable Acts, regulations and rules of law, and vice versa.[27]

[46] Part 3 is concerned with requirements for carrying out certain activities, and the consenting process in respect of discretionary activities. Subpart 1 provides for the making of regulations in relation to a range of matters. Section 29A provides for regulations to be made in relation to discharges and dumping in the EEZ and continental shelf area. Among other matters, regulations under section 29A may prescribe a substance to be a harmful substance,[28] and in relation to a harmful substance may prohibit its discharge, or allow the discharge without a marine consent, or allow the discharge with a marine consent.[29]

[47] Section 34 sets out the "information principles" that the Minister responsible for administering the EEZ Act must apply when developing regulations under sub-pt 1. It provides:

> **34 Information principles**
>
> (1) When developing regulations under sections 27, 29A, and 29B, the Minister must—
>
> (a) make full use of the information and other resources available to him or her; and
>
> (b) base decisions on the best available information; and
>
> (c) take into account any uncertainty or inadequacy in the information available.

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26 EEZ Act, s 25.
27 Section 26.
28 Section 29A(4).
29 Section 29A(2)(b).

(2) If, in relation to the making of a decision under this Act, the information available is uncertain or inadequate, the Minister must favour caution and environmental protection.

(3) If favouring caution and environmental protection means that an activity is likely to be prohibited, the Minister must first consider whether providing for an adaptive management approach would allow the activity to be classified as discretionary.

(4) In this section, **best available information** means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

[48] Sections 35 to 37 define the concepts of permitted activities, discretionary activities and prohibited activities. The seabed mining activities that TTR proposes to carry out include a number of discretionary activities. Section 36(2) provides that a person must have a marine consent before undertaking a discretionary activity.

[49] Subpart 2 of pt 3 governs applications for marine consents. It applies in relation to discretionary activities in the EEZ other than discharges and dumping (those activities are governed by sub-pt 2A, discussed below). Section 38 provides that any person may apply to the EPA for a marine consent to undertake a discretionary activity. An application must fully describe the proposal and must include an impact assessment prepared in accordance with s 39.[30] Section 39 sets out the requirements for an impact assessment to accompany an application for a marine consent. It provides (so far as relevant):

39 Impact assessment

(1) An impact assessment must—

(a) describe the activity for which consent is sought; and

(b) describe the current state of the area where it is proposed that the activity will be undertaken and the environment surrounding the area; and

(c) identify the effects of the activity on the environment and existing interests (including cumulative effects and effects that may occur in New Zealand or in the sea above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

30 Section 38(2)(b) and (c).

(d) identify persons whose existing interests are likely to be adversely affected by the activity; and

(e) describe any consultation undertaken with persons described in paragraph (d) and specify those who have given written approval to the activity; and

(f) include copies of any written approvals to the activity; and

(g) specify any possible alternative locations for, or methods for undertaking, the activity that may avoid, remedy, or mitigate any adverse effects; and

(h) specify the measures that the applicant intends to take to avoid, remedy, or mitigate the adverse effects identified.

(2) An impact assessment must contain the information required by subsection (1) in—

(a) such detail as corresponds to the scale and significance of the effects that the activity may have on the environment and existing interests; and

(b) sufficient detail to enable the Environmental Protection Authority and persons whose existing interests are or may be affected to understand the nature of the activity and its effects on the environment and existing interests.

(3) The impact assessment complies with subsection (1)(c) and (d) if the Environmental Protection Authority is satisfied that the applicant has made a reasonable effort to identify the matters described in those paragraphs.

…

[50] The EPA is required to deal with an application for a marine consent as promptly as is reasonable in the circumstances.[31] The EPA may return an application that it considers is incomplete because it does not include an impact assessment that complies with s 39, or any other information required by the EEZ Act.[32]

[51] Section 42 provides that the EPA may request an applicant to provide further information relating to an application. A request under s 42 can be made at any reasonable time before a hearing on an application for a consent (or, if no hearing is to be held, before a decision is made). Section 44 confers broad powers on the EPA to commission reviews and reports, and seek advice and information, in relation to an

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31 Section 40.
32 Section 41.

application for a marine consent. Section 44(1)(c) provides that the EPA may seek advice on any matter related to an application from the Māori Advisory Committee established under s 18 of the Environmental Protection Authority Act 2011.

[52] Subpart 2 goes on to set out the process for public notification of applications, and for the hearing and determination of applications.[33]

[53] A number of the provisions that are at the heart of this appeal are set out under the sub-heading "Decisions". Section 59 identifies a number of mandatory relevant considerations in relation to the determination of an application for a marine consent. The relevant limbs of s 59 provide as follows:

> **59 Environmental Protection Authority's consideration of application**
>
> (1) This section and sections 60 and 61 apply when the Environmental Protection Authority is considering an application for a marine consent and submissions on the application.
>
> (2) The EPA must take into account—
>
> (a) any effects on the environment or existing interests of allowing the activity, including—
>
> (i) cumulative effects; and
>
> (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and
>
> (b) the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity, including—
>
> (i) the effects of activities that are not regulated under this Act; and
>
> (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

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33 Sections 45–71.

(c) the effects on human health that may arise from effects on the environment; and

(d) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and

(e) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and

(f) the economic benefit to New Zealand of allowing the application; and

(g) the efficient use and development of natural resources; and

(h) the nature and effect of other marine management regimes; and

(i) best practice in relation to an industry or activity; and

(j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and

(k) relevant regulations; and

(l) any other applicable law; and

(m) any other matter the EPA considers relevant and reasonably necessary to determine the application.

(3) The EPA must have regard to—

(a) any submissions made and evidence given in relation to the application; and

(b) any advice, reports, or information it has sought and received in relation to the application; and

(c) any advice received from the Māori Advisory Committee.

…

[54] Although s 59 identifies the key factors that are relevant to consideration of an application for a marine consent, it does not set out any decision-making criteria for the EPA to apply when determining that application. We return to this point below.

[55] The term "existing interest" used in s 59(2) is defined in s 4 as follows:

existing interest means, in relation to New Zealand, the exclusive economic zone, or the continental shelf (as applicable), the interest a person has in—

> (a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing:
>
> (b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62:
>
> (c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991:
>
> (d) the settlement of a historical claim under the Treaty of Waitangi Act 1975:
>
> (e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:
>
> (f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011

[56] Section 60 sets out certain matters that the EPA must consider when determining the extent of adverse effects on existing interests, as required by s 59(2)(a). Section 60 provides:

> **60 Matters to be considered in deciding extent of adverse effects on existing interests**
>
> In considering the effects of an activity on existing interests under section 59(2)(a), the Environmental Protection Authority must have regard to—
>
> (a) the area that the activity would have in common with the existing interest; and
>
> (b) the degree to which both the activity and the existing interest must be carried out to the exclusion of other activities; and
>
> (c) whether the existing interest can be exercised only in the area to which the application relates; and
>
> (d) any other relevant matter.

[57] Section 61 sets out the information principles relevant to marine consents:

> **61 Information principles**
>
> (1) When considering an application for a marine consent, the Environmental Protection Authority must—
>
> (a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and

(b) base decisions on the best available information; and

(c) take into account any uncertainty or inadequacy in the information available.

(2) If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection.

(3) If favouring caution and environmental protection means that an activity is likely to be refused, the EPA must first consider whether taking an adaptive management approach would allow the activity to be undertaken.

(4) Subsection (3) does not limit section 63 or 64.

(5) In this section, **best available information** means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

[58] Section 62 provides that after complying with ss 59 to 61, the EPA may grant an application for a marine consent in whole or in part, or refuse the application. It confirms, to avoid doubt, that the EPA may refuse an application for a consent if it considers that it does not have adequate information to determine the application. That is a necessary consequence of the direction in s 61(2) to favour caution and environmental protection where the information available is uncertain or inadequate.

[59] A consent may be granted subject to conditions imposed under s 63, which provides:

63 Conditions of marine consents

(1) The Environmental Protection Authority may grant a marine consent on any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent on the environment or existing interests.

(2) The conditions that the EPA may impose include, but are not limited to, conditions—

(a) requiring the consent holder to—

(i) provide a bond for the performance of any 1 or more conditions of the consent:

(ii) obtain and maintain public liability insurance of a specified value:

(iii) monitor, and report on, the exercise of the consent and the effects of the activity it authorises:

(iv) appoint an observer to monitor the activity authorised by the consent and its effects on the environment:

(v) make records related to the activity authorised by the consent available for audit:

(b) that together amount or contribute to an adaptive management approach.

(3) However, the EPA must not impose a condition on a consent if the condition would be inconsistent with this Act or any regulations.

(4) To avoid doubt, the EPA may not impose a condition to deal with an effect if the condition would conflict with a measure required in relation to the activity by another marine management regime or the Health and Safety at Work Act 2015.

[60] Section 64 confirms that an adaptive management approach may be incorporated in a marine consent. It provides:

64 Adaptive management approach

(1) The Environmental Protection Authority may incorporate an adaptive management approach into a marine consent granted for an activity.

(2) An **adaptive management approach** includes—

(a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:

(b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

(3) In order to incorporate an adaptive management approach into a marine consent, the EPA may impose conditions under section 63 that authorise the activity to be undertaken in stages, with a requirement for regular monitoring and reporting before the next stage of the activity may be undertaken or the activity continued for the next period.

(4) A stage may relate to the duration of the consent, the area over which the consent is granted, the scale or intensity of the activity, or the nature of the activity.

[61] Section 65 makes detailed provision for bonds, where a bond is required by conditions imposed by the EPA under s 63.

[62] Section 66 makes detailed provision in relation to monitoring conditions incorporated in a marine consent.

[63] Section 76 provides for the EPA to review the duration and conditions of a consent in certain circumstances. Section 76(1) provides as follows:

> (1) The Environmental Protection Authority may serve notice on a consent holder of its intention to review the duration of a marine consent or the conditions of the consent—
>
> (a) at any time or times specified for that purpose in the consent for any of the following purposes:
>
> (i) to deal with any adverse effect on the environment that may arise from the exercise of the consent and with which it is appropriate to deal after the consent has been granted:
>
> (ii) any other purpose specified in the consent:
>
> (b) if regulations take effect that prescribe standards, to ensure that the conditions are consistent with the standards, methods, or requirements:
>
> (c) to deal with any adverse effects on the environment or existing interests that arise and that—
>
> (i) were not anticipated when the consent was granted; or
>
> (ii) are of a scale or intensity that was not anticipated when the consent was granted:
>
> (d) if the information made available to the EPA by the applicant for the consent for the purposes of the application contained inaccuracies that materially influenced the decision made on the application and the effects of the exercise of the consent are such that it is necessary to apply more appropriate conditions:
>
> (e) if information becomes available to the EPA that was not available to the EPA when the consent was granted and the information shows that more appropriate conditions are necessary to deal with the effects of the exercise of the consent.
>
> …

[64] Subpart 2A of pt 3 is concerned with marine discharge consents and marine dumping consents: consents relating to the activities described in sub-pt 2 of pt 2. Subpart 2A was inserted in the EEZ Act by the 2013 amendment legislation.[34]

[65] Section 87B provides that any person may apply to the EPA for a marine discharge consent or a marine dumping consent to undertake a discretionary activity. The application must fully describe the proposal and include an impact assessment prepared in accordance with s 39. Most of the procedural provisions in sub-pt 2 also apply to applications under sub-pt 2A.[35] However s 87D modifies the application of s 59 in the context of marine discharge and dumping consents. It provides:

> **87D Environmental Protection Authority's consideration of application**
>
> (1) This section and sections 87E and 87F apply when the Environmental Protection Authority is considering an application for a marine discharge consent or a marine dumping consent and submissions on the application.
>
> (2) The EPA must take into account,—
>
> (a) in relation to the discharge of harmful substances,—
>
> (i) the matters described in section 59(2), except paragraph (c); and
>
> (ii) the effects on human health of the discharge of harmful substances if consent is granted; and
>
> (b) in relation to the dumping of waste or other matter,—
>
> (i) the matters described in section 59(2), except paragraphs (c), (f), (g), and (i); and
>
> (ii) the effects on human health of the dumping of waste or other matter if consent is granted; and
>
> (iii) any alternative methods of disposal that could be used; and
>
> (iv) whether there are practical opportunities to reuse, recycle, or treat the waste.

34 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013.

35 EEZ Act, s 87C.

(3) Section 59(3) applies to the application for a marine discharge consent or a marine dumping consent.

[66] Section 87E sets out the information principles relevant to discharges and dumping. It corresponds to s 61 in relation to marine consents, but — importantly for this appeal — without the provision found in s 61(3) contemplating the use of an adaptive management approach. It provides:

87E Information principles relating to discharges and dumping

(1) When considering an application for a marine dumping consent or a marine discharge consent, the Environmental Protection Authority must—

(a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and

(b) base decisions on the best available information; and

(c) take into account any uncertainty or inadequacy in the information available.

(2) If, in relation to making a decision on the application, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection.

(3) In this section, **best available information** means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

[67] Section 87F expressly precludes the possibility of granting marine discharge consents or marine dumping consents on the basis of conditions amounting to an adaptive management approach. It provides:

87F Decision on application for marine discharge consent or marine dumping consent

(1) After complying with sections 87D and 87E, the Environmental Protection Authority may—

(a) grant an application for a marine discharge consent or a marine dumping consent, in whole or in part, and issue a consent; or

(b) refuse the application.

(2) However, the EPA must refuse an application for a marine dumping consent if—

(a) the EPA considers that the waste or other matter may be reused, recycled, or treated without—

(i) adverse effects on human health or the environment that are more than minor; or

(ii) imposing costs on the applicant that are unreasonable in the circumstances; or

(b) the waste or other matter is identified in such a way that it is not possible to assess the potential effects of dumping the waste or other matter on human health or the environment; or

(c) the EPA considers that dumping the waste or other matter is not the best approach to the disposal of the waste or other matter in the circumstances.

(3) To avoid doubt, the EPA may refuse an application for a marine discharge consent or a marine dumping consent if the EPA considers that it does not have adequate information to determine the application.

(4) If the EPA grants the application, it may issue the consent subject to conditions under section 63, but not under section 63(2)(b).

[68] The conditions referred to in s 63(2)(b), which by virtue of s 87F(4) may not be included in a marine discharge consent or marine dumping consent, are conditions which "together amount or contribute to an adaptive management approach". Adaptive management is not permitted in the marine dumping or discharge context.

[69] Section 87G provides for the application to marine dumping consents and marine discharge consents of ss 65 to 67, which relate to conditions (including conditions relating to bonds), and ss 68 to 72, which address a number of ancillary matters in relation to consents.

[70] Subpart 3 of pt 3 is concerned with marine consents for cross-boundary activities, which are defined as activities that are carried out partly in the EEZ or in or on the Continental Shelf, and partly in New Zealand.[36] The seabed mining activities that TTR proposes to carry out are not cross boundary activities as defined, as they would be carried out solely within the EEZ. But as noted above, the effects of those

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[36] Section 88.

activities will occur to a significant extent within the CMA. We return to this topic at paragraph [111] below.

[71] Before leaving this review of relevant provisions of the EEZ Act, we note that s 105 provides for appeals on a question of law from a decision of the EPA. Section 113 provides for appeals from the High Court to this Court as if the decision had been made under s 300 of the Criminal Procedure Act 2011.

[72] In light of this review of the relevant provisions of the EEZ Act, we turn to some key elements of the approach that the EPA was required to adopt when making decisions in respect of TTR's application for a marine discharge consent.

How should the EPA have approached the decision on TTR's marine discharge consent application?

[73] Before turning to the specific challenges to the High Court decision advanced by the parties, it is helpful to outline — painting with broad brush strokes — the way in which the EEZ Act required the EPA to approach TTR's application for a marine discharge consent in relation to the sediment from its mining activities. We focus on the marine discharge consent because that was the focus of the submissions on appeal.

[74] TTR's application was required to fully describe the proposal and include an impact assessment prepared in accordance with s 39.[37] The EPA was required to base its decisions on the best available information.[38] The phrase "best available information" is defined to mean the best information that, in the particular circumstances, is available without unreasonable cost, effort or time.[39]

[75] In order to obtain the best available information, the EPA was required to make full use of its powers to request information from the applicant, obtain advice, and commission reviews and reports.[40] The requirement to obtain "best available information" did not require the EPA to obtain complete information relevant to TTR's application. The EEZ Act is framed on the assumption that information about

37 Section 87B.
38 Section 87E(1)(b).
39 Section 87E(3).
40 Section 87E(1)(a). See also ss 42 and 44.

the marine environment may be limited, and decision-making may therefore take place against the backdrop of incomplete information. The implications of incomplete information are identified below. For present purposes, however, the key point is that the EPA will necessarily exercise judgement in deciding what additional information to obtain from the applicant and others, and what reviews and reports to commission. The obligation to make full use of those powers must be understood against the backdrop of the provisions in the EEZ Act expressly recognising the prospect that there will be uncertainty or inadequacy in the available information, and the obligation of the EPA under s 40 to deal with the application as promptly as is reasonable in the circumstances.

[76] The EPA was required to give public notice of TTR's application and serve it on the parties identified in s 45. Those parties include Ministers with relevant responsibilities, and iwi authorities, customary marine title groups and protected customary rights groups that the EPA considered may be affected by the application.[41]

[77] Any person could then make a submission to the EPA within 20 working days of public notification of the application.[42] The EPA was required to advise the applicant of the submissions it had received.[43] Once submissions had been received, the EPA was able to request the applicant and one or more submitters to meet to discuss any matters in dispute in relation to the application for consent, or to enter a mediation to resolve a dispute.[44]

[78] The EPA was required to conduct a hearing if the applicant or any submitter requested a hearing.[45] A hearing was requested in this case. The EEZ Act provides that the date for commencement of a hearing must not be later than 40 working days after the closing date for submissions.[46] The EPA had a broad power to give directions in relation to the conduct of the hearing.[47]

41 Section 45(1)(a) and (1)(c).
42 Sections 46–47.
43 Section 48.
44 Section 49.
45 Section 50(b).
46 Section 51(2).
47 Section 51(4). See also ss 56–58.

[79] Sections 87D to 87G govern decision-making by the EPA in relation to an application for a marine discharge consent. The EPA was required to take into account the matters described in s 59(2) (except paragraph (c)).[48] Of particular relevance here was the obligation to take into account effects on the environment and effects on existing interests of allowing the activity; the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; the economic benefit to New Zealand of allowing the application; the nature and effect of other marine management regimes; "any other applicable law"; and any other matter the EPA considered relevant and reasonably necessary to determine the application.[49] The EPA was also required to take into account the effects on human health of the discharge of harmful substances if consent was granted.[50]

[80] The EPA was required to expressly turn its attention to the existence of uncertainty or inadequacy in the information available.[51] If the information available to it was uncertain or inadequate, the EPA was required to favour caution and environmental protection.[52] The EPA could refuse an application for a marine discharge consent if the EPA considered that it did not have adequate information to determine the application.[53]

[81] The EPA could either grant the application in whole or in part and issue a consent, or refuse the application.[54] If the EPA granted the application, it could issue the consent subject to a wide range of conditions. But it was expressly prohibited from imposing conditions that together amounted or contributed to an adaptive management approach.[55]

[82] Sections 87D to 87F outline the approach to be adopted by the EPA in considering and determining an application. They identify factors to be taken into

48 Section 87D(2)(a)(i).
49 Section 59(2)(b),(d),(e),(f),(h),(l) and (m).
50 Section 87D(2)(a)(ii).
51 Section 87E(1)(c).
52 Section 87E(2).
53 Section 87F(3).
54 Section 87F(1).
55 Section 87F(4). See also s 63(2)(b). For the conditions that can be imposed, see ss 63 and 65–67.

account. But they do not specify the test to be applied when deciding whether a marine discharge consent should be granted in whole or in part, or declined. What is the question the EPA must ask, in relation to which the factors identified in s 59 are relevant?

[83] We consider that it is clear from the scheme of the EEZ Act that the relevant test is found in the purpose statement in s 10(1). The EPA must ask itself whether granting a marine discharge consent (with appropriate conditions) will achieve both purposes identified in s 10(1):

> (a) promoting the sustainable management of the natural resources of the EEZ and the continental shelf; and
>
> (b) protecting the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

[84] In this case neither the DMC nor the High Court recognised that s 10 provided the criteria by reference to which the application was to be determined. And neither the DMC nor the High Court identified the need for the EPA to expressly consider what decision would give effect to *both* limbs of s 10(1). In particular, when considering TTR's application for a marine discharge consent the EPA needed to expressly consider whether granting such a consent would be consistent with the s 10(1)(b) purpose of protecting the environment.

[85] Protecting the environment, in this context, means keeping the environment safe from harm caused by the discharge of harmful substances. In *Environmental Defence Society Inc v Mangonui County Council* Cooke P said, referring to the phrase "protection of [the coastal environment and the margins of lakes and rivers] from unnecessary subdivision and development":[56]

> In his careful argument … in this Court Mr Salmon put it that "protection" in para (c) is not as strong a word as prevention or prohibition; that it means

[56] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 262. See also *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, (2015) 19 ELRNZ 122 at [63].

> keeping safe from injury and that a development may be permitted if the natural environment is more or less protected. Accepting this [apart] from the vagueness of "more or less", I am nevertheless unable to accept that the Tribunal have found that the natural environment would be kept safe from injury. Read as a whole, their decision seems to me ambiguous on this important matter.

[86] The definition of sustainable management in s 10(2) refers to avoiding, remedying or mitigating any adverse effects of an activity on the environment. It may be consistent with the s 10(1)(a) sustainable management purpose for an activity to cause adverse effects, provided those adverse effects are appropriately remedied or mitigated. But as the Supreme Court explained in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, there are circumstances in which the broader sustainable management goal is most appropriately pursued through preservation or protection of certain aspects of the natural environment.[57] That is, by avoiding adverse effects on the natural environment. The Supreme Court held that protection of the natural environment was required by certain policies in the NZCPS (a topic we return to below). The same is true of s 10(1)(b) of the EEZ Act. In relation to marine discharges and marine dumping, the way in which the broader goal of sustainable management is to be pursued is by protecting the environment from harm caused by those activities. It is not consistent with s 10(1)(b) to permit marine discharges or marine dumping that will cause harm to the environment, on the basis that the harm will subsequently be remedied or mitigated. The s 10(1)(b) goal can only be achieved by regulating the activity in question (for example, by imposing conditions) in a manner that will avoid material pollution of the environment, or if that is not possible, by prohibiting the relevant discharge or dumping in question. As we explain at [109] below, the reference to regulating discharges or dumping is a reference to regulating those activities in order to pursue the goal of protecting the environment from pollution: it does not indicate that there are circumstances in which that goal need not be pursued.

[87] Thus, when the EPA considers an application for a marine discharge consent or a marine dumping consent, it is insufficient to consider the s 10(1)(a) sustainable management principle without going on to address the more specific goal in s 10(1)(b).

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57 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [149].

To do so risks losing sight of the guidance given in para (b) about how the sustainable management objective is to be implemented in the context of marine discharges and dumping.

[88] As explained at [26] above, New Zealand's international obligations under the London Convention (including the 1996 Protocol) require marine dumping to be regulated in a manner that ensures protection of the environment. If an application for a marine dumping consent were to be determined by reference to s 10(1)(a), disregarding the more specific purpose set out in s 10(1)(b), that could result in outcomes inconsistent with New Zealand's obligations under the London Convention. In the marine dumping context, the approach to s 10(1) that we have outlined above is necessary in order to ensure that the New Zealand legislation effectively implements relevant international obligations. The EEZ Act applies the more stringent standard of protection of the environment that is required by the relevant international instruments in the marine dumping context to a wider range of discharges. That is a deliberate policy choice which must be given effect in relation to all the activities to which s 10(1)(b) and the marine discharge and marine dumping provisions apply.

[89] It follows that the criteria for marine discharge consents are different from, and more demanding than, the criteria with respect to marine consents generally. It is not consistent with the scheme of the EEZ Act to trade off harm to the environment caused by a marine discharge against other benefits, such as economic benefits. Nor is it consistent with the scheme of the EEZ Act to permit harm to the environment caused by a marine discharge on the basis that this harm will subsequently be remedied or mitigated. It would be inconsistent with s 10(1) for the EPA to grant a marine discharge consent if granting the consent is not consistent with the goal of protecting the environment from pollution. Protecting the environment — keeping it safe from harm caused by marine discharges or marine dumping — is in this sense a bottom line.[58] It is not open to the EPA to grant a consent for a marine discharge or marine dumping unless it is satisfied that the relevant activity is not likely to cause

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58 The Supreme Court reached a similar conclusion in the RMA context in relation to certain policies set out in the NZCPS in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 57, at [132]. The implications of the NZCPS for the present appeal are discussed in more detail at [181]–[203] below.

harm to the environment. If there is a real prospect of material pollution of the environment, a marine discharge or dumping consent should not be granted.

[90] Consistent with the bottom line of protecting the environment from pollution caused by marine discharges or marine dumping, the EEZ Act provides for a lower tolerance for risk to the environment when making decisions about marine discharge and marine dumping consents. That is reflected in the prohibition on adaptive management approaches in this context. We return to this point below.

[91] In light of this overview, we turn to the challenges advanced by the parties in relation to the decisions of the High Court and DMC.

Challenges to the decisions below

[92] The appeal by TTR and the cross-appeals by other parties raised numerous overlapping issues. The following sections of the judgment address the challenges to the High Court decision which we consider have been made out. We then describe briefly the numerous challenges that are not in our view well-founded.

[93] We adopt the same approach taken in the High Court of grouping the various challenges by reference to the key issues they raise.

Approach to s 10 purpose statement

The issue

[94] We begin by addressing a fundamental issue raised by the respondents: did the DMC and the High Court err by failing to correctly identify the statutory purpose in relation to marine discharge consents, and by failing to treat that purpose as the relevant decision-making criterion for TTR's application for such a consent?

DMC decision

[95] The DMC decision set out s 10,[59] and recorded, correctly, that the DMC needed to consider whether the application met the purpose of the EEZ Act.[60] The DMC summarised its understanding of the implications of s 10 briefly as follows:

> 12. Section 10 requires that the environment is protected from pollution and dumping of harmful substances and waste such as the residual material that will be returned to the seabed after processing and the extraction of iron ore.
>
> 13. The use of the resource must be regulated and controlled in such a way that meets the Act's purpose of sustainable management. We are obliged to identify and to manage effects on the environment to achieve that purpose.

[96] In a section headed "Purpose of the Act" the DMC said:

> 117. The DMC is required to give effect to the EEZ Act (the Act). We need to consider whether [the] application meets the purpose of the Act and the framework for assessing that is set out in Sections 59 and 87D of the Act.

[97] After reviewing the wide range of issues that were relevant to TTR's application, the DMC turned, in chapter 7 of its decision, to what it described as its "Integrated Assessment" of the application. The introductory text in chapter 7 reads as follows:

> The following part of our record of decision (Chapter 7-24) integrates the various matters covered in evidence and submissions which we set out in previous sections. Our intention in doing so is to achieve the purpose of the Act (Section 10) and more particularly the requirements under s 10(3), which require us to take into [account] specific decision making criteria and information principles.

[98] The introductory paragraphs of chapter 7 expand on that approach in a section headed "Section 59 Summary and Analysis":

> 928. We must take into account the decision making criteria and information principles set out in the Act. Specifically, this requires us to follow Sections 59 and 87D – which sets out a decision making

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59 Environmental Protection Authority *Decision on Marine Consents and Marine Discharge Consents Application: Trans-Tasman Resources Limited: Exacting and processing iron sand within the South Taranaki Bight* (August 2017) at [2.1] [DMC decision]. All references to the DMC decision are references to the majority decision in pt 1, unless otherwise stated.

60 At [5.1].

framework; Section 60 – which lists matters to be considered in deciding the extent of effects on existing interests; and Sections 61 and 87E and 87F – which establish certain information principles. These matters are set out in Chapter 7-24.3 of our record of decision.

929. We note that pursuant to Section 59(5) of the EEZ Act, we have not given regard to:

(a) trade competition or the effects of trade competition; or

(b) the effects on climate change of discharging greenhouse gases into the air; or

(c) any effects on a person's existing interest if the person has given written approval to the proposed activity.

[99] After going through each limb of s 59, the decision of the majority comes to a somewhat abrupt end. Chapter 8 deals with conditions. The record of the decision then moves to the alternative view of the two dissenting members of the DMC. The only record of the majority's overall assessment of the application is set out in the "Summary of Decision" at the beginning of the DMC decision, as follows:

Conclusion

43. Our assessment of the effects of this proposal is that, with the imposition of these conditions granting consent meets the purpose of the Act.

44. Pursuant to section 62(1)(a) and 87F(1) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, the application for marine consents and marine discharge consents by Trans-Tasman Resources Ltd to undertake restricted activities (listed in Appendix 1) is **GRANTED** and the consents are issued subject to conditions (listed in Appendix 2).

45. These marine consents and marine discharge consents expire 35 years after the date of the granting of the consents.

46. The reasons for granting the marine consents and marine discharge consents are set out below in this record of decision in accordance with section 69 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

High Court decision

[100] In the High Court the consent opponents (the respondents before this Court) argued that the DMC did not follow the framework established by s 10. They submitted that the DMC majority failed to articulate any test by reference to which the application should be assessed. Rather, they argued, the DMC majority identified

a series of factors that they said they took into account without explaining how they had done so, or what ultimate standard they had applied to decide whether the application should be granted.[61] They also argued that the DMC failed to directly address the s 10(1)(b) purpose of protecting the environment from pollution, and wrongly conflated it with avoiding, remedying or mitigating adverse effects.[62]

[101] The Judge did not accept that argument. The Judge noted that the DMC was clearly aware of the statutory purpose, setting s 10 out in full and making the observations set out at [95]–[98] above.[63]

[102] The Judge considered that it was clear that the DMC had correctly identified the statutory purposes and, particularly in chapter 7, explained how they had taken the EEZ Act's purposes into account in reaching their decision to grant the consents.[64]

[103] The Judge said:

> [119] At [117] of the Majority Decision, the DMC specifically acknowledged it was required to give effect to the EEZ [Act] and needed to consider whether the application met the purpose of the Act and the framework for assessing that, as set out in ss 59 and 87D of the Act. There is no doubt that the DMC correctly identified the purposes of the Act and the relevant criteria to apply in assessing whether the purposes were met.

Submissions in this Court

[104] Before us the respondents reiterated their argument about the failure of the DMC to understand the function of s 10, and in particular s 10(1)(b), in the statutory scheme. They submitted that the Judge had made essentially the same mistake.

[105] Mr J Smith QC, counsel for TTR, submitted that the DMC and the High Court had correctly understood and applied the purpose of the EEZ Act. In response to the complaint that the DMC had not identified and applied the relevant decision-making criteria, he submitted that the DMC specifically considered whether

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61 High Court decision, above n 6, at [108].
62 At [111].
63 At [117].
64 At [121].

it had sufficient information to make a decision and determined that it did. This, he said, was a factual finding which was entirely open to the DMC on the evidence. Mr J Smith emphasised s 10(3) and argued that the way in which the s 10(1) purpose statement was to be given effect was by taking into account the decision-making criteria specified in relation to particular decisions (in particular, in this context, s 59 as modified by s 87D), and by applying the information principles. He also emphasised that s 10(1)(b) referred to *regulating* marine discharges, as well as *prohibiting* such discharges. He argued that this meant that the purpose of protecting the environment was not absolute.

Analysis

[106] As we have explained above, it was essential that the DMC turn its mind to both limbs of the purpose provision in s 10(1). In particular, the DMC needed to ask itself:

(a) whether granting the marine consents sought would give effect to the sustainable management objective set out in s 10(1)(a); and

(b) whether granting a marine discharge consent in this case would be consistent with the objective set out in s 10(1)(b) of protecting the environment from pollution caused by discharges of harmful substances.

[107] The DMC majority analysis does not identify these as the relevant criteria for its decision-making. In particular, the DMC decision does not identify protecting the environment from pollution as a relevant criterion for grant of a marine discharge consent and does not apply this test in carrying out its "Integrated Assessment". There is no discussion at all in chapter 7 of whether that limb of the purpose provision is met. Rather, the DMC majority appears to have undertaken a broad evaluation of the desirability of granting a marine discharge consent weighing all the relevant s 59 factors in the mix — an "Integrated Assessment" in which all the factors are balanced together, and a conclusion reached by reference to an unarticulated overall test. It is possible that the overall test that the DMC majority applied was whether granting the consents would be consistent with the sustainable management objective in s 10(1)(a),

though that is not explicitly identified as the relevant criterion in the DMC decision. But even if that was the DMC's (implicit) approach, that approach would be wrong in law so far as the marine discharge consent applications are concerned.

[108] Section 10(3) does not remove the need to consider and apply the s 10(1) purpose statement. Section 10(3) identifies key steps that the decision-maker must take in order to achieve the EEZ Act's purpose. But neither that provision, nor the provisions to which it refers, provide any criteria to govern the overall assessment and determination of applications. The relevant criteria are found in s 10(1).

[109] TTR's submissions based on the reference to regulating discharge of harmful substances in s 10(1)(b) misunderstand the structure of that provision. The goal of protecting the environment from pollution caused by marine discharges may be able to be met by either regulating or prohibiting the discharge of harmful substances, depending on the context. But the goal remains the same: protecting the environment, which as we explained above means keeping the environment safe from pollution caused by such discharges. If regulation of discharges is not sufficient to achieve that goal, then prohibition is the appropriate response to ensure it is achieved. Section 10(1)(b) recognises that the "protection of the environment" goal may be achieved in some cases by regulating discharges, rather than prohibiting them. But it is not possible to reason from this to a different, and watered-down, version of that goal.

[110] The Judge's conclusion on this issue proceeded on the basis of the same misunderstanding about the structure of the EEZ Act and the relevant decision-making criteria that is found in the decision of the DMC majority. Because the Judge did not appreciate that the s 10(1) purpose statement provides the fundamental criteria by reference to which the application was to be determined, the Judge did not turn his mind to the question of whether the DMC had identified and applied that test. The respondents' criticisms of this aspect of the DMC decision were well-founded. The Judge erred in law in failing to uphold those criticisms. This was a fundamental flaw in the approach of the DMC and of the High Court.

[111] This error may well have affected the outcome of TTR's application. The findings made by the DMC suggest that there is a real prospect that the sediment plume would have material adverse effects on the environment, despite the conditions imposed by the DMC decision. That outcome would be inconsistent with the objective of protecting the environment from pollution caused by such discharges. For example:

(a) The DMC found there would be significant adverse effects on environmentally sensitive areas to the east-southeast of the mining site, including adverse effects on the Patea Shoals, The Crack and the Project Reef. The DMC said:

> 970. There will be significant adverse effects on environmentally sensitive areas to the east-southeast of the mining site. We agree that there will be significant effects on macroalgae on at least part of Graham Bank and minor effects on macroalgae at The Traps. There will also be significant effects on microphytobenthos within 1 to 2 km of the mining site. Overall, we find that the effect on the primary production of the Patea Shoals is likely to be moderate, but will be significant at environmentally sensitive areas such as The Crack and The "Project Reef". However, we note that not all primary production is dependent on the availability of light.

(b) The DMC was "concerned for effects at locations demonstrated to have a rich and diverse benthic fauna, such as The Crack and The "Project Reef"".[65]

(c) The effects in these areas may include either temporary or permanent displacement of fish species.[66]

(d) The DMC described the impact of the sediment plume in this area on Ngāti Ruanui and the Ngā Rauru rohe as follows:

> 939. The highest levels of suspended sediment concentration will occur in the CMA offshore from Ngāti Ruanui's whenua. There will be severe effects on seabed life within 2 – 3 km of the project area and moderate effects up to 15 km from

[65] DMC decision, above n 59, at [406].
[66] At [437].

> the mining activity. Most of these effects will occur within the CMA. There will be adverse effects such as avoidance by fish of those areas. Kaimoana gathering sites on nearshore reefs are likely to be subject to minor impacts given background suspended sediment concentrations nearshore.
>
> 940. The Traps, Graham Bank and The "Project Reef" are all within Ngaa Rauru's rohe. In relation to Ngaa Rauru, there are likely to be adverse effects such as avoidance by fish in areas towards the outer edge of the CMA such as Graham Bank and this area will at times have significant reductions in light, affecting primary production levels. Kaimoana gathering sites on nearshore reefs are likely to be subject to minor or negligible impacts given that background SSC is typically elevated in the nearshore area. Impacts may be moderate towards the western end of the rohe, but minor or negligible elsewhere.

[112] On the basis of these findings, it appears that if the DMC majority had asked itself the right question it might well have arrived at a different result. We return below to the question of relief, and whether TTR's application for marine consents and marine discharge consents should be dismissed or remitted to the EPA for determination in accordance with the approach set out in this judgment.

Failure to apply information principles

The issue

[113] The respondents argued that the DMC and the High Court failed to give effect to the information principles in ss 61 and 87E, and in particular the requirement to favour caution and environmental protection.

[114] The EEZ Act provides a clear direction to the EPA that if the information available to it is uncertain or inadequate, it must favour caution and environmental protection.[67] We agree with the Judge that this requirement is the means by which Parliament has sought to comply with relevant international obligations.[68] This language is in our view a statutory implementation of the "precautionary

[67] EEZ Act, s 87E(2).

[68] High Court decision, above n 6, at [335].

approach" or "precautionary principle" contemplated by Principle 15 of the Rio Declaration on Environment and Development, which reads:[69]

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[115] The 1996 Protocol to the London Convention expressly requires States to adopt the precautionary principle in relation to marine dumping.[70] The information principles in the EEZ Act implement this requirement in relation to marine dumping and apply it to all applications under the Act for marine consents, marine discharge consents and marine dumping consents.

[116] In the context of an application for a marine discharge consent, if there is uncertainty about whether granting the consent will achieve the purpose of protecting the environment from pollution, the EPA must favour caution and environmental protection and either decline the consent, or grant it subject to conditions that ensure that the environment will be protected from pollution by the discharge.[71] The EPA does not have the option of adopting an adaptive management approach, as such an approach would risk causing harm to the environment of the kind that s 10(1)(b) requires the EPA to avoid. We return to this point in more detail below.

DMC decision

[117] The DMC clearly identified the need to favour caution. The DMC summarised its approach as follows:

> 40. There is no requirement on the DMC to apply a precautionary approach. When faced with uncertainty, we are required to favour caution. We have done that. The Consent Holder will not be handed a carte blanche in respect of this mining operation. They will have to conduct the operation in such a way that they avoid adverse effects, remedy adverse effects, or mitigate them. We have imposed conditions which manage the potential for effects on the environment in each of these three ways.

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69 *Rio Declaration on Environment and Development* UN Doc A/Conf.151/26 (Vol 1) (12 August 1992), annex I.

70 1996 Protocol, art 3(1).

71 EEZ Act, s 87E(2).

[118] As this passage shows, the DMC understood the requirement that it favour caution. However, the DMC did not put the same emphasis on the requirement to favour environmental protection, despite the reference to that requirement in s 87E(2). Nor did the DMC make the link between the requirement to favour caution and environmental protection and the s 10(1)(b) purpose of protecting the environment from pollution caused by marine discharges and dumping. Rather, the DMC appears to have proceeded on the basis that it would be sufficient if the adverse effects of the sediment plume were either avoided or remedied or mitigated (a diminishing scale of response).

[119] The DMC minority also did not make the link between s 87E and s 10(1)(b) and appear to have focused on the sustainable management objective in s 10(1)(a), rather than on s 10(1)(b). But they did appreciate the need to favour caution and environmental protection in making a decision on TTR's application. The key difference between their approach and the majority's approach that they identified was:[72]

> … our view that overall the localised adverse environmental effects on the Patea Shoals and tangata whenua existing interests are unacceptable, and are not avoided, remedied or mitigated by the conditions imposed. We also have concerns regarding uncertainty and the adequacy of environmental protection within the coastal marine area (CMA).

High Court decision

[120] Before the High Court, the respondents argued that the DMC failed to favour caution and environmental protection. Some of the respondents also argued that in addition to the requirement to favour caution, there was an obligation derived from international law to adopt a precautionary approach.

[121] The High Court rejected the argument that the DMC had erred in focussing on the statutory information principles and declining to incorporate an additional "extraneous precautionary ideal" in its analysis.[73]

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72 DMC decision, above n 59, at pt 2, [1.1].
73 High Court decision, above n 6, at [336]–[337].

[122] However, as the Judge noted, the fact that the DMC did not err in declining to apply an overlay of the precautionary principle, in addition to the statutory test, is a different question from whether or not the DMC actually applied an approach which favoured caution and environmental protection.[74] The Judge's approach to this argument focused on whether the DMC had adopted an adaptive management approach. The Judge considered that the DMC had not complied with the information principles because an adaptive management approach had been adopted. We discuss adaptive management in more detail below.[75] The Judge considered that the conditions imposed by the DMC either constituted or contributed to an adaptive management approach and had been used as a tool for managing uncertainty.[76] That approach was not available under the EEZ Act in relation to marine discharges.[77]

[123] The Judge also noted that even if an adaptive management approach had been permitted, there was doubt as to whether it would have been appropriate in this context "because one of the pre requisites for using an adaptive management approach is to have sufficient baseline information so that appropriate conditions can be drafted. There must be real doubt that this is the case here".[78]

Submissions on appeal

[124] The respondents submitted that the Judge's focus on whether an adaptive management approach had been adopted by the DMC meant that he failed to address the more fundamental issue they sought to raise: whether the DMC should have refused the application on the basis that the information before it was not sufficiently certain or adequate to satisfy the requirement for caution and environmental protection.

[125] The respondents also argued that the precautionary principle recognised in international environmental law should have been taken into account as a relevant factor, either as an "applicable law" under s 59(2)(l) or as another matter that the EPA should have identified as relevant under s 59(2)(m).

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[74] At [337].
[75] See [204]–[228] of this judgment.
[76] High Court decision, above n 6, at [404].
[77] At [404].
[78] At [405].

[126] TTR supported the High Court decision on this issue. TTR submitted that the only difference between the information principles applying to marine consents and marine discharge consents is that for discharge consents, an adaptive management approach cannot be considered as a means to grant consent. That, TTR said, does not change the underlying intent of the information principles — which is to facilitate the granting of consents. It simply removes a mechanism that applicants could have otherwise had recourse to, in order to satisfy the decision-maker that the adverse effects of its activity can be appropriately avoided, remedied or mitigated.

Analysis

[127] As explained above, we consider that the requirement in ss 61(2) and 87E(2) to favour caution and environmental protection gives effect to the precautionary principle in the context of the EEZ Act. We agree with the Judge that there is no justification for imposing some additional (and presumably different) requirements via s 59(2)(l) or (m). Nor is it necessary to do so: the information principles in ss 61 and 87E can and should be interpreted as implementing the precautionary principle established by international environmental law, including the 1996 Protocol.

[128] We do not accept TTR's submission that the purpose of the information principles is to facilitate the granting of consents. The information principles recognise that decisions about activities in the EEZ will almost always involve uncertainty and incomplete information. That is not in itself a reason to refuse consent. But if the lack of information and resulting uncertainty about the effects of a proposed activity mean that the EPA is left uncertain whether the s 10(1) objectives will be met if a consent is granted, then the information principles require that consent to be refused. One key purpose of the information principles is to ensure that the environmental objectives of the EEZ Act are not undermined by the grant of consents in circumstances where it is uncertain whether those objectives will be achieved.

[129] TTR's approach to the information principles also fails to engage with the key difference between marine discharge consents and other marine consents: the requirement in s 10(1)(b) that the environment be protected from pollution caused by marine discharges of harmful substances. Although the form of the information

principles in ss 61(2) and 87E(2) is the same, the way in which the principles operate in the context of the s 10(1)(b) bottom line of protecting the environment differs in important respects.

[130] We consider that the High Court erred in failing to find that the incompleteness of information and resulting level of uncertainty in relation to TTR's application required refusal of the marine discharge consent it sought, unless the DMC was satisfied notwithstanding that uncertainty that conditions could be imposed that would protect the environment from pollution caused by the discharge. If the DMC remained unsure whether granting the consent subject to the contemplated conditions would protect the marine environment from pollution caused by the sediment plume, it was required to decline to grant that consent. The High Court erred in law by failing to articulate this approach and apply it to the DMC decision.

[131] We consider that it is clear that the DMC failed to adopt the approach required by s 87E in determining whether to grant the marine discharge consent sought by TTR. The DMC failed to make the connection between the requirement to favour caution and environmental protection in s 87E(2), and the objective of protecting the environment from pollution caused by discharges in s 10(1)(b). If there is a real prospect that a marine discharge will result in material harm to the environment, then whether or not that harm could subsequently be remedied or mitigated, the grant of a consent would not be consistent with the requirement to favour caution and environmental protection in response to uncertainty about whether the s 10(1)(b) goal would be achieved.

[132] This was another fundamental error in the approach of the DMC and the High Court.

Approach to the Treaty of Waitangi, tikanga Māori and kaitiakitanga

The issue

[133] Before us, as in the High Court, the parties differed on the extent to which, and the manner in which, the DMC was required to have regard to the principles of the Treaty, and to the concept of kaitiakitanga. Their disagreement focused on whether

s 12 is an exhaustive statement of the relevant principles of the Treaty under the EEZ Act, and on whether the Treaty principles and kaitiakitanga are relevant factors under s 59(2).

DMC decision

[134] The DMC decision contains an extended discussion of "Tangata Whenua Matters" in chapter five. As the DMC recorded, all iwi with mana whenua status who were affected by the proposal made submissions in opposition to it.[79]

[135] The DMC recorded that affected iwi expressed concern about environmental impacts, and the level of uncertainty about those impacts.[80]

[136] The DMC noted that iwi also expressed significant concerns about the impact of the proposal on the mauri of the ocean and the marine environment. The DMC summarised its understanding of the views of iwi by reference to a submission made on behalf of Ngā Rauru:[81]

> … we submit that seabed mining is an experimental operation and that it will have destructive effects on our marine environment, marine species and people. As kaitiaki we cannot support this activity. It is the absolute antithesis of what we stand for. … Seabed mining effects are a violation of kaitiakitanga. … as kaitiaki, we, as Ngā Rauru Kītahi, are defenders of the ecosystems and its constituent parts. We believe that everything has a mauri or a life force and that mauri must be protected.

[137] The DMC heard evidence about, and recorded its findings on, customary fishing and kaimoana collection in the CMA.[82] The DMC also heard evidence about the impact of the proposal on iwi commercial fishing interests, both offshore and inshore.[83]

[138] The DMC received a report from its Māori advisory committee: Ngā Kaihautū Tikanga Taiao (NKTT). The NKTT report made a number of recommendations.

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79 DMC decision, above n 59, at [623]–[626].
80 At [640]–[646].
81 At [650].
82 See [664]–[673].
83 See [674]–[678].

It identified a range of matters of concern identified by Māori in relation to the proposal:[84]

- The relationship of Māori to both the environment and area through whakapapa. Whakapapa is what ensures the interconnectedness of all living things and is central to Māori life and the role of kaitiaki.

- The practice of tikanga and kawa, and the application of mātauranga Māori by kaitiaki, ensures the mauri of the ecosystem and environment.

- The rights and interests of Māori, whether as existing interests, activities defined in the EEZ Act, or as lawfully established activities, whether authorised or not.

- The adverse effects from noise and vibration, primarily on marine mammals.

- Impacts from the sediment plume on the environment, with particular reference by some submitters on customary areas/sites of significance.

- The conflict between the Te Tai Hauāuru Fisheries Forum report and the submissions (individual and joint) received from members/ representatives on the Forum.

- The role of kaitiaki.

- The principle of protection.

- The lack of a bond mechanism, or insurance cover towards environmental restoration, should something go wrong.

- Inadequate consultation undertaken by TTRL with tangata whenua.

- Lack of transparency and disclosure of information by TTRL.

[139] The DMC said that it had noted the NKTT recommendations and taken them into account where appropriate.[85] It also noted that it took all submissions into account.[86]

[140] The DMC recorded that affected iwi had expressed dissatisfaction with TTR's approach to consultation.[87] TTR said it had sought to engage with iwi, but this had been unsuccessful prior to the DMC hearing.[88] Ngāti Ruanui, who TTR acknowledged

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84 At [685].
85 At [686].
86 At [686]–[687].
87 At [638].
88 At [639].

as the iwi holding mana whenua, had declined to engage with TTR on its terms or to prepare a cultural impact report to be funded by TTR.[89]

[141] The DMC sought, and adopted, legal advice on how it should approach s 12 of the EEZ Act and the submissions it received in relation to the relevance of the Treaty. The extract from that advice set out in the DMC decision reads as follows:[90]

> 59. TTRL's counsel … noted that section 12 does not impose any express requirement on the DMC to take into account the principles of the Treaty when making decisions on applications.
>
> 60. We agree that it is instructive that section 12 sets out specific means by which the Crown's responsibility to give effect to the principles of the Treaty is achieved, rather than enacting a direct requirement on the EPA or a DMC to take into account the principles of the Treaty in its decisions. This approach can be contrasted with the means by which the principles of the Treaty are addressed in the RMA.
>
> 61. As noted above, this formulation means that it is untenable, in our view, to read in an obligation or power on the EPA to take Treaty principles directly into account in decisions on marine consent applications, such as under the catch-all provision in section 59(2)(m).
>
> 62. That said, in our view there remains scope for Treaty principles and the issues that arise in that respect, such as the duty for the Crown to act reasonably, the duty to make decisions informed by Māori perspectives, and the duty of active protection of Māori interests, to influence or 'colour' the way in which other provisions are interpreted.
>
> 63. The provisions referred to in section 12 encompass both procedural and substantive elements of the marine consenting process; the references are to section 18 (the Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao), section 45 (notification), and section 59 (highlighting the substantive consideration to be given to effects on existing interests). When interpreting these sections in particular, in our view it is appropriate to consider the relevant principles of the Treaty.
>
> 64. Procedurally, the EPA must notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them to assist their ability to engage in the publicly notified marine consent process.
>
> 65. Substantively, any advice provided to the DMC by Ngā Kaihautū Tikanga Taiao is a mandatory consideration to which the DMC must have regard (together with various other mandatory considerations). Further, the concept of existing interests provides a very express

89 At [638]–[639].
90 At [628].

means by which recognised Māori interests are to be considered (discussed further below).

In our view it is appropriate to read these obligations in light of the principles of the Treaty. For example, if considering whether an interest asserted by a Māori individual or group is a "lawfully established existing activity", and thus within the definition of "existing activity", it may be appropriate (and consistent with the principles of the Treaty) to apply a broad, inclusive interpretation.

66. Other cultural considerations may also be relevant to the DMC's decision, as discussed below in the context of its question about claims founded on the Treaty of Waitangi, and the question regarding cultural, spiritual, and metaphysical values.

67. Consideration should also be specifically given to effects on Māori, as relevant, when the DMC considers the effects on human health of the discharge of harmful substances under section 87D(2)(a) of the Act.

(Footnotes omitted.)

[142] The DMC also sought legal advice on how to incorporate Māori cultural perspectives, such as concern about the impact of the proposal on the mauri of the sea and the marine environment, into its decision-making. The advice received by the DMC, to which it said it had regard, was as follows:[91]

81. We agree that information about Māori interests and values in "existing interests", including cultural, spiritual, and metaphysical values in such interests, is potentially relevant under Section 59(2)(a); to the extent that such information is relevant, it must be taken into account by the DMC, as discussed below.

82. Further, we note that the term "environment" is defined in the Act as "the natural environment, including ecosystems and their constituent parts and all natural resources of New Zealand and its waters". Unlike under the RMA, effects on people and communities, amenity values, and social, economic, aesthetic, and cultural conditions are not effects on matters that make up the "environment" for the purposes of the Act.

83. In our view, however, the DMC should take into account any evidence or information before it about relevant cultural perspectives of effects on the natural environment, alongside scientific or technical information. This would include information about the values that Māori hold in the natural environment, such as values in taonga species or in the mauri of land, water, or other elements of environment.

(Footnotes omitted.)

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[91] At [648]–[649].

[143] Before the DMC, iwi submitted that kaitiakitanga is an "existing interest" for the purpose of s 59(2)(a). It was therefore necessary for the DMC to have regard to the impact of the TTR proposal on kaitiakitanga. Iwi also submitted that the DMC should take into account the likelihood that customary marine title and protection mechanisms for customary activities would be processed and granted within the 35-year duration of the mining project. The affected iwi have all applied for recognition of customary interests under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). Iwi argued that those interests are also "existing interests", and that the effect of the proposal on those interests was also relevant under s 59(2)(a).

[144] The DMC did not set out any analysis of whether kaitiakitanga is an "existing interest" for the purposes of s 59(2)(a). The DMC did accept that customary activities have the status of existing interests under the Act.[92] The DMC appears to have accepted the advice it received from counsel assisting the DMC that "the lawful exercise of kaitiaki responsibilities might fall within the scope for consideration of effects on the environment or existing interest under Section 59(2)(a)".[93]

[145] The DMC also recorded the advice it received from counsel that settled claims under the Treaty are an existing interest for the purposes of the EEZ Act.[94]

[146] The DMC expressly rejected the submission that claims made under MACA qualify as existing interests.[95] The DMC recorded that the advice it received from counsel was that a contingent or potential interest that an iwi asserts under a MACA customary marine title application is not an existing interest for the purposes of the EEZ Act.[96]

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92 At [716].
93 At [647].
94 At [652].
95 At [662].
96 At [662].

[147] After considering a number of other matters raised by iwi submitters, the DMC set out its findings on "Tangata Whenua Matters" in section 17.5 of the decision. The DMC summarised its approach as follows:

> 720. Māori interests in general, and Te Tiriti principles in particular, are important and relevant 'other matters' under Section 59(2)(m) of the Act. Our approach in this regard is also consistent with the advice of counsel assisting the DMC; that principles of Te Tiriti should 'colour' our assessment. As an example, we have taken into account the potential physical and biological effects of the sediment plume on kaimoana.
>
> 721. On physical and biological questions, our consideration is based on effects. However, we also acknowledge and have had regard to the Māori worldview, including cultural and metaphysical aspects that go beyond western physical science. This includes the focus of iwi on kaitiakitanga, and potential effects on the mauri of any impacted part of the environment. In this regard, we note that there are aspects in common between the three iwi, as well as some differences. Working from north to south, the following paragraphs outline the likely biophysical impact on each rohe.
>
> 722. Regarding customary gathering, we considered that it is inappropriate to view the issue from a STB- [Southern Taranaki Bight] wide perspective. The rohe of individual iwi are confined to much smaller areas than the STB. The effects on reefs as a focus for food gathering has been part of our consideration.
>
> 723. The nearest shoreline in Ngāruahine rohe is north of and over 20 km from the mining site. Even during unusual current and weather conditions, the predicted level of suspended sediment concentrations will be small increments on background levels inshore and will be less than the levels at which potential adverse effects on marine life might occur.
>
> 724. The highest levels of suspended sediment concentration will occur in the coastal marine area offshore from Ngāti Ruanui's whenua. There will be severe effects on seabed life within 2 – 3 km of the project area and moderate effects up to 15 km from the mining activity. Most of these effects will occur within the CMA. There will be adverse effects such as avoidance by fish of those areas. Kaimoana gathering sites on nearshore reefs are likely to be subject to minor impacts given background suspended sediment concentrations nearshore.
>
> 725. The Traps, Graham Bank and The "Project Reef" are all within Ngā Rauru's rohe. In relation to Ngā Rauru, there are likely to be adverse effects such as avoidance by fish in areas towards the outer edge of the coastal marine area such as Graham Bank and this area will at times have significant reductions in light, affecting primary production levels. Kaimoana gathering sites on nearshore reefs are likely to be subject to minor or negligible impacts given that background SSC is typically elevated in the nearshore area. Impacts

may be moderate towards the western end of the rohe, but minor or negligible elsewhere.

726. Our findings in relation to human and environmental health (see Chapter 4-16) are that effects related to heavy metals are very unlikely, whether by direct impact or via bioaccumulation. The consequent risk to kaimoana is assessed as negligible but we have imposed conditions to monitor and respond to indicators. We consider that the kaimoana monitoring programme (Condition 77) should be imposed because of the importance of this issue to iwi. The monitoring programme will be required to operate, even in the absence of engagement by iwi in the Kaitiakitanga Reference Group.

727. We acknowledge there will be some impact on kaitiakitanga, mauri, or other cultural values. A significant physical area will be affected, either within the mining site itself, or through the effects of elevated SSC in the discharge. Iwi identified other relevant effects such as the impact of noise on marine mammals as being of concern.

728. The concepts of kaitiakitanga and mauri (as well as other cultural values) are of great importance to the iwi within whose rohe the effects of the mining will be felt. We consider that the conditions (especially Conditions 73 - 80) will provide an opportunity for iwi to exercise kaitiakitanga through engaging in monitoring, and other scientific and operational aspects of the project.

729. Condition 80 requires the Consent Holder to continue efforts to engage with and inform iwi. Condition 77 requires the kaimoana monitoring programme to proceed regardless.

[148] The DMC majority returned to the subject of impact on kaitiakitanga and cultural values in its chapter 7 "Integrated Assessment". They said:

942. We acknowledge there will be some impact on kaitiakitanga, mauri, or other cultural values. A significant physical area will be affected, either within the mining site itself, or through the effects of elevated SSC in the discharge. Iwi identified other relevant effects such as the impact of noise on marine mammals as being of concern.

[149] The DMC minority reached a different view on the impact of the TTR proposal on tangata whenua. They said:

8. We view the lack of engagement between TTRL and tangata whenua as a serious deficiency. The application does not adequately recognise the role of tangata whenua as kaitiaki and undermines their relationship with their rohe. This relationship is not limited to kai moana sites within the nearshore environment. The message of local iwi and majority of the wider community was consistent and clear – the social and economic benefits of the proposal are small and the environmental effects and risks to marine life are unacceptable.

9. The conditions of consent do not avoid, remedy or mitigate direct or indirect adverse effects on the coastal marine area that tangata whenua have statutory acknowledgement over. A large proportion of their rohe will be significantly impacted by the sediment plume on an ongoing basis for the duration of the mining. This will significantly impact the ability of tangata whenua to exercise kaitiakitanga over their rohe and marine resources, and will in their view adversely affect the mauri of the marine environment.

High Court decision

[150] The High Court decision rejected the submission that the DMC limited their consideration of existing Māori interests to physical matters, and that the references to broader customary interests were "hollow assessments".[97]

[151] The Judge considered that it was clear that the DMC specifically considered existing Treaty settlements, existing marine and coastal area titles and rights, customary uses, and Māori commercial fisheries interests.[98]

[152] The Judge did not accept the submission that the reference to "existing interests" extended to the interests that would be recognised by applications under MACA. The Judge considered that the definition of existing interest was clear, and did not extend to claims under MACA that had not yet been determined.[99] The High Court also rejected submissions that the DMC was obliged to consider rights recognised by the United Nations Declaration on the Rights of Indigenous Peoples,[100] and was required to have regard to the principles of the Treaty.[101] The Judge considered that Treaty matters were addressed in s 12, which "indicates how the legislature has required a consent decision-maker to have regard to the interests of Māori".[102] The Judge considered that the DMC correctly regarded this obligation as being subsumed within the express provisions of the EEZ Act.[103]

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97 High Court decision, above n 6, at [195]–[205].
98 At [227].
99 At [233].
100 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).
101 High Court decision, above n 6, at [243].
102 At [237].
103 At [243].

Submissions on appeal

[153] The respondents submit that the Treaty is of fundamental importance in the environmental context, as recognised in *Huakina Development Trust v Waikato Valley Authority*.[104] Section 12 cannot reasonably be read to be exhaustive. That would mean that the Treaty received less emphasis under the legislation as the result of an express provision referring to the Treaty than it would if the legislation were silent on the topic. They say the Treaty is relevant in a number of ways: it is relevant to the identification of existing interests under s 59(2)(a), and it is itself relevant under s 59(2)(m) as another relevant matter to which the EPA should have regard.

[154] In particular, the respondents submit that kaitiakitanga is an "existing interest" within the meaning of that term as defined in s 4, either as a "lawfully established existing activity" within paragraph (a), or via paragraph (d) which refers to the settlement of an historic claim under the Treaty of Waitangi Act 1975. Both Ngā Rauru and Ngāti Ruanui have settled their historical claims against the Crown. Both settlements emphasise the importance of the role those iwi continue to play as kaitiaki of their respective rohe.

[155] The respondents submit that although the DMC decision referred to kaitiakitanga at a number of points in its decision, the DMC failed to engage with the concept. The consideration of the proposal's impact on iwi was confined to its bio-physical impact.

[156] The respondents also say that the DMC failed to give separate consideration to the effect of the proposal on Māori commercial fishing interests. The DMC recognised these as relevant existing interests under paragraph (e) of the definition of that term — they are interests by virtue of "the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992". But they were lumped in with other commercial fishing interests in the DMC's s 59 analysis, ignoring their special status as interests under a Treaty settlement.

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104 *Huakina Development Trust v Waikato Valley Authority*, above n 25.

[157] TTR says that the Judge was right to find that s 12 of the EEZ Act is a complete statement of the ways in which the principles of the Treaty are relevant under the Act. TTR says that the procedural protections referred to in s 12, and the requirement to take into account the effects of activities on existing interests, must be treated as giving effect to the principles of the Treaty. There is no room for a separate Treaty overlay in the EPA's decision-making process.

[158] TTR goes on to say that there is no separate requirement under s 12, or any other provision of the EEZ Act, that requires kaitiakitanga to be taken into account. Had Parliament intended kaitiakitanga to be specifically and separately considered (as it is under the RMA),[105] it could have included a provision requiring the EPA to do so. Parliament did not include any such provision in the EEZ Act. However, TTR notes that in any event the DMC did consider kaitiakitanga interests.

[159] Similarly, TTR says that the effects of the proposal on Māori interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (Fisheries Settlement Act) were identified and considered by the DMC. There was no error of law in this respect.

Analysis

[160] We set s 12 out again for ease of reference:

> **12 Treaty of Waitangi**
>
> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
>
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise the Environmental Protection Authority so that decisions made under this Act may be informed by a Māori perspective; and
>
> (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
>
> (c) sections 33 and 59, respectively, require the Minister and the EPA to take into account the effects of activities on existing interests; and

105 See Resource Management Act, s 7(a) [RMA].

(d) section 45 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

[161] Section 12 identifies a number of specific ways in which the EEZ Act seeks to ensure that decisions made under the Act are consistent with the Crown's responsibility to give effect to the principles of the Treaty. It does not expressly provide that it is intended as an exhaustive statement of the ways in which the principles of the Treaty are given effect in the EEZ Act. TTR contended that it was exhaustive, and that approach was accepted by the Judge. The respondents were critical of this approach, which they said would undermine the status of the Treaty in this important environmental statute. Indeed, as noted above, they argued that this would produce a worse outcome than if there had been no reference to the Treaty at all.

[162] On its face s 12 appears to be a non-exhaustive statement of the principal ways in which the EEZ Act seeks to implement the Crown's obligations under the Treaty. However, we consider that provided the provisions referred to in s 12 are interpreted and applied in a manner that does give effect to the principles of the Treaty, the question of whether s 12 is exhaustive is more apparent than real, and need not be resolved here. Rather, the focus should be on ensuring that the provisions referred to in s 12 — and in particular, s 59 as it relates to existing interests — are read in a way that ensures that s 12 accurately characterises their effect.

[163] In particular, we consider that in order to ensure that s 12 achieves the outcome that it expressly identifies — recognising and respecting the Crown's responsibility to give effect to the principles of the Treaty — the references to existing interests in s 59 must be read as including the interests of Māori in relation to all the taonga referred to in the Treaty.

[164] Paragraph (a) of the s 4 definition of the term "existing interest", which is set out at [55] above, refers to "any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation and fishing".

[165] The second article of the Treaty provides as follows, in te reo and in English:

> **Ko te Tuarua**
>
> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.
>
> **Article the Second**
>
> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

[166] This provision of the Treaty contains an unqualified guarantee to the rangatira and hapū of New Zealand of "rangatiratanga" (in te reo Māori) and "full exclusive and undisturbed possession" (in English) in relation to their lands, estates, forests, fisheries and "taonga katoa". The exercise of those guaranteed rights and interests is a "lawfully established existing activity" for the purposes of the EEZ Act.[106] Indeed the exercise of these rights and interests can fairly be described as the most long-standing lawfully established existing class of activities in New Zealand. Those rights were not affected by the acquisition of sovereignty by the British Crown in 1840, as this Court explained in *Attorney-General v Ngati Apa*.[107] Article 2 of the Treaty recognises the continued existence of these rights and interests.

[167] This approach to the term "existing interest" is supported by the express inclusion within that term of settlements of historical and contemporary claims under the Treaty of Waitangi Act. The DMC and the High Court accepted that customary

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106 The word "activity" is defined in s 4 by reference to the activities regulated under the EEZ Act. But it is clear that the word "activity" does not have that narrow technical meaning in the context of the phrase "existing activity" that appears in the definition of the term "existing interest". Thus for example existing activities in this context include rights of access, navigation and fishing, none of which are "activities" in that narrow technical sense.

107 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [13]–[47] per Elias CJ, [133]–[149] per Keith and Anderson JJ and [183]–[185] per Tipping J.

interests recognised by Treaty settlements qualify as existing interests.[108] But at the risk of stating the obvious, those customary interests are not derived from the Treaty settlements: rather, they are pre-existing interests that are recognised by the Treaty settlements. It would make no sense for the longstanding customary rights and interests of iwi that have entered into a Treaty settlement to be treated as existing interests for the purposes of s 59, while disregarding the equally longstanding customary rights and interests of groups that have not (yet) entered into a settlement, or whose settlement deed and legislation do not expressly refer to all relevant customary interests. It follows that all customary rights and interests in relation to taonga referred to in the Treaty, including rights and interests in relation to the natural environment, qualify as existing interests for the purposes of s 59(2)(a) whether or not they are referred to or recognised in a Treaty settlement.[109]

[168] A similar point can be made in connection with the argument about whether claims under MACA are "existing interests". We agree with the Judge that statutory rights that have been claimed under MACA but not yet granted are not naturally seen as "existing interests".[110] But that is beside the point. MACA provides a formal mechanism for recognising certain customary interests in the marine and coastal area, and for giving contemporary expression to those interests. The starting point for a claim to the recognised statutory interests is the existence of customary rights and interests. Section 6 of MACA expressly provides that any customary interests in the common marine and coastal area that were extinguished by the Foreshore and Seabed Act 2004 are restored and given legal expression in accordance with MACA. Section 7 records that in order to take account of the Treaty, MACA recognises and promotes the exercise of customary interests of Māori in the common marine and coastal area. MACA does not bring the underlying customary interests into existence. Rather, it provides a mechanism for recognising them. Where that recognition has taken place, those recognised interests qualify as existing interests by virtue of paragraph (f) of the s 4 definition of the term "existing interest". In the meantime, pending such recognition, tangata whenua with customary interests continue to have

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108 DMC decision, above n 59, at [906]; and High Court decision, above n 6, at [233].

109 New forms of rights and interests established under a Treaty settlement, that reflect but do not directly correspond to customary rights and interests, also qualify as existing interests under the EEZ Act.

110 High Court decision, above n 6, at [233].

and enjoy those customary interests, and those customary interests qualify as existing interests under paragraph (a) of the definition.

[169] The existence, nature and scope of the customary rights and interests that may be relevant as "existing interests" under s 59 must be determined "as a matter of the custom and usage of the particular community".[111] Customary rights and interests are not less deserving of recognition, and cannot be disregarded as "existing interests" under s 59(2)(a), merely because they do not conform with English legal concepts. Nor, as this Court explained in *Attorney-General v Ngati Apa*, is it appropriate to attempt to shoe-horn customary rights and interests into an English property law framework.[112]

[170] It was therefore necessary for the DMC to squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests. In particular, in the context of this application, it was necessary for the DMC to address the impact of the TTR proposal on the kaitiakitanga relationship between the relevant iwi and the marine environment. Kaitiakitanga is an integral component of the customary rights and interests of Māori in relation to the taonga referred to in the Treaty.

[171] We also consider that the principles of the Treaty, including partnership (which embraces the concepts of utmost good faith and fair dealing) and active protection, are relevant when assessing the effects of a proposal on existing interests protected by the Treaty, in the context of s 59. They are intrinsically relevant, having regard to the nature of those interests. And they can be seen as relevant matters that must be taken into account in assessing the effects of an activity on those interests pursuant to s 60(d). Those Treaty principles require at the very least that reasons be given to justify a decision to override existing interests of this kind, absent the free and

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111 *Attorney-General v Ngati Apa*, above n 107, at [32], referring to the earlier decision of this Court in *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 351 per Edwards J. The existence and content of customary rights can where necessary be ascertained by evidence: *Attorney-General v Ngati Apa*, above n 107, at [31] and [54] referring to *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577.

112 At [33], referring to the decision of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 404. See also [54], [144]–[146] and [184].

informed consent of affected iwi. The adequacy of those reasons can then be assessed by reference to the assurances given by the Crown to Māori under the Treaty, and the express statement in s 12 of the EEZ Act that s 59 is intended to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty.

[172] The respondents are right to say that the focus of the DMC decision was on bio-physical effects. The DMC focused on the marine environment as a resource that Māori exploited to obtain food and other practical advantages. The difference between this perspective and the perspective of kaitiakitanga is neatly captured by the Waitangi Tribunal in its report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, explaining the central characteristics of the system of custom that Kupe brought with him to these islands:[113]

> Its defining principle, and its life blood, was kinship – the value through which the Hawaikians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

[173] The inextricably linked concepts of whanaungatanga and kaitiakitanga in relation to the natural environment and its resources were helpfully summarised by Williams J, writing extra-judicially, in *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*:[114]

> … whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal)

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113 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

114 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 4.

> metaphor informing human relationships with the physical world – flora, fauna, and physical resources – and the spiritual world – the gods and ancestors.
>
> …
>
> No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is kaitiakitanga. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare. Kaitiakitanga is then a natural (perhaps even inevitable) off-shoot of whanaungatanga.

[174] In this case the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right — as ancestors, gods, whānau — that iwi have an obligation to care for and protect.

[175] The DMC decision contains references to the concepts of kaitiakitanga and the mauri of the ocean. But there is no analysis of the nature and significance of the kaitiaki relationship, or of the nature and extent of the effects of the proposed activities on the existing interests of iwi as kaitiaki. The evidence and submissions of affected iwi and the NKTT report explained why the TTR proposal would have an adverse impact on the existing interests of those iwi, and would be inconsistent with their kaitiakitanga responsibilities in relation to the affected areas. The DMC decision does not engage with the nature and extent of the adverse effects on the existing interests of affected iwi and does not explain why the DMC considered that those adverse effects were outweighed by other factors.

[176] Similar points can be made in relation to the effect of the TTR proposal on Māori commercial fishing rights under the Fisheries Settlement Act. The effect of the proposal on this existing interest required consideration separate from the DMC's consideration of the effect on commercial fishing interests generally. The principles of the Treaty requiring utmost good faith and active protection were directly relevant when assessing whether the interests of iwi derived from this Treaty settlement would be adversely affected by granting the consents sought by TTR. Those principles require at the very least that reasons be given to justify a decision to permit a new

activity to proceed in a manner that risks impairing the interests of iwi under a Treaty settlement. The rights provided under that settlement are entitled to the same level of respect and protection as the customary fishing rights to which the settlement related, and to which the Fisheries Settlement Act gave contemporary expression.

[177] There are other routes to the conclusion that kaitiakitanga interests must be taken into account as existing interests under s 59. We consider that it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.[115] As this Court explained in *Attorney-General v Ngati Apa*, the incidents and concepts of Māori customary property rights and interests depend on the customs and usages (tikanga Māori) which gave rise to those rights and interests.[116] The continued existence of those rights and interests necessarily implies the continued existence and operation of the tikanga Māori which defines their nature and extent. As Tipping J said in *Attorney-General v Ngati Apa*, "Maori customary land is an ingredient of the common law of New Zealand".[117] The same can be said of the tikanga that defines the nature and extent of all customary rights and interests in taonga protected by the Treaty.

[178] It follows that the tikanga Māori that governs the relationship between iwi and relevant taonga must be taken into account as an "applicable law" under s 59(2)(l), where it is relevant to an application before the EPA. The need to take tikanga Māori relevant to the natural environment into account in so far as relevant to TTR's proposal meant that the DMC needed to identify and address the relevant aspects of tikanga, which in the present case included the interrelated concepts of whanaungatanga and kaitiakitanga. That analysis needed to engage with those concepts as they are understood and applied by Māori: that is the only perspective from which tikanga

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[115] See *Attorney-General v Ngati Apa*, above n 107, at [13]–[20] per Elias CJ; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116. See also Williams, above n 114, at 32–34; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95] per Elias CJ, [150] and [164] per Tipping, McGrath and Blanchard JJ; *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); and *Baldick v Jackson* (1910) 30 NZLR 343 (SC).

[116] *Attorney-General v Ngati Apa*, above n 107, at [184].

[117] At [185].

concepts can be meaningfully described and understood.[118] In this case iwi with mana whenua and mana moana in the affected area were united in submitting that the proposed activities were inconsistent with core tikanga values. The DMC needed to identify the nature and extent of that inconsistency and have regard to it. The DMC had the benefit of evidence from affected iwi, and a report from NKTT. If the DMC required further information about these matters, it could exercise its statutory powers to obtain such information. If the DMC concluded that consents should be granted notwithstanding their inconsistency with tikanga, reasons needed to be given for reaching that conclusion.

[179] It follows that the DMC erred in law in failing to have regard to the effects of the proposal on existing interests of affected iwi, properly understood, and in failing to have regard to tikanga as relevant "applicable law" in this context.

[180] It also follows that the High Court erred in law in finding that the DMC's approach was consistent with the EEZ Act.

Other marine management regimes: RMA and NZCPS

The issue

[181] Among the matters that the EPA must take into account under s 59(2) of the EEZ Act is "the nature and effect of other marine management regimes".[119] Section 7 defines the term "marine management regime" to include regulations, rules and policies made under a number of Acts including the RMA. The marine management regime of particular relevance in the present case is the NZCPS, which is made under the RMA on the recommendation of the Minister of Conservation.[120]

[182] The respondents argued unsuccessfully in the High Court that the DMC had erred in law by failing to take into account the nature and effect of the RMA and the NZCPS.[121] They pursued that argument in their cross-appeal before this Court.

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118 Williams, above n 114, at 21–22; and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111.

119 EEZ Act, s 59(2)(h).

120 RMA, s 57.

121 High Court decision, above n 6, at [162].

DMC decision

[183] The DMC identified the RMA, the NZCPS, and certain regional policy statements and regional coastal plans as marine management regimes that were potentially relevant under s 59(2)(h) of the EEZ Act.[122]

[184] The DMC proceeded on the basis that the NZCPS and other instruments under the RMA apply within the CMA, but do not apply directly in the EEZ. The DMC noted that they were required to take into account the nature and effect of other marine management regimes, such as the NZCPS and other relevant planning instruments, although those instruments do not apply within the EEZ.[123] The DMC expressed its agreement with advice it received from counsel assisting the DMC that the relevance of those instruments and the weight to be given to them are matters to be determined by the DMC, in the circumstances of the matter before it.[124]

[185] The DMC noted that it had regard to the fact that many of the effects of the TTR proposal would be experienced within the CMA, where the NZCPS is relevant.[125]

[186] The DMC referred to a number of potentially applicable provisions from the relevant regional plans, noting that if consent had been required for the discharge under those plans it seems likely it would be classified as a discretionary activity.[126] The DMC majority consideration of the NZCPS was brief and very general. The relevant paragraphs read as follows:

> 1019. We have had regard to the NZCPS, but provisions (or parts of provisions) of potential relevance include the following:
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> - Objective 1 – Ecosystems
> - Objective 2 – Natural character
> - Objective 3 – Treaty of Waitangi
> - Objective 4 – Recreation opportunities

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122 DMC decision, above n 59, at [1007]–[1009].
123 At [1001] and [1008].
124 At [1012].
125 At [1012].
126 At [1016].

- Objective 6 – Enabling development
- Policy 2 – Treaty of Waitangi
- Policy 3 – Precautionary approach
- Policy 4 – Integration across administrative boundaries
- Policy 6 – Extraction of minerals
- Policy 11 – Biodiversity
- Policy 12 – Harmful aquatic organisms
- Policy 13 – Preservation of natural character
- Policy 14 – Restoration of natural character
- Policy 15 – Natural features and landscapes
- Policy 18 – Public open space
- Policy 22 – Sedimentation
- Policy 23 – Discharge of contaminants

…

1021. Many of the effects associated with the project will be experienced in environments outside of the EEZ. The coastal marine area (CMA) is subject to the RMA. Various provisions of documents developed under the RMA are relevant to understanding the importance of the CMA and the environmental aspirations which bordering communities have for CMA waters. We have taken those matters into account in our deliberations. We have not ignored effects simply because they are outside the area covered by the EEZ.

1022. Our review of the NZCPS found that many of its potentially relevant provisions have parallels in the EEZ. For instance, the NZCPS has provisions related to indigenous ecosystems / biodiversity; and Section 59(2)(d) of the EEZ requires us to take into account the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes. Similarly, taking into account Te Tiriti is required under both documents. Importantly, we note that the NZCPS establishes discretionary activities as the highest consent status under regional coastal plans.

1023. The NZCPS is a national policy document, and therefore differs from the EEZ Act in the detail of direction that it provides. That detail provided us with a useful framework that gave additional context to our deliberations. That said, we have not regarded the NZCPS as in any way a replacement for the EEZ Act. We are clear that our duty and powers lie only under the Act, and there is no relevant topic covered by the NZPS which is also not able to be considered in some way under the EEZ Act. We were mindful of avoiding duplication

> related to the Act's requirement for caution, as opposed to the NZCPS direction on the 'precautionary principle'. See paragraph 41 for legal advice we received on the precautionary principle.

[187] The DMC minority took a different view. They summarised their understanding of the relevance of the nature and effect of the NZCPS as follows:[127]

> 7. The New Zealand Coastal Policy Statement (NZCPS) is a national policy statement under the Resource Management Act 1991 (RMA). To take into account the nature and effect of the RMA and the NZCPS we are required to be satisfied that the proposal will not have significant adverse effects on important ecological values and would not result in deterioration or degradation of the CMA. The applicant's evidence clearly demonstrates there will be significant adverse effects on ecologically sensitive sites, such as The Crack and The "Project Reef", and the Patea Shoals on an ongoing and long-term basis. The timeframe for recovery of such complex and diverse offshore marine habitats that are adapted to relatively low levels of suspended sediment concentrations for short durations, is largely unknown.

[188] The DMC minority decision includes an extended discussion of the RMA and NZCPS. The minority concluded the application was contrary to the nature and effect of the RMA and the objectives and policies of the NZCPS.[128] The minority considered that the evidence clearly demonstrated there would be significant adverse effects on ecologically sensitive sites and the Patea Shoals, and that water quality in the CMA would be degraded on an ongoing and long-term basis.[129] To allow this level of adverse impact on ecological values in the CMA could be viewed as undermining the nature and effect of the RMA.[130]

High Court decision

[189] The Judge concluded that the obligation to take into account the nature and effect of other marine management regimes was not an obligation to implement or give effect to those regimes, but to pay attention to those regimes and to weigh the nature and effect of them in addressing any effects on the environment or existing interests of allowing the activities for which consent was sought.[131]

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127 DMC decision, above n 59, pt 2.
128 At pt 2, [56].
129 At pt 2, [50].
130 At pt 2, [50].
131 High Court decision, above n 6, at [160].

[190] The Judge considered that the real difference between the approach of the majority and the minority was the weight which they gave to other marine management regimes.[132]

[191] The Judge found that in circumstances, where the DMC majority clearly considered (and to that extent took into account) both the RMA and NZCPS, but differed from the minority in the weight that they accorded to those regimes, it cannot be said that they made an error of law.[133]

Submissions on appeal

[192] The respondents submitted that the High Court was wrong to find that the DMC had met the requirement to take into account the nature and effect of the RMA and, in particular, the NZCPS. That requirement was not satisfied by the brief analysis conducted by the majority, or by simply observing that the topics covered by the NZCPS could also be considered in some way under the EEZ Act. If the DMC had properly considered the nature and effect of the RMA and NZCPS, it would have identified the substantive differences between those regimes and the EEZ Act, and the potential conflict between them. This would have caused the DMC to recognise that, by permitting an activity in the EEZ, it would be permitting adverse effects in the CMA that would have resulted in the activity being prohibited if it were taking place in the CMA.

[193] The respondents say that the NZCPS would require refusal of consent for an activity within the CMA that had the effect that TTR's proposal would have within the CMA. In particular, they point to the following features of the NZCPS:

(a) the explicit incorporation of the precautionary approach in Policy 3.1;

(b) the requirement in Policy 11 to avoid adverse effects on threatened and vulnerable taxa;

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132 At [161].
133 At [162].

(c) the requirement in Policy 13 to avoid adverse effects in areas with outstanding natural character, and to avoid significant adverse effects on natural character in all other areas of the coastal environment;

(d) the requirement in Policy 15 to avoid adverse effects of activities on outstanding natural features in the coastal environment, and to avoid significant adverse effects of activities on other natural features in the coastal environment;

(e) the requirement in Policy 22 that subdivision, use, or development will not result in a significant increase in sedimentation in the CMA;

(f) specific requirements in Policy 23 relating to the discharge of contaminants.

[194] The respondents emphasised that the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* held that a number of provisions of the NZCPS create environmental bottom lines.[134]

[195] The respondents submitted by way of example that the reef area known as "The Traps", which lies about 26–28 km east of the mining site, is recognised as an "outstanding natural feature" by the Taranaki Regional Coastal Plan. The DMC found that the proposal would have adverse effects, albeit minor, on macroalgae at The Traps. The respondents submitted that that outcome would be inconsistent with the environmental bottom lines in Policies 13 and 15 of the NZCPS, which require avoidance of adverse effects on outstanding natural features, and in areas with outstanding natural character.

[196] TTR submitted that the Judge was right to find that the DMC had taken the relevant marine management regimes into account. The issues raised by the respondents were matters going to the weight given to those regimes. There was no error of law.

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[134] See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 57, at [62], [132] and [137].

[197] TTR said that the respondents' arguments misconstrued both the "nature and effect" and "take into account" components of the DMC's duty under s 59(2)(h). TTR's proposal is not governed by the RMA, and the EEZ Act does not extend the NZCPS into the EEZ. The DMC was required to take the NZCPS into account, not to apply it. And it was only required to take into account the "nature and effect" of the RMA regime, which involves a much higher order consideration than the detailed assessment of individual NZCPS policies for which the respondents contend. That was the level of consideration that the DMC applied.

[198] Thus, TTR submitted, the policies that create bottom lines under the RMA regime do not have that status under the EEZ Act. There is no requirement to give effect to the NZCPS in the EEZ as there is in the CMA under the RMA.

Analysis

[199] TTR's mining will take place close to the boundary of the EEZ and the CMA. Many of its effects will be felt within the CMA. In particular, the effects of the sediment plume will be felt mostly within the CMA. In those circumstances, s 59(2)(h) required the DMC to consider:

(a) the objectives of the RMA and NZCPS, and the outcomes sought to be achieved by those instruments, in the area affected by the TTR proposal; and

(b) whether TTR's proposal would produce effects within the CMA that are inconsistent with the outcomes sought to be achieved by those regimes.

[200] Most importantly, the DMC needed to consider whether TTR's proposal would be inconsistent with any environmental bottom lines established by the NZCPS. If a proposed activity within the EEZ would have effects within the CMA that are inconsistent with environmental bottom lines under the marine management regime governing the CMA, that would be a highly relevant factor for the DMC to take into account. The DMC would need to squarely address the inconsistency between the proposal before it and the objectives of the NZCPS. If the DMC was minded to grant

a consent notwithstanding such an inconsistency, it would need to clearly articulate its reasons for doing so.

[201] It follows that the approach of the DMC majority did not meet the requirement that it take into account the nature and effect of the RMA and NZCPS, in the context of this application and its effects. The difference between the approach of the DMC majority and minority was not solely one of weight. Rather, the majority erred in law by not assessing whether the proposal would produce outcomes inconsistent with the objectives of the RMA and NZCPS within the CMA. In particular, the DMC majority did not identify relevant environmental bottom lines under the NZCPS, and did not consider whether the effects of the TTR proposal would be inconsistent with those bottom lines, and the other objectives of the NZCPS.

[202] It also follows that the High Court erred in law in finding that the DMC majority had met the requirement to take the RMA and NZCPS into account as other marine management regimes.

[203] It is not necessary for us to determine whether the effects of the TTR proposal would be inconsistent with environmental bottom lines established by the NZCPS within the CMA. We accept there is a serious argument to that effect, in light of the findings of fact made by the DMC. But for the purposes of this appeal, it is sufficient for us to find that the approach of the DMC and of the High Court to this issue was wrong in law. The analysis required by s 59(2)(h) will need to be carried out by the EPA in the future, if TTR's application comes back before it.

Did the DMC adopt an adaptive management approach?

The issue

[204] The EPA is permitted to incorporate an adaptive management approach into a marine consent.[135] Indeed s 61(3) imposes a positive obligation on the EPA, where favouring caution and environmental protection means that a marine consent for an activity is likely to be refused, to first consider whether taking an adaptive

[135] EEZ Act, s 64.

management approach would allow the activity to be undertaken. But, as s 87F(4) makes clear, an adaptive management approach is not permitted in relation to a marine discharge consent or a marine dumping consent. In those contexts, if favouring caution and environmental protection means that a consent is likely to be refused, it should be refused: the "learning by doing" option of adaptive management is not permitted.

[205] The consents granted by the DMC included a wide range of conditions providing for pre-commencement monitoring, ongoing monitoring, and operational responses by the consent-holder in light of information obtained from monitoring.[136] The respondents successfully argued in the High Court that these and other conditions together constituted or contributed to an adaptive management approach. That was the basis on which their appeal to the High Court was successful. TTR's appeal to this Court challenges that finding.

DMC decision

[206] The DMC decision recognises that an adaptive management approach is not permitted in the context of consents that include a marine discharge consent.[137] Relying on legal advice that it had received, the DMC adopted a narrow view of what the concept of "adaptive management" involved. That advice included the following passage:[138]

> … in our view a relatively narrow interpretation of "adaptive management approach" is supported by the text of section 64 itself, read in light of the EEZ Act's purpose. Adopting such an approach, "adaptive management approach" would mean:
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> (a) allowing an activity to commence on a small scale or for a short period, or in stages otherwise contemplated by subsection 64(4), with its effects monitored, and where a possible conditioned outcome is the activity being discontinued on the basis of the observed effects; or
>
> (b) any other approach reflecting, through conditions, that an appropriate possible response to the activity's effects, following ongoing assessment, is the consented activity being discontinued altogether.

136 High Court decision, above n 6, at [378].
137 DMC decision, above n 59, at [51].
138 At [54].

[207] The DMC decision also refers to advice provided by Crown Law, which supported the advice provided by counsel assisting the DMC:[139]

> Under this interpretation, monitoring conditions designed to verify that conditions are met or test the validity of the assumptions made as part of the environmental assessment are not prohibited simply because monitoring may result in an adjustment of activities. However, where the effects of the activity are so uncertain and potentially significant that the conditions of consent need to provide, on the basis of observed effects, for discontinuance of the activity altogether, this will amount to an adaptive management approach for the purposes of s 87F(4) of the Act.

[208] The DMC did not consider that the prohibition on adaptive management precluded the imposition of conditions that required pre-commencement monitoring in order to establish a baseline for the proposed activities; continuing monitoring of the effects of the consented activities; the consent-holder demonstrating, no later than five years following the completion of all seabed material extraction within 2 km of the location where the extraction first occurred, that recovery of the macroinfauna benthic community at that location has occurred; and various conditions which required an operational response from the consent-holder as a result of information obtained from monitoring.

High Court decision

[209] The High Court considered that the approach taken by the DMC to the concept of "adaptive management" was unduly narrow. As the Judge pointed out, the examples of adaptive management approaches set out in s 64(2) of the EEZ Act include any approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, *or continued with or without amendment*, on the basis of those effects.[140] The legal advice received by the DMC was wrong to narrow the concept of adaptive management down to scenarios where as a result of the assessment of effects, an activity would be wholly discontinued.[141] An approach that involved amending activities in light of an assessment of effects could also constitute adaptive management.

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139 At [55].
140 High Court decision, above n 6, at [392].
141 See [399(d)].

[210] The Judge recognised that it was necessary to draw a line between orthodox reporting and monitoring conditions, which are a common feature of consents, and conditions which amount to adaptive management. He said:

> [390] Imposing conditions such as reporting and monitoring, of itself, will not amount to an adaptive management approach. Adaptive management is a tool to be implemented in circumstances where a resource consent would not otherwise be granted because of inadequate or uncertain information. If the tools such as monitoring and reporting are used as part of a regime which is designed to address the fact that, at the time the consent is granted, there is inadequate information about the receiving environment, or the potential effects, then they can be part of an adaptive management approach or contribute to such an approach.

[211] The Judge concluded that the approach in the DMC decision crossed the line and amounted to an adaptive management approach. His conclusions were as follows:

> [399] The critical features of the regime established or contributed to by the conditions discussed above are that the conditions provide for:
>
> (a) the gathering of baseline information, then the monitoring of the effects of the activities on the environment;
>
> (b) the making of further formal decisions in stages, with the first stage being the period of two years prior to mining commencing, the second stage involving the first five years of operation, and the final stage being the balance of the life of the consents. In relation to condition 5, a potential outcome is that "extraction activities shall cease until the Consent Holder can demonstrate compliance with those conditions, to the satisfaction of the EPA". To that extent, this condition would fall within even the narrow definition of adaptive management approach adopted by the DMC, and the other conditions fall within the second concept set out in s 64(2)(b) in that, depending on the results of the monitoring, the activity may be continued with or without amendment on the basis of the effects revealed by the monitoring;
>
> (c) thresholds being set to trigger remedial action, and decisions must be made at each stage by the EPA and technical experts to allow the activities to continue, or be modified; and
>
> (d) the consenting activities must either cease or be modified if the information gathered demonstrates that environmental standards are not sustained.
>
> [400] A broad reading of the examples given in s 62(2)(b) is justified because it is consistent with the purpose of environmental protection and the statutory obligation to favour caution.

> [401] What distinguishes the monitoring and reporting conditions in the present case from "normal monitoring conditions" is that, it is not just monitoring to ensure compliance with environmental standards, it is monitoring to establish what the environmental baselines are, because of uncertainty or inadequate information coupled with a potential modification or cessation of the activity, depending upon the circumstances revealed by the information.
>
> [402] I accept the submission of Mr M Smith, for Forest and Bird, that "… the key to adaptive management is that it involves allowing an activity to be carried out so that its effects can be monitored and assessed and the activity modified or discontinued accordingly".
>
> …
>
> [404] Here, the conditions imposed by the DMC and discussed above, either constitute or contribute to an adaptive management approach and have been used as a tool for managing uncertainty. Although such an approach is permitted, and indeed very sensible, in relation to activities taking place in the marine environment covered by the RMA and NZCPS, it is simply not available (in relation to the discharge consent) in an area governed by the EEZ Act.

Submissions on appeal

[212] TTR argued on appeal that the conditions imposed by the DMC did not amount to an adaptive management approach. Rather, they represented an orthodox approach to establishing appropriate environmental baselines; monitoring against those baselines; and ensuring that the day-to-day conduct of the activities was consistent with the conditions imposed. Before us Mr Smith QC emphasised that nothing in the conditions provided for the "consent envelope" to be adjusted in response to ongoing monitoring. Neither the scope of the activities authorised by the consent, nor the permitted effects, would be adjusted in response to such assessments. He drew our attention to the provisions of the EEZ Act that would in any event require the consent-holder to cease its mining activities if there was a breach of permitted limits on suspended sediment concentration (SSC). If a limit set by consent conditions is exceeded the activity is not permitted under the consent, and continuing the activity is unlawful.[142] The consent holder is liable to enforcement action under s 115, or to service of an abatement notice under ss 125 and 126. Mr Smith also pointed out that the EEZ Act provides that the EPA can review the duration of a marine consent or the conditions of the consent to deal with certain adverse effects, including effects that

[142] See EEZ Act, ss 20, 132 and 133.

were not anticipated when the consent was granted, or that are of a scale or intensity that was not anticipated when the consent was granted. Conditions imposed in this case that contemplated review of the operation of the consent did not in his submission go beyond what would be possible under the EEZ Act in any event.

[213] The respondents sought to uphold the High Court finding that the DMC decision adopted an adaptive management approach. Their submissions drew attention to the conditions referred to at [208] above. They emphasised the way in which the different conditions interact, and submitted that those conditions, taken as a whole, comprise an adaptive management approach. They noted that the DMC had adopted this approach in order to respond to uncertainty. They identified conditions that had all four of the characteristics identified by the High Court as "critical features" of adaptive management:

(a) the gathering of baseline information then the monitoring of the effects of the activities on the environment;

(b) the making of further formal decisions in stages;

(c) thresholds being set to trigger remedial action; and

(d) the cessation or modification of the consented activities if the information gathered demonstrates that environmental standards are not sustained.

[214] The respondents also emphasised that these four features should not be seen as an exclusive list. They referred to caselaw in New Zealand and elsewhere identifying characteristics of adaptive management approaches, in particular the recent decision of the Supreme Court in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd*.[143]

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143 *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [95]–[140].

[215] The respondents also expressed concern about the extent of subsequent decision-making contemplated by the conditions that would not involve any opportunity for input by interested parties. A number of conditions contemplate preparation of management plans by TTR. Those plans would be reviewed by a Technical Review Group (TRG) established in accordance with condition 61. The plans, accompanied by comments and recommendations from the TRG, would be submitted to the EPA for certification that they comply with the requirements of the relevant conditions. In the absence of a response from the EPA within a specified timeframe, the plans would be deemed to be approved. The respondents pointed out that deferring the determination of key parameters of the consented activities in this way deprived them of an effective opportunity to participate in the decision-making process. This, they said, was an especially problematic aspect of the adaptive management approach adopted by the DMC.

Analysis

[216] It was common ground that an adaptive management approach is not permitted in relation to a marine discharge consent. That is apparent from ss 87E and 87F, in particular s 87F(4), read together with ss 63 and 64. The Act does not define the concept of adaptive management. But s 64 provides examples of adaptive management approaches. We set s 64 out again, for ease of reference:

> **64 Adaptive management approach**
>
> (1) The Environmental Protection Authority may incorporate an adaptive management approach into a marine consent granted for an activity.
>
> (2) An **adaptive management approach** includes—
>
> (a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:
>
> (b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.
>
> (3) In order to incorporate an adaptive management approach into a marine consent, the EPA may impose conditions under section 63 that authorise the activity to be undertaken in stages, with a requirement for regular monitoring and reporting before the next stage of

the activity may be undertaken or the activity continued for the next period.

(4) A stage may relate to the duration of the consent, the area over which the consent is granted, the scale or intensity of the activity, or the nature of the activity.

[217] As the Judge held, it is apparent from s 64(2)(b) that the approach adopted by the DMC to the concept of adaptive management was unduly narrow. A consent may adopt an adaptive management approach even though it does not provide for complete discontinuance of the consented activity in response to an assessment of its effects.[144] It is sufficient that, in response to such an assessment, the activity may be continued with or without amendment.

[218] We also agree with the Judge that imposing conditions in relation to reporting and monitoring will not of itself amount to an adaptive management approach. The common practice of incorporating requirements in conditions that correspond to statutory provisions applicable to all consents also does not amount to adaptive management. So, for example, requiring monitoring of compliance with the conditions of a consent is not inherently problematic. Requiring activities to cease if their effects are outside the consented parameters simply reflects the scheme of the EEZ Act, and cannot of itself be regarded as adaptive management. Similarly, provision for review of conditions in the event of unanticipated adverse effects does not in and of itself amount to adaptive management.

[219] In *Sustain Our Sounds v The New Zealand King Salmon Co Ltd* the Supreme Court did not seek to define the concept of adaptive management. But the Court's discussion of the preconditions for adaptive management sheds helpful light on the concept. The goal of an adaptive management approach is to enable an activity to proceed despite a measure of uncertainty about its effects, in a manner that is consistent with a precautionary approach, by sufficiently reducing uncertainty and adequately managing any remaining risk.[145] Such an approach can be adopted only if there is an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve those goals.[146] If there is an adequate

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144 High Court decision, above n 6, at [402].
145 *Sustain our Sounds v New Zealand King Salmon Co Ltd*, above n 143, at [124].
146 At [125].

evidential foundation that provides that level of assurance, then the question whether the precautionary approach requires an activity to be prohibited until further information is available, rather than adopting an adaptive management approach, will depend on an assessment of a combination of factors:[147]

(a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);

(b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);

(c) the degree of uncertainty; and

(d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

[220] The overall question, the Supreme Court said, is whether any adaptive management regime can be considered consistent with a precautionary approach — an approach which, under the EEZ Act, is given expression in the requirement to favour caution and environmental protection.[148]

[221] We consider that the best way to understand what amounts to a prohibited adaptive management approach in the context of marine discharge and dumping consents under the EEZ Act is to focus on the rationale for prohibiting such an approach in the context of marine discharge and dumping consents, but not in relation to other marine consents. The answer takes us back to the different objectives set out in s 10(1). In relation to marine discharges and marine dumping, the Act sets an environmental bottom line: protecting the environment from pollution caused by discharge of harmful substances and dumping. That bottom line provides the rationale for a prohibition of adaptive management in this context. Where there is incomplete information and uncertainty, the EEZ Act prohibits the adoption of an adaptive management approach that permits an activity that may have effects prohibited by that

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147 At [129].
148 At [129].

bottom line, followed by an adjustment of the consented activities with a view to achieving compliance with the bottom line prospectively. Such an approach would be inconsistent with the "bottom line" character of the marine discharge and dumping regime. "Learning by doing", a description that is often applied to adaptive management regimes, is not acceptable if the decision-maker cannot be satisfied that the "doing" will not result in the harms to the environment that must be avoided, consistent with the objective set out in s 10(1)(b). In other words, it is not open to the EPA to grant a marine discharge or dumping consent if it is unsure whether the consented activity will cause such harms, on terms that provide that if such harms do occur then the consent envelope will be adjusted prospectively. Nor is the possibility that those harms might be remedied or mitigated after the event a sufficient answer in the s 10(1)(b) context.

[222] So, for example, it would not be consistent with the scheme of the EEZ Act for the EPA to grant a marine discharge consent for an activity in circumstances where incomplete information and uncertainty mean that the EPA cannot be satisfied that the consented activity will not result in pollution of the marine environment. The EPA cannot respond to this uncertainty by granting the consent subject to a condition requiring the activity to be discontinued if it becomes apparent from monitoring of the activity that such harm has in fact occurred.

[223] For the same reasons, it would not be consistent with the statutory scheme to grant a marine discharge consent on the basis that if the prohibited harms do result, the activity will be scaled back. A consent cannot be granted for the maximum potential envelope for an activity if it is uncertain whether that maximum would result in contravention of the s 10(1)(b) bottom line, with a view to scaling back that envelope if the prohibited harms result. A consent cannot be granted to undertake the activity on a staged basis, if each stage is to be undertaken on the basis that it is not known in advance whether that stage may cause some prohibited harm, and the only way to find out is to expand the envelope of the consent by stages and find out whether or not each such expansion results in relevant harms.

[224] A set of conditions may amount to an adaptive management approach whether they contemplate adjustment of the consent envelope by the EPA or some other

decision-maker in light of the monitoring that has occurred, or an adjustment that occurs automatically by reference to benchmarks established in the conditions. An adaptive management approach will often involve reference back to a decision-maker to assess the implications of the ongoing monitoring and adjust the consent envelope in light of that assessment. But that is not, in our view, an essential element of an adaptive management approach.

[225] The consents that were granted by the DMC in this case provide for pre-commencement monitoring to establish relevant baselines, development of management plans, and ongoing monitoring by reference to the relevant conditions and the monitoring plans. The monitoring plans are required to provide for operational responses in the event that the requirements of the consent and the monitoring plans are not met.

[226] However, the conditions imposed by the DMC do not contemplate adjustment of the consent envelope in response to monitoring and assessment of the effects of the consented activities. The proposed mining activities are authorised in their entirety, not in stages. The conditions do not contemplate the scaling back of the authorised mining activities, or any adjustment of the effects permitted under the consent, over and above the adjustments contemplated by the EEZ Act in relation to consents generally. The conditions do contemplate TTR adjusting the way it carries out its operations to ensure it remains within the consent envelope — but that does not amount to adaptive management.

[227] The respondents' strongest argument that the conditions imposed amount to an adaptive management approach focuses on the conditions providing for operational responses to be determined by management plans in light of monitoring of effects. We accept the submission that an adaptive management approach is no less objectionable if it is implemented via management plans, rather than in the conditions attached to the consent itself. If anything, that would be more problematic, as it would reduce opportunities for effective public participation in the determination of the consent envelope. But we do not consider that the problem with these consents, and the extensive post-decision information-gathering, monitoring and subsequent

decision-making that they require, is best analysed by reference to whether they amount to an adaptive management approach. The problem is more fundamental:

(a) The DMC did not proceed on the basis that there was an environmental bottom line established by s 10(1)(b), and that the consents could be granted if, and only if, the DMC was satisfied that they were consistent with that environmental bottom line.

(b) The high degree of uncertainty about the consequences of the consented activities at the time of the DMC decision could not be cured by post-decision information gathering and monitoring of effects.

(c) The prohibition on adopting an adaptive management approach cannot be cured by overly broad consenting using vague terms, for example by referring to avoidance of adverse effects on certain environments or on certain flora or fauna, and fleshing out what that broad prohibition means in management plans. If the DMC did not have sufficient information to grant a consent that set out with reasonable precision the conditions to be complied with by TTR in order to avoid such adverse effects, then the requirement to favour caution and environmental protection meant that consent should have been refused.

[228] We accept TTR's submission that the High Court erred by finding that the DMC had adopted an adaptive management approach. That aspect of the High Court decision was wrong. But that does not rescue the DMC decision, as the DMC made other, more fundamental, errors of law in determining TTR's application.

Conditions in relation to bond and insurance

The issue

[229] The EPA has powers to impose conditions requiring the consent holder to provide a bond for performance of any conditions of the consent, and requiring the consent holder to obtain and maintain public liability insurance.[149]

[149] EEZ Act, s 63.

[230] The DMC imposed the following condition requiring TTR to maintain public liability insurance:[150]

> The Consent Holder shall, while giving effect to these consents, maintain public liability insurance for a sum not less than NZ$500,000,000 (2016 dollar value) for any one claim or series of claims arising from giving effect to these consents to cover costs of environmental restoration and damage to the assets of existing interests (including any environmental restoration as a result of damage to those assets), required as a result of an unplanned event occurring during the exercise of these consents.

[231] The DMC considered that having regard to the circumstances of the application and taking into account the legal and technical advice that they received, a bond was not necessary in addition to this public liability insurance.[151]

[232] Kiwis Against Seabed Mining Incorporated and Greenpeace of New Zealand Incorporated (KASM/Greenpeace) argued in the High Court that in deciding not to require a bond, the DMC erred in law.[152] On appeal before this Court they argued that the High Court erred in law in upholding the approach of the DMC that treated a bond and insurance as alternatives.

DMC decision

[233] The DMC decision referred to evidence about the purpose of a bond (to secure the performance of one or more conditions of the consent), and the process for setting the amount of a bond.[153]

[234] As noted above, the DMC decided that a bond was not necessary in addition to the public liability insurance required under the consent conditions.[154]

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[150] DMC decision, above n 59, appendix 2, condition 107.
[151] At [1074].
[152] High Court decision, above n 6, at [301].
[153] DMC decision, above n 59, at [1072].
[154] At [1074].

High Court decision

[235] The Judge did not accept KASM/Greenpeace's submission that bonds and insurance serve different purposes, and that the DMC had erred in law in treating them as alternatives. The Judge said:

> [305] It is clear that the legislature, in s 63, sees both the requirement for a bond and public liability insurance, as acceptable alternatives to be imposed by way of condition where deemed necessary. The suggestion that the Act envisages that the two will be imposed, for different purposes, is unjustified. They are both clearly related to conditions that the marine consent authority may impose to deal with adverse effects of an activity authorised by the granting of a consent. There is nothing in either ss 63 or 65 of the Act that indicates that bonds are regarded differently to public liability insurance as a means of providing a safeguard to ensure compliance with conditions.

[236] The Judge observed that the requirement for a bond, or for maintenance of public liability insurance, is discretionary.[155] There is no requirement that either be imposed.[156] The Judge concluded that the DMC's decision to exercise its discretion under s 63(2)(a)(ii) rather than s 63(2)(a)(i) was neither irrational nor unreasonable. It did not amount to an error of law.[157]

Submissions on appeal

[237] KASM/Greenpeace submitted that the approach of the High Court misunderstood the different purposes served by public liability insurance and bonds. The failure to appreciate this difference meant that proper consideration had not been given to whether a bond was appropriate, in addition to insurance, to ensure compliance with conditions. This was an error of law.

[238] TTR submitted that the Judge was right to find that it was open to the DMC to exercise its discretion not to require a bond. There was no error of law in the approach adopted by the DMC to this discretionary decision.

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155 High Court decision, above n 6, at [310].
156 At [310].
157 At [312].

Analysis

[239] We consider that the DMC and the High Court erred in treating a bond and public liability insurance as alternative ways of achieving similar outcomes. As a result, the DMC failed to identify the different purposes served by a bond and failed to turn its mind to whether a bond was required to ensure that the conditions attached to the consent were implemented; in particular, the conditions relating to ongoing monitoring and remediation.

[240] The public liability insurance required by the consent conditions does not address costs of remediation for uninsurable harms; harms caused by planned activities; or harms resulting from a failure by TTR to act, for example due to deliberate non-compliance with conditions or supervening insolvency. These are all scenarios in which a bond, if required, would be available to meet the cost of ensuring that the steps required by the relevant conditions are taken. The DMC needed to turn its mind to whether a bond should be required in order to achieve these objectives, having regard to the risks that such a bond would address and any countervailing reasons for not requiring a bond. It did not do so.

[241] We consider that the High Court should have upheld the KASM/Greenpeace submission on this issue. The appropriate response to this error, taken alone, would have been to require the DMC to reconsider its decision not to require a bond in light of the guidance provided in this judgment. We return to the question of relief below.

Effects on seabirds and marine mammals

The issue

[242] The information available to the DMC in relation to the presence and distribution of seabirds and marine mammals in the South Taranaki Bight (STB), and the potential effects of TTR's mining activities on seabirds and marine mammals, was limited. The DMC decision responded to this uncertainty by imposing conditions that required pre-commencement monitoring, and specified high level objectives relating to harm to seabirds and marine mammals (such as avoiding adverse effects at a

population level) that would be fleshed out in management plans prepared by TTR and submitted to the EPA for certification.

[243] The Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) say that the conditions imposed by the DMC in relation to seabirds and marine mammals are too imprecise to be enforceable, and impermissibly delegate to management plans matters properly the subject of conditions. Forest and Bird say the issue was not dealt with in the High Court decision. They have pursued it on appeal before this Court.

DMC decision

[244] The information before the DMC established that there is significant diversity of marine mammals in the general region of which the STB forms part. The species present include three nationally critically endangered species — the Maui's dolphin, killer whale and Bryde's whale — and three nationally endangered or vulnerable species — the Hector's dolphin, bottlenose dolphin and southern right whale. There was also evidence of the presence of blue whale, a migratory species that is internationally critically endangered. But the evidence about habitats and population numbers in the area was incomplete, and subject to a number of uncertainties.[158] The evidence about effects on marine mammals, and in particular the effect of marine noise, was also uncertain in a number of respects.[159] The DMC findings expressly acknowledged the absence of comprehensive well-researched species-specific and habitat-specific information about noise effects on marine mammals.[160]

[245] The DMC noted that:[161]

> … the STB is visited by a diverse range of seabirds that either pass through or forage in the region. However there have been no systematic and quantitative studies of the at-sea distributions and abundances of seabirds within the area.

158 DMC decision, above n 59, at [442]–[481].
159 At [482]–[562].
160 At [544].
161 At [563].

[246] The DMC concluded that:[162]

> … there is a lack of detailed knowledge about habitats and behaviour of seabirds in the STB. It is difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself.

[247] Against the backdrop of this uncertainty, the DMC included conditions relating to seabirds and marine mammals in the consent conditions. Condition 9 in relation to seabirds provides as follows:

> 9. At all times during the term of these consents, the Consent Holder shall comply with the following:
>
> a. There shall be no adverse effects at a population level of seabird species that utilise the South Taranaki Bight that are classified under the New Zealand Threat Classification System as "Nationally Endangered", "Nationally Critical" or "Nationally Vulnerable" or classified as "Endangered" or "Vulnerable" in the International Union for the Conservation of Nature "Red List"; and
>
> b. Adverse effects on seabirds, including but not limited to effects arising from:
>
> i. Lighting (including the Integrated Mining Vessel ("IMV"), Floating Storage and Offloading Vessel);
>
> ii. Spills; and
>
> iii. The effect of sediment in the water column on diving birds that forage visually
>
> shall be mitigated, and where practicable avoided.

[248] Extensive conditions were included in condition 10 in relation to marine mammals, including the following:[163]

> 10. Notwithstanding the requirements of Conditions 11, 37, 67 and 88, with respect to marine mammals (excluding seals), the Consent Holder shall ensure that:
>
> a. There are no adverse effects at a population level on:
>
> i. Blue whales; or

[162] At [579].

[163] The DMC decision divides subparagraph 10(a)(ii) into two separate subparagraphs, but this appears to be a typographical error and we have corrected it in the quoted passage.

ii. Marine mammal species classified under the New Zealand Threat Classification System as "Nationally Endangered", "Nationally Critical" or "Nationally Vulnerable"; or

iv. Marine mammal species classified as "Endangered" or "Vulnerable" in the International Union for the Conservation of Nature "Red List";

that utilise the South Taranaki Bight.

b. Adverse effects on marine mammals, including but not limited to effects arising from:

i. Noise;

ii. Collision and entanglement;

iii. Spills; and

iv. Sediment in the water column,

are avoided to the greatest extent practicable.

…

[249] In addition, condition 11 imposed limits on underwater noise generated by the operation of marine vessels and project equipment.

[250] Condition 48 provided for two years of environmental monitoring to be undertaken before mining operations begin. The list of matters to be monitored includes marine mammals and seabirds, as well as SSC levels. The purpose of the pre-commencement monitoring would include establishing a set of environmental data that identifies natural background levels while taking into account spatial and temporal variation of the various matters to be included in the plan. The pre-commencement monitoring would, among other matters, inform preparation of an Environmental Management and Monitoring Plan (EMMP) in accordance with condition 55. The EMMP would be submitted to the EPA for certification that it meets the requirements of the relevant conditions (with certification deemed to have occurred if the EPA has not given a decision within 30 working days). Condition 54 then requires ongoing environmental monitoring of a range of matters including marine mammals, to be undertaken in accordance with the EMMP.

[251] Condition 66 provided for TTR to prepare a Seabird Effects Mitigation and Management Plan (SEMMP) to set out how compliance with condition 9 would be

achieved, including setting out indicators of adverse effects at a population level of seabird species that utilise the STB. The SEMMP is required to be submitted to the EPA for certification that the requirements of the condition have been met.

[252] Similarly, condition 67 provided for TTR to prepare a Marine Mammal Management Plan (MMMP) which sets out, among other things, how compliance with condition 10 will be achieved, and indicators of adverse effects at a population level of marine mammals that utilise the STB listed in condition 10(a). The MMMP is required to be submitted to the EPA for certification that the requirements of the condition have been met.

High Court decision

[253] The Judge recorded that the consent opponents all submitted that there was inadequate information about the proposal's impacts on matters such as benthic ecology, marine mammals, fish and shellfish, seabeds, ocean productivity, and the effect of the sediment plume generally.[164] The Judge said that:[165]

> … as most of these matters overlap with the appellants' arguments that the conditions imposed by the DMC to address these issues amount to the implementation of a prohibited "adaptive management" regime, I will address them in the part of this decision that focusses on that topic.

[254] However, there is no further discussion of the DMC approach to seabirds in the High Court decision. There are some further references to marine mammals, but these occur in other contexts. The High Court decision did not address the specific complaints that the seabird and marine mammal conditions are imprecise and involve impermissible delegations.

Submissions on appeal

[255] Before us, Forest and Bird renewed its submissions that the conditions imposed in relation to seabirds and marine mammals were unlawful, because they were too imprecise and impermissibly delegated to management plans matters that should have been addressed and determined by the DMC. Forest and Bird say that the general

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164 High Court decision, above n 6, at [300].
165 At [300].

requirement to avoid "adverse effects at a population level" is so open-ended as to be meaningless. TTR is left to gather baseline information about the receiving environment, to define what amounts to an "adverse effect" on that environment, and to determine whether and how such effects might be attributable to its activities. Key decisions, and the gathering of information on which those decisions are based, are impermissibly left for another day and another decision-maker. The EPA was obliged to make these decisions at the time of consent, and to ensure it had adequate information to do so. If it did not have adequate information to make those decisions, the consent should have been declined.

[256] TTR says in response that the use of management plans to establish detailed methods of compliance allows appropriate flexibility in the methodology, which is justified given the subject matter and the length of the consent term (35 years). The conditions do not leave the compliance outcomes to management plans. The conditions fix the outcomes in clear and absolute terms: for seabirds and marine mammals there must be no adverse effects at a population level. TTR also notes that these are not the only outcomes for seabirds and mammals that the conditions specify.

[257] Nor was there any impermissible delegation. TTR had provided draft management plans which set out the measures it could take to ensure no adverse effects occurred at a population level. The DMC heard evidence from experts. It was open to the DMC to conclude that detailed methods could be developed, through the management plans, to ensure there would be no adverse effects at a population level. The DMC was entitled to conclude, and did conclude, that it would be both meaningful and achievable to address the potential adverse effects on seabirds and marine mammals at a population level in this manner.

Analysis

[258] The conditions imposed by the DMC reflect a high level of uncertainty about the baseline in relation to the presence and distribution of seabirds and marine mammals, and about the likely effects of TTR's mining activities on seabirds and marine mammals. That uncertainty was the product of incomplete information about those matters.

[259] We consider that the DMC's response to this level of uncertainty was inconsistent with the EEZ Act for a number of overlapping reasons:

(a) The level of uncertainty identified in the DMC decision, and reflected in the conditions imposed, engaged the requirement to favour caution and environmental protection in ss 61(2) and 87E(2). Granting consent on the basis of this level of information, and conditions of the kind imposed by the DMC, was not in our view consistent with that requirement.

(b) To the extent that the relevant effects were caused by the sediment plume, and thus relevant to the marine discharge consent sought by TTR, the high level of uncertainty meant that the DMC could not be satisfied that the s 10(1)(b) objective of protecting the environment from pollution caused by such discharges would be achieved.

(c) Imposing very general conditions about avoiding adverse effects on these fauna, and leaving the specific controls required in order to avoid such effects to management plans prepared by TTR and submitted to the EPA for certification, was inconsistent with the scheme of the EEZ Act and the public participation rights for which it provides. Submitters should have an opportunity to be heard on these topics. The result of deferring these issues to management plans was to remove submitters' rights to be heard by the decision-maker with responsibility for determining these important issues.

[260] The High Court erred in law in failing to uphold this challenge to the DMC decision.

Other issues raised by cross-appeals

[261] There are a number of other challenges to the High Court decision advanced by the respondents in their cross-appeals that we consider are not made out. In light of the conclusions we have reached above, we deal with these very briefly below.

Obtaining information from submitters

[262] The respondents submitted that the High Court erred in finding that it was appropriate for the DMC to obtain information from submitters on issues where there were gaps in the information provided by TTR. The argument appeared to be that this was inconsistent with the burden on the applicant to satisfy the EPA that the consent should be granted.

[263] We do not consider that there was any error of law on the part of the DMC in seeking additional information from any submitter that was able to provide such information, including requiring experts called by submitters to participate in conferences. Seeking further information and requiring conferencing fall squarely within the powers of the EPA to seek advice or information from any person and conduct a hearing in a manner that is appropriate and fair in the circumstances.[166]

Best available information

[264] KASM/Greenpeace argued that the DMC erred in adopting a standard of "sufficient information", and making its decision on the basis of the "information to hand", rather than applying the required standard of "best available information".

[265] This submission was founded on observations in the DMC decision about the DMC having sufficient information to make a decision, and the need to make a decision on the information to hand.[167] The High Court judgment also refers to DMC Minute 46 of 31 May 2017, which recorded the unanimous decision of all members of the DMC that they "have received sufficient information to make a decision and will not be seeking further information from any party".

[266] As set out above, "best available information" is defined to mean the best information that, in the particular circumstances, is available without unreasonable cost, effort or time.[168] The DMC needed to determine, in the exercise of its judgment, whether it had obtained the best available information and then proceed to make its

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166 EEZ Act, ss 44, 49 and 53. See also s 55 which provides that certain provisions of the Commissions of Inquiry Act 1908 apply to hearings.

167 DMC decision, above n 59, at [37]–[39] and [86].

168 EEZ Act, ss 61(5) and 87E(3).

substantive determination in relation to TTR's application. As we explained above, if the information available was inadequate to support the grant of a consent, consistent with the information principles and s 10(1), then the consent would be refused. Any inadequacy in the information available to the DMC would disadvantage the applicant, not other submitters.

[267] There is nothing to suggest that the DMC applied an incorrect legal test in determining that it had obtained the best available information. We do not consider that an inference to that effect can be drawn from the language used in the Minute referred to above. KASM/Greenpeace's argument that the information available to the DMC was not the best available information in this case, applying the relevant standard, does not raise a question of law in respect of which there is a right of appeal to the High Court or to this Court.

Relevance of international law

[268] KASM/Greenpeace argued that relevant international law instruments, including the LOSC and the Biodiversity Convention, should have been taken into account as "other applicable laws" under s 59(2)(l).

[269] The international law framework is relevant to the interpretation of the EEZ Act, as we have explained above. In particular, the EEZ Act can and must be interpreted to give effect to the instruments referred to in s 11: the LOSC, the Biodiversity Convention, MARPOL and the London Convention (including the 1996 Protocol). The approach we have adopted to s 10(1)(b) is informed by these instruments, and is designed to ensure that the EEZ Act will secure compliance with New Zealand's obligations under those instruments, as s 11 confirms it was intended to do.

[270] We do not consider that it is helpful to take those international instruments into account separately, under s 59(2)(l), in addition to looking to them to inform the interpretation of the EEZ Act. Provided the Act is properly interpreted, the result of applying the Act will be to achieve consistency with New Zealand's obligations under those instruments. Making separate reference to those instruments via s 59(2)(l)

would not add anything of substance and would result in duplication of analysis and unnecessary complexity.

Pre-commencement monitoring

[271] Forest and Bird submitted that conditions 48–51, which relate to pre-commencement monitoring, are not conditions authorised by s 63 of the EEZ Act as they are not conditions "to deal with the adverse effects of the activity authorised by the consent on the environment or existing interests". They say that this argument was advanced before the High Court, but is not addressed in the High Court decision. They reiterated the argument before us.

[272] Section 63(1) permits the EPA to grant a consent on any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent on the environment or existing interests. We consider that a condition requiring pre-commencement monitoring falls squarely within this provision. It does deal with adverse effects, because it ensures they can be accurately identified and responded to.

[273] It follows that the DMC did not err in law in imposing conditions of this kind. There was no relevant error in the High Court decision, which appears to have treated this issue as subsumed within the broader arguments about adoption of an adaptive management approach.

Casting vote

[274] KASM/Greenpeace submitted that in circumstances where the DMC was equally divided, the Chairperson was required, as a matter of law, to specifically turn his mind to whether his casting vote should be exercised to grant the consent. They submit that this required separate consideration from the Chairperson's decision on how to cast his deliberative vote. They also submitted that he should have given reasons explaining his decision to exercise his casting vote to allow the consent. They argued that in deciding to do so, he was required to favour caution and environmental protection, and that the fact that two of the four members considered there was inadequate and uncertain environmental information was a relevant factor

he needed to take into account in deciding whether to exercise his casting vote in favour of granting the consent.

[275] Counsel for KASM/Greenpeace were not able to identify any authority to support the argument that the exercise of the casting vote required separate consideration, that different factors were relevant in this context, and that separate reasons addressing those factors were required.

[276] We do not consider that any additional overlay of caution was required in connection with the exercise of the casting vote, or that any factors were relevant to the exercise of the casting vote that were not also relevant to the Chairperson's deliberative vote. There was no error of law in this respect.

Iterative approach to information gathering from TTR

[277] The respondents submitted that it was inconsistent with the EEZ Act for the DMC to call for and receive evidence from TTR at a late stage in the hearing. They said that this affected the ability of other parties to effectively consider and respond to that evidence, contrary to the information principles under s 61 of the EEZ Act.

[278] The iterative approach to information gathering adopted by the DMC, and the requests made to TTR for additional information in the course of the hearing, were authorised by ss 42, 44, 55 and 57 (pre-hearing) and ss 55 and 58 (in the course of the hearing), provided that this was done in a manner consistent with the requirements of natural justice.

[279] We do not consider that any natural justice concerns amounting to errors of law were identified by the respondents in their cross-appeals. The concerns that were identified are more properly framed as concerns about the adequacy of the information available to the DMC in making its decisions. We have dealt with that issue above.

Failure to identify net economic benefits

[280] KASM/Greenpeace argue that the High Court erred in finding that the requirement in s 59(2)(f) of the EEZ Act to take into account the "economic benefit to New Zealand of allowing the application" was met by the DMC. They say the DMC erred in law by failing to properly address the need for costs as well as benefits to be assessed (using a cost-benefit analysis); the need for environmental, social and cultural costs to be considered as part of an assessment of economic benefit; and the need to consider potential economic benefits that would be precluded or harmed by the activity.

[281] We agree that consideration of the economic benefit of a proposal to New Zealand must focus on net economic benefit. It would be artificial and inappropriate to focus on gross benefits, disregarding economic costs. However, there is nothing in the DMC decision to suggest that the DMC made that error.

[282] We consider that it was a matter for the DMC to decide how best to approach the assessment of economic benefit in a particular case. The EEZ Act does not require a cost-benefit analysis. That may well be an appropriate approach to adopt, in particular where economic benefit is a critical factor.[169] But it is not mandated by the EEZ Act.

[283] We do not consider that there was any error of law in the DMC's decision not to seek to quantify, and include in a cost-benefit analysis, environmental, social and cultural costs. It was consistent with the scheme of the EEZ Act, and open to the DMC, to have regard to these matters on a qualitative basis. Indeed, we see force in TTR's argument that taking those costs into account in the assessment of economic benefit, and then weighing them separately under other limbs of s 59, could give rise to double-counting.

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169 For an insightful guide to the appropriate use of cost-benefit analysis, and the ways in which unquantifiable factors can be incorporated into a cost-benefit analysis, see Cass Sunstein *The Cost-Benefit Revolution* (MIT Press, Cambridge, 2018).

[284] Nor have we identified any error of law in the DMC's approach to potential economic benefits in the counterfactual. The DMC did not consider that the evidence before it justified placing any weight on the effect of the proposal on possible future activities.[170] This was a matter for the DMC.

[285] In summary, the DMC did not err in law in its approach to economic benefit, and the High Court did not err in law in rejecting this ground of appeal.

Conclusion

[286] We have upheld TTR's argument that the approach adopted by the DMC was not an adaptive management approach that was inconsistent with the EEZ Act framework for marine discharge consents. The basis on which the High Court allowed the respondents' appeal from the DMC decision, and quashed that decision, is not made out.

[287] However, we have identified other defects in the DMC decision, some of them fundamental. Although these issues were raised in the context of cross-appeals by the respondents, we consider that they are for the most part better seen as grounds for upholding the result in the High Court on a different basis.[171] They provide further justifications for the orders made by the High Court allowing the appeal from the DMC, and quashing the DMC decision.

[288] The only aspect of the respondents' cross-appeals that requires consideration as a cross-appeal is their challenge to the order made by the High Court referring the matter back to the DMC for reconsideration, applying the correct legal test in relation to the concept of adaptive management.[172] The respondents say that the High Court should have declined the TTR application, rather than remitting it back to the DMC.

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[170] DMC decision, above n 59, at [809].

[171] See *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13.

[172] High Court decision, above n 6, at [421].

[289] We are not in a position to decide whether, in light of our conclusions on the questions of law raised by this appeal, TTR's application should be declined. We are conscious that we do not have the benefit of a decision from the DMC or the High Court applying what we have found to be the correct test under s 10(1). Nor are we in a position to assess for ourselves whether it is possible that a more limited activity could be consented, or that other conditions could be imposed which would enable a consent to be granted that would be consistent with the objectives of the EEZ Act and the decision-making framework it prescribes. We therefore consider that the appropriate outcome is for TTR's application to be referred back to the DMC to be considered in light of this judgment.

Result

[290] TTR's appeal is dismissed. The High Court decision to allow the respondents' appeal and quash the decision of the DMC is upheld on other grounds.

[291] In so far as the respondents' cross-appeal seeks relief in the form of an order declining TTR's application for a marine consent and marine discharge consent by TTR, that cross-appeal is dismissed.

[292] TTR's application is referred back to the EPA to be considered in light of this judgment.

[293] The respondents have been substantially successful on appeal before us. Costs should follow the event in the normal way. We award costs as follows:

(a) We award one set of costs to Te Rūnanga o Ngāti Ruanui Trust, the Trustees of Te Kaahui o Rauru Trust, Te Ohu Kai Moana Trustee Ltd, Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd, Talley's Group Ltd and the Taranaki-Whanganui Conservation Board for a complex appeal on a band B basis. We certify for two counsel, with usual disbursements.

(b) We award costs to Forest and Bird for a complex appeal on a band B basis, for one counsel only, with usual disbursements.

(c) We award one set of costs to KASM/Greenpeace for a complex appeal on a band B basis, for one counsel only, with usual disbursements.

Solicitors:
Atkins Holm Majurey, Auckland for Trans-Tasman Resources Ltd
Dawson & Associates, Nelson for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd and Talley's Group Ltd
Lee Salmon Long, Auckland for Kiwis Against Seabed Mining Inc and Greenpeace New Zealand Inc
Whāia Legal, Wellington for Te Ohu Kai Moana Trustee Ltd
Ocean Law New Zealand, Nelson for Te Rūnanga o Ngāti Ruanui Trust
Gilbert Walker, Auckland for The Royal Forest and Bird Protection Society of New Zealand Inc
Kāhui Legal, Wellington for Te Kahui o Rauru Trust

GLOSSARY

1996 Protocol	Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the London Convention)
Biodiversity Convention	Convention on Biological Diversity
CMA	Coastal marine area
DMC	Decision-making Committee
EEZ	Exclusive economic zone
EEZ Act	Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
EMMP	Environmental Management and Monitoring Plan
EPA	Environmental Protection Authority
Forest and Bird	Royal Forest and Bird Protection Society of New Zealand Inc
IMV	Integrated Mining Vessel
KASM/Greenpeace	Kiwis Against Seabed Mining Inc and Greenpeace of New Zealand Inc
LOSC	United Nations Convention on the Law of the Sea
London Convention	Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter
MACA	Marine and Coastal Area (Takutai Moana) Act 2011
MARPOL	International Convention for the Prevention of Pollution from Ships
MMMP	Marine Mammal Management Plan
NKTT	Ngā Kaihautū Tikanga Taiao
NZCPS	New Zealand Coastal Policy Statement
RMA	Resource Management Act 1991

SEMMP	Seabird Effects Mitigation and Management Plan
SSC	Suspended sediment concentration
STB	South Taranaki Bight
TRG	Technical Review Group
TTR	Trans-Tasman Resources Ltd
Treaty	Treaty of Waitangi

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 28/2020
[2021] NZSC 127

BETWEEN	TRANS-TASMAN RESOURCES LIMITED Appellant
AND	TARANAKI-WHANGANUI CONSERVATION BOARD, CLOUDY BAY CLAMS LIMITED, FISHERIES INSHORE NEW ZEALAND LIMITED, GREENPEACE OF NEW ZEALAND INCORPORATED, KIWIS AGAINST SEABED MINING INCORPORATED, NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN INCORPORATED, SOUTHERN INSHORE FISHERIES MANAGEMENT COMPANY LIMITED, TALLEY’S GROUP LIMITED, TE OHU KAI MOANA TRUSTEE LIMITED, TE RŪNANGA O NGĀTI RUANUI TRUST, ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED AND THE TRUSTEES OF TE KĀHUI O RAURU TRUST First Respondents
AND	ENVIRONMENTAL PROTECTION AUTHORITY Second Respondent

Hearing:	17–19 November 2020
Court:	Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ
Counsel:	J B M Smith QC, V N Morrison-Shaw and P F Majurey for Appellant J D K Gardner-Hopkins for Taranaki-Whanganui Conservation Board

R A Makgill and P D M Tancock for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd and Talley's Group Ltd
D M Salmon QC, D A C Bullock and D E J Currie for Greenpeace of New Zealand Inc and Kiwis Against Seabed Mining Inc
R J B Fowler QC, J Inns, H K Irwin-Easthope and N R Coates for Te Ohu Kai Moana Trustee Ltd, Te Rūnanga o Ngāti Ruanui Trust and the Trustees of Te Kāhui o Rauru Trust
M C Smith, H E McQueen and P D Anderson for Royal Forest and Bird Protection Society of New Zealand Inc
V E Casey QC and C J Haden for Second Respondent
D A Ward and Y Moinfar-Yong for Attorney-General as Intervener

Judgment: 30 September 2021

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Leave is reserved to a party to apply to the High Court for directions if necessary.

C Costs are reserved.

SUMMARY OF RESULT
(Given by the Court)

[1] The appellant sought marine consents and marine discharge consents in order to undertake seabed mining within New Zealand's exclusive economic zone. By a majority decision, the decision-making committee (DMC) of the Environmental Protection Authority granted the application for consents with conditions under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act). The first respondents successfully challenged the DMC decision in the High Court as wrong in law. The Court of Appeal dismissed the appellant's appeal, upholding the High Court's decision to quash the decision of the DMC and refer the matter back for reconsideration. The appellant was granted leave to appeal to this Court on the question of whether the Court of Appeal was correct to dismiss the appeal.

[2] The Supreme Court has unanimously dismissed the appeal. In doing so, the Court addressed the correct approach to a number of provisions of the EEZ Act.

[3] In particular, Glazebrook J (with whom Williams J agreed[1]) held that the purpose provision in s 10 provides an overarching framework for decision-making under the Act and, to this extent, has substantive or operative force.[2] This means that s 10(1)(b), which applies to marine discharges and dumping, creates an environmental bottom line in the sense that, if the environment cannot be protected from material harm through regulation, then the discharge or dumping activity must be prohibited.[3] The assessment of whether there is material harm requires qualitative, temporal, quantitative and spatial aspects to be weighed.[4] The s 10(1)(b) requirement is cumulative on the requirement in s 10(1)(a) (which applies to all consent applications) to achieve sustainable management.[5]

[4] The operative force of s 10(1) means the relevant decision-making criteria in s 59 must be weighed by the decision-maker in a way that achieves both the s 10(1)(a) and s 10(1)(b) purposes.[6] However, the bottom line in s 10(1)(b) does not mean applicants for discharge consents are limited to showing there is no material harm. Rather, they may also accept conditions that avoid material harm, mitigate the effects of pollution so that harm will not be material, or remedy it so that, taking into account the whole period of harm, overall the harm is not material.[7] To meet the bottom line, remediation will have to occur within a reasonable time in the circumstances of the case and, in particular, in light of the nature of the harm to the environment, the length of time that harm subsists (that is, the total duration of projected harm until remediation occurs), existing interests and human health.[8] All else being equal, economic benefit considerations to New Zealand may also have the potential to affect the decision-maker's approach to remediation timeframes, but only at the margins.[9]

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1 At [292]–[293].
2 At [240] per Glazebrook J.
3 At [245] per Glazebrook J.
4 At [255] per Glazebrook J.
5 At [245] and [250] per Glazebrook J.
6 At [249] and [253] per Glazebrook J.
7 At [260] per Glazebrook J.
8 At [256]–[259] per Glazebrook J.
9 At [259] per Glazebrook J.

[5] Accordingly, decision-makers must follow a three-step test when assessing applications for marine discharge and dumping consents under the EEZ Act:[10]

(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping? If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.

(b) Is the decision-maker satisfied that conditions can be imposed that mean:

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

If not, the consent must be declined. If yes, then step (c) must be undertaken.

(c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

[6] The Chief Justice took a similar view to Glazebrook and Williams JJ's approach to s 10, with one key difference.[11] She did not consider economic benefit considerations were relevant in any circumstances to the assessment of materiality and so could not be taken into account in terms of setting remediation timeframes.[12] Nevertheless, for pragmatic reasons, the Chief Justice was content to adopt the

10 At [261] per Glazebrook J.
11 At [302] and [315].
12 At [316]–[317].

three-step approach set out above at [5], in order to reach a majority.[13] This therefore represents the majority approach to how discharge and dumping applications are to be determined.

[7] William Young and Ellen France JJ differed in that, on their approach, what is required is an overall assessment of the relevant factors in s 59, albeit those factors need to be addressed with both s 10(1)(a) and (b) purposes in mind.[14] Section 10(1)(b) does not set an environmental bottom line.[15] Material harm was not automatically decisive, but s 10(1)(b)'s sole focus on protection and other elements of the statutory scheme meant the balancing exercise may well be tilted in favour of environmental factors where discharge and dumping consents are concerned. That decision, however, would need to be made on a case-by-case basis.[16]

[8] In considering the effect of the Treaty of Waitangi clause in s 12 of the EEZ Act, all members of the Court agreed that a broad and generous construction of such Treaty clauses, which provide a greater degree of definition as to the way Treaty principles are to be given effect, was required. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[17] Here, s 12(c) provided a strong direction that the DMC was to take into account the effects of the proposed activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty.[18] It followed that tikanga-based customary rights and interests constitute "existing interests" for the purposes of the s 59(2)(a) criterion, including kaitiakitanga and rights claimed, but not yet granted, under the Marine and Coastal Area (Takutai Moana) Act 2011.[19]

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[13] At [319]. The Chief Justice at [319] also makes explicit the point which she considers implicit in step (c) of the three-step test set out above, which is that because s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 is cumulative on s 10(1)(a), it may be that a decision-maker would want to impose conditions to mitigate, remedy or avoid adverse effects even though the threshold of material harm will not be met.

[14] At [59].

[15] At [102].

[16] At [102].

[17] At [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

[18] At [149] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

[19] At [154]–[155] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

[9] Further, drawing on the approach to tikanga in earlier cases such as *Takamore v Clarke*,[20] all members of the Court agreed that tikanga as law must be taken into account by the DMC as "other applicable law" under s 59(2)(l) of the EEZ Act where its recognition and application is appropriate to the particular circumstances of the consent application at hand.[21]

[10] The Court was also largely in agreement on the remaining issues relating to the approach to the requirement to consider economic benefit in s 59(2)(f),[22] whether the conditions imposed amounted to adaptive management,[23] whether the DMC erred in not requiring a bond,[24] the approach to the casting vote,[25] whether the appeal raised questions of law,[26] what is required to take into account the nature and effect of other marine management regimes under s 59(2)(h)[27] and the approach to the information principles in ss 61 and 87E.[28] On the latter two issues, the points of disagreement flowed inevitably from the different approaches to s 10(1)(b). Thus, the majority held that if the other marine management regime provided for a bottom line, this could not be outweighed by other s 59 factors,[29] and that discharge consents may be granted on incomplete information, as long as that is the best available information and that,

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20 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

21 At [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ. Williams J at [297] (with whom Glazebrook J agreed at n 371) wished to make explicit that these questions must be considered not only through a Pākehā lens.

22 At [188]–[197] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.

23 At [199]–[213] per William Young and Ellen France JJ, [281]–[284] per Glazebrook J (where she also observed the conditions may nevertheless fall within the spirit of the prohibition), [299] per Williams J and [332] per Winkelmann CJ.

24 At [214]–[221] per William Young and Ellen France JJ, [285]–[286] per Glazebrook J (where she also considered it irrational not to require a bond in this case), [299] per Williams J and [332] per Winkelmann CJ.

25 At [222]–[226] per William Young and Ellen France JJ, [287] per Glazebrook J (where she also expressed unease about the legislation which gives a casting vote), [299] per Williams J and [332] per Winkelmann CJ.

26 At [227] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.

27 At [175]–[187] per William Young and Ellen France JJ, [280] per Glazebrook J, [298] per Williams J and [331] per Winkelmann CJ.

28 At [103]–[138] per William Young and Ellen France JJ, [238] and [272]–[279] per Glazebrook J, [294]–[295] per Williams J and [321]–[330] per Winkelmann CJ.

29 At [280] per Glazebrook J, [298] per Williams J and [331] per Winkelmann CJ. Compare at [186] per William Young and Ellen France JJ.

taking a cautious approach and favouring environmental protection, the decision-maker is satisfied that the bottom line in s 10(1)(b) is met.[30]

[11] Although differing on the correctness of the approach adopted to the purpose provision, all members of the Court were satisfied that the Court of Appeal was right to find there were errors of law in the DMC's decision. A fundamental error was that the DMC's decision did not comply with the requirement to favour caution and environmental protection in ss 61 and 87E, as was illustrated by the conditions imposed by the DMC relating to marine mammals and seabirds.[31] Winkelmann CJ, Glazebrook and Williams JJ also made the point that the attempt to rectify information deficits by imposing conditions requiring pre-commencement monitoring which would subsequently inform the creation of management plans inappropriately deprived the public of the right to be heard on a fundamental aspect of the application.[32]

[12] As a result, the Court is agreed that the Court of Appeal was correct to uphold the High Court's decision to quash the DMC's decision. A majority consider the matter should be referred back to the DMC for reconsideration.[33] Leave is reserved to a party to seek directions from the High Court should that prove necessary.[34]

[13] The reasons of the Court for this result are given in the separate opinions delivered by:

	Para No
William Young and Ellen France JJ	[14]
Glazebrook J	[236]
Williams J	[290]
Winkelmann CJ	[301]

30 At [273]–[274] per Glazebrook J, [294] per Williams J and [327] per Winkelmann CJ. Compare at [117] per William Young and Ellen France JJ.

31 At [118]–[131] per William Young and Ellen France JJ, [274]–[276] and [279] per Glazebrook J, [294] and [299] per Williams J and [328] per Winkelmann CJ.

32 At [277]–[278] per Glazebrook J, [295] per Williams J and [329] per Winkelmann CJ. Compare at [133] per William Young and Ellen France JJ.

33 At [229] per William Young and Ellen France JJ, [299] per Williams J and [333] per Winkelmann CJ. Compare at [288]–[289] per Glazebrook J.

34 At [231] per William Young and Ellen France JJ, [299] per Williams J and [333] per Winkelmann CJ.

REASONS

WILLIAM YOUNG AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[14] The appellant, Trans-Tasman Resources Ltd (TTR), wants to mine iron sands. It seeks to do so in an area in the South Taranaki Bight 22–36 km offshore and

comprising an area of approximately 66 km^2 within New Zealand's exclusive economic zone (EEZ). The EEZ comprises the areas of the sea, seabed and subsoil between the outer boundary of New Zealand's territorial sea (12 nautical miles from shore) and 200 nautical miles from shore.[35]

[15] TTR has a permit issued under the Crown Minerals Act 1991 in relation to its proposed seabed mining activities. However, to undertake those activities, TTR also requires marine consents and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act or the Act).[36] The Act is an environmental and resource management measure relating to New Zealand's EEZ.[37]

[16] TTR applied for the necessary consents in August 2016. After a hearing of 22 days over a period of just over three months, marine consents and marine discharge consents were subsequently granted by a decision-making committee (the DMC) appointed by the Board of the Environmental Protection Authority (the EPA).[38] The consents were subject to a range of conditions. The four-person DMC was equally divided on whether or not to grant the consents and the decision to grant the consents was made on the casting vote of the chairperson of the DMC.

[17] Under the consents, TTR can extract up to 12.5 million tonnes of seabed material during any three-month period and up to 50 million tonnes of seabed material per annum, and process that material on an integrated mining vessel. About 10 per cent of the seabed material extracted will be processed into iron ore concentrate, which is retained for later shipping. The de-ored material which remains after that

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35 The exclusive economic zone (EEZ) means the EEZ as defined in s 9 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977: Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [the EEZ Act], s 4(1) definition of "exclusive economic zone".

36 The Act in force as at the time of Trans-Tasman Resources Ltd's (TTR) application is the version as at August 2016. That is the version used in this judgment, unless otherwise stated.

37 The area in which the mining would take place abuts the coastal marine area (CMA). Activities in that area are governed by the Resource Management Act 1991 [the RMA].

38 Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight* (August 2017) [DMC decision]. An earlier application made by TTR in November 2013 was declined by a differently constituted decision-making committee (DMC) in June 2014: Environmental Protection Authority | Te Mana Rauhī Taiao *Trans-Tasman Resources Ltd – Marine Consent Decision* (June 2014).

process would be returned to the seabed via a controlled discharge. The discharge of de-ored sediment from the integrated mining vessel is a mining discharge of harmful substances under the EEZ Act for which TTR requires a marine discharge consent.[39] The other marine and marine discharge consents granted to TTR cover a range of matters, including extraction, the redisposition of de-ored sediments, anchor handling, and noise caused by the integrated mining vessel during extraction activities.[40] The marine consents and marine discharge consents would be valid for 35 years.[41]

[18] An important focus of the DMC's assessment of TTR's application was on the likely environmental effects of the sediment plume. In addition, the DMC was required to address the direct effect of mining on the seabed floor and benthos (that is, the flora and fauna on the bottom of the seabed in the 66 km^2 mining area) and the effect on marine mammals and other fauna of the noise generated by the mining activities, as well as the effects on iwi and on various existing interests.

[19] The first respondents all participated in the hearing before the DMC.[42] They made submissions opposing the grant of the consents. The first respondents appealed to the High Court challenging the DMC decision on the basis that it was wrong in law on a number of grounds. The High Court allowed the appeal on one ground.[43] The High Court found that the consents adopted an "adaptive management approach", which is not permitted under the EEZ Act in relation to marine discharge consents.[44] The High Court quashed the decision of the DMC and the matter was referred back to the DMC for reconsideration, applying the correct legal test on adaptive management.

[20] TTR appealed to the Court of Appeal, arguing that the consents should not have been quashed because they did not adopt an adaptive management approach. The first respondents sought to uphold the High Court decision and filed cross-appeals in the Court of Appeal contending that there were other errors of law in the DMC decision.

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39 EEZ Act, s 20C.
40 A full list of authorised restricted activities as set out in the DMC decision, above n 38, is reproduced below at Appendix 1.
41 See EEZ Act, ss 73 and 87H.
42 The second respondent, the Environmental Protection Authority (the EPA), also participated.
43 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 (Churchman J) [HC judgment].
44 EEZ Act, s 87F(4).

[21] The Court of Appeal dismissed the appeal.[45] The High Court's decision to allow the first respondents' appeal and quash the decision of the DMC was upheld but on other grounds. Leave to appeal to this Court was granted on the question of whether the Court of Appeal was correct to dismiss the appeal.[46]

[22] TTR's appeal to this Court raises a number of issues about the approach to the EEZ Act, in particular, to its purposes, how the Act gives effect to the Treaty of Waitangi and customary interests, the place of tikanga,[47] the approach to international instruments, the adequacy of the information before the DMC and its ability to address any uncertainty about that information and adverse effects by the conditions that were imposed on the consents, as well as the interrelationship between the regime in the EEZ Act and other marine management regimes. Finally, there is also a question about the use of the chairperson's casting vote.

[23] We address these issues in the discussion which follows but first provide an overview of the statutory scheme.

Overview of the statutory scheme

[24] It will be necessary in due course to refer to a number of provisions in the EEZ Act, but for the moment, it suffices to give a brief description of the outline of the Act[48] and to set out the key provisions relating to TTR's application for marine consents and marine discharge consents.

[25] The purpose of the Act is set out in s 10 and at this point it is sufficient to note the two purposes in s 10(1), that is:

> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and

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45 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment].

46 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZSC 67.

47 The Attorney-General was granted leave to intervene on the issues arising in relation to the Treaty of Waitangi, Māori customary interests and the applicability of tikanga to marine consent and marine discharge consent applications. Leave was also given to the EPA to make submissions on systemic issues raised in the appeal which may affect the Authority's further work.

48 See EEZ Act, s 3.

> (b) in relation to the exclusive economic zone, … to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

[26] The Act also provides that it continues or enables the implementation of New Zealand's international obligations relating to the marine environment,[49] and sets out how the Crown's responsibility to give effect to the principles of the Treaty of Waitangi is recognised and respected by provisions of the Act.[50]

[27] Subpart 3 of Part 1 then sets out the functions, duties and powers of the EPA and of the Māori Advisory Committee which assists the EPA under the EEZ Act.[51]

[28] Central to the Act's consenting regime is the classification of activities as permitted, discretionary or prohibited. An activity is a permitted activity if it is described in regulations made under the Act as a permitted activity.[52] Permitted activities can be undertaken without a marine consent, provided the activity complies with the specifications set out in the regulations.[53] An activity is a discretionary activity if, relevantly, the Act or regulations describe the activity as discretionary or allow the activity with a marine consent.[54] Discretionary activities can only be undertaken with a marine consent.[55] An activity is a prohibited activity if it is described in the Act or regulations as a prohibited activity.[56] Such activities cannot be undertaken, nor can consents be applied for or granted in relation to them.[57]

[29] Part 2 of the Act sets out the duties, restrictions and prohibitions relating to various activities in the EEZ. The effect of s 20 is that the activities listed in s 20(2), which do not include discharges and dumping, may not be carried out in the EEZ

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49 Section 11.
50 Section 12.
51 The EPA and its Māori Advisory Committee are both established under the Environmental Protection Authority Act 2011: ss 3 and 18. Section 8 provides that the EPA is a Crown entity for the purposes of s 7 of the Crown Entities Act 2004 (that section sets out the various categories of Crown entities).
52 EEZ Act, s 35(1).
53 Section 35(2).
54 Section 36(1).
55 Section 36(2).
56 Section 37(1).
57 Section 37(2)–(3).

unless the activity is a permitted activity or authorised by a marine consent,[58] or by ss 21, 22 or 23. (Sections 21–23 permit specific existing and planned petroleum activities to continue.) The listed activities are as follows:

> (a) the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed:
>
> (b) the construction, placement, alteration, extension, removal, or demolition of a submarine pipeline on or under the seabed:
>
> (c) the placement, alteration, extension, or removal of a submarine cable on or from the seabed:
>
> (d) the removal of non-living natural material from the seabed or subsoil:
>
> (e) the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil:
>
> (f) the deposit of any thing or organism in, on, or under the seabed:
>
> (g) the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine species or their habitat.

[30] TTR required various marine consents for the activities linked to the recovery of iron ore deposits and the related environmental monitoring activities as these were not permitted activities. To illustrate the nature of the consents in terms of the activities referred to, s 20(2)(d) relates to the removal of non-living natural material from the seabed or subsoil. That subsection was relevant to two of TTR's proposed activities: the removal of sediment from the seabed and subsoil using its crawler and by grade control drilling; and the taking of sediment and benthic grab samples from the seabed and subsoil associated with environmental monitoring.[59]

[31] There are also duties, restrictions and prohibitions relating to discharges of harmful substances or dumping into the EEZ.[60]

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58 A "marine consent" is defined to mean "(a) a marine consent granted under section 62; or (b) an emergency dumping consent, a marine discharge consent, or a marine dumping consent": s 4(1) definition of "marine consent" or "consent".

59 TTR's impact assessment report prepared as part of its application describes grade control drilling as involving "closely spaced seabed sampling to further define the extent of the extraction area as well as providing further information of the sediment characteristics within this area, prior to any extraction activity".

60 See Subpart 2 of Part 2.

[32] To put this part of the legislation in context, it is necessary first to explain what is meant by a "harmful substance". Harmful substances are defined in s 4(1) of the EEZ Act as "any substance specified as a harmful substance by regulations made under [the] Act". The Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015 (EEZ Regulations 2015) relevantly define harmful substance as including "sediments from mining activities other than petroleum extraction".[61]

[33] It is also important to note the interrelationship between the EEZ Act and the Maritime Transport Act 1994.[62] The Maritime Transport Act and the Maritime Rules and Marine Protection Rules made under that Act comprise the primary mechanisms for regulating maritime activity in New Zealand. The Maritime Transport Act and its associated delegated legislation, broadly speaking, address both maritime activity generally and the protection of the marine environment.[63] For present purposes, it is relevant that the Maritime Transport Act also regulates the discharge of harmful substances into the sea or seabed of the EEZ but not discharges associated with mining activity. TTR's activities with which the DMC's decision was directly concerned are accordingly governed by the EEZ Act rather than the Maritime Transport Act because the relevant discharges are mining discharges.[64] A "mining discharge", in relation to a harmful substance, is defined in s 4(1) of the EEZ Act to mean "a discharge made as an integral part of, or as a direct result of, a mining activity".[65]

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61 Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015 [EEZ Regulations 2015], reg 4(d). The applicable version of the regulations is the version as enacted on 28 September 2015. This is the version used in this judgment.

62 The RMA also deals with marine pollution, providing criminal liability for certain dumping and discharges within the CMA: RMA, ss 15A, 15B and 338(1A)–(1B).

63 The purposes of the Maritime Transport Act 1994 include "to protect the marine environment" and "to continue, or enable, the implementation of obligations on New Zealand under various international conventions relating to pollution of the marine environment" (long title).

64 EEZ Act, s 20A. See also s 224A of the Maritime Transport Act, which sets out how the discharge of harmful substances is regulated under that Act and under the EEZ Act. See further ss 226(1)–(2) and (4) and 226A of the Maritime Transport Act, the effect of which is that harmful substances other than mining discharges cannot be discharged from a ship into the sea within the EEZ or into or onto the seabed below that sea except where discharged in accordance with the Marine Protection Rules.

65 A "mining activity" means "an activity carried out for, or in connection with,—(a) the identification of areas of the seabed likely to contain mineral deposits; or (b) the identification of mineral deposits; or (c) the taking or extraction of minerals from the sea or seabed, and associated processing of those minerals": EEZ Act, s 4(1) definition of "mining activity".

[34] Section 20B of the EEZ Act prevents the discharge of a harmful substance from a structure into the sea or into or onto the seabed of the EEZ unless the discharge is a permitted activity or authorised by a marine consent or ss 21, 22 or 23.[66] Section 20C makes similar provision for mining discharges of harmful substances from a ship into the sea of the EEZ. To illustrate the application of those provisions here, s 20C applied to the discharge of de-ored sediments and any associated contaminants back to the water column from TTR's integrated mining vessel. We add that the term "marine consent" is used in these reasons to encompass consents required for s 20 activities, not consents relating to discharges and dumping.

[35] The next part of the Act, Part 3, provides for regulations to be made and the matters to be considered in making the various regulations.[67] This Part also contains the process for making and deciding on applications for marine consents (in respect of the activities described in s 20).[68] We will come back to some of the detail of the processes for applications and hearings later. We will also return shortly to the detail of s 59, which sets out the factors to be taken into account by the EPA in considering an application for a marine consent, as well as to s 60, which provides for the matters to be considered in considering the effect of an activity on existing interests, and to s 61, which describes the information principles applicable to applications for a marine consent.

[36] Section 62(1) states that after complying with ss 59–61, the EPA or (as here) the DMC may grant an application for a marine consent in whole or in part, or may refuse the application.[69] If the application is granted, it may be subject to conditions as provided for in s 63.[70] Section 64(1) provides that the EPA may incorporate an adaptive management approach into a marine consent, as defined in that section. Section 65 deals with bonds and s 66 with monitoring conditions.

66 Under reg 10 of the EEZ Regulations 2015, the discharge of sediments other than a discharge permitted by regs 7, 8 or 9, or prohibited by reg 11, is classified as a discretionary activity under the EEZ Act.

67 Subpart 1 of Part 3.

68 Subpart 2 of Part 3.

69 Where referring to the decision-maker in the present case, reference will be to the DMC rather than to the EPA. Further, references to the DMC's approach are references to the DMC majority unless specified otherwise.

70 Section 62(3).

[37] Where the activity involves a mining discharge of a harmful substance which is not a permitted activity, as was the case here, the relevant processes are described in Subpart 2A of Part 3. The effect of this Subpart is, broadly, that the provisions governing applications for marine consents also apply to applications for marine discharge or dumping consents but with some important modifications. In terms of the modifications, for example, and as noted above, on a marine discharge or dumping consent it is not permissible to impose a condition that amounts to or contributes to an adaptive management approach.[71]

[38] Part 4 of the Act deals with objections, appeals and enforcement. The only aspect of this Part that needs to be recorded is that there is a right of appeal from a decision of the EPA to the High Court on a question of law.[72]

The correct approach to determine applications for a marine discharge consent

[39] This part of the appeal turns on whether the Court of Appeal was correct in its approach to the statutory purpose and, in particular, as to the interrelationship between s 10, the purpose provision, and s 59 (and s 87D),[73] which sets out various factors the DMC was required to take into account.

[40] It is helpful at this point to set out s 10 in full:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

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71 Section 87F(4).

72 Section 105. See s 113 for appeals to the Court of Appeal.

73 When considering an application for discharge and dumping consents, s 87D(2) provides that the DMC must take into account the matters described in s 59(2) apart from some specific exceptions depending on the type of application. Accordingly, and for convenience, throughout these reasons we refer to the “s 59 factors” even where they relate to the discharge aspects of the application.

> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

[41] When considering an application for a marine consent and submissions on the application, the specified decision-making criteria are those factors set out in s 59. For applications for a marine discharge consent and the submissions on the application, s 87D(2)(a) provides that the relevant criteria are also as set out in s 59(2), with one amendment relating to s 59(2)(c), as we will discuss.[74]

[42] The list of factors in s 59(2) begins with a number of environmental factors and the effects on existing interests. Section 59(2)(a) accordingly directs the EPA to consider "any effects on the environment or existing interests of allowing the activity" and s 59(2)(b) refers to "the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity". When considering an application for a marine consent, s 59(2)(c) provides that the EPA is to take into account "the effects on human health that may arise from effects on the environment". But when the application is for a marine discharge consent, this requirement is expressed as "the effects on human health of the discharge of harmful substances if consent is granted".[75] Section 59(2)(d) directs attention to "the importance of protecting the biological diversity and integrity of marine species,

[74] Section 87D(2)(a)(i).
[75] Section 87D(2)(a)(ii).

ecosystems, and processes" and s 59(2)(e) to "the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species".

[43] The remaining factors in s 59(2) are as follows:

> (f) the economic benefit to New Zealand of allowing the application; and
>
> (g) the efficient use and development of natural resources; and
>
> (h) the nature and effect of other marine management regimes; and
>
> (i) best practice in relation to an industry or activity; and
>
> (j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and
>
> (k) relevant regulations; and
>
> (l) any other applicable law; and
>
> (m) any other matter the EPA considers relevant and reasonably necessary to determine the application.

[44] Section 59(3) makes it clear that the EPA must also have regard to submissions and evidence given in relation to the application, any advice the EPA has sought, and any advice from the Māori Advisory Committee. Under s 59(5), the EPA is directed not to have regard to the following factors:

> (a) trade competition or the effects of trade competition; or
>
> (b) the effects on climate change of discharging greenhouse gases into the air; or
>
> (c) any effects on a person's existing interest if the person has given written approval to the proposed activity.

[45] As the case has developed, two main issues arise about the correct approach to the purpose provision and its interrelationship with s 59. The first is whether, as the Court of Appeal found, s 10(1)(a) and (b) provide the operative criteria for the DMC's decision. The second issue is whether the Court was correct to conclude that the objective of s 10(1)(b) can only be achieved by regulating the proposed activity in a way that will avoid material pollution of the environment or, if that is not possible, by prohibiting the relevant discharge or dumping.

[46] On these two aspects of the appeal, TTR's position is that the Court of Appeal has erred in adopting an environmental bottom line or a position close to that. TTR says that what the Act requires is an overall assessment of the various relevant factors with no requirement to give ascendancy to the environmental effects of an application. The first respondents support the judgment of the Court of Appeal on this aspect.[76] As is apparent from TTR's case, the issues arising under this head are interrelated, but it is useful nonetheless to first address how ss 10(1) and 59 work together before turning to the meaning of s 10(1)(b).

Decision-making criteria?

[47] The Court of Appeal saw s 10(1) as the "principal criteria by reference to which powers must be exercised under the EEZ Act". Indeed, the Court considered that for marine consents and marine discharge consents s 10 provides "the only decision-making criteria in the EEZ Act and must be the touchstone of the EPA's analysis".[77] In developing this point, the Court said the DMC erred in not asking two questions, that is, whether granting the consents would give effect to sustainable management and whether granting the consents was consistent with the objective in s 10(1)(b) of protecting the environment from pollution caused by the discharge of harmful substances.[78] The DMC, and similarly the High Court, were accordingly wrong to have "undertaken a broad evaluation of the desirability of granting a marine discharge consent weighing all the relevant s 59 factors in the mix—an 'Integrated Assessment' in which all the factors are balanced together, and a conclusion reached by reference to an unarticulated overall test".[79]

[48] We do not agree with the view of the Court of Appeal that s 10(1)(a) and (b) provide the main operative decision-making provisions.[80] That is clear from s 10(3), which says that to achieve the purpose in s 10(1), decision-makers must "take into

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76 The first respondents generally adopted each other's submissions. Individual respondents led the argument on various topics. We accordingly largely focus on the primary submissions on any topic.
77 CA judgment, above n 45, at [35].
78 At [106].
79 At [107]. See also at [110].
80 See also, in the context of s 5 of the RMA, *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [130] and [151] as to the operative decision-making criteria applying in that case.

account decision-making criteria specified in relation to particular decisions".[81] The Court of Appeal accepted that s 10(3) "identifies key steps that the decision-maker must take in order to achieve the [statutory] purpose". But the Court stated that neither s 10(3), "nor the provisions to which it refers, provide any criteria to govern the overall assessment and determination of applications". As noted, the Court said the "relevant criteria are found in s 10(1)".[82] That approach, however, does not fit with the words of s 10(3)(a), which expressly describe the matters set out in s 59 as "decision-making criteria". That point is emphasised by the direction in s 62(1) (the provision on decisions for applications for consents) that, "[a]fter complying with" ss 59–61, the EPA may grant or refuse an application for a marine consent.

[49] Further, the s 10(1) purposes apply in the context of a definition of the environment which addresses the biophysical aspects.[83] Section 59, by contrast, also lists non-biophysical and environmental factors as needing to be taken into account, which suggests s 10(1) does not provide the full considerations.[84]

[50] Finally, it is clear from the overall statutory scheme, which sets out which factors apply to which type of proposed activity, that the approach is to provide, via those factors, for the way in which the purposes are to be achieved in respect of different activities.

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81 This appears also to have been the responsible Minister's view at the time of the passage of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-1) [EEZ Bill] through the House. The Minister said she saw the s 59 factors as mirroring s 6 of the RMA (which provides a range of matters decision-makers must recognise and provide for in order to achieve the purpose of the RMA): (16 August 2012) 682 NZPD 4492. The departmental report to the Select Committee also described the clauses which became s 59 as the "operative decision-making clauses": Ministry for the Environment *Departmental Report on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill* (March 2012) [Departmental Report on EEZ Bill] at 41.

82 CA judgment, above n 45, at [108].

83 The definition of "environment" in s 4(1) of the EEZ Act is narrower than that in s 2(1) of the RMA. In the EEZ Act, "environment" means "the natural environment, including ecosystems and their constituent parts and all natural resources" of New Zealand, the EEZ, the continental shelf and the waters beyond the EEZ and above and beyond the continental shelf. The RMA definition of "environment" also includes "amenity values" and "the social, economic, aesthetic, and cultural conditions" affecting ecosystems, natural and physical resources and amenity values: s 2(1) definition of "environment", paras (c)–(d).

84 R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) notes at 341 the need to keep "in mind that the statement of purpose, being only a précis, may sometimes not accurately cover the whole scope of the Act, and individual provisions may go beyond it".

[51] We therefore accept TTR's argument that what is required is an overall assessment of the s 59 factors albeit, as we will come to, the statutory purpose must always be kept to mind.

[52] An approach requiring an overall assessment or judgment is not inconsistent with this Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.[85] The Court in that case considered the Board of Inquiry had erred in making an "overall judgment" on the facts and in light of the purposes and principles set out in Part 2 of the Resource Management Act 1991 (the RMA) in deciding whether or not to make the changes sought by New Zealand King Salmon Co Ltd to the Marlborough Sounds Resource Management Plan. The changes sought would move salmon farming from a prohibited activity to a discretionary activity in eight locations.

[53] The Court found that, in the plan change context in issue, the "overall judgment" approach did not recognise environmental bottom lines, which in that case were those in the New Zealand Coastal Policy Statement (NZCPS).[86] The NZCPS was "an instrument at the top of the hierarchy [of planning instruments]" and contained "objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in Part 2 [of the RMA] in relation to the coastal environment".[87] Therefore, the Court held there was "no need to refer back to [Part 2] when determining a plan change".[88] There were also other factors supporting rejection of the "overall judgment" approach in relation to the implementation of the NZCPS.[89]

[54] Since *King Salmon*, there has been debate as to how that decision impacts the approach to applications other than for plan changes under the RMA, such as applications for resource consent which have different statutory directives.[90] Differing approaches have emerged in the lower courts.[91] This issue was recently considered by

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85 *King Salmon*, above n 80.
86 At [132]. See also at [136]–[137] and [152]–[153].
87 At [152].
88 At [85].
89 At [136]–[139].
90 Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 591.
91 At 591.

the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*.[92] This decision addressed the interrelationship between the purpose provision in s 5 of the RMA and s 104 of that Act, dealing with applications for resource consents. The case concerned the same resource management plan as was in issue in *King Salmon*.[93] The Court of Appeal accordingly addressed the effect of the rejection of the "overall judgment" approach in *King Salmon*. The Court did not consider that the ability to consider the purposes and principles in Part 2 of the RMA (including s 5) in the context of s 104 was subject to any limitations of the kind contemplated by *King Salmon*.[94] Various statutory provisions relied on by this Court in rejecting the "overall judgment" approach in *King Salmon* were not relevant in *RJ Davidson*. The Court concluded that s 5 was relevant to the decision as to whether or not to grant a resource consent under s 104.[95]

[55] In the present case, there is a clear link between the purposes in s 10(1) and s 59. The decision-maker has to consider the criteria in s 59 with a view to ensuring that the statutory purposes in s 10(1) are met.[96] Accordingly, the DMC, when taking into account the s 59(2) factors and having regard to the matters in s 59(3) and (4), will always have to consider those aspects in terms of the purpose. Treating both of the purposes as a cross-check is a way in which that consideration may be achieved. To this extent we accept the notion that s 10(1) is the ultimate touchstone.[97]

[56] However, the approach taken by the Court of Appeal unduly elevates the purpose provision by giving it an operational effect and by treating s 10(1)(b) as thereby giving priority to some effects in s 59 over others.[98] If that means a

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92 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
93 At [54].
94 At [66].
95 At [47], [51]–[52] and [70].
96 This is clear from the wording of s 10(3)(a), which states that "[i]n order to achieve the purpose", the decision-maker must take into account the decision-making criteria specified in relation to particular decisions. See similarly *RJ Davidson*, above n 92, at [52], where the Court held that the reference to Part 2 in s 104(1) of the RMA "enlivens ss 5–8 in the case of applications for resource consent".
97 Carter, above n 84, at 343 makes the point that "individual sections of an Act may be so clearly expressed that they are not susceptible to qualification in the light of [a] purpose statemen[t]", but, even then, the purpose statement is "an important part of the context in which every section of the Act must be read before a meaning is attributed to it".
98 The High Court similarly rejected a submission that the s 10(1)(b) purpose overrode the purpose in s 10(1)(a): HC judgment, above n 43, at [102].

hierarchical approach to s 59 is required, we do not agree. The obvious contrast is with ss 6, 7 and 8 of the RMA, which plainly establish a hierarchy of interests.[99] But, when dealing with marine discharge consents, both limbs of s 10(1) are relevant, so each must be addressed. The sustainable management purpose therefore remains part of the equation when considering the s 59 factors.

[57] Further, the legislative history suggests that the decision not to adopt a hierarchical approach in the EEZ Act was a deliberate one. During the parliamentary process, an amendment was proposed by a member of Parliament which would have amended the purpose clause in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (EEZ Bill)[100] by establishing the priority of environmental-focused matters over the broader matters, including economic benefit.[101] This amendment was not passed.[102]

[58] That said, in a particular case, some factors will be more relevant and more important as a matter of fact than others. To take an obvious example, some situations may involve impacts on human health where the proposed activity has only limited economic benefit. In those situations, the impact on public health will take primacy. As the Court in *RJ Davidson* said, this reflects "the possibility of different outcomes where an overall judgment is applied".[103]

[59] To summarise, an overall assessment of the s 59 factors (except for s 59(2)(c) and substituting s 87D(2)(ii)) was required to be taken in this case, but the DMC also needed to address those factors with both s 10(1) purposes in mind. The DMC's approach was to focus on the s 59 factors, albeit acknowledging the need to achieve

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99 Section 6 of the RMA lists matters of national importance that the decision-maker "shall recognise and provide for", s 7 lists other matters that decision-makers "shall have particular regard to" and s 8 provides that decision-makers "shall take into account" the principles of the Treaty of Waitangi. All three sections apply as part of achieving the statutory purpose set out in s 5, but Salmon and Grinlinton, above 90, at 595 state that the different phraseology "establish[es] a hierarchy of importance for decision-makers to follow".

100 EEZ Bill, above n 81.

101 Supplementary Order Paper 2012 (89) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (321-2) (explanatory note) at 2–3. See also (16 August 2012) 682 NZPD 4506–4507. The departmental report to the Select Committee explicitly rejected any hierarchical or tiered approach to the s 59 factors, contrasting this aspect of the Bill with the RMA. The report suggested the matters listed were "equally weighted and the weight will depend on the circumstances of a given case": Departmental Report on EEZ Bill, above n 81, at 12.

102 (16 August 2012) 682 NZPD 4518.

103 See *RJ Davidson*, above n 92, at [69]. See also at [74].

the statutory purpose. The DMC undertook what it described as an "Integrated Assessment" which worked through those factors in turn. However, it is fair to say, as the Court of Appeal did, that this assessment comes to a "somewhat abrupt end" with no clear indication of the test applied in coming to the conclusion to grant the consents.[104] Further, the DMC took the view that it was not possible to deal with the applications for marine consents separately from the applications for marine discharges because they were linked. That may well have been a practical approach to take but the risk in doing so was that the s 10(1)(b) purpose was overlooked. We consider that, at least in respect of the significant adverse effects identified by the DMC, for example, in relation to the Pātea Shoals and other environmentally sensitive areas, it appears that the s 10(1)(b) purpose was not considered. However, given our approach to s 10 is not one shared by the majority, we do not need to reach a concluded view on this.

The requirement to "protect the environment from pollution"

[60] We turn to consider what s 10(1)(b) means in the present context. On this aspect also we take a different view from the majority. The dispute between the parties turns on whether the Court of Appeal's approach is correct. While the first respondents generally adopt the Court of Appeal's approach, TTR says the Court incorrectly attributed "protection" with an absolute quality. TTR argues that what is required instead is a trade-off against a range of protective measures and the DMC can balance the materiality of harm against economic benefits. This exercise, it says, should be undertaken in the round. In supporting the approach taken by the Court of Appeal, Mr Fowler QC for the iwi parties submitted that the addition of s 10(1)(b) shifts the focus to the prevention of pollution. He says this does not allow an activity to proceed where essentially that would entail cleaning up the environmental damage left behind, albeit over time that damage may be mitigated.

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[104] CA judgment, above n 45, at [99].

[61] To put the argument in context, it is helpful to begin with the key conclusion on this point in the judgment of the Court of Appeal, namely that:[105]

> It is not consistent with s 10(1)(b) to permit marine discharges or marine dumping that will cause harm to the environment, on the basis that the harm will subsequently be remedied or mitigated. The s 10(1)(b) goal can only be achieved by regulating the activity in question (for example, by imposing conditions) in a manner that will avoid material pollution of the environment, or if that is not possible, by prohibiting the relevant discharge or dumping in question. … [T]he reference to regulating discharges or dumping is a reference to regulating those activities in order to pursue the goal of protecting the environment from pollution: it does not indicate that there are circumstances in which that goal need not be pursued.

[62] The Court of Appeal in this passage and elsewhere discusses both "harm" (and "pollution") and "material harm" (and "material pollution"). There was some debate at the hearing in this Court about the test being applied, but it was generally accepted that the Court of Appeal meant "material" harm. That this is the position is confirmed by the Court's emphasis on the findings of the DMC as to the real prospect that the sediment plume resulting from TTR's proposed activities would have "material" adverse effects on the environment despite the conditions imposed.[106]

[63] The Court said that protecting means "keeping the environment safe from pollution".[107] If regulation will not achieve that, then prohibition is the appropriate response.[108] The Court stated that it followed that the criteria for marine discharge consents were "more demanding" than for marine consents generally, and, importantly, the Court explained:[109]

> It is not consistent with the scheme of the EEZ Act to trade off harm to the environment caused by a marine discharge against other benefits, such as economic benefits. Nor is it consistent with the scheme of the EEZ Act to permit harm to the environment caused by a marine discharge on the basis that this harm will subsequently be remedied or mitigated. It would be inconsistent with s 10(1) for the EPA to grant a marine discharge consent if granting the consent is not consistent with the goal of protecting the environment from pollution. Protecting the environment—keeping it safe from harm caused by marine discharges or marine dumping—is in this sense a bottom line. It is not open to the EPA to grant a consent for a marine discharge or marine dumping

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105 At [86].

106 At [111].

107 At [109]. See also at [85]. In this respect, the Court of Appeal cited (at [85], n 56) *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 262.

108 CA judgment, above n 45, at [109].

109 At [89] (footnote omitted).

> unless it is satisfied that the relevant activity is not likely to cause harm to the environment. If there is a real prospect of material pollution of the environment, a marine discharge or dumping consent should not be granted.

[64] It is clear from the legislative history that, at the time the EEZ Act was enacted, the intention was to enable the natural resources of the EEZ to be exploited but "in an environmentally responsible way".[110] What was envisaged was a balancing process between environmental and economic interests in the exploitation of those natural resources. As Hon Amy Adams, the responsible Minister, put it in the course of the second reading debate, the Bill was not about "pitting the economy against the environment. It is about balance, and responsible management of our oceans".[111]

[65] In the Bill as introduced, the purpose clause (cl 10) was framed in terms of that balance: the "balance between the protection of the environment and economic development".[112] Neither environmental nor economic interests prevailed. This balancing exercise was to be undertaken by requiring decision-makers to do various things, including taking into account the matters in cls 12 and 13. Clause 12 listed many of the factors which are now in s 59, including adverse effects on the environment and economic wellbeing. Clause 13 set out the information principles which are now in s 61. In the report back on the Bill from the Select Committee, the Committee recommended moving the requirements in cls 12 and 13 to the "substantive decision-making clauses" in the Bill (what is now s 59).[113] This, the Committee said, "would strengthen the connection between decision-making and the relevant considerations".[114]

[66] A number of supplementary order papers were introduced at the Committee stage of the Bill. In one supplementary order paper, the responsible Minister sought

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110 See the speech of the responsible Minister at the time in the first reading: (13 September 2011) 675 NZPD 21216.

111 (30 May 2012) 680 NZPD 2734. The departmental report to the Select Committee was clear that the EEZ Bill did not have "an absolute conservation or protection purpose", noting that there were "better tools available to address conservation needs in the EEZ [such as] the Marine Reserves Bill": Departmental Report on EEZ Bill, above n 81, at 10.

112 EEZ Bill, above n 81.

113 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) (select committee report) [EEZ Bill (select committee report)] at 3–4.

114 At 3.

an amendment to cl 10 which would insert a new purpose provision. The proposed amendment read:[115]

> **10 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

[67] The explanatory note to the supplementary order paper advanced by the Minister noted that the proposed amendment replaced the balancing purpose with a purpose of promoting sustainable management.[116] The Minister did not see this change as reflecting a shift away from a balance. Rather, the Minister described it as substituting a term, "sustainable management", that was "well defined in case law" and well understood.[117] This, the Minister later reiterated, would "provide for fundamentally the same process [as the original balancing exercise] but directed

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115 Supplementary Order Paper 2012 (100) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) at 2.

116 Supplementary Order Paper 2012 (100) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) (explanatory note) at 14.

117 (16 August 2012) 682 NZPD 4492. To the same effect, see the Minister's speech in the third reading: (28 August 2012) 683 NZPD 4780.

through better-understood legal mechanisms".[118] This proposed amendment was adopted by a majority of the House following the Committee debate.

[68] As we have noted, another member proposed an amendment to cl 10 and consequential changes, which would have provided for a prioritised list of factors for decision-makers to consider. This was rejected.[119] A proposed amendment to the purpose clause so that it provided that the Act's purpose was "to protect and preserve the environment while providing for sustainable economic development" was also rejected.[120]

[69] Section 10 was enacted in the same terms as the Minister's proposed amendment. This was then the position until the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 (the 2013 Amendment Act).[121] The 2013 Amendment Act inserted s 10(1)(b) into the EEZ Act, this provision coming into force in October 2015. What became the 2013 Amendment Act arose from an omnibus bill, the Marine Legislation Bill 2012, which was introduced to the House shortly after the EEZ Bill was given its third reading.[122]

[70] The explanatory note to the Marine Legislation Bill recorded that the Bill amended the EEZ Act in order to transfer the responsibility for the regulation of discharges and dumping in the EEZ and continental shelf from Maritime New Zealand to the EPA.[123] The transfer was to enable discharges and dumping "to be assessed

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118 (28 August 2012) 683 NZPD 4780.

119 See above at [57].

120 Supplementary Order Paper 2012 (97) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2).

121 The EEZ Bill did not address management of the effects of discharges and dumping because these were regulated under the Maritime Transport Act and Marine Protection Rules by Maritime New Zealand. That may have been because the Bill was seen as gap-filling, a point to which we return later: at n 297 below. An early regulatory impact statement produced shortly after the EEZ Bill had its first reading recommended transferring discharge and dumping regulatory functions to the EPA under the EEZ Bill: see Ministry for the Environment *Regulatory Impact Statement: Transfer of discharge and dumping regulatory functions from Maritime New Zealand to the Environmental Protection Authority* (14 September 2011) [Regulatory Impact Statement on Transfer of Discharge and Dumping Regulatory Functions] at 3 and 10. However, this did not occur in the EEZ Act as originally enacted.

122 Marine Legislation Bill 2012 (58-1).

123 Marine Legislation Bill 2012 (58-1) (explanatory note) at 7.

within the same consenting regime as other activities relating to the wider operation".[124]

[71] The explanatory note also recorded that some of the amendments made to the EEZ Act were required to ensure New Zealand acted consistently with the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL) and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention).[125] It was as part of this exercise that s 11 of the EEZ Act dealing with international instruments relevant to the Act was amended to add s 11(c) and (d), which refer respectively to MARPOL and to the London Convention.

[72] Of cl 92, which inserted s 10(1)(b), the explanatory note stated that the clause amended s 10 "so that it encompasses the new provisions relating to discharges and dumping".[126] The scope of the discharges that would come under the EEZ Act was to be determined by the definition of "harmful substance" which would be provided for in regulations.[127] The High Court said that because of the more limited focus of MARPOL and the London Convention, "it was not obvious that, at the time the Bill was introduced, the discharge of sediments from marine mining would be caught by this provision".[128] The Court said this was due to the fact that "the definition of 'harmful substance' had not yet been set by regulation, and sediments from seabed mining had not been included as 'harmful substances' under the prior regime under the [Maritime Transport Act]".[129]

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124 At 7.

125 At 7, citing Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 61 (signed 17 February 1973, entered into force 2 October 1983) [MARPOL]; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120 (opened for signature 29 December 1972, entered into force 30 August 1975) [London Convention]; and 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (adopted 7 November 1996, entered into force 24 March 2006) [1996 London Protocol]. The Ministry of Transport and Ministry for the Environment's joint report to the Select Committee did not support replacing the phrase "to protect the environment from pollution" with the words "to protect and preserve the marine environment" as the current wording complied with MARPOL and the London Convention: Ministry of Transport and Ministry for the Environment *Marine Legislation Bill 2012* (15 November 2012) at 123.

126 Marine Legislation Bill 2012 (58-1) (explanatory note) at 19.

127 At 20.

128 HC judgment, above n 43, at [81].

129 At [81].

[73] Against this background, we turn to how the addition of s 10(1)(b) altered the position from that when the EEZ Act was enacted. Does the word "protect" mean to protect from material harm, as the Court of Appeal found, with no ability to trade off against other benefits such as economic benefits? Or, as TTR would have it, does it envisage a range of protective measures which may have the effect of partially or fully addressing any harm?

[74] We agree with TTR that the construction of s 10(1)(b) has to leave some room for the effective operation of the considerations in s 59. The need to leave room for s 59 means factors other than the environmental effects are necessarily part of the equation. That must be so where s 87D(2)(a), which was introduced along with s 10(1)(b), makes it clear that s 59(2)(f) (referring to the economic benefit to New Zealand of allowing the application), s 59(2)(g) (referring to the efficient use and development of natural resources) and s 59(2)(j) (requiring consideration of the extent to which imposing conditions might "avoid, remedy, or mitigate" the adverse effects) remain relevant considerations to applications relating to the discharge of harmful substances. The ongoing relevance of those factors reflects the statutory intention, which was to allow for some exploitation of the natural resources in the EEZ.

[75] By contrast, the approach to dumping consents is more restrictive than that applicable to marine discharges. Under s 87D(2)(b)(i), for example, the factors in s 59(2)(c), (f), (g) and (i) are excluded, which means that economic benefit is irrelevant when the proposed activity comes within the definition of dumping.[130]

[76] Further, in their ordinary dictionary meanings, the three words "avoid, remedy, or mitigate" in s 59(2)(j) suggest varying levels of "protection".[131] The notion of something less than complete protection from material harm is also consistent with the use of the word "protect" in the definition of sustainable management in s 10(2),

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[130] Section 59(2)(c) refers to the effects on human health arising from effects on the environment and s 59(2)(i) refers to best practice in relation to an industry or activity.

[131] "Avoid" means to "[k]eep off; prevent; obviate", "remedy" means to "[p]ut right, reform, (a state of things); rectify, make good"; and "mitigate" means to "lessen the suffering or trouble caused by … [a] difficulty" and to "[m]oderate (the severity, rigour, etc, of something)": see William R Trumble and Angus Stevenson (eds) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 1 at 159 and 1800; and William R Trumble and Angus Stevenson (eds) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 2526.

referring to the "protection of natural resources in a way … that enables people to provide for their economic well-being". Its use in s 10(2) clearly envisages some balancing.[132]

[77] We do not consider that the idea that there may be some balancing of interests is inconsistent with the ordinary dictionary meaning of "protect", namely:[133]

> (1) Defend or guard against injury or danger; shield from attack or assault; support, assist, give [especially] legal immunity or exemption to; keep safe, take care of; extend patronage to.
>
> …
>
> (1C) Aim to preserve (a threatened plant or animal species) by legislating against collecting, hunting, etc; restrict by law access to or development of (land) in order to preserve its wildlife or its undisturbed state; prevent by law demolition of or unauthorized changes to (a historic building etc).

[78] A similar approach to the meaning of "protection" was taken by Cooke P in *Environmental Defence Society Inc v Mangonui County Council*, in a passage adopted by the Court of Appeal in the present case. The Town and Country Planning Act 1977 referred to the "protection of [the coastal environment and margins of lakes and rivers] from unnecessary subdivision and development".[134] The argument put to the Court in *Mangonui* was that "protection" was "not as strong a word as prevention or prohibition; that it means keeping safe from injury and that a development may be permitted if the natural environment is more or less protected".[135] Cooke P, apart from noting that "more or less" was vague, accepted this argument, but did not consider that the Planning Tribunal had found that the natural environment would be "kept safe from injury".[136]

[79] TTR is critical of the application of *Mangonui* to the present case, given the different statutory context. We do not see the passage cited from *Mangonui* as

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132 As discussed, the sustainable management purpose in s 10(1)(a) represented a way to balance environmental and economic factors: see above at [64]–[67].
133 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 2), above n 131, at 2376.
134 Town and Country Planning Act 1977, s 3(1)(c).
135 *Mangonui*, above n 107, at 262.
136 At 262.

adopting a different approach to the ordinary dictionary meaning. Obviously though, the phrase as used in s 10(1)(b) has to be read in light of the overall statutory scheme.

[80] Nor do we see the passage referred to by the Court of Appeal from this Court's decision in *King Salmon* as adding particularly to the issue in this case. The point made in the passage cited was that in some cases the sustainable management goal may be most appropriately pursued via preservation or protection of the environment.[137] But we consider the Court of Appeal draws too much from that passage in concluding that for marine discharges and dumping, "the way in which the broader goal of sustainable management is to be pursued is by protecting the environment from harm caused by those activities", such that discharges and dumping could not be permitted if they would cause material harm (pollution) to the environment.[138]

[81] Some weight must be given to the reference in s 10(1)(b) to achieving protection by "regulating or prohibiting" marine discharges. "Regulate" in its ordinary dictionary meaning encompasses controlling, governing or directing by rule or regulations and to "adapt to circumstances or surroundings".[139] We agree with the conclusion of the High Court that the ability to regulate or prohibit means that the EEZ Act envisages circumstances where the discharge of harmful substances need not be prohibited if it can be appropriately regulated.[140] By contrast, some discharges are separately and completely prohibited.[141] No consents can be applied for, or granted, for such discharges.[142] Discharges of the nature in issue in this case necessarily involve the ejection of "harmful" substances to the marine area where the substances previously were not present, thus disrupting the marine ecosystem, but they are not automatically prohibited. That supports the view that "protect" does not mean there can be no material harm.

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137 *King Salmon*, above n 80, at [149].
138 CA judgment, above n 45, at [86].
139 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 2), above n 131, at 2516.
140 HC judgment, above n 43, at [93].
141 For example, the discharge of sediments that are prohibited radioactive materials: EEZ Regulations 2015, reg 11.
142 EEZ Act, s 37(2).

[82] Thus, as TTR submits, the use of the word "regulate" suggests protection is a relative and not an absolute concept. The effect of the ability to regulate may mean that if harm, albeit material, can be avoided, remedied or mitigated over time, the goal of s 10(1)(b) may nonetheless be able to be met.[143] Of course, whether that is so in any given case is a factual question. This interpretation is further supported by the reference to "protection" in s 10(2)'s definition of sustainable management. As this Court said in *King Salmon* about the analogous definition in s 5(2) of the RMA, "the use of the word 'protection' links particularly to subpara (c)", namely, "avoiding, remedying, or mitigating any adverse effects of activities on the environment".[144] It seems likely that "protection" in s 10(2) has the same meaning as "protect" in s 10(1)(b).

[83] Despite the analogy with s 10(2)(c) (and s 5(2)(c) of the RMA), we accept, as the iwi parties submit, that the addition of s 10(1)(b) must add something to the equation. Indeed, TTR accepts there is a heightened threshold when it comes to authorising discharges and dumping. That must be so where, unlike s 10(1)(a) (and s 10(2)), the focus in s 10(1)(b) is solely on protection. And the activities covered by s 10(1)(b) are broader than those activities, such as emptying ballast water from ships, which do not have much to do with sustainable management.[145]

[84] The prohibition, in applications for discharge and dumping, on imposing conditions which involve adaptive management is also relevant.[146] That prohibition

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143 Compare CA judgment, above n 45, at [86]. While the DMC's decision suggests it considered the conditions imposed had the effect of avoiding, remedying or mitigating material harm over time, any such consideration was tainted by the DMC's fundamental error, discussed below, of acting on the basis of uncertain information. As we discuss at [129] in relation to seabirds and marine mammals, on the information before it, the DMC simply could not be satisfied that the harm would be remedied, mitigated or avoided.

144 *King Salmon*, above n 80, at [24(c)].

145 The discharge of ballast water from ships is dealt with under the Maritime Transport Act, not the EEZ Act: Maritime Transport Act, Part 19A. In the early regulatory impact statement recommending the transfer of discharge and dumping regulatory functions from Maritime New Zealand (under the Maritime Transport Act) to the EPA (under the EEZ Act), the Ministry for the Environment considered that such a transfer would produce better environmental results, noting that the Maritime Transport Act was "largely a transport Act" and "not suited to assessments of environmental effects": Regulatory Impact Statement on Transfer of Discharge and Dumping Regulatory Functions, above n 121, at 6. See also at 10.

146 EEZ Act, s 87F(4). The High Court Judge pointed out that although neither the London Convention nor the associated 1996 London Protocol prohibited adaptive management in relation to dumping, it appeared that adaptive management was prohibited to ensure consistency with both MARPOL and the 1996 London Protocol: HC judgment, above n 43, at 80, citing Ministry of Transport and Ministry for the Environment, above n 125, at 111.

too suggests a greater concern by the legislature with protection of the environment than is the case for general marine consents. We interpolate here that we consider the submission for the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) goes too far, however, in saying that the unavailability of adaptive management means that an activity causing material harm must be prohibited. We say that because s 59(2)(j) – "the extent to which imposing conditions … might avoid, remedy, or mitigate the adverse effects of the activity" – still applies to applications for marine discharges as a matter the DMC must take into account.[147]

[85] The fact that there is a heightened threshold is also emphasised by the need to favour caution and environmental protection if there is uncertainty as to the information available.[148] In practice, the uncertainty is likely to relate to environmental effects. This more cautious approach is reflected also in the requirements applicable to the Minister in recommending the making of regulations relating to discharges and dumping, and that, in turn, imposes limits on what could otherwise become a permitted activity in terms of s 20C.[149]

[86] Obviously the relevant international obligations also provide an overlay to the approach to be taken. Section 11 provides that the EEZ Act "continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment". Section 11 provides that those conventions include: the United Nations Convention on the Law of the Sea 1982 (LOSC);[150] the

147 EEZ Act, s 87D(2)(a)(i).
148 Section 87E(2).
149 For example, unlike the position for regulations relating to cases requiring general marine consents, when developing regulations relating to discharges and dumping the Minister cannot take into account the economic benefit of an activity, the efficient use and development of natural resources and best practice in relation to an industry or activity: s 34A(3)(a). The Minister can however consider adaptive management as an approach that would allow a dumping or discharge activity to be classified as discretionary in circumstances where it would otherwise be prohibited due to the need to favour caution and environmental protection: see s 34(3), which s 34(1) says applies to regulations made under s 29A.
150 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) [LOSC].

Convention on Biological Diversity 1992;[151] MARPOL;[152] and the London Convention.[153]

[87] Of those instruments listed in s 11, the LOSC and the Convention on Biological Diversity apply directly. While MARPOL and the London Convention are also relevant, neither applies directly to TTR's application.

[88] The LOSC applies to activities in the EEZ.[154] The relevant part of the LOSC (Part XII) deals with the "protection and preservation of the marine environment". The "[g]eneral obligation" is set out in art 192, under which states "have the obligation to protect and preserve the marine environment". Relevant also is art 193, which recognises the national economic interests of states along with the duty to protect and preserve the marine environment. Art 193 provides that:

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

[89] Reference should also be made to art 194, which sets out obligations in relation to measures to prevent, reduce and control pollution of the marine environment. Under art 194(1), states parties are required to take:

> … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance

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151 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).

152 Art 1(2) to the Protocol of 1978 relating to MARPOL states that the provisions of the MARPOL Convention and Protocol shall be read and interpreted together as one single instrument.

153 Art 23 of the 1996 London Protocol provides that it supersedes the London Convention for those contracting parties to the Protocol which are also parties to the Convention.

154 Article 55 defines the EEZ and subjects it to the "specific legal regime" in Part V. Part V's regime is "characterized by a combination of selected exclusive rights and jurisdiction of the coastal State and rights and freedoms of other States": Alexander Proelss "Exclusive Economic Zone" in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, Munich, 2017) 408 at 409. Article 56(1)(a) provides that a coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" in the EEZ. Article 56(1)(b)(iii) states that the coastal state has jurisdiction, as provided for in the relevant provisions of the LOSC, with regard to "the protection and preservation of the marine environment". Thus, the general obligation in art 192 to protect and preserve the marine environment is applicable to activities in the EEZ of coastal states: Detlef Czybulka "Protection and Preservation of the Marine Environment" in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, Munich, 2017) 1277 at 1280.

> with their capabilities, and they shall endeavour to harmonize their policies in this connection.

[90] "Pollution of the marine environment" is a defined term and means:[155]

> … the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities[.]

[91] Art 194(3) provides that the measures taken need to deal with all sources of pollution of the marine environment. The measures are to include, amongst other things, "those designed to minimize to the fullest possible extent" pollution from various sources, including pollution from seabed activities subject to national jurisdiction. One commentator writes that the objective of art 194(3) "is not to eliminate pollution as such but to reduce it, thus minimizing it to the greatest extent possible".[156] That is seen as a "realistic approach, as otherwise most kinds of ocean uses would have to be banned".[157]

[92] Finally, art 208(1) provides for coastal states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction". Under art 208(3), the national legislation and regulations in this respect are to be "no less effective" than international rules. Unlike the position for dumping, the information we have is that international rules on seabed pollution subject to national jurisdiction are not commonplace.

[93] The case law and commentary on arts 192–194 of the LOSC suggest that what is envisaged is a balance between environmental protection and preservation (art 192) and the economic development of resources (art 193), but that the balance is tilted towards environmental protection. That environmental protection has priority over economic development is apparent in the wording of art 193 which provides that states

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155 Art 1(1)(4) definition of "pollution of the marine environment".

156 Czybulka, above n 154, at 1307.

157 At 1307. See also Joanna Mossop *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (Oxford University Press, Oxford, 2016) at 103.

can exploit resources "*in accordance with*" their duty to protect and preserve the environment.[158]

[94] That something less than absolute protection is envisaged is also reflected in the characterisation of the art 194(1) obligation as one of "due diligence" rather than strict liability, given the leeway in art 194(1) for states to prevent, reduce and control pollution "using the best practicable means at their disposal and in accordance with their capabilities".[159] Further, the International Tribunal for the Law of the Sea's (ITLOS) Advisory Opinion on Seabed Activities, to which we were referred, has said that the obligation of due diligence is a variable standard that changes over time and in relation to the risks, with the standard of due diligence being more severe for riskier activities.[160]

[95] The Convention on Biological Diversity has as its objectives:[161]

> … the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources…

[96] The Convention, like art 193 of the LOSC, provides that states have "the sovereign right to exploit their own resources pursuant to their own environmental policies".[162] Under art 6(a), each party shall "in accordance with its particular

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158 Emphasis added. See, for example, Elizabeth A Kirk "Science and the International Regulation of Marine Pollution" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 516 at 521; Czybulka, above n 154, at 1288; and Robin Warner *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff Publishers, Leiden, 2009) at 48.

159 Warner, above n 158, at 48, quoting Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 352. See also Donald R Rothwell and Tim Stephens *The International Law of the Sea* (2nd ed, Hart Publishing, Oxford, 2016) at 370. Sands and others describe art 194(1) as "introduc[ing] the element of differentiated responsibility based upon economic and other resources available": Phillipe Sands and others *Principles of International Environmental Law* (4th ed, Cambridge University Press, Cambridge, 2018) at 463. In the context of interpreting a bilateral treaty with similarly worded obligations to protect and preserve the environment and prevent pollution, see the comments of the International Court of Justice in *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits)* [2010] ICJ Rep 14 at [197]. See also at [116].

160 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Reports 10 [Seabed Advisory Opinion] at [117]. See further Mossop, above n 157, at 103–104.

161 Convention on Biological Diversity, above n 151, art 1.

162 Article 3.

conditions and capabilities … [d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity”.[163]

[97] We turn, then, to MARPOL and the London Convention and its associated 1996 Protocol (the 1996 London Protocol). MARPOL deals with marine pollution from ships.[164] The preamble to MARPOL states the parties’ wish “to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances”. Article 1(1), setting out the general obligations, accordingly requires parties “to prevent the pollution of the marine environment by the discharge of harmful substances … in contravention of the Convention”. MARPOL does not apply to discharges of harmful substances from ships that arise directly from seabed mining activities and is therefore not directly applicable to TTR’s application.[165]

[98] The London Convention deals with marine pollution from the dumping of waste and other matter.[166] As TTR’s application does not involve dumping as defined, this Convention is not directly applicable.[167] Under art 2 of the 1996 London Protocol, parties must “protect and preserve the marine environment from all sources of pollution and take effective measures, according to their … capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping”. But the

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163 There are other international instruments relevant to New Zealand’s obligations in terms of the LOSC. None of these add substantively to the present issue. In this category are the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region [1990] NZTS 22 (signed 24 November 1986, entered into force 22 August 1990) [Noumea Convention] and various soft law instruments endorsed by New Zealand, namely, the Rio Declaration on Environment and Development UN Doc A/Conf 151/26 (vol 1) (12 August 1992) [Rio Declaration] and *Agenda 21: Programme of Action for Sustainable Development* UN GAOR 46th Sess, Agenda Item 21, A/Conf 151/26 (1992) [Agenda 21]. The Noumea Convention and the Rio Declaration have provisions equivalent to arts 192 and 193 of the LOSC; that is, while emphasising the need for environmental protection, a state’s sovereign right to exploit resources is affirmed. Agenda 21 is an action plan “calling for the ‘further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns’”: James Crawford *Brownlie’s Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 339.

164 MARPOL, above n 125, preamble and art 2(3)(a).

165 Article 2(3)(b)(ii).

166 London Convention, above n 125.

167 Dumping is defined in art 3(1)(a)–(c). Art 3(1)(c) provides the “disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of sea-bed mineral resources will not be covered by the provisions of this Convention”.

Protocol, like the Convention, does not apply to the dumping of waste related to seabed mining activities.[168]

[99] We agree with the Court of Appeal that these instruments all inform the interpretation of the EEZ Act.[169] The effect of such instruments on interpretation is set out in this way by McGrath J in *Helu v Immigration and Protection Tribunal*:[170]

> [143] Parliament takes differing approaches to the implementation of international obligations. It sometimes gives them effect by incorporating their exact terms into New Zealand law. At other times, it enacts legislation, with the purpose of giving effect to such obligations, using language which differs from the terms or substance of the international text. In such cases, the legislative purpose is that decision-makers will apply the New Zealand statute rather than the international text. Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations. But the international text may not be used to contradict or avoid applying the terms of the domestic legislation.
>
> [144] Accordingly, if the legislation confers a discretion in general terms, without overt links to pertinent international obligations, the application of this principle of consistency may, depending on the statute and, in some instances, the nature of international obligation, require that the power is exercised in a manner consistent with international law. Or it may require that a decision maker take into account particular considerations arising from international instruments to which New Zealand is a party. If, however, Parliament has provided that a decision-maker is to have regard to specific considerations drawn from international obligations, the legislation must be applied in its terms, although they may be clarified by reference to the international instrument.

[100] The EEZ Act has been enacted with the purpose of giving effect to New Zealand's international obligations, but has used language which differs from the international texts. In such cases, as McGrath J says, the legislative purpose was that decision-makers would apply the EEZ Act rather than the international text, but resort can be had to the relevant international instruments to clarify the meaning of the Act.

[101] Here, neither the LOSC nor the Convention on Biological Diversity imposes absolute requirements on states parties to these Conventions. They do nonetheless

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[168] 1996 London Protocol, above n 125, art 1(4.3).

[169] See CA judgment, above n 45, at [269]–[270].

[170] *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 (footnotes omitted). See also at [207] per Glazebrook J in *Helu*; and *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96].

provide support for the proposition that s 10(1)(b) imposes a heightened threshold in favour of environmental protection. It is less clear in our view that the Court of Appeal is correct to say that the interpretation of the provisions in the Act dealing with marine discharges and dumping must take into account the objective of giving effect to MARPOL and the London Convention.[171] To put it another way, we do not see either instrument as adding to the effect of the LOSC or the Convention on Biological Diversity in the present case.

Conclusions on the correct approach to s 10(1)(b)

[102] When all of these features of the statutory scheme are considered, in disagreement with the majority, we do not consider it would be correct to describe s 10(1)(b) as creating an environmental bottom line.[172] Harm, even material harm, is not automatically decisive. The ongoing relevance of all but one of the considerations listed in s 59(2) to marine discharge applications is the strongest pointer against that. But the addition of s 10(1)(b) with its sole focus on protection must be given effect. As we see it, that will likely mean that the s 59 balancing exercise may well be tilted in favour of environmental factors, particularly when s 10(1) is read in light of the information principles, but that is a decision that will need to be made on a case-by-case basis having considered all of the relevant factors.

The information principles

[103] In accordance with s 10(3)(b) of the Act, the DMC was obliged to apply the relevant information principles. Those principles are, on our analysis, part of the decision-making criteria. Section 61 sets out the information principles applicable to the DMC's consideration of an application for a marine consent. Section 61(1) provides that the DMC must:

> (a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and
>
> (b) base decisions on the best available information; and
>
> (c) take into account any uncertainty or inadequacy in the information available.

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171 CA judgment, above n 45, at [28]–[29] and [88].

172 See below at [245] per Glazebrook J, [292] per Williams J and [305] per Winkelmann CJ.

[104] Under s 61(2), if, in making a decision under the Act, "the information available is uncertain or inadequate, the EPA must favour caution and environmental protection". If the effect of favouring caution and environmental protection is that "an activity is likely to be refused, the EPA must first consider whether taking an adaptive management approach would allow the activity to be undertaken".[173] Section 87E provides that the same principles apply to applications for marine discharge and dumping consents,[174] except, as discussed, there is no ability to take an adaptive management approach.[175] The relevant provisions also make clear, for the avoidance of doubt, that the EPA may refuse a general marine consent application or discharge or dumping consent application if it considers it does not have adequate information to determine the application.[176]

[105] As TTR submits, the information principles recognise that considerably less is known about the marine environment as opposed to the terrestrial environment.[177]

[106] A number of issues arise in respect of the information principles. We begin with TTR's challenge to the finding by the Court of Appeal that the requirement to favour caution and environmental protection in the Act is a statutory implementation of the "precautionary principle" in international environmental law.[178]

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173 EEZ Act, s 61(3). Section 61(4) states that s 61(3) does not limit ss 63 or 64.

174 Accordingly, and for convenience, our discussion refers to the information principles in s 61 even in relation to the discharge aspects of the application, except where it is necessary to refer to s 87F(4)'s prohibition on adaptive management for discharge applications.

175 In addition, applications for consent must include an impact assessment. That assessment must contain, among other things, information about the effects of the activity on the environment and existing interests in "sufficient detail" to enable an understanding of the nature of the activity and its effects. If the impact assessment does not comply with these requirements, the EPA may return the application as incomplete: see ss 38(2)(c), 39 and 41 in relation to marine consents and s 87B(2)(c) for discharge and dumping consents.

176 Sections 62(2) and 87F(3).

177 The Fisheries Act 1996 contains a similar set of information principles, including the requirement for decision-makers to be "cautious when information is uncertain, unreliable, or inadequate": s 10(c). Further, s 10(d) states that any uncertainty in information "should not be used as a reason for postponing or failing to take any measure to achieve the purpose" of the Act. In her dissenting reasons in *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [9], Elias CJ said s 10 meant "imperfect information" was not a reason "for postponing or failing to take measures to achieve the purpose of the Act".

178 CA judgment, above n 45, at [127]. Some states prefer to refer to a "precautionary approach", but for our purposes we do not need to deal with the difference (if any) between the two.

Implementation of the precautionary principle?

[107] This point can be dealt with briefly. As has been said in the commentary, "At its most basic, environmental precaution involves the idea that it is better to be safe than sorry when the effects of activities are uncertain."[179] The concern underlying the reference to the need to favour caution in the EEZ Act obviously reflects that idea. Further, two of the international instruments referred to in s 11 of the EEZ Act, the Convention on Biological Diversity[180] and the London Convention as modified by art 3(1) of the 1996 London Protocol (in respect of dumping), incorporate the precautionary principle and so are relevant to the interpretation of the phrase "favour caution".[181] The Rio Declaration on Environment and Development 1992 (Rio Declaration) and the Programme of Action for Sustainable Development (Agenda 21), both of which New Zealand has endorsed, also incorporate the precautionary approach.[182] That said, for the reasons we discuss, it is important to focus on the actual words used. The observations of McGrath J in *Helu*, discussed above, are apposite here.[183] The following points can be made.

[108] First, Parliament could have used the term the "precautionary principle" but did not. Rather, as TTR submits, the choice of the wording "favour caution" was a deliberate one reflecting the uncertainty around the "precautionary principle" at international law.[184] Given that uncertainty, the international instruments do not assist substantially in clarifying the interpretation of the statutory wording.

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179 Catherine J Iorns Magallanes and Greg Severinsen "Diving in the Deep End: Precaution and Seabed Mining in New Zealand's Exclusive Economic Zone" (2015) 13 NZJPIL 201 at 201. Jacqueline Peel "Precaution — A Matter of Principle, Approach or Process?" (2004) 5 MJIL 483 at 484 says the heart of the principle "is a reminder of the limitations of scientific knowledge as a guide to decision-making, and a warning to heed the lessons of the past to prevent the occurrence of environmental damage in the future".

180 Convention on Biological Diversity, above n 151, preamble.

181 The precautionary approach is incorporated into the RMA regime via Policy 3 of the New Zealand Coastal Policy Statement (NZCPS): Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

182 Rio Declaration, above n 163, at Principle 15; and Agenda 21, above n 163, at [17.1].

183 See above at [99].

184 A supplementary order paper which would have replaced the word "caution" with the words the "precautionary approach" was rejected: Supplementary Order Paper 2012 (103) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2012 (321-2). See also (21 August 2012) 683 NZPD 4601 where the Hon Nick Smith, the responsible Minister at the time of the Bill's introduction, referred to the uncertainty of the principle at international law.

[109] Second, there are suggestions that the "precautionary principle" may have a narrower effect than the wording adopted in the EEZ Act. This Court noted in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* that there is material in the international law context to support the view that "rather than being concerned with taking precautionary measures in allowing development, the term is more often used for advocating precautionary measures to protect the environment".[185] There is also debate in the international law context about the scope of the principle.[186] Further, the references to the principle in international instruments are not uniform. Under Principle 15 of the Rio Declaration, for example, the threshold is "threats of serious or irreversible damage" and the approach is only to be applied by states "according to their capabilities". By contrast, art 3(1) of the 1996 London Protocol refers to the application of a precautionary approach where the dumping of waste is "likely to cause harm".[187] Further, under the Protocol, dumping is not permitted unless specifically allowed.[188]

[110] These contextual matters serve to emphasise the importance of considering the way in which the concept is expressed in a particular context. The DMC was cognisant of this context. The DMC obtained legal advice from counsel assisting as to the relevance of New Zealand's international obligations including those relating to the precautionary principle. The DMC adopted the advice from counsel on this aspect.[189] That advice in turn adopted the advice given to the DMC that considered Chatham Rock Phosphate Ltd's application, noting the absence of any universal approach to applying the precautionary principle and that the language of s 61 could "be taken to embody" that principle. The advice also noted that this interpretation was supported by the legislative history. The opinion concluded there was no need for the DMC to

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185 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [109], n 208. The Court referred in that context to the International Union for Conservation of Nature "Guidelines For Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management" (as approved by the 67th meeting of the IUCN Council 14–16 May 2007). For a discussion of the precautionary principle in international law, see Sands and others, above n 159, at 229–240; and World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) *The Precautionary Principle* (United Nations Educational, Scientific and Cultural Organization, March 2005).

186 See, for example, Peel, above n 179, at 500.

187 The preamble to the Convention on Biological Diversity, above n 151, adopts the precautionary principle, referring to "a threat of significant reduction or loss of biological diversity".

188 See 1996 London Protocol, above n 125, art 4(1).

189 DMC decision, above n 38, at [40]–[41].

apply a precautionary approach in addition to the requirement to favour caution and that it was not clear what practical distinction there was between the requirement in s 61(2) and the precautionary principle as it is "generally understood".[190]

[111] There is no apparent reason to read down the wording adopted in the EEZ Act. Against the background outlined above, we see no reason to depart from the ordinary meaning of those terms. The dictionary definition of "favour" includes "[t]reat with partiality" and "have a liking or preference for", and "caution" means "a taking of heed", "[p]rudence", "taking care" and "attention to safety, avoidance of rashness".[191]

[112] Finally, we do not consider that Kiwis Against Seabed Mining Inc (KASM) and Greenpeace of New Zealand Inc's reliance on the ITLOS Advisory Opinion or on the International Seabed Authority Regulations assists. These regulate seabed activities in areas beyond national jurisdiction (the Area) to which a different international regime applies.[192]

[113] In conclusion, for these reasons, we do not consider the DMC misdirected itself when it summarised the test as imposing "no requirement … to apply a precautionary approach". When faced with uncertainty, as the DMC said, it was "required to favour caution".[193] As the DMC was advised, this, in any event, accords with the precautionary principle as it is generally understood.

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190 See also Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consent Application – Chatham Rock Phosphate Ltd – To mine phosphorite nodules on the Chatham Rise* (February 2015) at [838].

191 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 1), above n 131, at 363 and 932.

192 LOSC, above n 150, Part XI. For an explanation of the international regime for seabed activities in the Area, see Joanna Dingwall "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework" in Catherine Banet (ed) *The Law of the Seabed: Access, Uses, and Protection of Seabed Resources* (Koninklijke Brill NV, Leiden, 2020) 139.

193 DMC decision, above n 38, at [40]. Nor is it necessary for us to resolve whether the precautionary principle is a mandatory consideration as "other applicable law" under s 59(2)(l) of the EEZ Act for the reasons discussed below at n 290.

The link between s 87E and s 10(1)(b)

[114] After addressing the relevance of the precautionary approach, the DMC considered it was sufficient to impose conditions managing the potential effects on the environment.[194]

[115] The Court of Appeal considered that while the DMC understood the requirement that it favour caution, it was apparent that the DMC "did not put the same emphasis on the requirement to favour environmental protection, despite the reference to that requirement in s 87E(2)".[195] It was important to recognise that the information principles operate differently in the context of discharge consents compared to marine consents generally. That was because, on the Court's analysis, the environmental bottom line in s 10(1)(b) applied to discharge consents.[196]

[116] Reflecting the respective views on s 10(1)(b), TTR submits the Court of Appeal has in this way erroneously imposed a gloss on the requirement in s 87E, whereas the first respondents support the Court of Appeal's approach.

[117] It follows from our approach to s 10(1)(b) that we disagree with the Court of Appeal that the DMC erred because it did not consider the effect of that section as the Court of Appeal interpreted s 10(1)(b), that is, as providing absolute protection from material harm.[197] We take the view that it is possible that even material harm may be able to be mitigated, avoided or remedied by conditions. Accordingly, we also accept TTR's proposition that consents may be granted subject to conditions even when the full information may not be available in a particular case so long as taking a cautious approach means that harm can be avoided, remedied or mitigated. As we have accepted, however, the effect of the information principles in the context of applications for a marine discharge may nonetheless tilt the balance in favour of environmental protection.

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194 At [40]. The DMC also added that s 61(2) required it to "favour environmental protection in addition to caution, if the information we receive is uncertain or inadequate": at [42]. The DMC said that some of the information it received did have uncertainties, noting that it was "in that context, for the purpose of environmental protection, that we have imposed a suite of conditions to avoid, remedy or mitigate environmental effects": at [44].

195 CA judgment, above n 45, at [118].

196 At [129].

197 Compare at [274] per Glazebrook J, [294] per Williams J and [327] per Winkelmann CJ.

Did the DMC comply with the requirement to favour caution and environmental protection?

[118] As the High Court noted, the fact the DMC did not err in law in the way it formulated the test is a "different question to whether or not they actually applied an approach which 'favoured caution and environmental protection'".[198] It is helpful to address this question by considering the approach taken by the DMC in relation to the effects of TTR's application on seabirds and marine mammals. The Court of Appeal took the view that the uncertainty identified by the DMC in relation to seabirds and marine mammals, which was reflected in the conditions imposed, activated the requirement to favour caution and environmental protection. The Court concluded that granting consent based on this level of information and on these conditions was inconsistent with the requirement to favour caution and environmental protection.

[119] There was information showing the presence of a diverse range of seabirds and marine mammals in the general region of which the South Taranaki Bight forms a part. There was also a lack of information available about these species and, as a result, difficulty in assessing the risks or effects on these species in particular areas and in assessing the effects on them of particular aspects of the mining operation.

[120] In terms of seabirds, the DMC noted the "diverse range" of seabirds either passing through or foraging in the South Taranaki Bight but said that there had been "no systematic and quantitative studies of the at-sea distributions and abundances of seabirds within the area".[199] Regarding potential effects on seabirds, the experts agreed that they included the sediment increasing turbidity and reducing light intensity within the water column, and mortality from vessel strike for seabirds attracted to artificial nocturnal light from the mining vessel. But the experts disagreed on the potential for other effects on foraging efficiency and food availability, and also as to the scale and consequences of any effects.[200] Ultimately, the DMC concluded there was a "lack of detailed knowledge about habitats and behaviour of seabirds" in the

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198 HC judgment, above n 43, at [337].

199 DMC decision, above n 38, at [563]. The experts for TTR and Kiwis Against Seabed Mining Inc (KASM)/Greenpeace of New Zealand Inc agreed a number of "threatened" and "at risk" taxa occur within the South Taranaki Bight year-round or seasonally (conservatively, 10 and 24 taxa respectively).

200 The expert for KASM/Greenpeace was of the view that mining would have adverse effects on seabirds, while the expert for TTR was of the view there would be no adverse effects.

area and said it was therefore “difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself”.[201]

[121] The marine mammals in the general region of which the South Taranaki Bight forms a part include the Māui dolphin, killer whale and Bryde’s whale, all of which are nationally critical species, as well as the Hector’s dolphin, bottlenose dolphin and the southern right whale, which are nationally endangered or vulnerable species. There was also evidence of blue whale, a migratory species that is internationally critically endangered. But, as the Court of Appeal noted, there was incomplete evidence about habitats and population numbers in the area and that evidence was subject to various uncertainties.[202] There were also uncertainties about effects, particularly of noise, on marine mammals. The DMC, the Court of Appeal said, accepted “the absence of comprehensive well-researched species-specific and habitat-specific information about noise effects on marine mammals”.[203]

[122] The DMC responded to these uncertainties by including various conditions concerning seabirds and marine mammals in the consents. Condition 9 in relation to seabirds required TTR to comply with various matters including that there be “no adverse effects at a population level” of seabirds that fell within various categories of the New Zealand Threat Classification System, including those that are “Nationally Endangered” or “Nationally Critical”. The condition then set out a non-exhaustive list of what comprised adverse effects, for example, effects arising from lighting or from the effect of sediment in the water column on diving birds that forage. These adverse effects were to be mitigated and, where practicable, avoided. A similar approach, that is directing that there be no adverse effects at a population level, was found in condition 10, which applied to the various marine mammal species listed. Condition 10 further provided that adverse effects on marine mammals, including those arising from noise, were to be “avoided to the greatest extent practicable”. There was also a condition, condition 11, imposing limits on underwater noise generated by the operation of marine vessels and project equipment.

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201 At [579].
202 CA judgment, above n 45, at [244].
203 At [244], citing DMC decision, above n 38, at [544].

[123] The second aspect of the conditions imposed affecting seabirds and marine mammals was the provision for pre-commencement environmental modelling, that is, two years of environmental monitoring to be undertaken before mining operations begin. The list of matters to be monitored in condition 48 included seabirds, marine mammals and sediment concentrations and quality. The Court of Appeal described the pre-commencement monitoring in this way:[204]

> The purpose of the pre-commencement monitoring would include establishing a set of environmental data that identifies natural background levels while taking into account spatial and temporal variation of the various matters to be included in the plan. The pre-commencement monitoring would, among other matters, inform preparation of an Environmental Management and Monitoring Plan (EMMP) in accordance with condition 55. The EMMP would be submitted to the EPA for certification that it meets the requirements of the relevant conditions (with certification deemed to have occurred if the EPA has not given a decision within 30 working days). Condition 54 then requires ongoing environmental monitoring of a range of matters including marine mammals, to be undertaken in accordance with the EMMP.

[124] Finally, conditions 66 and 67 required TTR to prepare a Seabird Effects Mitigation and Management Plan and Marine Mammal Management Plan setting out how compliance with conditions 9 and 10 about adverse effects at the population level for seabirds and marine mammals were to be met. For seabirds, the plan had to include indicators of adverse effects at a population level of seabird species that utilise the area, and this plan was to be submitted to the EPA for certification that the requirements of the condition have been met. The plan for marine mammals was along similar lines.

[125] It is plain that the information available about the environmental effects on seabirds and on marine mammals was uncertain. It is sufficient to quote the DMC's conclusion in relation to seabirds that, because of the lack of detailed knowledge about habitats and behaviour of seabirds in the South Taranaki Bight, it was "difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself".[205] The obligation to favour caution and environmental protection was accordingly triggered.

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204 At [250].

205 DMC decision, above n 38, at [579]. The Pātea Shoals was an area of particular focus in the DMC's decision.

[126] Forest and Bird says the DMC could not remedy the uncertainty in information by granting consent subject to the conditions that TTR gather information post-approval and prepare management plans. Forest and Bird also says the imposition of very general conditions, leaving specific controls to management plans, was too uncertain, unlawfully delegated decision-making power and deprived submitters of participation rights.

[127] TTR, however, says the DMC's approach was sufficient for a number of reasons. First, the pre-commencement monitoring conditions will provide any further necessary information. Second, the conditions imposed were sufficiently specific and set clear limits, noting for example that the phrase "population level" is a term of art, and experts called upon to consider compliance will be able to determine whether or not that is met. TTR also notes that the DMC's conditions relating to noise levels and marine mammals adopted recognised noise standards. The matters left to the management plans were, TTR says, technical details. Third, TTR says that conditions 66 and 67, in indicating a list of adverse effects, provide sufficient protection. In other words, TTR says that the requirement to favour caution and environmental protection was met by this combination of conditions. Finally, because the appeal is limited to questions of law, TTR maintains that the respondents have to show that the DMC's approach was so wrong that it has effectively misdirected itself.

[128] As discussed, on our approach to s 10(1)(b) and the information principles, we accept TTR's proposition that consents may be granted subject to conditions even when the full information may not be available in a particular case, so long as taking the cautious approach means that harm can be avoided, remedied or mitigated. That is not to say that, as TTR submits, the purpose of the information principles is to facilitate the granting of consents. Accordingly, on our analysis, the key question in terms of the requirement to favour caution and environmental protection is whether the Court of Appeal was right in its conclusion that by granting the consents on the broad terms it did, the DMC did not meet that requirement.

[129] The difficulty with the conditions imposed in terms of the requirement to favour caution and environmental protection in this case is twofold. First, given the uncertainty of the information, it was not possible to be confident that the conditions

would remedy, mitigate or avoid the effects. Second, the physical environment in the South Taranaki Bight is, as the DMC said, "challenging, dynamic and complex".[206] The margins involved in relation to seabirds and marine mammals in the area may be extremely fine, with the outcomes turning on those margins extreme. To take just one example, for those dolphin species which are critically endangered, a very small change in population could have a disastrous effect. But conditions 9 and 10 do not respond to or reflect this because the population level that is problematic is not defined. The end result is that the DMC simply could not be satisfied that the harm could be remedied, mitigated or avoided.

[130] A very basic way of putting the problem is that as a result of the uncertainty of the information, it could not be known whether the death of one or 10 Hector's dolphins would be treated as an adverse effect at a population level or not. We consider in those circumstances the DMC had to say something more than "at a population level" in terms of how the adverse effect would be measured and that not doing so was an error of law. We accept that in other contexts, it may be sufficient to require an absence of adverse effects, for example, where the effects of noise can be measured against a standard. And in other cases, it may be sufficient to impose a condition effectively requiring that no damage be done. But the particular factual situation here is quite different, and the DMC has misdirected itself in concluding that such conditions are adequate to avoid, remedy or mitigate adverse effects. Accordingly, although the DMC cited the correct test, it did not apply that test, which is an error of law.[207]

[131] We have focused on the conditions relating to seabirds and marine mammals as the most obvious illustration of the problems. But we agree with the Court of Appeal that there are similar problems in terms of the uncertainty as to the effects caused by the sediment plume and the associated conditions dealing with suspended sediment levels, although we base that on the need to favour caution and environmental protection rather than s 10(1)(b) per se.[208]

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206 At [931].

207 We do not accept TTR's submission that it is necessary to show that the likely resultant degradation is so extreme that no reasonable person properly directing themselves could countenance it or come to the same conclusion.

208 CA judgment, above n 45, at [259(b)].

[132] Before leaving this topic, we very briefly address the argument for Forest and Bird that the pre-commencement monitoring conditions are ultra vires on the basis that they were not imposed to deal with adverse effects, but rather were conditions imposed for the purpose of baseline investigation and identifying effects. This is a reference to s 63(1) of the EEZ Act, which allows conditions to be imposed "to deal with adverse effects of the activity authorised by the consent on the environment or existing interests". On this topic, we agree with the Court of Appeal that the relevant conditions came within the statute because they ensure that adverse effects can be identified and a response provided.[209] Section 63(2)(a)(iii) anticipates conditions which "monitor, and report on, the exercise of the consent and the effects of the activity" authorised. Section 66(1) also makes it clear that a condition imposed under s 63(2)(a)(iii) may require the consent holder to undertake a range of activities directed towards monitoring, for example, making measurements, taking samples, and undertaking analyses or other specified tests.

[133] We do not agree, however, with the Court of Appeal that dealing with aspects of the conditions via management plans was inconsistent with the public participation rights in the EEZ Act.[210] Rather, we consider that TTR is right that in this case that was not an issue because drafts of the plans were included with the application for consent as lodged. That was sufficient in this case to enable public participation.

"Best available information"?

[134] The last of the issues relating to the information principles requires consideration of the joint submission for KASM/Greenpeace that the Court of Appeal erred in concluding that the DMC had not applied the wrong legal test for whether it had the "best available information" as required by the information principles. "Best available information" is defined to mean "the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".[211]

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209 At [272].
210 At [259(c)]. Compare at [277]–[278] per Glazebrook J, [295] per Williams J and [329] per Winkelmann CJ.
211 EEZ Act, ss 61(5) and 87E(3).

[135] The Court of Appeal agreed with the High Court[212] that this challenge to the DMC's decision did not raise a question of law.[213] The Court said that the DMC was required to decide "in the exercise of its judgment, whether it had obtained the best available information and then proceed to make its substantive determination".[214] We agree. We accept the submissions for TTR that the DMC correctly set out its understanding of the requirement to use the best information and carefully explained the steps it took to satisfy itself that this requirement was met. In terms of s 61(1)(a), the DMC made use of its powers to request further information and to obtain advice.[215] The view that sufficient information had been received to enable a decision to be made was the unanimous decision of the DMC.[216]

[136] KASM/Greenpeace submit that the imposition by the DMC of the pre-commencement monitoring conditions demonstrated that the best available information had not been obtained before granting the consent. The argument is that the information that could be obtained from the pre-commencement monitoring was obtainable without unreasonable cost, effort or time and hence represented the best available information. Accordingly, KASM/Greenpeace argue the DMC should have required this information before granting the consent, rather than granting the consent in the absence of this information with the condition that TTR gather this information at a later time.[217]

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212 HC judgment, above n 43, at [294].

213 CA judgment, above n 45, at [267].

214 At [266].

215 In the DMC decision, above n 38, at [21], the DMC set out the further requests for information which it made to TTR encompassing a number of issues, including effects on plankton, fish and marine mammals, worst-case sediment plume modelling, noise modelling not based on a simple spherical approach, and questions for TTR's noise expert. The DMC also set out at [18] and [26] the various sources of information on which it relied, which included requiring experts to confer, considering submissions, expert and non-expert evidence, and taking expert and legal advice in relation to a range of issues.

216 Environmental Protection Authority | Te Mana Rauhī Taiao *Trans-Tasman Resources Limited (TTRL) iron sand extraction and processing application: M46 – Minute of the Decision-making Committee – 31 May 2017* at [2]. Contrary to the notice to support on other grounds filed by KASM/Greenpeace, nothing turns on the use of the word "sufficient" information in this minute given the other explanations within the DMC decision which show an appreciation of the standard required. This point was not developed in the written submissions or oral argument for KASM/Greenpeace.

217 The Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) made submissions of a similar tenor.

[137] That submission conflates satisfying the requirement to have the best available information with the need to favour caution and environmental protection if information is uncertain. As the Court of Appeal noted, if the information was not adequate to support a consent, then the consent would be refused. Inadequacies "in the information available to the DMC would disadvantage the applicant", not others.[218] Mr Makgill, on behalf of the various fisheries organisations, also made the point that if the presumption is that the best available information meant there was enough information on which to grant consent, that would obviate the need for the other requirements such as the need to favour caution and environmental protection.

[138] We add that the DMC recorded that its approach was to reduce uncertainty whilst recognising that the cost of supplementing some of the information about the marine environment by requiring further surveys would not meet the definition of "best available information" in the Act.[219] That was an orthodox approach to the statutory definition of "best available information", given the qualifier that the information be available "without unreasonable cost … or time". The DMC was required to make a factual assessment of what constituted unreasonable cost and delay in the circumstances of this case.

The place of the Treaty of Waitangi and customary interests

[139] In addressing this aspect of the appeal, two questions arise. The first relates to the effect of s 12 of the EEZ Act, which sets out the way in which the Crown's responsibilities in terms of the principles of the Treaty of Waitangi are to be given effect. The second question concerns the effect of the requirement that the DMC must take into account any effect on existing interests of allowing the activity that is the subject of the application for a marine consent. The two questions are interrelated.

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218 CA judgment, above n 45, at [266].
219 DMC decision, above n 38, at [13].

The relevant provisions

[140] Section 12 is in the following terms:

> **12 Treaty of Waitangi**
>
> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
>
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise the Environmental Protection Authority so that decisions made under this Act may be informed by a Māori perspective; and
>
> (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
>
> (c) sections 33 and 59, respectively, require the Minister and the EPA to take into account the effects of activities on existing interests; and
>
> (d) section 45 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

[141] In relation to existing interests, there are two key provisions. First, as noted above, the relevant part of s 59 provides that the DMC must take into account "any effects on the environment or existing interests of allowing the activity".[220] The DMC must also take into account "the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity".[221]

[142] "Existing interest" is defined in s 4(1) as follows:

> **existing interest** means, in relation to New Zealand, the exclusive economic zone, or the continental shelf (as applicable), the interest a person has in—
>
> (a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing:

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220 EEZ Act, s 59(2)(a). "Effect" is broadly defined in s 6(1) and in s 59(2)(a) "effects" include both cumulative effects and effects occurring in the waters above or beyond the continental shelf beyond the outer limits of the EEZ.

221 Section 59(2)(b).

> (b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62:
>
> (c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991:
>
> (d) the settlement of a historical claim under the Treaty of Waitangi Act 1975:
>
> (e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:
>
> (f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011

[143] In relation to para (f) of the definition of existing interests, s 4(1) defines "protected customary rights group" as having the same meaning as that in s 9(1) of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act).[222] That definition in turn refers to a group to which a "protected customary rights order" applies, where both "protected customary rights order" and "protected customary rights" are also defined in s 9(1).

[144] Second, reference should be made to s 60 of the EEZ Act, which sets out the matters to be considered in deciding the extent of adverse effects on existing interests. Those matters are as follows:

> (a) the area that the activity would have in common with the existing interest; and
>
> (b) the degree to which both the activity and the existing interest must be carried out to the exclusion of other activities; and
>
> (c) whether the existing interest can be exercised only in the area to which the application relates; and
>
> (d) any other relevant matter.

222 Section 4(1) definition of "protected customary rights group". In the Marine and Coastal Area (Takutai Moana) Act 2011, a "protected customary right" is defined in s 9(1) as "an activity, use, or practice— (a) established by an applicant group in accordance with subpart 2 of Part 3 [which addresses establishment of protected rights]; and (b) recognised by— (i) a protected customary rights order; or (ii) an agreement".

The approach in the Court of Appeal

[145] The approach of the Court of Appeal to these questions can be summarised briefly. The first point to note is that the Court decided that it was not necessary to resolve the question of whether s 12 is exhaustive or, as the iwi parties submitted in this Court, a "non-exhaustive way of directing attention to those sections in the EEZ Act that are of particular significance" in relation to the Treaty. That was because the correct focus was on making sure that the provisions referred to in s 12, especially s 59 in relation to existing interests, were interpreted correctly.[223] As the Court saw it, that required existing interests in s 59(2)(a) to include the interests of Māori in respect of all of the taonga referred to in the Treaty.[224] Further, the Court said that all customary rights and interests relating to the natural environment (whether or not they are referred to or recognised in a Treaty settlement) and relating to claims under the MACA Act were existing interests.[225] The Court found that the DMC had not approached its task in this way and, at the least, should have given reasons to justify determining that these interests were appropriately overridden.[226]

The effect of s 12

[146] The challenge to the findings of the Court of Appeal by TTR and, at least to some extent, the Attorney-General requires consideration of the effect of the deliberate absence in the EEZ Act of any direction requiring the decision-maker, the DMC, to give effect to the principles of the Treaty of Waitangi. To illustrate the point, TTR highlights the difference between s 12 of the EEZ Act and s 4 of the Conservation Act 1987. The latter provides that the Conservation Act is to be "interpreted and administered [so] as to give effect to the principles of the Treaty of Waitangi".

[147] The submission that the difference between the method adopted to address Treaty obligations in the EEZ Act and that in other statutes such as the Conservation Act reflected a deliberate choice draws some support from the legislative history of s 12. Relevantly, in the EEZ Bill as introduced, the clause that became s 12 referred

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223 CA judgment, above n 45, at [162].
224 At [163].
225 At [167]–[168].
226 At [175] and [178]–[179].

to the Crown's responsibility to "take appropriate account" of the Treaty.[227] The Select Committee considering the Bill recommended that the clause be amended "to give effect to the principles of the Treaty of Waitangi" through the specified provisions.[228] That change was made, but a supplementary order paper which would have added in a new subsection like that in s 4 of the Conservation Act stating that the Act "must be interpreted and administered so as to give effect to the principles of the Treaty" was rejected.[229]

[148] The legislative history, however, only takes the matter so far. While the amendments proposed in the supplementary order paper were not accepted, the clause was strengthened in accordance with the Select Committee's recommendation.[230]

[149] In any event, s 12 does not limit or constrain the DMC in the way that TTR and the Attorney-General suggest. When read with s 59, as s 12(c) itself directs, s 12 requires the DMC to take into account the effects of the activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty.[231] That is a strong direction. And that direction can only be given effect through the way in which the DMC interprets and applies the relevant factors in s 59(2).

[150] Ultimately, it was not contended that s 12 has the effect of ousting Treaty principles. That is not surprising, given the Treaty's constitutional significance. The broader, constitutional context in which Treaty clauses like s 12 are to be interpreted has been the subject of attention in the authorities. Chilwell J in *Huakina Development Trust v Waikato Valley Authority* made the point that the cases "show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute" of the Crown's Treaty obligations.[232] Of that statutory recognition, s 12 illustrates the trend in more recent

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227 EEZ Bill, above n 81, cl 14.

228 EEZ Bill (select committee report), above n 113, at 4.

229 Supplementary Order Paper 2012 (96) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2). See (16 August 2012) 682 NZPD 4518–4519.

230 See the responsible Minister's speech in (30 May 2012) 680 NZPD 2733–2734.

231 An analogy can be drawn with the interrelationship between ss 9 and 27 of the State-Owned Enterprises Act 1986 considered by the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands case*] at 658 per Cooke P.

232 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

statutes to give a greater degree of definition as to the way in which the Treaty principles are to be given effect and a departure from the more general, free standing Treaty clauses like that in s 4 of the Conservation Act.[233] The author of *Burrows and Carter Statute Law in New Zealand*, for example, notes that in recent years there has been a move towards precise consideration of how Parliament "wants particular legislative schemes to provide for and protect Māori interests in the light of the Crown's responsibility under the Treaty".[234]

[151] But the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question.[235] It ought to follow therefore that Treaty clauses should not be narrowly construed.[236] Rather, they must be given a broad and generous construction.[237] An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[238]

The scope of "existing interests" in s 59(2)(a) and the application of those interests

[152] Whether or not there are existing interests has considerable impact in terms of the procedure applicable to an application for a marine consent as well as on the substantive decision-making process. There are various provisions in the EEZ Act which require the identification of existing interests[239] and action subsequent on such

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233 Carter, above n 84, at 697–699.

234 At 697. See also Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 96–101 and 183–184; and Legislation Design and Advisory Committee *Legislation Guidelines* (2018) at ch 5.

235 *Huakina*, above n 232, at 210 and 233; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46].

236 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whales case*] at 558.

237 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [*Coals case*] at 518; and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]–[54].

238 See similarly *Lands case*, above n 231, at 655–656 per Cooke P.

239 See EEZ Act, ss 38(2)(c) and 39(1)(c)–(d). The same approach applies to applications for marine discharge or dumping consents: s 87B(2)(c).

identification, for example, the giving of notice.[240] Further, on a review of the durations or conditions of a marine consent, the EPA can cancel the consent if the activity has significant adverse effects on the environment or existing interests.[241]

[153] Against this background, TTR says the terms of s 12 mean that the Court of Appeal was wrong in its approach to the meaning of "existing interests" in s 59(2)(a). TTR also says that the Court erred in concluding that the DMC was required to, and did not, "engage meaningfully" with the impact of TTR's application on the "whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment".[242] Similarly, the Attorney-General submits that the Court of Appeal's approach is inconsistent with the statutory history, scheme and purpose.

[154] The iwi parties submit that giving appropriate recognition to Treaty principles in terms of s 12 means that the Court of Appeal was right to conclude that tikanga-based customary rights and interests are existing interests under s 59(2)(a). The submission is that, accordingly, the existing interests that the DMC needed to consider here are kaitiakitanga of iwi of their relevant rohe; rights recognised by the MACA Act; and interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[243] We agree. That follows from the guarantee in art 2 of the Treaty of tino rangatiratanga in the context of the marine environment.[244] The answer to the submission that the Court of Appeal goes too far in treating all customary interests in this context as existing interests is found in that guarantee. Further, as the Court of

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240 Section 45(1)(d). The same procedure applies to applications for marine discharge and dumping consents: s 87C(1). The probability of significant adverse effects on the environment or existing interests must be considered when determining whether a discretionary activity can be treated as non-notified in regulations: s 29D(2)(a).

241 Section 81(3).

242 CA judgment, above n 45, at [174]. See also at [175].

243 The iwi parties adopt the following definition of kaitiakitanga: "the obligation to care for one's own", citing Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 3. The author also emphasises the importance of whanaungatanga to kaitiakitanga (and other core values), as "the glue that … holds the system together" and "the fundamental law of the maintenance of properly tended relationships": at 4. See also Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 13, where the Tribunal describes how Kupe's people brought with them Hawaikian culture which "enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) it also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga)".

244 To the extent the Court of Appeal's approach may suggest the environment as a whole to be a taonga in the way that term is used in the Treaty, we disagree. See the discussion in Waitangi Tribunal, above n 243, at 269.

Appeal notes, the processes such as that provided for by the MACA Act are not the source of such customary interests but rather provide a mechanism for their recognition.[245] Thus, we agree with the Court of Appeal that rights claimed under the MACA Act but not yet granted may qualify as "existing interests" under para (a) of the definition.[246] It may be that there are questions to be resolved to clarify the nature and extent of existing interests in a particular case, but that is an evidential issue and not an obstacle to the interpretation adopted by the Court of Appeal.

[155] In challenging the Court of Appeal's approach, TTR emphasises that existing interests in the EEZ Act reflect the interests a person has in any lawfully established activity rather than the relationship a person has with a particular resource.[247] However, as the iwi parties submit, practice and principle in this respect are intertwined. Kaitiakitanga manifests itself in an activity. Nor do we find persuasive TTR's submission that New Zealand's limited "sovereign rights" in the EEZ,[248] where the proposed seabed mining will take place, means that case law on how the principles of the Treaty are to be recognised by decision-makers under other environmental legislation has little relevance. The nature of New Zealand's rights does not dictate the scope of existing interests in the EEZ Act.[249]

[156] As noted, the Court of Appeal also found that the DMC was required to "[give reasons] to justify a decision to override existing interests of this kind".[250] The

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[245] CA judgment, above n 45, at [168].

[246] At [168]. There is support for this approach in decisions of the Supreme Court of Canada which recognise the Crown's duty to consult (and where necessary, accommodate) indigenous peoples in relation to aboriginal title and rights extended to situations where the aboriginal rights and title had not yet been proved: see, for example, *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511. More recent Supreme Court of Canada decisions have confirmed that the Crown can rely on steps taken by an administrative body or regulatory agency to partially or completely fulfil its duty to consult and accommodate: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* 2017 SCC 41, [2017] 1 SCR 1099; and *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40, [2017] 1 SCR 1069.

[247] The EPA makes a similar submission.

[248] LOSC, above n 150, arts 55–56. See Scott Davidson and Joanna Mossop "Law of the Sea" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 687 at 701; and Proelss "Exclusive Economic Zone", above n 154, at 409 and 416.

[249] The distinction between waters and seabed within New Zealand's territorial sea and EEZ has legal implications, but as noted by commentators, from the perspective of te ao Māori, this division is immaterial: see Andrew Erueti and Joshua Pietras "Extractive Industry, Human Rights and Indigenous Rights in New Zealand's Exclusive Economic Zone" (2013) 11 New Zealand Yearbook of International Law 37 at 66; and Benjamin Ralston and Jacinta Ruru "Landmark EPA Decision" [2014] NZLJ 284 at 285.

[250] CA judgment, above n 45, at [171].

Attorney-General submits that this imposes an unduly high standard where the requirement in s 59 is to take account of the listed factors.

[157] Plainly, the DMC must give reasons: s 69 of the EEZ Act says as much. However, that requirement must be tempered by the fact that this is an area where it may not be possible to do much more than explain the balance struck, having set out the evidence for the findings of fact on which that balance depends.[251] It also needs to be kept in mind that the DMC is not a judicial body, but is comprised of lay members.[252] Further, the DMC has to work within the statutory time limits, and the subject matter which the DMC has to deal with in a case like the present is complex and will often involve measuring incommensurable values.[253] In context then, and as we understand the Attorney-General accepts, where there are a number of factors to be taken into account and interests relevantly reflecting Treaty obligations, the decision-maker will need to explain, albeit briefly, the way in which the balance has been struck.

[158] The next question is whether the DMC approached these matters correctly. In supporting the analysis adopted by the Court of Appeal, the iwi parties used the following statement from Ngā Rauru to the DMC to illustrate the significance and effects of TTR's application on the environment and the relevant iwi:

> [W]e submit that seabed mining is an experimental operation and that it will have destructive effects on our marine environment, marine species and people. As kaitiaki we cannot support this activity. It is the absolute antithesis of what we stand for. … Seabed mining effects are a violation of kaitiakitanga. … [A]s kaitiaki, we, as Ngā Rauru Kītahi, are defenders of the ecosystems and its constituent parts. We believe that everything has a mauri or a life force and that mauri must be protected.

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251 See *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [81]; and Harry Woolf and others *De Smith's Judicial Review* (8th ed, Thomson Reuters, London, 2018) at [7-105]–[7-106]. See also *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345.

252 Accordingly, reasons of the detail and scope of legal reasoning normally expected in High Court judgments are not required: GDS Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 318, 322 and 327; and Woolf and others, above n 251, at [7-105].

253 In the context of the values set out in s 5(2) of the RMA, Royden Somerville notes the difficulties that may arise in balancing incommensurable values where there is no common measure to undertake that balancing: *Resource Management* (online ed, Thomson Reuters) at [IN4.06]. See also *Helu*, above n 170, at [221] per William Young and Arnold JJ (dissenting).

[159] In this case, as we shall explain, we see the DMC's error as the failure to properly engage with the nature of the interests affected rather than the absence of reasons. The DMC did consider a range of interests including kaitiakitanga, noting that the legal advice it received stated that the lawful exercise of kaitiaki responsibilities might fall within the scope for consideration of effects under s 59(2)(a).[254] The DMC also said it took into account the duty of active protection of Māori interests,[255] although it concluded that the relevant interests of iwi could be met through the conditions imposed. Of particular relevance were the conditions relating to the direction to TTR to offer to establish and maintain a "Kaitiakitanga Reference Group" with the purpose of, amongst other things, recognising the kaitiakitanga of tangata whenua and the establishment of the kaimoana monitoring programme, which would be required to operate even in the absence of iwi engagement in the Reference Group.[256]

[160] However, despite the references to the effect of the proposal on kaitiakitanga and the mauri of the marine environment, the DMC did not effectively grapple with the true effect of this proposal for the iwi parties or with how ongoing monitoring could meet the iwi parties' concern that they will be unable to exercise their kaitiakitanga to protect the mauri of the marine environment, particularly given the length of the consent and the long-term nature of the effects of the proposal on that environment.

[161] What was required was for the DMC to indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply. Here, while there was some reference to spiritual aspects, the primary focus does appear to have been on physical and biological effects, for example, of the sediment plume.[257] Further, while the DMC acknowledged there would be "some impact" on kaitiakitanga, mauri and other cultural values, that significantly underrated the effects.[258] The DMC then needed to explain, albeit briefly, why these existing interests were outweighed by other s 59

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[254] DMC decision, above n 38, at [647].
[255] At [716].
[256] See at [726] and [728]–[729].
[257] At [721]–[725].
[258] At [727]. See also at [728].

factors, or sufficiently accommodated in other ways. Further, also reflecting the advice it had received, the DMC did not consider that the as yet unrecognised claims made by iwi under the MACA Act were existing interests, and nor was this a situation where these "future possibilities" could be considered under s 59(2)(m) as any other relevant matter.[259] Finally, the DMC's starting point was that the principles of the Treaty were not directly relevant but, rather, could "colour" the approach taken.[260] On our approach, these two aspects were also errors of law.

The scope of "any other applicable law" in s 59(2)(l)

[162] Section 59(2)(l) directs the DMC to take into account "any other applicable law". Two issues require consideration under this heading. The first of these is whether tikanga Māori comprises "applicable law". The second issue is whether the relevant international law instruments should have been treated as applicable law.

Tikanga Māori

[163] In the Act as it was at the relevant time, there were two situations in which tikanga appeared. In the first of these, s 53(3)(b) provides that in deciding on an "appropriate and fair" procedure for a hearing, the EPA must "recognise tikanga Māori where appropriate".[261] Second, under s 158(1)(a), the EPA has the power to provide for a hearing or parts of a hearing to be held in private and to prohibit or restrict the publication of information relating to a proceeding if such an order is necessary "to avoid causing serious offence to tikanga Māori". In addition, since 1 June 2017, the responsible Minister may appoint a board of inquiry to decide an application for a marine consent in specified situations.[262] In appointing members to such a board, the responsible Minister must consider the need for the board to have "from its members, knowledge, skill, and experience relating to … tikanga Māori".[263]

259 At [696]. See also at [710] and [719].
260 At [628]–[629] and [720].
261 See also cl 2(3)(b) of sch 2, cl 3(3)(b) of sch 3 and cl 7(3)(b) of sch 4 of the current version of the EEZ Act.
262 See the changes made to the EEZ Act providing for boards of inquiry by the Resource Legislation Amendment Act 2017.
263 See ss 52(5)(c) and 99A(5)(a)(iii) of the current version of the EEZ Act.

[164] The Court of Appeal said that tikanga Māori must be treated as an "applicable law" under s 59(2)(l) where it is relevant to an application before the EPA.[264] That approach followed from the fact that the tikanga that "defines the nature and extent of all customary rights and interests in taonga protected by the Treaty" is part of the common law of New Zealand.[265] The iwi parties support that approach.

[165] TTR supports the conclusion of the High Court that tikanga Māori was not a matter to be considered under s 59(2)(l).[266] TTR says that although tikanga is acknowledged as forming "part of the values of the New Zealand common law", citing the reasons of Elias CJ in *Takamore v Clarke*,[267] it is not an "independent source of law" requiring separate consideration under s 59(2)(l).[268] The submission for the Attorney-General is to similar effect. In addition, TTR argues that to the extent tikanga is a relevant factor in the exercise of existing interests, it is to be considered under s 59(2)(a). To consider it under the "applicable law" limb in s 59(2)(l) would be double counting.

[166] In the context of considering what the position was in New Zealand at common law in relation to the duties and rights of executors, the majority of this Court in *Takamore* relevantly made two points in relation to the relevance of tikanga to the common law. First, it was noted that the English common law has applied in New Zealand "only insofar as it is applicable to the circumstances of New Zealand".[269] It followed that, subject to conflicting statute law, "our common law has always been seen as amenable to development to take account of custom".[270] In *Paki v Attorney-General*, the majority said that accordingly, common law presumptions of

264 CA judgment, above n 45, at [178].
265 At [177].
266 The High Court accepted it was a matter for the DMC to consider under s 59(2)(m) (other relevant matters): HC judgment, above n 43, at [177].
267 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore* (SC)] at [94].
268 Citing Williams, above n 243, at 16.
269 *Takamore* (SC), above n 267, at [150] per Tipping, McGrath and Blanchard JJ, citing *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ and [105] per McGrath J. See English Laws Act 1858, s 1; and English Laws Act 1908, s 2, the effect of which is preserved by the Imperial Laws Application Act 1988, s 5. See also *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [13] and [17] per Elias CJ, [134]–[135] per Keith and Anderson JJ and [183]–[185] per Tipping J.
270 *Takamore* (SC), above n 267, at [150] per Tipping, McGrath and Blanchard JJ, citing *Baldick v Jackson* (1910) 30 NZLR 343 (SC); and *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

Crown ownership "could not arise in relation to land held by Maori under their customs and usages, which were guaranteed by the terms of the Treaty of Waitangi".[271]

[167] The second of the points made by the majority in *Takamore* was that the common law of New Zealand required reference to tikanga (as well as other important values and relevant circumstances) in that case.[272] As foreshadowed above, in a separate judgment, Elias CJ said that "Maori custom according to tikanga is … part of the values of the New Zealand common law."[273] More recently, and in a similar vein, this Court in *Ngāti Whātua Ōrākei Trust v Attorney-General* recognised that the Ngāti Whātua Ōrākei Trust should be able to pursue claims based on tikanga.[274] Elias CJ in a partial dissent put the point directly, stating: "Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation."[275] The issue in that case arose in the context of a strike-out application, but the approach indicates the way in which the common law in New Zealand has been developing.

[168] One commentator suggests that the decision in *Takamore* has resulted in some confusion in that although the Court recognised "that customary law is clearly relevant in the common law, [the Court] did not explicitly address the possibility of customary law being recognised as law based on the doctrine of continuity and the additional tests set out in [*The Public Trustee v Loasby*[276]] and by the Court of Appeal's *Takamore* decision[277]".[278] That is correct because it was not necessary to determine whether the tests for the recognition of custom at common law in cases such as *Loasby* were met or whether tikanga was a source of law on the approaches taken. But undoubtedly, the

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271 *Paki*, above n 269, at [18].
272 *Takamore* (SC), above n 267, at [164].
273 At [94]. See also *Ngati Apa*, above n 269, at [205] per Tipping J.
274 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
275 At [77] (footnote omitted).
276 *Loasby*, above n 270.
277 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore* (CA)].
278 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1 at 12. See also Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 120–123.

aspects of tikanga relevant in *Takamore* were treated as norms influencing the development of the common law.[279]

[169] For the purposes of the EEZ Act, tikanga Māori has the same meaning as in s 2(1) of the RMA,[280] that is, "Maori customary values and practices".[281] That definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices referred to in the Act. It follows that any aspects of this subset of tikanga will be "applicable law" in s 59(2)(l) where its recognition and application is appropriate to the particular circumstances of the consent application at hand.[282]

[170] It is not entirely clear what it was intended would be encompassed by the reference to other applicable law, given s 59(2) already requires the DMC to take into account the other marine management legislative regimes obviously relevant by virtue of s 59(2)(h) and relevant regulations under s 59(2)(k).[283] Counsel for the Attorney-General suggests that, because caution is required in referring in general terms to tikanga as a single body of law, a general reference to tikanga Māori in number 12 of a list of 13 factors does not appear a likely portal for the approach adopted by the Court of Appeal.

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279 In Te Aka Matua o Te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [77], the Law Commission observed that "The debate about whether 'law' exists in societies which do not have written laws, law courts and judges is an old one. Anthropologists now generally accept that all human societies have 'law', in the sense of principles and processes, whether or not it can be classified as 'institutional law generated from the organisation of a superordinate authority'." The Law Commission also refers to the conclusion of ET Durie that "Māori norms were sufficiently regular to constitute law": at [79], citing ET Durie *Custom Law* (draft paper for the Law Commission, January 1994) at 4.

280 EEZ Act, s 4(2)(d).

281 RMA, s 2(1) definition of "tikanga Maori".

282 We leave open for determination the questions of whether or not tikanga is a separate or third source of law and whether or not there should be any change to the tests for the recognition of customary law as law set out in *Loasby*, above n 270; see *Takamore* (CA), above n 277, at [109]–[134], [197] and [254]–[258] per Glazebrook and Wild JJ; and see also *Takamore* (SC), above n 267, at [164] per Tipping, McGrath and Blanchard JJ and [94] per Elias CJ.

283 For completeness, we note that s 26(a) of the EEZ Act provides that, for the avoidance of doubt, compliance with the Act "does not remove the need to comply with all other applicable Acts, regulations, and rules of law".

[171] The only other indication of the scope of s 59(2)(l) is provided by the amendment in June 2017, which made it clear that EEZ policy statements are excluded from consideration as other applicable law.[284] These policy statements appear to have been introduced to provide a broad equivalence to the various policy instruments in the RMA context.[285] Although not legislative instruments, these policy statements are disallowable instruments in terms of the Legislation Act 2012 and must be presented to the House of Representatives under s 41 of that Act.[286] The fact the Act expressly excludes these policy statements from "other applicable law", suggests that "law" in s 59(2)(l) should otherwise be understood in a wide sense. Thus, the better view is that s 59(2)(l) is intended as something of a catch-all provision and there is no apparent reason to interpret it more restrictively.

[172] As we have discussed, we see tikanga as also covered by the effect of s 12 as it relates to s 59.[287] It seems more likely that because the primary issues in an application for a marine consent will be directed to the effects on existing interests, the focus will, for practical purposes, be on s 59(2)(a) and (b). But we accept that tikanga could also be covered by s 59(2)(l) in those cases where the issues facing the decision-maker require its consideration.[288] Section 59(2)(a) and (b) and s 59(2)(l) do serve different purposes. The emphasis in the former two subsections, as we have said, is on the effects. Under s 59(2)(l), the decision-maker would look at the tikanga itself and consider what it might say about the rights or interests of customary "owners" or of the resources itself. To give just one illustration, the iwi parties in this case emphasise the mauri of the area. Considering the proposed activity in terms of tikanga may indicate that material harm extends beyond the physical effects of a discharge, or that pollution can be spiritual as well as physical. In any event, the relevant issues need to be considered under one or the other heading.

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284 The amendment was made by s 229(5) of the Resource Legislation Amendment Act.

285 (5 April 2017) 721 NZPD 17164. See also Ministry for the Environment *Regulatory Impact Statement: Resource Legislation Amendment Bill 2015 – EEZ Amendments* (28 October 2015) at 19–21.

286 See s 37G of the current version of the EEZ Act.

287 As discussed above at [154], the art 2 guarantee in the Treaty of Waitangi of tino rangatiratanga over taonga katoa (which includes taonga within the marine environment) means tikanga-based customary interests are existing interests under s 59(2)(a). This gives appropriate recognition to the Treaty principles in s 59, as required by s 12.

288 It is not necessary in the present case to consider the evidential issues that may arise. See also above at n 282.

International law instruments

[173] The Court of Appeal concluded that the relevant international law instruments (LOSC, the Convention on Biological Diversity, MARPOL, and the London Convention and associated 1996 London Protocol) do not need to be taken into account separately as "other applicable law" under s 59(2)(l), given they are considered under s 11. The Court said that a separate reference to these instruments as "applicable law" under s 59(2)(l) "would not add anything of substance and would result in duplication of analysis and unnecessary complexity".[289]

[174] KASM/Greenpeace submit that this was an error. The submission is advanced "for completeness" and can be dismissed shortly. Essentially, the Court of Appeal's analysis of this point is consistent with the statutory scheme and with the approach taken by this Court in *Helu*. There is no need, as TTR submits, to "strain" the statutory language to require international instruments to be considered again under s 59(2)(l).[290]

What is required by the direction in s 59(2)(h) to take into account the nature and effect of other marine management regimes?

[175] The principal point at issue in this part of the appeal is whether the DMC was required to consider inconsistencies between TTR's proposal and the NZCPS, which is a part of the marine management regime governing the coastal marine area

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289 CA judgment, above n 45, at [270].

290 Customary international law, however, is part of the law of New Zealand and so could comprise other applicable law: see *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24]; Alberto Costi *Laws of New Zealand* International Law (online ed) at [128]; and Kenneth Keith "The Impact of International Law on New Zealand Law" (1998) 7 Waikato L Rev 1 at 22. KASM/Greenpeace and the fisheries organisations referred to the Seabed Advisory Opinion, above n 160, at [135], where the International Tribunal for the Law of the Sea's Seabed Disputes Chamber observed there was "a trend towards making [the precautionary] approach part of customary international law". Mr Makgill accepted, however, that the Chamber was not saying the precautionary principle had reached the status of being customary international law. Whether the precautionary principle has crystallised into a norm of customary international law is much debated: Sands and others, above n 159, at 234–240; and Warwick Gullett "The Contribution of the Precautionary Principle to Marine Environmental Protection: From Making Waves to Smooth Sailing?" in Richard Barnes and Ronán Long (eds) *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Koninklijke Brill NV, Leiden, 2021) 368 at 370. Accordingly, we do not need to consider whether the DMC erred in not taking it into account as "other applicable law" under s 59(2)(l) of the EEZ Act. Nor was the argument put to us on this basis. See also *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [124]–[125].

(CMA).[291] As we have noted, the CMA abuts the area of proposed seabed mining.[292] The other question is whether, if so, the DMC's consideration of this issue met the statutory test.

[176] Marine management regimes are defined as including the:[293]

> … regulations, rules, and policies made and the functions, duties, and powers conferred under an Act that applies to any 1 or more of the following:
>
> (a) territorial sea:
>
> (b) exclusive economic zone:
>
> (c) continental shelf.

[177] Section 7(2) of the EEZ Act then sets out a non-exhaustive list of 15 marine management regimes encompassed by the section. Some of these regimes have general application, such as the Crown Minerals Act, the Fisheries Act 1996, the RMA, the MACA Act and the Wildlife Act 1953. Other regimes are specific to a particular area, such as the Hauraki Gulf Marine Park Act 2000 and the Kaikōura (Te Tai o Marokura) Marine Management Act 2014.

[178] The context for the consideration of the approach to s 59(2)(h) of the EEZ Act is the practical reality that the effects of a proposed activity in a particular part of the marine environment may well spill over into other areas.[294] Here for example, as the Court of Appeal said, the effects of the sediment plume will in fact be felt mostly within the CMA.[295] There are good policy reasons for not ignoring the fact that if the proposed activity took place on the other side of an arbitrary line[296] between two regimes, its proposed effects would be assessed differently.

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291 The NZCPS, above n 181, is made under the RMA on the recommendation of the Minister of Conservation: RMA, s 57.

292 See above at n 37. A map of the project area as reproduced in the DMC decision, above n 38, is set out below at Appendix 2 to this judgment.

293 EEZ Act, s 7(1).

294 In the third reading debate, the responsible Minister said that alignment between the approach to matters within the 12 nautical mile limit (governed by the RMA) and those outside that limit between 12 to 200 nautical miles (governed by the EEZ Act) was desirable because it was not hard to envisage applications "that cross or could have impact on both sides of the 12 nautical mile limit": (28 August 2012) 683 NZPD 4780. It has to be said, however, that it is not clear from the legislative history that facilitating integrated consideration of effects and decision-making across the jurisdictional boundaries was a priority.

295 CA judgment, above n 45, at [199].

296 It is a jurisdictional line, rather than a line drawn on the basis of environmental or scientific factors.

[179] What then is the DMC required to consider? TTR and the EPA resist the suggestion that the DMC has to apply the other regimes or undertake a detailed evaluation of consistency with the policies, plans or environmental bottom lines of the other regimes. We agree that the DMC was not required to apply those regimes or to consider the minutiae of each particular regime, but nor did the Court of Appeal suggest that.

[180] Indeed, that would be an impossible task inconsistent with the intention to create a specific regime for the regulation of mining and other activities in the EEZ.[297] The EPA members will not necessarily have the expertise to undertake such an inquiry, and in any event, work under timeframes would not permit such an inquiry.[298] And, as has been noted, the definition of the environment in the EEZ Act is different from that in the RMA, and the relevant considerations for consent applications are also different. Further, as Ms Casey QC for the EPA submits, the EEZ Act provides the procedure applicable for activities requiring both consent under the RMA for activities in the CMA and consent under the EEZ Act for activities in the EEZ.[299] That procedure envisages the possibility of separate or joint application processes.[300] But even if a joint process is followed, the applications are dealt with separately, with the EPA having responsibility for deciding the marine consent application under the EEZ Act and the consent authority having responsibility for deciding the resource consent application under the RMA.[301] Finally, the DMC is required to take into account the nature and effect of the other regimes, but there is no prescription as to how that is to be achieved.[302]

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297 As we have noted above at n 121, the regime in the EEZ Act was seen as a gap-filler. Further, it was plain that the intention was not to create the "[RMA] of the seas": (18 July 2012) 681 NZPD 3680. See also (13 September 2011) 675 NZPD 21215; (30 May 2012) 680 NZPD 2734–2735; and (28 August 2012) 683 NZPD 4802.

298 A desire to avoid the lengthy, more complicated approach under the RMA was to the forefront in considering the scope of the EEZ Act. The more complex RMA framework was seen as "overkill" in the relatively uncrowded EEZ. Further, it was seen as important that consent decisions were made in a timely manner, which in turn was investment-friendly: see (30 May 2012) 680 NZPD 2734; (18 July 2012) 681 NZPD 3684; and (28 August 2012) 683 NZPD 4785.

299 EEZ Act, Subpart 3 of Part 3.

300 Section 90(a) and (b).

301 Section 98.

302 In response to a question from the Select Committee about how regional coastal plans were to be considered under the Act, the officials said it "will be up to the EPA how to give effect to the consideration of other marine management regimes in marine consent decision-making": Departmental Report on EEZ Bill, above n 81, at 145.

[181] That said, approaching the matter by using the ordinary dictionary meaning of the words "nature and effect", it is apparent that the DMC does have to consider the key features of the other management regimes and how they would apply if the activity "were" being pursued under those regimes. The word "nature" means the "inherent or essential quality … of a thing".[303] The word "effect" means "a consequence", "a contemplated result", or "a purpose".[304] Accordingly, consideration of the nature and effect of the other marine management regimes must, as the Court of Appeal said, involve considering:[305]

> (a) the objectives of the RMA and NZCPS, and the outcomes sought to be achieved by those instruments, in the area affected by the TTR proposal; and
>
> (b) whether TTR's proposal would produce effects within the CMA that are inconsistent with the outcomes sought to be achieved by those regimes.

[182] We agree also with the Court of Appeal that, importantly, the DMC had to consider:[306]

> … whether TTR's proposal would be inconsistent with any environmental bottom lines established by the NZCPS. If a proposed activity within the EEZ would have effects within the CMA that are inconsistent with environmental bottom lines under the marine management regime governing the CMA, that would be a highly relevant factor for the DMC to take into account. The DMC would need to squarely address the inconsistency between the proposal before it and the objectives of the NZCPS. If the DMC was minded to grant a consent notwithstanding such an inconsistency, it would need to clearly articulate its reasons for doing so.

[183] The question then is whether the Court of Appeal is right that the DMC did not consider the matter in this way and that its failure to do so was an error of law,[307] or whether the High Court was correct that the issues raised by the parties were matters merely going to the weight to be given to this factor, which would not comprise an error of law.[308]

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303 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 2), above n 131, at 1891.
304 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 1), above n 131, at 793.
305 CA judgment, above n 45, at [199].
306 At [200].
307 At [201].
308 HC judgment, above n 43, at [161]–[162].

[184] The approach of the DMC was that it had taken into account the other marine management regimes.[309] The DMC took advice on this point and agreed with that advice that the NZCPS was not directly applicable within the EEZ, but said that it had regard to the fact that many of the effects were going to be felt in the CMA, which was covered by the NZCPS,[310] and identified the provisions of the NZCPS that were of potential relevance.[311] The DMC also made specific reference to the submission from Ngā Motu Marine Reserve Society that the NZCPS requires avoidance of adverse effects on areas with outstanding natural character and threatened species.[312] Ultimately, the DMC said of the NZPCS that:[313]

> … many of its potentially relevant provisions have parallels in the EEZ. For instance, the NZCPS has provisions related to indigenous ecosystems / biodiversity; and Section 59(2)(d) of the EEZ requires us to take into account the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes. Similarly, taking into account Te Tiriti is required under both documents. Importantly, we note that the NZCPS establishes discretionary activities as the highest consent status under regional coastal plans.

[185] The correctness of this approach can be viewed in the light of policy 13(1)(a) of the NZCPS, which provides that to "preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development", local authorities are directed to "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character". This part of the NZCPS has been described as providing "something in the nature of a bottom line" by this Court in *King Salmon*.[314] But the majority of the DMC has not squared up to that in the context of s 59(2)(h), simply treating the NZCPS as equating to s 59(2)(d) (take into account the importance of protecting biodiversity). In other words, the DMC did not recognise the impact of the fact that the proposed activities would have adverse effects in some locations, such as "The Traps" (an area within the Pātea Shoals and some 26–28 km east of the mining site). It is, as the Court of Appeal found,[315]

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309 DMC decision, above n 38, at [1003].
310 At [1011]–[1012].
311 At [1019]. See also at [1023]. The DMC took particular account of Horizon Regional Council's "One Plan" and the Taranaki Regional Council's regional policy framework under the RMA (at [1014]–[1016]) but, as we shall discuss, did not consider the effect of the environmental bottom lines relevant to those instruments via the NZCPS.
312 At [1018].
313 At [1022].
314 *King Salmon*, above n 80, at [132].
315 CA judgment, above n 45, at [203].

seriously arguable that if the same activities had occurred in the CMA, this would have resulted in those activities being prohibited.[316]

[186] By contrast, the minority of the DMC, in considering the nature and effect of the marine management regimes, noted there were some environmental bottom lines which would have been relevant if the proposed activities were taking place in the CMA. The minority considered "significant weight" had to be given to such bottom lines "where discharge activities occur in close proximity to the CMA and the effects predominantly occur in the CMA".[317] The DMC similarly needed to directly confront the effect of the environmental bottom lines in the NZCPS in relation to areas where TTR's mining activities would be felt and explain, albeit briefly, why it considered that factor was outweighed by other s 59 factors or sufficiently accommodated in other ways.[318]

[187] Accordingly, we agree with the Court of Appeal that the difference in approach between the DMC majority and the minority on this aspect was not solely one of weight. Rather, there was an error of law in "not assessing whether the proposal would produce outcomes inconsistent with the objectives of the RMA and NZCPS within the CMA". In particular, the DMC majority "did not identify relevant environmental bottom lines under the NZCPS and did not consider whether the effects of the TTR proposal would be inconsistent with those bottom lines".[319]

The approach to the requirement in s 59(2)(f) to consider economic benefit

[188] Three issues arise from KASM/Greenpeace's submissions on this topic. The first is whether the Court of Appeal erred in finding that the DMC took into account the economic costs of the proposals as well as the benefits. The second issue is whether the Court was correct to find that the DMC was not required to quantify environmental, social and cultural costs and benefits. The final issue is whether the

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316 See, for example, policy 4.1 of the Taranaki Regional Council *Regional Coastal Plan for Taranaki* (1997), which identifies The Traps as being of "outstanding coastal value". (The Plan is currently under review.) In terms of the hierarchy of planning instruments in the RMA, that Plan must give effect to the NZCPS: RMA, s 67(3)(b); and see *King Salmon*, above n 80, at [31], [125] and [152].

317 DMC decision, above n 38, at [45].

318 The DMC minority's reasons focused on the effect of the NZCPS in relation to the effects on the Pātea Shoals: DMC decision, above n 38, at [46]–[47], [49]–[50] and [56] of the minority reasons.

319 CA judgment, above n 45, at [201].

Court was right that there was no error of law in the DMC's approach to "potential economic benefits in the counterfactual".[320]

[189] On the first issue, the Court of Appeal considered that addressing economic benefit under s 59(2)(f) must address net economic benefit, but said there was nothing to suggest that the DMC only considered gross benefits.[321] We agree that the DMC would need to satisfy itself that there was an economic benefit so that, if there were material economic costs, the DMC would be obliged to take those into account. The issue then is whether the DMC approached this matter correctly.

[190] In addressing s 59(2)(f), the DMC said it was not necessary to consider "a benefit cost analysis". Rather, it said that: "Understanding that there is an economic benefit is all that is necessary and is consistent with the purpose of the Act."[322] On its face, if net economic benefit must be shown, this observation is perhaps not a promising start. However, it is not entirely clear from the decision whether the DMC in this passage was rejecting the need to consider net economic benefit at all or whether the DMC was rejecting a broader cost/benefit analysis in the sense of the second issue raised by KASM/Greenpeace. We say that because, first, the DMC immediately went on to say that consideration had been given to "the potential environmental, social or cultural 'costs' (or benefits) that might arise", but the DMC did not consider that it was necessary "to ascribe a monetary value to those things".[323] Further, it appears that the primary difference between the experts who gave evidence before the DMC was whether there was any need to weigh up environmental costs against economic benefits. The DMC also had evidence suggesting any economic costs were negligible. Finally, the DMC did in fact note that, "[i]n considering benefits, … any economic dis-benefits must also be taken into account", citing, for example, impacts on existing interests.[324]

[191] To put the matter in context, the DMC's observation followed a review, in some detail, of the expert evidence on this topic. Mr Leung-Wai, who gave expert evidence

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320 At [284].
321 At [281].
322 DMC decision, above n 38, at [805].
323 At [806].
324 At [995].

on behalf of TTR based on a report he prepared for Martin, Jenkins & Associates Ltd (MartinJenkins), applied an input-output multiplier analysis which assumed recovery over time of the seabed environment and no ongoing irreversible effects.[325] His evidence covered the district, regional, national and offshore figures, for example, as to potential benefits in terms of direct spend and employment. While Mr Leung-Wai's analysis did not reflect a net benefit, he did address the likelihood of achieving the reported benefits, concluding that negative impacts were likely to be insignificant, temporary or trivial. He did not favour a benefit-cost analysis encompassing costs such as environmental costs, which was the preferred approach of Mr Binney, the expert who gave evidence on behalf of KASM/Greenpeace.

[192] Further, the conclusions of the MartinJenkins report were set out in TTR's impact assessment report. The impact assessment report first addressed potential costs, noting arguments there could be some adverse effects on other industries in the local and regional areas such as tourism. The report considered that there was, for example, likely to be limited impact on tourism, given the project was offshore and not visible from the shore. The report then noted MartinJenkins' conclusion that "[o]verall … when considering the balance of economic effects of the project, the positive economic effects are significantly greater than any other effects". The report said that this overall outcome had been accepted by the DMC in their earlier decision on TTR's previous marine consent application, "where they concluded that, while the value of the potential adverse effects is difficult to quantify, the project is likely to have a positive net economic benefit".

[193] Our attention has not been drawn to evidence of material economic costs which should have been taken into account.

[194] Against this background, we do not consider the DMC has erred in law in its approach to this issue.

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325 The expert conferencing on this topic noted that the input-output multiplier analysis identified the economic benefits of the iron sands project in terms of employment and gross domestic product (GDP).

[195] Similarly, we agree with the Court of Appeal in the approach to the second question. As the Court said:

> [283] We do not consider that there was any error of law in the DMC's decision not to seek to quantify, and include in a cost-benefit analysis, environmental, social and cultural costs. It was consistent with the scheme of the EEZ Act, and open to the DMC, to have regard to these matters on a qualitative basis. Indeed, we see force in TTR's argument that taking those costs into account in the assessment of economic benefit, and then weighing them separately under other limbs of s 59, could give rise to double-counting.

[196] As we have indicated, the DMC had expert evidence about the perceived pros and cons of the two approaches. We see no error of law in the DMC's preference for a qualitative analysis of environmental, social and cultural benefits and costs.[326]

[197] We also adopt the Court of Appeal's reasoning on the final issue, the approach to potential economic benefits in the counterfactual. The DMC had received submissions on the potential for adverse impacts on businesses not yet established. KASM/Greenpeace argue the DMC erred in failing to take into account these potential economic benefits that would be precluded or harmed by the activity, relying in this respect on the fact "effects" in s 6 of the EEZ Act are defined to include "future effect[s]". But the DMC did not ignore that. Rather, the DMC determined that in the absence of evidence "that such a venture or ventures were imminent", it could place no weight on the possibility of such a business being established in the future.[327] As the Court of Appeal said, that was a factual determination for the DMC.[328]

The correct approach to the imposition of conditions

[198] Two issues arise under this head. The first of these is whether the DMC's approach to conditions amounted to an adaptive management approach, which is not permitted in the context of an application for a marine discharge consent. The second issue is whether the DMC erred in its approach to the imposition of a bond. We deal with each issue in turn.

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326 DMC decision, above n 38, at [806].
327 At [809].
328 CA judgment, above n 45, at [284].

An adaptive management approach?

[199] "Adaptive management" for these purposes has the meaning set out in s 64(2),[329] and includes:

> (a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:
>
> (b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

[200] The question here is whether, in imposing conditions seeking to avoid particular effects and requiring ongoing monitoring to achieve that outcome, the DMC has in fact applied an adaptive management approach as the High Court found.[330]

[201] It is clear that the DMC adopted too narrow an approach to what constitutes an adaptive management approach. The DMC proceeded on the basis that conditions only comprised adaptive management where, as a result of the assessment of effects, the activity would be wholly discontinued.[331] The High Court and Court of Appeal were in agreement the DMC erred in this respect.[332] There were, however, differing views as to whether the conditions imposed comprised an adaptive management approach.

[202] In determining that the High Court was wrong to treat the approach adopted as one of adaptive management, the Court of Appeal saw the prohibition on adaptive management as linked to the objective in s 10(1)(b). "In other words", the Court said, the EPA could not "grant a marine discharge or dumping consent if it is unsure whether the consented activity will cause [the harms to the environment that must be avoided], on terms that provide that if such harms do occur then the consent envelope will be adjusted prospectively".[333]

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[329] Section 4(1) definition of "adaptive management approach".
[330] HC judgment, above n 43, at [404].
[331] See DMC decision, above n 38, at [54]. See also at [55].
[332] HC judgment, above n 43, at [392], [399(d)] and [420]; and CA judgment, above n 45, at [217].
[333] CA judgment, above n 45, at [221].

[203] The Court of Appeal noted that in this case, the consents provided for pre-commencement monitoring "to establish relevant baselines, development of management plans, and ongoing monitoring by reference to the relevant conditions and the monitoring plans". The Court observed that the monitoring plans were necessary to "provide for operational responses" if the requirements of the consent and the monitoring plans were not met.[334] However, the Court of Appeal did not consider that the conditions imposed by the DMC comprised adaptive management. That was because they did not envisage any "adjustment of the consent envelope in response to monitoring and assessment of the effects of the consented activities".[335] The Court continued:[336]

> The conditions do not contemplate the scaling back of the authorised mining activities, or any adjustment of the effects permitted under the consent, over and above the adjustments contemplated by the EEZ Act in relation to consents generally. The conditions do contemplate TTR adjusting the way it carries out its operations to ensure it remains within the consent envelope—but that does not amount to adaptive management.

[204] It is helpful to address the correctness of this conclusion by considering the two broad categories of conditions imposed, that is, those involving pre-commencement monitoring and those involving ongoing monitoring.

[205] Conditions 9(a) and 66(b)–(c) relating to seabirds, discussed above, are illustrative of the approach to pre-commencement monitoring conditions. Condition 9(a) states that "There shall be no adverse effects at a population level of [various threatened] seabird species that utilise the South Taranaki Bight" at all times during the terms of the consent. Under condition 66(b) and (c), the Seabirds Effects Mitigation and Management Plan, which must be prepared and certified before any seabed extraction can begin, must set out indicators of adverse effects at a population level of those seabirds and identify responses or actions to be undertaken by TTR if the indicators are reached.[337] In this way, the broad consenting terms in condition 9(a)

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334 At [225].
335 At [226].
336 At [226].
337 Although condition 66 is not strictly speaking a pre-commencement monitoring condition, it has a pre-commencement aspect. While the Seabirds Effects Mitigation and Management Plan can be amended on an ongoing basis, an initial plan must be prepared and certified before any seabed extraction can begin. That initial plan will be informed by the data obtained from pre-commencement monitoring: DMC decision, above n 38, at [36].

(“no adverse effects”) are left to be “flesh[ed] out” in management plans prepared following extensive post-decision information gathering.[338] There is much force in the argument for the first respondents that these conditions and other pre-commencement monitoring conditions are a mechanism for providing baseline information as to effects, which was lacking in TTR’s application. There is some support for that in the descriptions used in the decision of the DMC.[339] And we agree, as the Court of Appeal also found, that these conditions suffer the more fundamental problem we have identified above in that they do not meet the requirement to favour caution and environmental protection.[340]

[206] We turn, then, to the ongoing monitoring conditions. There is plainly a tension here between the provisions in the Act which allow for, respectively, monitoring conditions[341] to be imposed and, as well, envisage the EPA initiating the review process under s 76,[342] and the bar on the use of an adaptive management approach for marine discharge consents. How else, apart from requiring some form of ongoing monitoring, would the EPA be able to exercise its obligations in relation to the review process? We agree with the submission for TTR that there must accordingly be some distinction to be drawn between orthodox review conditions, which the EPA is expressly empowered to impose, and those which constitute adaptive management conditions, which are prohibited.

[207] Given this tension, we do not agree with the submissions for KASM/Greenpeace and Forest and Bird that the Court of Appeal’s test for adaptive management is incorrect. In its written submissions, Forest and Bird notes that an adaptive management approach involves “courting a material risk of harm” so that “further information may be gathered and the management of the activity adapted accordingly to address that harm appropriately prospectively”.[343] Both KASM/Greenpeace and Forest and Bird emphasise the words “so that” in s 64(2)(b), but we do not consider the wording can be read literally because of the need to manage

338 CA judgment, above n 45, at [227(c)].
339 For example, see the DMC decision, above n 38, at [155] and [1065].
340 CA judgment, above n 45, at [227].
341 Sections 63(2)(a)(iii) and 87F(4).
342 Section 87I(1)(b) provides that s 76 also applies to marine discharge and dumping consents.
343 Both KASM/Greenpeace and Forest and Bird draw on the discussion in *Sustain Our Sounds*, above n 185, of when an adaptive management approach is an available response.

the tension identified. In our view, the "consent envelope" test advanced by the Court of Appeal provides a rule of thumb which can assist in resolving this tension in a manner consistent with the overall scheme of the Act.

[208] The Taranaki-Whanganui Conservation Board accepts that the "consent envelope" test is a possible test for determining whether conditions comprise adaptive management. But the Board says that the conditions imposed met that test. The Board also emphasises that s 87F(4) precludes the imposition of conditions on a marine discharge consent that amount or "contribute to" adaptive management. In other words, it is sufficient for conditions to contribute to an adaptive management approach, but the Court of Appeal has not factored that into its analysis. The Board argues that some of the conditions do not leave compliance and "operational responses" solely to TTR's discretion and that in this way they contribute to adaptive management.

[209] We consider the Court of Appeal was right, for the reasons given, in concluding that the conditions did not comprise adaptive management.[344]

[210] The conditions imposed in relation to the suspended sediment limits illustrate the point that the conditions do not contemplate scaling back the authorised activities or an adjustment of permitted effects beyond those contemplated by the Act. As TTR submits in response to the challenge to these conditions, conditions 5 and 51 and sch 3 provide a means by which the numerical values for each of the specified percentiles of background suspended sediment limits (25th, 50th, 80th, and 95th) in sch 2 can be reviewed and updated after the pre-commencement monitoring, but before the seabed extraction activities commence. The effect of this is that the number of grams of sediment per litre already occurring in the environment at, say, 75 per cent, 50 per cent, 20 per cent and 5 per cent of the time can be updated before the mining commences. But neither that mechanism nor the requirement to comply with it in condition 5(b) changes. There are no new thresholds. Nor do they allow for the numerical values of suspended sediment limits to change once mining has commenced.

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[344] See above at [203].

[211] Further, condition 5(b) does not provide for the assessment of effects or any further decision-making based on the outcome of the monitoring and assessment. Rather, the requirement in condition 5(b) is that TTR ceases extraction activities if it cannot achieve compliance with the suspended sediment limits. As TTR says, this is a standard compliance requirement. Non-compliance does not result in any consequential amendment to the consented activity or any change to its scale or intensity but rather would mean that the enforcement provisions in the Act would come into play.[345] If TTR cannot meet that condition, then it cannot continue to operate.

[212] It does not seem to us that the addition of the requirements of the environmental management and monitoring plans, here condition 55, alters the position. For example, the requirement to identify operational responses to be undertaken if unanticipated effects are identified (condition 55(g)) does not amount to adaptive management as it does not contemplate any adjustment of the consent envelope as a result of the monitoring. Rather, it simply contemplates TTR adjusting the way it carries out its operations to ensure it remains within the envelope, which, as we have said, does not amount to adaptive management. Similarly, the ability to amend the environmental and management plans in condition 56 does not allow changes to any limits or thresholds.

[213] For these reasons, we agree with the Court of Appeal that the conditions imposed do not constitute adaptive management.

Did the DMC err in its approach to the imposition of a bond?

[214] Under s 63(2)(a)(i) of the Act, the DMC has the power to impose a condition requiring the consent holder to "provide a bond for the performance of any 1 or more conditions of the consent", and under s 63(2)(a)(ii), the DMC may also make it a condition, as it did in this case, that the consent holder "obtain and maintain public liability insurance of a specified value".

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345 The effect of ss 20B and 20C of the EEZ Act is that if a limit is exceeded, continuing the activity would not be permitted. TTR would be liable to prosecution under s 134 and enforcement action is available under s 115. Under ss 125 and 126, abatement notices can be served and TTR would have to comply with them.

[215] The Court of Appeal found that the DMC had wrongly treated "a bond and public liability insurance as alternative ways of achieving similar outcomes".[346] As such, the Court said the DMC failed to identify the different purposes served by a bond and failed to turn its mind to whether a bond was required in this case. Some forms of harm caused by the planned activities were not insubstantial but would not be covered by insurance. It would, however, be covered by a bond. Thus, the Court said the DMC needed to have turned its mind to whether a bond should be required.[347]

[216] TTR supports the approach to this issue taken by the High Court. That is, that the DMC was entitled to treat a bond and public liability insurance as alternative ways of achieving similar outcomes, although accepting they operated differently.[348] Further, the Act does not require either, and whether the DMC adopted either, both or neither was a matter within the DMC's discretion.[349]

[217] Section 65 sets out the relevant provisions relating to bonds as follows:

> **65 Bonds**
>
> (1) A bond required under section 63(2)(a)(i) may be given for the performance of any 1 or more conditions of a marine consent that the Environmental Protection Authority considers appropriate and may continue after the expiry of the consent to secure the ongoing performance of conditions relating to long-term effects, including—
>
> (a) a condition relating to the alteration, demolition, or removal of structures:
>
> (b) a condition relating to remedial, restoration, or maintenance work:
>
> (c) a condition providing for ongoing monitoring of long-term effects.
>
> (2) A condition of a consent that describes the terms of the bond may—
>
> (a) require that the bond be given before the consent is exercised or at any other time:
>
> (b) provide that the liability of the holder of the consent be not limited to the amount of the bond:

[346] CA judgment, above n 45, at [239].
[347] At [240].
[348] HC judgment, above n 43, at [305] and [308].
[349] At [303].

> (c) require the bond to be given to secure performance of conditions of the consent, including conditions relating to any adverse effects on the environment or existing interests that become apparent during or after the expiry of the consent:
>
> (d) require the holder of the consent to provide such security as the EPA thinks fit for the performance of any condition of the bond:
>
> (e) require the holder of the consent to provide a guarantor (acceptable to the EPA) to bind itself to pay for the carrying out of a condition in the event of a default by the holder or the occurrence of an adverse environmental effect requiring remedy:
>
> (f) provide that the bond may be varied, cancelled, or renewed at any time by agreement between the holder and the EPA.
>
> (3) If the EPA considers that an adverse effect may continue or arise at any time after the expiration of a marine consent, the EPA may require that a bond continue for a specified period that the EPA thinks fit.

[218] The relevant condition required TTR to take out public liability insurance to cover the costs of environmental restoration and damage resulting from an unplanned event. The condition, condition 107, as ultimately imposed provided as follows:

> The Consent Holder shall, while giving effect to these consents, maintain public liability insurance for a sum not less than NZ$500,000,000 (2016 dollar value) for any one claim or series of claims arising from giving effect to these consents to cover costs of environmental restoration and damage to the assets of existing interests (including any environmental restoration as a result of damage to those assets), required as a result of an unplanned event occurring during the exercise of these consents.

[219] In addition, condition 108 imposed a requirement for a certificate of insurance to be submitted prior to giving effect to the consents and that the certificate be updated annually. There was no requirement that TTR pay a bond.

[220] The need for a bond was raised by submitters. On this topic, the DMC had before it the joint statement of issues by the experts and legal advice on both a bond and on a condition TTR obtain insurance. The statement of issues said there was no agreement as to whether or not a bond was required. The legal advice treated a bond and insurance as separate and, in a passage set out by the DMC, stated that the "key requirement" for the imposition of a bond "is that it must relate to – and in effect

secure – the performance of one or more other conditions of consent".[350] Finally, the DMC noted the advice of Dr Lieffering as to the purpose of a bond, namely, "to ensure that an event such as restoration occurs, not to solve compliance issues".[351] Given the advice before the DMC that treated the bond and insurance as different, it is not necessarily the case that the DMC did not understand the two served different purposes. Nor is there the need to make an adverse inference that the DMC did not understand the advice.

[221] The more significant issue relates to the DMC's reasons. The reason given by the DMC for declining to require a bond was to note that given "the circumstances of the application, and taking into account the legal and technical advice" obtained, a bond was "not necessary in addition to the $500 million insurance offered by TTR".[352] However, that reasoning did not explain, even briefly, how the risks a bond would address were met by insurance, or could somehow be put to one side. To illustrate the point, in their submissions in this Court, KASM/Greenpeace expressed particular concern about two risks – what would happen if TTR went into liquidation and what would happen if it failed to fulfil its post-extraction conditions. KASM/Greenpeace say those risks would not be covered by the condition as to insurance, which provides only for unplanned events. As noted, the need for a bond to ensure environmental restoration work would take place had been raised by submitters.[353] The DMC did therefore need to explain (briefly) why it considered it was not necessary to impose a bond in addition to the insurance offered by TTR. It was an error of law not to have done so.

The exercise of a casting vote

[222] KASM/Greenpeace submit that the Court of Appeal was wrong to reject their argument that in exercising the casting vote, the chairperson was required to separately

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350 As quoted in the DMC decision, above n 38, at [1072].
351 At [1073].
352 At [1074].
353 Although consideration of whether to impose a bond and/or insurance condition is not a mandatory factor which the DMC must consider, it is mandatory for the DMC to have regard to any submissions made, evidence given and advice received in relation to the application, including advice from the Māori Advisory Committee: s 59(3).

consider the exercise of the vote, give reasons for the exercise of the casting vote, and favour caution in the exercise of the vote.

[223] The Court of Appeal dealt with this argument shortly on the basis that there was no "additional overlay of caution" necessary in relation to the exercise of the casting vote, "or that any factors were relevant to the exercise of the casting vote that were not also relevant to the Chairperson's deliberative vote".[354]

[224] We agree. The procedure adopted in Appendix 5 to the DMC's decision was to make decisions "[a]s far as possible" on a consensus basis. All members had a vote. When there was no clear majority, the procedure was that the chairperson has a casting vote.[355] The approach adopted by the DMC reflected in this respect the procedure applicable to the EPA as a Crown entity.[356]

[225] It is clear on the face of the report that the chairperson was aware of the minority's views.[357] Further, the chairperson considered that the approach adopted by the majority favoured caution and environmental protection. We do not see how the fact that the chairperson was now exercising a casting vote changed that or required reconsideration. As the EPA submits, if the chairperson properly applying the law is satisfied that granting the consent is appropriate in the exercise of the general vote, the chairperson is then also properly satisfied of those matters for the purposes of exercising a casting vote.[358]

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354 CA judgment, above n 45, at [276].

355 Matthew Ockleston "'… in the event of an equality of votes …': The Chairperson's Casting Vote" (2000) 11 PLR 228 at 229 notes that the term "casting vote" is at least 300 years old and derives from an archaic use of the word "cast" to mean to tilt the balance.

356 The EPA is a Crown entity: Crown Entities Act 2004, s 7(1)(a) and sch 1 pt 1. Clause 12(2) of sch 5 gives the chairperson "in the case of an equality of votes" a casting vote. Clause 14 empowers a board of a Crown entity to appoint committees to perform or exercise any of the entity's functions. The common law did not recognise casting votes: see Ockleston, above n 355, at 229; Madeleine Cordes, John Pugh-Smith and Tom Tabori (eds) *Shackleton on the Law and Practice of Meetings* (15th ed, Sweet & Maxwell, London, 2020) at 75; and Roger Pitchforth *Meetings: Practice and Procedure in New Zealand* (4th ed, CCH, Auckland, 2010) at 70.

357 See DMC decision, above n 38, at [5].

358 See *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [59]–[64].

[226] Nor were further reasons for the view required to be given. The chairperson had explained the position adopted in the context of reaching the views set out in respect of his deliberative vote.[359]

A question of law

[227] In relation to various aspects of the appeal, TTR, in its written submissions, said that the Court of Appeal had strayed into the merits of the application and did not identify any error in a question of law.[360] This was not a central focus of the oral argument. The point can be dealt with briefly. There was no real dispute between the parties as to the test for what constitutes a question of law for these purposes.[361] Apart from the two questions discussed earlier – whether the DMC was correct to decide that it had the best information and as to the DMC's approach to potential economic benefits in the counterfactual – it is clear that the other issues arising on the appeal raise questions of law.

Relief

[228] Having quashed the decision of the DMC, the Court of Appeal referred TTR's application back to the EPA for reconsideration in light of the Court's judgment.[362] The iwi parties along with Forest and Bird argue that if the Court upholds the decision of the Court of Appeal, this is one of those cases in which TTR's application should be dismissed outright.[363] The essential submission is that there are specific DMC findings that would compel the view that if s 10(1)(b), the information principles and powers as to conditions are correctly applied, TTR's application would not succeed. Mr Fowler illustrated the point by reference to some of the findings of the DMC, for example, the finding that the modelling "indicates that there will be significant adverse effects within [ecologically sensitive areas] to the east-southeast of the mining site

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359 See *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) at 313.

360 Section 105(4) of the EEZ Act provides that appeals to the High Court from decisions of the EPA can only be on a question of law.

361 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]–[58]; and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[28]. Both discuss the older case of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

362 CA judgment, above n 45, at [290] and [292].

363 The Taranaki-Whanganui Conservation Board submits that the decision should be remitted back but raises the possibility that the decision simply be quashed.

extending to at least Graham Bank".[364] In that context, the DMC also considered the effect on primary production would be significant at ecologically sensitive areas such as the Crack and the Project Reef.[365]

[229] We see no reason not to refer the matter back to the EPA for reconsideration as is the usual course on an appeal of this nature. Given the complex and evolving nature of the issues involved, it would not be appropriate to deny TTR the opportunity to have the application reconsidered. TTR may, for example, be able to remedy some of the information deficits identified. If a reconsideration is ordered, the Conservation Board sought directions that TTR should not be able to further amend its proposal to avoid the need for adaptive management or to reduce its effects. Obviously there are costs implications for submitters, like the Conservation Board, if the proposal is amended, but TTR should be able to remedy matters if it can.

[230] Finally, it is necessary to address the EPA's submission that if the Court of Appeal decision is upheld and the order to remit to the EPA confirmed, we should reserve jurisdiction for the High Court to make practical directions relating to the determination of the application. The EPA says this is necessary because of the passage of time since the DMC heard and determined the application in 2016–2017. For example, under s 16 of the EEZ Act, the EPA's delegation to the DMC requires that one member of the DMC be a member of the EPA board.[366] The DMC member who had that role in 2016–2017 no longer serves on the EPA board. The EPA also submits it would be necessary to consider a range of evidential issues.

[231] We consider the EPA/DMC may well be able to deal with these sorts of things which are not unusual in the situation where a decision has to be reconsidered following an appeal. That said, we see no issue with this Court reserving leave to a party to seek directions from the High Court should that prove necessary.[367]

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364 DMC decision, above n 38, at [350].

365 Mr Fowler submits that while it is not explicit, it is nevertheless clear from the DMC decision that the conditions imposed do not create the reduction in adverse effects that would be required.

366 A reference to cl 14 (1)(b) of sch 5 to the Crown Entities Act.

367 In reliance on r 20.19 of the High Court Rules 2016, which provides that a court, after hearing an appeal, may "make any order the court thinks just".

Result

[232] Although differing on aspects of the reasoning, the Court upholds the decision of the Court of Appeal. Accordingly, the appeal is dismissed. Leave is reserved to a party to seek directions from the High Court should that prove necessary.

Costs

[233] We reserve costs.

[234] Unless the parties are able to agree on costs, we seek submissions on that issue. We note in this respect that a full set of costs for each of the five groupings making up the first respondents would comprise over-recovery. That is so in light of the fact that the first respondents were asked to divide up the hearing time available to them and as a result, as we have noted, each took responsibility for the primary argument on particular topics.

[235] Submissions for the first respondents are to be filed and served by 1 November 2021. Submissions for TTR are to be filed and served by 15 November 2021 and any submissions from the first respondents in reply by 22 November 2021.

GLAZEBROOK J

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Summary

[236] I write separately because I take a different view from William Young and Ellen France JJ on some aspects of the appeal, although I agree with much of what is in their reasons.[368]

[237] I adopt Ellen France J's description of the background and the statutory scheme.[369] I agree with her discussion of the place of the Treaty of Waitangi and customary interests,[370] the scope of any other applicable law,[371] and the approach to the requirement to consider economic benefit.[372] I agree with her discussion of whether there is a question of law.[373] I agree the appeal should be dismissed and also agree with costs being reserved.[374]

[238] I take a different view on the approach to determining an application for a marine discharge consent and in particular the effect of the purpose provision, s 10 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act),[375] on the relevant s 59 factors.[376] I add some comments on the information principles, although agreeing with much of what Ellen France J says on that topic.[377] I also add some comments on her discussion of what is required to take

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368 In these reasons from now on I refer to Ellen France J alone as she is the author of their joint reasons.

369 Above at [14]–[38].

370 Above at [139]–[161].

371 Above at [162]–[174]. I also agree with Williams J's further comments below at [297] that the question of what is meant by existing interests and other applicable law must not only be viewed through a Pākehā lens.

372 Above at [188]–[197], although see below at [253] and [259] for discussion of when economic benefit can legitimately be taken into account for discharge consents.

373 Above at [227].

374 Above at [232]–[235].

375 All references are to the version of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [EEZ Act] in force as at August 2016, as that was the version in force when Trans-Tasman Resources Ltd (TTR) made its application.

376 I thus do not agree with Ellen France J's reasons above at [39]–[102], except as expressly indicated. Williams J agrees with my approach to s 10 of the EEZ Act and its effect on the s 59 factors below at [292]–[293].

377 Above at [103]–[138]. In particular, I agree with her discussion of the implementation of the precautionary principle (above at [107]–[113]). I agree that the decision-making committee (DMC) majority did not comply with the requirement to favour caution and environmental protection (above at [118]–[131]), although I do not agree that the DMC majority applied the correct test and so do not agree with the reasons above at [114]–[117], at [128] to the extent it does not apply the bottom line approach to s 10(1)(b) and the reference to the DMC majority citing the correct test in [130]. I also agree with the discussion on best available information (at [134]–[138]). Williams J agrees with my approach to the information principles below at [294]–[295].

into account the nature and effect of other marine management regimes,[378] the correct approach to the imposition of conditions[379] and the exercise of a casting vote.[380] I differ from the other members of the Court on the issue of relief.[381]

Role of s 10(1)(b)

[239] It is helpful to set out s 10 of the EEZ Act again:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

378 Above at [175]–[187].
379 Above at [199]–[213] (adaptive management) and [214]–[221] (bond).
380 At [222]–[226].
381 Above at [228]–[231] per Ellen France J and below at [299] per Williams J and [333] per Winkelmann CJ.

[240] As a purpose provision, s 10 provides the basis for the purposive interpretation of the other sections of the EEZ Act.[382] It also, however, provides an overarching guiding framework for decision-making under the Act and, to this extent, has substantive or operative force.[383] This Court took a similar view of the purpose provision in s 5 of the Resource Management Act 1991 (RMA) in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.[384] It held that the definition of sustainable management in s 5(2) of the RMA "states a guiding principle which is intended to be applied by those performing functions under the RMA".[385]

[241] The central concept of the definition of sustainable management in s 5(2) of the RMA is the same as that in s 10(2) of the EEZ Act, the differences merely reflecting the different contexts in which the two Acts operate.[386] Section 10(1)(a), coupled with s 10(2), uses language of compromise between economic and environmental needs. As is clear from the legislative history,[387] s 10(1)(a) is also aimed at achieving a balance between protecting the environment and exploiting it for economic reasons.

[242] *King Salmon* is authority for the proposition that even sustainable management can, however, at times require absolute protection from environmental harm, depending on the circumstances or the terms of other planning documents.[388] If that is the case for sustainable management, then it must be even more the case when account is taken of s 10(1)(b).

[243] Section 10(1)(b) was inserted in 2013 as part of transferring responsibility for the regulation of discharges and dumping to the Environmental Protection Authority (EPA).[389] Unlike s 10(1)(a), the language in 10(1)(b) is not premised on compromise. There is no mention of economic well-being or sustainable management. It simply provides that the purpose of the EEZ Act with regard to the designated areas and waters

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382 See Interpretation Act 1999, s 5(1).
383 Winkelmann CJ agrees with this below at [303].
384 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
385 At [24(a)]. See also at [30] and [151].
386 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment] at [34].
387 See Ellen France J's reasons above at [64]–[68].
388 *King Salmon*, above n 384, at [149]–[154] and in particular [150] and [153].
389 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013. The provision came into force on 31 October 2015.

is "to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter".

[244] I do not agree that "protect" means the same thing in s 10(1)(b) as "protection" does in the context of the definition of sustainable management in s 10(2).[390] If it did, then there would have been no need for its separate identification in s 10(1)(b). Further, in s 10(2), the word "protection" is used with the words "use, development, and protection" not of the environment but of natural resources, and in a context that provides for the balancing of the need to enable people to provide for their economic well-being with the three factors in s 10(2)(a)–(c). By contrast, s 10(1)(b) just talks about the purpose being to protect the environment from pollution. Under s 10(1)(a), environmental protection can be subordinated to economic needs, but under s 10(1)(b), it cannot.[391]

[245] Section 10(1)(b) is cumulative on s 10(1)(a).[392] It must therefore provide for something more than sustainable management. In my view, s 10(1)(b) is an operative restriction for discharges and dumping and thus an environmental bottom line in the sense that, if the environment cannot be protected from pollution through regulation, then discharges of harmful substances or dumping must be prohibited.[393] I therefore agree with the Court of Appeal that s 10(1)(b) is a separate consideration from sustainable management and should have been separately addressed by the decision-making committee (DMC) of the EPA as a bottom line.[394]

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390 Contrary to Ellen France J's view at [76] and [82]. It means more than merely a heightened threshold, contrary to the view expressed above at [83] of Ellen France J's reasons. Winkelmann CJ agrees with my reasoning below at [308] and n 509.

391 Winkelmann CJ agrees with this below at [309].

392 I note that Ellen France J also accepts that the decision-maker has to consider the criteria in s 59 of the EEZ Act with both purposes in s 10(1) in mind: see above at [55], [59], [83] and [102].

393 Winkelmann CJ agrees with this below at [305].

394 CA judgment, above n 386, at [84], [89], [106] and [107]. Winkelmann CJ agrees with this below at [303] and [305].

[246] Other features of the EEZ Act such as the need for the best available information,[395] the prohibition on adaptive management[396] and the need for caution[397] support this view of s 10(1)(b), as do New Zealand's international obligations.[398]

[247] Section 10(3) does not affect the conclusion that s 10(1) has substantive or operative force.[399] Section 10(3) merely makes it clear that the information principles and the specific decision-making criteria in the EEZ Act must be considered and applied in "order to achieve the purpose" of the Act, meaning that any assessment must be done in light of both of the purposes in s 10(1) in cases where s 10(1)(b) applies.[400] This is consistent with the approach in *King Salmon*, which rejected an "overall judgment" approach that did not take account of the other provisions of the RMA or of any relevant instruments.[401]

[248] I do not, however, agree with the Court of Appeal that s 10(1) provides the main operative criteria for the determination of applications.[402] As Ellen France J points out, the Court of Appeal's approach does not fit with the words of s 10(3), which

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395 EEZ Act, ss 61(1)(b) and 87E(1)(b).

396 Section 87F(4).

397 Sections 61(2) and 87E(2).

398 In accordance with s 11 of the EEZ Act. Article 192 of the United Nations Convention on the Law of the Sea 1982 (LOSC) provides that "States have the obligation to protect and preserve the marine environment". Article 194 imposes an obligation on States to use the "best practicable means" to "prevent, reduce and control pollution of the marine environment". It is true that art 193 allows the exploitation of natural resources, but it also provides that this must accord with the duty to protect and preserve the marine environment. I thus see LOSC as being consistent with the bottom line approach of protection from material harm in s 10(1)(b). The same applies to the Convention on Biological Diversity, the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL) and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention). It follows that I do not adopt Ellen France J's commentary on these instruments: see above at [86]–[101] of her reasons. See United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994); Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993); Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973 1340 UNTS 61 (signed 17 February 1973, entered into force 2 October 1983); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120 (opened for signature 29 December 1972, entered into force 30 August 1975); and 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (adopted 17 November, entered into force 24 March 2006).

399 Contrast Ellen France J's reasons above at [48].

400 See similarly Winkelmann CJ's reasons below at [304].

401 *King Salmon*, above n 384, at [130] and [151], where this Court said that s 5 of the Resource Management Act 1991 [the RMA] was not intended to be an operative provision under which particular planning decisions are made, although Part 2 (of which s 5 is part) remains relevant. As indicated above at [240], this Court described s 5 of the RMA as a guiding principle.

402 See CA judgment, above n 386, at [35] and [108].

expressly describe the matters set out in s 59 as “decision-making criteria”.[403] Section 10(1) sets out guiding principles but is not the section under which particular consent decisions are made.[404] Nevertheless, the s 10(1) purposes are not merely context for decision-makers. Nor are they factors to be given special weight. Ensuring those purposes are met is the very point of the s 59 assessment.

[249] In respect of discharges and dumping, therefore, this means that the relevant s 59 factors must be weighed in a way that achieves both the sustainable management purpose in s 10(1)(a) and the bottom line purpose in s 10(1)(b) of protecting the environment from pollution. Contrary to Ellen France J’s view, I do not see this as imposing a hierarchical approach to s 59.[405] It just means applying the s 59 factors consistently with s 10(1)(b). It follows that I disagree with Ellen France J that there is a balancing exercise under s 59 but that s 10(1)(b) means this may be more tilted in favour of environmental protection.[406] To perform an “overall assessment” of the s 59 factors[407] in effect would mean that the protective aspect of s 10(1)(b) is not given effect (even assuming a heightened threshold).[408]

[250] Section 10(1)(b) is a cumulative and substantive provision requiring separate consideration when applying s 59 to ensure the bottom line of protection of the environment from pollution is achieved.

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403 Above at [48]. I also agree with her comments above at [49]–[50], but not the conclusion she draws at [51].

404 See above at n 401 for the similar position under the RMA. In the EEZ Act, the link between the decision-making criteria and statutory purpose is in s 10, the purpose section itself, whereas in the RMA the decision section for resource consent applications, s 104, is expressly “subject to Part 2”, in which s 5, the statutory purpose section, is located. I note, as Ellen France J does at [171], that s 227 of the Resource Legislation Amendment Act 2017 amended the EEZ Act and made provision for EEZ policy statements (see Subpart 2 of Part 3A of the current EEZ Act), aligning the EEZ Act with the RMA in this regard (see (5 April 2017) 721 NZPD 17164).

405 See above at [56].

406 Above at [102] and [117]. Winkelmann CJ agrees with this below at [306].

407 As suggested by Ellen France J above at [59].

408 See above at [83], [85] and [101] of Ellen France J’s reasons for the use of the term “heightened threshold”. At [102] and [117] above she speaks of the possible tilting of the balance in favour of environmental protection factors.

What does protection require?

[251] There remains the issue of how the term "protect" is to be interpreted, whether the Court of Appeal's threshold of material harm is correct and, if so, how this is measured and over what period.

[252] The standard used by the Court of Appeal, "material harm", seems sensible as a bottom line.[409] If the environment is materially harmed, then it cannot be said to have been protected from pollution. On the other hand, it seems most unlikely that the purpose of s 10(1)(b) was to protect the environment against immaterial harm.[410] What amounts to "material harm" and the period over which this is measured will be for the decision-maker to determine on the facts of each case. Of course, harm does not have to be permanent to be material. Temporary harm can be material.[411]

[253] How then do the relevant s 59 factors fit with this bottom line? On my approach, s 10(1)(b) is not only relevant to the interpretation of s 59 but has substantive or operative force in its own right and is thus a qualification on s 59.[412] In light of this, I do not accept that protection is balanced against economic benefit. That is the province of s 10(1)(a).[413] Section 10(1)(b) is only concerned with protection. The fact that the list of factors in s 59 includes economic benefit and the efficient use and development of natural resources[414] with regard to discharges does not change this analysis and in particular does not mean that s 10(1)(b) allows varying levels of protection from material harm, depending on the amount of economic benefit. There is room between protection from all harm and protection from material harm for factors such as economic benefit and the efficient use of resources to operate.[415]

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409 I agree with Ellen France J above at [62] that the criterion used by the Court of Appeal was material harm.

410 Winkelmann CJ agrees with this below at [308].

411 Section 6(1)(b) of the EEZ Act defines "effect" as including "any temporary or permanent effect".

412 See similarly Winkelmann CJ's reasons below at [304] where she describes the s 59(2) factors as serving the s 10(1) purposes and hence subservient to those purposes.

413 I do not rely on the reasoning of the Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283: see Ellen France J's reasons above at [54], [58] and n 96. I do not comment on *RJ Davidson*, except to refer to the discussion of the approach in *King Salmon* above at [240], [242], [247] and n 401.

414 Sections 59(2)(f)–(g) and 87D(2)(a)(i) of the EEZ Act.

415 Winkelmann CJ agrees with this below at [312].

[254] I do not, however, agree with the Court of Appeal's view that consent cannot be granted where material harm to the environment may be caused in circumstances where that harm can be remedied or mitigated.[416] The Court of Appeal's approach does not give sufficient weight to the word "regulating" in s 10(1)(b) or indeed to practice both nationally and internationally. Section 59(2)(j) also supports this conclusion in the sense that it requires consideration of the extent to which imposing conditions under s 63[417] might avoid, mitigate or remedy adverse effects.

[255] The consequence of the link between ss 59 and 10(1) is that the s 59 factors are to be weighed in order to achieve the s 10(1)(b) purpose where that paragraph applies. This means that the terms in s 59(2)(j) in relation to conditions (avoid, remedy and mitigate) are aimed at achieving the bottom line. This approach also gives effect to the phrase "the extent to which" imposing conditions might avoid, remedy or mitigate adverse effects, which is defined in s 6(1)(b) as including temporary effects. There will be an acceptable extent of harm and an unacceptable extent. I accept, as the Chief Justice notes, that the assessment of whether there is material harm has qualitative, temporal, quantitative and spatial aspects that have to be weighed.[418]

[256] The meaning of the term "avoid" is obvious (avoid material harm).[419] The bottom line in s 10(1)(b) (protection from material harm) determines what is an acceptable extent of mitigation: mitigation must bring any harm below the threshold of material harm. As to the term remedy, this must mean that it may be permissible for discharges to cause harm, so long as the decision-maker is satisfied that any effects can be remedied and so rendered immaterial.[420] That by definition creates a margin of appreciation around timing, but in order to meet the bottom line (no material harm), remediation will have to occur within a reasonable time in the circumstances of the

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416 CA judgment, above n 386, at [86].

417 Section 63 of the EEZ Act sets out the types of conditions the decision-maker may impose.

418 See Winkelmann CJ's reasons below at [310].

419 As this Court said in *King Salmon*, above n 384, at [96], the term "avoid" in s 5(2)(c) of the RMA has its ordinary meaning of "not allow" or "prevent the occurrence of".

420 I see this as including any natural remediation that is projected to occur, except where there are no related conditions (which would be rare). In terms of the three-stage test set out below at [261], absent conditions, the matter will not be dealt with at the [261](b) step but at the [261](a) step. The issue at the [261](a) step will be only whether the duration and severity of any harm means it is material and with no consideration of economic benefit. It is only if the harm is not material, that economic benefit may come into play at the [261](c) step.

case and particularly in light of the nature of the harm to the environment, the length of time that harm subsists, existing interests and human health.

[257] The assessment of what is a reasonable time must take into account not only the duration of any recovery once the activity has ceased but also the total duration of the projected harm before remediation will occur. The longer the period before remediation occurs, the longer there will have been harm to the environment. That in itself may mean that the bottom line of protection is not achieved. In other words, what is a reasonable time for remediation must be assessed in a manner that is consistent with the s 10(1)(b) bottom line of protection of the environment from material harm.

[258] It follows that the length of time there is projected to be (unremedied) harm must also be factored into decisions on the duration of consents in order to ensure the bottom line in s 10(1)(b) is met.[421] Logically, too, the longer the timeframe before remediation and the longer the duration of any remediation measures, the less likely it is that a decision-maker could be satisfied, taking a cautious approach and favouring environmental protection,[422] that remediation will in fact occur as projected.

[259] Generally, therefore, what constitutes a reasonable time is for the decision-maker to decide, applying all the factors in s 59 but also meeting the standard of protection in s 10(1)(b). All else being equal, economic benefit considerations to New Zealand may have the potential to affect the decision-maker's approach to remediation timeframes in respect of discharges, but only at the margins.[423]

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421 See ss 73(2)(a) and 87H(4) of the EEZ Act, which provide that when determining the duration of the consent the decision-maker must, among other things, comply with ss 59 and 61.

422 See below at [270].

423 It follows that I disagree with the Chief Justice's view below at [316] about the complete irrelevance of economic benefit in the assessment of whether there will be material harm. The survival of s 59(2)(f) (economic benefit), following the 2013 reform inserting s 10(1)(b) into the EEZ Act, as a factor the decision-maker must consider, means economic benefit must play some role in dumping and discharge applications. But ultimately, as I have said above at [249], all the s 59 factors must be weighed with a view to achieving the s 10(1)(b) bottom line, and as such economic benefit will likely only be relevant at the margins to the assessment of a reasonable time for remediation. Thus, I do not consider that there is any practical difference between my approach and that of the Chief Justice.

[260] One possible objection to adopting a bottom line approach is that it may leave no realistic room for activities that require discharges, as most discharges could cause material harm through pollution of the environment.[424] The answer is that applicants for discharge consents are not limited to showing there is no material harm. They may also accept conditions that avoid material harm, mitigate the effects of pollution so that harm will not be material or remedy it so that, taking into account the whole period of harm, overall the harm is not material. It is only where there would be material harm and conditions cannot be imposed such that this material harm will be avoided, mitigated (so that it is no longer material) or remedied (within a reasonable timeframe taking into account the whole period harm subsists) that a discharge consent cannot be granted.

How applications should be determined

[261] In practice, the exercise of determining applications for discharge and dumping consents comprises up to three steps:

(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping?[425] If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.

(b) Is the decision-maker satisfied that conditions can be imposed that mean:

    (i) material harm will be avoided;

    (ii) any harm will be mitigated so that the harm is no longer material; or

    (iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

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424 See Ellen France J's reasons above at [81].

425 Unlike the definition of environment in s 2(1) of the RMA, the definition of the environment in s 4(1) of the EEZ Act is limited to the biophysical aspects of the environment: see Ellen France J's reasons above at [49].

If not, the consent must be declined. If yes, then step (c) must be undertaken.

(c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

[262] This provides a coherent and clear framework for thinking about the different standards required for the different types of consents. It means the standard for dumping is the strictest because at step (c), the decision-maker cannot consider economic benefit, efficiency or best practice.[426] By contrast, those factors can be considered for discharges, so such consents will be more likely to be granted at step (c), but only provided the bottom line is cleared at steps (a) or (b).

[263] This sets discharges and dumping apart from other activities, where s 10(1)(b) does not apply and so there is no bottom line. In those cases, it is purely a balancing of the s 59 factors in light of the purpose of sustainable management in accordance with s 10(1)(a), but even in those cases, absolute protection from material harm may be required in some circumstances.[427]

The DMC's approach in this case

[264] I agree with Ellen France J that the DMC majority's approach was to focus on the s 59 factors to undertake what it described as an "Integrated Assessment" which worked through those factors in turn.[428] Like Ellen France J, I also agree with the Court of Appeal that this assessment comes to a "somewhat abrupt end" with no clear indication of the test applied in coming to the conclusion to grant the consents.[429]

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426 Instead, as well as the remaining factors in s 59(2), the factors in s 87D(2)(b) must be considered, along with the absolute prohibition in the circumstances described in s 87F(2). Section 87D(2)(b)(ii) is effectively substituted for s 59(2)(c).

427 See above at [242].

428 Above at [59].

429 CA judgment, above n 386, at [99].

[265] While it might be implicit in the DMC majority's ultimate conclusion that it found the economic benefits of the project outweighed its adverse environmental effects, the integrated assessment does not explicitly weigh the relevant s 59 factors against an overall test of sustainable management.[430] Further, there does not seem to be any suggestion that the DMC understood that even sustainable management can, at times, require absolute protection from environmental harm.[431] In this sense, it is likely the DMC erred in not giving even s 10(1)(a) its requisite substantive or operative force as a guiding principle.

[266] Whether or not the DMC majority in this exercise took into account s 10(1)(b) at all is, as Ellen France J notes, open to doubt.[432] However, what is clear from the fact the DMC majority undertook an integrated assessment of all relevant s 59 factors is that it did not follow the three-step approach set out at [261] above and that it did not treat s 10(1)(b) as a cumulative and operative provision providing a bottom line of protection of the environment from material harm. This was an error of law.

[267] The problem may have stemmed from the DMC majority's decision not to separate out the marine consent and marine discharge aspects of the application as it considered the two to be "so interrelated that they must be regarded as an integrated whole".[433] I agree with Ellen France J that this may have been a practical approach,[434] but even on an integrated approach, what is required is that the decision-maker understands and applies the different standard relevant to the discharge aspects of the application. The DMC majority did this in some respects: for example, it understood that it could not impose conditions that contributed to adaptive management because the application involved discharges.[435] But there is no indication that it understood the significance of the bottom line imposed by s 10(1)(b) in addition to s 10(1)(a).

430 The Court of Appeal made a similar observation at [107].
431 See above at [242].
432 Above at [59].
433 Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight* (August 2017) [DMC decision] at [126].
434 Above at [59].
435 See, for example, DMC decision, above n 433, at [46] and [1055].

Indeed, in some parts of its decision, the DMC majority only identifies sustainable management as a purpose.[436]

[268] There is also much force in the iwi parties' submission that the DMC majority could not, had it properly directed itself in terms of the requirements of s 10(1)(b), have rationally come to the conclusion it did in light of a sediment plume that, for a distance of 2–3 km of the mining site, would have "severe effects on seabed life"[437] and significant effects on ecologically sensitive areas (ESAs) substantially further from the site.[438]

[269] It does appear that the DMC majority considered the effects on the environment would either not be material or that any adverse effects could be avoided, mitigated or remedied through the conditions imposed. It said that the effects will be in some sense "temporary" with "no constant level of effect in most locations".[439] It also saw various effects on the environment as minor or negligible,[440] although some others, such as effects on benthic fauna and oceanic productivity, were identified as more significant.[441]

[270] Ultimately, the DMC majority seems to have concluded that the conditions it imposed "will avoid, remedy or mitigate effects to the extent required to achieve the

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436 For example, in setting out the purpose at [4] of its decision, the DMC majority simply says that the purpose of the EEZ Act is to "promote the sustainable management of natural resources" in the EEZ.

437 At [939].

438 At [350] and sch 2 of Appendix 2. See also Appendix 3 of this judgment.

439 At [933].

440 See, for example, at [938], [941], [943], [953] and [954]. Note that the DMC majority uses the scale of harm set out in Table 5 of the decision: see [135]. Similar tables are used by the Ministry of Environment and in Australia. That scale sets a consequence level from negligible to catastrophic, taking into account the proportion of habitat affected; the population, community, and habitat impact; and the recovery period. The first two are appropriate for assessing whether there will be material harm. The third column, however, concentrates on recovery time once the activity ceases. This is not the correct measure for assessing material harm. The third consideration should be the total duration of material harm including recovery time: see above at [257]–[258] and below at [270]. The level of harm (and in particular whether there would be material harm) would then be considered taking all three factors into account. I note that in any event, Table 5 assumes a linear approach of effects across all three columns. It does not seem to take account of situations where, for example, effects are "measurable but localized" (minor) but with population, habitat or community components "substantially altered" (major) and a recovery period of one to two decades (severe). This means that a more nuanced analysis may be required – see, for example, the analysis from TTR's ecology expert, Dr MacDiarmid, regarding eagle rays, which was accepted by the DMC majority: at [431] and [433] of the majority decision.

441 See, for example, at [939], [968], [970], [972] and [974].

Act's purpose".[442] But this conclusion suffers from the same flaw as its assessment of the relevant s 59 factors: the failure to recognise s 10(1)(b) as providing a bottom line. In particular, the DMC majority does not follow the approach to economic benefit outlined at [253] and [259] above. Nor does it address the length of time before remediation and whether it will occur within a reasonable period, taking into account the bottom line of environmental protection in s 10(1)(b).[443] In this respect, the DMC majority seems to rely on its view that the effects will not be permanent, rather than assessing whether recovery will occur within a reasonable period taking into account the fact that the longer the total period of unremedied harm before remediation, the more likely the bottom line in s 10(1)(b) will be breached.[444] This was an error of law. The gist of this approach is evident in the following two paragraphs of the DMC majority's decision:[445]

> [25] Most of the effects on the environment will be temporary, albeit of considerable duration. When the extraction of material from the seabed finally comes to an end so will the generation of the plume and most of associated deposition and build up of sediment particles. We acknowledge recovery of the project site and areas in close proximity to it will recover over varying and longer periods than the rest of the [sediment model domain]. Noise from the extraction and processing of seabed material will cease and the existing ecology will be largely restored.
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> …
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> [43] Our record of decision acknowledges that there will be effects related to the mining. The effects will stop when the mining stops, or within a reasonable time period after that point.[446] We acknowledge that the 35-year duration of the consent means that the effects will be long term, but they will

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442 At [1028]. Although, as noted above, the DMC majority does not treat s 10(1)(b) as creating an environmental protection bottom line and so it was not assessing the conditions it imposed to the correct standard.

443 See above at [256]–[259] for the correct approach to this question. And see, for example, in light of the comments in that paragraph, the long timeframes (and uncertainties) associated with the recovery of some benthic fauna in the DMC decision, above n 433, at [402]–[408] and [972]. The DMC minority's assessment was that the recovery of certain ecological and cultural values was "extremely uncertain", and that more complex reef habitat and hard rocky outcrops "would take significantly longer to recover": at [97]–[99] of the minority's reasons. See also conditions 7–8 and 57–59 set out in Appendix 2. It must be remembered too that the consents (and therefore the effects) are for a very long period (35 years), as the DMC majority acknowledged at [43] of its summary set out in this paragraph.

444 See above at [257]–[258] and n 440. As noted above at [252], s 6(1)(b) of the EEZ Act means the DMC must consider temporary as well as permanent adverse effects.

445 See also, for example, DMC decision, above n 433, at [402] and [933]. I note too that Mr Leung-Wai's economic benefit analysis (expert for TTR) "assumed recovery over time of the seabed environment, and no ongoing irreversible effects": at [789].

446 I acknowledge that the DMC majority did mention remediation within a reasonable time in this passage. However, it is not just the period after mining ceases that should have been considered but the whole period of projected unremedied harm: see above at [256]–[259] and n 440.

> not be permanent. Our consideration of this point also acknowledges recovery, and that recovery may not be an exact replication of the environment that existed before the commencement of mining.

[271] There is another major issue with the majority's approach. Even if in some respects some of the conditions imposed may have had the effect of avoiding, remedying or mitigating material harm (at least over time), any such consideration was tainted by the DMC majority's fundamental error of acting on the basis of uncertain and incomplete information.[447] As discussed below in relation to seabirds and marine mammals and some other factors, the DMC majority simply could not be satisfied, on the basis of the information before it and taking the required cautious approach favouring the environment, that the conditions imposed would ensure all of the material harm would be remedied, mitigated or avoided.

Information principles

[272] Under s 61(1)(b) of the EEZ Act, the decision-maker must base the decision on the best available information. Section 61(1)(a) requires a decision-maker to make full use of its powers "to request information from the applicant, obtain advice, and commission a review or a report". Under s 61(1)(c), the decision-maker must "take into account any uncertainty or inadequacy in the information available" and, where this is the case, under s 61(2) must "favour caution and environmental protection".[448]

[273] This means that discharge consents may be granted even on incomplete information, as long as that is the best available information and that, taking a cautious approach and favouring environmental protection, the decision-maker is satisfied that the bottom line in s 10(1)(b) is met: that there is no material harm from pollution or that material environmental harm can be avoided, remedied (within a reasonable timeframe) or mitigated (so that it is not material) through the use of conditions.[449] Where this is not the case, the application must be refused.[450]

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447 See also Ellen France J's reasons above at n 143 and [129].

448 See also s 87E of the EEZ Act, which applies in respect of marine discharge and dumping applications.

449 See also Ellen France J's reasons above at [117] and [128].

450 See also the comment in the CA judgment, above n 386, at [266], referred to in Ellen France J's reasons above at [137].

[274] I agree with Ellen France J that the DMC did not favour caution or environmental protection in this case.[451] Given my view of the effect of s 10(1)(b), I do not, however, agree with Ellen France J's discussion of the link between the information principles and s 10(1)(b). Rather, I agree with the approach of the Court of Appeal.[452] It follows from my view of s 10(1)(b) that the DMC could not have met either step [261](a) or [261](b) above, given the almost total lack of information in this case on seabirds and marine mammals and the similar issues with the sediment plume and suspended sediment levels discussed by Ellen France J.[453]

[275] This information deficit could not legitimately be compensated for by conditions designed to collect the very information that would have been required before any conclusion at all could be drawn as to the possible effects, any possible material harm and any effect of any possible conditions. No conclusion was therefore possible on whether the bottom line could be met and a consent could not legitimately be granted.[454]

[276] While it is not necessary to decide this point, I think it is strongly arguable that in this case the pre-commencement monitoring conditions (conditions 48 to 51) were ultra vires as they went well beyond monitoring or identifying adverse effects and were for the purpose of gathering totally absent baseline information.[455]

[277] In my view, there is also force in the Royal Forest and Bird Protection Society of New Zealand Inc's submissions about conditions in this case meaning there was a deprivation of participation rights, as the Court of Appeal found.[456] Participation is

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451 Above at [118]–[131] (but see above at n 377 for specific aspects of the reasoning I disagree with). See also at [205].

452 Ellen France J's discussion is above at [114]–[117]. For the Court of Appeal's view, see CA judgment, above n 386, at [129].

453 See Ellen France J's reasons above at [131].

454 I agree with Ellen France J's analysis above at [129]–[130] as to the effect of the conditions but do not agree the DMC majority cited the correct test.

455 As the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) submits. Contrast Ellen France J's reasons above at [132]; and CA judgment, above n 386, at [272]. I do agree with Ellen France J's comments at [205] where she says there is much force in the argument that the seabird and other pre-commencement conditions are a mechanism for providing baseline information as to effects which had been lacking in TTR's application. As Ellen France J points out at n 337, even though condition 66(b)–(c) (relating to seabirds) is not strictly a pre-commencement condition, it has a pre-commencement aspect.

456 CA judgment, above n 386, at [259(c)]. See similarly Williams J's reasons below at [295] and Winkelmann CJ's reasons below at [329]. Contrast Ellen France J's reasons above at [133].

only meaningful on the basis of sufficient information, including as to the possible effects of the conditions. That information was in important respects entirely lacking and would only become available once the pre-commencement monitoring had occurred and the opportunity for public input had passed.[457]

[278] In particular, there would have been no opportunity for public input into vital conditions that would only be set after the informational gaps had been remedied. For example, as the Taranaki-Whanganui Conservation Board submits, some of the suspended sediment concentration limits required to be complied with under condition 5 are only to be set following the pre-commencement monitoring.[458] The same comment applies to the management plans related to seabirds and marine mammals.[459]

[279] I agree with Ellen France J that the conclusion of the DMC that it had the best available information that could have been delivered without unreasonable cost and time is a question of fact and therefore not subject to review by this Court.[460] The information before the DMC was, however, not sufficient to satisfy a decision-maker that there would be no material harm or that it would, through the conditions, be avoided or mitigated so that it was no longer material or remedied so that, taking into account the whole period harm subsists, overall the harm was not material. Consequently, the application should have been refused because the DMC could not rationally be satisfied that the bottom line in s 10(1)(b) would be met.

Other marine management regimes

[280] I agree with Ellen France J's general approach to s 59(2)(h) and other marine management regimes.[461] I agree that the way the New Zealand Coastal Policy

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457 The existence of the Technical Review Group and the Kaitiakitanga Reference Group does not change that conclusion.

458 See conditions 48 and 51 and sch 2 set out in Appendix 2 of the DMC decision, above n 433. I do not agree with Ellen France J at [210] that condition 51 only allows for the updating of numerical values pre-commencement, but that the "thresholds" do not change following pre-commencement monitoring.

459 See conditions 66 and 67 set out in Appendix 2 of the DMC decision. As Ellen France J notes above at [205], these are designed to set indicators of adverse effects at a population level before mining commences.

460 Above at [134]–[138].

461 Discussed above at [175]–[187].

Statement 2010 (NZCPS)[462] was dealt with by the DMC majority was an error of law.[463] My reasons for this differ from those of Ellen France J. She says that, although the NZCPS was not directly applicable to Trans-Tasman Resources Ltd's (TTR) proposed activities, the DMC majority needed to confront the effect of the environmental bottom line in the NZCPS and explain briefly why that factor was outweighed by other s 59 factors.[464] I agree that the NZCPS was not directly applicable and that the DMC nevertheless needed to take into account the environmental bottom line in the NZCPS. I do not, however, consider this environmental bottom line can be outweighed by other s 59 factors. This is because, on the approach I take, s 10(1)(b) itself provides an environmental bottom line that cannot be overridden. There must be synergy in the approach to the NZCPS bottom line and s 10(1)(b).[465]

Adaptive management

[281] I agree with Ellen France J that the DMC adopted too narrow an approach to adaptive management.[466] I also agree with the Court of Appeal that an adaptive management approach is one where there is uncertainty as to harm and a discharge or dumping consent is granted "on terms that provide that if such harms do occur then the consent envelope will be adjusted prospectively".[467] I agree too that there is a distinction between an adaptive management approach and one where monitoring and management plans are designed to "provide for operational responses" if the requirements of a consent are not met.[468] I thus agree with the Court of Appeal's "consent envelope" approach, endorsed by Ellen France J.[469]

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462 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

463 Above at [187].

464 Above at [178]–[179] and [186].

465 That is, the bottom line in the NZCPS must be interpreted and applied in light of s 10(1)(b). It follows that I also disagree with the Court of Appeal's conclusion where it seems to contemplate that it would have been possible for the DMC to grant consent even if the proposed activity would have effects within the coastal marine area that were inconsistent with the NZCPS bottom line: CA judgment, above n 386, at [200].

466 Above at [201].

467 CA judgment, above n 386, at [221].

468 At [225].

469 Above at [207].

[282] In this case the real issue was that there was totally inadequate baseline information provided by TTR in a number of respects and therefore, as indicated above, the application should have been declined.[470] The pre-commencement monitoring and the management plans for seabirds and marine mammals were designed to gather baseline information that should have been provided by TTR in its application and were to be used, in effect, to set the consent envelope before mining began.[471] It was not, however, a case of starting mining and then adjusting the consent envelope prospectively and, thus, does not amount to adaptive management.

[283] It is true that, under the conditions, monitoring continues once the mining begins. This ongoing monitoring will inform further management plans,[472] but the ability to amend operational responses in the plans in light of the ongoing monitoring is not adaptive management as it does not allow for changes to the consent envelope. It only allows for changes in how TTR carries out its operations in order to stay within the consent envelope. I agree therefore with Ellen France J that this was not a case of adaptive management.[473]

[284] Having said that, even if not strictly adaptive management, what occurred here seems to me to fall within the spirit of the prohibition against adaptive management. It also reinforces the conclusion that the baseline information gathering conditions were not appropriate and that, on the basis of the information before the DMC, the discharge consent should have been refused.[474]

Bond vs insurance

[285] There is a clear difference between bonds and insurance in terms of when each operates and, while sometimes they will coincide in what they cover and therefore

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470 See above at [275].

471 As noted above at n 455. See similarly Ellen France J's reasons above at [205].

472 DMC decision, above n 433, at [36].

473 I thus agree with the discussion in Ellen France J's reasons above at [206]–[213], with the exception noted above at n 458. As discussed at n 458, I consider condition 51 does allow for the changing of thresholds following the pre-commencement monitoring. But this still does not amount to adaptive management as any change to the thresholds (and hence the consent envelope) occurs before mining begins.

474 See similarly CA judgment, above n 386, at [227], where the Court of Appeal said that the DMC's decision suffered from a much "more fundamental" problem than adaptive management of not meeting the requirement to favour caution and environmental protection. Ellen France J agrees with this finding of the Court of Appeal above at [205].

have similar outcomes, this will not always be the case. Consideration should be given to each where there is not congruence between the two and brief reasons should be given for not requiring both.[475] I do not consider this requirement was fulfilled here and thus there was an error of law.[476]

[286] In this case, given the uncertainties involved, the fact that there was no evidence that insurance would cover all of the risks, the length of time the conditions were to continue after mining ceases[477] and the real possibility of insolvency should the worst happen, it was in any event in my view irrational not to have required a bond.[478]

Casting vote

[287] I am uneasy about the use of a casting vote in favour of a consent where the legislation requires the exercise of caution. But this is a criticism of the provision of the legislation which gives a casting vote. I agree with Ellen France J that there was no error of law in its exercise in this case.[479]

Relief

[288] As indicated above, on the basis of the information before the DMC (which was found to be the best available information), the consent application should have been declined. In these circumstances, there is no point in referring the matter back for reconsideration.[480] It would also put an unwarranted burden on the first respondents if TTR is now allowed to try to fill the information gaps.[481]

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475 This is so whether or not the issue is raised by the submitters.

476 In agreement with Ellen France J's reasons above at [214]–[221].

477 See, for example, the conditions relating to benthic recovery. Once mining ceases, there are no direct economic incentives to comply with the conditions and operational capacity would also no doubt be much reduced.

478 I do not consider the possibility of enforcement proceedings meets this point, contrary to TTR's submissions. This is self-evidently not sufficient in the case of insolvency and in any event would mean time, trouble and expense.

479 Above at [222]–[226].

480 As Forest and Bird and the iwi parties submit.

481 There is nothing to indicate that the information gaps have been or will be filled to the degree that would be necessary to come to a positive conclusion on the environmental bottom line. Contrary to Ellen France J's reasons above at [229], I would in any event accept the submission of the Taranaki-Whanganui Conservation Board that the parties should not be put to the cost of responding to yet more evidence or a modified proposal even if the matter were referred back.

[289] I also consider there to be great force in the submissions of the iwi parties that there are specific DMC findings related to ESAs[482] that would in any event have compelled the refusal of the application. In addition, and more generally, it is difficult to see how a more than 35-year duration of significant effects could rationally meet the test of the environment being remediated within a reasonable period.[483]

WILLIAMS J

[290] I have had an opportunity to read my colleagues' drafts as they have evolved and to discuss various aspects with them. I record my appreciation for the collaborative approach they have taken.

[291] It remains for me to set out where (and occasionally why) I agree with the reasons of William Young and Ellen France JJ, and where I support Glazebrook J's reasons, having, on those aspects only, parted company with William Young and Ellen France JJ.

Section 10(1)(b) and the material harm bottom line

[292] For the reasons she adopts, I agree with Glazebrook J's assessment of the role of s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).[484] In particular, I agree that s 10 performs the same structural function as s 5 of the Resource Management Act 1991 and that, as s 10(3) makes clear, the criteria in s 59 must be applied to achieve the s 10(1) purposes.[485] Similarly, I agree with Glazebrook J that s 10(1)(b) imposes an environmental bottom line to protect the marine environment against material harm from marine dumping

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482 Summarised in Ellen France J's reasons above at [228]. See also Appendix 3 of this judgment.

483 See above at [270] and the conclusion at [43] of the DMC majority's decision, above n 433, that the effects will be throughout the 35-year period and cease only when mining stops or within a reasonable time thereafter. I make the comment about the lack of rationality despite economic benefit being able to be taken into account at the margins in assessing what is a reasonable period for remediation, given that what is a reasonable period must take into account the whole period harm will endure: see above at [256]–[259]. I comment that such a long period of significant effects may well not meet the s 10(1)(a) threshold either, given s 10(2)(a)–(c).

484 See above at [239]–[263].

485 I note that the same drafting formula as that in s 10(3) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [EEZ Act] is used in ss 6–8 of the Resource Management Act 1991.

and discharges.[486] The decision-making committee's (DMC's) failure to apply s 10(1)(b) in that way was an error of law.

[293] I agree with Glazebrook J that the reference in s 59(2)(j) to consent conditions that "avoid, remedy or mitigate" adverse effects contemplates the possibility that discharges may cause temporary harm of a material kind. But that will be so only if it can (with a reasonable degree of confidence) be remediated within a reasonable time, so that it is nonetheless appropriate to treat the harm as immaterial in all of the circumstances. In addition to that temporal aspect, those circumstances will include the scale of the receiving environment, the magnitude of any (temporary) effect, the sensitivity of the receiving environment and so forth. I also agree (subject to the careful caveats set out by Glazebrook J) that economic factors may be considered in making that judgment.[487]

Information principles

[294] Like Glazebrook J, I am in general agreement with William Young and Ellen France JJ's conclusions in respect of the effect of the EEZ Act's information principles. But in light of my view of the effect of s 10(1)(b), I do not agree with the latter's conclusions about the relationship between the information principles and s 10(1)(b).[488] Rather, I prefer Glazebrook J's analysis.[489]

[295] I also disagree with William Young and Ellen France JJ's conclusion at [133] in relation to management plans, even though, as they rightly note, Trans-Tasman Resources Ltd (TTR) provided drafts of those plans in the application documents and their content would have been no surprise to submitters. It would be usual in complex consent applications such as TTR's to deal with some effects through management plans. But such plans would generally contain clear operational and effects parameters because their purpose would be to demonstrate how the applicant will keep the activity within those parameters and what will happen if it does not. TTR's management plans

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486 See above at [251]–[260].

487 EEZ Act, s 59(2)(f). See above at [259]. Compare Winkelmann CJ's reasons below at [315]–[317].

488 See above at [117] and [128]. Nor do I agree that the decision-making committee (DMC) majority cited the correct test in relation to s 10(1)(b): compare above at [130].

489 See above at [273]–[274].

did not contain clear parameters at all; rather, their first purpose would be to *set* the parameters. This allowed the applicant to postpone this task to a post-consent administrative phase. The Court of Appeal was right that this deprived submitters of the ability to engage at the hearing with what was plainly a fundamental aspect of the application.[490]

The Treaty of Waitangi, existing interests and tikanga

[296] I am in broad agreement with William Young and Ellen France JJ's reasoning and conclusions with respect to the Treaty of Waitangi and existing interests, and whether tikanga Māori (and international law instruments) are "other applicable law" in terms of s 59(2)(l).[491] In particular, I agree that s 12 contains a strong Treaty direction and that, in any event, the constitutional significance of the Treaty means that Treaty clauses will be generously construed. If Parliament intends to limit or remove the Treaty's effect in or on an Act, this will need to be made quite clear.[492]

[297] As to what is meant by "existing interests"[493] and "other applicable law",[494] I would merely add that this question must not only be viewed through a Pākehā lens. To be clear, I do not say the reasons of William Young and Ellen France JJ reflect that shortcoming. On the contrary, they make the same point implicitly at [155] and [161]. I simply wish to make it explicitly. As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place.[495] As with all interests, they reflect the relevant values of the interest-holder. Those values—mana, whanaungatanga and kaitiakitanga—are relational. They are also principles of law that predate the arrival of the common law in 1840. And they manifest in practical ways, as William Young and Ellen France JJ note.[496] There would have to be a very good reason to read them out of the plain words of s 59(2)(a), (b) and (l). I see no such reason.

490 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment] at [259(c)]. See similarly Glazebrook J's reasons above at [277]–[278].
491 See above at [139]–[174].
492 See the reasons of William Young and Ellen France JJ above at [149]–[151].
493 EEZ Act, s 4(1) definition of "existing interest".
494 Section 59(2)(l).
495 CA judgment, above n 490, at [166].
496 See above at [155].

Other matters including relief

[298] I largely agree with William Young and Ellen France JJ's approach to "other marine management regimes", particularly their approach to the New Zealand Coastal Policy Statement 2010 (NZCPS)[497], which was the focus of argument.[498] I disagree, however, with their conclusion that the bottom line contained in that document is defeasible by reference to other s 59 factors. Like Glazebrook J, I consider that in this respect the NZCPS is in lockstep with s 10(1)(b).[499]

[299] On all other matters I adopt in full William Young and Ellen France JJ's reasons and conclusions. I also agree with William Young and Ellen France JJ that the appropriate remedy is to refer the matter back to the Environmental Protection Authority (EPA) for reconsideration, subject to the reservation of leave to a party to seek directions from the High Court should that prove necessary.[500] TTR may wish to apply to provide further material in relation to the information deficits identified in those aspects of the reasons given by Ellen France and Glazebrook JJ that represent the majority view of this Court. I agree the scale and complexity of this application is such that TTR should not be denied an opportunity to convince the EPA that, despite our findings, this would be an available and worthwhile course to take. Further, as a matter of principle, I would be most reluctant to take away from an expert statutory decision-maker the final reassessment of the substantive merits of the application.

[300] Finally, I also agree with the costs order.[501]

WINKELMANN CJ

[301] I write separately to record the areas of my agreement with the reasons of Glazebrook J and with the reasons of William Young and Ellen France JJ.[502]

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497 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).
498 See above at [175]–[187].
499 See above at [280].
500 See above at [228]–[231].
501 See above at [233]–[235].
502 As given by Ellen France J.

Relationship between s 10(1) and s 59(2) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

[302] I agree in large part with the reasons of Glazebrook J in relation to the role s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) plays in the decision whether to grant a marine consent for the discharge of harmful substances in the exclusive economic zone. The scope of my disagreement with her reasons is set out below at [315]–[317].

[303] I agree with Glazebrook J that it is clear from the statutory scheme that s 10(1)(b) is an operative restriction for the grant of consents for discharges of harmful substances and the dumping or incineration of waste or other matter.[503] It is operative in the sense that this section, along with s 10(1)(a), provides the standard against which an application for consent for such activities is to be assessed.

[304] As s 10(3) makes clear, the decision-making criteria and information principles are to be applied in order to achieve the statutory purposes set out in s 10(1)(a) and (b). In that sense, the s 59(2) factors serve the s 10(1) purposes, and therefore are subservient to them.[504] I see s 10(1)(a) and (b) as providing the critical standard to be applied by the decision-maker, with the s 59(2) factors relevant only to the extent that they assist the decision-maker in making decisions that achieve those purposes. This approach is consistent with the language of s 59(2). Although it provides that the Environmental Protection Authority (EPA) must take the factors listed there into account, it gives no indication as to how they are to be taken into account – that can only be determined by reference back to the s 10(1)(a) and (b) standard.

Environmental bottom line

[305] The next issue that arises is the nature of the operative restriction imposed by the s 10(1)(b) requirement to "protect" the environment from pollution. I agree with Glazebrook J, and for the reasons she gives, that s 10(1)(b) imposes a requirement cumulative on the s 10(1)(a) requirement of sustainable management. I also agree that it provides an environmental bottom line in the sense that where the discharge of a

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503 Above at [245].
504 See similarly Glazebrook J's reasons above at [247].

harmful substance will cause pollution that the environment cannot be protected from through regulation, then a consent should not be granted.[505]

[306] I therefore disagree with the reasons given by Ellen France J that the EEZ Act requires an overall assessment, balancing the factors set out in s 59(2), and that the s 10(1)(a) and (b) purposes operate as a cross-check on that balancing exercise,[506] or that they operate to tilt the s 59 balancing exercise in favour of environmental factors in some but not necessarily all cases.[507] Either approach elevates the s 59(2) factors to operate independently of the s 10(1) purposes – an approach that is inconsistent with the requirements of s 10(3). Ellen France J sets out the legislative history of s 10, which suggests an intention that decision-making in respect of proposed activities within the exclusive economic zone and the continental shelf proceed by way of a balancing exercise – balancing environmental and economic interests.[508] But, in my view, that history is not of any assistance in interpreting the requirements of s 10(1)(b) because it pre-dates the enactment of s 10(1)(b) – and really does no more than describe the concepts that lie at the heart of sustainable management, as captured in s 10(1)(a) and s 10(2).

[307] What does it mean to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances? There is nothing in the language of s 10 or in the wider statutory context to suggest that the word "protect" in s 10(1)(b) has anything other than its ordinary meaning, namely;[509]

> (1) Defend or guard against injury or danger; shield from attack or assault; support, assist, give [especially] legal immunity or exemption to; keep safe, take care of; extend patronage to.
>
> …
>
> (1C) Aim to preserve (a threatened plant or animal species) by legislating against collecting, hunting, etc; restrict by law access to or development of (land) in order to preserve its wildlife or its

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505 Above at [245].
506 Above at [51], [55] and [102].
507 Above at [102].
508 Above at [64]–[68].
509 William R Trumble and Angus Stevenson (eds) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 2376. I agree with Glazebrook J above at [244] that "protect" in s 10(1)(b) does not mean the same thing as "protection" in the definition of sustainable management in s 10(2) – the context makes plain that the words are used in a different sense.

> undisturbed state; prevent by law demolition of or unauthorized changes to (a historic building etc).

[308] As to the standard of protection, I agree with Glazebrook J that s 10(1)(b) is not intended to protect the environment from all harm – there seems no environmental utility in protecting the environment from immaterial or insignificant harm.[510] The Court of Appeal and Glazebrook J adopt a standard of material harm. I am content with that. It is consistent with the use of the descriptor "pollution" in s 10(1)(b) as the effect to be avoided. I note that the definition of "pollution of the marine environment" in the United Nations Convention on the Law of the Sea 1982 is also set at the level of what can be described as material harm:[511]

> … the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities[.]

[309] Trans-Tasman Resources Ltd (TTR) says that the s 10(1)(b) purpose of protection does not preclude consent being granted where the discharge will cause material harm, if other s 59(2) interests (economic benefit and efficient use and development of natural resources) are assessed as justifying that harm. TTR argues that interpretation is consistent with the ordinary meaning of "protect" and how the word is used in the EEZ Act. In my view, the requirement to protect is inconsistent with permitting material harm to the environment through the consented discharge of a harmful substance. Whilst the approach suggested by TTR may be open where the decision is to be judged against the s 10(1)(a) purpose alone, it is not available in the case of marine discharge and dumping consents to which s 10(1)(b) also applies. If the environment is materially harmed by the consented discharge, it has not been protected from pollution, even if economic benefits flow from the activity – the environment cannot be said to have been defended or guarded against injury.

[310] The qualification added by the descriptor "material" is important in making sense of the statutory scheme and in terms of how it operates. Whilst s 10(1)(b) applies

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510 Above at [252].

511 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 1(4).

to every consent application for discharge of a harmful substance, not every discharge of a harmful substance will cause harm to the environment – material or otherwise. The continental shelf and exclusive economic zone cover a large and varied expanse of seabed. The exclusive economic zone contains a vast volume of ocean water and supports a wide variety of life. Whether harm is material in any one case will require assessment of a multiplicity of factors, such as the volume of the harmful substance discharged into the expanse of the sea, the flora, fauna and natural characteristics of the area of seabed affected, the size of seabed or volume of water affected, and the time for which the damage will last. There are therefore qualitative, temporal, quantitative and spatial aspects to materiality that have to be weighed.[512]

[311] The assessment of whether the projected harm crosses the threshold of materiality therefore requires a factual inquiry. Consideration must be given to the impact of the discharge upon the marine ecosystem when assessing what is to be adjudged a material level of harm. Consideration must also be given to the impact upon those who depend upon that ecosystem – s 59(2)(a) and (b) require any effects on existing interests of allowing the activity to be taken into account.

[312] TTR argues that the construction of s 10(1)(b) has to leave room for the effective operation of the factors in s 59(2), and that there is significance in the fact that, when s 10(1)(b) was engrafted onto the legislative scheme, the s 59(2)(f) and (g) factors of economic benefit and efficient use of resources were not removed from consideration for discharge consents. This suggests, says TTR, that the protection s 10(1)(b) describes is not intended to be absolute. The answer to this argument is the point made by Glazebrook J – there is room between protection from all harm and protection from material harm for factors such as economic benefit and the efficient use of resources to operate.[513] In other words, if the decision-maker is satisfied that the discharge will not, if regulated and subject to such conditions as the decision-maker imposes, cause material harm to the environment, the decision-maker must nevertheless still take into account whether there is any economic benefit (or detriment) to allowing the activity, and whether the activity allows for the efficient use and development of resources.

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512 See similarly Glazebrook J's reasons above at [255] and Williams J's reasons above at [293].
513 Above at [253].

[313] TTR argues that its interpretation is strengthened by the express contemplation within s 10(1)(b) that the discharge of harmful substances can be allowed where the environment can be protected from pollution through regulation, which must be a different standard to outright prohibition. It further argues that its approach is supported by the application of s 59(2)(j) to discharge consents: "the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity". In my view, neither point assists TTR's argument. The EEZ Act clearly contemplates the discharge of harmful substances, and so must provide for regulation or mitigation to be used to reduce the impact caused by the consequent pollution of the exclusive economic zone and continental shelf below the threshold of material harm. The EEZ Act provides for the imposition of conditions requiring remediation of adverse effects for the same reason it provides for the imposition of conditions requiring mitigation – conditions may be imposed requiring remediation of the adverse effects, so that the pollution caused by the discharge does not cause material harm to the environment.

[314] I therefore agree with the Court of Appeal, and with Glazebrook J, that s 10(1)(b) provides an environmental bottom line and the s 59 factors are to be taken into account by the decision-maker in achieving that purpose.[514]

Relevance of economic benefit considerations to the assessment of material harm

[315] I differ from Glazebrook J in one respect.

[316] Glazebrook J,[515] with whom Williams J agrees,[516] says that all else being equal, economic benefit considerations to New Zealand may have the potential to affect the decision-maker's approach to remediation timeframes in respect of discharges, albeit noting only at the margins. As noted above, I agree that economic benefit will be relevant in the decision to grant a consent, where the harm the discharge causes the

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514 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment] at [82]–[83] and [89]; and Glazebrook J's reasons above at [249]–[250].

515 Above at [259].

516 Above at [293].

environment is assessed as falling beneath the threshold of material harm.[517] However, I disagree if it is suggested that economic benefits associated with the activity necessitating the harmful discharge affects the assessment of materiality. In my view, the decision-maker's assessment of whether the discharge of a harmful substance will cause material harm cannot be affected by considerations of economic benefit. If the harm cannot be avoided through regulating the discharge or through imposing conditions requiring mitigation or remediation, then consent must be refused, regardless of economic considerations.

[317] I see this conclusion as flowing inevitably from my earlier conclusions: that the s 10(1) purposes provide the standard against which consent decisions are to be made, and that s 10(1)(b), while cumulative upon s 10(1)(a), is an environmental bottom line which requires that decisions about the discharge of harmful substances be made so as to protect the environment from pollution which causes material harm. On my view of the legislative scheme, considerations of sustainable management play a part in relation to consents for discharge of harmful substances only where the proposed discharge (with all regulatory, remedial and mitigatory steps) does not cross the threshold of material harm.

How applications should be determined

[318] This, however, leaves the situation that there is no clear majority within the Court on this critical issue of how applications should be determined. The pragmatic solution is that I should join with Glazebrook and Williams JJ on this point, viewing that as the preferable of two approaches, each of which I disagree with, at least in part.

[319] I am therefore content with the three-step approach suggested by Glazebrook J at [261] of her reasons, but make explicit the following point which I see as implicit in the third step set out at [261](c). Since s 10(1)(b) is cumulative on s 10(1)(a), I do not exclude the possibility that a decision-maker would want to impose conditions to mitigate, remedy or avoid adverse effects even though the threshold of material harm will not be met.

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517 See above at [312]. To be clear, whether it meets that threshold is to be assessed taking into account any conditions regulating the discharge, or requiring remediation or mitigation of adverse effects.

The DMC's approach in this case

[320] That takes me to the issue of whether the EPA decision-making committee (DMC) erred in its application of s 10(1). I agree with Glazebrook J that the integrated assessment undertaken by the DMC did not explicitly weigh the relevant s 59 factors against the s 10(1) purposes.[518] There is no indication in the DMC majority's reasons that the majority asked themselves the critical question, at the end of that assessment, whether the granting of the consents would give effect to the s 10(1) purposes, and in particular, to the s 10(1)(b) environmental bottom line.[519] I consider that the Court of Appeal was therefore correct in its conclusion that the DMC did not ask itself the right question when undertaking the decision-making process for the grant of the consents.

Information principles

[321] Section 10(3) requires the decision-maker to apply the information principles in order to achieve the s 10(1) purposes. The information principles that apply to applications for the discharge (or dumping) of harmful substances are those set out in s 87E of the EEZ Act. Section 87E is largely duplicative of s 61, which sets out the information principles that apply to marine consents other than for discharge or dumping activities,[520] save in one important respect relating to the prohibition on adaptive management for discharge and dumping consents.[521] These information principles require a decision-maker to make full use of its powers to obtain information,[522] to base its decisions on the best available information,[523] and to take into account any uncertainty or inadequacy in the information available.[524] Most relevantly, s 87E(2) provides that if, in relation to a decision on the application, "the

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518 Above at [265] (in relation to s 10(1)(a)) and [266]–[267] (in relation to s 10(1)(b)).

519 See similarly the discussion in CA judgment, above n 514, at [106]–[107]; the reasons given by Ellen France J above at [59]; Glazebrook J's reasons above at [264]–[271]; and Williams J's reasons above at [292].

520 For activities described in s 20 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

521 Section 87F(4). Compare s 61(3).

522 Section 87E(1)(a).

523 Section 87E(1)(b). This obligation is qualified by s 87E(3), which provides that "best available information" means the "best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".

524 Section 87E(1)(c).

information available is uncertain or inadequate, the EPA must favour caution and environmental protection".

[322] TTR challenges the Court of Appeal finding that s 87E(2) is a statutory implementation of the "precautionary principle", sometimes called the "precautionary approach",[525] at international environmental law.[526] That principle is expressed in Principle 15 of the Rio Declaration on Environment and Development 1992, which provides:[527]

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[323] TTR says that neither the Rio Declaration nor the precautionary principle are expressly mentioned in s 11, and are not mentioned elsewhere in the EEZ Act.

[324] I see no error in the Court of Appeal's characterisation of ss 61 and 87E as a statutory implementation of the precautionary principle. It is true that s 11, which contains a list of international conventions which the EEZ Act implements, does not expressly refer to the Rio Declaration. However, the list of conventions is expressed to be non-exclusive – the introductory part of s 11 states:

> This Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment …

It is also true that the EEZ Act does not use the expression "precautionary principle"; nevertheless, it is apparent from the content of ss 61 and 87E that they implement aspects of the precautionary principle as found in international environmental law.

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525 The language of "principle" and "approach" is a matter of preference between some states. In this context, it is unnecessary to deal with the difference (if any) between the two, and thus I will refer to "principle" as a matter of efficiency for the remainder of my reasons.

526 For a discussion of the principle and its source, see *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [109] and [111]. See also the reasons given by Ellen France J above at [107].

527 Rio Declaration on Environment and Development UN Doc A/Conf 151/26 (vol 1) (12 August 1992).

[325] Nevertheless, it is also important to bear in mind that these provisions in the EEZ Act are a particular and detailed statutory expression of that principle. As Ellen France J notes, the exact scope and application of the precautionary principle remains unsettled in international law.[528] It is arguable that the obligations imposed by s 87E, when applied in the context of a proposed marine discharge of harmful substances, are more protective of the environment than the precautionary principle.[529] Certainly nothing of substance was presented to us to suggest that interpreting this provision in light of that principle of international environmental law would enlarge the scope of obligations upon a decision-maker. I agree with the reasons given by Ellen France J that the DMC was therefore correct that there was "no requirement" for it "to apply a precautionary approach" in addition to applying the s 87E information principles.[530]

[326] TTR also contends that the Court of Appeal was wrong to say that the information principles operate differently between marine consents under s 61(2) and s 87E(2), an error, it says, that flowed from the Court of Appeal's finding that s 10(1)(b) operated as an environmental bottom line. It says that the provisions of ss 61 and 87E are in all material respects identical and had Parliament intended that a different or more restrictive meaning of "favour caution" should apply to discharge/dumping consents under s 87E(2), it could have used a different expression. It did not.

[327] It follows, as a matter of logic, from the conclusions I make above that there is an environmental bottom line and, as to the status of s 10(1) in the statutory scheme, that I am satisfied that the Court of Appeal was correct to find error in the DMC's approach, which failed to make the connection between the requirement to favour

528 Above at [108]–[109].

529 In that they are to be applied to achieve the s 10(1)(b) purpose, and in that adaptive management is not permitted as a means of gathering information.

530 Above at [113]. See Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight* (August 2017) [DMC decision] at [40].

caution and environmental protection in s 87E(2) and the objective of protecting the environment from pollution caused by marine discharges.[531]

[328] I otherwise agree with the reasons given by Ellen France J that the DMC did not apply the s 87E(2) requirement to favour caution and environmental protection, given the paucity of information available to the DMC to allow it to assess the level of harm the proposed discharges would cause to seabirds and marine mammals, or as to the effects caused by the sediment plume and suspended sediment levels.[532]

[329] I also agree with the Court of Appeal that the information deficits in this case were such that there was a deprivation of participation rights. The DMC attempted to deal with the uncertainty arising from the lack of information not by favouring caution and refusing the consent, but by imposing conditions, including a condition requiring two years of pre-commencement environmental modelling to be undertaken before mining began. That monitoring would then inform the creation of management plans.[533] As the Court of Appeal said, the result of deferring these issues to management plans was to remove submitters' rights to be heard by the DMC.[534] This approach deprived submitters of the right to be heard on whether the conditions contained in those management plans would meet the risk of material harm caused by the discharges.

[330] I agree with Ellen France J that the DMC did not err by applying the wrong legal test in determining whether it had the best available information.[535]

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531 CA judgment, above n 514, at [131]. I therefore disagree with the reasons given by Ellen France J on this point above at [117], and agree with Glazebrook J's reasons above at [274] and Williams J's reasons above at [294].

532 Above at [118]–[131]. See also above at [205]. Glazebrook J also agrees with this above at [274]–[275], as does Williams J above at [294].

533 See DMC decision, above n 530, at [36] and condition 48.

534 CA judgment, above n 514, at [259(c)]. I therefore disagree with the reasons given by Ellen France J on this point above at [133] and agree with Glazebrook J's reasons above at [277] and Williams J's reasons above at [295]. I agree with Glazebrook J that participation is only meaningful on the basis of sufficient information: above at [277].

535 Above at [134]–[138], agreeing with the Court of Appeal finding that the challenge to the DMC's decision did not raise a question of law: CA judgment, above n 514, at [266]–[267].

Other marine management regimes

[331] I agree with Ellen France J[536] and Glazebrook J[537] that the New Zealand Coastal Policy Statement (NZCPS)[538] and other marine management regimes do not apply directly to TTR's marine consents application. The DMC was therefore not required to apply the entirety of every marine management regime governing the coastal marine area. Rather, as Ellen France J says[539] the nature and effect of those other policies are to be taken into account under s 59(2). But, like Glazebrook J,[540] I disagree with the approach suggested by Ellen France J[541] that the DMC needed to consider whether the environmental bottom lines in the NZCPS were outweighed by the other s 59(2) factors or sufficiently accommodated in other ways, if it is thereby suggested that the s 10(1)(b) bottom line could be overridden or displaced. As stated above, the ultimate assessment for the DMC must take place against the s 10(1)(b) standard.

Remaining issues

[332] I agree with the reasons given by Ellen France J in relation to all remaining issues.

Relief

[333] I agree with the reasons given by Ellen France J that, having quashed the decision of the DMC, it is appropriate to refer the matter back to the EPA for reconsideration in light of this Court's judgment, rather than, as the iwi parties along with the Royal Forest and Bird Protection Society of New Zealand Inc argue, dismiss TTR's application outright.[542] I also agree that leave should be reserved to a party to

536 Above at [179].
537 Above at [280].
538 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).
539 Above at [181].
540 At [280]. See similarly Williams J's reasons above at [298].
541 Above at [182]–[186].
542 At [228]–[229]. See also Williams J's reasons above at [299].

seek directions from the High Court relating to the determination of the application should that prove necessary[543] and with the costs order.[544]

Solicitors:
Atkins Holm Majurey Ltd, Auckland for Applicant
Holland Beckett Law, Tauranga for Taranaki-Whanganui Conservation Board
Dawson & Associates Ltd, Nelson for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd and Talley's Group Ltd
Lee Salmon Long, Auckland for Greenpeace of New Zealand Inc and Kiwis Against Seabed Mining Inc
Whāia Legal, Wellington for Te Ohu Kai Moana Trustee Ltd
Oceanlaw New Zealand, Nelson for Te Rūnanga o Ngāti Ruanui Trust
P D Anderson, Royal Forest and Bird Protection Society of New Zealand Inc, Christchurch for Royal Forest and Bird Protection Society of New Zealand Inc
Kāhui Legal, Wellington for the Trustees of Te Kāhui o Rauru Trust
C J Haden, Environmental Protection Authority, Wellington for Second Respondent
Crown Law Office, Wellington for Attorney-General as Intervener

543 Above at [231]. I agree that r 20.19 of the High Court Rules 2016 provides sufficient jurisdiction for this procedure.
544 Above at [233]–[235].

Appendices

Appendix 1: Authorised restricted activities

The marine consents and marine discharge consents [granted to TTR] authorise the following restricted activities, subject to conditions listed in Appendix 2 [of the DMC decision].

Section 20(2)(a) – the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed.

1. The placement, movement and removal of the Integrated Mining Vessel ("IMV") anchor and the geotechnical support vessel anchor, including the anchor spread, on or under the seabed.
2. The placement, movement and removal of the crawler on or under the seabed.
3. The placement, movement and removal of the grade control drilling equipment on or under the seabed.
4. The placement, movement and retrieval of moored environmental monitoring equipment on or under the seabed.

Section 20(2)(d) – the removal of non-living natural material from the seabed or subsoil

1. The removal of sediment from the seabed and subsoil using the crawler and by grade control drilling.
2. The taking of sediment and benthic grab samples from the seabed and subsoil associated with environmental monitoring.

Section 20(2)(e) – the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil

1. The disturbance of the seabed and subsoil associated with the placement, movement and removal of the IMV anchor and the geotechnical support vessel anchor, including the anchor spread.
2. The disturbance of the seabed and subsoil associated with seabed material extraction via the crawler, through re-deposition of de-ored sediments, and from grade control drilling.

3. The disturbance of the seabed and subsoil associated with the placement, deployment, retrieval and mooring of environmental monitoring equipment.

4. The disturbance of the seabed and subsoil associated with the taking of sediment and benthic samples associated with environmental monitoring.

Section 20(2)(f) – the deposit of any thing or organism in, on, or under the seabed

1. The re-deposition of de-ored sediments in, on or under the seabed.

2. The deposition of small amounts of marine organisms and solids in, on or under the seabed as a result of vessel maintenance, hull cleaning (biofouling).

Section 20(2)(g) – the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine species or their habitat

1. The disturbance and damage of the seabed and subsoil as a result of the placement, movement and removal of the IMV anchor, and the geotechnical support vessel anchor on the seabed.

2. The disturbance and damage of the seabed and subsoil as a result of seabed material extraction via the crawler, the redeposition of de-ored sediments, and the grade control drilling.

3. The disturbance and damage of the seabed and subsoil as a result of the placement, deployment, retrieval and mooring of environmental monitoring equipment.

4. The disturbance and damage of the seabed and subsoil as a result of the taking of sediment and benthic samples associated with environmental monitoring.

Section 20(4)(a) – the construction, mooring or anchoring long-term, placement, alteration, extension, removal, or demolition of a structure or part of a structure

1. The anchoring of the IMV and the geotechnical support vessel, and the associated placement, movement and removal of the IMV anchor and the geotechnical support vessel anchor in the water column above the seabed.

2. The placement, movement and removal of the crawler in the water column above the seabed.

3. The placement, movement and removal of the grade control drilling equipment in the water column above the seabed.

4. The placement, deployment, retrieval and mooring of environmental monitoring equipment in the water column above the seabed.

Section 20(4)(b) – the causing of vibrations (other than vibrations caused by the normal operation of a ship) in a manner that is likely to have an adverse effect on marine life

1. Vibration (noise) caused by the IMV and crawler during iron sand extraction activities.

Section 20B – No person may discharge a harmful substance from a structure or from a submarine pipeline into the sea or into or onto the seabed of the exclusive economic zone

1. The release of seabed material (sediments) arising from the seabed disturbance during grade control drilling activities;

2. The release of disturbed seabed material (sediments) arising from the seabed disturbance during the crawler extraction operations; and

3. The release of disturbed seabed material (sediments) arising from taking of sediment and benthic samples associated with environmental monitoring.

Section 20C – No person may discharge a harmful substance (if the discharge is a mining discharge) from a ship into the sea or into or onto the seabed of the exclusive economic zone or above the continental shelf beyond the outer limits of the exclusive economic zone

1. De-ored sediments and any associated contaminants discharged back to the water column from the IMV.

Appendix 2: Map of project area

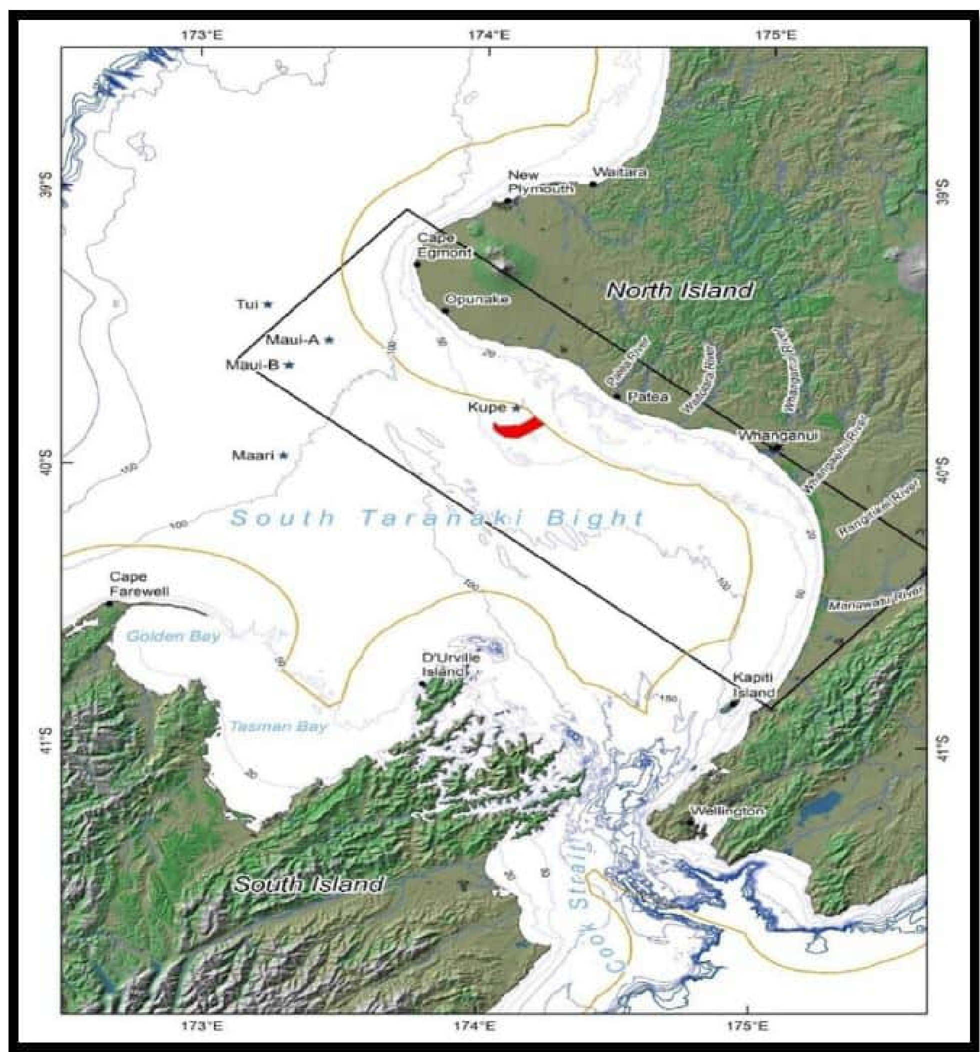
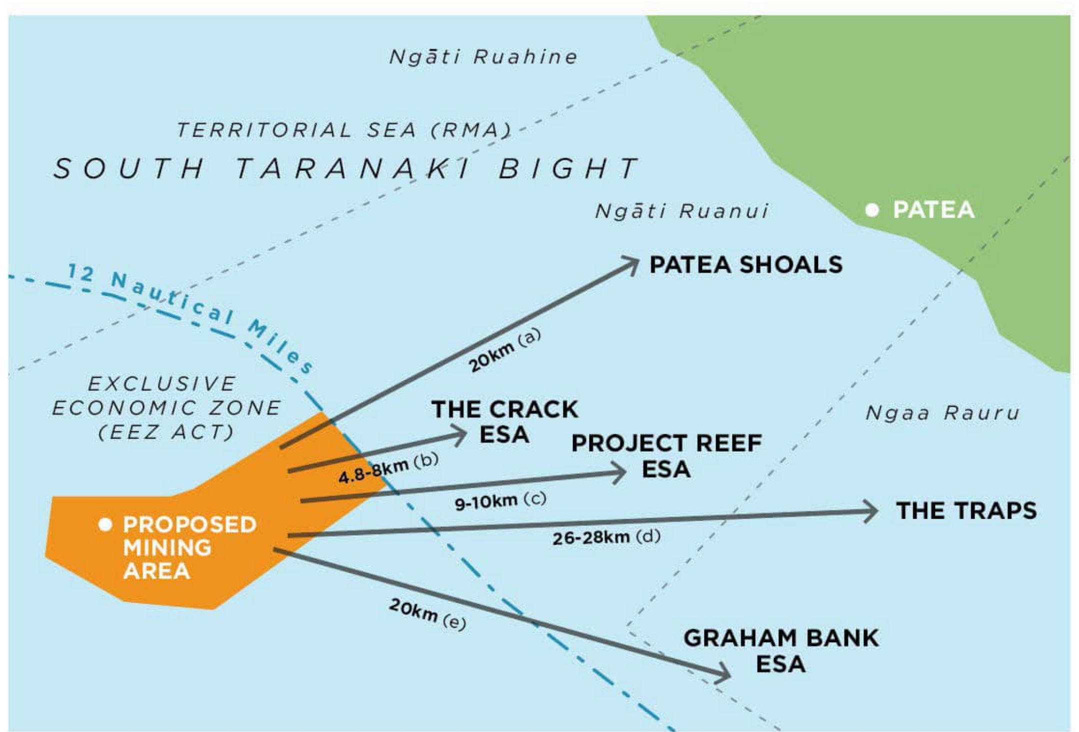


Figure 3.1: **The South Taranaki Bight (STB) showing the Sediment Model Domain (SMD) (oblique black rectangle). The approximate project area is shown in red and the 12 NM boundary of the Territorial Sea is shown in yellow.**

Appendix 3: Diagram prepared by iwi parties

Below is a diagram prepared by the iwi parties. The diagram is not to scale and should not be read as a map.



ESA	DMC Finding on Effect	Ref to DMC Decision
PATEA SHOALS	Moderate effect Significant effect	At [350] At [970] At [968]
THE CRACK	Significant effect Effects of concern Effects including temporary or permanent displacement of species Major effect	At [350] At [970] At [406] At [437] At [980] At [952]
THE PROJECT REEF	Significant effect Major effect	At [350] At [970] At [952]

ESA	DMC Finding on Effect	Ref to DMC Decision
THE TRAPS	Minor effect	At [970]
GRAHAM BANK	Significant adverse effect	At [350] At [940] At [970]
	Effects including temporary or permanent displacement of species	At [437] At [980]

Raikes v Hastings District Council

[2023] NZCA 264

Court of Appeal, (CA 704/2022) 29 June 2023
French and Goddard JJ

Court of Appeal — Civil procedure — Application — Leave to bring a second appeal — Whether the High Court was correct in its interpretation and application of the provisions of pt 2 of the Resource Management Act 1991, as relied on by the Maungaharuru-Tangitu Trust and the Environment Court — Whether the High Court was correct to conclude that the outcome and reasoning of the Environment Court's decision met appropriate standards of rationality, considering the Resource Management Act 1991 scheme and requirements.

Resource management — Wāhi taonga — Kaitiakitanga Eight sites were categorised as wāhi taonga in the Proposed Hastings District Plan — The applicants appealed to the High Court against a revised Environment Court decision on a number of questions of law under s 299 of the Resource Management Act 1991 — The applicants contended that the one site in question should not have been identified as a wāhi taonga and that, in the event that determination was upheld, the extent of the site should be limited — Whether the High Court was correct in its interpretation and application of the provisions of pt 2 of the Resource Management Act 1991, as relied on by the Maungaharuru-Tangitu Trust and the Environment Court — Whether the High Court was correct to conclude that the outcome and reasoning of the Environment Court's decision met appropriate standards of rationality, considering the Resource Management Act 1991 scheme and requirements — Section 7 of the Resource Management Act 1991 requires decision-makers to have particular regard to, among other matters, kaitiakitanga — The spiritual element of kaitiakitanga has been recognised in Court of Appeal and Supreme Court decisions — Identification of the site as a wāhi taonga in the Proposed Plan did not prevent future development on the site, contrary to the applicants' claim — Criminal Procedure Act 2011, s 303(2); Resource Management Act 1991, s 7.

Eight sites were categorised as wāhi taonga in the *Proposed Hastings District Plan* (the Proposed Plan). One of those sites, known as Tītī-a-Okura, affected land owned by the applicants, Mr and Mrs Raikes (the Raikes). Tītī-a-Okura was referred to in the Proposed Plan as MTT88.

MTT88 comprised approximately 70 ha of rural land, part of which is owned by the Raikes. MTT88 was not originally identified as a wāhi taonga site in the Proposed Plan. However, the Maungaharuru-Tangitū Trust (MTT) appealed against the decision of the Hasting District Council (the Council) to the Environment Court, which issued an interim decision on 28 May 2018 (see *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79). That interim decision was the subject of appeals to the High Court by both MTT and the Raikes. Cooke J allowed the appeals and remitted the matter back to the Environment Court for determination (see *Maungaharuru-Tangitu Trust v Hastings District Council* [2019] NZHC 2576 [the

First High Court judgment]). The parties agreed that the appeal should be allowed, and the matter was sent back to the Environment Court for further consideration, as it was common ground that the interim decision had erred in law in a number of respects. The Judge concurred as he considered that the Environment Court had not engaged in the required analysis for the purpose of reaching its conclusions.

In July 2021 the Environment Court issued a revised decision (the revised decision), in which it held that site MTT88 should be identified as a wāhi taonga. The Environment Court considered that the level of protection and control over the site proposed by the Council was sufficient to provide for MTT's relationship with the site, and that the more stringent draft rules proposed by MTT for this site would be an unreasonable interference with the rights of the landowners.

The Raikes appealed, under s 299 of the Resource Management Act 1991 (the RMA), against the revised decision to the High Court on several questions of law. They argued that the site should not have been identified as a wāhi taonga, and that if that determination was upheld, the extent of the site should be limited. They did not challenge the rules that would apply to the site if it was included in the list of wāhi taonga in the Proposed Plan. The Council took a neutral stance on this appeal to the High Court. The appeal was opposed by MTT as an interested party. In November 2022, a second High Court judgment was delivered, in which the Raikes' appeal was dismissed.

The Raikes framed two questions of law that they wished to pursue on appeal: (i) was the High Court correct in its interpretation and application of the provisions of pt 2 of the RMA, as relied on by MTT and the Environment Court?; and (ii) was the High Court correct to conclude that the outcome and reasoning of the Environment Court's decision met appropriate standards of rationality, considering the RMA scheme and requirements?

The Raikes said that the spiritual and cultural values invoked as grounds for identifying MTT88 as wāhi taonga were "beyond reason, being metaphysical through cultural associations between places and gods or concerning mythical acts".

Held, (1) the question whether it is open to a council to identify land as a wāhi taonga, and to impose controls designed to protect Maori cultural connections with that land, in the circumstances described at [11] of this judgment is a question of public or general importance. However, this question was not capable of bona fide and serious argument. Section 6(e) of the RMA expressly refers to the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga. All decision-makers under the RMA are required to recognise and provide for that matter. Section 7 of the RMA requires decision-makers to have particular regard to, among other matters, kaitiakitanga. The spiritual element of kaitiakitanga has been recognised in Court of Appeal and Supreme Court decisions. Section 8 of the RMA requires decision-makers to take into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi. It is, self-evident that these provisions require decision-makers to have regard to, and provide for, connections between hapū and their ancestral lands of a cultural, spiritual and historic nature as well as other more tangible connections. (paras 15, 16)

(2) The applicants' criticism of the rationality of the Environment Court and High Court decisions was misconceived. The question of whether tangata whenua have a cultural, traditional and/or spiritual connection to particular land that is sufficient to justify protection of that land in a district plan is a matter that can be established by evidence. A finding that cultural, traditional and/or spiritual connections exist does not involve any finding about the "correctness" of any spiritual or metaphysical beliefs

relevant to those connections. The susceptibility of the "correctness" of such beliefs to determination on the basis of evidence is a red herring. It is the existence and significance of the beliefs that a court can, and must, consider. In the present case, the courts below did precisely that. It is not the Court of Appeal's role on a second appeal to revisit the assessment of the evidence by the Environment Court and (so far as appropriate) the High Court. Similarly, the existence of cultural and traditional connections based on historical uses of the land before that land was acquired by the Crown and sold to private owners can be established by evidence. It is not seriously arguable that the RMA permits a council to provide for protection of a site as wāhi taonga in a district plan on the basis of historical uses and their cultural and traditional significance if, and only if, there are tangible artifacts or other physical traces of those uses on the land. The Court of Appeal did not consider that there was any appearance of a potential miscarriage of justice. The second High Court judgment carefully analysed the Environment Court decision and concluded that the Environment Court had carried out the more detailed analysis required by the First High Court judgment. (paras 17-19)

(3) Contrary to the Raikes' claim, identification of the site as a wāhi taonga in the Proposed Plan did not prevent future development on the site. The Raikes would be required to seek resource consent for certain specified activities on the site. Any application for consent would fall to be determined by reference to the provisions of the RMA and the Proposed Plan (when operative). To the extent that the proposed appeal seeks to challenge the restrictions on activities on the site contained in the Proposed Plan, the proposed rules to apply to the site were not challenged in the courts below, so could not be the subject of a new challenge on a second appeal to the Court of Appeal. The other criticisms of the Environment Court decision and the second High Court judgment, advanced by the Raikes, did not raise any issues of public or general importance. They were specific to this case. The application for leave to appeal was declined. (paras 20-22)

Cases referred to

Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc [2021] NZCA 398

Maungaharuru-Tangitu Trust v Hastings District Council [2018] NZEnvC 79

Maungaharuru-Tangitu Trust v Hastings District Council [2019] NZHC 2576

Maungaharuru-Tangitu Trust v Hastings District Council [2021] NZEnvC 98

Te Whare o Te Kaitiaka Ngahere Inc Society v West Coast Regional Council [2015] NZCA 356

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2020] NZCA 86, (2020) 21 ELRNZ 700

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127, [2021] 1 NZLR 801, (2021) 23 ELRNZ 47

Application

This was an unsuccessful application for leave to appeal.

J W Maassen for applicants (Peter and Caroline Raikes)
M E Casey KC and *A J Davidson* for respondent (Hastings District Council)
K M Anderson and *M J Dicken* for Maungaharuru-Tangitū Trust (Interested party)

Cur adv vult

The judgment of the Court was delivered by

GODDARD J

The application for leave to bring a second appeal

[1] The applicants, Mr and Mrs Raikes, seek leave to appeal against a decision of the High Court[1] determining an appeal on questions of law from the Environment Court.[2] The Environment Court decision concerned eight sites categorised as wāhi taonga in the proposed Hastings District Plan (the Proposed Plan). The appeal to the High Court concerned only one of those sites, known as Tītī-a-Okura, insofar as that site affected land owned by the applicants. That site is referred to in the Proposed Plan as MTT88.

[2] The application for leave to appeal to this Court is opposed by the Hastings District Council, and by the Maungaharuru-Tangitū Trust (MTT), which appeared as an interested party in the High Court.

Background

[3] MTT88 comprises approximately 70 hectares of rural land, part of which is owned by the applicants.

[4] MTT88 was not originally identified as a wāhi taonga site in the Proposed Plan. MTT appealed to the Environment Court against the decision of the Hastings District Council not to include a number of sites on the list of wāhi taonga in the Proposed Plan, including MTT88. The Environment Court issued an interim decision on that appeal on 28 May 2018.[3] That interim decision was the subject of appeals to the High Court by both MTT and the applicants. Cooke J allowed the appeals and remitted the matter back to the Environment Court for determination.[4] The parties had agreed that the appeal should be allowed, and the matter sent back to the Environment Court for further consideration, as it was common ground that the interim decision had erred in law in a number of respects.[5] The Judge concurred: he considered that the Environment Court had not engaged in the required analysis for the purpose of reaching its conclusions.[6]

[5] In July 2021 the Environment Court issued a revised decision, in which it held that site MTT88 should be identified as a wāhi taonga. The Environment Court considered that the level of protection and control over the site proposed by the Council was sufficient to provide for MTT's relationship with the site. The more stringent draft rules proposed by MTT for this site would be an unreasonable interference with the rights of the landowners.[7]

[6] The applicants appealed the revised decision to the High Court on a number of questions of law under s 299 of the Resource Management Act 1991 (the RMA). They argued that the site should not have been identified as a wāhi taonga. They also argued

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1 *Raikes v Hastings District Council* [2022] NZHC 3075, (2022) 24 ELRNZ 598 [Second High Court judgment].

2 *Maungaharuru-Tangit Trust v Hastings District Council* [2021] NZEnvC 98 [Revised Environment Court decision].

3 *Maungaharuru-Tangit Trust v Hastings District Council* [2018] NZEnvC 79.

4 *Maungaharuru-Tangit Trust v Hastings District Council* [2019] NZHC 2576 [First High Court judgment].

5 At [1] and [63].

6 At [63]-[65].

7 Revised Environment Court decision, above n 2, at [81].

that, in the event that determination was upheld, the extent of the site should be limited. They did not challenge the rules that would apply to the site if it was included in the list of wāhi taonga in the Proposed Plan.

[7] The Council took a neutral stance on this appeal to the High Court. The appeal was opposed by MTT as an interested party. In November 2022 Grice J delivered the second High Court judgment, in which she dismissed the applicants' appeal.

The test for grant of leave to bring a second appeal

[8] The application for leave to appeal to this Court against the second High Court judgment is brought under s 308 of the RMA, which provides that appeals against decisions of the High Court determining appeals on questions of law are to be dealt with under subpt 8 of pt 6 of the Criminal Procedure Act 2011 (the CPA) as if the High Court decision had been a first appeal on a question of law under s 300 of the CPA. Section 303(2) of the CPA, which applies to such appeals, provides that this Court must not give leave for a second appeal unless it is satisfied that:

(a) The appeal involves a matter of general or public importance; or
(b) A miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[9] A second appeal on a question of law must raise one or more questions of law that are capable of bona fide and serious argument.[8] The appeal must involve interests of sufficient importance to outweigh the cost and delay of a further appeal.[9]

Questions of law identified by the applicants

[10] The applicants have framed the questions of law that they wish to pursue on appeal in a number of ways. In their submissions they say the relevant questions of law can be summarised as follows:

(a) Was the High Court correct in its interpretation and application of the provisions of pt 2 of the RMA, as relied on by MTT and the Environment Court?
(b) Was the High Court correct to conclude that the outcome and reasoning of the Environment Court's decision met appropriate standards of rationality, considering the RMA scheme and requirements?

[11] In short, the applicants intend to argue that it is not open to a council to impose controls on the use of private land by designating that land as a wāhi taonga, and providing for certain activities to be restricted discretionary activities, on the basis of:

(a) Spiritual or metaphysical associations with the land; or
(b) Historical use of the land by tangata whenua (in this case, as a trail and for seasonal hunting of tītī (mutton birds)), where those past activities have left no tangible artifacts or other physical traces on the land.

[12] The applicants say that the spiritual and cultural values invoked as grounds for identifying MTT88 as wāhi taonga are "beyond reason, being metaphysical through cultural associations between places and gods or concerning mythical acts".

[13] The applicants describe the grounds referred to in [11(b)] as relating to "matters of cultural memory only", which they say are not and cannot be part of the existing environment because they are purely historical.

[14] The applicants also argue, in reliance on the first High Court judgment,[10] that the Environment Court did not perform the task it was directed to perform. They say

8 *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZCA 398 at [19]-[20].

9 *Te Whare o Te Kaitiaka Ngahere Inc Society v West Coast Regional Council* [2015] NZCA 356 at [23].

10 First High Court judgment, above n 4, at [42] and [47].

the first High Court judgment required a "particularised analysis of the nexus and the method of rational assessment concerning [the applicants'] anticipated activities and effects on [the cultural values of the land]". They identify this ground as both a question of law and as giving rise to a potential miscarriage of justice because, they say, the second High Court judgment failed to ensure that the earlier directions in the first High Court judgment were performed.

Discussion

[15] We agree that the question whether it is open to a council to identify land as a wāhi taonga, and impose controls designed to protect Māori cultural connections with that land, in the circumstances described at [11] above is a question of public or general importance. But we do not consider that this question is capable of bona fide and serious argument.

[16] Section 6(e) of the RMA expressly refers to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga. All decision-makers under the RMA are required to recognise and provide for that matter. Section 7 of the RMA requires decision-makers to have particular regard to (among other matters) kaitiakitanga. The spiritual element of kaitiakitanga has been recognised in decisions of this Court and of the Supreme Court.[11] Section 8 of the RMA requires decision-makers to take into account the principles of the Treaty of Waitangi | Te Tiriti o Waitangi. It is, we think, self-evident that these provisions require decision-makers to have regard to, and provide for, connections between hapū and their ancestral lands of a cultural, spiritual and historic nature as well as other more tangible connections.

[17] The applicants' criticism of the rationality of the decisions of the Environment Court and High Court is misconceived. The question of whether tangata whenua have a cultural, traditional and/or spiritual connection to particular land that is sufficient to justify protection of that land in a district plan is a matter that can be established by evidence. A finding that cultural, traditional and/or spiritual connections exist does not involve any finding about the "correctness" of any spiritual or metaphysical beliefs relevant to those connections. The susceptibility of the "correctness" of such beliefs to determination on the basis of evidence is a red herring: it is the existence and significance of the beliefs that a court can, and must, consider. The courts below did precisely that in the present case. It is not the role of this Court on a second appeal to revisit the assessment of the evidence by the Environment Court and (so far as appropriate) the High Court.

[18] Similarly, the existence of cultural and traditional connections based on historical uses of the land before that land was acquired by the Crown and sold to private owners can be established by evidence. It is not seriously arguable that the RMA permits a council to provide for protection of a site as wāhi taonga in a district plan on the basis of historical uses and their cultural and traditional significance if and only if there are tangible artifacts or other physical traces of those uses on the land.

[19] We do not consider that there is any appearance of a potential miscarriage of justice: the second High Court judgment carefully analysed the Environment Court decision, and concluded that the Environment Court had carried out the more detailed analysis required by the first High Court judgment.

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11 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, (2020) 21 ELRNZ 700 at [12(c)] and [172]-[174]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, (2021) 23 ELRNZ 47 at [160]-[161] per William Young and Ellen France JJ.

[20] We accept the submission by the Council and by MTT that identification of the site as a wāhi taonga in the proposed plan does not prevent future development on the site, contrary to the applicants' claim. The applicants will be required to seek resource consent for certain specified activities on the site: any application for consent will fall to be determined by reference to the provisions of the RMA and the Proposed Plan (when operative). To the extent that the proposed appeal seeks to challenge the restrictions on activities on the site contained in the Proposed Plan, we accept the submission of the Council and MTT that the proposed rules to apply to the site were not challenged in the courts below, so cannot be the subject of a (new) challenge on a second appeal to this Court.

[21] The other criticisms advanced by the applicants of the Environment Court decision and the second High Court judgment do not raise any issues of public or general importance: they are specific to this case.

Result

[22] The application for leave to appeal is declined.

[23] The applicants must pay costs to each of the respondent and the interested party for a standard application on a band A basis, with usual disbursements.

Application for leave to appeal declined; applicants must pay costs to the respondent and the interested party for a standard application on a band A basis, plus usual disbursements

Reported by P. A. Ruffell

BEFORE THE ENVIRONMENT COURT

Decision No: [2013] NZEnvC 269

ENV-2009-AKL-000171

IN THE MATTER	of an appeal under s 120 Resource Management Act 1991
BETWEEN	HEYBRIDGE DEVELOPMENTS LIMITED Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent
AND	PIRIRAKAU INCORPORATED SOCIETY Section 274 Party

Court: Environment Judge B P Dwyer

Alternate Environment Judge C L Fox

Environment Commissioner H McConachy

Environment Commissioner P Catchpole

Heard: at Tauranga on 22 – 23 April 2013

Counsel/Appearances:

K M Barry-Piceno on behalf of Heybridge Developments Limited

P H Cooney on behalf of Bay of Plenty Regional Council

J P Koning appeared on behalf of Pirirakau Incorporated Society

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DECISION

Decision Issued: 13 NOV 2013

A: Consent granted

B: Directions made concerning conditions

Introduction

[1] On 1 April 1999, Heybridge Developments Limited (Heybridge) lodged an application with the Western Bay of Plenty District Council for a 13 lot subdivision. The application was declined and an appeal was heard during 2002 with an interim decision given by the Environment Court in November 2002[1]. That proposal was later modified to a 4 Lot subdivision and the District Council granted consent.

[2] In 2007, Heybridge applied to the Bay of Plenty Regional Council for resource consent to carry out earthworks and other activities on land it owned within a greater area known to Pirirakau as Tahataharoa. In February 2009, the Bay of Plenty Regional Council declined the application (inter-alia) because the earthworks would have an adverse effect on Pirirakau's relationship with the land. Pirirakau believe their eponymous ancestor is buried at Tahataharoa.

[3] On 5 - 9 October 2009, the Environment Court heard an appeal from Heybridge against a decision of the Bay of Plenty Regional Council refusing consent for earthworks and other activities on certain lands owned by that company.

[4] On 10 June 2010, this Court released its decision[2]. The background and description to this land is outlined in our decision and we do not intend to traverse that history again. What is directly relevant is that this Court dismissed the appeal. Heybridge appealed the decision to the High Court.

[5] On 19 August 2011, the High Court released its judgment[3]. In that decision, after traversing the background to the appeal, Peters J noted that appeals to the High Court may only be made on a question of law and that it was not for the High Court to enter into a re-examination of the merits of the Environment Court's decision[4]. The questions of law the High Court considered and answered were:

[1] *Heybridge Developments Limited v Western Bay of Plenty District Council* Decision A 231/2002.
[2] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195.
[3] *Heybridge Developments Limited v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593; [2012] NZRMA 123 (HC)at [2]-[4].
[4] Resource Management Act 1991 ("RMA") s 299.

- Did the Environment Court in its decision of 10 June 2010 err in law when it concluded that a previous decision of the Environment Court concerning the same land did not provide definitive findings that the whole of the site was not waahi tapu? In the High Court, Peters J was not satisfied that any error of law arose stating:

  It is clear from [58] and [59] of the first decision that the Court was not persuaded that the site, or some lesser area "within or in the vicinity" of the site, was classifiable as waahi tapu. It is equally clear that the Court did not find that the site or some part of it was not waahi tapu[5].
- Did this Court err in determining that it was necessary to consider afresh the issue of waahi tapu? In the High Court, Peters J noted that both Environment Court decisions of 2002 and 2010 found that Pirirakau had not established that the site or some lesser part of it was waahi tapu. In the view of Peters J, this did not materially affect the decision made on 10 June 2010.
- Did this Court err in determining that the onus was on the appellant to prove, through probative evidence, that there was no urupā (or burial ground) on site?
- Did this Court properly balance the legal requirements of evidence relating to evidence and burden of proof in relation to cultural beliefs and factual evidence?

Peters J considered questions three and four should be dealt with together. She found that the Environment Court erred as a matter of law and she accepted the submission for Heybridge that *...If Pirirakau alleged that s6(e) required the Court to recognise and provide for Pirirakau's relationship with the site on the basis of waahi tapu, it was for Pirirakau to establish the existence of waahi tapu. It was not for Pirirakau simply to assert a belief and for the appellant to be required to disprove it*[6]. Peters J stated:

[5] *Heybridge Developments Limited v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593; [2012] NZRMA 123 (HC) at [37].
[6] *Heybridge Developments Limited v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593; [2012] NZRMA 123 (HC) at [49] – [50].

> *...a party who asserts a fact bears the evidential onus of establishing that fact by adducing sufficiently probative evidence. The existence of a fact is not established by an honest belief. I am satisfied that the Court erred as a matter of law in this respect...*
>
> *To conclude, I am satisfied that the Court sought to impose an onus on the appellant to disprove Pirirakau's belief, and that the Court erred in law in doing so. I am satisfied that the Court sought to provide for a relationship with the site predominantly on the basis of a belief. I consider an issue arises as to whether the Court was correct in doing so. The matter requires further consideration and I propose to remit it back to the Court for that further consideration*[7].

In other words, it was for the Bay of Plenty Regional Council or Pirirakau to establish, on the balance of probabilities, that the land was ancestral land or waahi tapu. If they could not do so, then s6(e) would not apply. In their joint memorandum dated 11 April 2013, all counsel agreed that the learned High Court judge did not make a determination, on whether s6(e) extended to recognition and provision of a relationship between Pirirakau and their culture and traditions with Tahataharoa based predominantly on a belief. Rather it was left to the Environment Court to reconsider if and how Pirirakau's relationship with the site should be provided for under s6(e)[8].

- Was this Court's finding that Pirirakau's belief that Tutereinga might be buried on the site reasonably open to the Court, given the evidence before it? Peters J found that this question was overtaken by her decision regarding the last two issues, and thus it was not necessary to address the issue[9].
- Was it open to the Court to find that the appellant had advanced its subdivision application to the District Council on the basis that it would import fill to the site? Peters J held that:

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[7] *Heybridge Developments Limited v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593; [2012] NZRMA 123 (HC) at [51] & [57].
[8] At para 7.
[9] *Heybridge Developments Limited v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593; [2012] NZRMA 123 (HC) at [58].

...the Court said that matters as to the cost of importing fill would not outweigh its other considerations. Having reviewed the documents to which counsel referred me, my impression on this point is that the Court's finding was not open to it on the evidence. If the point remains material in the future, all relevant evidence must be put before the Court[10].

- On a site where earthworks are a permitted, controlled or discretionary activity and where no s8 or Part 2 cultural matters are identified as affecting the site in any statutory policy or plan document, did the Court err in holding that the Crown's duties of active protection under Part 2 were met by declining the earthworks consent sought.? Peters J held that:

  The Crown does not have a duty of active protection under Part 2 RMA. Section 8 imposes an obligation on a person exercising a function and power under RMA to take into account the principles of the Treaty of Waitangi in achieving the purpose of the RMA. One such principle is the obligation of active protection. In the context of Part 2, that cannot afford greater protection to the relationship with the ancestral lands given under s6. It follows that I consider s8 may fall to be reconsidered when the Court revisits the third issue which it had to decide, namely whether to grant the consents sought.

  I add that I do not consider the appellant could be restrained from undertaking earthworks on the site (or sites, given the 4 lots) to the extent the relevant plan permits earthworks as of right.

Did the Court wrongly find that the appellant had accepted the site was *land* and was confiscated by the Crown? In the view of Peters J, no error of law was made concerning this question.

[6] As a result of her findings, Peters J allowed the appeal on questions three, four and six above. The decision of the Environment Court on the third issue before

[10] *Heybridge Developments Limited v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593; [2012] NZRMA 123 (HC) at [62].

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

the Court, namely to refuse the consents, was quashed. The matter was remitted back to this Court for reconsideration, in light of the High Court decision.

[7] Pirirakau Incorporated Society, supported by the Bay of Plenty Regional Council, subsequently sought but were declined leave in 2011 to appeal to the Court of Appeal against the High Court decision[11]. In declining leave, Peters J noted that the Environment Court must address issue 3 and 4 above, especially in light of the established authorities concerning s6.

[8] LDL Tauranga Limited (LDL) purchased the site from Heybridge financiers on October 19, 2011[12]. LDL publically listed 3 lots on the site for sale in 2012. One lot was sold in July 2012, with the importation of fill used for the building platform. Permitted activity earthworks related to restoration of the bunds and clearing of drain channels have been completed.

High Court Issues 3 and 4

[9] In a joint memorandum dated 11 April 2013, all counsel agreed that this Court should consider if and how the relationship of Pirirakau and its culture and traditions with the site, stemming from its historical association with the area, including its belief that Tutereinga might be buried on the site, should be recognised and provided for.

Relevant Evidence for Pirirakau

[10] In our previous decision we found:

- That the Heybridge site is located within the general area known as Tahataharoa[13];
- That Tahataharoa, including the subject site, is the ancestral land of Pirirakau[14];

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[11] *Pirirakau Incorporated Society v Heybridge Developments Limited* (HC Tauranga CIV-2010-470-585, 22 December 2011).

[12] LDL is Heybdrige's successor in terms of Section 2A RMA.

[13] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [69] and [88].

[14] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [88].

- That Pirirakau believe that their eponymous ancestor Tutereinga is buried at Tahataharoa and likely within the site of the proposed earthworks[15];
- That there was nothing in the evidence which we heard that led us to the view that Pirirakau's belief is misconceived, nor is it inconsistent with the evidence which we heard[16];
- The site is of cultural significance to Pirirakau because of their historical association with it together with their beliefs as to the burial of Tutereinga [17];
- Pirirakau retain a *relationship* with the site because of that association and those beliefs[18];
- That the Court could not discount the possibility Tutereinga may be buried on the site. That possibility was established on the evidence of Pirirakau's witnesses[19].

[11] In our previous decision, we also recorded that Tahataharoa was considered by Pirirakau to be an essential part of their hapu identity. We also noted that Te Tawa on the Heybridge - LDL site also formed a part of Tahataharoa. We found that its coastal margins were used for cultural purposes such as a fishing, eeling, mahinga kai or nohonga kai (food gathering site or camp).

[12] We heard evidence that Pirirakau considered that the subject site was tapu as a part of Tahataharoa, the place where Tutereinga was buried, and that as a result of that act, Pirirakau acquired mana whenua over the land. It was an area that was described as containing the mauri (life essence) of the hapu[20].

[15] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [88].
[16] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [88]
[17] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [88].
[18] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [88].
[19] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [77] and [83].
[20] *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [52]-[57].

[13] During the hearing before us in April 2013, only one witness (Mr S W Rolleston) was called to give evidence directly touching on the issues which we need to consider.

Nature of the Case for Pirirakau

[14] In our view, the case for Pirirakau has always been that while they were not entirely sure, they believed that Tutereinga was buried at Tahataharoa, within the vicinity of the Heybridge - LDL site which was also referred to as Te Tawa. Such evidence included the following statements or material:

1. Mr C P Bidois who noted that people of high rank were buried in sand and swamps after he refuted statements made by Mr B Mikaere that a *...tūpuna of stature such as Tutereinga would not be interred in an area such as Tahataharoa, or the area within known as Te Tawa*[21]*;*
2. Mr J J Borell who concluded his brief by stating that if Heybridge:
   ...develops the land as proposed then my relationship with our tūpuna Tutereinga and our ancestral land at Tahataharoa will be completely destroyed. Every other generation of Pirirakau, whether past, present or future, will feel the same hurt and loss[22].
3. Mr S W Rolleston who in response to Heybridge's proposals for mitigation stated the following:
   The establishment of a hapu reserve or other hapu facilities does not address the fundamental fact that our <u>*Tūpuna is still buried on the site,*</u> *and that any proposed development will most likely disturb his resting place. Tutereinga was interned there under his wishes as noted by Mr Kuka*[23]*...*
   As indicated by previous submitters our challenge and opposition to the proposed development is based entirely on our history and traditions with Tahataharoa, and nothing else. ...It is the resting place of our eponymous ancestor Tutereinga. Nothing can and will diminish the fact and knowledge that <u>*he rests on that site*</u>[24].

[21] C Bidois, Brief of Evidence, 4 September 2009, page 4, paragraph [18].
[22] J Borell, Brief of Evidence, 4 September 2009, page 3, paragraph [18].
[23] S Rolleston, Brief of Evidence, 4 September 2009, page 12, paragraph [62] (emp. added).
[24] S Rolleston, Brief of Evidence, 4 September 2009, page 12, paragraph [66]-[68] (emp. added).

4. Mr Shadrach Rolleston who stated that:

   Pirirakau do not oppose this application lightly. If the development were on an adjoining site, or if Tutereinga was buried on another site, Pirirakau would be happy to discuss development options with the Appellant; however, this is not the case. The development proposal is on Tahataharoa, and Tutereinga is buried on site. Pirirakau are not anti-development, but we will actively defend our right to preserve the resting place of our ancestor[25].

5. Mr Shadrach Rolleston also quoted from notes taken by his father (Mr P Rolleston) who recorded the following conversation with a Mr Tuhakaraina:

   Shortly before Tipi died I spoke with him about the Heybridge development. At one point I became angry over aspects of the proposed development and said to Tipi that in the event Heybridge wins the appeal, we should not bless the site and leave him to cope with whatever may occur there.

   He rounded on me, not in anger, but with grave concern. He said:

   "If we lose, we must lift the tapu for our own protection, not Ian Dustin's [Appellant]."

   "Our Tūpuna were charged with carrying out Tutereinga's ohaaki."

   "He was buried there in a secret place."

   "If he is disturbed then the ohaaki is broken."

   "Who then does he turn to, his uri, that's who."

   "He will seek to know why we could not protect him."

   "That is why, even though there may be sorrow, we must lift the tapu."..."[26]

6. Mr S Rolleston added:

   In summary the facts are:

   - *According to our traditions, Tutereinga was buried secretly at Tahataharoa making the site tapu;*

[25] S Rolleston, Supplementary Evidence, 25 September 2009, page 19, paragraph [67] (emp. added).
[26] S Rolleston, Supplementary Evidence, 25 September 2009, page 17, paragraph [60] (emp. added).

- *According to our traditions, Tahataharoa is included in the proposed development site;*
- *Pirirakau still maintain that the harbour and coastal margins of Tahataharoa are a culturally significant food gathering area;*
- *Pirirakau do not; have not; and will not gather food from Tahataharoa because of the tapu associated with Tahataharoa; and*
- *The only means to alleviate our concerns is avoidance*[27].

7. In answer to questions from Judge Dwyer, Mr S Rolleston noted the hapu belief that Tahataharoa was the site of the burial and that it included the Heybridge - LDL site:

HIS HONOUR: Mr Rolleston, you are quite firm in your evidence that Tutereinga is buried on the site, meaning the Heybridge site. All of the other witnesses have referred to the burial site as being on Tahataharoa somewhere. I detect a different approach from you, it is very, more specific than I understood the other witnesses to be, is there a reason for that?

MR ROLLESTON: I suppose in terms of my family's association with the place and we visited it on the site visit and we saw where my grandparents live and we had a track down to the beach and we used it frequently. A lot of the times we, you know, gathered seafood from around those areas, my dad always referred to that place as Tahataharoa which is the subject site...

HIS HONOUR: So when he was talking about Tahataharoa was he talking about something narrower, something more specific to the site than the wider area that we have been talking about.

MR ROLLESTON: Well, my dad also talked in landscape terms, you know, just as much as I did and that, you know, it is hard to define where an area of significance starts and where it ends and that was clear from his evidence to the Environment Court in the first sitting about the indivisibility of landscapes.

From my understanding of us collecting shellfish and dragging nets around those areas and him indicating to me where Tahataharoa was I

[27] S Rolleston, Supplementary Evidence, 25 September 2009, page 21, paragraph [75].

always, I suppose, had that mental association with that whole area which includes the subject site. Up toward where Mr Nelson Parker lives and across to where the ridge drops down onto the flood plain. So that was my understanding of where Tahataharoa was. My dad also made reference to Te Tawa as being the eastern most – the extremities of the site closest to the harbour[28].

8. Mr P Rolleston, who, during the course of related proceedings, passed away in 2007. Much of his work was referred to by witnesses before us in 2009. In leading the hapu challenge against any development of the Heybridge - LDL site, Mr P Rolleston, for example, stated that it was based entirely upon their history and cultural traditions with Tahataharoa, the importance of that place to Pirirakau and the importance it holds in their identity[29]. He also noted that if the development proposed was located at a site *of lesser importance* elsewhere within the hapu's rohe (boundaries) then an accommodation with the developer may have been reached[30]. Indicating, thereby, that the Heybridge - LDL site was of particular importance to the hapu. In discussing the burial site of Tutereinga he went on to note that as:

   ...befits a man of rank, the actual site of his grave was kept secret. To Pirirakau, the whole of the landscape is a waahi tapu. It has been stressed by our kaumātua that desecration of his remains equates to the desecration of the mauri. ... If his remains are disturbed or removed we, his uri are lost[31].

While he described the whole of the landscape at Tahataharoa as one of the most sacred sites in their rohe[32], it was the thrust of his statement that Pirirakau believed

[28] Transcript 9 October 2009, pages 434-435.
[29] P Rolleston, Brief of Evidence, Bundle of Documents on Behalf of Pirirakau Incorporated Society, tab 4, page 4 at paragraph 9.
[30] P Rolleston, Brief of Evidence, Bundle of Documents on Behalf of Pirirakau Incorporated Society, tab 4, page 4 at paragraph 11.
[31] P Rolleston, Statement, Bundle of Documents on Behalf of Pirirakau Incorporated Society tab 2, page 11 paragraph 3.4 and 3.5.
[32] P Rolleston, Statement, Bundle of Documents on Behalf of Pirirakau Incorporated Society tab 2, page 11 paragraph 3.4.

that Tutereinga's remains were likely to be disturbed by any development of the Heybridge - LDL site[33]. He stated in this regard:

> *The subject matter of this appeal concerns a proposal by the appellant to develop a rural residential site at Te Puna, Tauranga. <u>The site of the proposed development</u> is known as Tahataharoa. <u>This site</u> is of significant importance to the Pirirakau hapu as it is the burial place of our eponymous ancestor Tutereinga. As such Tahataharoa is sacred to us. The hapu is of a view that any development <u>on that site</u> would desecrate not only our traditional, cultural, and spiritual values but would go to the heart of our identity"[34].*

9. The approved Te Pirirakau Cultural Assessment Report (1994), where Mr P Rolleston wrote that:

   Although physical evidence may not be apparent, the stories and histories of our people generally describe the area as the final resting-place of our tūpuna, Tutereinga. The customary values that arose from the burial of Tutereinga, embody all the traditional elements of identity and tribal rights which emanate from that incident; te mauri, tapu, ihi, te wehi, and te mana...

   ...The memory of the inherent cultural values associated with Tahataharoa, the place, and Tutereinga the man, are passed down the generations as an oral tradition.

   These deep and fundamental issues cannot be mitigated. Even if the human remains are not found as a result of this proposed development, the cultural and spiritual damage done to Pirirakau will remain with Pirirakau and Ngāti Ranginui forever as a continuation of the injustices of settlement and a violation of the Treaty of Waitangi[35].

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[33] P Rolleston, Affidavit, Bundle of Documents on Behalf of Pirirakau Incorporated Society, tab 3, page 15 at paragraph 3.

[34] P Rolleston, Affidavit, Bundle of Documents on Behalf of Pirirakau Incorporated Society, tab 3, page 15 at paragraph 3 (emp. added).

[35] P Rolleston, Te Pirirakau Cultural Assessment Report, Bundle of Documents on Behalf of Pirirakau Incorporated Society, tab 4, page 32, Section 1.0.

Mr P Rolleston and other hapu representatives were clearly concerned in those times that desecration of the remains of Tutereinga could occur during any development of the actual Heybridge - LDL site[36].

10. The Heybridge Archaeological Field Inspection Report February 1997 where the hapu concerns were noted by the author. In that report she stated:
There is oral traditional information relating to the request made by Tutereinga – a prominent Pirirakau warrior – that upon his death he should be buried at a place w[h]ere he could hear the murmur of the sea from his grave. The exact location of his burial spot is unknown, but there is considerable feeling within the Pirirakau hapu that this could be within the vicinity of the proposed development[37].
11. A further Cultural Assessment Report completed by Keni Piahana in 1999, and paid for by Heybridge, recorded how the Tauranga tribes settled the area. The author also noted that the oral *"traditions indicate that Tutereinga is buried in the area of the subject site."*
12. In the decision of the independent hearing Commissioner on the consents that are the subject of this appeal, the hapu oral tradition that the remains of Tutereinga may be buried on this site were described in this manner:
The precise location of Tutereinga's internment is unknown to Pirirakau. Their oral tradition, as explained to the hearing by Rawiri Kuka amongst others, is that following Tutereinga's death his body was taken in the middle of the night by three kaumātua and buried somewhere in the swamp area known as Te Tawa, it being a small part of Tahataharoa as described above. The three kaumātua kept the knowledge of the internment site to themselves until they too passed on.
I accept the evidence of Pirirakau that the subject site is known to them as Te Tawa, that being a smaller part of the wider area known to them as

[36] P Rolleston, Statement, Bundle of Documents on Behalf of Pirirakau Incorporated Society tab 2, page 13 paragraph 6.2.
[37] L Bowers "Archaeological Field Inspection – Proposed Residential Development, Lochhead Road, Te Puna, Tauranga" Pepared for Heybridge Developments Limited (February 1997) page 3.

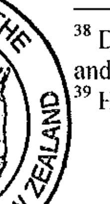
> *Tahataharoa. I also accept that it is Pirirakau's oral tradition that their revered ancestor Tutereinga is buried in that area*[38].

Submissions of Counsel

[15] Ms Barry-Piceno noted that both Environment Court decisions of 2002 and 2010 found that there was insufficient evidence to clearly establish the Heybridge - LDL site was the place of Tutereinga's burial or that it was a waahi tapu. As a result, she contended that the lack of probative evidence of fact put forward by Pirirakau, indicates that it would be highly unlikely that Tutereinga's remains are on the subject site. As a result, it was unlikely that there would be any potential effect under s3 of the Resource Management Act 1991 (RMA) on the relationship, culture and traditions of Pirirakau. She noted the decision of the High Court in *Ngāti Maru Iwi Authority v Auckland City Council* (2002) require that the evidence of Māori values under either ss6 or 7 must be *probative* and *credible*[39].

[16] Ms Barry-Piceno also analysed the evidence concerning Pirirakau's culture and traditions and contended that the Court should weigh that evidence against the alienation history of the Heybridge - LDL site, the modifications and earthworks already completed on the site and its previous situation as land within the costal marine area.

[17] Mr Cooney for the Bay of Plenty Regional Council, on the other hand, submitted that as the High Court did not criticise our approach to oral evidence from Pirirakau, it was appropriate for this Court to maintain its previous approach, subject to ensuring that it does not impose a burden on the Appellant to disprove that evidence. In other words, the evidential onus is on Pirirakau to provide reliable evidence to support its case. Furthermore, the High Court did not determine that a s6(e) relationship could not be based on an honest *belief* but rather that this Court needed to address the point, particularly in light of established authorities on the subject.



[38] Decision of the Hearing Committee – 17 February 2009, Resource Consent Application No. 65125 and 65126, page 8, at paragraphs 46 and 47.
[39] HC Auckland AP 18/02, 7 June 2002.

[18] Mr Koning noted that Peters J in the High Court directed that this Court have regard to a number of authorities. He reviewed *Te Rohe Potae o Matangirau Trust v Northland RC*[40], *Gibbs v Far North District Council*[41], *Heta v Bay of Plenty Regional Council*[42], *Winstone Aggregates Ltd v Franklin District Council*[43] and *Friends and Community of Ngawha Inc v Minister of Corrections*[44]. He also considered the definitions of "ancestral land, water and sites" concluding that there was evidence to support the existence of a relationship between Pirirakau and the site.

Decision on Issues 3 and 4 from the High Court

[19] After reviewing authorities relied upon by Peters J, such as *Friends and Community of Ngawha Inc v Minister of Corrections*[45], we are satisfied that there is no authority for the blanket proposition that a relationship under s6(e) could not be based on honest belief. Rather, we agree with Mr Cooney that the cases demonstrate that "oral assertions of a belief supported by consistent and credible evidence tending to corroborate the authenticity of the belief" can sustain a relationship for the purposes of s6(e) of the RMA. As Mr Cooney noted, the cultural significance of the relationship of Pirirakau with the site may be predominantly based on a belief that Tutereinga (as a physical, rather than metaphysical or spiritual, being) may be buried at the site.

[20] We conclude that the relevant probative evidence of the relationship of Pirirakau, their culture and traditions to the Heybridge - LDL site amounts to:

- Their traditions of settlement of the area where the site is located and the importance of Tutereinga in that story;
- The fact that he is their eponymous ancestor, his importance reflected in marae and wharenui being named after him;
- The central role he plays in their identity, mauri and mana whenua;

[40] Decision A 107/96.
[41] Decision W 76/2004.
[42] Decision A 93/2000.
[43] Decision A 80/02.
[44] [2002] NZRMA 401 (HC).
[45] [2002] NZRMA 401 (HC).

- The survival of the ohaaki (dying wish) reciting the area within which Tutereinga is said to have been buried which includes the Heybridge – LDL site. Their oral tradition is that Tahataharoa is the burial place of Tutereinga;
- The location of the Heybridge – LDL land is consistent with the geographical description in the ohaaki. Tahataharoa is within Pirirakau's rohe and in physical proximity to Ranginui's Settlement at Pukewhanake, Tutereinga's main pa at Raropua, and his own son's pa at Oikimoke. It also faces Mauao;
- Pirirakau practices did not preclude burial on the marshlands on the site;
- Pirirakau's actions over time, as recorded in our last decision at paragraph [74], and including their consistent approach to reciting their culture and oral traditions concerning Tutereinga;
- Their customary use of the coastal margins of Tahataharoa, as opposed to the land because they believe it is waahi tapu;
- Their continuous occupation and use of the general area where they attempt to act as kaitiaki or guardians of Tahataharoa[46].

[21] What they or the Bay of Plenty Regional Council have not established, based upon any new "probative" evidence, is whether the Heybridge - LDL site is, according to their belief, the actual burial site of Tutereinga and therefore whether it is waahi tapu. However, we do not consider that they must do so in terms of s6(e). All the probative evidence that they can muster has been tendered. What more can they provide?

[22] Rather there is sufficient evidence in probative terms to establish that Pirirakau's honest belief based upon their oral traditions of Tutereinga, including the ohaaki, establishes that they have a relationship in s6(e) terms. In our view, and after reconsidering the evidence, we consider that Pirirakau have done sufficient to

[46]See discussion in *Heybridge Developments Limited v Bay of Plenty Regional Council* Decision [2010] NZEnvC 195 at [52]-[53] of evidence from Messers Tangitu and Borell.

establish, on the balance of probabilities, that Tahataharoa, including the Heybridge – LDL site is ancestral land and thus s6(e) applies[47].

Result

[23] The result of this case would have been straight forward for us if it had not been for the evidence given by Mr Shadrach Rolleston for the purposes of this hearing. Without that evidence, we would have found that our previous decision to decline the resource consents should be upheld.

[24] However, and despite his previous equivocal answers to questions from this Court as recorded above, Mr Shadrach Rolleston for the first time stated definitively that his people believe that the entire area of Tahataharoa is waahi tapu and that they want restrictions on development, beyond and not limited to the Heybridge- LDL site. To them the entire area must be protected given its associations with their hapu and Tutereinga. In answer to questions from the judges of this Court he stated:

> *QUESTIONS FROM THE COURT: JUDGE DWYER*
>
> *Q. Mr Rolleston, can I just take up the same matter I took up with Mr Koning before. We were talking about another site in Tahataharoa with a different sort of development. Would you see the issues as being the same or is there a particular issue about the site we're talking about within Tahataharoa?*
>
> *A. I have to say that the only – any proposed development on this site will be of concern.*
>
> *Q. You mean on the site we're talking about as opposed to Tahataharoa?*
>
> *A. The extent of Tahataharoa would be of concern to Pirirakau.*
>
> *Q. So anywhere in Tahataharoa.*
>
> *A. Anywhere on that site, anywhere in that, in Tahataharoa would be of concern to Pirirakau.*
>
> *QUESTIONS FROM THE COURT: JUDGE FOX*
>
> *Q. And just to be clear, and I'm sure you said it in the last hearing, your people's view is that Tutereinga could be anywhere along Tahataharoa?*

[47] See *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2006] NZRMA 193 (HC) for the standard of proof required under the RMA.

A. Well according to the Ohaaki he was laid to rest at Tahataharoa.

Q. Yes we know that.

A. And we have no evidence of where exactly on that site he is buried.

THE COURT: JUDGE DWYER

Q. Where exactly in Tahataharoa as opposed to the site.

A. Oh Tahataharoa.

QUESTIONS FROM THE COURT CONTINUES: JUDGE FOX

Q. Yes I thought you were far more specific in the last hearing about it being located at this spot because you denounced Mr Mikaere's evidence as being unlikely because of the situation of that location –

A. Yeah.

Q. relative to the view of Mauao?

A. Yeah.

Q. And here then you indicated as far as I can remember, I'll have to go back to the transcript that the Ohaaki would pinpoint this, the burial site, the possible site, or probable depending on your point of view in and around or approximately at this location?

A. Um, I think when we, when we talked about Tahataharoa we said it extended from the Heybridge site through to the base of Pukewhanake, somewhere in that vicinity. I can't definitively say that, and none of our people can, definitively say where he is buried in that location. All we can say is that he is buried on Tahataharoa somewhere and the location of Tahataharoa being from the Heybridge site through to the base of Pukewhanake.

Q. Yes does that mean that when another developer comes along at the other end of the beach that you're going to claim that's the burial site as well?

A. Potentially, potentially. I mean it will run into issues for other applicants that are seeking to do similar kinds of things yes.

Q. Well no it will end up running into a problem for you I would think?

A. Yes for us[48].

FURTHER QUESTIONS FROM THE COURT: JUDGE DWYER

48 Transcript 22 April 2013, pages 29-30.

Q. So the power site that you've just referred to, was it Puke –

A. Pukewhanake.

Q. Whereabouts is that?

A. On the corner of Station Road. It's on Station Road in Te Puna. It's on a bend right next to the Wairoa River.

Q. Where is it in relation to this site. It's probably one of the places we went and looked at?

A. It adjoins the site, you know, yeah.

Q. It that on the hill –

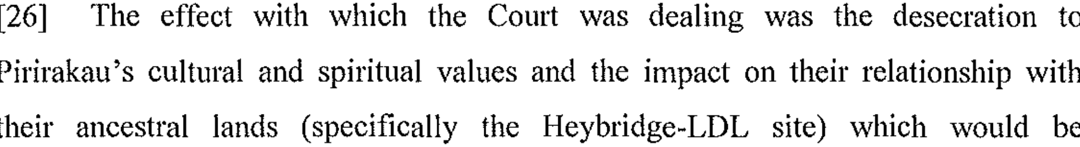
A. Yes.

Q. – behind the site?

A. Well no, not on that – not that particular site. As you move further up the river Pukewhanake is located probably about maybe 500 to a kilometre from the LDL site.

Thus due to the clarity now surrounding the position of Pirirakau, and after reconsidering the evidence, we must reconsider what is necessary to provide for their relationship with the Heybridge – LDL site.

[25] To take such a determined stand over the entire area from Pukewhanake (in the south) to Oikimoke (in the north), potentially a distance of some kilometres, or even the lesser but still extensive area from and including the Heybridge land to Pukewhanake, raises questions as to the degree of likelihood of the burial place being on the Heybridge site. While there was some suggestion from a number of witnesses that Tutereinga could be anywhere within the Tahataharoa area, the focused opposition to the Heybridge developments and the evidence we heard or received in 2009 and recited above, narrowed that zone considerably to the vicinity of the Heybridge – LDL site. That led to the finding made by the Court in the second bullet point of paragraph [88] of our previous decision.



[26] The effect with which the Court was dealing was the desecration to Pirirakau's cultural and spiritual values and the impact on their relationship with their ancestral lands (specifically the Heybridge-LDL site) which would be

occasioned should the burial site be disturbed. Such disturbance was a reasonable possibility in light of the findings which we had made and in that case avoidance of the risk by declining consent was an appropriate finding.

[27] However, in light of the evidence now given on behalf of Pirirakau it must be said that the degree of that possibility is considerably less than we were initially led to believe. While we accept that the possibility of disturbance remains to some degree it is no greater a possibility than applies to any other land at Tahataharoa. While we accept that disturbance of Tutureinga's remains would constitute an effect of high impact to Pirirakau should it occur, the degree of possibility (or probability) of that occurring must now be assessed as being sufficiently low that avoidance of the risk by declining consent is not the only outcome which the Court must consider.

[28] Given the wide extent of protection that Pirirakau is seeking, it would be unreasonable to decline the consent. Rather, we must grant the consents while imposing appropriate conditions to ensure that the s6(e) relationship, culture and traditions of Pirirakau may be provided for. We allow the parties 20 working days to discuss what form conditions might take. We note the modified proposals and conditions outlined by Ms Barry-Piceno including earthworks protocols and suggest that those provide the basis for discussion. The Council is directed to provide a status report on or before the conclusion of that period.

High Court Issues

[29] The final matter counsel in their joint memorandum of 11 April 2013 agreed we should address is whether this Court may make a finding that the subdivision application was "advanced on the basis that fill would be imported" and whether the alternative option of importation of fill is a viable option to complete the approved subdivision for sale. As the Regional Council has indicated that it does not intend to pursue this issue, and as we have found that the consents should be granted on the basis outlined above, there is no need to deal further with the matter.

Costs

[30] Our initial view is that this is not a matter where it is appropriate to reserve costs. If any party has a contrary view they may advise accordingly on resolution of conditions.

Majority Decision

[31] This is a decision of the majority of the Court, Commissioner McConachy being of the view that the outcome of the Court's initial decision ought stand.

DATED at Wellington this 13th day of November 2013

For the Court:

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

B P Dwyer	C L Fox
Environment Judge	Alternate Environment Judge

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2013-470-000612
[2014] NZHC 2544

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to section 299 of the Act
BETWEEN	PIRIRAKAU INCORPORATED SOCIETY Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
	D155 LIMITED Second Respondent

Hearing:	28 August 2014
Appearances:	J P Koning for Appellant P H Cooney for the First Respondent K M Barry-Piceno for the Second Respondent
Judgment:	16 October 2014

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Thursday, 16 October 2014 at 1.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:

Koning Webster, Papamoa
Cooney Lees Morgan, Tauranga
K Barry-Piceno, Barrister, Tauranga

Introduction

[1] On 13 November 2013 the Environment Court granted resource consent to the respondent, D155 Limited (D155), to carry out earthworks and other activities on land it owns in Tauranga.[1] The Court held that it would be unreasonable to decline the consent given the wide extent of protection that the appellant, Pirirakau Incorporated Society (Pirirakau), sought for the land and for the surrounding area, known to Pirirakau as Tahataharoa.

[2] Pirirakau appeals that decision on five questions of law. Its central claim is that the Court erred in its assessment of the evidence provided by its witness, Mr Shadrach Rolleston. The Court concluded from that evidence that Pirirakau had changed its position from an earlier hearing on the likelihood of an ancestor being buried on site and their belief that the land and the wider area is waahi tapu. But for this change of position, the Court would have declined the consent. Pirirakau claims there was no change and those conclusions were not reasonably available to the Court on the facts.

[3] D155 opposes the appeal and has filed submissions to that effect. The first respondent, the Bay of Plenty Regional Council (Council), supports the appeal and has also filed submissions in addition to those filed by Pirirakau.

Background

[4] The land in question is a low lying 42 ha coastal site on Lochhead Road, Te Puna (the Heybridge site). The site abuts Tauranga harbour and is located on former wetland on the west bank of the Wairoa River mouth.

[5] D155 purchased the land from LDL Limited, the successor to Heybridge Developments Limited (Heybridge), on 1 June 2012. It proposes a four lot rural/residential subdivision. Because of the low lying nature of the site, a significant amount of fill (approximately 144,000 m^3) is required to construct both the proposed 920 m extension to Lochhead Road and to create a platform for the

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[1] *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269, [2014] NZRMA 164 [2013 EC decision].

building sites. The proposed source of that fill is a 3.5 ha borrow pit in the middle of the site dug to a depth of 3 metres.

[6] The four marae of Pirirakau, a hapu of Ngati Ranginui, strongly oppose the development on the site due to the deep cultural and spiritual connection they have with the area. Pirirakau claims a mana whenua interest in the region between the Wairoa River and the Waipapa River and from Tauranga Harbour to the top of the Kaimai Ranges. Within that rohe they claim a predominant interest in an area known to them as Tahataharoa. The exact contours of Tahataharoa are unknown, but roughly speaking the area extends 90-150 ha from Oikimoke to the north of the estuarine headland of the Wairoa River to Pukewhanake in the south.[2] The Heybridge site sits directly within Tahataharoa.

[7] Tahataharoa is important to Pirirakau for two main reasons. First, it is ancestral land used for generations by their ancestors. It was not sold to the settlers, nor did Pirirakau sign the Treaty of Waitangi; rather, the land was forcibly confiscated from them in 1864 after the battles of Te Ranga and Gate Pa. The coastal margins and the fringes of the Heybridge site were used for cultural purposes such as food gathering and camp sites.[3] Food gathering did not occur on the actual site for the second reason, namely that according to oral tradition Pirirakau's revered founding ancestor Tutereinga, the son of Ranginui, is buried in the area, and for that reason the area is said to be waahi tapu.[4] That belief stems from the ohaaki (dying wish) of Tutereinga:

> *Tanumia ahau i Tahataharoa kia rongo ai ahau kit te tangi o te tai*
>
> *Bury me at Tahataharoa that I might hear the murmur of the sea.*

[8] While they believe that Tutereinga was buried in Tahataharoa, as befits someone of his rank and status the exact urupa (burial site) of Tutereinga in the area

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2 *Heybridge Developments Limited v Western Bay of Plenty District Council* [2010] NZEnvC 195 [2010 EC decision] at [51].

3 2013 EC decision at [11].

4 2010 EC decision at [81].

is unknown. Apart from the ohaaki there is other probative evidence that suggests Tutereinga is buried at Tahatataharoa and in the vicinity of the Heybridge site.[5]

[9] Pirirakau believe that as the descendants of Tutereinga and kaitiaki of the area, they are duty bound to ensure that Tutereinga's burial ground is left untouched, and any desecration to Tutereinga's remains will have significant consequences because it would amount to desecration of the mauri (life force) of the hapu.[6] If they fail to protect the remains they will cease to exist as a collective group. For those reasons Pirirakau opposes development on the site, and in particular is opposed to the planned 3.5 ha borrow pit due to the risk that Tutereinga's remains would be disturbed.

[10] There is a lengthy history to D155's application for and Pirirakau's opposition against development on the site, including three Environment Court decisions (2002, 2010, and the 2013 decision currently under appeal) as well as a prior appeal decision of the High Court (2011).[7] I will briefly summarise those applications and decisions as is necessary for the purposes of this appeal.

[11] The first application was made by Heybridge in 1999 in which it applied for consent from the Western Bay of Plenty District Council to subdivide the site into 13 lots. The consent was successfully opposed by Pirirakau. Heybridge appealed unsuccessfully to the Environment Court in 2002.

[12] The primary issue on appeal in 2002 was whether the Heybridge site was waahi tapu for the purposes of s 6(e) of the Resource Management Act 1991 (RMA). In an interim decision released 21 November 2002 the Court dismissed the appeal. The Court was unable to find the entirety of the Heybridge site to be waahi tapu, having regard to the doubts raised in evidence as to the burial site of Tutereinga, and did not make a definitive finding on the matter. However, the Court found the site was nevertheless ancestral land:

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5 2013 EC decision at [20].

6 2010 EC decision at [87].

7 *Heybridge Developments Limited v Western Bay of Plenty District Council* EC Tauranga A231/2002, 21 November 2002 [2002 EC decision]; 2010 EC decision; *Heybridge Developments Limited v Western Bay of Plenty District Council* [2012] NZRMA 123, (2011) 16 ELRNZ 593 (HC) [2011 HC decision]; and the 2013 EC decision.

> [59] In the end, we find ourselves unable to make a definitive finding on the waahi tapu issue, given the conflicting views in evidence. Bearing in mind that the exact burial place of Tutereinga is unknown, coupled with the conflicting views over the location and extent of Tahataharoa, we decline to hold that the whole subject land is waahi tapu. Furthermore, we are unable to determine satisfactorily what lesser area within or in the vicinity of the subject land is so classifiable.
>
> [60] Notwithstanding the foregoing, the subject land is without doubt ancestral land, formerly used and occupied by many generations of forebears preceding present day members of Pirirakau. On the strength of the case presented for Pirirakau in relation to the river and its estuary, the headland area, the Hakao Stream, and the harbour, we find that due recognition and provision needs to be afforded to Pirirakau's position and interest in the context of s 6(e) of the Act. In other words, the subsection is applicable as a matter of national importance, given the land's status as ancestral land of notable association and value traditionally to Pirirakau, irrespective of the doubts surrounding Tutereinga's resting place, the location and extent of Tahataharoa, and the allied issue of waahi tapu. …

[13] In 2007 the Western Bay of Plenty District Council granted Heybridge a new modified four-lot subdivision consent, subject to a grant of resource consent by an independent Commissioner acting under delegated authority from the Environment Bay of Plenty Hearings Committee. Consent was required because the proposed earthworks as originally planned were a discretionary activity under r 1C of the Bay of Plenty Regional Water and Land Plan, thereby engaging s 104 and Part 2 of the RMA.

[14] In February 2009 the Commissioner declined six of the consents sought due to the significant adverse effect of the development upon the cultural and spiritual values of Pirirakau and their relationship with the subject site. Heybridge appealed that decision to the Environment Court. The Court heard five days of evidence in October 2009 (2009 hearing) and dismissed the appeal on 10 June 2010 (2010 decision). It held that Pirirakau's relationship with the site is strong, genuine and heartfelt, and sufficient to establish a relationship within the meaning of s 6(e) of the RMA.[8] It also accepted Pirirakau's belief that serious cultural consequences would follow if the remains were disturbed during development of the site.[9] The potential for disturbance was considered of itself an affront to the kaitiaki of the site.[10]

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8 2010 EC decision at [125]-[126].

9 At [86] and [126].

10 At [126].

[15] While there was no doubt that the actual burial site of Tutereinga would be waahi tapu, the Court considered in line with its 2002 interim decision that there was not enough evidence to find that the burial site was or was not on the Heybridge site.[11] What was left was Pirirakau's honestly held belief that Tutereinga's burial is or may be within the application site. That belief was not unlikely, implausible, or inconsistent with evidence the Court heard.[12]

[16] Having regard to ss 5, 6(e), 7(a) and 8 of the RMA the Court concluded with the following:

> [129] We agree with [the Council] that we could not recognise and provide for Pirirakau's relationship with their ancestral land and their culture and traditions if the appeal was granted by way of conditions attached to the consent, given that the consequence would be, according to Pirirakau, that the mauri of their hapu, and their rangatiratanga and mana whenua lost.

[17] In this respect, while the Court found the site to be ancestral land, it did not provide or provide exclusively for Pirirakau's relationship with the site in its capacity as ancestral land.[13] Rather, the Court made its decision on the need to recognise and provide for the relationship based on Pirirakau's belief that waahi tapu (being Tutereinga's urupa) was or may be on site.[14] Accordingly, the proposal failed to achieve the imperative of sustainable management as it could not avoid remedy or mitigate the identified adverse effects to Pirirakau.[15]

[18] Heybridge appealed that decision to the High Court on a number of questions of law.[16] Among others the primary contention was that the Environment Court erred in placing the onus on Heybridge to prove that Tutereinga's burial place was not on site. On 19 August 2011 Peters J allowed the appeal in part. She found that a party who asserts a fact bears the evidential onus of the fact, and accordingly the Court had erred in placing the onus on Heybridge to disprove Pirirakau's belief.[17] Although not a material issue, she also found that it was not open to the Court to find

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11 At [83].
12 At [83].
13 2011 HC decision at [56].
14 2010 EC decision at [126].
15 At [130].
16 2011 HC decision.
17 At [51].

on the evidence that Heybridge had advanced its subdivision application on the basis that it would import fill to the site.[18]

[19] In declining the Society's subsequent application for leave to appeal to the Court of Appeal, Peters J clarified her position, stating that she did not determine the question of whether the relationship between Pirirakau and their culture and traditions with Tahataharoa could be established by reason of a belief for the purposes of s 6(e) RMA.[19] Rather that was a point for the Environment Court to address. Peters J remitted the case for the Environment Court for reconsideration in light of the decision.

[20] The Environment Court reheard the matter on 22 April 2013. No new evidence was heard except that provided by Mr S Rolleston for Pirirakau, who was briefed to update the Court on Pirirakau's treaty settlement claim as hapu for Ngati Ranginui. The primary issue was whether and if so how the relationship of Pirirakau and its culture and traditions with the site, stemming from its historical association with the area, including its belief that Tutereinga might be buried on the site, should be recognised and provided for.[20]

[21] In a majority verdict issued on 13 November 2013 the Court granted resource consent.[21] The Court found that Pirirakau's honest belief based upon their oral traditions of Tutereinga, including the ohaaki, was sufficient probative evidence to establish a relationship within the terms of s 6(e) RMA. Pirirakau had established that Tahataharoa, including the Heybridge site, was ancestral land and therefore s 6(e) applied.[22] However, the likelihood that Tutereinga was buried on site and the alleged status of the site and Tahataharoa as waahi tapu remained an issue of contention. The Court considered the result would have been straightforward but for the evidence of Mr S Rolleston, provided orally to the Court in response to questions put to him at the hearing:

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18 At [62].

19 *Pirirakau Incorporated Society v Heybridge Developments Limited* HC Tauranga CIV-2010-470-585, 22 December 2011 at [20].

20 2013 EC decision at [9].

21 Environment Commissioner McConarchy considered that the outcome of the Court's initial decision in 2010 should stand (at [31]).

22 At [22].

> … Without that evidence, we would have found that our previous decision to decline the resource consents should be upheld.
>
> [24] However, and despite his previous equivocal answers to questions from this Court as recorded above, Mr Shadrach Rolleston for the first time stated definitively that his people believe that the entire area of Tahataharoa is waahi tapu and that they want restrictions on development, beyond and not limited to the Heybridge-LDL site. To them the entire area must be protected given its associations with their hapu and Tutereinga. …
>
> …
>
> Thus due to the clarity now surrounding the position of Pirirakau, and after reconsidering the evidence, we must reconsider what is necessary to provide for their relationship with the Heybridge-LDL site.
>
> [25] To take such a determined stand over the entire area from Pukewhanake (in the south) to Oikimoke (in the north), potentially a distance of some kilometres, or even the lesser but still extensive area from and including the Heybridge land to Pukewhanake, raises questions as to the degree of likelihood of the burial place being on the Heybridge site. While there was some suggestion from a number of witnesses that Tutereinga could be anywhere within the Tahataharoa area, the focused opposition to the Heybridge developments and the evidence we heard or received in 2009 and recited above, narrowed that zone considerably to the vicinity of the Heybridge – LDL site. That led to the finding made by the Court in the second bullet point of paragraph [88] of our previous decision.
>
> [26] The effect with which the Court was dealing was the desecration to Pirirakau's cultural and spiritual values and the impact on their relationship with their ancestral lands (specifically the Heybridge-LDL site) which would be occasioned should the burial site be disturbed. Such disturbance was a reasonable possibility in light of the findings which we had made and in that case avoidance of the risk by declining consent was an appropriate finding.
>
> [27] However, in light of the evidence now given on behalf of Pirirakau it must be said that the degree of that possibility is considerably less than we were initially led to believe. While we accept that the possibility of disturbance remains to some degree it is no greater a possibility than applies to any other land at Tahataharoa. While we accept that disturbance of Tutuereinga's remains would constitute an effect of high impact to Pirirakau should it occur, the degree of possibility (or probability) of that occurring must now be assessed as being sufficiently low that avoidance of the risk by declining consent is not the only outcome which the Court must consider.

[22] In the Court's opinion, given the wide extent of protection for Tahataharoa sought by Pirirakau, it considered it unreasonable to decline the consent.[23] Accordingly, it issued consent for development on the site subject to appropriate conditions that may provide for the s 6(e) relationship, culture, and traditions of Pirirakau, as to be discussed between the parties.

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[23] At [28].

Approach to appeal

[23] Section 299 of the RMA provides that a party may appeal against a decision of the Environment Court to the High Court on questions of law. An error of law occurs if the Environment Court:[24]

(a) applied a wrong legal test; or

(b) came to a conclusion without evidence, or one to which, on evidence, it could not reasonably have come; or

(c) took into account matters which should not have been taken into account; or

(d) failed to take into account matters which should have been taken into account.

Any identified error of law must materially affect the result of the Court's decision before this Court should grant relief.[25] On appeal this Court is not to revisit the merits of the case under the guise of a question of law.[26]

Alleged errors of law

[24] The Society claims the Environment Court made five errors of law, namely:

(a) its erroneous assessment of the evidence presented by the appellant on the relationship between Pirirakau and its ancestral land known as Tahataharoa;

(b) the undue weight it gave to the evidence of Mr S Rolleston given at the second [2013] hearing;

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24 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
25 Ibid.
26 *Nicholls v Papakura District Council* [1998] NZRMA 233 (HC) at 235.

(c) the insufficient weight it gave to the evidence of the other Pirirakau witnesses given at the first [2009] hearing;

(d) in making adverse findings from the evidence of Shadrach Rolleston given at the second hearing which were not reasonably open to it; and

(e) in making adverse findings contrary to the overwhelming weight of evidence given by the Pirirakau witnesses at the first hearing.

Although pleaded separately, these questions of law run together. The claim is that undue weight was placed on certain statements of Mr S Rolleston at the 2013 hearing, the result of which was to lead the Environment Court to conclude Pirirakau had changed its stance as to the status of Tahataharoa, when in fact, seen in the context of the evidence provided at the 2009 hearing, Pirirakau had always considered Tahataharoa to be waahi tapu and was staunchly opposed to development in the area, including but not limited to the subject site. The key issue for determination in this proceeding is therefore whether Pirirakau did in fact change its position in the manner described by the Environment Court.

Summary of submissions

[25] The pivotal issue, in the Council's submission, is whether Pirirakau did in fact change its position between the first hearing in 2009 and the second hearing in 2013 as to the likelihood of Tutereinga being buried on the Heybridge site and their belief as to the status of Tahataharoa as waahi tapu. Counsel submits that if Pirirakau through Mr S Rolleston did not change its position, then the Court came to a conclusion it could not reasonably have reached on the facts.

[26] The Council submits that Pirirakau did not change its position on Tahataharoa. They have always made it known they oppose development anywhere in Tahataharoa on the basis of the belief that their founding ancestor could be buried anywhere in that area and the Court was clearly made aware of their stance at the 2009 hearing. All the oral evidence of Mr S Rolleston did was to confirm the evidence that the Court heard and accepted at the 2009 hearing. As such it is said the Court was wrong to conclude that for the first time Pirirakau had definitely stated

that they believe the entirety of Tahataharoa is waahi tapu, when in fact Pirirakau had always made clear their position as to the importance of Tahataharoa and their belief that Tutereinga was buried somewhere in the area.

[27] If it is accepted that the evidence for Pirirakau did not change, Pirirakau submits that the Court erred in coming to a different conclusion on how to provide for Pirirakau's relationship with the Heybridge site on the same evidence. The Court stated that "but for" Mr S Rolleston's evidence, interpreted as evincing a change, it would have come to the same conclusion as the 2010 decision and refused consent. Since nothing in fact changed between the 2009 and 2013 hearings, it is submitted the Court erred in reaching a different conclusion on the evidence it had.

[28] In addition to that primary issue it is submitted that the Court:

(a) became distracted by the extent of Tahataharoa, when it was required to assess the merits of the particular application for development on the Heybridge site, rather than concerning itself with any potential future applications (and Pirirakau's possible position on any future unknown applications). That constituted an irrelevant consideration for the Court and the Court erred in that regard;

(b) erred in reconsidering the effects of the development and their probability/likelihood of manifestation, when the High Court had directed it to reconsider whether a s 6(e) RMA relationship existed in light of its ruling on the burden and standard of proof to apply in establishing that relationship; and

(c) should have exercised caution in introducing a new probability/likelihood test for cultural effects, which the High Court did not direct the Environment Court to use.

[29] In response D155 submits that there was a change in the position of Pirirakau between the 2009 and 2013 hearings, and largely adopts the reasoning of the Environment Court. It is submitted that Pirirakau originally said at the 2009 hearing

that there was a very real possibility of an adverse effect on them, by virtue of its assertion of fact that Tutereinga's remains were likely to be disturbed if earthworks were undertaken on the Heybridge site. To the contrary at the 2013 hearing Pirirakau claimed that Tutereinga's remains could be equally likely buried elsewhere in Tahataharoa, and they may or may not be located at the Heybridge site. The change, therefore, was as to the likelihood of disturbance of Tutereinga's remains.

[30] It is submitted that given that change in position and the lack of probative evidence of fact put forward by Pirirakau, it was open to the Court in 2013 to undertake a fresh reassessment of the evidence. Having regard to all the evidence, the Court considered that the likelihood of disturbance was considerably less because of the low probability Tutereinga was buried on the Heybridge site in the vicinity of the proposed borrow pit.

Did Pirirakau change its position on Tahataharoa?

[31] There are a number of overlapping components that together inform Pirirakau's position in respect to the Heybridge site and Tahataharoa generally. These can be summarised as:

(a) the perceived status of Tahataharoa as waahi tapu;

(b) the location of Tutereinga's urupa in Tahataharoa, and the likelihood he is buried at the Heybridge site; and

(c) the location and size of Tahataharoa in relation to the Heybridge site.

I will address each of these components in turn.

[32] As to the status of Tahataharoa as waahi tapu, counsel for the Council submits the Court cherry-picked passages from Mr S Rolleston's oral evidence at the 2013 hearing to support the conclusion that there had been a change in Pirirakau's stance, and that a broader reading of his evidence shows there to be consistency in approach between his evidence and that presented at the 2009 hearing.

[33] I agree with that submission. At paragraph 4 of Mr S Rolleston's brief of evidence for the 2013 hearing he stated:

> I confirm that the position of Pirirakau on the status of Tahataharoa as a wahi tapu has not changed since the last hearing. I would add that such is the significance of Tahataharoa to Pirirakau that our position will never change.

[34] That approach is consistent with Mr S Rolleston's statement in his brief of evidence provided for the 2009 hearing:

> 34. Pirirakau have always maintained and will continue to maintain that Tahataharoa is a waahi tapu. The status of waahi tapu is confirmed by the burial of Tutereinga at Tahataharoa.

[35] There are a number of other statements by Pirirakau witnesses at the 2009 hearing that suggest Pirirakau's position was that Tahataharoa was of utmost importance and considered to be waahi tapu. That is consistent with the position of Mr P Rolleston in February 2002 in support of Pirirakau's opposition to the original proposal put forward by Heybridge:[27]

> 3. The subject of this appeal concerns a proposal by the appellant to develop a rural residential site at Te Puna, Tauranga. The site of the proposed development is known as Tahataharoa. This site is of significant importance to the Pirirakau hapu as it is the burial place of our eponymous ancestor Tutereinga. As such Tahtaharoa is sacred to us. The hapu is of a view that any development on that site would desecrate not only our traditional, cultural, and spiritual values but would go to the heart of our identity.

[36] At the 2002 hearing the Environment Court stated that because of the lack of knowledge as to Tutereinga's actual burial site, Pirirakau's witnesses took a broad view to waahi tapu, based on the understanding that Tutereinga's burial was within Tahataharoa and that Tahataharoa embraces the Heybridge site.[28]

[37] The Environment Court was clearly aware that Pirirakau considered the entirety of Tahataharoa to be waahi tapu and would staunchly oppose development in Tahataharoa for that reason. At [64] of its 2010 decision the Court refers to that possibility being canvassed in argument by counsel for Heybridge:

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[27] Affidavit of Peter Rolleston, 22 February 2002.
[28] 2002 EC decision at [57].

> [64] Ms Barry-Piceno argued that Pirirakau witnesses were elevating the importance of Tahataharoa to one of a blanket waahi tapu or similar constraint, so as to prevent earthworks for the entire area. She noted that the land identified by the Pirirakau witnesses as Tahataharoa runs from Raropua to Pukewhanake covering an area of approximately 90-150 hectares. Tahataharoa therefore covers a very large area that has been significantly modified and changed in physical form in the last 600 years.

[38] Counsel for the Council also refer to a line of questioning directed at Mr Koning, the counsel for Pirirakau, at the 2009 hearing, the material parts of which are quoted below:

> HIS HONOUR: I think one of the sources of confusion that has occurred in this case, Mr Koning, is a certain interchangeability between the description of Tahataharoa and then a narrowing down of that same description. That is how I seem to read your submissions. When you are talking about Tahataharoa in connection with the matters we are discussing, you are really meaning Te Tawa, is that right? You are referring to the Heybridge site?
>
> MR KONING: Yes.
>
> HIS HONOUR: So the –
>
> MR KONING: Not solely the Heybridge site for Pirirakau and I think the witness will confirm that – Tahataharoa extends beyond the Heybridge site.
>
> HIS HONOUR: I understand that perfectly but it seems to me that you have used them interchangeably in your submission, there are times when you are clearly referring specifically to the Heybridge site when you have used the term Tahataharoa.
>
> MR KONING: Yes, I accept that, sir, that in my submissions –
>
> HIS HONOUR: We understand that it is considerably wider than that.
>
> MR KONING: Yes, in my submission, sir, I accept that it is a little interchangeable but in terms of this particular appeal, the position of Pirirakau is that the Heybridge land forms part of Tahataharoa.
>
> HIS HONOUR: Yes, I understand that. Is it only this particular part of Tahataharoa where Pirirakau would seek to ensure there is no development of the nature we are talking about or is it wider than that?
>
> MR KONING: I think the witnesses will say that it is wider than that, sir. But because of the ohaaki which says that Tutereinga was buried within the murmur of the sea this is –
>
> HIS HONOUR: Presumably that could cover a wide range of sites within Tahataharoa within the sound of the sea.
>
> MR KONING: But it may be that those questions are best answered by the witnesses.

[39] Although there remain issues with what Mr P and S Rolleston meant by 'Tahataharoa' in terms of its location, extent, and its relationship with the Heybridge site, having regard to the other affidavit evidence available on file I conclude that Pirirakau as a collective had always considered Tahataharoa to be waahi tapu, and would oppose development in that wider area accordingly. The Environment Court knew that this was Pirirakau's position. Understandably at the 2009 hearing Pirirakau's focus was on the Heybridge site but it is clear they have consistently considered the entirety of Tahataharoa to be of the greatest importance due to its status as ancestral land and their belief that Tutereinga is buried somewhere in the area.

[40] Accordingly I am satisfied the Court erred at [24] of its judgment in finding that for the first time Mr S Rolleston had made clear that Pirirakau believed the entire area of Tahataharoa is waahi tapu and that they want restrictions on development, beyond and not limited to the Heybridge site.

[41] If anything changed between the 2009 and 2013 hearings it was the assessed size of Tahataharoa in respect to the Heybridge site, the assessed importance of that for determining the likelihood of Tutereinga's remains being in the vicinity of the Heybridge site and the consequent likelihood of disturbance of Tutereinga's remains if the development went ahead.

[42] Pirirakau's position had always been that while they were not entirely sure, they believed Tutereinga was buried at Tahataharoa, and the Heybridge site formed part of Tahataharoa. The Environment Court's interpretation of the 2009 evidence in its 2013 decision was that Pirirakau believed it was likely that Tutereinga was buried on the Heybridge site.[29] A number of witness statements were cited. An example is the following statement from Mr S Rolleston in his brief of evidence provided at the 2009 hearing:[30]

> *The establishment of a hapu reserve or other hapu facilities does not address the fundamental fact that our Tupuna is still buried on the site, and that any proposed development will most likely disturb his resting place. Tutereinga was interned there under his wishes as noted by Mr Kuka …*

[29] 2013 EC decision at [14].
[30] 2013 EC decision at [14](3) (italics and underline included).

As indicated by previous submitters our challenge and opposition to the proposed development is based entirely on our history and traditions with Tahatataharoa, and nothing else. ... It is the resting place of our eponymous ancestor Tutereinga. Nothing can and will diminish the fact that he rests on that site.

[43] From the evidence of Mr S Rolleston, the Court considered Pirirakau now claimed Tutereinga could be buried anywhere in Tahatataharoa. The following is an extract from the 2013 hearing question trail cited at [24] of the judgment:

…

QUESTIONS FROM THE COURT: JUDGE FOX

Q. And just to be clear, and I'm sure you said it in the last hearing, your people's view is that Tutereinga could be anywhere along Tahatataharoa?
A. Well according to the Ohaaki he was laid to rest at Tahatataharoa.
Q. Yes we know that.
A. And we have no evidence of where exactly on that site he is buried.

…

QUESTIONS FROM THE COURT CONTINUES: JUDGE FOX

Q. Yes I thought you were far more specific in the last hearing about it being located at this spot because you denounced Mr Mikaere's evidence as being unlikely because of the situation of that location –
A. Yeah.
Q. relative to the view of Mauao?
A. Yeah.
Q. And here then you indicated as far as I can remember, I'll have to go back to the transcript that the Ohaaki would pinpoint this, the burial site, the possible site, or probable depending on your point of view in and around or approximately at this location?
A. Um, I think when we, when we talked about Tahatataharoa we said it extended from the Heybridge site through to the base of Pukewhanake, somewhere in that vicinity. I can't definitively say that, and none of our people can, definitively say where he is buried in that location. All we can say is that he is buried on Tahatataharoa somewhere and the location of Tahatataharoa being from the Heybridge site through to the base of Pukewhanake.

…

[44] The Council submits that a careful reading of Mr S Rolleston's 2009 briefs of evidence demonstrates that he used the terms 'the site' and 'Tahatataharoa' interchangeably, and where the Court states he was referring specifically to the Heybridge site, he is referring in fact to Tahatataharoa. That conflation can be seen in this statement in Mr S Rolleston's 2009 brief of evidence:

> [63] The applicant has been most helpful in trying to seek a compromise. If the development were on an adjoining property and not on Tahataharoa then I am sure that compromise could have been reached. However, this is not the case. As shown by the Pirirakau witnesses, we are fervently opposed to this development.
>
> …
>
> [68] It is the resting place of our eponymous ancestor Tutereinga. Nothing can and will diminish the fact and knowledge that he rests on that site. The oral traditions and recent historical reports refer to the importance and significance of Tahataharoa.

[45] These statements suggest Mr S Rolleston considered the Heybridge site and Tahataharoa to be the same area. At the 2009 hearing Mr S Rolleston clarified his position as the location of Tahataharoa in comparison to the Heybridge site:[31]

> HIS HONOUR: Mr Rolleston, you are quite firm in your evidence that Tutereinga is buried on the site, meaning the Heybridge site. All of the other witnesses have referred to the burial site as being on Tahataharoa somewhere. I detect a different approach from you, it is very more specific than I understood the other witnesses to be, is there a reason for that?
>
> MR ROLLESTON: I suppose in terms of my family's association with the place and we visited it on the site visit and we saw where my grandparents live and we had a track down to the beach and we used it frequently. A lot of the times we, you know, gathered seafood from around those areas, my dad always referred to that place as Tahataharoa which is the subject site.
>
> To be fair that was the first time that I had actually been onto the site with you on the site visit and visiting the pa site. I have been up and down Lochhead Road many times but not actually been onto the subject site. So in terms of – the information that has been given to me was given to me by my father while we were down on the flats, not in reference to a map of any kind and his descriptions of what that place was and what it meant.
>
> HIS HONOUR: So when he was talking about Tahataharoa was he talking about something narrower, something more specific to the site than the wider area that we have been talking about.
>
> MR ROLLESTON: Well, my dad also talked in landscape terms, you know, just as much as I did and that, you know, it is hard to define where an area of significance starts and where it ends and that was clear from his evidence to the Environment Court in the first sitting about the indivisibility of landscapes.
>
> From my understanding of us collecting shellfish and dragging nets around those areas and him indicating to me where Tahataharoa was I always, I suppose, had that mental association with that whole area which includes the subject site. Up toward where Mr Nelson Parker lives and across to where the ridge drops down onto the flood plain. So that was my understanding of

31 At [14](7) (italics included).

> where Tahataharoa was. My dad also made reference to Te Tawa as being the eastern most - the extremities of the site closest to the harbour.

[46] The conclusion to be drawn from those statements in 2009 is that while Pirirakau did not know the boundaries of Tahataharoa, in landscape terms the Heybridge site constituted a core portion of that area, and therefore given Pirirakau's belief that Tutereinga was buried on Tahataharoa there was a likelihood that Tutereinga was buried on the Heybridge site. That likelihood was supported by the other probative evidence identified by the Environment Court at [20] of its 2013 decision.

[47] At the 2013 hearing the Court had a newfound focus on the size of Tahataharoa and the impact it has on the issue of likelihood. That focus is clear from the statements in the 2013 decision at [25] and the questions put to Mr S Rolleston at the hearing and cited at [24]. At the 2013 hearing Ms Barry-Piceno argued that Tahataharoa was a wide landscape of 90 to 150 hectares, and when compared to the size of the proposed borrow pit of 3.5 hectares, the earthworks would disturb only approximately three per cent of the area in which Tutereinga was likely to reside, and accordingly it was highly unlikely that Tutereinga would be disturbed.[32] Mr Koning for the Council was asked to comment on that matter and the likelihood of Pirirakau opposing other developments in Tahataharoa.[33] The Court then proceeded to question Mr S Rolleston on that same issue. The statements made by Mr S Rolleston in response formed the basis of the Court's conclusion that there had been a change in position by Pirirakau in respect to the likelihood of Tutereinga being in the vicinity of the Heybridge site.

[48] This focus on the size of Tahataharoa may well have been a relevant consideration at the original hearing in 2009. However, the exact contours of Tahataharoa were not determined in the 2010 decision. In light of Heybridge's concession that the Heybridge site was within Tahataharoa, the Court decided not to discuss the comprehensive evidence heard as to the extent of Tahataharoa, simply finding that the area known as Tahataharoa extended to and included the Heybridge

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32 2013 EC hearing transcript at 10-11.
33 At 27.

site.[34] The Court proceeded to determine whether to grant resource consent without particular reference to the relative size of the Heybridge site in comparison to Tahataharoa and the impact that determination would have on the likelihood of whether Tutereinga would be disturbed by earthworks. Instead they opted to focus on the relevant probative evidence of the relationship of Pirirakau with the Heybridge site. That evidence included the consistency between the site and the geographical description of the ohaaki, the proximity of Ranginui's pa at Pukewhanake, and its outlook at Mauao.[35]

[49] The Court was entitled to take that approach, and it is not open to this Court at the present time to question its decision. At the 2011 appeal Heybridge did not specifically argue that it was wrong for the Court to do so, although I note one of the stated questions of law was whether the Court's finding that Pirirakau's belief that Tutereinga might be buried on the site was reasonably open to it. Peters J did not determine that question because it had been overtaken by her other findings, but she nevertheless noted that the Environment Court's finding was that Pirirakau believed that Tutereinga might be buried on the site, not that he was buried on the site.[36]

[50] In my view what changed was not the evidence before the Court, but rather the Court's interpretation of it, including in particular its assessment of the relevance of the location and size of Tahataharoa and its importance for determining the likelihood that Tutereinga's remains would be disturbed. This was not a change that can be attributed to the evidence tendered by Pirirakau at the 2013 hearing.

[51] There is an inconsistency between Mr S Rolleston's statements in his 2009 evidence and the comments made in 2013. At the 2009 hearing he made statements that conflated Tahataharoa with the Heybridge site, while at the 2013 hearing he distinguished between the Heybridge site and the wider Tahataharoa area. However, that inconsistency did not amount to a change in Pirirakau's position.

[52] At the 2009 hearing Pirirakau presented evidence on the size of Tahataharoa. It was described as a continuous landscape running along the Wairoa river and

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[34] 2010 EC decision at [70].
[35] At [55].
[36] 2011 HC decision at [58].

Tauranga harbour, extending from Oikimoke (in the north) to the Wairoa river and then to Pukewhanake (in the south), a distance of some kilometres.[37] The Court was aware that Tahatāharoa possibly covered a very large area of approximately 90-150 ha.[38] At the 2009 hearing Pirirakau made clear its position that the Heybridge site (approximately 40 ha) formed but part of this larger landscape. The Court accepted this to be the case.[39]

[53] Mr S Rolleston's 2009 evidence and Mr P Rolleston's earlier statements[40] must be placed in the context of that position. In their evidence they conflated the Heybridge site with Tahataharoa. Their statements were inconsistent with Pirirakau's position at the 2009 hearing that Tahataharoa was a larger area than the Heybridge site. While an inconsistency existed, it did so at the time of the 2009 hearing and did not emerge nor constitute a change in position between 2009 and 2013. Pirirakau's position had always been that Tahataharoa was a larger landscape than the Heybridge site. Mr S Rolleston's statements at the 2013 hearing reflected this and their position that Tahataharoa was waahi tapu, and it is only to the extent that he corrected his conflation of the two areas that there was a change in evidence. He had previously corrected this conflation to some degree when questioned by the Court during the 2009 hearing, as cited at [45] above.

[54] Since the Environment Court did not see it necessary to specifically address that inconsistency in its 2009 hearing, the inference is that they took account of that evidence and gave it appropriate weight, having regard to the other evidence tendered by Pirirakau suggesting that Tutereinga could be buried anywhere in Tahataharoa and their firm belief the entirety of Tahataharoa was waahi tapu.

[55] In my view the Court was led into error by its focus on Mr S Rolleston's comments at the 2009 hearing that conflated the Heybridge site and Tahataharoa, and took them out of context without reference to the consistent accepted position of Pirirakau and the amount of evidence tendered by it as to the relative size and location of Tahataharoa in respect to the Heybridge site. The evidence on the size

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37 2010 EC decision at [51].
38 At [64].
39 At [88].
40 At [35] above.

and location of Tahataharoa did not change between the 2009 and 2013 hearings. It was the Court's assessment of the importance of that information which did. The assessment of its importance had already been made by the Environment Court previously in its 2010 decision, and it was not open to the Environment Court to redetermine the matter in 2013.

[56] The Environment Court's ambit to determine whether to grant resource consent must also be seen in context with the 2011 High Court decision and the purpose for which Mr S Rolleston's evidence at the 2013 hearing was tendered. In the 2011 decision Peters J found that the Environment Court had wrongly determined the onus to be on Heybridge to disprove Pirirakau's belief that Tutereinga's urupa was on site.[41] The matter was remitted back to the Court to reconsider if and how the relationship of Pirirakau and its culture and traditions with the site, stemming from its historical association with the area, including its belief that Tutereinga might be buried on the site, should be recognised and provided for. As clarified in her refusal to give leave to appeal, she left open the possibility that a s 6(e) relationship could be predominately based on a belief.[42]

[57] Mr S Rolleston's statement of evidence for the 2013 hearing was a page and a half long. It was submitted for the limited purpose of updating the Court and parties on Pirirakau's (as a hapu of Ngati Ranginui) treaty settlement with the Crown that was signed on 21 June 2012. Paragraph 4 reaffirmed Pirirakau's position on its relationship with Tahataharoa. The hearing took place over the course of one day. That must be contrasted with the evidence heard at the 6 day hearing in 2009, described by Ms Barry-Piceno in her written submissions as comprehensive. In my view the comments made by Mr S Rolleston at the 2013 hearing, made in response to pointed questions, were insufficient when given their appropriate weight to determine that there had been a change of position by Pirirakau of the kind suggested by the Environment Court.

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[41] 2011 HC decision at [57].

[42] *Pirirakau Incorporated Society v Heybridge Developments Limited*, above n 19 at [20].

Conclusion

[58] For those reasons I am satisfied the Environment Court made the errors of law identified by the appellant in [24]. The Court placed too much weight on the oral statements made by Mr S Rolleston at the 2013 hearing. It gave insufficient weight to the evidence presented by the other Pirirakau witnesses at the 2009 hearing. The result of that error is that it made adverse findings from the evidence of Mr S Rolleston that was not reasonably open to it, having regard to the evidence tendered at the 2009 hearing and applied in the 2010 decision. The Court thereby erred in its assessment that there was a change of position by Pirirakau in respect to its relationship with Tahataharoa between the 2009 and 2013 hearings.

[59] The Court stated that it would have declined the resource consents without the evidence, of Mr S Rolleston. As there was an error in its assessment of that evidence the error materially affected the Court's decision to grant consent. Accordingly I consider this matter should be remitted back to the Environment Court for further reconsideration. The Environment Court should reconsider the issue put to it by the parties in the joint memorandum dated 11 April 2013, having regard to this decision, the 2010 Environment Court decision, and the 2011 High Court decision.

[60] Given my findings on the evidence, it is unnecessary for me to consider Pirirakau's alternative argument, namely that the Environment Court may have erred in introducing a probability/likelihood test for cultural effects.

Result

[61] I allow the appeal on questions one, two, three, four and five. The decision of the Environment Court to grant resource consent to D155 is set aside. I direct the matter be remitted back to the Environment Court in light of the above findings.

[62] My view is that the appellant and first respondent are both entitled to costs on a 2B basis from D155. The parties may submit memorandum on costs if they wish. Any memorandum from D155 is to be filed and served by 4.00 p.m. on Thursday,

13 November 2014. Any memoranda in reply are to be filed and served by 4.00 p.m. on Thursday, 27 November 2014.

…………………………………

Woolford J

DOUBLE SIDED

ORIGINAL

Decision No. A 80/02

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of nine appeals under section 120 of the Act
BETWEEN	**WINSTONE AGGREGATES LIMITED**
	(RMA 57/99)
AND	**HEARTBEAT CHARITABLE TRUST**
	(RMA 353/00)
	Appellants
AND	**FRANKLIN DISTRICT COUNCIL**
	Respondent
AND	
BETWEEN	**P STOWERS and R LEACH**
	(RMA 52/99)
	L TRIBE
	(RMA 53/99)
	WINSTONE AGGREGATES LIMITED
	(RMA 58/99)
	P E and S P HOPKINS
	(RMA 89/99)
	D S and G D HALL
	(RMA 94/99)

POKENO PROTECTION ASSOCIATION

(RMA 95/99)

R and B WILSON FAMILY TRUST

(RMA 101/99)

Appellants

AND **WAIKATO REGIONAL COUNCIL**

Respondent

AND **WINSTONE AGGREGATES LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner A H Hackett
Environment Commissioner R F Gapes

HEARING at **AUCKLAND** on 9, 10, 11, 15, 16, 17, 18, 23, 24, 25 and 26 October; 5, 6, 7, 12, 13, 14, 15 and 16 November 2000.

APPEARANCES

Mr D A Nolan, Mr M J Williams and Ms S Westgate for Winstone
Ms H Ash and Ms B Carruthers for Franklin District Council
Ms P Kapua and Ms G Cole for the Pokeno Kaitiaki Society
Ms K McMurray-Cathcart for the Brays
Mr J C Dawson for the Pokeno Protection Association
Mr D W Phillips for Heartbeat Charitable Trust

DECISION

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Introduction

[1] Winstone proposes developing a quarry on land it owns south of Pokeno. Geological investigations have identified a basalt rock resource, which is of sufficient size and of suitable quality to establish a quarry.

[2] Resource consents from both the Regional and District Councils are required to extract and process aggregate and carry out ancillary activities. Transport of aggregate from the site will occur by road and rail. Consent is, therefore, also sought for: the establishment and operation of a railway siding to connect with the main trunk line; and the development of a private accessway to provide access directly to the old State Highway 1.

[3] The applications for resource consents were opposed by the Heartbeat Charitable Trust and the Pokeno Kaitiaki Society. The applications were supported by the District and Regional Councils and the Pokeno Protection Association.

[4] The main opposition to the proposal relates to potential adverse effects. These included noise, traffic, vibration and detraction of amenity. It was also contended with equal force that the proposal would offend Maori. Further, those opposed maintained that the establishment of a quarry on the site would be contrary to the statutory instruments.

Resource Consents and Appeals

[5] On 12 June 1998 Winstone applied to the Councils for a range of resource consents. Specifically it sought a land use consent from the District Council and resource consents for a range of activities from the Regional Council, including land use consents, water permits and discharge permits.

[6] The District Council declined the land use consent principally over a concern about the effects of heavy traffic movements through Pokeno, particularly McDonald Road and Great South Road.

[7] The Regional Council granted the resource consents applied for, specifically:

- Consent 101235 – a land use consent for land disturbance and removal of vegetation;
- Consent 101236 – a land use consent for channel works;
- Consent 101237 – a water permit to take groundwater;
- Consent 101238 – a water permit to take surface water;
- Consent 10239 – a water permit to dam surface water;
- Consent 101240 – a discharge permit to discharge to water ;
- Consent 101241 – a discharge permit to discharge to air;
- Consent 101242 – a discharge permit to discharge to land.

[8] Winstone appealed the decision of the District Council to decline the land use consent, and against one aspect of the Regional Council consent for discharge of contaminants to air. A number of submitters appealed against the granting of resource consents by the Regional Council. These we refer to as the "Pokeno Quarry Appeals".

[9] The Heartbeat Charitable Trust lodged and served a notice of interest in respect of the Pokeno Quarry appeals under section 271A of the Resource Management Act 1991. The Pokeno Kaitiaki Incorporated Society also lodged a notice pursuant to section 274 of the Act in respect of the Pokeno Quarry appeals.

[10] In order to address the concern about effects on McDonald Road, Winstone lodged an application for an alternative access route to service the quarry. This we refer to as the "Leathem Access Application".

[11] Before the hearing of the Leathem Access Application, Winstone, the Council, and the appellants to the Pokeno Quarry Appeals entered a lengthy mediation process. This resulted in a compromise and modification of the proposal to meet the concerns of some of the parties.

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[12] The modified proposal was incorporated into a heads of agreement document, signed by all the appellants to the Pokeno Quarry appeals and the Councils. This was transposed into those draft consent orders filed at the commencement of this hearing together with the memorandum of consent. These documents provided for:

(1) A draft land use consent together with proposed conditions for both the quarry and the Leathem Access.

(2) Amendments to the Regional Council's proposed conditions of consents.

[13] At the completion of the mediation process the hearing of the Leathem Access application was revived. Consent was given on 18 April 2000. The Heartbeat Charitable Trust appealed, as did D & L Bray, the owners of a nearby property. Winstone appealed some of the conditions.

[14] Winstone's appeal on the Leathem Access was settled with the District Council and the appellants to the Pokeno Quarry appeals, and the agreed proposed conditions are recorded in the memorandum of consent filed.

[15] At the commencement of the hearing, and leaving aside the Pokeno Quarry appeals that were settled, there were only two appeals extant. These were the appeals against the Leathem Access application by the Charitable Trust and the Brays respectively. On the fifth day of the hearing the Brays settled their differences by entering a conditional sale and purchase agreement with Winstone for the sale of their property. Their appeal was withdrawn.

[16] This left only the Charitable Trust and the Kaitiaki Society in opposition. The Charitable Trust is an appellant in respect of the Leathem Access Application and a s.271A party in respect of the Pokeno Quarry Appeals. The Kaitiaki Society is a s.274 intervenor in respect of both the Pokeno Quarry Appeals and the Leathem Access Application.

Conditions

[17] The proposed conditions of consent, as set out in the draft consent order filed by the parties at the commencement of the hearing, have been amended by us following evidence and submissions. The conditions for the District Council's

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consents as amended are attached as Appendix 1. The conditions for the Regional Council's consents as amended are attached as Appendix 2. They are extensive, exacting, and detailed. We have regard to them when considering the effects of the proposal and the application of the statutory instruments.

Challenge to Validity of Condition 3(a)

[18] Condition 3(a) as agreed to by the parties to the memorandum of consent says:

> 3(a) Heavy vehicle movements through Pokeno township along Great South Road shall be limited as follows:
>
> (i) Such movements must be for the purpose of transporting aggregates to destinations within Franklin District (as it currently appears in the planning maps of the Franklin District Plan) and districts south of Franklin District; and
>
> (ii) A maximum of 250,000 tonnes of aggregate from the quarry shall be transported through Pokeno township along Great South Road in any given year from the date of commencement of works.

[19] Condition 3(a) is the linchpin of the mediated agreement. It is therefore fundamental to the existence of the agreement. As Mr Dawson said in his further submissions:

> ...the PPA wishes to reiterate its concern that proposed condition 3 is an integral and fundamental component of the proposed consent order which was negotiated as a "package" of controls. The totality of the proposed consent order is acceptable to the PPA as it considers that it appropriately avoids, remedies or mitigates any potential environment effects arising from the proposed quarry.
>
> ...if the Court were to determine that proposed condition 3 is either invalid or unenforceable and on that basis decline to accept the proposed condition, an integral part of the proposed consent order would then be removed. As a result, the PPA would then need to reconsider its position... .

[20] Ms Kapua at paragraph 5.6 of her submissions advanced the following argument:

> It is submitted that such a condition is invalid because it is essentially unenforceable. The condition really relies on compliance by third parties and the Court has in such circumstances considered such conditions to be invalid: ***McKay v North Shore City Council*** W146/95.

We also raised a concern as to whether we had jurisdiction to restrict heavy trucks, transporting aggregate from the quarry, to a particular route, once they had left the site.

[21] In response, Mr Williams submitted that the issues do not arise as the draft consent order terms were volunteered. He also pointed out succinctly that Winstone would simply have to comply with the conditions, and ensure that all contractors do so too, being at risk of prosecution under section 340 of the Act.

[22] Because of the importance of condition 33, we invited the parties to make further submissions. We are grateful for the further submissions received. From them, it appears to us, that two issues arise. These are:

(i) Whether the Court has the power to control the movement of vehicles on public roads; and

(ii) Whether condition 3 is enforceable.

Has the Court the Power to Control the Movement of Vehicles on Public Roads?

[23] This matter concerns the public law rights of passage on public roads. The effect of the RMA on pre-existing common law rights has been considered both in the Environment Court and in the High Court. In ***Aquamarine Limited v Southland Regional Council***[1], which concerned the effects on the environment of the passage of water tankers along Doubtful Sound, the Court held that such effects are relevant matters when considering such proposals involving common law rights of passage at sea.

[24] Judge Skelton, sitting alone, referred to ***Faulker v Gisborne District Council***[2], where Barker J was concerned with the issue of whether common law rights and duties, in relation to coastal protection works, have been abrogated or modified by the Resource Management Act. Barker J said:

> The Act prescribes a comprehensive, inter-related system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a

1 [1996] 2 ELRNZ 361.
2 [1995] NZRMA 462, 477.

regime that common law property rights pertaining to the use of land or sea are to be subject to it.

[25] Judge Skelton then went on to say at page 366:

> ...relevance is not dependent upon the need or otherwise for resource consents or whether such effects can be the subject of controls. Nor is it dependent on whether a common law right of passage is being exercised. Rather, it is dependent upon giving a sufficiently wide interpretation to section 104(1)(a) of the Act to ensure that in achieving its purpose, all reasonably foreseeable effects whether positive or adverse can be considered by the consent authority, and on appeal by this Court. To exclude such effects on the grounds that a resource consent is not required or that they cannot be controlled by conditions, could lead to the granting of resource consents, that, because of those effects, may not achieve the purpose of the Act.

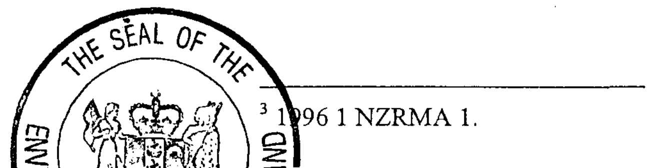
[26] In ***Faulker***, Barker J also stated:

> ...where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable. Clearly, a unilateral right to protect one's property from the sea is inconsistent with the resource consent procedures envisaged by the Act; accordingly any protection work proposed by the residents must be subject to that procedure.

[27] Judge Skelton was again faced with the principle, in relation to the common law rights of passage on a public road, in ***Hall v McDrury***[3]. After a discussion of the principles enunciated in the High Court decisions he said at page 10:

> Yet activities on roads, which of course are land and physical resources in terms of the Resource Management Act 1991, may give rise to the kind of adverse effects that are subject to sections 17 and 314 of that Act. If these effects were not susceptible to control by enforcement proceedings under that Act and there were no bylaws or regulations, those suffering such effects would have no remedy except possibly, an action for nuisance.

[28] Accordingly, we are of the view that a consent authority, and this Court, does have the jurisdiction to control the manner in which a public road is used in order to control effects on the environment. The volume, rate, hours, and route of heavy vehicle movements have the potential to cause adverse environmental effects on the area in immediate proximity to the quarry. Without such a condition as condition 3(a), which is proposed to avoid, remedy or mitigate those effects, residents in the area would have no redress from the effects that would result from heavy vehicle movements.



[3] 1996 1 NZRMA 1.

Enforceability

[29] The next question to be considered is that of enforceability. We accept that enforcement issues can potentially arise in situations where, in order to satisfactorily address traffic effects, the actions of third parties, which are legally unrelated to the consent holder, may need to be constrained.

[30] Ms Kapua referred us to the case of ***McKay v North Shore City Council***. In that case the applicants themselves challenged the validity of conditions which sought to restrict third party rights as follows:

> (vii) That reversing from the site into Sunset Road be prohibited.
>
> (viii) That vehicles departing from the site be prohibited from making a right turn to Sunset Road.
>
> (ix) That any vehicle movement relating to the childcare centre be prohibited from stopping on the northern side of Sunset Road.

[31] Similarly, in ***Fluid v Waitakere City Council***[4], the applicant challenged a condition which purported to specify the route to be used by vehicles travelling to the site. The then Tribunal held that such a condition would be invalid on the grounds that the truck belonged to third parties and that the applicant had no legal control over where they are routed.

[32] We accept that in ***McKay***, the condition which covered "any vehicle movement relating to the childcare centre" would have the potential to create difficulties of enforcement in terms of the rights and actions of third parties. The issue of enforceability is a question of fact depending on the circumstances of each case. Both ***McKay*** and ***Fluid*** can be distinguished, because in each of those cases it was the applicant who challenged the conditions as being unenforceable. By contrast, in the present circumstances, Winstone is not seeking to avoid the obligation; rather they are willing and able to accept control over the situation.

[33] Ms Kapua maintained that condition 3(a), as in ***McKay***, is unenforceable against the operators of the trucks that will be entering and leaving the site. However, there is one crucial point which seems to have been overlooked in that submission. Neither in the present case, nor in ***McKay***, is there any suggestion of the consent authority attempting to directly impose conditions against a third party. We

[4] Decision No. A123/92.

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are in agreement with Mr Williams, that the question is simply, whether the consent holder has the power and ability to control the actions of visitors to the site.

[34] In ***McKay's*** case the condition was found to be impractical and therefore difficult to enforce against the consent holder. In the present circumstances the activities which Winstone is proposing to control, are those which are an essential part of the activities of the quarry, and performed, at least in part, on the quarry site which is owned by the consent holder. More importantly, the condition does not seek to impose conditions on third parties who are not related to the quarry activities, but third parties who have a contractual relationship with the consent holder. It is through this contractual relationship that the consent holder is able to require compliance with the conditions, such as the route and frequency of vehicle movements to and from the quarry.

[35] Accordingly, we are satisfied that condition 3(a) is both legally valid and enforceable and that Winstone is both required to, and has the ability to, accurately monitor and record all vehicle movements to and from the quarry, including destinations and routes used.

[36] However, as a matter of caution Winstone has proposed an amendment to condition 3(a) that reflects a pragmatic approach. The amendment proposed is as follows:

> 3(a) The consent holder shall not sell, or otherwise permit, any aggregate to be distributed off the site by road through the Pokeno township along Great South Road except in the following circumstances:
>
> (i) The destination of the aggregate is within the Franklin District (as it currently appears in the planning maps of the Franklin District Plan) and districts south of the Franklin District; and
>
> (ii) Where no more than 250,000 tonnes of aggregate from the quarry is transported through Pokeno township along Great South Road in any given year from the date of commencement of works; and
>
> (iii) It has ensured that the number of heavy vehicles destined for the quarry passing through Pokeno township along Great South Road will be limited to the same or equivalent number as it would allow all vehicles undertaking movements in accordance with (i) and (ii) to return to the quarry.

[37] Winstone's pragmatic approach reflects that approach taken in ***Selwyn Plantation Board & Ors v the Selwyn District Council***[5]. That case concerned the following condition:

> White Cliff Road from the White Cliff's Road Bridge to State Highway 77 at Glentunnel shall not be used by logging trucks travelling to or from the forest plantings approved in this consent.

[38] The issue of enforceability was raised. Counsel referred the Court to ***Waimairi District Council v Christchurch City Council***[6], which dealt with the use of urban routes by heavy refuse trucks transporting refuse to a landfill site. In that decision a condition was inserted which stated:

> Vehicles carrying refuse to the landfill will only be permitted entry to the site after the owners and operators have agreed to adhere to a route of access including Marshland Road, Prestons Road and thence the driveway via Rothesay Road and Bottle Lake Forest Park...

[39] On the basis of the ***Selwyn*** case the Court amended the condition to read:

> Logging trucks shall only be permitted entry to the forest plantings approved in this consent after the owner and operator of those trucks have agreed when travelling to or from the forest plantings to use roads other than White Cliff's Bridge to State Highway 77 at Glentunnel.

[40] Accordingly, as a matter of caution we direct that condition 3(a) and (b) as set out in Appendix 1 be deleted and substituted by the proposed amendment referred to in paragraph [36] but as amended as follows:

> The consent holder shall not sell aggregate nor permit its transport, through the Pokeno township along Great South Road except in the following circumstances:
>
> (i) The destination of the aggregate is within the Franklin District (as it currently appears in the planning maps of the Franklin District Plan) and districts south of the Franklin District; and
>
> (ii) Where no more than 250,000 tonnes of aggregate from the quarry is transported through Pokeno township along Great South Road in any given year from the date of commencement of works; and
>
> (iii) It has ensured that the number of heavy vehicles destined for the quarry, and passing through Pokeno township along Great South Road, will be limited to the same, or equivalent number, as would be covered by vehicles undertaking aggregate transport in accordance with (i) and (ii) above.

[5] Decision No. C145/98.
[6] Decision No. C61/83.

The Hearing

[41] The hearing took place over 19 sitting days. We heard from 20 witnesses, most of whom were extensively cross-examined. A list of the witnesses is attached as Appendix 3. Our consideration of that evidence was assisted by a lengthy site visit. The evidence was in the main confined to the contested issues that were identified during the course of case management. We also heard detailed submissions from the parties' representatives for which we are grateful. We have had regard to all of the evidence and the submissions in coming to our determination. We say this because it is not possible to refer to all of the evidence and all of the submissions in this decision.

[42] The hearing proceeded on the basis that the proposal is deemed to have been amended by the proposed conditions set out in the draft consent orders as filed. As no issue was taken with the Regional Council consents, the contested issues related solely to the land use consents. Therefore, counsel for the Regional Council requested leave to be excused attendance at the hearing, and that was granted.

Status of Land Use Consents

[43] It was agreed that both the Quarry and the Leathem Access applications fall to be assessed as discretionary activities. Some concern was expressed by the Trust, the Society, and the District Council during the course of the hearing, when Mr Chote indicated the applicant's intention to transport aggregate onto the site from other quarry sites, for processing. Clearly, such an activity would amount to a non-complying activity, unless it was of such a scale as to fall within the ambit of an ancillary activity, as defined in the District Plan. To put beyond doubt such compliance the applicant agreed to the addition of two further proposed conditions, they being conditions 5(r) and 5(s)[7]. Accordingly, we consider the matter overall as a discretionary activity.

Jurisdictional Issue

[44] The Society has raised the issue of jurisdiction. It was submitted by Ms Kapua that the compromised proposal, as set out in the draft consent orders, is outside the scope of the original applications (Quarry and Leathem Access). The

[7] See Appendix 1.

amended proposal makes no provision for limiting the number of trucks per day exiting the quarry, whereas the original quarry application limited the number of trucks per day exiting the quarry to 194.

The Law

[45] It is the original application together with documents incorporated in it by reference that define the scope of the consent authority's jurisdiction. The extent to which an original application can be extended was considered by the then Planning Tribunal in ***Darroch v Whangarei District Council***[8]. In that case, the Tribunal refused to increase the number of livestock, to be offered for sale by auction in the applicant's stockyard, from 300 to 350 head at each sale. The Tribunal said at page 27:

> In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required.

[46] The issue came before the Tribunal again in ***Haslam v Selwyn District Council***[9] which concerned the change of location for a composting site. His Honour Judge Sheppard emphasised the process of public participation provided for under the RMA, and the provisions allowing those who wish to take part, to do so. He also referred to the balancing factor of the desirability of allowing a practical response to sound points made by submitters or by consent authorities' advisors. He commented that the modification of proposals to meet sound objections is surely part of the statutory intent of the participatory process. Bearing these things in mind he said:

> I hold...that the basis for the test that I should apply in this case is whether the amendment made after the period for lodging submissions had commenced is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment.[10]

[8] A18/93.
[9] [1993] 2 NZRMA 628.
[10] Page 634.

[47] The learned Judge then went on to hold that the test is whether *"it is plausible that any person who did not lodge a submission"* to an application would have done so if the application had incorporated the amendment.

[48] We adopt the test laid down in ***Haslem***. We are required to consider whether it is plausible that any person who did not lodge a submission to either of the applications (Quarry and Leathem Access) would have done so if either one had incorporated the proposal as amended by the draft consent orders. The extent to which any amendment may alter the character or scale and intensity of effects is a matter, but not necessarily the only matter, to consider.

Removal of the Truck Limit

[49] The original quarry application limited truck movements leaving the quarry via McDonald Road to 194 per day. As McDonald Road was the only exit from the quarry, this had the effect of capping the daily truck movements. Following this, the original Leathem Access application also limited truck movements through Pokeno to 194 per day.[11] Leathem proposed no limit on vehicles travelling south.

[50] In contrast, the compromise reached by the mediation parties did away with that original daily cap of 194 truck movements per day. It substituted an annual volume limit through Pokeno, set at 250,000 tonnes of aggregate, for destinations restricted to those within Franklin District or districts south. Further, no such distribution by road will be permitted on Sundays.

[51] The effect of the negotiated agreement is that levels of truck movement might exceed 194 per day at peak periods. Conversely, the agreed annual volume limit of 250,000 tonnes will be considerably less than the total tonnage which could have been distributed through Pokeno at the maximum 194 movements per day for 7 days each week that was proposed in the original application.[12]

[52] The proposal thus revised, is a result of mutual concessions being made by all of the parties to the mediation process, which involved a wide range of submitters including the Pokeno Protection Association. The compromise indicated a preference of those representing the community to have some peak periods of truck movements, followed by periods of reduction in truck numbers. Any increase, above

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[11] See mitigation measures proposed for road traffic, C.4 page 38 of application; D(iii)(a).

[12] 194 movements per day over 7 days as originally proposed could be as much as 665,000 tonnes.

194 needs to be considered in the context of the agreed wide-ranging and comprehensive suite of conditions and controls intended to mitigate adverse effects.

[53] We discuss the effects of the proposal on the environment later in this decision and we are conscious of the findings we make there. We note there were extensive submissions to the Councils on both the original quarry application (115 submissions) and the Leathem Access application (109 submissions). Both of those applications refer to the figure of 194 truck movements through Pokeno township. Truck movements through Pokeno was a factor in most of the submissions. As we have said, the Pokeno Protection Association had an active role in representing a wide range of submitters. Any party opposed to the mediated agreement, that varied the proposal, has had opportunity to present views to this Court. Furthermore, the District Council wrote to all submitters to both applications advising them of the details of the agreement reached through mediation.

[54] It was suggested that other parties further afield might have been prompted to file submissions. On that point, particular reference was made to State Highway 1, especially near Mercer, where an about-turn would be performed by those trucks intending to travel north that had entered the state highway via the south bound on-ramp near the quarry. The evidence of the traffic engineers satisfied us that the number of trucks likely to be leaving the quarry, on any given day, would have negligible effect on an already busy state highway.

[55] We find that it would be most unlikely that any individual, not originally involved as a submitter (or who has not subsequently had opportunity in the present proceedings), would have become involved as a result of the changes agreed through mediation.

The Site and Land in the Vicinity

[56] The area of the proposed quarry site is approximately 146 hectares. The area of the proposed Leathem Access site is approximately 3.2 hectares. Their boundaries are defined on the quarry layout plan[13]. Their location in the context of land in the vicinity, is shown on a typographic map[14] attached as Appendix 4. The site is approximately 1.5 km to the south-west of Pokeno township, and approximately 45 km to the south of the centre of Auckland.

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[13] Figure 1, Appendix A to Appendix 1.
[14] Figure A, Crampton, EiC.

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[57] The site contains a relatively small volcanic centre known as Bluff Road Volcanic Centre. It forms a prominent hill on the southern part of the application site. A tuff[15] ring surrounds a central scoria cone on which a telecom mast is situated. Basalt lava ponded between the tuff ring and cone is to be quarried. The exterior of the tuff ring and the top of the scoria cone will be left intact.

[58] The land surrounding the Winstone site has a mix of native forest, small lifestyle blocks and larger farm holdings. The Pokeno township is some 500 metres to the north-east. To the south of the site the land falls away steeply to the Waikato River. Contiguous with the site is a large area of native bush, beyond which lies an area of shrub land, exotic forest and farm land.

[59] To the north of the site there are a number of smaller lifestyle blocks located in a valley which extends north-east to the base of another elevated ridge. This ridge extends west from Mt William and the Bombay Hills.

The Proposal

[60] The conditions proposed for the quarry are in the main not prescriptive in nature. Rather, they specify effects-based performance standards that the operation is required to meet. We were told by Mr Chote, project engineer for Winstone, that this will enable the quarry to be operated in the most efficient and flexible manner, while ensuring that effects on the environment are appropriately avoided, remedied or mitigated. The principle methods employed in this approach are: the provision of a quarry layout plan; a description of the proposed quarry operation; a quarry concept plan; a landscape rehabilitation programme; augmented by detailed conditions relating to such matters as heavy vehicle movements, noise, and the relationship with Maori.

[61] The quarry layout plan is a site map which defines the areas and identifies activities which may be undertaken in those areas. Compliance with the quarry layout plan is to be a primary condition of all resource consents. The quarry concept plan sets out a range of environmental objectives which the quarry aims to achieve.

[62] The description of the proposed quarry operation summarises the proposed quarry activities namely:

[15] Rock formed from volcanic ashes.

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- Site preparation;
- Top-soil stripping and stockpiling;
- Overburden stripping and disposal;
- Rock removal;
- Processing rock;
- Storage and distribution;
- Rehabilitation.

Further, it breaks the sequence of development of the quarry into a series of stages, outlining activities at each stage. The stages are termed: Stage 1; Stage 2; Stage 3; and Rehabilitation Landform.

[63] Details of the proposal, broadly set out above, are set out in detail in the proposed conditions as contained in the draft consent order attached as Appendix 2. There was some criticism by Ms Kapua to the effect that the methodology is in breach of rule 35.6 of the operative plan which requires a management plan. We find that the components of the proposal amount, in substance, to a management plan, thus complying with the requirements of Rule 35.6.

[64] The Winstone proposal referred to transporting *"the bulk of the product"* by rail. However, *"bulk"* was seen as a term with various usages; too general a word in this situation. Alterations that evolved during the hearing led to the wording now set out in proposed condition 5(o) that calls for railing of *"...at least 51% of aggregate product distributed from the site within any twelve month period..."*.

[65] It is proposed that rail operations would commence once a secondary processing plant[16] is commissioned and a sight and sound screen is completed. The establishment and operation of a proposed railway siding[17] together with the operation of rail facilities will be done in conjunction with Trans Rail.

[66] Winstone emphasised, through the evidence of Mr Chote, that it has always recognised that a sound alternative means of transportation is needed as a backup to rail. This is because, apart from practical considerations, the term of the project may give rise to a significant economic risk if rail is the only mode of transport relied on. We are satisfied that it is appropriate to allow provisions for temporary unavailability of rail and for the unlikely situation of rail becoming economically unviable.[18]

[16] See Appendix A of Appendix 1, Area F.
[17] See Figure 1 of Appendix A to Appendix 1.
[18] See Appendix 1, Condition 5(o)(i) and (ii).

[67] Winstone propose to provide, as an alternative to rail, an access route to public roading infrastructure by way of a private access route to Great South Road. This would be over land owned by Winstone to the south-east of the quarry operation. It is proposed to be bridged across the North Island main trunk railway line and provide access, by means of a priority controlled intersection, from and to the north via Great South Road and south from and to State Highway 1 via a direct link to the present southern Pokeno interchange.[19] This is the access referred throughout this decision as the Leathem Access route.

[68] As well as dealing with rail transport, a significant description and analysis of optional routes for road transport was provided in the evidence particularly the evidence of Mr Harries[20], a traffic engineer called by Winstone. Each of the options had disadvantages compared with the situation now proposed especially with the now proposed amended conditions of consent.

[69] Nor was the potential for barge transportation overlooked in Winstone's investigations. However, barging did not appear to be a realistic option, there being a significant number of reasons set out by Mr Harries[21].

[70] An applicant under the Act is not required to establish that a proposal is necessarily the best[22]. We are satisfied about the extensive investigation of alternatives by Winstone, and about the subsequent selection they have made and proposed for road access to and from the quarry.

Basis for Decision and Contested Issues

[71] Both the quarry and the Leathem Access application fall to be assessed as discretionary activities; we may grant or refuse consent in our discretion under section 105 (1)(b) of the Act and we may impose conditions under section 108 if consents are granted. In exercising our discretion, we must have regard to the relevant section 104 matters, namely:

(i) Part II matters;

(ii) The actual and potential effects on the environment;

[19] See Figure 1 of Appendix A to Appendix 1.
[20] Harries, EiC, paragraphs 68-102.
[21] Harries, EiC, paragraphs 47-49.
[22] See *Dunbar v Gore District Council,* EC W289/96.

(iii) The following statutory instruments namely:

(a) The Waikato Regional Policy Statement;

(b) The Auckland Regional Policy Statement

(c) The Proposed Waikato Regional Plan;

(d) The Franklin District Plan

Relevant Statutory Instruments

Waikato Regional Policy Statement

[72] The regional policy statement identifies a number of issues and specifies a number of objectives and policies that are relevant to the application. It provides an overview of the significant resource management issues of the region and contains objectives, policies and methods to achieve and integrate the management of the natural and physical resources of the region.

[73] Matters of particular relevance (in addition to matters pertaining to Maori which we address later) are the objectives and policies relating to:

(i) Integrated management of natural and physical resources –Part 2.2; and

(ii) Minerals - Part 3.4.

[74] As to the first, the policy statement promotes the view that because of the interconnected nature of biophysical systems an integrated approach to resource management is required. It requires that resource consent decisions recognise and provide for matters relating to:

- the interconnected nature of all elements of the environment;
- the interrelationships between natural and physical resources;
- the potential adverse effects to occur; and
- the range of social, cultural and economic values within the region.

[75] As to the second, it provides an overview of the mineral issues for the Waikato Region, recognising particularly that aggregate material is necessary for the maintenance of the region's infrastructure. It notes the conflicts that may occur between mineral extraction and nearby activities.

[76] Part 3.1.4.2 specifies objectives and issues regarding the ability to extract mineral reserves. Part 3.1.4.3 specifies objectives and issues in respect of the adverse effects of mineral exploration and development.

[77] We do not intend to elaborate further on this document, as neither the Trust nor the Society asserted that the proposal was contrary to, or inconsistent with, its provisions. Suffice it to say we agree with Mr Phyn when he said:

> I consider that the application has undertaken an integrated approach to addressing the issues and adverse effects likely to occur from the quarry construction and operation. It includes the positioning of the quarry pit to minimise adverse effects on the physical landforms and visibility of the site, in addition to positioning internal accessways to minimise adverse effects on the discharge and watercourses and environment within the site. Furthermore, comprehensive mitigation measures, such as landscaping, replanting and retention of existing vegetation, will minimise adverse effects upon the natural environment.
>
> I consider the approach taken in the application, and the implementation of conditions as imposed by the draft consent order, are consistent with the integrated approach as outlined in the WRPS.[23]

The Proposed Waikato Regional Plan

[78] The proposed regional plan is divided into modules such as land and soil, water, air and matters of significance to Maori. These are matters addressed by the granting of the Regional Council consents. The Regional Council consents were not specifically opposed by the opponents to the quarry and no issue was taken by them with any of the provisions of the proposed regional plan. Accordingly, we do not consider it necessary to address the matter further, other than to say we are satisfied the conditions of consent give effect to the principles set out in the proposed plan.

Auckland Regional Policy Statement

[79] The Auckland Regional Policy Statement is relevant because of inter-regional resource management issues. It recognises the importance of a continuing

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[23] Phyn, EiC, paragraph 6.10 and 6.11.

supply of aggregate to the Auckland Region[24]. It also emphasises that the Auckland Region is becoming increasingly dependent on aggregate resources from adjacent regions such as the Waikato[25].

[80] Ms Crampton and Mr Happy, pointed out that the quarry will contribute to meeting the demand for aggregate in the Auckland Region. We agree. As with the proposed regional plan, the opponents to the quarry took no issue with any matters pertaining to the Auckland Regional Policy Statement.

The Franklin District Plan

[81] The Franklin District Plan contain a number of relevant broad principles relating to the zoning and strategies of the Franklin District as well as those directly relating to matters concerning the application and its events.

[82] The overall strategy of the plan is contained in section 3.3. Relevantly, it emphasises:

(i) The need to manage and ensure the ongoing versatility, accessibility and life-supporting qualities of highly valued land and soil resources.

(ii) The need to manage urban areas in a flexible way so as to provide for a wide range of activities.

(iii) The desirability of managing many small urban settlements as an integral part of the rural environment rather than as urban areas in their own right. However, with regard to this strategy we note Part 19 which sets out the objectives, policies and methods for urban areas. Section 19.2.1 includes Pokeno as an "Urban Settlement" within a growth area.

(iv) The desirability of ensuring that activities with adverse effects on versatile land should either be refused or directed to other areas or modified or managed so as to avoid, remedy or mitigate any adverse effects.

[24] See for example section 2.3.2 and objective 13.3.2.
[25] See section 13.2.2 and section 3.14.1.

[83] The relevant principal issues identified include conservation (section 3.6); matters relating to the Waikato River (Section 3.8); and to minerals (section 3.10). The latter section 3.10 notes that the Franklin district's proximity to Auckland, its largely rural makeup and its favourable geology ensures that there is a continuing interest in the mineral resources. It further notes that much of this resource is vital to the district's and region's industries and infrastructure, and that because the resource is fixed in location, its extraction can easily be compromised by inappropriate development.

[84] Part 5 of the plan identifies a number of conservation issues: including those relating to vegetation, wetlands, habitats, landforms, geological features and the coastal environment. Part 5 contains a schedule of outstanding natural features that are afforded varying degrees of protection under the plan. There are no named outstanding natural features contained on the application site although the stream systems from the site drain into the Mangatawhare wetlands area, which is identified for "outstanding wildlife value" in Schedule 5A of the plan.

[85] The proposal includes retention of indigenous vegetation on the application site. Although some clearance of indigenous vegetation will occur, the draft consent order contains proposed conditions designed to enhance indigenous vegetation and habitats on the quarry site.[26] The potential effects on the streams and the Mangatawhare wetland have been dealt with in the discharge consents granted by Environment Waikato. As we have said, they are not being contested.

[86] Part 8 of the plan outlines the background to the cultural heritage issues in the Franklin district, covering matters that are of essential importance to the identity of the communities and individuals in the Franklin district. These include sites, places, waahi tapu, buildings, objects, and features of cultural and historical significance. The plan incorporates a number of objectives aimed at safeguarding heritage features, including the provision and maintenance of historical information and records. We deal later with details of cultural heritage issues that were addressed in evidence and submissions

[87] A portion of the quarry site and the land surrounding it is zoned "General Rural" in the District Plan. Part 16 identifies a number of issues for rural land including:

[26] See conditions 8, 13, 14 and 38.

(i) Sustainability of the natural resources – land, soil, water and the minerals;

(ii) Conflicts between activities;

(iii) The protection of amenity.

[88] In Part 17, the plan contain objectives aimed at managing both the potential adverse effects associated with mining and extraction[27]. It seeks to ensure that particular significant mineral resources are protected from being rendered unusable by other activities occurring over or near their locations.

[89] Part of the quarry site is contained within the Aggregate Extraction and Processing zone, considered in section 35 of the District Plan. The purpose of the Mineral Aggregate Extraction zone is described in Part 20.8. By these provisions, the plan recognises not only that such activities are significant to the economy of the district and region, but that they must be carefully managed with regard to environmental effects. Further, there is recognition of need to consider carefully such other sensitive land uses that might constrain the ongoing operation and viability of quarrying

[90] Having recognised both the need for aggregate resources and the potential for the quarrying of such resources to create adverse effects, the plan contains a number of assessment criteria relevant to resource consent applications. These relate to matters such as: site layout; landscape treatment and screening; natural and cultural heritage; traffic safety and movement; natural hazards; noise, lighting, vibration; utility services, hazardous substances; monitoring, reviewing; and financial contributions. Further, the General Rural zone contains various criteria for consideration in respect of discretionary activities, although these are not specific to mineral extraction. They relate to matters such as: the effects of any activity on the socio-economic and cultural values of people in the neighbourhood and the wider community; the detraction from amenity values of the surrounding area; any adverse effect on the convenience, health or safety of people in the neighbourhood and the wider community; any adverse effects on the local economy and employment; landscape qualities; the effects on ecosystems including indigenous vegetation, wildlife habitat and ecological systems; the potential for such matters as erosion and flooding and degradation of air, water and soil; the possible destruction of archaeological or historical sites; and the discharge of contaminants.

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[27] See for example objectives 17.2.2, 17.2.3. 17.2.4, and 17.2.5.

[91] With regard to the Leathem Access proposal, Part 15 of the District Plan is also relevant. This relates to network utilities, including the construction, operation, and maintenance of railway lines. It provides relevant assessment criteria including: the effects on the existing character of the locality and amenity values; rehabilitation following construction; landscaping; location and route; and environmental effects, including visual, noise, vibration, odour, dust and glare.

[92] All of the assessment criteria to which we have referred, seek to ensure that adverse effects are either avoided, remedied, or mitigated.

Comments on Statutory Instruments

[93] The statutory instruments we have referred to are complementary. They all recognise the importance of aggregate as a resource and the need for that resource to be quarried in the interests of the infrastructure of the regions. They recognise the potential for conflict between quarrying and other activities, particularly activities that are sensitive to effects arising from quarrying operations.

[94] Thus do they recognise the needs, the potential for adverse effects, and the potential for conflict. The instruments then set objectives, policies, and rules; intended to ensure that quarrying operations are carried out in an appropriate locality; and with conditions appropriate to managing the effects of activities on the environment.

[95] Quite detailed assessment criteria are set out; against which any proposal must 'stack up'. We consider that the detailed and exacting proposed conditions of consent respond adequately to the concerns expressed in the statutory instruments, particularly the relevant assessment criteria set out in detail in the district plan. They are designed to avoid, remedy or mitigate adverse effects, a topic that we discuss in detail next.

Potential Adverse Effects

Introduction

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[96] The majority of the evidence addressed the effects on amenity values of the area as a consequence of the quarry's operation. These included physical effects,

and the effects on cultural values, heritage sites, and natural resources. We deal with cultural, heritage and natural resources separately. In this section, we address the effects on amenity.

[97] Ms Kapua told us that it is the effects on the amenity value of the Pokeno township that is the crux of the Society's opposition. She adopted the words of the Council decision which recorded the issue this way:[28]

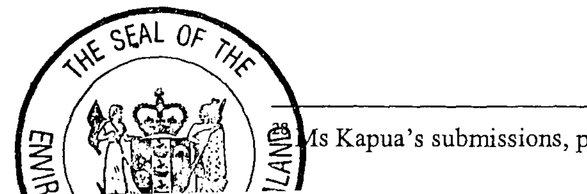
> The effect of heavy traffic is not merely a matter of noise but a composite of the total effect that ensues from the daily movement of large trucks and vehicles, their passing along the route and their subsequent disturbance to the residents, businesses and environment of McDonald Road, the Pokeno Main Street and adjacent residential areas.

[98] Likewise, Mr Phillips was concerned about the effects on the Pokeno Township. However, his opposition extended as well to the wider community beyond.

[99] We heard evidence from witnesses operating businesses in Pokeno, who told us of the transition that had occurred when State Highway 1 bypassed the town. Ms Kapua introduced in evidence, through cross-examination, a background study known as the "Corydon Report" and a document called "Structure Plans for Pokeno". These reports were the focus of much of her cross-examination of a number of witnesses. We allowed both documents to be produced under the wide powers given by section 276 of the RMA. However, the weight we can give to the documents is limited by a number of factors including:

- The authors of the documents were not available for questioning;
- As explained by Mr Phyn the documents had not been the subject of any formal statutory process, nor do they constitute a structure plan of the type contemplated in section 54 of the District Plan;
- Ms Crampton pointed to a number of difficulties with the accuracy of the Corydon Report including that it was based on a mere 35% response rate, and that it was prepared prior to the mediation.

Therefore, we can give little weight to these documents.



[28] Ms Kapua's submissions, paragraph 4.10.

[100] Ms Kapua noted in her submissions and questioning that the Corydon Report refers to a low level of traffic and that the quietness of the village atmosphere contributes to the pleasantness and peoples' appreciation of the area.[29] To this Mr Phyn responded:

> Yes, although in addition to that, one has to examine the nature of the centre in respect of what is possible under the District Plan for instance, or what is there now in terms of the roading context. We have heard in evidence in respect to vehicles, about heavy vehicle movement through the township. This is indeed not just merely a quiet rural residential environment, but is associated with an access roading environment which I have alluded to in my evidence so when we look at the Corydon Report we need to balance it against the reality of where the village is positioned, and the particular environment associated with it.[30]

[101] Mr Phyn went on to explain that the zoning of the business centre is liberal, with few restrictions on activity types. He noted that the centre has a number of functions, which include commercial activities that currently exist there. Activities such as service stations, truck stops etc, can occur as of right; and all of those factors form part of the character of the township. That being so, he did not accept that it was relevant to look at peoples' perceptions of the characteristics and positive attributes of an area in isolation, as in the Corydon Report.

[102] The evidence of a number of residents called, conveyed the impression that Pokeno was a truck-free town. This was in contrast to the expert traffic evidence we heard, which is discussed later. Unfortunately, most, or all of the residents who gave evidence had not even heard of that more objective evidence, let alone read it. We felt in the main that the perceptions they conveyed to us so very genuinely, were not supported by the other evidence that we heard.

[103] A consideration of the effects on the area requires us to assess the well-known adverse effects that can arise from a quarry not appropriately managed and operated. These include the effects of blasting, of quarry operations such as noise, vibration, and dust, and of transportation (both road and rail). In considering their impact on amenity values, such effects must be looked at not merely in isolation one from another, but cumulatively. However, for convenience here, we address each of these matters in turn.

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[29] See Ms Kapua's submissions, paragraph 4.4.

[30] Phyn xxm, page 350 transcript.

Traffic

[104] The effects of heavy traffic movements, especially through Pokeno, are a critical issue in this case. We heard evidence from two experienced traffic engineers, Mr Harries and Mr Burgess. Their evidence addressed the existing traffic environment, the increase in traffic and its effect on road capacity and safety.

Existing Traffic Environment

[105] Mr Harries told us that as a result of the opening of the bypass in September 1997, Great South Road, through Pokeno, is no longer required to carry the former daily traffic volume of some 14,400 vehicles per day. The result and effect is significant. A 90% reduction of traffic flow volume to about 1,400 vehicles per day. Mr Harries in his evidence tabulated the traffic survey results Traffic counts were taken at the southern end of Great South Road (after the opening of the bypass) in 1997 and again in 2001. There was no appreciable difference between them in relation to the average daily total traffic – the recorded figures from the 2001 study show 7-day average flows of all vehicle types to be 692 north-bound and 726 south-bound, totalling 1418 vehicles per day.[31]

[106] Hourly traffic patterns were also recorded. From these recordings Mr Harries produced graphs, flow plan diagrams and tables from which he noted essential features, saying:[32]

> There are no real morning or afternoon peak periods, but rather a gradual climbing of volumes throughout the day that reach a peak about the middle of the day.
>
> Weekday peak hour flows of about 120 vehicles per hour ("vph") in total, are less than the peaks that occur either on a Saturday (160 vph) or a Sunday (180 vph).
>
> Between 11.00pm, and 5.00am, traffic flows on Great South Road are light, totalling less than 100 vph.

[107] Mr Harries referred also to manual counts that had been performed at various intersections within and around Pokeno on 24 September 1997, during busy periods. From the data he concluded that:

[31] Harries, EiC, paragraph 24.
[32] Harries, EiC, paragraph 27.

> ...for all periods of the day, traffic flows within Pokeno are clearly dominated by the flow along the central axis of Great South Road. Apart from the traffic that travels to and from the west along Pokeno Road, (which intersects Great South Road at the western end of the township), all other turn volumes are relatively light, generally never amounting to more than 10 vehicle movements per hour for any particular movement.

[108] The evidence showed there to be a comparatively high proportion of heavy commercial vehicles within the vehicle mix that uses Great South Road. As part of the April/May 2001 machine traffic count, recordings were made of the axial configurations of each vehicle passing the detectors. That data when sorted, enables separation of information about heavy commercial vehicles. Mr Harries noted that heavy traffic vehicles might well be slightly undercounted, because on occasions a truck and trailer might have been counted as two closely-spaced cars.[33]

[109] He was able then to demonstrate that there are 175 truck movements per day at the southern end of Great South Road each weekday, and 145 per day when averaged over the full week. These rates are 12.8% and 10.2% respectively of the relevant total traffic flows.

[110] Separate recordings of heavy commercial vehicles and cars were made in a manual survey undertaken over a 13-hour day-time period on Thursday 1 May 2001. Again, Mr Harries tabulated the results in his evidence. He noted:

> Over the day-time periods of an average weekday, HCV numbers vary between 3 (in the hour beginning 5am) and 40 (in the hour beginning 4pm). As a proportion of total traffic flows in those hours, these truck volumes correspond to 33.3% and 24.8% respectively.
>
> The average number of trucks in any given hour at the southern end of Great South Road during the day-time period surveyed was 16, which corresponds to 17.1% of the total traffic volumes over that period.
>
> It is, therefore, readily apparent that Great South Road through Pokeno has already a significant component of trucks within its vehicle mix. ...it is clear that truck traffic already has a significant influence on the "traffic character" of Great South Road.

Increase in Vehicle Numbers

[111] There was considerable evidence and extensive cross-examination of witnesses about traffic expectations. We heard numerous calculations of truck numbers under various scenarios with different output rates and market conditions.

33 Harries, EiC, paragraph 34.

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[112] As we have said, the mediated agreement proposes to establish a maximum moving annual total of 250,000 tonnes of product that Winstone may truck through Pokeno, permitting that route for destinations within the Franklin District only. That would take 66 truck movements (33 each way), on a 6-day per week average over the year. Dependant upon the conditions at any given times, including seasonal effects, a rate higher than the 66 may occur. If the number increased to the originally proposed limit of 194 movements per day, then the annual 250,000 tonnes would be transported in some 4½ months, leaving a large portion of the year without the additional movements through Pokeno generated by Winstone.

[113] Because the annual total is the only condition purporting to limit traffic through Pokeno, we were told that the movements could be even higher (as much as 1000 trucks per day). This figure is derived from the maximum able to leave the quarry site whilst complying with noise limitations at the Leathem Access Quarry boundary.[34] Of course, that implies that there can be fewer days per year with high truck numbers passing (because the 250,000 tonne limit will be reached more rapidly).

[114] Proposed condition 5(o) (as amended) provides, that 51% of aggregate products shall be distributed by rail from the quarry, within any twelve month period, following completion of the sight and sound screen, subject to certain limited exceptions, namely the unavailability of rail distribution or if it was economically unfeasible. In the event of those exceptions being activated there would be no traffic limitation on movements to and from the site other than the noise condition that would apply at the quarry boundary and the 250,000 tonnes limit through Pokeno.

[115] To move the maximum expected annual extraction of 200,000 tonnes would require 534 truck movements per day taking the average based on a 6-day week. Daily numbers would be above that average during the peak construction period.

Road Capacity

[116] Both Mr Harries and Mr Burgess were of the view that the present road capacity could more than accommodate even the maximum increase in traffic numbers. Mr Harries said:[35]

[34] Day, EiC, paragraphs 4.9-4.11; also see condition 18(a).
[35] Harries, EiC, paragraph 61.

> ...there is ample capacity to both Great South Road and SH 1 to accommodate the flows. Great South Road traffic totals would increase to around 1950 vpd, which is well within the 14,400 vpd it previously carried. The additional traffic demands would increase SH 1 traffic flows by around 3%, leaving it still well within 50% of its available capacity.

[117] And again, in cross-examination when answering a question about all of the quarry output being distributed by road he said:[36]

> No, my understanding is that there is a maximum tonnage that can be transported north along Great South Road regardless of rail use and that any truck transportation to the south will have virtually no effect. In my opinion the whole output of the quarry could be transported to the south without creating an adverse effect on the capacity or function of either the Leathem Access intersection with Great South Road or SH 1.

[118] Similarly, Mr Burgess was of the view that in traffic planning terms the road network could accommodate the truck activity quite satisfactorily.

[119] Having regard to the evidence relating to the adequacy of the road design, (they having been designed for much greater volumes), and the evidence of Mr Harries and Mr Burgess, we are satisfied that any increase in heavy vehicle movements arising as a consequence of the proposed quarry operation, will be well within the capacity of the relative roading networks.

<u>Safety</u>

[120] For the four-year period since the opening of the bypass, Mr Harries told us that a search of the Land Transport Safety Association Accident database showed only two accidents. Of these he noted:[37]

> Significantly, neither...involved trucks, and neither points to any inherent road safety problem with Great South Road. This is perhaps not unexpected, since Great South Road was designed and built to State Highway standards, and to accommodate much greater traffic demands than now exist.

[121] We are satisfied on the evidence that the expected increase in traffic movement will have no significant effect, if any, on traffic safety.

[36] Page 88A(1) of transcript.
[37] Harries, EiC, paragraph 40.

Noise

[122] We heard much evidence in relation to noise, especially that related to truck movements through Pokeno village, where such noise issues bear a direct relationship to the total number of truck movements through the village per day. Less contentious was the issue of noise from the construction and operation of the quarry itself.

[123] Mr G Warren, an acoustical consultant employed by Marshall Day Acoustics, told us that Marshall Day had been engaged in 1997 to undertake an assessment of noise effects related to a possible quarry construction and operation. This initial assessment was amended in 1999, when the Leathem access was introduced as an alternative accessway. Further modifications followed discussions with the applicant and the neighbours, input from another consulting acoustics engineer (Mr Neville Hegley); and mediation with the Pokeno Protection Association

[124] The potential noise effects on some 16 dwellings to the north and east of the quarry site are of primary concern

[125] In their Quarry Concept Plan, Winstone adopted the following objectives relating to noise from both the quarry and the road access routes:

> To avoid, remedy or mitigate adverse effects of noise, including vibration, from on-site plant and equipment, on the residents of existing dwellings and any other existing noise sensitive activities.
>
> To enable construction works for the establishment of noise mitigation structures and for rock extraction, processing and distribution facilities, while avoiding or mitigating adverse effects of noise on residents in the vicinity of the quarry.
>
> To manage traffic to and from the site on routes which, where practicable, avoid, remedy or mitigate adverse effects of visual intrusion, vibration and emissions to air, on residents living in close proximity to the site.

The Existing Noise Environment

[126] A survey of the existing noise environment was undertaken between March and July 1997. The adjacent State Highway 1 was the source of almost continuous traffic noise; the North Island Main Trunk railway line added further noise during some 40 train movements a day; whilst aircraft from Ardmore were the source of occasional noise.

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[127] For those areas close to Pokeno with significant exposure to traffic noise, recorded ambient noise levels were 40 – 55dBA during the day, or 30 – 45dBA at night. Further away from the Pokeno township, the L10 level rarely fell below 40dBA, with a typical average not less than 50 dBA. There was a small reduction in level between midnight and 5am. For those areas 1 km or more to the west of the state highway, the daytime noise levels were typically 5dBA lower, and the night-time levels, 10dBA lower.

[128] In June 2001, after the realignment of the state highway to bypass the Pokeno Township, a further noise assessment was carried out. Then, the ambient noise level was found to be unchanged, but the L10 was 3dBA higher. This slight increase is attributed to diminished physical sheltering of the McDonalds Road noise-measuring site, even though its distance from the state highway traffic had increased because of the realignment. Before discussing the predicted noise levels from the activity of the quarry, and the traffic/rail noise associated with transport of the aggregate, it is necessary to understand the noise performance standards adopted in the Operative Franklin District Plan.

[129] Approximately two-thirds of the site containing quarry activities is zoned 'Aggregate Extraction and Processing'. The remainder is zoned 'Rural'. The district plan noise controls in the Aggregate Extraction and Processing zone are:

> 35.5.7 Activities shall not exceed the following sound levels (L10 dBA) at a notional boundary of 20 metres from an occupied dwelling outside the site.
>
> 0700 – 2200 Monday to Saturday — 55dBA
>
> At all other times and on public holidays — 40dBA

[130] The Franklin district plan contains no controls for noise generated on land zoned Rural, accepting that many rural activities have the potential to create noise. When a resource consent is for other than a permitted activity, the council (and this court on appeal) may impose conditions to control noise from the activity for which application is made

[131] Originally, quarry applications met the noise limits in relation to the notional boundary of dwellings. However, there have been developments to overcome perceived flaws in the use of that boundary concept. Therefore, after discussion with council consultants and consideration of the issues raised by the Pokeno residents, two new concepts were introduced to enable an agreed new set of noise limits.

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[132] A Quarry Noise Boundary (QNB) is to be established, as the first new concept. This will coincide with the current Winstone property boundary and covenanted properties, except for an expanded area to the N.E. and the S.W. of the site[38]. At this well-defined boundary, the noise controls will apply. This will avoid uncertainties associated with notional boundaries, clarifying the controls that will affect buildings not yet constructed. Compliance at the QNB is designed to ensure that all dwellings not owned by Winstone will be protected against unacceptable quarry noise effects.

[133] A "dividing line" was established as a second concept, separating the quarry site into the eastern and western parts that are already categorised as having different ambient noise levels[39]. To the west, the night-time noise limit applying at the QNB is 5dBA lower than to the east.

[134] The QNB was established by means of detailed computer modelling of quarry noise emissions. The model produced plans showing noise level contours, and calculated the noise levels at selected point receiver positions, for increased accuracy. The contours ensure that the noise limits can be complied with within the QNB, and, at the same time, ensuring that the QNB does not obtrude, outside the application site boundary, in proximity to any dwelling.

[135] Within the noise boundary, noise limits for both construction and operational phases have been established by post-mediation agreements.

Construction Noise

[136] As in the following table, noise levels limits proposed to be adopted are taken from the former NZ Standard "Measurement and Assessment of Noise from Construction, Maintenance and Demolition Work". These appear to be lower than those in table 2 of NZS 6903:1999, the current standard. They will apply during November – April for no more than two such construction seasons during the first five years after commencement of the works:

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[38] See Figure 7E, Appendix 1.
[39] See Figure 7E, Appendix 1.

Time Period	Sound Level not to be exceeded dBA					
	Weekdays		Saturdays		Sundays and Public Holidays	
	L10	Lmax	L10	Lmax	L10	Lmax
0630-0730	55	70	45	70	45	70
0730-1800	70	85	70	85	55	85
1800-2000	65	80	55	70	55	70
2000-0630	45	70	45	70	45	70

[137] The consent conditions describe the construction activities within each stage of the construction programme to which those limits shall apply These include:

- Construction of noise and visual mitigating earth structures, during stages 1 and 2.
- Formation of new access-ways in stages 1 and 2.
- Formation of water retention and sediment control structures in stages 1 and 2.

[138] Computer-generated construction noise contour mapping shows that some dwellings to the north-east lie between the 55 – 65dBA L10 contours. Although point noise-receiver predictions gives noise levels of between 57 and 61dBA for these dwellings, the levels could range up to 65dBA L10 for short periods of time and are well below the 70dBA proposed in the draft consent order. Additionally, these results were confirmed by the calculations of Mr J K Cawley, an environmental consultant specialising in acoustics, called by the respondent council.

[139] To ensure that noise intrusion shall be kept to a minimum, various management procedures are prescribed, including:

- a "sight and sound" screen[40] which is to be constructed in a specific manner to mitigate any noise effect from some of the main noise sources, particularly on the houses in McDonald and Hitchen Roads;
- when and where access-ways and bunds shall be constructed to avoid line of sight to dwellings outside the QNB;

[40] See Figure 15, Appendix 1.

- maintenance of all construction vehicles and trucks;

- an enforced speed limit within the site; and

- no unnecessary movements of heavy vehicles will occur at night, on Sundays, or on public holidays.

[140] Mr Warren told us that these measures are more prescriptive and detailed than generally found in consent conditions, and that in his opinion they represent a significant concession to the community by Winstone.

Operational Noise

[141] The levels specified in the original quarry application were modified after the mediation process, and the notional boundary concept was re-introduced in addition to the QNB controls. In broad outline the operational noise limits established are:

Time	**Noise Level Not to be Exceeded**	
Monday to Saturday	0630 – 2130 hours	L10 55dBA
Sundays (for 30 Sundays per year	0700 – 2000 hours	L10 50dBA
At all other times	East of the dividing line West of the dividing line	L10 45dBA L10 40dBA Lmax 75dBA

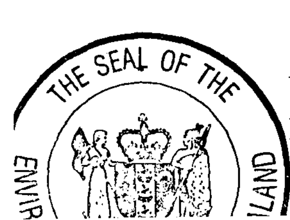
[142] Some further fragmentation of these noise conditions was done by subdividing the quarry and the neighbourhood area into three zones.

- East of the NIMT line

- Between the NIMT line and the "dividing line".

- West of the "dividing line".

[143] These different noise limits are fully covered in condition 18(b). Mr Cawley told us they are more restrictive than those applying to the QNB, with different noise limits applying to each of the three different sectors and based on the measured



ambient conditions. Noise limits in the area west of the dividing line were thereby lowered by some 3 to 7dBA.

[144] As well, the quarry activities were subdivided into those associated with several stages. Stage 1 will involve all the construction work up to the commencement of the extraction of the rock resource. Stages 2 – 4 cover the period during which the quarry will reach full operational mode, with all plant and equipment operating in both the secondary processing area and the quarry pit. During this period, the pit will expand to the north and east to reach its anticipated full extent

[145] Mr Warren told us that he believed these noise limits were unnecessarily stringent and not necessary to avoid adverse effects of the quarry noise. Nor did he believe the re-instatement of the notional boundary controls were necessary. During cross-examination, he agreed that they would ensure a very high degree of noise control in the local residential area. He believed that noise from the quarry will sometimes be audible at the nearest private residences, but always within generally accepted limits. He considered the character of the noise to be very similar to that of other rural activities in which machinery is used

[146] Mr Cawley summarised this aspect of his evidence by saying:

> In my opinion noise limits, in the memorandum of consent, will provide sufficient protection to local residents and other sensitive receivers around the quarry site, and through Pokeno township to maintain an acceptable level of general amenity and sleep protection.

Blast Noise

[147] In relation to the control of blast noise, Mr Warren expressed his belief that the provisions of the Franklin District Plan for the Aggregate Extraction and Processing zone are appropriate for the Winstone site. They are the same as those in the superseded New Zealand Standards of 1991, but are still widely used throughout this country. They are:

35.5.8

- The noise created by the use of explosives, measured at a notional boundary of 20 metres from occupied dwellings, shall not exceed a peak overall sound pressure of 128dB.

- Blasting shall be restricted to between 1000 and 1600 hours Monday to Saturday, except where necessary because of safety reasons.

- Blasting shall be confined to two occasions per day except where necessary for safety reasons.

- Where blasting is irregular, and the occupiers of neighbouring sites could be alarmed, they shall be advised of pending blasts at least one hour before any blast.

[148] Additionally, he recommended the introduction of a "Quarry Vibration and Airblast Boundary" (QVAB). He noted that compliance at this boundary would ensure that all dwellings not owned by Winstone outside that boundary will be protected from quarry blast noise. This is largely because the boundary location is governed by vibration effects rather than by airblast requirements. The distance required for airblast compliance will generally be not more than 150m from the edge of the quarry pit. We discuss the QVAB in relation to vibration later in this decision.

[149] During cross-examination, Mr Warren was asked to describe the effect that a blast noise of 128dB was likely to have on a resident in the Pokeno village. In reply, he said that the best subjective explanation he could give was a sound like a distant booming/crack noise. Its character would differ from noise to which they were currently exposed, but it was unlikely to be louder than a truck passing by a residence close to the road.

Mitigation Measures

[150] Mr Warren listed in his evidence a number of specific noise mitigation measures. Although not all of these are specifically included in the conditions of consent, they have been adopted by the applicant as a part of the management plan. These measures include...

(i) The location of the secondary processing plant either in the quarry pit or close to the sight and sound screen.

(ii) The enclosure of crushers, screens and load-out bins in specifically designed buildings.

(iii) The formation of a 3.5m high, 100m long bund at the exit of the Leathem access road onto Great South Road.

(iv) A high standard of maintenance of the plant and machinery.

(v) Stockpiles so placed as to be shielded from residents.

(vi) No tertiary crushing and screening on Sundays and between 10pm and 6.30am, Monday to Sunday.

(vii) On-site traffic, including the rail siding, is to be shielded from dwellings by the use of earth bunds.

(ix) Conveyance of aggregate to and from stockpiles is to be by belt-conveyor where practicable, to minimise the use of trucks.

[151] Mr Warren believes that these mitigation measures will ensure that noise levels will be maintained below the agreed noise limits, in most cases, well below.

Noise Monitoring

[152] Monitoring will be undertaken at significant stages of the quarry's development, and at other times if it is needed to ensure that the specified noise criteria are not exceeded. These conditions are very detailed and are to be found in consent conditions 25 – 28 of the Franklin District Council's resource consent.[41]

Transportation Noise

[153] Mr J K Cawley referred us particularly to the Pokeno Township, where he pointed out that the various zonings within the township, had different noise controls. These zones of residential, business and rural had the following noise controls:

Residential

L10 45dBA----Lmax 75dBA	7am to 10pm
L10 35dBA----Lmax 65dBA	10pm to 7am

[41] See Appendix 1.

Business

L10 60dBA----Lmax 75dBA	at all times
Business/residential interface	
Slightly higher than residential	
L10 50dBA----Lmax 75dBA	7am to 7pm
L10 45dBA----Lmax 75dBA	7pm to 10pm
L10 40dBA----Lmax 65dBA	10pm to 7am

As previously mentioned there are no noise controls in the Rural zone.

[154] Noise monitoring by Marshall-Day had shown that ambient noise levels in town, particularly to the East of the NIMT, are higher than expected in rural or residential areas. They relate both to the traffic on the rail line and the state highway.

[155] The bulk of the evidence relating to transportation noise from the quarry activities was given by Mr C Day, a principal in the consulting practice of Marshall Day Associates.

[156] It is Winstone's intention to transport the aggregate to the Northern (Auckland) market by combinations of trains and trucks over different routes, of which much is said elsewhere in this decision. Mr Day recognised that many such factors bear heavily on the overall interpretation of noise and should not be assessed totally in isolation. He considered both intermediate effects and those from the two extremes; either when all aggregate is transported by rail, or when all is trucked.

[157] The noise from trucks, and from trains on the quarry siding, has to comply with the noise conditions described in Mr Warren's evidence, covered by his noise contours. When vehicles leave the quarry site they come to be regarded in law as the same as any other truck or train on a public road or rail-line. Mr Day's evidence concentrated on the noise effect these vehicles and trains would have on the local community. Mr Cawley pointed out that Great South Road would continue to be used by heavy vehicles, the present rate being approximately 175 heavy vehicles per day. Therefore, the issue about truck noise is not that of a totally new source, but simply about the degree to which extra vehicles augment existing noise levels.

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[158] Having in mind s16 of the RMA, Mr Day told the court about ongoing difficulty in establishing just what is a 'reasonable level of noise' when dealing with road traffic noise. Many countries set an 'absolute' noise limit, often within a range between 55dBA and 65dBA. Others, like NZ, specify limits that are related to the ambient noise levels; for example, setting lower levels in rural environments than in urban areas.

[159] Mr Day assessed the acceptable noise levels for truck traffic, based on each of these different formulae, together with the concept of "a change in noise levels", which some practitioners believe represents a measure of a community's response to noise. Use of the 'Transit Guidelines', the existing ambient noise level to set noise limits, are, according to Mr Day, [42]

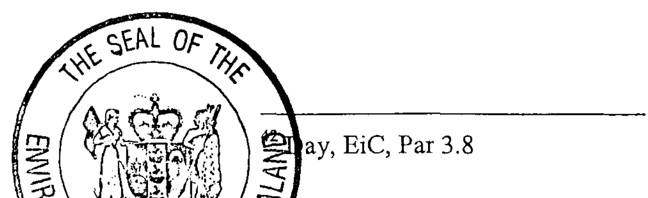
> ... a sensible approach to the assessment process, and there are currently no other agreed alternatives available in NZ for the basis of such an assessment.

[160] These guidelines determine a "Noise Design Level" which for quieter areas, such as Pokeno, is around 55 – 60dBA Leq. (Leq being the noise level recorded and averaged over a given period of time. To get a measure that best correlates with human subjective responses). These noise levels do not differ from the 'absolute' noise levels of other countries, by any significant degree.

[161] When assessing the community's response to transportation noise, Mr Day stated that reference is frequently made to the ' Schultz Curve'. It is a graph showing psychological and annoyance factors, based upon averaging of surveys from huge numbers of individuals, to yield some measure of general community response. For a given noise level, it shows the percentage of the community that will be 'highly annoyed'. In particular, Schultz shows that approx. 7% of people are highly annoyed by levels of 60dBA, but only 4% at 55dBA.

Noise Associated with Trucks on Great South Road

[162] A prediction of the possible increased level of truck noise on the community was put to us. For the purpose of his investigations Mr Day proposed two different levels of activity, and took the figures of 194 (the number proposed in the original application) and 400 truck movements per day, passing through Pokeno.



[42] Day, EiC, Par 3.8

[163] Approximately 17 houses along Great South Road are closer than 50m to the carriageway, the closest being 9m from the kerb. At one house, the ambient noise level is 60 dBA, categorising it in the Transit 'high noise area' of 63dBA. Six houses are between 11 and 14m from the kerb. At 14m, a dwelling has an ambient noise level of 58dBA, is therefore in a 'medium noise area', and has a 'design level' of 62dBA.

[164] With the addition of 194 quarry truck movements per day, the noise levels for these houses would be just below the design level. For a flow of 400 truck movements per day they would exactly meet the Transit design level.

[165] In terms of the 'change of noise level', 194 movements will increase the existing noise level by 2dBA; 400 movements will give a three dBA increase. An increase of 2dBA is generally not detectable by humans, 3dBA is just detectable.

[166] It is to be expected that noise exposure will be slightly higher on high demand days, with a corresponding period of relief to ensure compliance with the overall distribution limit.

[167] In terms of the Schultz Curve, the predicted noise levels of 60 – 63dBA would result in approximately 10% of recipients being highly annoyed, compared with the existing noise environment of 58 – 60dBA, where 7% are highly annoyed. We were told that houses exposed to noise levels of 55 – 65dBA can generally meet satisfactory internal noise levels by controlling the extent to which windows are opened.

[168] Mr Day concluded this aspect of his evidence by saying:

> In my opinion....considering the environment that can be expected with residences located adjacent to a major arterial route, the noise levels due to the proposed truck activities constitute an effect that is no more than minor.

Noise Associated with Leathem Access Road

[169] The closest residences potentially affected by noise of HCVs moving on the Leathem Access road are those of the Chamberlains and the Pearces on McDonald Road, about 120 m to the north-west. Until leaving the junction of the Leathem Access Road and Great South Road, (the "entrance" locality), all truck noise would be obliged to conform to the noise limits set by the QNB. It was calculated that at that entrance and within the first segment of this road, some 70 truck movements per

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hour would comply with the 55dBA limit at the QNB. Further, Mr Day told us that noise from 200 movements/hr would still be within this limit, provided mitigation in the form of fences and bunding were implemented.

[170] The formation of a 3.5m high and 100m long bund near the entrance will shield dwellings to the east from noise generated by trucks on this segment of road. Such a bund is a required part of the proposed conditions of consent.

[171] There is doubt whether the night-time noise limit of 45dBA can be complied with, without substantial mitigation. Accordingly, Winstones agreed not to operate trucks at night, on Sundays, or on public holidays, unless on-site measurements show conclusively that they can comply with the night-time noise conditions To this effect, a new condition (25(f)) is added to the proposed monitoring conditions.

Train Noise

[172] At Pokeno there are currently 26-37 train movements per day on the NIMT line. At Pokeno, there are currently 37 – 45 train movements per day on the NIMT line. While on the spur line, the trains from the Winstone siding will travel no faster than 25Km/hr, then accelerating only when on the NIMT. They will be approximately 20 dBA quieter than other trains that pass Pokeno normally and at greater speed.

[173] Mr Day calculated the predicted level of rail noise for a residence 70m distant from the NIMT, and one 200m away. These calculations showed that an increase of 1dBA would result from the quarry trains, a change not normally detectable by residents.

Conclusion on Noise

[174] No expert on sound was called by those opposed to the quarry, but. Mr Warren, Mr Cawley and Mr Day were subjected to extensive cross-examination. We were impressed by their evidence and prefer their conclusions. In so doing, we do not overlook the evidence of a number of lay witnesses called by the Society including Ms Joan Castle, Mr Alan McIntosh, Mr Peter Egan and Mr John Carter. As we have already found above, many of their perceptions were not supported by evidence. We conclude that the proposed conditions of consent will ensure that noise levels will not adversely affect Pokeno and the surrounding area.

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Vibration

[175] Tonkin and Taylor, Environmental and Engineering Consultants, were engaged by Winstone to undertake vibration monitoring of trial blasts at the site of the proposed quarry. The purposes of the study were, to provide assessment of the effects of blasting including guidance for compliance with relevant vibration standards, and to make recommendations for any necessary mitigation measures.

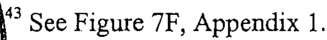
[176] Based on this report, and other computer generated findings, a 'Quarry Vibration and Airblast Boundary' (QVAB) was established[43]. Factors considered in the position of this boundary included: the requirements of the district plan; the most practical method of blasting and the location of existing or proposed dwellings, with building consent granted prior to consent for the quarry. To the east, this boundary closely follows the legal site boundary, to the north, west and south the QVAB is significantly expanded beyond the site.

[177] Evidence in relation to vibration was given by Mr P Millar, a geotechnical engineer, called by Winstones, who was also the Project Co-ordinator for the Tonkin and Taylor study. In his technical introduction, Mr Millar explained how the major energy component of an explosive charge is used to fragment and move the rock mass, whereas a lesser amount is converted into ground vibration and air noise.

Noise of Blasting

[178] "Air Overpressure" noise refers to the effect of energy from the explosion that escapes to the atmosphere as an air pressure wave. Mr Millar told us that air overpressure is often mistaken for ground vibration, and can produce effects such as rattling of windows and noise which intensifies the apparent effect of an explosion. The overpressure travels more slowly than the ground vibration and can, at a distance, give the impression that two blasts have occurred very close together.

[179] Mr Millar told us that the level of air overpressure (noise) is affected by a number of variables, the most important of which is distance. The distance from the quarry pit to where compliance with the noise limit of 128dB will be achieved, is well within the QVAB, the location of which is governed by vibration effects, not by air blast requirements. It is appropriate to note, that although overpressure may be clearly felt, and may cause windows to rattle, at 128dB it is highly unlikely to cause



[43] See Figure 7F, Appendix 1.

any damage. Mr Millar assessed that it would take a blast ten times this magnitude to break a window.

Vibration

[180] The evidence established that the ground vibration effects from an explosion have certain characteristics, the most important of which are:

(i) The duration of the vibration, which is related to the time it takes to reduce, or attenuate, the vibration in the ground.

(ii) The frequency of the energy wave.

(iii) The velocity of the displaced earth/rock particles through the ground.

[181] Based on the evidence, we deal with each in turn:

(i) Each site varies in the way the vibration is progressively attenuated. Whilst the most important of these variables is distance, the relationship is complicated by a number of other variables. The most important are the size and shape of the quarry, the geology of the site, ground water conditions and the weight of the explosive charge.

(ii) The frequency of the vibration is an important factor in understanding the effects of vibration on people and buildings. It is a measure of the number of energy oscillations that occur in one second, familiarly called "cycles per second", but nowadays referred to in Hertz (Hz). People are more sensitive to frequencies higher than10Hz. Structures are more affected by vibrations close to their 'natural' frequencies, generally in the range of 5 – 10Hz. A typical blast energy wave that is transmitted through the ground and remains detectable, is normally in the range of 15 – 30Hz

The response of a building to the frequency of a ground vibration will depend upon its own *natural* (or *resonant*) frequency. This is dependent on characteristics of the building, including its design, foundations, and orientation to the vibration energy wave-path. An increased response to the blast vibration is more likely where its frequency is close to the natural frequency of an affected building. Fortunately, characteristic frequencies of blast vibrations (15-30Hz)

are higher than the natural frequencies of most buildings (5-10Hz). Therefore, significant complications are extremely unlikely.

(iii) Particle velocity, measured in mm/sec, is widely used in standard guidelines that address the protection of buildings from vibration. The Australian guidelines, used as a basis for the criteria in the Franklin district plan, provide absolute limits, which are readily enforceable. Mr Millar told us that the recommended limits in the proposed conditions of consent (condition 21)[44] are significantly below the levels that are likely to result even in cosmetic damage to buildings . The potential for structural damage is much less.

He pointed out that to understand the conservative nature of the particle velocity in proposed condition 21, it is of assistance to understand what a range of such velocities represents. Mr Millar showed this in the following table:

Activity	Peak Particle Velocity (PPV) mm/sec
Child jumping of a chair	5
Hammering of a nail	8
Wastemaster	11
Out of balance washing machine	15

[182] The proposed condition requires all blasting to be carried out to a target maximum for resulting vibration of 10mm/sec peak particle velocity, measured at any point outside the QVAB, including the notional boundary of all existing and future permitted dwellings. Recognising the possibility of random exceedances that may result from aberrations in geology, or as the pit moves closer to the QVAB, the PPV shall not exceed this level for more than one blast in any 1,000 sequential blasts, nor may <u>any</u> blast exceed 25mm/sec PPV. In practice, blasting is done within a progressive design situation, during which each blast is monitored by seismography and so analysed as to provide guidance in avoiding exceedances from subsequent blasts. Mr Millar told us in cross-examination, that a single 25mm/sec blast was unlikely to cause structural damage to a building, unless the building were old or clearly under stress sufficient to allow hair-line cracks.

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44 See Appendix 1.

Human Perception of Vibration

[183] Mr Millar told us about the human body's high sensitivity to vibration. Discomfort levels are affected by:

- Position of the affected person
- The activity of the affected person
- Age and individual characteristics
- Community influences and tolerance levels
- Whether daytime or night-time.

[184] The intensity of perception depends on the character of the vibration and is most affected by the duration of the vibration. The level of discomfort, during daytime, for a blast of the 15-30Hz range, is just perceptible at a PPV of 0.6mm/sec, in a normal house. It does not become disturbing until the PPV reaches a level of 9mm/sec.

[185] Blasting is normally designed to meet structural damage criteria rather than physiological criteria based on reduced comfort. When this concept is followed, while the resultant vibrations may be clearly perceptible, they do not approach levels likely to result in reduced comfort. The criteria set out in the conditions of consent are designed to ensure that neither buildings nor the residential amenities are materially effected.

[186] Another concern was the possibility of fault lines within the ambit of the quarry materially influencing the propagation and velocity of vibrations from explosive charges in the pit. We were made aware, during Mr Phillip's cross-examination of Mr Millar, that amplification or attenuation of the velocity of vibration will depend on several factors, such as the angle the fault line might have to the blast, and the nature of the crushed rock and earth that occupies the fault line itself. Mr M Melchers, a resident of Pokeno, brought to our attention the map (originally produced in evidence by Mr Millar), showing 'the potentially active fault lines near Pokeno'. This shows the siting of the quarry to be adjacent to a triangle of fault lines, which, he said, might well have the potential to spread the impact of an explosion. The possibility was further highlighted in Mr Phillip's submissions.

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[187] Paramount to Mr Phillips concern is the juxtaposition of any fault line to the basalt deposit. Mr Millar on cross-examination (transcript p163, lines 5-9) states that [*the 20 km distant*] Wairoa North fault line is the only one that has shown any activity in the last 10,000 years, all the others are much older and considered inactive. Despite some differences in opinion about the geological age of the basalt, the relative location of the active fault is such that in cross-examination Mr Millar said[45].

> Most of the quarried rock is superimposed on the top of ground where the faulting pre-existed the placement of the basalt, so the faulting should not be directly in contact with any blasting I consider the distance to any significant fault would be sufficient that any attenuation would have occurred to a level such that its effect would be minimum.

[188] In his final submissions Mr Williams pointed out that much of the cross-examination about fault lines was addressed to witnesses who were not geologists. He also restated Mr Millar's evidence that the nearest active fault was about 20Km away from the quarry.

[189] The Geologists report in Vol 1 of the AEE confirms that:

> The Pokeno area lies at the junction of several potentially active faults. The trend of the Kimihia-Drury and Port Waikato faults places them in close proximity to the site.

and:

> ...no evidence of offset of the basalt deposit has been observed.

[190] From this, we conclude that there is no evidence of a surface irregularity in the basalt plate that would lead to credible assumptions of recent geological activity in the quarry area, or of likelihood that a blast / fault conjunction will trigger a significant effect.

[191] Therefore, we are satisfied that the comprehensiveness of the conditions relating to vibration will prevent structural damage to any houses in the area

Fly Rock

[192] Incorrectly used explosive charges can result in the ejection of rock fragments beyond the face of basalt being broken up. This is known as 'fly rock'. Mr Millar told the Court that the good blasting techniques developed by Winstone

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[45] Millar, XXM, page 161 transcript.

are of an international standard, appropriate for the effective control of all side effects of blasting such as fly rock.

[193] As blasting approaches the nearest residences, additional avoidance techniques may be used, including reduction in charge weight, ground mats, and special warnings

[194] The QVAB was designed also to ensure that fly rock trajectories would not reach that boundary. Mr Millar's opinion was clearly that appellants' concerns about safety and fly rock are not applicable to the proposed quarry.

Conclusion on Vibration

[195] Mr Millar was extensively cross-examined particularly by Mr Phillips. Despite Mr Phillip's probing cross-examination we feel satisfied that Mr Millar's conclusions are soundly based. There was no expert evidence to the contrary. We are confident there will be no adverse effects from blasting, especially under the exacting proposed conditions of consent imposed.

Dust

[196] The potential of dust as a problem was not raised as an issue, and no evidence was led regarding the origin or effects of dust. However, it was referred to very briefly in the evidence of Dr Prickett, an archaeologist who told us that he was disturbed by the possible effects of dust (and noise) on visitors to the Queen's Redoubt. As well, Mr J Carter, an organic farmer, felt that insufficient attention had been paid to the problem of dust which, he thought, might well travel far enough to have an effect on his farming practice. Finally, Mr Phillips, in his submissions, made mention of the deleterious effect dust has on the respiratory health of horses, although no evidence was called to support the contention. Neither the witnesses, nor Mr Phillips, were further questioned on this topic, nor was reference made to the matters pertaining to dust in the AEE and the Quarry Concept Plan.

[197] There is discussion in the AEE, under the section related to 'Discharges to Air' about the sources and aggravating factors in the production of dust or particulates.

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[198] The sources are recognised as being the pit, which includes drilling sites; blast areas; overburden removal; loading and transport; processing areas; overburden disposal areas; and unpaved roads. The factors influencing the amount of dust produced are: wind erosion of exposed areas and stockpiles; wind speed; moisture content of the exposed areas and the aggregate; and silt content of the surface material.

[199] These factors having been identified their control and mitigation becomes a part of the quarry concept plan. Such mitigation includes...

- Minimisation of exposed earth by vegetation of those areas not to be disturbed in any current construction season.
- Sealing of internal access roads.
- Installation of fixed sprinkler systems along the haul road and around the processing and stockpile areas.
- Water tanker backup; for example, when loading and unloading aggregate.
- Use of chemical stabilisers if road watering is not able adequately to suppress the dust.
- House or cover the processing plant, screens and conveyors
- Air extraction filter systems attached to the drilling equipment.
- Adoption of good blasting practices with attention paid to wind strength and direction, sequential shot firing and the use of minimal quantities of explosives.

[200] Mr K Phyn, a consultant planner, called by the respondent, drew our attention to the conditions of consent addressing the discharge of contaminants to air, found in the Environment Waikato resource consent, 101241. These conditions are based on the AEE report, but include the establishment of a 'complaints register' process. which requires that complaints suggesting non-compliance with the conditions, shall be referred to the Waikato Regional Council within 5 days of receipt.

Monitoring of Dust

[201] A monitoring programme will be established that takes into consideration such criteria as wind speed and direction, rainfall, deposited particulate and air quality. Air quality itself will be assessed on the basis of the Ministry of the

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Environment criteria. Deposition of particulate will be assessed on the New South Wales Environmental Protection Agency criteria.

Findings on Dust

[202] We are satisfied that the conditions of consent will adequately ensure that no adverse effects will arise by way of dust nuisances.

Amenity Values/Pokeno

[203] So far we have focussed individually on the potential adverse effects of noise, blasting, traffic, and dust; all of which received attention in the evidence. However, Ms Kapua correctly reminded us that we are required to look at the overall effect of potential adverse effects in a combined way. Only then can we address the overall effects on the amenity values of Pokeno. In the Act, amenity value:

> ...means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[204] In ***Shell Oil New Zealand Limited v Wellington City Council***[46] the Tribunal stated that *"the definition of 'amenity values', 'places strong emphasis on present neighbourhood character'*, a standard also adopted by the Tribunal in ***Shell Oil New Zealand Limited v Auckland City Council***[47].

[205] In ***Phantom Outdoor Advertising Limited v Christchurch City Council***[48] the Environment Court found that pleasantness, aesthetic coherence, and cultural and recreational attributes were not some combined absolute value which members of the public appreciated to a greater or lesser extent. Rather, that the definition of amenity embraces a wide range of elements and experiences, and appreciation of amenity values may change depending on the audience.

[206] In considering amenity values the Court is required to have regard to the existing environment including such matters as landscape, noise, views, as well as cultural and historical aspects.

[46] 1992 2 NZRMA 80, 84 (pt).
[47] W8/94 (pt).
[48] Environment Court C90/2001.

[207] The Pokeno settlement was subdivided after the New Zealand wars of the 1860s. A number of roads in the settlement are unformed. Vacant lots are common and development potential is restricted by a lack of a sewerage system. Its zoning is a mix of Residential, Business, General Rural and Recreation Zones.

[208] In assessing the effects on amenity values, the starting point is the present environment overlaid by activities allowed as of right, other than fanciful activities.[49]

[209] Pokeno's character changed as a consequence of the state highway bypassing the town. However, the present nearby state highway still has a distinct effect particularly in relation to noise. The former state highway, Great South Road, was built for a large traffic volume and we have already referred to the fact that it is not by any means free of heavy traffic.

[210] The Business Zone does not prescribe permitted activities. It allows any activity that complies with its development and performance standards. There is no control on traffic generation, other than vehicle crossing and driveway standards, on any business activity. We recognise that Great South Road is a public road and is used by a variety of vehicles, without being subject to control. The traffic engineering evidence of Mr Harries was that the road is well designed with excess capacity.

[211] We have already adverted to the views of a number of local residents, who gave evidence for the Society, and our impression of this evidence as being subjective. We balance those views against all the evidence we have heard including the uncontested expert evidence on traffic, noise, planning and vibration.

[212] Having considered all the evidence, we find that the overall impact on amenity values will be no more than minor.

Part II Matters – Maori Cultural Issues – Section 6(e), 7(a) and 8

[213] The provisions of the Regional Policy Statement and the District Plan reflect the principles relating to Maori cultural matters enunciated in Part II. Part II of the policy statement outlines matters of significance to Maori and in particular matters relevant to section 8 of the Act. It encourages active participation and consultation

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[49] See *Smith Chilcott v Auckland City Council* (2001) NZRMA 481, (CA).

and recognises the relationship the tangata whenua have with natural and physical resources.

[214] Section 3.4 of the District Plan recognises the need for the principles of the Treaty of Waitangi to be taken into account and that the relationship of Maori and their culture to their ancestral lands, water, sites, waahi tapu and other taonga must be considered. Part 4 of the District Plan addresses the obligations in terms of partnership including consultation. The partnership with tangata whenua is expanded in two ways:

(i) The need for appropriate consultation both at the board level and at the resource consent level;

(ii) The appropriate assessment of the actual and potential effects of any particular proposal upon relevant Maori matters.

[215] The statutory instruments therefore reinforce the principles referred to in Part II. Sections 6(e), 7(a) and 8 of the RMA. To some extent they overlap with each other and also with the enabling provisions of section 5(2), directed at providing for the social and cultural well-being of communities. Section 8 is a general provision, requiring all persons, exercising functions and powers under the Act in relation to managing the use, development, and protection of natural and physical resources, to take into account the principles of the Treaty of Waitangi.

[216] Section 6(e) and 7(a) are much more specific. Section 6(e) requires all persons exercising functions and powers under the RMA to recognise and provide for:

> The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[217] Section 7(a) requires particular regard to be had to kaitiakitanga, defined in section 2(1) as meaning:

> The exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

[218] Tikanga Maori is defined in section 2(1) as meaning:

> Maori customary values and practice.

[219] The Pokeno Kaitiaki Society contended that the proposal would offend Maori as it failed to recognise sufficiently:

(i) The requirement in section 6(e) to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

(ii) The requirement in section 7(a) to have particular regard to kaitiakitanga.

(iii) The requirement in section 8 to take account of the principles of the Treaty of Waitangi.

[220] The concerns of the Society reflect the concerns of Ngati Naho. They are threefold:

(i) There has been inadequate consultation with Ngati Naho.

(ii) The proposal will offend against the waahi tapu nature of the site;

(iii) Ngati Naho has not been sufficiently considered as the hapu with kaitiaki over the area.

Consultation

[221] Ngati Naho is a hapu of Tainui. Mr Phyn told us that on 29 July 1993 the Council entered a memorandum of understanding with the Tainui iwi[50]. This memorandum established a working relationship between the Council and Ngati Te Ata through Awaroua Ki Manukau, Ngati Paoa, and the Huakina Development Trust.

[222] Mr Phyn expanded on the Council's former relationship with tangata whenua and the expected approach to consultation. This can be summarised as follows:

- Following the signing of the memorandum of understanding in 1993 and up to the time of the filing of the quarry application in 1998, as a result of both representations to Council, and Council awareness of the role of various hapu, other relationships have evolved by agreement with Council. These included agreed processes with:

[50] Phyn, EiC, Attachment 12.

- Ngati Te Ata
- Nga Muka Development Trust
- Ngati Paoa Whanau Trust

We note that as at 1998 Ngati Naho were not part of the agreed protocol for consultation between the Council and tangata whenua.

- A list of resource applications and full application documentation for significant applications were forwarded to the tangata whenua authorities on a regular basis.

- The process of notification was and still is implemented by Council as follows:

  - Forwarding a list every week of all applications received by Council for the identified area.

  - Forwarding full application details on request from the particular tangata whenua.

  - Informing all applicants of the need to consult directly with all the separate tangata whenua in respect of each area (as known to Council).

  - Notifying tangata whenua of all notified resource consent applications for their areas.

[223] A formal consultation process with the Ngati Naho Hapu Trust Board was recognised and instituted from January 1999 following the receipt by Council of a facsimile received on 4 December 1998[51] from the chairperson of the Trust Board (Mr Sonny Wara). In this letter Mr Wara advised the boundary of the Ngati Naho Hapu as: *"the rohe (boundary) is strategic in its location – Mercer to the north, Rangiriri to the south, Pukekawa to the west and Maramarua to the east".* The quarry site is north of Mercer. Clearly therefore, even at that stage, neither the Council, nor Winstone could be expected to have known that Ngati Naho had an interest as tangata whenua. Indeed, the clear inference is that at that stage, even Ngati Naho was of the view that the quarry site did not lie within their rohe.

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[51] Mr Phyn, EiC, Attachment 13.

[224] The quarry application was notified on 23 July 1998, before the December 1998 letter and any Council recognition of the role of Ngati Naho. The Leathem Access application was received after December 1998. However, it was Council's understanding that Pokeno was outside that rohe described in Mr Wara's facsimile of 4 December 1998.

[225] Accordingly, with both the quarry application and the subsequent Leathem Access application, Winstone was informed by Council to consult directly with Huakina and to demonstrate that this had occurred within the application documentation. This process was confirmed by a letter from Huakina dated 30 April 1998 that accompanied the application. In addition, the application documents recorded the details of the site inspection of the proposed quarry by kaumatua and Huakina.

[226] Following notification of the quarry application a large number of submissions was received. While a number of individual submissions highlighted concerns on tangata whenua consultation, with respect to hapu affiliations, there was no record of any submission from Ngati Naho in this regard. Submissions on the quarry application were received from Ngati Te Ata, and other submissions expressed concern about a lack of consultation with local people on the history of the area, particularly in respect to waahi tapu. For a very considerable period of time before and during the application process there was opportunity for exchanges and responses to information, including tangata whenua input.

[227] Mr Chote, the Winstone officer responsible for consultation with tangata whenua, sought to identify and contact all iwi who had an interest in the area. Early in the project, consultation commenced with the Tainui Trust Board and its then environmental arm at the time, the Huakina Development Trust. In addition Winstone commenced discussion with Ngati Te Ata, and as the project developed was made aware of the more direct concerns of resident iwi who felt that their interests were not necessarily being represented by the larger agencies. In response to this Winstone held meetings and site visits, and discussed issues with local representatives. Later in the project Winstone was contacted by two other iwi groups who expressed an interest in the project – Te Kono Trust (Ngati Mahuta) and Wahu Pu O Waikato. Meetings were held on site with Te Kono Trust, who did not voice any concerns subsequently, and with Wahu Pu O Waikato, who failed to reply.

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[228] Mr Chote attached as Appendix 6 to his evidence a schedule setting out a summary of consultation with iwi. We attach this as Appendix 5.

[229] Mr Chote did not take at face value the advice given to Winstone, by the Council, to the effect that the authority to contact was Huakina Development Trust. In addition, and as a matter of caution, Mr Chote wrote to the General Secretary of the Tainui Trust Board on 4 November 1996. This letter said in part[52]:

> As part of identifying all affected parties we have made contact with Peter Nuttle at Huakina Development Trust and Nganeko Minnhinnick of Ngati Te Ata.
>
> I am writing to you to request whether you are aware of any other groups our organisation should be talking to about our proposed development and if so who he may make contact with.

[230] Winstone was not referred to any "other group". Ngati Naho first made the Council and Winstone aware of its interest in the Pokeno area when it filed various papers in late May 2001, asserting status as tangata whenua over Pokeno. This involvement of Ngati Naho appears to have come about by a curious twist of events.

[231] As part of the iwi consultation process Winstone commissioned Mr Rod Clough, a consultant archaeologist, to carry out an archaeological assessment of the site in October 1996. His report was sent to Huakina and Ngati Te Ata. Later, it was made available to other local Maori.

[232] Huakina itself then commissioned a report on the cultural significance of the application. These reports acknowledged the presence of Chief Te Wheoro in the locality by reference to interviews with local Maori and historical records. Wiremu Te Wheoro was a Ngati Naho Chief. He collaborated with the British during the Maori Wars and there is historic reference to a pa/signal station near the proposed quarry which was manned by Te Wheoro and his warriors.

[233] Huakina requested an independent assessment be undertaken by an archaeologist of its choice to further investigate. This was done between the 14 October and 19 November 1997, then being referred to in the evidence as the Lawlor Report.[53]

[52] Chote, EiC, Appendix 11.
[53] Chote, EiC, Appendix 8.

[234] That report recommended that despite no physical evidence of koiwi or Te Wheoro's pa having been identified following intensive survey, protocols be developed in case of subsequent discovery of archaeological remains. These protocols were developed in consultation with Huakina, who endorsed the proposed management plan, sent to them in draft in 1998, and later included in the application. This has led to a draft condition of consent (proposed condition 23) that addresses Maori concerns in relation to their culture and tradition.

[235] If it had not been for Winstone's commissioning the Clough Report and thus triggering investigations and interest, the relevance of the historic existence of Te Wheoro's pa/signal station seems unlikely to have been recognised. If that were so, then Ngati Naho would not have known to extend its rohe to include the area, albeit at a late stage, in May 2001.

[236] We wish to make it clear that the fortuitous chain of events leading to a recognition of Ngati Naho's historical connection with the area is understandable. We mean no criticism of anybody. Mr Herbert, Manager of the Ngati Naho Co-operative Society, said the findings in the archaeological reports, are just some of a number of matters *that provide us with new and critical information in our ongoing quest to discover our past and to undertake what our responsibilities and boundaries are.*[54]

[237] Notwithstanding Ngati Naho's late involvement, Winstone endeavoured to address the concerns expressed by representatives of Ngati Naho. Mr Chote wrote to Mr Wara, a kaumatua of Ngati Naho who holds the equivalent position of Chief, on 22 August 2001 agreeing to attend a hui at Meremere with Ngati Naho on Saturday 1 September. On that day, Mr Chote and other representatives of Winstone visited Ngati Naho at their offices at Mere Mere, to discuss their concerns. Ngati Naho was represented at that meeting by Mr Sonny Wara, Mr Rima Herbert, Mr Malcolm Wara, and Mr Richard Turner. Two members of the Society were also in attendance, namely Ms Muriel Chamberlain and Te Tuhi Kelly. Mr Chote told us that the 1 September meeting was fairly informal and was chaired in the main by Mr Sonny Wara who was interested in getting everyone's views on the project, the location of the pa/signal station site and Winstone's future relationship with Ngati Naho. To assist Ngati Naho with an understanding of the proposal, a site visit was suggested for the following Saturday 8 September. However that meeting was postponed at the request of Mr Herbet from Ngati Naho.

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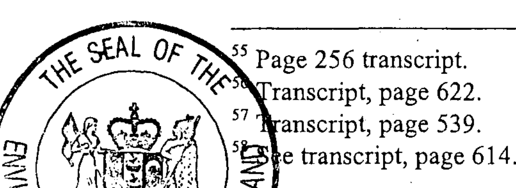
[54] Herbert, EiC, paragraph 3.

[238] Clearly Ngati Naho was not directly consulted as an entity before the lodging of the application. This is understandable, as Ngati Naho was not aware of the significance of the site at the time the application was prepared, as discussed above. Mr Wara himself acknowledged this at paragraph 21 of his evidence, as did Mr Herbert in cross-examination.[55]

[239] In our view the failure to consult with Ngati Naho until a late stage was unfortunate but was not as a consequence of any failure on the part of Winstone or the Council. The Huakina Report does not refer to Ngati Naho as having an interest in the area. It simply referred to tribes being engaged in canoe transport for the cartage of British provisions. These tribes included Ngati Naho and Ngati Tepa under the leadership of Te Wheoro. This was the only point of reference that Mr Chote and Winstone's advisors, would have had at the time, to a possible link between Ngati Naho and the site. To expect Winstone to draw a link from that oblique reference to Te Wheoro and the interests of present day members of Ngati Naho would be unreasonable.

[240] Winstone not only relied on Council to identify Maori parties, but also made efforts through the Tainui Trust Board to identify any possible additional party. To require more of Winstone or the Council would put applicants and consent authorities in an impossible situation. It would mean that consultation with Council identified parties would not be sufficient, nor would consultation with those other parties who identified themselves during the process, as occurred here. To require more in the present circumstances would be impracticable and unfair.

[241] In the present circumstances Ngati Naho was in a position to raise its hand. Mr Wara confirmed in response to a question from Ms Ash that he was aware of the quarry proposal for two years prior to the commencement of this case.[56] Similarly, Mr Herbert also was aware.[57] Further, Mr Wara had been on the site with Huakina representatives, Mr Rangi Mahuta and Mr Barnie Kirkwood.[58] He must have been aware of what was happening. The application contained a reference to Te Wheoro in Dr Clough's Report, and that application was publicly available and notified. One would have expected Ngati Naho to have first recognised the linkage with their own Chief, who was directly known to them, and to register an interest. Indeed, they did so, in May 2001.



[55] Page 256 transcript.
[56] Transcript, page 622.
[57] Transcript, page 539.
[58] See transcript, page 614.

[242] As we have already mentioned, Winstone made further attempts to discuss Ngati Naho's concerns once learning of their interests. Mr Chote told us of Winstone's willingness to discuss the issue with Ngati Naho on an ongoing basis and to make provision for them in the implementation of the consent. Indeed the revised proposed conditions of consent provides for Ngati Naho in condition 23 (relating to discovery of koiwi). Ms Kapua was invited to submit a further condition to address the concern about ongoing involvement. In response to that she said:

> A suggested condition might record that the applicant will forward a report on activities on site quarterly with any accompanying material, and if requested by Ngati Naho the applicant will meet at least twice a year, the condition should record the applicant's commitment to recognising the relationship Ngati Naho have with the site.

[243] We find that adequate consultation has taken place. The purpose of consultation is twofold. *The first is to recognise the rights of Maori under the treaty as a party who has a right to be consulted (the recognition limb). The second purpose is to obtain appropriate and accurate information on the potential effects and effects on affected Maori (the information limb)*[59].

[244] As to the recognition limb, we are satisfied that Winstone, with the assistance and direction of the Councils and the Tainui Trust Board, made every reasonable effort to identify affected Maori interests. They then entered into meaningful consultation with those that were identified.

[245] As to the information limb, we are satisfied that the degree of consultation undertaken by Winstone with tangata whenua generally, and more latterly with Ngati Naho, has been more than adequate to ensure that we have been fully informed on Maori cultural issues.

[246] Furthermore, Ngati Naho has had the opportunity, and indeed took advantage of that opportunity, to give evidence before us. Proposed condition 23 ensures that future consultation includes Ngati Naho, and we also find that the further suggested condition by Ms Kapua is appropriate, save that we consider the report should be twice a year rather than quarterly. Accordingly, we propose to add to the proposed conditions set out in Appendix 1, an additional condition 23A, which says:

[59] See *The Minister of Conservation v Northland Regional Council*, E.C. A074/2002, paragraph 574: and The Mechanisms For the Protection of Maori Interests under Part II of the Resource Management Act 1991 by Paul Beverley (1998) 2 NZJEL 121 and authorities there referred to.

23A.

In recognition of Ngati Naho's relationship with the quarry site the consent holder shall be available to meet with any two representatives of the Ngati Naho Co-operative Society Limited or its successor, provided it has first been requested to do so by such representatives at their discretion, on at least two occasions in any 12 month period from the commencement of consent, for the purpose of explaining and discussing activities at the quarry.

If requested to do so by the Ngati Naho representatives following any such meeting, the consent holder shall provide a written summary document outlining the matters discussed.

Waahi Tapu

Introduction

[247] Ngati Naho asserted the site, or at least part of the site, was waahi tapu. We heard a great deal of evidence as to the meaning of the term and to the factual circumstances founding the claim. The conflict in the evidence on both matters brought us yet again directly at the interface of British-based New Zealand Law and Tikanga Maori (Maori custom). In ***Land, Air, Water Association & Ors v Waikato Regional Council & anor*** [60] (Hampton Downs) this division of the Court set out in some detail the methodology we adopted in determining such issues. Counsel made detailed submissions on the issue. We adopt what we said there, and propose to make some additional comments pertinent to this case to reflect the helpful submissions of Mr Williams.

[248] In any enquiry involving concepts of tikanga Maori there are three stages of enquiry for the Court. The first is to determine, as best as we are able in the English language, the meaning of the concept. The second is to assess the evidence to determine whether it probatively establishes its existence and relevance in the context of the facts of a particular case. If so, the third is to determine how it is to be recognised and provided for. When, as in the case here, it is alleged that a site is waahi tapu, it is necessary: first to determine the meaning of waahi tapu; second to determine whether the evidence probatively establishes the existence of a waahi tapu; and third, if it does, how it is to be provided for.

[60] Environment Court Decision No. A110/01.

[249] All stages of enquiry require us to consider the evidentiary basis and burden required. There is no burden of proof on either party, but there is an evidentiary burden on a party who makes an allegation to present evidence tending to support the allegation[61].

[250] In ***McIntyre v Christchurch City Council***[62] Judge Jackson and his colleague Commissioners considered that the basic principles of evidence developed by the general courts provide a valuable guide for fact finding by the Environment Court. The Court set out three requirements for making a finding on a question of fact:

(i) There needs to be material of probative value, ie tending logically to show the existence of facts consistent with the finding. ***(Rey Erebus Royal Commission; Air New Zealand v Mahon*** 1983 NZLR 662, 671);

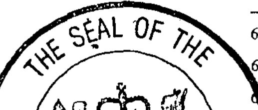
(ii) The evidence must satisfy the Court of the fact on the balance of probabilities and having regard to the gravity of the question;

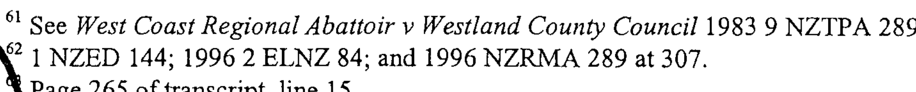
(iii) The heart of a finding of fact is that the Court needs to feel persuaded that it is correct.

With respect we agree.

[251] Ms Kapua claimed that "as a general principle identification of waahi tapu is a matter for tangata whenua"[63]. As a general principle this may well be so. However, claims of waahi tapu must be objectively established, not merely asserted. There needs to be material of a prohibitive value which satisfies us on the balance of probabilities. We as a Court need to feel persuaded that the assertion is correct.

[252] In ***Te Rohe Potae O Matangirau Trust v Northland Regional Council***[64] Judge Bollard and his colleague Commissioners stated that evidence of kaumatua is frequently helpful, but if challenged, the question is not to be resolved simply by accepting an assertion or belief by kaumatua or anyone else. General evidence of waahi tapu over a wide and undefined area (in that case evidence as to the entire bay being used as a traditional food gathering area), was not probative of a claim that waahi tapu existed on a specific site.




[61] See *West Coast Regional Abattoir v Westland County Council* 1983 9 NZTPA 289.
[62] 1 NZED 144; 1996 2 ELNZ 84; and 1996 NZRMA 289 at 307.
[63] Page 265 of transcript, line 15.
[64] Environment Court A107/90.

Meaning of Waahi Tapu

[253] As to the first stage, it is the experience of this division of the Court, that quite often Maori cultural concepts are raised, with very little evidence given to explain their meaning. The interpretation of the concepts is a crucial matter. Therefore evidence, in some cases expert evidence, by both Maori and Pakeha, should be adduced to explain them. In appropriate circumstances, can the Court go beyond the evidence to other resources as a guide to interpreting the meaning of such terms as "waahi tapu" and "taonga". We think it can.

[254] Firstly, we consider the Court can refer to dictionary definitions such as the Williams Dictionary of the Maori Language or a specialist dictionary of that type. If a term is included as part of the words of a statute a dictionary can be referred to.[65] We can see no reason why such a practice should not also be adopted when considering concepts of tikanga Maori. The need to have regard to tikanga Maori, by virtue of section 8, means that the Court may be required to have regard to a wide range of concepts, even though not expressly referred to in the Act.

[255] Secondly, we consider the Court is entitled to have regard to decisions of the Waitangi Tribunal. As stated in the ***Land, Air, Water Association*** decision, Waitangi Tribunal decisions are admissible in evidence before the Courts[66], and under section 276(2) of the RMA, the Environment Court is not bound by rules of law about evidence applying to civil proceedings.

[256] Nevertheless, the Court of Appeal has also determined that there is a distinction to be drawn between factual findings made as part of Waitangi Tribunal decisions, and conclusions or legal findings made under distinct legislation. In ***Te Runanga O Muriwhenua Inc. v Attorney-General***[67], the Court of Appeal said:

> The crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively.
>
> In **New Zealand Maori Council v Attorney-General** 1987 1 NZLR 641, at 661, it was mentioned that the opinions of the Tribunal expressed in reports under the 1975 Act are of course not binding on Courts in proceedings concerned with other Acts, although it was stressed that they were of great value to the Courts. So, under the State-owned Enterprises Act, it is inevitably the province of the Court, (not the Waitangi Tribunal) to determine what the Act means and whether it has been complied with. This was

[65] See J F Burrows text, "Statute Law in New Zealand", page 148.
[66] Refer paragraph 395-397.
[67] 1992 2 NZLR 641, at 651.

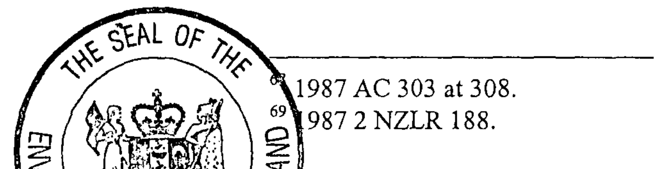
rightly conceded by the Crown in the **Maori Council** case (see the report at page 658). Necessarily this requires the Court to rule in the end what is meant or called for by that Act by the phase "the principles of the Treaty of Waitangi". This ultimate function of statutory interpretation falls on the Courts as pointed out again in **Tainui Maori Trust Board v Attorney-General** *1989 2 NZLR 513 (529).*

[257] Accordingly, we are of the view that this Court can refer to Waitangi Tribunal decisions, should it decide that this is necessary, in order to gain some assistance on the meaning of a relevant term. However, for the purpose of reaching decisions on the meaning of those terms under the RMA, we are not bound by Waitangi Tribunal decisions. Indeed, we must make our own decision by reference to the purpose and provisions of the RMA.

[258] Thirdly, we can refer to definitions of tikanga Maori terms in planning instruments prepared under the RMA. However, we consider that the Court is not bound by a definition in a policy statement or plan. Unless an Act has delegated the power to define statutory terms to the makers of the delegated legislation under it (which the RMA does not do), the meaning of any such terms should be construed from the parent Act itself by reference to ordinary principles of interpretation. We were referred by Mr Williams to ***R v Maginnis***[68] where it was held that Regulations could be a guide to the meaning of a statute only in exceptional cases; the point being that Parliament and Regulators are frequently different bodies, as is certainly the case under the RMA.

[259] Fourthly, by contrast, reference could more generally be had to other Acts forming part of an overall statutory scheme, for example the Historic Places Act 1993. In ***Huakina Development Trust v Waikato Valley Authority***[69] the High Court held that decisions under the Water and Soil Conservation Act require consideration of spiritual values and the cultural relationship of Maori people, by reference to related requirements of the Town and Country Planning Act 1977, despite the silence of the Water and Soil Conservation Act on those issues.

[260] With the assistance of the evidence and the various aids discussed above we now address the meaning of the term "waahi tapu" as it relates to this case.



68 1987 AC 303 at 308.
69 1987 2 NZLR 188.

Statutory Definitions and Definitions in Statutory Instruments Prepared under the RMA

[261] Waahi tapu is not defined in the RMA. The Historic Places Act 1993 defines waahi tapu as "a place sacred to the Maori in the traditional, spiritual, religious, ritual, or mythological sense".

[262] Waahi tapu is defined in the operative regional policy statement for Environment Waikato (October 2000) as:

> Sacred site: These are defined locally by the hapu and iwi which are the kaitiaki[70] for the waahi tapu. It typically includes burial grounds and sites of historical importance to the tribe in order to prevent particular sites from interference and desecration some tribes will refuse to disclose their exact location to outsiders.

The same definition appears in the proposed Waikato Regional Plan as amended by decisions (October 2001).

[263] The statutory definition, in both the Historic Places Act and the statutory instruments, makes reference to the word "sacred".

Dictionary Definitions

[264] The Williams Dictionary of the Maori language defines waahi tapu as:

> Part, portion, place, locality.

Tapu is defined as:

> Under religious or superstitious restriction; a condition affecting persons, places and things, and arising from numerable causes. Anyone violating tapu contracted a hara, and was certain to be overtaken by a clamity.

Or alternatively, as simply:

> Sacred

[265] The Reid Dictionary of Modern Maori defines waahi as:

> Place, little (before noun) area.

Tapu is defined as:

> Sacred, forbidden, confidential, taboo.

[70] Guardian, Steward (Operative Waikato Regional Policy Statement October 2000).

Waahi tapu is defined as:

> Cemetery, reserved ground.

[266] The dictionary definitions emphasise both the religious and the spatial dimensions of waahi tapu.

Waitangi Tribunal

[267] Mr Williams advised us that from extensive research most Waitangi Tribunal decisions do not set out any detailed discussion on the meaning of waahi tapu, either because it is self-evident, or not an issue. He did refer us to the 1992 Teroroa Report which generally discusses waahi tapu. At page 227 the Tribunal said:

> For Maori, waahi tapu like taonga is an "umbrella" that applies not only to urupa but other places that are set apart both permanently and temporarily. These include places associated in some way with birth and death, with chiefly persons and with traditional canoe landing and building places. Temporary tapu are usually imposed and are removed on hunting and fishing grounds or cultivation to confirm and protect the resource. They also include places associated with particular tepuna and events associated with them, set in order by whakapapa.

[268] Again, the discussion focuses on actual places rather than overlaying entire regions. As Mr Williams pointed out, themes emerging from the various sources mentioned so far, include a requirement of spiritual or religious significance, to the effect that (as closely as we can understand it) a site be sacred. The word "sacred" appears in the Historic Places Act, the Regional Policy Statement and the dictionary definitions. All of the definitions also have a geographical element, referring to "sites" or "locality" or "places", rather than broad general areas.

Case Law Under RMA

[269] In ***Land, Air, Water Association*** it was alleged that the landfill site had significant cultural and historical values. The term "waahi tapu" was the subject of judicial consideration including by reference to the resources just cited. Conflicting expert evidence was heard, but ultimately the Court accepted Mr Mikaere's [71] "narrower but more precise" definition of waahi tapu over a "broad and almost fluid

[71] Mr Mikaere is an environmental consultant with responsibility for assisting in consultation with Maori on environmental and cultural issues. He has had 25 years experience in human resource management in both the private and public sector. He is an historian who has published widely in 19th century race relations in New Zealand and Maori history. He has had extensive experience on matters pertaining to the concerns and grievances of Maori before the Waitangi Tribunal.

definition" proffered by a witness for the tangata whenua representatives. Mr Mikaere restricted waahi tapu to places of "high spiritual and religious danger" such as urupa or burial grounds and ceremonial or spiritual sites. Conversely he stated, old pa sites, fortifications, earthworks, cultivations and such like, can not be waahi tapu, because they are associated with secular rather than religious activities.

[270] He also emphasised the spatial element. The concept was, he said geographically circumscribed or limited to "a specific place – usually very small". The rationale behind this, as explained by Mr Mikaere, is pragmatic. To accord large areas of land waahi tapu status would have been too restrictive in daily life, given the very severe cultural restrictions that applied to such places.

[271] A similar approach was taken in ***Te Kupenga O Ngati Hako Incorporated v Hauraki District Council***[72]. The Court found that the various ancestral activities which were relied upon as creating waahi tapu status of the area at issue did not "relate to mortality or otherwise to matters of a religious kind"[73], but rather were of a secular nature. This did not support the existence of waahi tapu. The Court stated that places with a purely secular association for Maori may nonetheless be "ancestral lands" within the meaning of the RMA.

[272] In ***Bay of Plenty Speedway Association Inc. v Tauranga District Council***[74] a plan to establish a speedway facility was objected to by some local Maori, given its proximity to a particular ridge, being the site of a former pa where a significant historical battle was said to have occurred. The speedway proposal did not specifically include this ridge. The Maori claimed that the general area should be given waahi tapu recognition. The Court declined to recognise this enlarged waahi tapu area as it was not convinced that the proposed site had the same cultural and spiritual significance as the ridge.

[273] Again Mr Williams pointed out that these decisions reflect the other sources referred to earlier. They demonstrate that waahi tapu status is limited to areas that have a religious or spiritual dimension. Moreover, waahi tapu is generally confined to small and precise sites rather than enlarged areas.

[72] Environment Court Decision No. A10/2001.
[73] Page 27.
[74] Environment Court Decision No. A152/99.

The Evidence in this Case

[274] In terms of a definition of waahi tapu, Mr Mikaere's evidence reflected what he said in ***Land, Air, Water Association***. He stated that burial sites would qualify as waahi tapu, as would other sites, such as the birth place of a founding ancestor, or where there had been some significant historical event. Mr Mikaere stated[75]:

> The point being that waahi tapu are very small specified places.

Mr Rima Herbet, the Manager of the Ngati Naho Co-operative Society Limited, gave evidence. He defined waahi tapu:[76]

> ...as physical features or phenomena, either on land or water, which have spiritual, traditional, historical and cultural significance to our people. Waahi tapu as conceived by Maori may originate from pre-contact history or from post-European history through to the present day. The waahi tapu identified up until recent times by us included cultivation areas and Maori earthworks and burial areas which are all of long-standing importance to the Maori people of our area.
>
> ...
>
> I must stress here that waahi tapu includes any area discovered that may reveal a meaningful linkage with the past for Ngati Naho.

[275] Mr Herbert's definition is much wider than the more confined definition of Mr Mikaere. Indeed Mr Herbert, during the course of cross-examination, widened his definition even further. He had this to say:

- That it involves *"the mere fact we were there"*[77];and
- Waahi tapu is *"every where in terms of Maori"*[78]; and
- At some stage the entire rohe would have been waahi tapu[79]. This statement was affirmed by Mr Wara.[80]

[276] Both Mr Wara and Mr Herbet rejected the narrower definition of Mr Mikaere during cross-examination. The reason given for rejecting Mr Mikaere's interpretation was that he was not from the area.[81]

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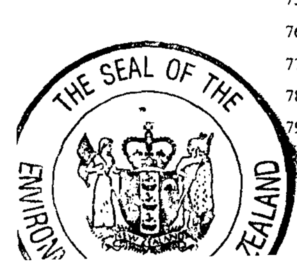
[75] Mikaere, XXM, page 265 transcript.
[76] Herbet, EiC, page 5-6.
[77] Herbet, XXM, page 518 transcript.
[78] Herbert, XXM, page 524.transcript.
[79] Herbet, XXM, page 535 transcript
[80] Wara, XXM, page 620 transcript.
[81] See transcript, pages 529-530.



Determination on Meaning of Waahi Tapu

[277] We have already referred to Mr Mikaere's impressive qualifications. His evidence reflected very much the dictionary definitions of the words and the comments made by the Waitangi Tribunal referred to above. We accept Mr Mikaere's definition.

Is the Site of the Proposed Quarry Waahi Tapu?

[278] Because of our finding on the meaning of waahi tapu it is self evident that we must find that the proposed site cannot be waahi tapu merely because it is within the rohe of Ngati Naho as was suggested both by Mr Wara and Mr Herbert. However, Mr Herbert in his evidence-in-chief, on pages 6 and 7, also emphasised the importance of the pa site and burial sites in the Pokeno hill area in relation to waahi tapu. We look at each of those matters in turn.

Te Wheoro's Pa/Signal Station

[279] Dr Clough told us that as part of his background research for his archaeological assessment of the site he researched historical records. He discovered that in or about July 1863 Wiremu Te Wheoro and his supporters built a strategic pa and signal station somewhere near the site. As we have already said, Te Wheoro was the Chief of the Ngati Naho. Although he was related to the Maori King Te Wheoro, he was supportive of the government.

[280] The exact location of the pa/signal station is uncertain. An approximate location of the pa has been given as adjacent to the east boundary of Havelock town[82] which would tend to indicate that it was situated outside the proposed quarry site. However, a local historian, Mr Don Reynolds, identified the pa as being on a high knoll some 500 metres to the north-west of Havelock town. Given the uncertainty as to the location, as opposed to its existence, further investigation was carried out by Dr Clough, one of a team of three archaeologists. The site, as defined by aerial plan overlays, was surveyed by visual inspection along transects, and tested with spade and steel probe. Soil profiles of earlier modifications were examined and the results recorded. Particular attention was paid to high knolls and ridgelines because of the historic reference to the pa/signal station.

[82] Spring-Rice 1989.

[281] The survey carried out in October 1996 revealed no direct evidence of Te Wheoro's pa/signal station. Dr Clough told us that the pa/signal station was a short-lived event, established temporarily and therefore may not have had distinguishing features, such as terraces or ditches, which would leave their physical inference. However there appeared to be two main possible locations for the pa signal station:

- One where the current telecom mast is situated. While within the quarry boundary this knoll is outside the area to be quarried and therefore will not be impacted by the quarrying operations; and

- A slightly higher knoll to the west, but outside of the quarry site.

[282] In 1998 at the request of tangata whenua, Winstone commissioned another archaeologist, Mr N Lawlor, to carry out a further survey and a peer review of the report by Dr Clough. That survey and review concurred with Dr Clough's report, in finding no direct evidence of archaeological remains suggesting that the quarry proposal would adversely affect a historical place.

[283] Speaking on behalf of Ngati Naho, Mr Herbert acknowledged that the information contained in the Clough/Tarlton and the Lawlor Reports provided Ngati Naho *"with new and critical information in our ongoing quest to discover our past and to undertake what our responsibilities and boundaries are…"*.[83] He then went on to say:

> …I would assess that the pa (which would also have incorporated a signal station) would most likely have been located on the area shown on the map (Winstone's) by the more south easterly mark… . … I assess that there would have also been another signal station on the other high point… .

[284] As we understand the evidence, Mr Herbert, in referring to the southeasterly mark, was referring to the knoll upon which now stands the telecom mast. As we have already indicated this knoll is not going to be affected by the quarrying operations. As to the other high point, we understand him to be referring to the more westerly point, which is outside the quarry area.

[285] A further study by Mr Clough revealed a map of the area prepared in 1862 by Captain Greaves. He overlaid this map on the modern property boundaries and those of the proposed quarry. As a result, it was his view, that this map throws considerable doubt on either the telecom knoll or the more westerly high point being

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83 Herbet, EiC, paragraph 3.

THE SEAL OF THE ENVIRO… …LAND

the location of Te Wheoro's signal station/pa, as originally determined in his 1996 Report. The overlay indicates that both points were in dense bush at the time (1862) and, as such, neither would have had views of both the Queens Redoubt and the river. It also shows three other possible high points, which were clear of bush and would have been excellent candidates for the signal station, as they would have all had good visibility of the Redoubt and the river. All three are located off the Winstone property to the south.

[286] Dr Clough concluded:

> Without any physical remains we are bound to conclude that there is unlikely to be any impact on archaeological values and that there are no archaeological reasons why the proposed quarrying should not proceed. Nevertheless, out of caution, the type of protocols to apply in the event of discovery of any such remains (proposed conditions 22 and 23) can ensure that any such values are protected.

[287] We agree with the conclusion of Dr Clough. We find that the pa/signal station is more than likely to have been situated outside the boundary of the proposed quarry site. If it was situated within the quarry site, it was more than likely to have been situated where the telecom mast is now erected. That being the case it would be unaffected by the quarry operations. We are satisfied that proposed conditions 22, 23 and 23A ensure protection to those tangata whenua with kaitiaki over the area.

Possible Burial Grounds

[288] During his investigations Dr Clough discovered anecdotal evidence of burial remains having been unearthed in the course of farming or because of erosion. Koiwi were found below a former trig station on the southward steep scarp, as well as in the area north of the proposed quarry site. During Dr Clough's survey the general area where these remains have been located was pointed out by the local historian Mr Don Reynolds. This was located within 500 metres of the proposed quarry on steep slopes to the south-west of the area and to the west of Havelock town. Although these slopes are close to the proposed quarry pit they were not surveyed, as this area will not be impacted by quarrying operations. We are satisfied that the type of protocols to apply in the event of discovery of any remains (conditions 22, 23 and 23A) can ensure that any tangata values are protected.

Historical Heritage Sites – Section 7(e)

Introduction

[289] The Resource Management Act and Historic Places Act 1993 both recognise the importance of cultural, heritage and historic resources. In particular, section 7(e) of the RMA provides for the recognition and protection of the heritage values of sites, buildings, places or areas.

[290] In giving effect to its duties under the RMA the Council, in Part 8 of the District Plan, outlines a background to the cultural heritage issues in the Franklin District. It covers sites, places, buildings, objects, and features of cultural and historical significance, that are of central importance to the identity of the communities and individuals in Franklin District. The plan incorporates a number of objectives aimed at safeguarding heritage features, and at providing and maintaining historical records of information.

[291] The principal protection of significant features and items is afforded by the scheduling of cultural heritage resources under the Protection Schedule – 8A of the Plan – which lists protected historic buildings, structures, trees and areas. There are no features or items listed in Schedule 8A within the application site. However, Dr Nigel Prickett (Chairman of the Queens Redoubt Trust) gave evidence regarding the effect of the quarry on the archaeological and historical site of Queens Redoubt, its associated encampments and old Great South Road.

[292] Queens Redoubt was a European fortification built in 1862 by the military troops under the authority of General Cameron. The Redoubt played a strategic role in the Waikato land wars, as a field headquarters heavily garrisoned with imperial troops. By 1867 the Redoubt had been abandoned and began to deteriorate. Today many houses have been built on the land where the Redoubt once stood, and there are few visible remains of the Redoubt. Nevertheless, an archaeological investigation of the Redoubt[84] uncovered valuable information regarding the defences and many items relating to the period of its occupation. This fortification had the capacity to hold about 450 troops and was one of the biggest British army Redoubts of the New Zealand campaigns. Initially, its purpose was to protect the road builders. However, it is historically important to New Zealand for its function as a main base for the British invasion of the Waikato.

[84] Prickett 1994: 81-86.

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[293] In particular, Dr Prickett expressed concern over aspects of the Winstone proposal which might impact on the educational and visitor potential of the Redoubt. In particular he was concerned about visitor access, noise and dust. We are satisfied from the evidence that there will be no physical impact on this historic archaeological site.

[294] Concerning associated encampments, the evidence established that the Leathem Access road crosses through the location of a former British military camp. Dr Prickett recommended archaeological monitoring to the earthworks to ensure that any archaeological deposits are treated appropriately. The potential of encountering archaeological remains has been accepted by Winstone. Proposed condition 44 requires that the route will be surveyed prior to excavation, to ensure that no archaeological site will be impacted on, or, if that is not possible, that any effects are mitigated by archaeological recording.

[295] The remnants of the Old Coach Road, which was part of the original Great South Road, built preceding the Waikato land wars, runs through the area terminating at a landing place on the Waikato River, close to where the Mangatawhare River joins it. The route of this old metalled road can be ascertained by the use of a gum spear. Part of it traverses the proposed quarry site. The Old Coach Road has not been recorded as an archaeological site as investigations by archaeological methods would not be expected to provide significant information relating to the historical and cultural heritage of New Zealand. It is its route that is of significance and that is already known in this area. Dr Prickett recommended that the remains of the Old Great South Road be photographically and archaeologically recorded before the quarry is developed. Winstone has taken steps to ensure that this happens and it is a requirement of proposed condition 24.

Important Geological Landforms – Section 6(b)

[296] The geological significance of the quarry site was raised by the Pokeno Kaitiaki Society in the evidence of Mr Mulchers. He attached as Exhibit 3 to his evidence selected pages from a publication titled "Inventory and Maps of Important Geological Sites and the Landforms in the Waikato Region". It is edited by J A Kearney and B W Hayward and was published by the Geological Society of New Zealand in 1996.

[297] This book represents the Society's working group on the New Zealand Geo-Preservation Inventory. The quarry is to be developed in a basalt flow in the crater of Bluff Road Hill which is one of about 80 volcanic centres in the Franklin basalt field. The inventory rates the importance of landforms and sites of other geological interest according to three levels of significance:

> A - International – site of international scientific importance;
>
> B – National – site of national scientific, educational or aesthetic importance; and
>
> C. – Regional – site of regional scientific, educational or aesthetic importance.

Bluff Road is rated C.

[298] Mr Alan Happy the Resource and Environment Manager with Winstone addressed this issue. His qualifications include a Master of Science Degree with Honours in Geology. He is also a Fellow of the Institute of Quarrying and a Member of the Australasian Institute of Mining and Methodology. He told us that he was familiar with the reference cited by Mr Mulchers. He told us that this work was a regional study for a Master of Science thesis and therefore did not examine the Bluff Road Volcanic Centre in detail. He told us that geological investigation work, that has since been carried out by Winstone, under his direction was detailed, involving a full range of techniques, including drilling, geophysical methods and surface mapping. He said that it resulted in a very accurate characterisation and definition of the volcanic centre. He then said[85]:

> In my opinion, this explains the fact that the "Bluff Road Volcanic Cone" is located in the inventory in a position which is on the southwestern margin of the Bluff Road Volcanic Centre as defined by the Winstone work. It also suggests that the geological character of this volcanic centre was not well known when it was listed in the inventory and that it was listed solely on the basis of being a volcanic centre.

[299] Mr Happy then went on to tell us that the Winstone quarry proposal, which mostly involve excavation of the basalt in the crater or mast, will not significantly affect the existing landforms or surface exposures which comprise the geo-preservation values. It was his opinion that it will enhance the scientific interest and value of this volcanic centre by extensively exposing the basalt for viewing within the crater.

[85] Happy, EiC, paragraph 80.

[300] Ms Crampton's evidence echoed that of Mr Happy's in part when she said that it was her belief that the term "regional significance" is being used without the rigorous scrutiny involved in such classifications under a district plan.

[301] It was her opinion that the rating of the Bluff Road site in the inventory recognises geological interest but the "regional significance" classification is lower than that for sites which are afforded protection under the district plan. Part 5 of the plan includes Schedule 5B of "Important Geological Sites and Landforms Listed in the New Zealand Geo-Preservation Inventory". Six of the sites listed in the Schedule 5B are volcanic site centres. The proposed quarry site is not listed in the district plan schedule of earth science features. It is therefore not subject to any special district plan provisions for the conservation of outstanding natural features and has not been regarded in the district plan as an "outstanding natural feature and landscape" to which section 6(b) of the RMA applies.

[302] We concur with Ms Crampton's evaluation. We conclude that Bluff Road Hill is not an outstanding natural feature. Even if it is, as Ms Crampton says, the development is sensitive to the geological values of the landform, in that the outer tuff ring and the scoria cone are to be retained.

Exercise of Discretion

[303] We have already identified, and discussed in some detail matters, under Part II and section 104(1), which bear directly upon the consideration of this appeal. The exercise of our discretion under section 105(1)(c) should properly relate to the exercise of the single purpose of the Act under section 5. This requires a balancing of the various factors raised.

[304] So far, in this decision, we have concentrated on the possible potential negative effects, largely because of the extent to which they were emphasised and addressed in the evidence and submissions. However, we are conscious of the positive effects that will flow from the operation of the quarry. These will include: positive economic benefits both locally and regionally; and the supply of a significant important resource both regionally and nationally – a resource that Mr Happy told us is becoming increasingly difficult to find prospective quarrying locations for.

THE SEAL OF THE

[305] We are mindful of the potential for quarries, operated in an inappropriate manner, to create serious adverse effects. This potential is recognised in the statutory instruments – hence the provision of strict criteria. We are confident that the detailed and exacting proposed conditions of consent will adequately protect the environment from harm. We accordingly exercise our discretion and dismiss the appeals save for the amendments made to the draft conditions of consent.

Determination

[306] The appeals against the landuse consent granted by the District Council are dismissed save for the amendment of conditions and the consent is granted subject to the conditions contained in Appendix 1 and as amended by paragraphs [40] and [246] of this decision.

[307] The appeals against the Regional Council consents are dismissed and the consents are granted subject to the conditions set out in Appendix 2.

[308] Because of the complexity of the set of conditions leave is reserved for the Councils to apply to the Court, on 14 days notice, for them to be amended in the event that we have overlooked any matter.

[309] Costs are reserved. However, it is our tentative view that costs should lie where they fall.

DATED at **AUCKLAND** this 17th day of April 2002.

For the Court:

R Gordon Whiting
Environment Judge

THE SEAL OF THE ENVIRO... ...ZEALAND

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2011-485-817
[2022] NZHC 2644

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER OF	an application for an order recognising Customary Marine Title and Protected Customary Rights
BY	the late Claude Augustin Edwards (deceased), Adrian Edwards and others on behalf of Te Whakatōhea
BY	Dean Flavell on behalf of Hiwarau C, Turangapikitoi Waiōtahe and Ōhiwa of Whakatōhea (CIV-2017-485-375)
BY	Larry Delamere on behalf of Pākōwhai Hapū (CIV-2017-485-264), and Te Whānau-a-Apanui (CIV-2017-485-278)
BY	Tracy Francis Hillier on behalf of Ngāi Tamahaua Hapū (CIV-2017-485-262), and Te Hapū Titoko o Ngāi Tama (CIV-2017-485-377)
BY	Muriwai Maggie Jones on behalf of Ngāi Tai (CIV-2017-485-270), and Muriwai Maggie Jones and Te Aururangi Davis on behalf of Ririwhenua Hapū (CIV-2017-485-272)
BY	Te Ūpokorehe Treaty Claims Trust and others on behalf of Te Ūpokorehe (CIV-2017-485-201)
BY	Christina Davis on behalf of Ngāti Muriwai Hapū (CIV-2017-485-269)
BY	Pita Tori Biddle and Karen Stefanie Mokomoko on behalf of Te Uri o

Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)

BY Te Rua Rakuraku on behalf of Ngāti Ira o Waiōweka (CIV-2017-485-299)

BY John Hata, Te Ringahuia Hata and Antoinette Hata on behalf of Ngāti Patumoana (CIV-2017-485-253)

BY Whakatōhea Māori Trust Board on behalf of Whakatōhea Hapū (CIV-2017-485-292)

Hearing: 14-25 February 2022
Further submissions received on:
4 March (x2), 8 March (x2), 21 March 2022,
30 March, 31 March (x2), and 8 July 2022

Counsel: B Cunningham for:
Te Whakatōhea (CIV-2011-485-817)
Hiwarau C, Turangapikitoi Waiōtahe and Ōhiwa of Whakatōhea (CIV-2017-485-375)
Pākōwhai Hapū (CIV-2017-485-264)
Te Whānau-a-Apanui Hapū (CIV-2017-485-278)
C Panoho-Navaja for:
Ngāi Tamahaua Hapū (CIV-2017-485-262)
Te Hapū Titoko o Ngāi Tama (CIV-2017-485-377)
E Rongo for:
Ngāi Tai (CIV-2017-485-270)
Ririwhenua Hapū (CIV-2017-485-272)
B Lyall for Te Ūpokorehe Treaty Claims Trust (CIV-2017-485-201)
M Sharp for Ngāti Muriwai Hapū (CIV-2017-485-269)
K Ketu and C Ratapu for Te Uri o Whakatōhea Rangatira Mokomoko (CIV-2017-485-355)
A Sykes for Ngāti Ira o Waiōweka (CIV-2017-485-299)
G Davidson for Ngāti Patumoana (CIV-2017-485-253)
J Pou for Whakatōhea Māori Trust Board (CIV-2017-485-292)
K Feint KC for Ngāti Ruatakenga

Interested Parties:
H Irwin-Easthope and K Tarawhiti for Te Rūnanga o Ngāti Awa (CIV-2017-485-196)
N Coates for Te Rūnanga o te Whānau-a-Apanui (CIV-2017-485-318)
C Leauga, D Stone and D Lafaele for Te Whānau a Harawaka (CIV-2017-485-238)
R Roff, R Budd and S Gwynn for Attorney-General
A Green and M Jones for Whakatāne District Council

T Reweti for Ōpōtiki District Council
R M Boyte for Bay of Plenty Regional Council
B Scott for Seafood Industry Representatives

Judgment: 13 October 2022

JUDGMENT (NO. 7) OF CHURCHMAN J
[Re Edwards (Whakatōhea Stage Two)]

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L – "Harvest of red ochre at Te Oneone" [533]

N – "Culling of black backed gull" [534]

O – "Customary harvest and use of natural and physical resources where they grow or are found within the PCR area" [536]

P – "Customary harvest of the following resources from within application area …" [537]

Ngāti Ruatakenga **[540]**

PART IV

CONCLUSION AND SUMMARY **[543]**

APPENDIX A

PART I

Introduction

[1] In a judgment dated 7 May 2021 in relation to the Stage One hearing, I granted recognition orders to several applicants finding that they had met the tests for Customary Marine Title (CMT) or Protected Customary Rights (PCR) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).[1]

[2] In this decision following the Stage Two hearing, the focus of the Court is on s 109 of the Act. Section 109(1) provides that an applicant group in whose favour the Court grants recognition by way of PCR or CMT must submit a draft order for approval by the Registrar or the Court.

[3] Section 109(2) is prescriptive as to what a recognition order must specify:

> (a) the particular area of the common marine and coastal area to which the order applies; and
>
> (b) the group to which the order applies; and
>
> (c) the name of the holder of the order; and
>
> (d) contact details for the group and for the holder.

[4] Section 109(3) requires additional information for a PCR:

> (a) a description of the right, including any limitations on the scale, extent, or frequency of the exercise of the right; and
>
> (b) a diagram or map that is sufficient to identify the area.

[5] Section 109(4) sets out important mandatory requirements for what an order for CMT must include:

> (a) a survey plan that sets out the extent of the customary marine title area, to a standard of survey determined for the purpose by the Surveyor-General; and
>
> (b) a description of the customary marine title area; and
>
> (c) any prohibition or restriction that is to apply to a wāhi tapu area within the customary marine title area.

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1 *Re Edwards (No. 2)* [2021] NZHC 1025.

[6] Despite the clarity with which s 109 sets out the matters that the Court must consider in Stage Two proceedings and the limited focus of the Stage Two hearing, many of the applicants made submissions and called evidence that went far beyond the limited matters that can be addressed when considering whether the requirements of s 109 have been met. Some submissions treated the hearing as if it were a type of appeal and tried to convince the Court that aspects of the Stage One decision should be changed; others forgot that the Court's jurisdiction stops at the landward limit of the takutai moana and sought protection for wāhi tapu that were clearly inland of mean high-water springs (MHWS) or for PCR rights that related to activities that occurred somewhere other than the takutai moana. Others sought orders in respect of matters that had not been specified in their original applications or in the orders granted and others invited the Court to make declarations that had nothing to do with s 109 matters at all.

[7] None of the applicant groups who had obtained CMT orders filed survey plans which complied with the requirements of the Act. A number of the groups who obtained PCR orders also did not file a diagram or map as required by s 109(3)(b).

[8] All of this unnecessarily complicated the hearing. The absence of documentation that is required to be filed necessitates that this decision has to be an interim one. The Court acknowledges that, because this is the first case where many of the issues set out in s 109 have been considered and because of the technical difficulties experienced in the preparation of survey plans, it is appropriate to give the successful applicants the opportunity to supplement their evidence in accordance with the Court's directions. However, applicants in future cases where the same issues arise should not assume that the Court will follow the same course.

The parties

Successful applicants at Stage One

[9] There were three different geographic areas where specified applicants met the tests set out in s 58 of the Act for CMT:

(a) CMT 1: a jointly held order for Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Ruatakenga, Ngāi Tamahaua, Ngāti Ngāhere and Te Ūpokorehe from Maraetōtara in the west to Tarakeha in the east and out to the 12 nautical mile limit;

(b) CMT 2: in relation to the western part of Ōhiwa Harbour, a jointly held CMT between the six Whakatōhea hapū and Ngāti Awa; and

(c) CMT 3: between Tarakeha and Te Rangi and out to the 12 nautical mile limit, an order of CMT for Ngāi Tai.

[10] A number of the applicants were granted recognition orders by way of PCR, pursuant to s 51 of the Act, these were:

(a) Ngāti Muriwai;

(b) Ngāti Ira o Waiōweka;

(c) Te Uri o Whakatōhea Rangatira Mokomoko;

(d) Ngāi Tamahaua;

(e) Te Ūpokorehe; and

(f) Ngāti Ruatakenga.

[11] In respect of the proposed PCR orders, I invited the successful applicants to prepare draft recognition orders, and engage in kōrero with other parties, including those who were successful in establishing that they met the tests for CMT.[2] Not all of the successful applicants took up that invitation.

[12] After the hearing, Crown Regional Holdings Limited made an application to participate as an interested party. Effectively, this was so that it could be an interested

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2 At [670].

party in the appeals. The basis of this application was that it was now the holder of the resource consents for the Ōpōtiki Harbour Development Project, such consents having been transferred to them by the Ōpōtiki District Council. It now has sole responsibility for the construction of the project, and holds it as an asset. It did not seek leave to file any additional evidence or submissions, given that had already been done on its behalf by the Ōpōtiki District Council. In the absence of any opposition, that application was granted on 24 May 2022.[3]

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[3] *Re Edwards (Te Whakatōhea) No. 6* [2022] NZHC 1160.

PART II

Legal issues

[13] Before addressing the specific applications, I need to make some comments of general application in respect of legal issues that have arisen. I note also that throughout this judgment I use the terms "common marine and coastal area" (CMCA), and "takutai moana" interchangeably.

Effect of application of the Act on tikanga

[14] In order to correct a misapprehension that seems to run through some submissions, I note that the Court does not determine tikanga, that is not its role, that is a matter for iwi and hapū, and the proper authorities on tikanga.[4] It is the Court's role to consider the evidence of tikanga submitted by the parties to assess whether it meets the statutory tests, where tikanga is a matter that the Court is required to have regard to.

[15] Nothing in this decision purports to revoke or amend existing rights exercised in accordance with tikanga. The purpose of this decision is only to give legal effect to the recognition orders granted by the Court in the terms that those rights are recognised by the Act.

Wāhi tapu and maps

[16] At the Stage Two hearing, many of the claims for recognition of wāhi tapu related to areas that were not in the common marine and coastal area as described in s 9 of the Act. The Court has no jurisdiction under the Act outside of the takutai moana.

[17] This Stage Two decision involves the necessity to draw lines on maps. In the Stage One decision the difficulty of synthesising tikanga with western proprietorial concepts, including the drawing of lines on maps to delineate boundaries was

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[4] *Re Edwards (No. 2)*, above n 1, at [272]; see also *Ellis v R* [2022] NZSC 114 at [181] per Winkelmann CJ, at [102]-[122] per Glazebrook J, and at [270]-[272] per Williams J.

highlighted.[5] However, as the Act stipulates that recognition orders in terms of those rights that the Court is authorised to grant, must be depicted on maps, the Court must attempt, as best it can, to do that, notwithstanding the inevitable tension with tikanga.

[18] Perhaps the greatest challenge in this case is to identify the boundaries of wāhi tapu in a way that meets the need for certainty as to the location of each individual wāhi tapu. The mechanisms in the Act governing sanctions for breaching wāhi tapu restrictions need to be capable of actually being enforced. This challenge includes taking into account the flexible nature of the concept of tapu, including the fact that, in some instances, tapu may exist at some times and not others and that the intensity of the tapu and the nature of any restrictions that might be required to protect it, decrease the further away one gets from the source of the tapu.[6]

Statutory context

[19] The statutory purposes, legislative history, and legal concepts relevant to the Act were set out in the Stage One judgment from paragraphs [22]-[171]. However, for present purposes, some elaboration is required.

Substantial interruption

[20] In the Stage One judgment, the Court held that:[7]

(a) while the physical activities authorised by a grant of resource consent may have the practical effect of amounting to a substantial interruption to the exclusive use and occupation of part of a particular specified area, the fact that a Council has issued a resource consent pre-dating the commencement of the Act does not automatically have that effect;

(b) the parts of the Ōpōtiki Harbour Development Project that result in the issue of a certificate of title on the basis that the land involved has risen

[5] At [286]–[300].
[6] See the discussion at [106] below.
[7] *Re Edwards (No. 2)*, above n 1, at [188]-[271].

above MHWS, will no longer be in the takutai moana, and so are unable to be included in a CMT order;

(c) the parts of the Ōpōtiki Harbour Development Project that fall outside the definition of reclaimed land will need to be considered on the same basis as other third-party structures in the takutai moana; and

(d) the fact that third parties undertake both commercial and recreational fishing activities in the specified area does not amount to a substantial interruption of the holding of the specified area in accordance with tikanga.

[21] The Court recognised in the Stage One decision and in *Re Ngāti Pāhauwera*,[8] that the presence of some structures could amount to substantial interruption on account of their interference with the applicant group's ability to undertake customary activities in the takutai moana over which the structure sits, or within its immediate surrounds. This is ultimately a question of fact.[9] It will depend on the nature, scale and intensity of the structure or activity, and its impact on the ability of applicants to show the requisite standards have been met.[10] There is no presumption that third party structures substantially interrupt customary rights in a specified area.[11]

[22] For example, the Pan Pac Pipeline in the Whirinaki area was held to amount to a substantial interruption in *Re Ngāti Pāhauwera* because the factual evidence demonstrated that there had been significantly reduced use of the area from the 1980s onwards, due to the effect of pollution on the kaimoana in that area.[12] What was important in that determination, was what the evidence established in respect of the actual occupation and use of the area in accordance with tikanga.

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8 *Re Edwards (No. 2)*, above n 1, at [252]; *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [235].
9 *Ngāti Pāhauwera*, above n 8, at [232].
10 *Re Edwards (No. 2)*, above n 1, at [230].
11 *Ngāti Pāhauwera*, above n 8, at [235].
12 At [232].

Regional Authorities' infrastructure

[23] For the reasons detailed below, I am satisfied that those parts of the Ōpōtiki Harbour Development Project that do not fall within the definition of reclaimed land have substantially interrupted the applicant's holding of the relevant area in accordance with tikanga, and that this area should be excluded from CMT 1.

[24] The Ōpōtiki Harbour Development Project was described in the opening submissions of counsel for the Ōpōtiki District Council as:

> [A] significant regional infrastructure project to redevelop the Ōpōtiki harbour into a fully functional deep-water harbour, capable of supporting a large aquaculture industry. Supported by more than $100 million dollars in central and regional government funding, the Harbour Project is the most significant collection of infrastructure occupying the CMCA area that is the subject of these proceedings. Work on the Harbour Project is now well advanced and on track for completion by mid-2023.

[25] In order to complete the project, the relevant resource consents authorise:

(a) erection of 400m-500m training walls (200m of which are located in the CMCA), dredging and depositing of more than 50,000m³ of foreshore and seabed around the Waiōweka River mouth (Consent 65563);

(b) vegetation clearance, earthworks of up to 10,000m³, constructing two 5000m² construction compounds, stockpiling construction materials, cutting through an existing sandspit to create a new harbour entrance, earthworks associated with the disposal of up to 450,000m³ of dredged material to land; and associated discharge of sediment-laden water (Consents 65565, 65569);

(c) activities associated with constructing the harbour entrance and closing the Waiōweka River mouth including the erection, maintenance, and removal of temporary and permanent structures in, on, under and over the foreshore and seabed, removal of material, discharge of sediment and water, disturbance of the foreshore and seabed, taking and diversion of coastal water (Consent 65566);

(d) activities associated with dredging 50,000m³ of material per year from the entrance channel, temporary structures in the CMCA, discharge to the CMCA, disturbance of the foreshore and seabed, taking of coastal water and depositing material in the CMCA (Consent 65567); and

(e) maintenance dredging and earthworks, as well as the associated discharge of contaminated water (Consent 65568).

[26] The general public have been excluded from the area since mid-2021, and this exclusion will continue until late 2023. This is necessary for the project's safe construction. The evidence shows that the project extends over 500 metres into the takutai moana past the mouth of the Waiōweka River and MHWS. The offshore dredging area is, at its widest, over a kilometre long and includes two training walls 200 metres in length.

[27] Regular temporary exclusions will be necessary for the ongoing maintenance of the harbour works following completion. The ongoing maintenance of the project involves dredging of materials, active management of accretion and erosion, and maintenance work for the training walls. This will involve heavy machinery accessing both sides of the harbour to either remove or add sand and/or other materials. These activities will continue for as long as the harbour exists.

[28] I have therefore concluded that the Harbour Development Project has substantially interrupted the applicants' holding of the relevant area in accordance with tikanga, because the project is fundamentally changing the landscape and use of this part of the takutai moana on a substantial scale, and has a major impact on the use and occupation of this area. While Te Whakatōhea have supported the project, the reality is that it is of a nature so as to, during construction and its ongoing operation, remove the ability of the applicant groups to exclusively use and occupy the area in accordance with tikanga.

[29] The goal of the project is to allow larger boats access to Ōpōtiki Harbour, so as to allow for a fully functioning deep-water port, through which the aquaculture industry is expected to grow. The area over which the consent holder will be legally

obliged to ensure the safe operation of the port under the Health and Safety at Work Act 2015, is large enough to disrupt the exercise of customary interests.

[30] What is presently lacking and will need to be provided so that one accurate survey plan can be drawn up for CMT 1, is a map accurately depicting the boundaries of the Ōpōtiki Harbour Development Project.

[31] In his second affidavit dated 1 February 2022, Gerard McCormack, on behalf of Ōpōtiki District Council, included as exhibit "B" an aerial photograph of the area in respect of which consents had been granted. That may provide the starting point for an accurate map.

[32] At [15] of the same affidavit, Mr McCormack noted full copies of the resource consent documentation could be obtained from the Bay of Plenty Regional Council website using their mapping software. That may also assist in creating an accurate map.

[33] I therefore direct that Ōpōtiki District Council/Crown Regional Holdings Ltd provide to the applicants an accurate map of the area of the Ōpōtiki Harbour Redevelopment Project of a sufficient standard to be able to be incorporated into the survey plan required by s 109(4)(a).

Other areas of "substantial interruption"

[34] I do not include as substantial interruptions Council-owned assets that enhance the ability of people to use the takutai moana for recreational activities or those things that have a maritime safety function such as navigation buoys or safety signage or structures with the purpose of environmental protection or monitoring. The relevant regional and local authorities have an established network of a variety of infrastructure within their boundaries. For example, the Ōpōtiki District Council described its infrastructure as including:[13]

> …a reticulated network and land disposal area for [wastewater], stormwater collection, treatment and disposal system, sea walls protecting property, jetties and boat ramps, and roads, bridges, and cycleways.

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13 Affidavit of Aileen Lawrie, 2 February 2022, at [11].

[35] The Ōhiwa Consents RM16-0129, 40268, 66262, and 65904 have not substantially interrupted the holding by the applicants either of the CMT 1 or CMT 2 areas in accordance with tikanga. Nor has Consent RM20-0615, for the construction of cycleway bridges from Ōpōtiki to the Waiōtahe River. Nor have any of the activities or consents associated with stormwater control, port assets, harbour assets or transportation put in evidence by the Whakatāne District Council had the effect of substantially interrupting the use and occupation in accordance with tikanga of the application areas. As individual assets, they have not substantially interrupted the exclusive use and occupation of the takutai moana by the applicants. This conclusion applies as well to the consents covered in the evidence of the Bay of Plenty Regional Council of their assets in the Waiōweka River and the Ōhiwa Harbour.

[36] If anything, the activities and structures associated with these consents can be seen to enhance the use of the relevant area by the applicants and others, rather than as substantially interrupting the exercise of customary rights. For example, the structures in and around the banks of the Maraetōtara Stream enhance and protect the use of the environment, rather than inhibit it. This is consistent with the views of the Court at Stage One. No evidence was submitted to the Court that established that in a wholesale sense, infrastructure owned and controlled by the relevant regional authorities (with the exception of the Harbour Project due to its scale and the ongoing aspect of exclusion) substantially interrupted the use and occupation of the applicant groups in accordance with tikanga. I include the wharf at Port Ōhope in this group of structures.

[37] Under Consent 65984, there is an outfall pipe which carries treated effluent from the Ōhope Wastewater Treatment Plant, into the moana, within the area of CMT 1. The consent was granted by the Bay of Plenty Regional Council to the Whakatāne District Council in November 2016, but the outfall has been used since 1974 and currently services all of Ōhope.

[38] At any point the discharge cannot exceed 1500m^3 per day. The point of discharge is less than one kilometre directly out from Ōhope Beach MHWS (approximately 550m), at a point between Maraetōtara and the entrance to Ōhiwa Harbour, perpendicular with the coastline. The area occupied in the ocean by the

outfall structure is not more than five metres in width, and the consent expires in September 2035.

[39] The description of the outfall site in the application for the consent provides that "there are no rock outcrops or reef habitats within the vicinity", and that both Te Ūpokorehe and Ngāti Awa were consulted in respect of the proposal. The application also noted that there remained opposition to the outfall, in that it affects Ngāti Awa mahinga mātaitai. Commitments were made by local authorities during the application for the current consent period, to move towards a land-based disposal system so as to reduce the adverse impact of discharge on culturally significant areas in the moana. Also, the:

> discharge is a continuation of the existing system which has been monitored for at least ten years. In this time there have been no adverse effects identified in relation to the quality of the environment. The commitment to improvements to the treatment system will produce a higher quality effluent and thereby reduce impacts on the environment.

[40] In a report assessing the environmental effects of the discharge, undertaken as part of the renewal application for Resource Consent 65984 in the early 2000s, shellfish samples were collected to ascertain the effects of discharge on quality. The report states:

> These shellfish samples were gathered as per the resource consent requirements. However on a number of occasions, divers were unable to find any shellfish in the designated area, and on most occasions when shellfish were found in the area, they were small mussels growing directly on the diffuser. Often no shellfish were found, or [there was] insufficient fish to make up a representative sample. This is reflective of the open mobile sandy seabed in the area. Higher populations of shellfish are found closer in shore.

[41] Notwithstanding this, there was evidence of samples of shellfish that were unsafe for human consumption in the area near the diffuser, particularly after rainfall, contrasting with samples taken closer to the shore which were safe to eat. The evidence therefore shows that the outfall pipe has had more than a negligible effect in its immediate environmental surrounds, although there is also evidence that the effect of dairy farm outflow into the Whakatāne River and then out into the moana has had a much greater environmental impact on the nature of kaimoana in the broader area. Glenn Cooper, who gave evidence for the Whakatāne District Council, deposed that

there are no formal restrictions in place (nor have they ever been needed) around the diffuser, but that generally shellfish are not gathered in the area, although water quality had improved throughout the last 20 years.

[42] Te Ūpokorehe submitted that the outfall pipeline merely changed the nature of the use of the area, rather than totally eradicated it, so as to constitute substantial interruption. They submitted that use of an area for food gathering had been replaced with kaitiaki responsibilities of monitoring the environmental impact of the outfall. They said that tikanga evolves to adapt to changing circumstances and so the presence of an outfall pipeline without more does not constitute substantial interruption. Te Ūpokorehe sought, through this submission, to distinguish the effluent outfall pipe from the Pan Pac outfall pipe referred to in the *Ngāti Pāhauwera* decision.[14]

[43] The evidence of the interruption of the use and occupation of the area around the outfall pipeline is not as overwhelming as it was in the case involving the Pan Pac outfall pipeline. There is some evidence that the outfall pipeline has caused some kaimoana at some times, to be unfit for human consumption, and that patterns of kaimoana gathering have changed. But it cannot be said that the presence of this structure has resulted in an impact of sufficient magnitude for there to have been a substantial interruption which would result in its exclusion from the CMT area.

Unique legal status of CMCA

[44] The Act gives the common marine and coastal area a unique legal status. Section 11(2) provides that neither the Crown nor any other person owns or is capable of owning the CMCA. The Act also operates to divest any ownership interest of the Crown and every local authority but, importantly for the purpose of drawing accurate boundaries of the CMCA, not land situated in the CMCA owned by other entities.[15]

[45] An exception to the divestment of Crown and local authority-owned land is provided by s 11(5)(e) which preserves the right of the Crown to designate land in the CMCA as having a special status. That special status can include conservation areas,

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[14] *Re Ngāti Pāhauwera*, above n 8.
[15] Section 11(3).

reserves (of various sorts), and national parks. The identification of areas with such special status is therefore necessary in order to accurately survey the boundaries of the CMCA.

[46] However, there is yet another complicating feature in relation to those areas which have a special status where part of such an area, after the commencement of the Act, as a result of erosion or other natural occurrence ceases to be land and becomes part of the CMCA. I address the implication of this in relation to the preparation of survey plans in further detail below.

[47] In order to assist those responsible for preparing survey plans and maps of the CMCA for the various recognition orders, I will set out what land is, and is not, to be included within the CMCA.

Records of titles within the takutai moana

[48] Brendan Mulholland, giving evidence on behalf of the Attorney-General, detailed various parcels of land for which freehold title existed, or which were identified as Crown land which has never been alienated and therefore had not had a freehold title. The majority of these were in the Ōhiwa area.[16] He also identified a number of gazetted reserves which were wholly or partially in the takutai moana.

[49] Richard Jennings, who also gave evidence on behalf of the Attorney-General, identified additional roads and parcels of land beyond those covered by Mr Mulholland.

[50] It is therefore necessary to clarify what effect the existence of such parcels of land has on the ability of the Court to grant CMT in respect of the relevant areas.

[51] Section 9 of the Act defines the common marine and coastal area as the area that is bounded by the line of MHWS and by the outer limits of the territorial sea other than:

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16 A notable example given by Mr Mulholland as to an area of land for which freehold titles existed but which was now inundated by the sea is the area at Ōhiwa Spit.

> (a) specified freehold land located in that area; and
>
> (b) any area that is owned by the Crown and has the status of any of the following kinds:
>
> > (i) a conservation area within the meaning of s 2(1) of the Conservation Act 1987.
> >
> > (ii) a national park within the meaning of s 2 of the National Parks Act 1980.
> >
> > (iii) a reserve within the meaning of s 2(1) of the Reserves Act 1997.

[52] Specified freehold land means any land that immediately before the commencement of the Act is:

> (a) Māori freehold land within the meaning of s 4 of Te Ture Whenua Māori Act 1993; or
>
> (b) set apart as a Māori reservation under Te Ture Whenua Māori Act 1993; or
>
> (c) registered under the Land Transfer Act 2017 and in which a person other than the Crown or local authority has an estate in fee simple that is registered under that Act; or
>
> (d) subject to the Deeds Registration Act 1908 and in which a person other than the Crown or a local authority has an estate in fee simple under an instrument that is registered under that Act.

Specified freehold land

[53] Mr Mulholland and Mr Jennings identified a number of areas that, prior to the commencement of the Act, consisted of Māori freehold land, a Māori reservation that was registered under the Land Transfer Act 2017 or was subject to the Deeds Registration Act. Appendix 1 to the Crown's closing submissions in this case helpfully collates this evidence. These areas do not form part of the takutai moana. Therefore the proposed CMTs will have to be re-drafted in accordance with the data set out in this evidence.

Roads

[54] Unformed roads located in the takutai moana are treated differently to specified freehold land. Section 14(1) of the Act provides that:

> Any road, whether formed or unformed, that is in the marine and coastal area on the commencement of this Act is not part of the common marine and coastal area.

[55] The Court was provided with evidence that both formed and unformed roads existed within the marine and coastal area.[17]

[56] The Act treats unformed roads located in the CMCA differently to formed roads.

[57] Section 14(3) says:

> If, on the day before any quinquennial anniversary,[18] an unformed road to which subsection (1) applies continues in existence as an unformed road, then that road is deemed to be stopped, and becomes part of the common marine and coastal area on that anniversary, unless a current certificate has been signed and dated in respect of that road.

[58] Section 14(5) also provides that:

> An unformed road that, after the commencement of this Act, comes into existence in the marine and coastal area is part of the common marine and coastal area.

[59] In closing submissions, counsel for the Crown confirmed that there were no certificates signed in respect of the unformed roads identified in the evidence of Mr Mulholland and Mr Jennings. Therefore, those unformed roads have now become part of the common marine and coastal area and are available for inclusion within any grant of CMT. All of the unformed roads can be included in the survey plan prepared for the three CMTs.

Conservation areas and reserves

[60] There was evidence of the existence of both conservation areas and reserves in the marine and coastal area.[19]

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[17] See exhibit BM-01 to the affidavit of Brendan Patrick Mulholland, 1 February 2022; exhibits RJ-01 to RJ-16 to the affidavit of Richard James Jennings, 31 January 2022; and exhibit AG-01 to the affidavit of Ashley Neville Gould, 8 June 2020.

[18] A quinquennial anniversary is one which marks the fifth, tenth or fifteenth anniversary of the passing of the Act.

[19] See exhibit BM-01 to the affidavit of Brendan Patrick Mulholland, 1 February 2022; and exhibits RJ-01 to RJ-10 in the affidavit of Richard James Jennings, 31 January 2022.

[61] The Act is clear that s 11(3) automatically divests Crown or local authority title to land in the CMCA, and that s 11(5)(e) also permits the Crown to set aside part of the CMCA for a specific purpose, thereby removing land from the CMCA. However, where after the commencement of the Act, as a result of erosion or other natural process, any land (including reserves, conservation areas, and/or national parks) becomes part of the CMCA, it ceases to be a reserve, conservation area and/or national park. That appears to be the result of the words "any land" contained in s 13(2), which relates to land other than a road that is owned by the Crown or a local authority.

[62] The presumption contained in s 13(2) does not affect Māori freehold land or other land not owned by the Crown or a local authority. However, although areas of land owned by the Crown or a local authority (other than roads) were excluded from the CMCA at the commencement of the Act, s 13(2) appears to have the effect of making those parts of reserves, national parks or conservation areas which, as a result of erosion or other natural process occurring since the Act's commencement, available for inclusion in the CMT.

[63] Exhibit BM-01 to the affidavit of Mr Mulholland noted that there was evidence that parts of certain reserves had eroded, and that if the areas now appearing to be in the coastal marine area had eroded since the commencement of the Act, then they would have become part of the coastal marine area available for an award of CMT.[20] Unfortunately there was no evidence upon which I could conclude that the erosion of these reserves had occurred since the Act commenced. This means that the various reserves identified in the evidence before the Court which have been affected by erosion and which are now wholly or partly in the coastal marine area are excluded from inclusion in CMT. However, if such erosion does occur in the future, this means that the boundaries of any CMT order which is affected in this fashion will have to be re-drawn. All other conservation areas and reserves identified in the evidence of Mr Mulholland and Mr Jennings as being located in the takutai moana are excluded from the areas available for the award of CMT. The boundaries for the CMT orders in the present case must be prepared on the basis of the current geographic situation.

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[20] Section 13(2).

Marine farms

[64] There are three small oyster farms in Ōhiwa Harbour. However, the evidence did not establish that their presence had interfered with the applicants' ability to carry out customary activities to the extent that could be said to amount to substantial interruption. These farms have been in operation for some time, the original consents having been issued approximately 20 years ago. The structures do not restrict access to the takutai moana around them, or prohibit traditional or recreational food gathering, and this is recorded in the resource consents that authorise them. The evidence before the Court was that all parts of the Ōhiwa Harbour continue to be used for customary activities notwithstanding the presence of the oyster farms, which are approximately two hectares in size. The farms have not had the effect of limiting the applicant groups who undertake customary activities in the area.

[65] Te Ūpokorehe submitted that the Ōhiwa Harbour farms could be distinguished from the Pan Pac outfall pipeline. In that case there was a significantly reduced use of the area, owing to the effect of pollution on kaimoana. I accept that submission. The areas occupied by these marine farms remain available for inclusion in CMT 2.

[66] Turning to Eastern Sea Farms Limited 3,800-hectare marine farm, which sits roughly 8.5 kilometres from the coast of Ōpōtiki. The Whakatōhea Māori Trust Board owns 54 per cent of Eastern Sea Farms Limited, which was established in 2001. Resource consent was granted in 2009 for a period of 20 years, with the right to renew. The first five years of the farm's operation involved only research, prior to being fully commercialised.

[67] Although sizeable, the marine farm does not inhibit access to, or navigation through, the takutai moana. According to the original resource consent application, the farm was never intended to inhibit access or navigation. Coupled with this, is the fact that the marine farm's existence seems entirely consistent with the continued use and occupation of the area in which it is located, by the applicant groups in accordance with tikanga. It is majority owned by Whakatōhea, and the Trust Board's goal is to progress and ensure the flourishing of the iwi as a whole. I conclude that the existence of the marine farm has not substantially interrupted the applicant's holding of the area

in accordance with tikanga. Its continued functioning is consistent with the award of CMT over the area, and so the area it occupies is available for inclusion in CMT 1.

Accommodated infrastructure

[68] During the course of the hearing, there was some dispute as to the meaning of the concepts of "accommodated activities" and "accommodated infrastructure" as those terms are set out in s 63 of the Act. Some applicants and interested parties also invited the Court to express an opinion on what infrastructure or activities in the area covered by this hearing could be considered "accommodated" activities or infrastructure.

[69] For the reasons I will now set out, I feel able to offer some views on the meaning of the statute, and will do that, but consider that expressing any opinion on whether any specific activity or infrastructure meets the tests in s 63 goes beyond the jurisdiction of the Court and is not appropriate in this decision.

[70] I start by explaining the connection between a recognition order for CMT and accommodated activities or infrastructure. Accommodated activities are able to be carried out in a CMT area with s 63(a) providing that such activities are:

> expressly excluded under s 64(1) from the exercise of an RMA permission right or a conservation permission right by a customary marine title group;

[71] The concept of accommodated infrastructure is defined in s 63 in a way that has created some confusion as to whether the three criteria set out in s 63 are conjunctive in the sense that all three are required to be met or whether the third criteria is an alternative to the first two. If the latter interpretation is correct, then one consequence could be that infrastructure owned by private entities or individuals could be "accommodated infrastructure". The definition in s 63 says:

> **Accommodated infrastructure** means infrastructure (including structures and associated operations) that is–
>
> (a) lawfully established; and
>
> (b) owned, operated, or carried out by 1 or more of the following:
>
> (i) the Crown, including a Crown entity:

(ii) a local authority or a council-controlled organisation:

(iii) a network utility operator (within the meaning of section 166 of the Resource Management Act 1991):

(iv) an electricity generator (as defined in section 2(1) of the Electricity Act 1992:

(v) a port company (as defined in section 2(1) of the Port Companies Act 1988):

(vi) a port operator (as defined in Part 3A of the Maritime Transport Act 1994):

(c) reasonably necessary for:

(i) the national social or economic well-being; or

(ii) the social or economic well-being of the region in which the infrastructure is located.

Disjunctive vs conjunctive – definition of accommodated infrastructure

[72] The issue is whether the word 'and' should be read into subparagraph (b)(vi), so that the *reasonably necessary* test is an additional requirement that needs to be met in addition to (a) and (b). The alternative proposition is that the definition should be read disjunctively – that is, whether the word 'or' should be read into subparagraph (b)(vi), so that the *reasonably necessary* test is separated and sufficient on its own to meet the definition.

[73] The legislative development and subsequent amendment to s 63 indicates that (a), (b) and (c) are to be read in conjunction with one another, and that the word 'and' after (b)(vi) needs to be implied to achieve the purpose of the statute.

[74] When the Act first came into effect, the definition of accommodated infrastructure was explicitly conjunctive, with the word 'and' being present at the end of subparagraph (b)(vi).[21] Consequential amendments listed in Schedule 2 to the Maritime Transport Amendment Act 2013, meant that the previous description of a 'port operator' needed to be changed. This amendment appears to have been inserted into the Act without consideration of the context or placement of the amendment

[21] Marine and Coastal Area (Takutai Moana) Act 2011 (as enacted), s 63.

within the wider subsection. As a result of this amendment, the 'and' disappeared from the definition.

[75] Given the nature of this amendment as a consequential amendment necessary to give effect to Maritime Transport legislation, it is highly unlikely that the legislators intended to fundamentally change the operation of the definition of accommodated infrastructure. The Select Committee report of the Māori Affairs Committee on the Act supports this conclusion.[22] The natural reading of the definition would also suggest that without the presence of the word 'or', that both (b) and (c) need to be satisfied, especially as Parliament has used the word 'or' throughout the definition within each both (b) and (c).

[76] The definition of accommodated infrastructure includes "associated operations". Also exempted from being affected by the RMA permission right, 'associated operations' are defined broadly as activities that are necessary for the functioning of an accommodated infrastructure, which includes the relocation of existing infrastructure. If the definition of accommodated infrastructure is read disjunctively, thereby bringing in privately owned structures, then those structures would be able to be relocated anywhere within a CMT area while being exempt from the RMA permission right. This is unlikely to have been intended by Parliament and would potentially undermine the bundle of rights associated with a grant of CMT.

[77] For these reasons, I therefore conclude that the definition should be read conjunctively.

Jurisdiction of the Court in respect of accommodated infrastructure and activities

[78] Ms Roff, counsel for the Attorney-General, in closing submissions submitted that:

> The Attorney-General's position is that the Court has no jurisdiction to make specific findings or determinations as to whether an activity or piece of infrastructure falls within the definition of "accommodated activity" and, if relevant, "accommodated infrastructure". The Act makes it clear that where between a customary marine title group and a person who owns, operates or

[22] Select Committee report of the Māori Affairs Committee on the Marine and Coastal Area (Takutai Moana) Bill, at 18.

> carries out an activity [there is a] dispute whether that activity is an accommodated activity, such cases are to be determined by the Minister for [Land Information] and that decision is final.
>
> Commentary in the departmental report goes some way to explaining the rationale behind the Minister [for] Land Information being responsible for disputes over whether activities are accommodated or not. The report notes the Minister's "expertise with activities in the marine and coastal area", and how the function aligns with other roles of that Minister within the statutory regime.
>
> (footnotes omitted)

[79] At the other end of the spectrum is the view that the Court does have jurisdiction to make determinations on this matter. To this effect, counsel for the Bay of Plenty Regional Council submitted that:

> It is acknowledged that any specific factual disagreements that arise in future over whether an existing activity is accommodated are to be resolved by the Minister [for] Land Information. However, in my submission, it is open to this Court to reach findings on the correct interpretation and application of the statutory criteria for accommodated activities. This will also assist the Regional Council as consent authority when it is processing other applications for activities that could be considered "accommodated".

Analysis

[80] The relevant statutory provisions are ss 64(3) and (4) of the Act. They provide:

> (3) Subsection (4) applies if, in relation to whether an activity is an accommodated activity, there is a dispute between–
>
> (a) a customary marine title group; and
>
> (b) the person who owns, operates, or carries out the activity that is the subject of the dispute.
>
> (4) Either party to the dispute may refer the dispute to the Minister for Land Information for resolution.

[81] The Act therefore clearly grants the Minister exclusive jurisdiction to determine such a dispute and the Court has no jurisdiction in relation to this question.

Reclamation

[82] The Act sets out a comprehensive regime relating to the status and vesting of reclaimed land.[23] Under s 29 of the Act, reclaimed land is defined as permanent land formed from land that formerly was below the line of MHWS and that, as a result of a reclamation is located above the line of MHWS, but does not include:

(a) land that has arisen above the line of MHWS as a result of natural processes, including accretion; or

(b) structures such as breakwaters, moles, groynes, or sea walls.

[83] Land reclaimed other than by natural processes whether lawfully or unlawfully is vested in the Crown as its absolute property, although by different mechanisms.[24] The Act does not affect the common law in relation to accretion and erosion.[25] In short, the Act vests reclaimed land from the common marine and coastal area as the absolute property of the Crown, outside of the exceptions in subpart 3 of the Act.[26] If reclaimed land is subject to subpart 3, then it is unable to be included in CMT or PCR orders.

[84] There is some dispute over the effect of reclamations that are not yet complete pursuant to the Harbour Development Project, particularly at the Waiōweka River mouth.

[85] As the Court stated at Stage One:[27]

> For the reasons that relate to other reclamations, the part of this proposal that results in the issue of a certificate of title on the basis that the land involved has arisen above the line of mean high-water springs, means that it is no longer within the takutai moana and therefore no longer falls within the area in respect of which CMT can be issued. That leaves those aspects of the proposal that fall outside the definition of reclaimed land in s 29 of the Act and could be described as "structures such as breakwaters, moles, groynes or seawalls". Such structures need to be considered on the same basis as other third-party structures in the takutai moana such as pipelines.

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23 *Re Ngāti Pāhauwera*, above n 8, at [276], citing *Re Edwards (No. 2)*, above n 1, at [231]-[250].
24 Marine and Coastal Area (Takutai Moana) Act 2011, s 30.
25 Section 13(1).
26 Above n 1, at [239].
27 At [250].

[86] Although the reclamation of areas involved in the Harbour Development Project is consented and well underway, it is not yet complete. The issue is therefore whether the areas which are in the process of being reclaimed should be excluded from the area in respect of which CMT is granted.

[87] Section 113 of the Act provides that a recognition order must not be sealed before the disposal of any appeal. The orders made at the Stage One hearing are all subject to appeal and will not be heard by the Court of Appeal for some time. It is possible that there may be further appeals to the Supreme Court. It therefore appears that the reclamation associated with the Harbour Development Project will be complete before any recognition order is able to be sealed. Accordingly, it is appropriate for such reclamation areas to be excluded from any recognition order.

CMT boundary angles

[88] The Stage One findings regarding CMT provided for the CMT areas to extend out to the 12 nautical mile limit. The way that the eastern Bay of Plenty curves means that if boundaries are depicted by straight lines which start at MHWS and proceed due north, CMT 1 and CMT 3 will overlap with the rohe moana of neighbouring applicant groups. The maps filed by Julia Glass provided an indicative view of the boundaries of each CMT area, but the applicants disagree as to the exact bearings of each of the boundary lines. The issue is whether the boundary lines at Maraetōtara, Tarakeha, and Te Rangi should be angled due north, towards the middle of Whakaari/White Island, or along some other bearing. In this respect the Court must be mindful of the presence of other parties across the Bay of Plenty, who are yet to have their full applications heard, particularly Ngāti Awa to the west, as well as Ngāi Tai and Te Whānau-a-Apanui to the east.

Positions of the parties

[89] Ngāi Tamahaua submitted that the angle issue could be resolved if the applicants were allowed further time to reach an agreement. However, Ngāi Tamahaua also produced exhibits during the hearing which appeared to advocate for boundary

lines at the Maraetōtara Stream and Tarakeha pointing due north.[28] Ngāti Awa and Te Whānau-a-Apanui alleged that this created an area for CMT 1 that went beyond the area depicted in the map attached to Ngāi Tamahaua's original application.

[90] Tracey Hiller, who gave evidence for Ngāi Tamahaua was cross-examined by Ms Rongo for Ngāi Tai on the boundary lines Ngāi Tamahaua proposed. Ms Rongo established that if Ngāi Tamahaua's view was adopted, the boundary at Tarakeha would cut across the rohe moana of Ngāi Tai, and eventually Te Whānau-a-Apanui. Ms Hiller was also cross-examined by Mr Mahuika for Te Whānau-a-Apanui, as to the difference between Ngāi Tamahaua's proposed boundaries and the map attached to their amended application. Ngāi Tamahaua's amended application shows an eastern boundary line that is angled in a north-western direction, towards Whakaari – whereas the boundaries Ms Hiller proposed at the hearing pointed due north. Ms Hiller accepted that these two positions were different.[29]

[91] Ngāti Ruatakenga submitted that at Maraetōtara, the boundary should sit at the middle of the stream. In respect of Tarakeha, Ngāti Ruatakenga endorsed the view of Te Riaki Amoamo, that the boundary should follow the ridgeline of the headland out to sea. They also submitted that in order to avoid boundaries cutting across the rohe of neighbouring iwi, that the boundary lines need to angle inwards as they head out to sea. At the hearing, Te Riaki Amoamo said that the boundary line at Tarakeha should follow the angle of a surveyed boundary on the Tarakeha headland, between the Ōpape and Torere blocks.[30] This proposal would angle the boundary line at Tarakeha slightly in a north-westerly direction.

[92] Mr Amoamo later supported the use of the Tarakeha ridge as the boundary, given that such landmarks were historically used to define customary boundaries between iwi, especially as they could be seen from a long distance out to sea.[31] However, he did not revise his position on what the angle of the boundary line should be.

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28 *Re Edwards* Stage Two Notes of Evidence, at 6-7.
29 At 31.
30 At 88-89; see also Exhibit 11 Tarakeha Boundaries.
31 *Re Edwards* Stage Two Notes of Evidence, at 357.

[93] Muriwai Jones and Kelvin Tapuke's evidence for Ngāi Tai was that the boundary lines for CMT should be from Te Rangi, out to Te Paepae o Aotea, around Whakaari, and then back to Tarakeha.[32] This position would result in the boundary lines pointing in a north-westerly direction, but more so than the angle proposed by Te Riaki Amoamo. This view was contested by Ms Feint for Ngāti Ruatakenga on the basis that the angle proposed by Ngāi Tai would cut across into the rohe moana of Te Whakatōhea. Kelvin Tapuke based the view that the boundaries should be angled towards Te Paepae o Aotea on the view that "at the end of life and when our loved ones pass away, our belief is that our people swim out to [Te Paepae o Aotea]".[33]

[94] Kelvin Tapuke also deposed that the location marked as Te Rangi on the Maven maps was incorrect – identifying Te Rangi as a bay slightly to the west of the headland that Maven marked as Te Rangi.[34] Moving the eastern boundary of CMT 3 to the west has the effect of decreasing the total area of CMT 3, but is in accordance with the Court's findings at Stage One that the boundary of CMT 3 was to be at Te Rangi. Kelvin Tapuke's evidence on this point was uncontested.

[95] In closing, Ms Rongo for Ngāi Tai, proposed that the most equitable solution, given that all of the applicant groups have a significant association to Whakaari, was to angle all of the boundary lines towards that island, addressing the curvature of the coast by dividing it in similar fashion as the cutting of a pie.

[96] Ngāti Awa submitted that the angle of the boundary line at Maraetōtara should be towards Whakaari, rather than due north, as proposed by Ngāi Tamahaua.

[97] Mr Mahuika for Te Whānau-a-Apanui submitted that the angle of both of the boundary lines for CMT 3 should extend in a straight line towards the middle of Whakaari, stopping at 12 nautical miles. Mr Mahuika submitted that this approach:

(a) aligns with the original boundaries of the applications of the Whakatōhea Māori Trust Board and Ngāi Tamahaua;

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32 At 328.
33 At 338.
34 At 327, see also Exhibit 22.

(b) is consistent with the evidence produced by Te Whakatōhea at Stage One;

(c) aligns with a visible and significant geographic marker;

(d) is pragmatic in that it accommodates the curvature of the coast;

(e) is the approach that is the least likely to encroach on the rohe moana of Te Whānau-a-Apanui and Ngāi Tai and therefore;

(f) is the only area that could be said to have been exclusively held in accordance with tikanga.

[98] Te Ūpokorehe, Ngāti Ira and Ngāti Patumoana did not appear to adopt a position on the issue of the boundaries.

Analysis

[99] Although some applicant groups alluded to the possibility of further hui resolving this issue, in the absence of any agreement, the Court must make a ruling. In order for the CMT orders to be finalised, they must be accompanied by a survey plan that sets out the extent of the CMT area.[35] This cannot be done if the parties remain in disagreement as to the angles of the relevant boundaries.

[100] Owing to the natural curvature of the coastline between Maraetōtara and Te Rangi, as well as further along the coast, boundary lines that point due north would have the effect of cutting across the rohe of Ngāti Awa, Ngāi Tai, and Te Whānau-a-Apanui. I accept Ms Feint's submission that the boundary lines for the CMT areas need to angle inwards so as to accommodate the neighbouring iwi along the coast of the Bay of Plenty.

[101] The applicants were agreed as to where the boundary points are, but there was no consensus as to their bearings. The Court's role is to adopt a position that is

35 Section 109(4)(a).

consistent with the Stage One judgment, is as consistent as possible with tikanga (acknowledging that the drawing of straight lines on maps is not a practice that would historically have been adopted at tikanga), equitable between the parties, enables an accurate survey, and durable in circumstances where neighbouring iwi are yet to have their full applications determined.

[102] I have concluded that the appropriate approach is to:

(a) survey the western boundary of CMT 1 as beginning at the midpoint of the Maraetōtara Stream, angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;

(b) survey the eastern boundary of CMT 1 as the tip of the Tarakeha headland (where it is already depicted on the Maven maps), angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;

(c) survey the eastern boundary of CMT 3 as at Te Rangi as identified by Kelvin Tapuke, angled in a straight line towards the midpoint of Whakaari, and ceasing at the 12 nautical mile limit;

(d) survey the landward boundary of each CMT area as MHWS; and

(e) survey the seaward boundary of each CMT area as at the 12 nautical mile limit, ensuring that this boundary aligns with the natural curvature of the coastline.

[103] These directions must also take into account the findings I have made above as to the boundaries of the CMCA.

Wāhi tapu

[104] Section 62 of the Act provides that one of the rights that is conferred by and may be exercised under an order made for CMT is a right to protect wāhi tapu and wāhi tapu areas. Under s 9 of the Act, "wāhi tapu" and "wāhi tapu area" have the

meanings given to those terms in s 6 of the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPTA). That Act defines those terms as follows:

> **wāhi tapu** means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense
>
> **wāhi tapu area** means land that contains 1 or more wāhi tapu

[105] A site must meet the terms of this definition before the CMT group is able to satisfy the requirements of s 78. Resort must therefore be had to tikanga. As stated by Mr Amoamo who gave tikanga evidence for Ngāti Ruatakenga:

> Tikanga guides us in everything that we do in Te Whakatōhea, how we behave and how we operate as whānau, hapū and iwi. 'Tikanga' literally means acting in the ways that are 'tika' (proper/correct). Tikanga is the law in our area and is underpinned by whakapapa, because without whakapapa you have no right to claim, speak for or take care of the whenua or its resources. This applies to the moana as much as the whenua: the moana is just whenua with water sitting on top of it.

[106] Mr Amoamo also provided guidance on the nature of tapu, and wāhi tapu. He said:

> 'Wāhi' is a place or location and 'tapu' is commonly defined as sacred. So in simple terms 'wāhi tapu' is usually out of bounds to people, at least until such time as the proper karakia ritual is performed.
>
> …
>
> Though 'tapu' is commonly translated as sacred, it is more accurate to think of tapu as being a restriction for spiritual purposes. 'Tapu' must be understood alongside the concept of 'noa'. Noa is when tapu is 'removed' or 'cleared' through the proper karakia ritual, removing the spiritual restriction.
>
> …
>
> The nature of the tapu restriction depends on the context and especially why the tapu was imposed. It could be a complete prohibition on entering an area unless you are a tohunga, or it might permit anyone to enter if appropriate karakia are performed first. Understanding whether something (or some place) is tapu (and if so, why it is tapu) is a central part of understanding tikanga.

[107] Muriwai Maggie Jones who gave evidence for Ngāi Tai and Ririwhenua took the position that wāhi tapu are linked to whakapapa and were a source of obligation to tūpuna. She said on this matter:[36]

> Wāhi tapu can include urupā, birthing sites, placenta burial sites, battle sites, sites of old and existing pā, midden and archaeological sites, sources of water, sites of valued natural resources, sites of ritual practises, significant sites attached to tūpuna, sites of extreme tragedy.

[108] Wāhi tapu protections under the Act can be utilised in limited circumstances to exclude third parties and members of the public from specified locations under a CMT order.[37] Wāhi tapu protections represent the sole limitation on public rights of access and navigation that the Act otherwise guarantees. The specificity of the location of the boundaries of a wāhi tapu or wāhi tapu area is therefore of critical importance, given that it is a right that must be capable of being reasonably understood and complied with.[38]

[109] The need for specificity of boundaries is also a matter that is important at tikanga. Louis Rapihana, a tohunga and Ōpōtiki District Councillor said:[39]

> One of the distinguishing features of a wāhi tapu is that its location and boundaries were identifiable so that people would know to avoid the area. Sometimes *tohu* (signs) or *kōrero* (statements) were used to define a wāhi tapu area. A wāhi tapu must have identifiable boundaries so that it can be protected from inappropriate uses and access. It is not possible to protect a wāhi tapu if nobody knows where the boundaries are.

[110] A wāhi tapu protection right may be recognised if there is evidence to establish:[40]

(a) the connection of the CMT group with the wāhi tapu or wāhi tapu area in accordance with tikanga; and

(b) that the CMT group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.

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36 Affidavit of Muriwai Maggie Jones, 25 January 2022 at [3].
37 *Re Ngāti Pāhauwera*, above n 8, at [72].
38 At [131].
39 Affidavit of Louis Rapihana, 31 March 2022 at [5.1].
40 Marine and Coastal Area (Takutai Moana) Act 2011, s 78(2).

[111] Section 79 of the Act is prescriptive as to what must be set out in a CMT. A CMT order or agreement must set out the wāhi tapu conditions that apply.[41] These are:[42]

(a) the location of the boundaries of the wāhi tapu or the wāhi tapu area that is the subject of the order; and

(b) the prohibitions or restrictions that are to apply, and the reasons for them; and

(c) any exemption for specified individuals to carry out a PCR in relation to, or in the vicinity of, the protected wāhi tapu or wāhi tapu area, and any conditions applying to the exercise of the exemption.

[112] Applicants who have been unable to provide the requisite level of detail in evidence, have not been granted wāhi tapu protections.[43]

[113] Section 81(1) of the Act imposes an obligation on the local authority with jurisdiction where a wāhi tapu protection right exists to take appropriate action that is reasonably necessary to encourage public compliance with any wāhi tapu conditions and s 81(2) provides that a person who intentionally fails to comply with a wāhi tapu condition is liable, on conviction to a fine not exceeding $5,000. Section 104(3)(c)(iv) of the Resource Management Act 1991 requires that, when considering an application for a resource consent, the consent authority must not grant a resource consent contrary to wāhi tapu conditions in a CMT order or agreement. In order to be able to do this effectively, there is a need for precision in describing not only proposed restrictions or prohibitions but the reasons for them.

[114] Claims for wāhi tapu must be objectively established not merely asserted.[44] However, the determination of wāhi tapu is:[45]

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41 Section 78(3).
42 Section 79(1).
43 *Re Ngāti Pāhauwera*, above n 8, at [90].
44 *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A80/02, 17 April 2002 at [251].
45 *Re Ngāti Pāhauwera*, above n 8, at [125].

> …ultimately a bijural assessment based on both tikanga and statutory law, as the applicants will have to satisfy the two elements under s 78(2) set out above, but this will be based on the factual evidence given by kaumatua and others as to the tikanga of the wāhi tapu in the area. So the test is based on s 78(2), but will be heavily influenced by the tikanga of the applicants.

[115] In accordance with the views I expressed in the Stage One judgment as to the appropriate lens through which to analyse whether or not the standard has been met for 'held in accordance with tikanga', I am of the view that tikanga must be the principal guiding determinant in establishing whether or not a particular area is wāhi tapu. Existence of tapu is not, and has never been, predicated on recognition by statute. But where, as under the Act, there is a statutory provision for recognition of a wāhi tapu protection right, the relevant statutory requirements must be met. The task for the Court is therefore to consider whether the requirements of ss 78 and 79 of the Act have been met.

[116] As will be seen from my comments below in relation to individual CMT areas, some applicants made claims in relation to a large number of wāhi tapu sites said to be in need of protection. The vast majority of these sites were either not described or identified with the degree of certainty required by s 79(1)(a), or plainly fell outside of the takutai moana. Some claims were withdrawn post-hearing, but many that clearly fell outside the takutai moana were not. The necessary consequence of a lack of certainty as to geographic boundaries of a claimed wāhi tapu is that the Court is unable to grant those applications for wāhi tapu status. The Court does not have jurisdiction to recognise wāhi tapu protection over sites that are not within both the takutai moana and the relevant CMT order.

Wāhi tapu adjacent to land

[117] At the hearing, some of the applicants sought wāhi tapu status for areas in the takutai moana that were adjacent to a wāhi tapu on land. This raised the issue of whether tapu originating on land adjacent to the takutai moana can extend into the takutai moana, so as to be capable of being recognised under the Act. An example of this was said to be Te Rangimatanui, Waiwhero and Rāhui Whākarōto, all located on land around the mouth of the Waiaua River. This assertion also raises the difficult question of how you measure how far out into the takutai moana the tapu might extend.

[118] The Court has been assisted in answering these questions by the evidence of Pou Tikanga/Tohunga Te Riaki Amoamo, as well as other tohunga such as Tā Pou Temara and Louis Rapihana. However, Mr Amoamo's evidence changed through the course of the hearing leaving me uncertain as to what exactly could be drawn from it. Mr Amoamo initially said, in respect of Te Rangimatanui, Waiwhero and Rāhui Whākarōto, that the tapu would end at MHWS and not follow the water receding with the tide.[46]

[119] He later said in respect of Onekawa Pā and Te Matai Pā, that the tapu would recede with the waters of the tide:[47]

> The tapu ends – if high tide comes high up against the beach towards the sandhills, that's where the tapu will end, but it will recede with the high tide going to the low tide, the tapu follows it to the low tides, because it's affecting the river, the sea, and from low tide it comes back up again and it goes just beyond the waves of the coastline, the tapu, and that falls within the mandate of the 12 nautical miles but close to the shoreline … especially closer to the beach where they can cast out for fishing because the tapu just goes beyond the waves, not, not right out to the 12 nautical miles but it's affecting that mandate of the 12 nautical miles.

[120] Finally, he appeared to conclude that, in such cases, an appropriate limit for the tapu to extend into the CMCA would be one nautical mile, but there was no indication as to where this would be measured from. He stated:[48]

> That's correct to all the wāhi tapu pertaining to Ngāti Rua commences with the high tide coming up on the incoming tide as far as it goes and it when it recedes it follows the outgoing tide as far as it goes and from the outgoing tide over the waves into the sea only.

[121] He further stated:[49]

> I'll put it one mile out because there's 10, yeah there's 11 miles beyond the one mile to make the 12 nautical miles…. As long as it goes into the sea to me is the wāhi tapu because the wāhi tapu on the land is I'm familiar with on either side and I'm familiar with on either side and I'm pretty familiar with the sea but it's how far out to sea and when I stated 1 mile, it should be 1 nautical mile out and that's still part of the 12 nautical miles.

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46 *Re Edwards* Stage Two Notes of Evidence, at 107.
47 At 258-259.
48 At 351.
49 At 355.

[122] Other experts in tikanga also provided their view on this issue. When questioned on how far out tapu needs to be extended from a site in order to protect it, Tā Pou Temara stated:[50]

> …it is for the people who are bound to that area to make those determinations. I have a view but the only view that I can give is a general view that, don't get too close to a wāhi tapu, keep right away from it and for me, I am four hours away in Tūhoe land, that is as far as I want to be from that wāhi tapu.

[123] He later expressed approval of an analogy with the heat of a fire:[51]

> ...it's like the heat of fire, the further you are away from the fire the less you will experience the heat of a fire and if you get too close you're going to get burnt and that's an interesting view. Okay. All right. Now about this, no I'd better not give you an example because it may ruin what you are trying to say but I think, I think that's a good, mmm. No I think tapu is tapu and you can't define that if people have died it's an urupā and the further you get away from it you are – it's tapu. The urupā is defined by a trench or by a fence and that's the extent of the tapu of the urupā.

[124] Finally, he stated in respect of fishing in proximity to a tapu area on land:[52]

> Again, yes, the extent of the tapu and the influence of the tapu may have extended to where I might be fishing and I do not want to take that risk. Always uppermost in my mind is that I might transgress that tapu and for my own safety I will go nowhere near that, that place.

[125] Te Rua Rakuraku, Pou Tikanga for Ngāti Ira, also appeared to agree with the view that tapu on adjacent land can extend, in certain circumstances, into the takutai moana. When discussing Ōpōtiki Mai Tawhiti, he said:[53]

> …Papatūānuku it's not just there, it seeps into the dirt, it becomes all part of this. So, it becomes part of the dirt, it becomes part of the sand, it becomes part of the particulars within Papatūānuku so that's why I believe the indications that are set out in this particular way are knowledge [in] those certain areas. From the high tide, tika, to the low tide because the sea will come up and Tangaroa will come up and he'll expose and he'll bring back the taongas that have been dormant for years…

[126] Although the various tohunga expressed the matter differently, a summary of their evidence is that tapu originating on a coastal area can in some cases extend into

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50 *Re Edwards* Stage Two Notes of Evidence, at 132.
51 At 133.
52 At 133.
53 At 153.

the adjacent takutai moana, beyond mean low-water springs. The issue for determination is how that concept can be depicted in a way that satisfies the requirements of s 79 as to clarity for the purposes of enforcement.

[127] There was no consensus among the experts in tikanga as to how to go about measuring the limit of the extent to which tapu from a site on dry land might extend into the adjacent takutai moana.

[128] Expressing a limit in terms of nautical miles is inherently artificial. It is also difficult to reconcile with the evidence from Mr Amoamo set out at [106] above that if an area is tapu then activities which are noa (including things like eating, bathing, or fishing) should not take place within it.

[129] The determination of whether wāhi tapu or wāhi tapu areas meet the test in s 78 involves a tikanga assessment of the extent to which the relevant tapu extends into the takutai moana, and whether the circumstances necessitate this be recognised in order for the wāhi tapu site to be protected. The distance therefore measured from mean high water springs should be no further than is necessary to protect the wāhi tapu site, in accordance with the purposes of the Act.[54]

[130] The issues seem to be whether tikanga establishes that:

(a) the relevant tapu 'extends' or 'radiates' into the takutai moana;

(b) if so, how far the tapu goes; and

(c) is there evidence connecting the proposed prohibitions or restrictions on access to the protection of the wāhi tapu?

[131] Based on the evidence discussed above, I accept that there may be cases where the tapu inherent in a site outside the takutai moana may also affect the adjacent takutai moana and may justify the imposition of prohibitions and restrictions. However, whether that is so depends on what is established by the evidence in relation to each

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54 Marine and Coastal Area (Takutai Moana) Act 2011, s 78(2)(b).

site. This will include whether the site can be accurately represented on the relevant survey plan and whether the proposed prohibitions can be framed in a way that will permit their effective enforcement. Sufficient information also needs to be provided so that the reasons for the proposed conditions can accurately be recorded on the CMT. All of this requires the Court to individually consider each application for wāhi tapu, and any proposed prohibitions and restrictions.

[132] As to what the Court should do where the evidence as to the location of the boundary of a wāhi tapu is inconsistent, Mr Rapihana's evidence was:[55]

> It is also my sincere whakaaro (belief) that the Court should not attempt to identify the boundaries of wāhi tapu itself where the locations provided are unclear or inconsistent. This is the function and role of tohunga and should not be undertaken by the Court or anyone else. These are extremely important, *tapu* matters of tikanga. It is for the tohunga who are experts in tikanga to provide the correct kōrero and information on wāhi tapu locations and boundaries.

[133] I accept that statement of principle. However, as discussed in detail below, there are some instances where tohunga giving evidence for different applicant groups have disagreed about aspects of tikanga in relation to wāhi tapu including the exact location and boundaries of a wāhi tapu. In some instances where the differences are relatively minor, it has been possible to interpret the evidence in a way that allows for an accurate boundary of the wāhi tapu to be identified. However, in those instances where the evidence is irreconcilable, the result has been a conclusion that the degree of certainty required in order to comply with s 79(1)(a) has not been met and that it is not possible to record the wāhi tapu area in the CMT.

[134] A further complicating factor has arisen where the CMT has been awarded to multiple groups on a joint basis. This means that the wāhi tapu able to be recognised on the relevant CMTs will be the wāhi tapu as agreed by all of the groups jointly awarded CMT. This is discussed in greater detail at [153]-[155] below. Some applicant groups, notably, but not only, Te Ūpokorehe, have proceeded on the basis that they were individually awarded CMT and that they have an entitlement for their wāhi tapu (as opposed to the wāhi tapu agreed upon by the joint group) to be recorded on the title. The difficulties presented by that approach are discussed in detail below.

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55 Above n 39, at [5.3].

Wāhi tapu – shared exclusivity?

[135] In the Stage Two hearing, multiple applicants brought claims for wāhi tapu protection over the same sites or areas. This was the case in respect of Maraetōtara, and some sites in the Ōhiwa Harbour.

[136] Te Ūpokorehe proceeded on the incorrect assumption that the Court had found that they alone had been awarded CMT in respect of their claimed area and therefore were able to dictate which wāhi tapu in that area were to be included in the joint CMT. They said that they:

> …[did] not want to diminish the relationship that others have to the wāhi tapu they have claimed. However Te Ūpokorehe are the ahi ka in the rohe from Maraetōtara to the Waioweka. It is tika that their iwi would hold wāhi tapu protection rights in that rohe – noting Mr Aramoana's statement that Te Ūpokorehe are the caretakers of their rohe, and while they will never bar others from going to wāhi tapu, Te Ūpokorehe will continue to look after the wāhi tapu "as we have all along".

[137] The Court did not find Te Ūpokorehe were the sole ahi kā in their claimed area. It found that they held the claimed area jointly with others. Te Ūpokorehe therefore cannot unilaterally determine what the wāhi tapu areas shown on the joint CMT are going to be, or insist that wāhi tapu areas that are of importance to them take precedence over the wāhi tapu areas of the other applicant groups that were jointly awarded CMT.[56]

[138] Ngāti Ira adopted an approach consistent with the finding that the CMT (and therefore the ability to seek protection for wāhi tapu) was held jointly in the CMT 1 and 2 areas, submitting that:

> …the duties and responsibilities of active protection of certain areas that are designated wāhi tapu are precisely the kinds of shared obligations which [t]ikanga [prescribes] to be recognised.

[139] Each of the applicant groups who were jointly awarded CMT are able to seek protection for their own wāhi tapu, provided they meet the criteria discussed above, and provided there is no disagreement from the other joint holders of the CMT as to the location of the wāhi tapu and any protections required. The hapū/iwi involved

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56 This topic is addressed below at [153]-[155].

cannot act unilaterally outside of the group awarded CMT. Within the umbrella of the successful CMT group, individual hapū/iwi may identify the same site or an overlapping site and, depending on the nature of the tapu, it is possible that they may propose different restrictions and prohibitions. These matters are discussed further in the context of the various proposed wāhi tapu sites.

[140] The availability of protection for a wāhi tapu within a jointly held CMT is driven by the consideration of whether the specified area is held in accordance with tikanga.

[141] It is not the role of the Court to determine a priority of rights in tikanga relative to wāhi tapu. That is something that needs to be resolved between the parties in accordance with tikanga.

Restrictions and prohibitions

[142] Section 78(2)(b) provides that a wāhi tapu protection right may be recognised on the application of a CMT group if there is evidence to establish:

> That the [customary marine title] group requires the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area.

[143] Some applicants submitted that if a group said that they "required" prohibitions or restrictions on access to a wāhi tapu area, that was the end of the matter and it was not necessary or permissible for the Court to assess whether the prohibitions or restrictions were reasonable or necessary. Such an assertion is untenable.

[144] It is a pre-condition to an order under s 78 that the CMT group provide the Court with evidence which establishes the connection of the group with the wāhi tapu in accordance with tikanga. There must also be evidence to establish the link between the proposed prohibitions or restrictions on access and the protection of the wāhi tapu. If access restrictions are proposed that are unrelated to any element of protection of the wāhi tapu, the Court would not be entitled to approve them. The test in the Act is not just that the group "require" prohibitions or restrictions on access, it is that they require them to protect the wāhi tapu. Wāhi tapu prohibitions and restrictions are intended to protect areas that are sacred. A number of applicants have proposed

conditions which seek to regulate the behaviour of the public for reasons unconnected with protection of wāhi tapu. That is not permissible.

[145] One of the most obvious ways for an applicant to establish the connection between proposed restrictions or prohibitions on access to a wāhi tapu and the protection of the wāhi tapu is to provide evidence that, in accordance with tikanga, the same sorts of restrictions and exclusions are already observed by members of the applicant group. Following this, the applicant would also have to show that those restrictions would be capable of enforcement on the terms of the Act, in respect of a specified location. If, for example, a group proposed a restriction or prohibition on access to a wāhi tapu for the purpose of fishing, but the evidence was that the members of the applicant group regularly fished in the area themselves, that could support a conclusion that such a condition was unconnected with the protection of the area and therefore, not available for the Court to impose.

[146] Some applicants, such as Ngāti Ruatakenga, sought to revisit conclusions made by the Court in *Re Ngāti Pāhauwera*, stating:

> In *Ngāti Pahauwera*, it was considered that proposed prohibitions or restrictions on inappropriate activity that are already regulated in existing legislation (such as a summary offence, or legislation relating to fishing or the RMA) cannot be said to be necessary. It is submitted that this conclusion warrants revisiting in light of the principles in *Trans-Tasman Resources*, that recognise "tikanga as law". Whether inappropriate activity is already regulated in existing legislation is largely beside the point. The requirement for protection is derived directly from tikanga, as a system of law, and it is that jural system that regulates the activity and defines the prohibitions and restrictions required. Indeed, it is inherent in the nature of tapu that restrictions are required, and that the kaitiaki are responsible for protection of the site, not Pākehā.
>
> (footnotes omitted)

[147] This submission misses the point. There is no doubt that it is the kaitiaki who are responsible for protecting wāhi tapu, not Pākehā. However, without in any way diminishing the rights and responsibilities of the tangata whenua, the Act provides a mechanism that allows the protection of wāhi tapu required at tikanga to be enforced through the state legal system. Because the Act contemplates enforcement for breach of wāhi tapu restrictions or prohibitions by way of prosecution, the issue of whether a particular prohibition or restriction is "required" does involve a consideration of

whether the activity sought to be restricted or prohibited is already expressly the subject of legislation addressing the same kind of prohibition or restriction sought by the applicant. Examples are prohibitions on littering or drinking alcohol in a public place.[57] The regulation of the use of vehicles on beaches by means of bylaws can also be relevant.

[148] The Act attempts to make penal sanctions of the type routinely available for breach of criminal or regulatory legal systems available for breaches of certain aspects of tikanga in relation to wāhi tapu. Section 81(2) creates an offence whereby:

> Every person commits an offence who intentionally fails to comply with a prohibition or restriction notified for that wāhi tapu or wāhi tapu area, and is liable on conviction to a fine not exceeding $5,000.

[149] Were it not for the provisions of the Act, these processes would not be available for a breach of tikanga. In that sense, the Act grafts Pākehā concepts of enforcement for breach of legal obligations onto the jural system of tikanga.

[150] If the integration of the two different concepts is going to be effective, the legal obligations which may potentially lead to a process of enforcement when they are infringed, must be articulated in a way that facilitates the ability to, in appropriate cases, bring a successful enforcement action.

[151] The most significant requirement in this regard would seem to be certainty as to the nature of the obligation so that those who are liable for breaching it know exactly what they must not do and where they must not do it. Enforceability is a fundamental requirement of any prohibition which carries with it the possibility of criminal sanction. There must be a relevant matrix to which reference can be made so as to provide individuals or groups with the opportunity to comply with any prohibition. This principle is described by Professors Horder and Ashworth as the principle of 'maximum certainty', and is a corollary to the rule of law.[58] An offence must be clearly defined in law in order to provide an opportunity for individuals to amend their

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57 See *Re Ngāti Pāhauwera*, above n 8, at [144]-[160].

58 Jeremy Holder and Andrew Ashworth *Ashworth's Principles of Criminal Law* (10th ed, Oxford University Press, Oxford, 2022) at 88.

conduct so as to comply with it – they must know what actions and/or omissions will result in sanction.[59]

[152] In respect of wāhi tapu, tikanga undoubtedly defines the prohibitions and restrictions that may be necessary to protect a wāhi tapu but the statement that "… the kaitiaki are responsible for protection of the site, not Pākehā …" would seem to overlook the fact that the Act does not purport to vest solely in kaitiaki all responsibility for protection of particular sites, but specifically includes the protective component of enforcement for breach of prohibitions or restrictions in relation to a wāhi tapu by way of prosecution through the Courts.

Stage One findings

[153] Wāhi tapu protection rights may only be granted in favour of a CMT group.[60] They are incidental to an award of CMT. In the Stage One judgment the applicants were awarded CMT on a joint basis.[61] The CMT orders are to be in accordance with those findings. The 'customary marine title group' for the purposes of the Act and the corresponding CMT orders, is that amalgamation of hapū collectively, rather than each hapū individually. Where the tests for wāhi tapu protections are established, those protections are to be granted in favour of the CMT group.

[154] While the CMT orders may delegate a particular group (for example, a hapū) as having responsibility for the protection of a wāhi tapu or a wāhi tapu area, it is not a mechanism for members of a jointly held order to carve out their own distinct areas of exclusivity. The Court does not have jurisdiction to award wāhi tapu protections in favour of any other entity other than a CMT group. In this respect the applicant's submissions and applications for wāhi tapu protections have, in a number of cases, misunderstood the Court's findings at Stage One, and the requirements of the Act.

[155] The Court was clear as to the basis upon which CMT was awarded. The same analysis applies to wāhi tapu protections. The Court has no jurisdiction to award wāhi tapu protection in respect of sites or areas that are contested or in respect of which

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59 At 89.
60 Section 78(1).
61 At [185]-[187], [331], and [660]-[667].

there is conflicting evidence.[62] That is the nature of the Court's findings as to shared exclusivity:[63]

Approach

[156] Based upon the factors set out above, the following framework has been applied to the assessment of wāhi tapu claims made by CMT groups:

(a) Does the proposed wāhi tapu or wāhi tapu area meet the definition contained in s 6 of the HNZPTA 2014?

(b) Has the CMT group established its connection with the wāhi tapu or wāhi tapu area in accordance with tikanga?

(c) Does the CMT group require the proposed prohibitions or restrictions on access to protect the wāhi tapu or wāhi tapu area?

(d) Has the CMT group provided sufficient information to allow the Court to identify with certainty the location of the boundaries of the wāhi tapu or wāhi tapu area?

(e) Are the proposed restrictions or prohibitions linked to the protection of the wāhi tapu area, and are they capable of being enforced?

(f) Have any exemptions for specified individuals to carry out PCR in relation to or in the vicinity of, the protected wāhi tapu or wāhi tapu area been set out with sufficient certainty?

(g) Where it is alleged that tapu originating on land extends into the takutai moana:

    (i) Does the tikanga evidence show that tapu originating on land extends into the takutai moana?

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62 Above n 8, at [166]-[173].
63 Above n 1, at [185]-[187], [331], and [660]-[667].

(ii) Do the circumstances necessitate that this be recognised in order for the wāhi tapu site to be protected?

(iii) What is the distance measured from MHWS that is necessary to protect the wāhi tapu site in accordance with the purposes of the Act?

Particular issues relating to Te Ūpokorehe

[157] There are two particular issues in relation to Te Ūpokorehe that need to be addressed as a result of submissions made to the Stage Two hearing. These are firstly, what was the nature of the recognition orders granted to Te Ūpokorehe and secondly, who represents Te Ūpokorehe.

Nature of CMT

[158] The case initially presented by Te Ūpokorehe Treaty Claims Trust (TUTCT) at the Stage One hearing was that they alone held mana over Ōhiwa Harbour and that any rights other groups claimed to exercise in that area were done under their mana.[64] They also made the same claim for the area from Maraetōtara in the west to Pakihikura (which they define as the mid-point of the Waiōweka River mouth) in the east. Those claims were not upheld by the Court.

[159] The Court's conclusions in relation to CMT, as set out in the Stage One decision, reflect the Court's adoption of, and agreement with, the report provided by the pūkenga. The pūkenga concluded that CMT in the area from Maraetōtara to Tarakeha was exclusively used and occupied in accordance with tikanga by a joint entity which had six different parts. They were: Ngāi Tamahaua, Ngāti Ruatakenga, Ngāti Ira, Ngāti Ngāhere, Ngāti Patumoana, and Te Ūpokorehe (the six entities).[65] Historically, the six entities had been regarded as the six hapū of Whakatōhea, although the evidence established that on various occasions from the latter half of the 19th century onwards, Te Ūpokorehe had been described in European documents as both a hapū and an iwi.

[64] Above n 1, at [158].
[65] At Appendix A [(2)(d)].

[160] In recent years, a number of members of Te Ūpokorehe have asserted more vigorously that they are an independent iwi and not a hapū of Whakatōhea. That view was espoused by TUTCT.

[161] Notwithstanding the continuing focus of Te Ūpokorehe on this issue, whether Te Ūpokorehe is properly described as a hapū of Whakatōhea or an iwi in its own right is immaterial to both the conclusions reached by the pūkenga in their report and the decisions reached by the Court in the Stage One hearing.[66] It is also irrelevant to the matters that the Court has to decide at the Stage Two hearing.

[162] The pūkenga report treated Ōhiwa Harbour differently to the area of coastline between Maraetōtara and Tarakeha. It specifically acknowledged that Ngāti Awa had interests in the western part of Ōhiwa Harbour together with the six entities.

[163] The pūkenga's report was available to the parties prior to the presentation of their closing submissions. The six entities and Ngāti Awa indicated that they accepted the pūkenga's findings and the Court was encouraged to adopt a joint exclusivity approach.

[164] This was a change in position for Ngāti Awa who, up to that point, had participated in the hearing as an interested party. None of the applicants objected to that part of Ngāti Awa's application that related to Ōhiwa Harbour being dealt with by the Court as if they had been applicants. Given the pūkenga's conclusions, that seemed a pragmatic result as otherwise potential difficulties could have arisen. Although Ngāti Awa's preference had been to engage directly with the Crown, they also had an application before the Court for orders under the Act. The Court had heard all the evidence relating to that part of Ngāti Awa's claim relating to Ōhiwa Harbour that would have been heard in direct engagement or a separate hearing, and it would have been an inefficient use of the parties', Crown's and Court's resources for the same issues to be litigated again. No applicant was disadvantaged by this approach.

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66 At [313]-[314].

[165] Ngāti Awa also expressly accepted that its interests in Ōhiwa Harbour were held jointly with the Whakatōhea hapū and Te Ūpokorehe (to the extent Te Ūpokorehe might be seen as a separate group to Whakatōhea).

[166] Counsel for Te Ūpokorehe, in closings submissions at the Stage One hearing, also expressly recognised that Ngāti Awa hapū held rights in Ōhiwa Harbour on a basis of joint exclusivity. Te Ūpokorehe's counsel expressly accepted the availability of the concept of joint exclusivity and a joint award of CMT in respect of Ōhiwa Harbour. However, counsel proposed that the joint interests could be recognised by the grant of multiple overlapping CMTs in respect of the same area.[67] The Court concluded that the Act did not provide for multiple CMTs in respect of the same area. That meant that Te Ūpokorehe (like Ngāti Awa in respect of Ōhiwa Harbour) could not insist on receiving their own individual CMT.

The Court's findings

[167] In the Stage One judgment, the Court noted that all of the six entities accepted the pūkenga's findings that the takutai moana was held jointly by the six named groups (in respect of Maraetōtara to Tarakeha) and the six entities and Ngāti Awa (Ōhiwa Harbour). The Court specifically noted that:[68]

> [Ūpokorehe] did not dispute the fact that the other hapū shared the area, the dispute was the basis upon which this was done.

[168] The Court also noted that:[69]

> The pūkenga and the Court differed from Ms Baker of TUTCT as to whether the areas found to have been held jointly were held by [Ūpokorehe] as an iwi with mana moana or as one of six equal groups (seven such groups in relation to Ōhiwa Harbour).

[169] The Court also noted that:[70]

> It is also possible that [Ūpokorehe] might not accept the Court's adoption of the pukenga findings and not wish to be part of any CMT which they jointly held with other hapū. That would obviously be a matter for them.

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67 At [164].
68 At [184].
69 At [183].
70 At [187].

Te Ūpokorehe's position at the Stage Two hearing

[170] The opening submissions of counsel for Te Ūpokorehe at the Stage Two hearing confirmed that Te Ūpokorehe, jointly with the other applicant groups that had been awarded CMT on the basis of joint exclusivity, had filed two draft CMT orders, one in respect of the area between Maraetōtara to Tarakeha, the other in respect of Ōhiwa Harbour. That was consistent with the Court's findings discussed above.

[171] However, some of the evidence filed on behalf of Te Ūpokorehe at the Stage Two hearing, and some of the submissions of counsel, created confusion as to the extent that Te Ūpokorehe actually accepted the Court's conclusion that they did not meet the test set out in s 58 of the Act for CMT on their own, but did meet it on the basis of a joint exclusivity with the other successful groups.

[172] The joint affidavit of Maude Edwards and Wallace Aramoana dated 22 January 2022 filed in support of Te Ūpokorehe's case in the Stage Two hearing, contains conflicting statements. After setting out the Court's findings in respect of CMT 1 and CMT 2 awards, the affidavit says:[71]

> We agree that it is tika for these groups to hold orders of this type – it recognises the rangatiratanga that each of these groups holds in their respective rohe.

[173] That statement is consistent with acceptance of the Court's findings as to shared exclusivity. However, immediately following that, the paragraph goes on to say:

> We don't agree that all of these groups hold mana whenua and mana moana in the Ōhiwa Harbour and the balance of the application area.

[174] That statement would indicate an unwillingness to accept the Court's fundamental finding that neither Te Ūpokorehe nor any other individual Whakatōhea hapū (or Ngāti Awa in respect of Ōhiwa Harbour) could, on their own, meet the test for CMT set out in s 58 of the Act.

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[71] At [4].

[175] At [9] of the affidavit, the deponents said:

> Te Ūpokorehe do not agree with the views that the Court arrived at; [sic] However, we now feel compelled to participate in this process to avoid others holding rights in our rohe without any ability on our part to influence the exercise of those rights. Therefore we have engaged with other groups, and arrived at what we would call an uneasy compromise.

[176] The Stage Two hearing is not the forum to challenge any of the findings made in the Stage One hearing. The Court of Appeal is the place to challenge such findings. In this Stage Two hearing, I am obliged to proceed in accordance with the findings made in the Stage One decision, and in accordance with the draft orders which Te Ūpokorehe participated in drafting and filing.

Who represents Te Ūpokorehe?

[177] Surprisingly, given that during the Stage One hearing none of the other applicants challenged the mandate of TUTCT to represent Te Ūpokorehe, during the Stage Two hearing Mr Cunningham, on behalf of the Edwards Priority applicant and the other WKW applicants, cross-examined Te Ūpokorehe witnesses in an apparent attempt to establish that TUTCT did not represent Te Ūpokorehe. He followed that up with submissions to the effect that "The group represented by [TUTCT] is not a hapū of Whakatōhea." He went as far as saying that the contact address for "Te Ūpokorehe hapū of Whakatōhea" is Ngāti Muriwai Authority Trust, 37a Woodlands Road, Ōpōtiki 3122.

[178] These submissions fly in the face of the Court's findings.

[179] There is no doubt that, in 1999, a representative of Te Ūpokorehe supported the original application under the Foreshore and Seabed Act 2004 lodged by the late Mr Edwards. However, it is equally as clear that any authorisation for Mr Edwards to act on behalf of the Te Ūpokorehe was promptly withdrawn.

[180] The entity that advanced the claim at the Stage One proceedings on behalf of Te Ūpokorehe was TUTCT. It was that entity whose evidence was accepted by the pūkenga and by the Court as establishing that Te Ūpokorehe, jointly with the others named, qualified for orders of CMT.

[181] There is no doubt that the view that Te Ūpokorehe is an iwi as opposed to a hapū of Whakatōhea, is not universally held by all people who identify as members of Te Ūpokorehe. Some people, who identified as Te Ūpokorehe and held the view that Te Ūpokorehe was a hapū of the Whakatōhea iwi, gave evidence. Keita Hudson and Bruce Pukepuke were two who gave evidence in support of the unsuccessful Flavell application for CMT. However, no entity, other than TUTCT, advanced an application at Stage One purporting to represent Te Ūpokorehe.

[182] Where, at the Stage One hearing, no challenge has been made to the authority of the applicant group to be represented by the particular entity conducting the litigation, then it is not appropriate for other applicants (or any other party) to attempt to raise such a challenge at the Stage Two hearing.

PART III

CMT and PCR orders

Draft CMT orders

[183] On 21 January 2022, the successful applicant groups filed updated draft CMT orders. The holders of the orders are listed as the various hapū who were successful at Stage One, and there are contact details for each of those hapū with the exception of Ngāti Ngāhere. The draft orders did not contain information regarding wāhi tapu areas and were not accompanied by maps.

[184] The successful applicants are in partial agreement as to the form of the draft orders. However, they have different views as to whether a formal structure/body needs to be created to give expression to the draft orders, so as to provide guidance on issues of governance and/or dispute resolution.

Submissions

Ngāti Ruatakenga

[185] Ms Feint KC, on behalf of Ngāti Ruatakenga, provided submissions as to who should be the holders of CMT 1 and CMT 2 on behalf of Te Kahui. She proposed the following approach in opening submissions, "to put some more flesh around the bare bones of the CMT orders":

> 7.1 *Holder of order* – the iwi/hapū recognised in the decision as the successful applicants are named as the groups to which the orders apply as well as the holders of the orders. The contact people for each group will be two persons:
>
> 7.1.1. one of the individuals who applied for the order (provided they consent); and
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> 7.1.2. a person elected by hui a hapū according to that group's tikanga – this will have to happen prior to the orders being sealed;
>
> 7.1.3. in the event that there is any dispute about who should be named, the first named applicant shall be inserted (with their consent, and if not, the next named in the application);

7.1.4 following the making of the order, application may be made at any time to vary the order under s 111 provided that the agreements [sic] of that provision are met.

7.2. *Separate Coastal and Ōhiwa Harbour orders* – although the judgment appears to contemplate one order for the six Whakatōhea hapū that covers the coastal area and Ōhiwa Harbour, with a separate order for the western part of Ōhiwa Harbour jointly held with Ngāti Awa hapū, it was decided that the cleanest approach is to have one order for the entire Ōhiwa Harbour, and another for the coastal area;

…

7.5. there was some thought given to including the poutarāwhare construct developed by the pūkenga, to make it clear that other groups (such as the Mokomoko whānau) are included under the roof of this whare held up by the six pou. However, there is not yet consensus as to whether this sort of detail should be included in the order itself or the supporting documentation (such as a trust deed);

7.6. *Decision-making processes* – there was considerable discussion about establishing a trust to hold the order on behalf of the hapū, but consensus was not achieved on this point. Some hapū considered that it would be administratively convenient to have a trust(s) named as the holder and contact point for the CMT orders (Ngāti Rua are in this camp), but others thought that each hapū should represent themselves on the order as a matter of mana motuhake;

7.7. there is agreement on the following principles:

7.7.1. each group has one vote through its two representatives;

7.7.2. in case of dispute between the two representatives, the person elected by hui a hapū takes precedence;

7.7.3. all decisions are by consensus of the holders, expressed through the vote of their representatives;

7.7.4. if agreement cannot be reached, holders must invoke a formal tikanga-based dispute resolution process;

7.7.5. for every application for permission to exercise a resource consent in the common marine area, in the event that consensus is not reached, the holders must advise the applicant that permission is refused;

7.7.6. split votes may be taken in the following two situations only (in the event that consensus is not achieved after following the dispute resolution process), in which case a two-thirds majority will be required:

(a) approval of an application for resource consents where one or more of the groups is an applicant for consents, and it is a condition of the consent that their interest is non-transferable over the life of the consent;

(b) approval of the planning document.

[186] In closing, counsel for Ngāti Ruatakenga submitted that there were two options for the Court to adopt in respect of who holds the CMT orders. These were that:

(a) the orders simply set out that they are held by the successful applicant groups with no further details, other than that all governance and dispute resolution issues are to be determined by tikanga; or

(b) the Court directs that a trust be formed to hold the orders on behalf of the applicant groups, with appointment and decision making processes described in the Trust Deed on the basis of the structure outlined in their opening submissions.

[187] Ngāti Ruatakenga submitted that the former approach had the benefit of simplicity and cost effectiveness, and that it is preferred by some applicants as enhancing the mana motuhake of hapū. However, they also noted that a lack of structure may make dispute resolution difficult. In respect of the latter, they submitted that a trust would provide greater certainty, and be more convenient for engaging with third parties. However, it may not be necessary, and it is unknown whether there is funding available for that purpose.

[188] The type of structure proposed by Ms Feint as to how the CMT orders should be held has considerable merit. It also has the benefit of substantial support from the majority of the successful applicant groups. However, that support is not unanimous. As detailed at [197] and [190]. Te Ūpokorehe and Ngāti Ira are opposed to some components of the proposal. In the absence of unanimity, the Court is obliged to follow option (a) set out by Ms Feint and to record the identity and contact details of those applicant groups jointly awarded CMT 1 and CMT 2, and leave it to them to work out, in accordance with tikanga, how the various rights and obligations flowing from a grant of CMT will be implemented.

[189] As to their PCR order, Ngāti Ruatakenga submits that "Ngāti Ruatakenga, hapū of Whakatōhea" should hold the order, with Mereaira Hata as the main contact person. They submit that their draft PCR order is self-explanatory, simply setting out the PCRs

awarded according to the terms of the Stage One Judgment. No diagram or map was attached to their draft order. That will need to be remedied before the Court can formally grant such an order.

Ngāti Ira o Waiōweka

[190] Ngāti Ira agrees with the submissions of Ngāti Ruatakenga on behalf of Te Kahui as to who should hold CMT 1 and CMT 2. However, Ngāti Ira contests the suggestions made at [7.7.1] and [7.7.2] of Ngāti Ruatakenga's opening submissions. They submit that each representative should have the right to vote and that hapū should not be restricted to one vote through two representatives. They submit that this would be more consistent with tikanga evidence presented by Tā Pou Temara, the position of tikanga at common law, and the right of indigenous peoples to self-determination in international law.

[191] Ngāti Ira submits that Te Mana Moana o Ngāti Irapuaia Charitable Trust should hold their PCR order, with Te Rua Rakuraku as the main contact person. No diagram or map was attached to their draft order. This will need to be remedied.

Ngāti Patumoana

[192] In his opening submissions Mr Bennion on behalf of Ngāti Patumoana stated:

> We adopt the submissions on the nature and content of the orders and the base requirements for the holding entity filed by counsel for Ngāti Ira.

[193] Mr Bennion did not alter this position in closing submissions, but did note briefly the mandate issue regarding Te Ringahuia Hata (discussed below), stating:

> 14. Ms Te Ringahuia Hata was challenged on her standing to hold the order. Her evidence is that she is required to take this matter forward as a kupu ohaaki. Mr Amoamo supported this approach (2nd affidavit Tab 678). In any event, as Ms Feint explained in her opening submissions, the proposal is to have 2 representatives, one from the applicants and one selected by hui a hapū.

[194] Ngāti Patumoana was not awarded any PCRs at Stage One.

Ngāi Tamahaua

[195] Ngāi Tamahaua supports the proposals made by the other members of Te Kahui as to who should hold the CMT orders. At the time the orders were submitted to the Court the hapū appointed representative was Mr Hetaraka Biddle. Given Mr Biddle's passing, Ngāi Tamahaua will need to nominate a replacement.

[196] As to the PCR orders for Ngāi Tamahaua and Te Hapu Tītoko o Ngāi Tama, they propose that Ms Hillier together with a representative appointed in accordance with tikanga should hold the order. The draft PCR order filed with the Court currently describes the proposed holders of the PCR order as Tracy Hillier and Hetaraka Biddle. No diagram or map was attached to their draft order. This will need to be remedied.

Te Ūpokorehe

[197] Te Ūpokorehe intend that TUTCT will be the holder of the CMT order on their behalf. However, Te Ūpokorehe submits that it is not necessary to direct that any other body or arrangement be formed to hold the orders on behalf of the successful applicants collectively. They submit any governance or dispute resolution issues can be addressed through tikanga. Te Ūpokorehe also submit that the guiding principle should be that each successful applicant group appoints their representatives in accordance with their own tikanga, rather than on the terms outlined by Ngāti Ruatakenga.

[198] Te Ūpokorehe submit that the holder of their PCR order should be TUTCT for the same reasons as in respect of the CMT orders. No diagram or map is attached to their draft order either.

Ngāti Ngāhere

[199] Ngāti Ngāhere did not provide submissions or draft orders in respect of their inclusion in CMT 1 or CMT 2. Unless they provide the information required by s 109, including the name of the person or entity to hold the orders on their behalf and their contact details and those of the holder, they will not be able to be listed on the CMT orders.

Te Runanga o Ngāti Awa

[200] Ngāti Awa supports the draft order that has been filed with the Court with respect to the Ōhiwa Harbour CMT. In closing, counsel for Ngāti Awa submitted that the draft order is sufficient in its current terms, and stated:

> Whilst TRONA is not opposed to an entity of some form in principle, such as a trust, TRONA is also mindful of the unnecessary proliferation of further entities in the Bay of Plenty that will require time and resource in an environment where time and resources are already stretched. That has also guided TRONA's approach to the draft Ōhiwa CMT order that has been filed. In short, it is counsels' submission that the requirements under section 109 of the Act have been satisfied in the draft Ōhiwa CMT order filed with the Court on 21 January 2022.

[201] Ngāti Awa confirmed that it is the successful applicants' intention to rely on the Maven maps as the basis for the CMT orders[72], and that they intend to add wāhi tapu schedules to the draft orders once determinations have been made as to wāhi tapu in the Stage Two judgment.[73]

[202] Ngāti Awa were not awarded any PCRs in the Stage One judgment.

Ngāi Tai and Ririwhenua

[203] Ngāi Tai have also filed a draft order in respect of their CMT between Tarakeha to Te Rangi. The holder of their order is to be the Ngāi Tai Takutai Kaitiaki Trust.

[204] Ngāi Tai were not awarded PCRs in the Stage One judgment.

Ngāti Muriwai

[205] Ngāti Muriwai's draft PCR order[74] lists as the holders of the order, the current trustees of the Ngāti Muriwai Authority Trust being: Nepia Tipene, Adriana Edwards, Christina Davis, Glenis Reeve and Milly Hunia. Attached to the draft order was a survey plan depicting the area to which the order is to apply.

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72 At [11(e)].
73 At [14].
74 Which is attached to their closing submissions.

[206] The Trust is proposed as the holder of the PCR on the basis that the hapū of Ngāti Muriwai has provided a mandate to the Trust through hui-a-hapū. Ngāti Muriwai submit that the Trust has been established with the support of the members of Ngāti Muriwai and that it is suitable as the Trust's deed requires the trustees to act for the benefit of the hapū. However, they also propose the addition to the PCR of a provision reading:

> Ngāti Muriwai may at any time by a decision at hui change the holder of the order and if this occurs an application for variation of this order will be made pursuant to section 111 of the Marine and Coastal Area (Takutai Moana) Act 2011.

[207] This provision is unnecessary. Section 111 provides that the holder of any recognition order may apply to vary that order. Alternatively, where the holder has ceased to exist, or being a natural person has died or no longer has legal capacity, a representative of the group to which the order relates may apply to vary it. This provision should therefore be deleted.

Te Uri a Whakatōhea Rangatira Mokomoko

[208] Te Uri a Whakatōhea Rangatira Mokomoko have filed a draft PCR order which names the applicant, Karen Stefanie Mokomoko, as the holder of the order, "or nominee(s) to be appointed before or after [the] order is sealed by the Court". The draft order contains a description of the rights, their location, and proposed limitations on the rights. It does not contain any diagrams or maps, as counsel are waiting for determinations on wāhi tapu to be made, as these may limit or prohibit the exercise of PCRs. Counsel for the whānau stated in their opening submissions that:

> 4.3 As the Court will be aware, no formal entity is established to represent the Whānau. Nevertheless, the proposed holder of the PCR Order remains Karen Mokomoko as per the originating application filed by her and the subsequent amended applications. The intention that the PCR Order be for the entire Whānau is maintained, and whether a representative entity be formed to hold the PCR Order, can be addressed prior to the sealing of the final Order.

[209] It is necessary for any representative entity to be formed and identified to the Court prior to the sealing of the final order in order to comply with s 109(2). No diagram or map is attached to their draft order.

[210] The whānau acknowledge that their application for CMT was unsuccessful, but seek to have their coastal presence in the application area acknowledged in the preamble of the order for CMT 1. They submit that the Stage One judgment[75] and the pūkenga report[76] support that outcome. They seek that their history and kōrero on the coast is reflected somehow in the final CMT orders, in isolation from their operative parts. The successful CMT 1 applicant groups indicated that they were still considering how to accommodate the pūkenga's observations regarding Mokomoko. They are encouraged to conclude that process promptly and advise the Court of the outcome.

CMT 1

Mandate requirements for CMT

[211] The Act is silent in respect of issues of mandate, although the definition of an applicant group provides that those applying for recognition orders must be one or more iwi, hapū or whānau groups, or a legal entity or person appointed to be the representative of such an iwi, hapū or whānau.[77] Any legal entity may be corporate or unincorporate.

Case law

[212] The primary authority regarding issues of mandate is *Re Tipene*. In that case, Mr Tipene had successfully established that he met the tests for a grant of CMT over a small marine and coastal area to the south west of Rakiura (Stewart Island), encompassing the islands of Pohowaitai and Tamaitemioka.[78] Mallon J addressed the issue of who should hold the CMT order in a further judgment.[79]

Positions of the parties

[213] Several applicants challenged the right of Ms Te Ringahuia Hata to effectively step into the shoes of her father, the late Mr John Hata, for the purposes of holding any

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75 Above n 1, at [413]-[420] and [546]-[576].
76 At 175.
77 Marine and Coastal Area (Takutai Moana) Act 2011, s 9.
78 *Re Tipene* [2016] NZHC 3199, [2017] NZAR 599.
79 *Re Tipene* [2017] NZHC 2990.

CMT on behalf of Ngāti Patumoana. Mr Hata was the original primary applicant for Ngāti Patumoana. The parties who sought to challenge Ms Hata's mandate alleged that she had no mandate to represent Ngāti Patumoana, or to be a holder of the CMT orders on their behalf, not having provided feedback to the hapū following the Stage One judgment. Ms Hata and Mr Amoamo were cross examined on that point.

[214] Mr Pou, counsel for the Whakatōhea Māori Trust Board, sought to establish that there had been a 'deficiency' in process because Ms Hata did not report back to the hapū, and alleged that she had not sufficiently engaged with the hapū so as to be able to adequately represent it as a holder of any CMT order.

[215] Mr Riesterer, who gave evidence for the Whakatōhea Māori Trust Board, advanced the same argument in support of the contention that either the Whakatōhea Fisheries Trust and/or the Whakatōhea Māori Trust Board should be appointed as the holder of CMT orders on behalf of the hapū of Whakatōhea.

[216] Mr Sharp, counsel for Ngāti Muriwai, submitted that a central issue was whether a proposed holder has the support of the applicant group, and that the Court must be satisfied that the applicant group have made an informed decision.

[217] Mr Cunningham, counsel for a number of applicant groups who were unsuccessful in their claims for CMT, submitted that all the successful applicants for CMT needed to provide evidence that a 'credible mandate' had been achieved. He expressed a concern that "many of those before the court do not appear to have been mandated to represent the applicant groups at these hearings".

[218] Mr Cunningham then invited the Court to view the procedure set out in the Crown's "Red Book" used by the Waitangi Tribunal, as an analogous process through which successful applicants could be required to demonstrate a credible mandate. The Red Book addresses process requirements in the Tribunal for overlapping claims in the historic settlement process. It is not relevant to claims under the Act. This topic is discussed in greater detail at [229] and [230] below.

Evidence of Mr Amoamo and Ms Hata

[219] Mr Amoamo's evidence was that John Hata was a pou tikanga for Ngāti Patumoana, that he regularly reported back to the hapū, that upon his death he passed that role to his daughter, and that this was in accordance with tikanga. He stated:[80]

> Well, it came under the role of a ōhāki. He passed it on to Te Ringahuia, the knowledge, because Ringahuia is the only one that can speak Māori and very few of Ngāti Patu today speak Māori of the generation of today. They have lost the reo to stand up and speak on the marae. He's passed it on to someone that still has the tikanga Māori and can still participate in karanga and all that on the marae.

[220] He also stated that the time would come when they would both go back to the hapū, confirming that had not occurred in the time between the Stage One judgment and the Stage Two hearing.[81] Ms Hata's evidence on this topic was consistent with that of Mr Amoamo.

[221] This role of kupu ōhāki[82] is one which both Mr Amoamo and Ms Hata described as being a role which tikanga requires that she undertake. Ms Hata stated in cross-examination:[83]

> I think Uncle Te Riaki explained to you the tikanga. The tikanga is kupu ōhāki in my instance, that's the tikanga. It doesn't need to go back to a hapū hui for endorsement, it's one's dying wishes as their last oath, what they wished to see happen and it's done in accordance with tikanga mai rānō. There's a lot of instances where this has happened in Whakatōhea, I'm one of many and it's not an easy role, if you can say, to accept and it's a role that you can't turn down under tikanga… In the case of my representation, Uncle Te Riaki has already explained our tikanga, the process that we follow.

Discussion

[222] In the absence of any prescriptions relating to mandate in the Act, it is for the Court to determine, on the basis of all the evidence tendered to it, who should hold the CMT. That is consistent with the approach taken by Mallon J in *Re Tipene*. It would have been preferable for the successful applicants to have agreed on who should hold

[80] *Re Edwards* Stage Two Notes of Evidence, at 284.
[81] At 284.
[82] Kupu ōhāki refers to a person's parting or dying wish/speech. See Byron Rangiwai "The critical theory of Te Kooti Arikirangi Te Turiki" (2017) 10 Te Kaharoa 194 at 194.
[83] *Re Edwards* Stage Two Notes of Evidence, at 287.

the CMT orders, but that has not happened and the Court must therefore determine the matter as best it can.

[223] As a result of my conclusions in the Stage One decisions as to the joint basis for CMT 1 and CMT 2, each of the successful joint applicants will have to have a representative named on the title. For CMT 1 that will be the six successful applicants. For CMT 2 that will be the seven successful applicants. For CMT 2 Ms Irwin-Easthope, on behalf of Ngāti Awa, nominated two hapū to hold the title. It is up to those two hapū to nominate the individual(s) or entity who are to be named on the title.

[224] Consistent with *Re Tipene*, there is no impediment to an individual or a group of individuals being named on the title in respect of a successful applicant group, so long that it is clear who they are. Subject to the requirements within the Act as to what must be included in a recognition order, it is an internal matter for each successful applicant group to nominate who will hold the title and what process they adopt as to mandate.

Finding in respect of Ngāti Patumoana

[225] None of the parties contesting Ms Hata's mandate provided contrary evidence as to the tikanga relating to kupu ōhāki. Nor did they suggest that Mr Amoamo's view was incorrect or that an alternative course of action would have been more consistent with tikanga. They sought only to dispute Ms Hata being named as a holder of the order on behalf of Ngāti Patumoana on the basis that she had not gone back to the hapū following the Stage One judgment.

[226] I accept the tikanga evidence of Mr Amoamo and Ms Hata, and find that Ms Hata is an appropriate person to be named to hold CMT on behalf of Ngāti Patumoana. She is a named applicant, and her name being included on the CMT is consistent with tikanga, as well as the work she has done to bring Ngāti Patumoana's application to completion.

Whakatōhea Māori Trust Board

[227] At the Stage Two hearing, Mr Pou, representing the Whakatōhea Māori Trust Board, advanced the submission that the Whakatōhea Fisheries Trust would be an appropriate entity to hold the CMT orders for the successful parties. None of the successful parties accepted this proposition and, in his oral comments in closing, Mr Pou appeared to abandon it. Given the absence of support for this proposition among the successful CMT groups, I will not consider it further.

[228] I conclude this section discussing mandate issues with the observation that unlike the situation in the Waitangi Tribunal, there is no particular mandate process that applicants for recognition orders under the Act have to undertake. If more than one party purports to represent the same applicant group, then that would normally be dealt with by an interlocutory hearing prior to the substantive hearing. Sometimes it is dealt with as part of the substantive hearing itself.

General observations on who should hold recognition orders

[229] An important consideration is attempting to ensure that recognition orders are designed in a way that enables a CMT group to self-manage in the future, without having to further resort to the Court to resolve disputes or governance issues. A degree of flexibility is required, so as to meet the purposes of the Act.[84] In addition, there is a need for finality in the present proceedings insofar as it is possible to achieve that.

[230] I do not accept the submission that mandate procedures adopted by the Crown in relation to claims before the Waitangi Tribunal have any application to claims in this Court under the Act. The Crown's policy in the Tribunal context is to negotiate with 'large natural groupings', meaning iwi or an amalgamation of hapū.[85] That is why the Crown implemented the "Red Book". The Act specifically permits applications for recognition orders by whānau, hapū or iwi groups. There is no requirement for applicant groups to be "large natural groupings".

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[84] *Re Tipene*, above n 79, at [27].

[85] Malcom Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259.

CMT 1 – Maraetōtara to Tarakeha

Wahi tapu claims

[231] This section of the judgment analyses the wāhi tapu claims made by the applicants, according to each of the CMT areas. It applies the general observations as to wāhi tapu discussed above.[86] For each applicant, I set out the relevant evidence for each wāhi tapu, before assessing whether the restrictions or prohibitions proposed by the applicants are required to protect the wāhi tapu, and are capable of enforcement.

[232] In relation to the conditions for the protection of wāhi tapu, a number of applicants followed a framework developed by the late Hetaraka Biddle. Some of the restrictions or prohibitions set out in that framework go beyond what is available under the Act. Where I have explained why a particular prohibition or restriction is not available, I will not repeat that explanation in relation to each subsequent claim for the same sort of prohibition or restriction.

[233] Wāhi tapu that were claimed by multiple members of the successful joint CMT groups are addressed separately from wāhi tapu that were claimed by only a single applicant group.

Ngāi Tamahaua

[234] Ngāi Tamahaua claims the following sites as wāhi tapu within CMT 1:

(a) Te Kārihi Pōtae urupā;

(b) Te Ahiaua;

(c) Tuamutu/Tuamotu urupā;

(d) Te Arakotipu;

(e) Te Roto;

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86 See [104]-[156].

(f) Otaotupuku;

(g) Awahou;

(h) Paengatoitoi;

(i) Tai Haruru;

(j) Kotukutuku/Puketapu;

(k) Te Ana o Ani Karere;

(l) the extent of the Maraetōtara Stream that is within the takutai moana, including the river mouth and out to sea;

(m) Paerata and Ōpōtiki Mai Tawhiti;

(n) Tawhitinui and Akeake;

(o) the extent of the Tirohanga Stream that is within the takutai moana, including the river mouth and out to sea;

(p) the extent of the Waiaua River that is within the takutai moana, including the river mouth; and

(q) Ōpēpē Stream.

[235] The restrictions and prohibitions sought by Ngāi Tamahaua in relation to all of their wāhi tapu claims were contained in the following table created by Hetaraka Biddle:

Restrictions	Prohibitions
• **Burials (including sea burials and ashes)** – no burials, sea burials, or ashes may be scattered at any of the wāhi tapu sites without the express permission of the relevant hapū representatives • **Camping** – at or near wāhi tapu sites must comply with the hapū coastal management plan (**TBC**) • **Collection and Harvesting** – no natural resources, minerals or any other organic materials may be collected or removed from a wāhi tapu site except with the express authority of the hapū representatives • **Commercial –** no activity for commercial use may be performed at a wāhi tapu site unless it has the express authority of the relevant hapū representatives • **Repairs and maintenance** – no alteration or destruction of the site can occur unless it is necessary for the repair and maintenance of the wāhi tapu and has the approval of the relevant hapū representatives prior to the works occurring • **Restoration** – any planned works involving restoration of a wāhi tapu must be approved by the relevant hapū representatives prior to the works being carried out • **Signage** – no signage, pou or other [fixtures] may not be erected without express permission of the hapū representatives • **Structures** – no structures may be erected at or on wāhi tapu sites or within wāhi tapu areas without the express authority of the relevant hapū representatives	• No drugs or alcohol to be consumed at a wāhi tapu • No vandalising of wāhi tapu areas • No rubbish to be left or dumped on a wāhi tapu site • No developments are to be built on a wāhi tapu site

[236] Ngāi Tamahaua submit that these restrictions and prohibitions are required to ensure that the wāhi tapu are protected from being damaged, disrespected or altered in such a way that would interfere with or diminish the mauri and tapu of those sites. They also seek to ensure that members of the hapū, any manuhiri or members of the public are kept safe. The activities that are sought to be restricted are those which, in the opinion of the hapū, have an effect on the mauri of a site. Ngāi Tamahaua submit that their list of prohibition and restrictions is precise, clear, and capable of readily

being enforced. They submit that they are for matters which cannot reasonably be protected by any other regulation or law. They say that this is because:

> the protections which are being sought are matters which are intrinsically Māori concepts regulated by tikanga Māori as law. The preservation of the mauri of the site for example is a matter which only experts in tikanga and tohunga who practice the various rituals are able to perform. The protection of people not only physically, but spiritually and emotionally is also a matter which these restrictions are aimed at protecting where they are entering onto a site which is a wāhi tapu.

Te Ahiaua

[237] Te Ahiaua is a pā site of historical significance to Ngāi Tamahaua, located on the eastern end of the Waiotahe spit, named for the tīpuna Te Ahiaua. It is in close proximity to Tuamutu/Tuamotu urupā. In oral evidence at the Stage Two hearing, Tracey Hillier, providing evidence for Ngāi Tamahaua stated that "[Te] Ahiaua is a significant site for [Ngāi] Tamahaua. It is where Rongopopoia and his people met their end."[87]

[238] Ngāi Tamahaua seek "wāhi tapu protection over those parts of the site which extend into the CMCA". The map filed by Ngāi Tamahaua does not show the exact location of the pā site. Pā sites are generally located on dry land, above MHWS. No evidence was provided by Ngāi Tamahaua indicating otherwise in respect of Te Ahiaua. No evidence was provided so as to justify a conclusion that the tapu of this site, where the pā is, extends into the takutai moana. As Te Ahiaua itself is not in the takutai moana, the Court has no jurisdiction to recognise it in a CMT as a wāhi tapu.

Otaotupuku

[239] Otaotupuku was said to be a location where kōiwi have been found. No further evidence was provided to the Court as to its location, or the boundaries of the site. The documentation filed with Ngāi Tamahaua's closing submissions shows that Otaotupuku is not in the takutai moana. Therefore, the Court has no jurisdiction to recognise it in a CMT as a wāhi tapu.

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87 *Re Edwards* Stage Two Notes of Evidence, at 13.

Awahou and Paengatoitoi

[240] Awahou and Paengatoitoi were said to be the locations of historic battle sites involving the hapū of Whakatōhea, on opposite sides of the mouth of the Waiaua River. The evidence of Te Riaki Amoamo established that area around the mouth of the Waiaua River is tapu.[88] Ngāti Ruatakenga also made wāhi tapu claims in relation to this area, although using different names to describe it. However, the sites of Awahou and Paengatoitoi as depicted in the hand-drawn diagrams super-imposed on the aerial photographs filed by Ngāi Tamahaua appear to show that they are outside of the takutai moana. They are therefore unable to be recognised on the CMT order as wāhi tapu. The Waiaua River itself is discussed below.

Tawhitinui and Akeake

[241] The documentation filed for Tawhitinui and Akeake indicate that these sites fall within the area of substantial interruption at the western banks of the Waiōweka River, caused by the Ōpōtiki Harbour Development Project. As these sites are not within the CMT area, they cannot be recognised on the CMT order as wāhi tapu.

Tai Haruru, Kotukutuku/Puketapu, Te Ana o Ani Karere, and Ōpēpē Stream

[242] These four sites are clustered closely together in the inter-tidal area at the Tarakeha Headland. Ngāi Tamahaua described them in the following manner:

> 81. Kotukutuku (historically known as Puketapu) is the site where Te Pahau was killed by Ngāi Tai.
>
> 82. Ōpēpē stream is where the Maruiwi women would give birth and various rituals would be performed. Significant evidence of this was given in stage one.
>
> 83. Tai Haruru is a Pā kainga and a site where pito is still buried. Further evidence of this was given in stage one particularly by Hetaraka Biddle who gave evidence of this tradition being passed down to his children.
>
> 84. This is the cave of Ani Karere who was an [important] kaitiaki of [Ngāi Tamahaua].

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88 See evidence of Te Riaki Amoamo, noted above at [118]-[121].

Hetaraka Biddle provided these details in his table of wāhi tapu sites for Ngāi Tamahaua:[89]

Wahi tapu	**Location**	**Type of wahi tapu**	**Cross-reference to Stage One evidence**
Kotukutuku/Puketapu	Entry to the beach, down the hill from Ōpape 1A18 block	(historically known as Puketapu due to the death of Te Pahau killed by Ngāi Tai)	
Ōpēpē Stream	Below Ōpape marae and urupa. Commences at Hinahinanui and flows out to sea	Birthing stream, a lot of babies died there, Maruiwi (small cervix) overcome through [caesarean] later	Hetaraka Biddle affidavit at [72]-[75] Tracy Hillier affidavit at [72]; 23/11 transcript pp 56-57; [25] p 95; [10] p 97
Tai Haruru	In the Ōpape area along the coast (description to be [provided])	Still put our pito in the cave there. My grandchildren's pito are buried there	
Te Ana o Ani Karere	Located next to Tai Haruru 50-100 [yards] heading towards the rocks	Ani Karere was a tipua and kaitiaki of the whole area. Refer to her as the kaitiaki of our pataka kai	

[243] In his written evidence for Stage One, Hetaraka Biddle stated:[90]

> 72. Ōpēpē is the name of the awa below Ōpape marae and below the urupā. The Ōpēpē awa commences at Hinahinanui and flows out to the sea.
>
> 73. According to our tradition, the name of the awa relates back to the Maruiwi people who Ngāi Tamahaua can also whakapapa back to. The Maruiwi people are considered one of the original inhabitants of the area. The Maruiwi women were small in stature and the Ōpēpē stream was a place they would go to deliver their babies. Due to their small frames the babies often died there at the awa. That is why the name Ōpēpē was given.

[244] An area where pito or whenua are buried or stored is a wāhi tapu. However, no further detail was provided in oral evidence as to the location of the boundaries of Tai Haruru or Ōpēpē Stream. The document filed does not provide the Court with

89 Exhibit HB2-1 to the Second Affidavit of Hetaraka Biddle, 24 January 2022.
90 Affidavit of Hetaraka Biddle, 20 February 2020.

certainty in respect of the location of the boundaries of these two sites, being shown through hand-drawn additions to a map prepared by Maven. In order for the Court to grant wāhi tapu protection to the areas at Tai Haruru or Ōpēpē Stream, the applicants must file a map with sufficient detail so as to allow the Court to conclude with confidence that they are both in the takutai moana. Given that Tai Haururu is described in the submissions of counsel as a Pā Kainga, it seeks unlikely that it is located in the takutai moana. The mouth of the Ōpēpē Stream may be in the takutai moana, but it is not clear exactly where, in connection with the river, the Maruiwi women gave birth, or where the various rituals referred to as giving rise to the tapu, were performed. If this happened on land beside the river and outside the takutai moana, it cannot be recognised in a CMT order.

[245] It is possible that the nature of a particular site may mean that its exact location cannot, according to tikanga, be shared with the Court. If this is the case, the Court will be unable to recognise that area within a CMT order because of the need for certainty as to the location of the boundaries of a wāhi tapu.

[246] In her Stage Two evidence, Tracey Hillier described Kotukutuku/Puketapu as a channel between a rock formation where "a number of waka came in for safe berthing".[91] It is also the site where Te Pahau was killed by Ngāi Tai. That small channel is visible on the original Maven map showing the area surrounding the Tarakeha Headland, and is within the takutai moana extending from Part Ōpape 1A19B block. Ms Hillier also stated that the wāhi tapu was only "within the toka [rock] environment".[92] Given this is an area that is clearly defined by reference to the natural geographic boundaries surrounding it, and Ngāi Tamahaua have established a connection to the area in tikanga, Kotukutuku/Puketapu meets the requirements of the Act for recognition within a CMT order.

[247] The only evidence provided by Tracey Hillier as to Te Ana o Ani Karere was that the area around the Tarakeha Headland is associated with Ani Karere, who is the kaitiaki of the "whole area".[93] Similarly to Tai Haruru and Ōpēpē Stream, the mapping

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91 *Re Edwards* Stage Two Notes of Evidence, at 35.
92 At 35.
93 At 36.

of Te Ana o Ani Karere by Ngāi Tamahaua does not provide the Court with certainty in respect of the location of its boundaries, being shown through hand-drawn additions to a map produced by Maven. Nor does the original Maven Map reveal any further geographic detail helpful to identifying its location. An accurate map will be required before it can be recognised as a wāhi tapu within the CMT order.

Restrictions and prohibitions

[248] As noted above, Ngāi Tamahaua sought to apply the same set of prohibitions and restrictions across all of their claimed wāhi tapu. However, many of the proposed prohibitions and restrictions do not seem to be linked to the protection of wāhi tapu located in the takutai moana. Many of the proposed restrictions or prohibitions were expressed in a way that meant that there was no real prospect of them being enforced by way of a prosecution. Minimal evidence was provided as to the basis for proposed prohibitions and restrictions other than that they were required to protect the mauri of a site, and/or that they applied as a matter of tikanga. I address each of these in turn.

[249] An obvious example is the proposed restriction that "camping – at or near wāhi tapu sites must comply with the hapū coastal management plan". People do not go camping in the takutai moana. This restriction seems designed to control activities that occur outside of the takutai moana. The Act does not give the Court jurisdiction to impose restrictions on activities occurring outside the takutai moana, even if they are occurring nearby to it. The reference to a "hapū coastal management plan" also creates problems. The Act does not provide for a "hapū coastal management plan". Section 85(1) of the Act provides that a **customary marine title group** has the right to prepare a planning document in accordance with its tikanga.

[250] The CMT group which this right vests in, is not any one of the hapū individually but the collective group in whom CMT 1 and CMT 2 were jointly vested. It may be that this group prepares a document that has different chapters relating to the enforcement of wāhi tapu conditions prepared by each individual hapū/iwi, but that can only be authorised by the collective group. The Act does not confer on an individual hapū the right unilaterally prepare its own planning document.

[251] The proposed restriction against the undertaking of commercial activity at a wāhi tapu, without further detail as to what those activities are and how preventing them is required to protect that wāhi tapu, does not satisfy the requirements of the Act. While this was a restriction sought by multiple applicants, there was no evidence relating to how the prohibition of commercial activities would be required to protect wāhi tapu sites or areas. Neither is the concept of a "commercial activity" one with a sufficiently certain meaning so as to allow those potentially affected by it, to understand exactly what sort of activity is intended to be covered by it.

[252] There was no evidence as to how a restriction on the erection of signage, pou or other fixtures at a wāhi tapu would be linked their protection. If wāhi tapu protections are to be enforceable and complied with, some form of notice or signage at a wāhi tapu is likely to be helpful, if not necessary. A restriction preventing this would seem to be inconsistent with the need for the restriction proposed to be required to protect the wāhi tapu. Some applicants submitted that no signage or pou were to be erected at wāhi tapu sites without express permission from hapū representatives. Information as to who those representatives were to be was not provided. Therefore, those affected by this proposed restriction would not be able to readily find out who to contact.

[253] Some applicants also referred broadly to the restriction or prohibition of activities that effect the mauri of wāhi tapu. The mauri of a wāhi tapu being affected by a particular defined activity provides an appropriate basis in tikanga for the restriction of that activity, and that may be recognised by the Act. However, a generalised restriction or prohibition of any activity that effects the mauri of wāhi tapu, does not meet the requirements of the Act as to certainty or enforceability. The same can be said for restrictions such as "no loud gatherings" or restriction of "public access to risk areas for the introduction of dangerous species".

[254] There are some restrictions that relate to activities that do not take place in the takutai moana or can only take place subject to a resource consent. For example, "developments" are not "repaired" or "restored" in the takutai moana. Once again, the intent seems to be the impermissible one of regulating activities taking place on sites nearby to the takutai moana rather than in it.

[255] It is possible that a prohibition on burials, sea burials, or the scattering of ashes at a wāhi tapu is linked to the protection of the mauri of a wāhi tapu and that these proposed restrictions are necessary to achieve that outcome. However, no evidence was provided by the applicants to suggest that this was the reason for which this prohibition was proposed. The only successful applicant who commented on this restriction was Kelvin Tapuke on behalf of Muriwai Maggie Jones, giving evidence for Ngāi Tai, who stated in respect of the scattering of ashes at wāhi tapu that "we don't want that".[94] This is not a sufficient evidential foundation upon which the Court can conclude that the requirements of the statute have been met. Nor did Ngāi Tamahaua provide evidence on this point.

[256] Section 83 of the Act provides that on or after the date upon which a CMT order is sealed:[95]

> (2) A customary marine title group has, and may exercise, ownership of minerals (other than petroleum, gold, silver, and uranium existing in their natural condition) that are within the customary marine title area of that group.
>
> (3) The reservation of minerals in favour of the Crown continued by section 16(2) ceases.

[257] A prohibition on the removal or collection of minerals is therefore consistent with the rights awarded upon a grant of CMT, with the exception of petroleum, gold, silver, and uranium existing in their natural condition. Sections 83(2) and 83(3) mean that the reservation in favour of the Crown upon the alienation of land from the Crown, of all other minerals existing in their natural condition, created by s 11 of the Crown Minerals Act 1991, ceases. This occurs when a CMT order is sealed. Because ownership of minerals within the CMT area is already a right that crystalises upon the sealing of a CMT order, it cannot be said that a prohibition on the removal or collection of minerals is required to protect wāhi tapu sites.[96] Those minerals will be owned by the CMT group when the order is sealed, and their removal by other parties prohibited.

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94 *Re Edwards* Stage Two Notes of Evidence, at 333.
95 See definition of "effective date", ss 9 and 113.
96 Section 2 of the Crown Minerals Act 1991 defines minerals as a naturally occurring inorganic substance beneath or at the surface of the earth, whether or not under water; and includes all metallic minerals, non-metallic minerals, fuel minerals, precious stones, industrial rocks and building stones, and a prescribed substance within the meaning of the Atomic Energy Act 1945.

Again, it is necessary to note that the rights given by s 83 vest in the joint CMT 1 and CMT 2 groups, not individual hapū.

[258] Conversely, a CMT group does not acquire ownership of all 'natural resources' or 'any other organic materials' upon the sealing of a CMT order. Indeed, neither the Crown nor any other person owns, or is capable of owning, the takutai moana, in the sense that would result in the ownership of all natural resources or organic materials.[97] A prohibition on the removal or collection of natural resources or any other organic materials is therefore inconsistent with an award of CMT, and is unable to apply to a wāhi tapu site or area.

[259] A prohibition on the vandalising of wāhi tapu areas, without further detail as to what is prohibited is not a prohibition amenable to enforcement. The word "vandalising" is capable of capturing a great range of actions, but it is difficult to see how the takutai moana itself, as opposed to structures on nearby land outside the takutai moana, could be vandalised. Similarly, no evidence was provided linking the prohibition of specific activities amounting to vandalism, to the protection of any of the applicants' wāhi tapu sites. Existing structures in the takutai moana could conceivably be vandalised but they remain the personal property of their owners and are not acquired as part of a CMT order.[98]

[260] If the applicants are able to describe proposed restrictions or prohibitions and the reasons for them that are supported by evidence and capable of enforcement, then these should be identified with the updated maps that need to be filed. In the absence of that information the Court cannot make the orders sought.

Ngāti Ira o Waiōweka

[261] Ngāti Ira o Waiōweka in closing submissions, reduced their wāhi tapu claims to two sites within CMT 1. These were Te Totara and Te Kārihi Pōtae.

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97 Section 11(2).
98 Section 18.

[262] The restrictions and prohibitions sought by Ngāti Ira o Waiōweka in relation these claims were contained in a table marked "B" in the appendices to their closing submissions, replicated below.

<table>
<tr><th>Restrictions</th><th>Prohibitions</th></tr>
<tr><td>

No camping at or near wāhi tapu (for example, directly on the beach in front)
No commercial activities performed at or near a wāhi tapu site (for example, directly on the beach in front)
No vehicle access, boats, 4WD bikes, yachts, or any ships to dock near at a wāhi tapu site (for example, directly on the beach in front)
No sea burials or ashes to be scattered at any wāhi tapu
No permanent or temporary structures to be erected at wāhi tapu (for example, directly on the beach in front)
No drones or other small flying devices are to be flown over the wāhi tapu without the prior consent of the hapū
No signage or Pou to be erected at the wāhi tapu without permission from the hapū

</td><td>
Directly on the beach in front of wāhi tapu:

No food, drinks, alcohol, picnics, or bonfires etc
No animals (especially horses, dogs)
No pollution, littering
No gutting of fish or leaving empty shells of kina, mussels, and pipi
No building of public toilets
No loud music or bonfires
No 4WDs, motorbikes, campervans, or vehicles
No horse sports or beach sports directly in front of wāhi tapu
No freedom camping, tents, or gazebos
No taking of sand, shells, plants, harakeke, reed, driftwood, or beach ecology
No events such as weddings, horse sports and music festivals

</td></tr>
<tr><td colspan="2">He Whakatūpato
A warning, cautionary provision noted in all resource consents and planning documents of the significance of this kaitiaki and who to contact should any strange phenomena occur, missing persons, strandings of boats and mammal life. Tohunga are to be contacted immediately. For Ngāti Ira and the above listed wāhi tapu, the Tohunga to contact is Te Rua Rakuraku. Upon his own directions, he can send someone else to carry out the duties of the Tohunga.</td></tr>
</table>

[263] The reasons for Ngāti Ira's proposed restrictions were drawn largely from the tikanga evidence of Tā Pou Temara, Te Riaki Amoamo, Te Rua Rakuraku and Donald Kurei. Ngāti Ira supported their evidence. Ngāti Ira submits that the restrictions and prohibitions sought are required by Tikanga Māori as law, for the protection of the sites themselves and the people who visit them. They submit that the values of Tikanga Māori are relevant in assessing the obligations of Māori to the takutai moana and future generations.

Te Totara

[264] Te Totara is a historic site where a battle took place between Ngāti Hokupū and Te Whakatōhea, described as being located "below the Onekawa bluff".[99] Mr Donald Kurei, in giving evidence for Ngāti Ira stated:[100]

> the bodies were never retrieved, the bodies that [remain] are still present and still washing up on those shores, and so that's the significance to us, for Ngāti Ira o Waiōweka.

[265] The map filed by Ngāti Ira illustrates that the tapu of the site originates on dry land, just down from Onekawa Pā. In closing, Ngāti Ira submitted that the Act merely requires that wāhi tapu be "located in the CMT area and demonstrably in the vicinity of the mean high water springs mark". I do not accept that submission. The Act requires that wāhi tapu are within the CMT area and within the takutai moana.

[266] Where the evidence establishes that tapu originating on dry land radiates into the moana, and that it is necessary to recognise this in order for the wāhi tapu to be protected, that may be recognised in a CMT order. However, the evidence led by Ngāti Ira in respect of Te Totara did not do that. It alleged that Te Totara was a battle site on the bluff below Onekawa, which falls outside of the takutai moana. That is also where the map filed shows it to be. Therefore, the Court has no jurisdiction to recognise it in a CMT as a wāhi tapu.

[267] Te Kāhiri Pōtae is discussed below in the section relating to wāhi tapu that were claimed by multiple applicants.

Restrictions and prohibitions

[268] As Ngāti Ira have not established the requirements of the Act in respect of Te Totara's wāhi tapu status, it is unnecessary to assess whether their proposed restrictions and prohibitions would be required to protect it. However, I note that the reasoning above at [248]–[260] relating to the proposed prohibitions and restrictions

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99 Joint Affidavit of Te Rua Rakuraku and Donald Kurei 21 January 2022, Exhibit A at 3.

100 *Re Edwards* Stage Two Notes of Evidence, at 152.

of Ngāi Tamahaua, apply to the restrictions and prohibitions proposed by Ngāti Ira, where they are substantially the same.

Ngāti Patumoana

[269] Ngāti Patumoana claims the following sites as wāhi tapu within CMT 1:

(a) Onekawa urupā;

(b) Tuamutu/Tuamotu urupā;

(c) Maraerohutu;

(d) Te Arautauta waka landing; and

(e) Whanaungakore kaitiaki.

[270] This is a reduced list of wāhi tapu, identified in a document filed with Ngāti Patumoana's closing submissions, compared to the original table attached to Te Riaki Amoamo's affidavit of 25 January 2022. Ngāti Patumoana submits that in respect of these claims that the "seaward extent of the wāhi tapu follows from Te Riaki Amoamo's comment that it extends beyond the breakers, about an imperial mile". The restrictions and prohibitions sought by Ngāti Patumoana in relation to all of their wāhi tapu claims were contained in the same table. They are essentially identical to the prohibitions sought by Ngāti Ira.

[271] Ngāti Patumoana's submissions did not squarely address the reasons for the restrictions and prohibitions they have sought in respect of wāhi tapu sites, beyond referring to the evidence of Te Riaki Amoamo, who said that all of the prohibitions and restrictions proposed applied as a matter of tikanga.

[272] Te Arautauta waka landing and Tuamutu urupā are discussed below in the section relating to sites claimed by multiple applicants.

Onekawa urupā

[273] Onekawa urupā was described by Te Riaki Amoamo as an ancient burial site of Ngāti Patumoana which pre-dates 1800.[101] It is situated in the sand dunes on the eastern spit of the Ōhiwa Harbour entrance, below Onekawa Pā. In his oral evidence Mr Amoamo stated:[102]

> …that's the urupā for the Onekawa and Matai ancient pā sites up on, elevated up on the top [of the hill]. So, the urupā is close to the base of [the] smallest headland or the land that extends out to the sea where the sandhills are…

[274] That evidence, and the document filed by Ngāti Patumoana as to its location, illustrates that Onekawa urupā is not in the takutai moana, being located in the sand dunes above MHWS. However, Mr Amoamo also gave evidence attesting that the tapu of the urupā extends from the sand dunes, out in to the moana to a short distance. When asked where the tapu of the urupā extended out to sea, Mr Amoamo said that the tapu of the urupā extends at least over the distance of the foreshore in front of the urupā, out into the waves of the moana.[103] Mr Amoamo was not cross-examined on this evidence for Ngāti Patumoana on the nature, location, or extent of tapu at Onekawa urupā. Nor was any conflicting evidence put before the Court.

[275] The evidence of Mr Brendon Mulholland and Mr James Jennings, given on behalf of the Attorney-General, indicated that the area of land located directly in front of the urupā is part of a reserve, titled 'Section 42 Block V Town of Ōhiwa'.[104] The presence of this reserve was also confirmed by survey maps filed by Ms Julia Glass.[105] Reserves are excluded from the common marine and coastal area, and fall outside of the area over which the Court has jurisdiction to award CMT.[106] However, this reserve does not fall within the takutai moana, and is therefore not a bar to the recognition in a CMT order of the area which is within the takutai moana in front of Onekawa urupā, as a wāhi tapu.

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[101] Affidavit of Te Riaki Amoamo on behalf of Ngāti Patumoana, 25 January 2022 at TRA007.
[102] *Re Edwards* Stage Two Notes of Evidence, at 258.
[103] At 259.
[104] Affidavit of Richard James Jennings, 31 January 2022, at Exhibit RJ-04.
[105] Julia Glass Maps, CMT 1, at Sheet 8.
[106] Section 9.

[276] I accept Mr Amoamo's uncontradicted evidence as to the tapu of Onekawa urupā extending into the takutai moana. However, his evidence was that the tapu area was limited to the area of the foreshore touched by water. Therefore, the wāhi tapu area is only to be the area between MHWS and MLWS directly in front of the urupā. That will need to be properly defined by an accurate map.

Maraerohutu

[277] Ngāti Patumoana seek wāhi tapu protections for the area of the takutai moana directly in front of Maraetohutu Pā, beginning at the Waiwhakatoitoi Stream, and extending out into the moana. Mr Amoamo described Maraerohutu Pā as being east of Waiōtahe beach, and located on privately owned land.[107] Te Ringahuia Hata's Stage One evidence also noted that there is a cluster of historic Pā sites near the mouths of the Maraerohutu and Waiwhakatoitoi Streams.[108]

[278] The document filed by Ngāti Patumoana depicts that the site of Maraerohutu Pā is on dry land some distance above MWHS, but also shows a purple shaded area, said to be wāhi tapu, extending from the Waiwhakatoitoi Stream in a curved fashion out into the moana. At the Stage Two hearing, in the giving of evidence for Ngāti Patumoana, Ms Hata and Mr Amoamo had the following discussion:[109]

> Q. Āe, kia ora Uncle. If we move to Waiwhakatoitoi Stream now, we're seeking [Maraerohutu] wāhi tapu area in this shaded area to the right side of Waiwhakatoitoi Stream, is that right?
>
> A. That's right.
>
> Q. Can you explain why?
>
> A. Because it's in the proximity of the residents of [Maraerohutu] and other ancient pā sites close by are buried down on the sandhills.
>
> Q. Ka pai.
>
> A. The sandhills just across the road and they are not buried on the beach, but they're buried in the sandhills, you get to the sandhills and then the beach, and then the sea.

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107 Affidavit of Te Riaki Amoamo on behalf of Ngāti Patumoana, 25 January 2022, at TRA008.
108 Affidavit of Te Ringahuia Hata, 29 January 2020, at [52].
109 *Re Edwards* Stage Two Notes of Evidence, at 261.

Q. So, the wāhi tapu area of influence, the shaded purple area, Uncle, you've mapped out here, what are the prohibitions and restrictions you want [to see] on this part of [Maraerohutu]? So no food, no kai.

A. Nothing. No food and no eating and drinking or whatever.

Q. Āe.

A. But it goes as far as the high tide water mark when the tapu recedes to the low tide water mark, and it's still affecting the water's edge and that water's edge is part of the ocean and it goes over the waves again, gets into the ocean and that's where the tapu is, from there to the coastland, to the beach.

[279] Ngāti Patumoana therefore assert that the area of the takutai moana in front of Maraerohutu Pā, beginning from the Waiwhakatoitoi Stream, is wāhi tapu, owing to its close proximity to the Pā, which is located on dry land above MWHS, behind the beach. The area mapped by Ngāti Patumoana is however, inconsistent with Mr Amoamo's view that the tapu extends only between the "high tide water mark" and the "low tide water mark", or between the coastland to the beach, as it shows an area extending some distance beyond MLWS. The area that is mapped as wāhi tapu is also entirely disconnected from Maraerohutu Pā, given that Waiwhakatoitoi Stream is slightly west of the Pā site. In order to recognise a wāhi tapu within a CMT order, the Court must be satisfied that a wāhi tapu is in the takutai moana, or that there is a sufficient foundation for a conclusion that tapu originating above MHWS extends into the moana.

[280] In respect of Maraerohutu Pā, the source of tapu is clearly above MHWS, being further away from the water's edge comparatively than Onekawa urupā. Given that the document filed by Ngāti Patumoana is inconsistent with the evidence provided by Mr Amoamo as to the distance the tapu extends, and location of the tapu, Maraerohutu (or the area in front of it) is unable to be recognised in the CMT order. A clear foundation for a conclusion that the tapu of Maraerohutu Pā extends beyond into the takutai moana, was not established by the evidence before the Court.

Whanaungakore kaitiaki

[281] The area relating to Whanaungakore is located at the mouth of the Waiōweka River, within the area of substantial interruption caused by the Ōpōtiki Harbour

Development Project. As it is not within the CMT area the Court is unable to recognise it within a CMT order as wāhi tapu.

Restrictions and prohibitions

[282] Ngāti Patumoana have met the requirements of the Act for the recognition of the area between MWHS and MLWS directly in front of Onekawa urupā, within the CMT order, as wāhi tapu. Ngāti Patumoana sought all of the restrictions and prohibitions in the table noted above, on the basis that they applied as a matter of tikanga.

[283] The reasoning set out above at [248]-[260] relating to the proposed prohibitions and restrictions of Ngāi Tamahaua, applies to the restrictions and prohibitions proposed by Ngāti Patumoana, where they are substantially the same. The remaining restrictions proposed by Ngāti Patumoana are:

(a) no drones or other small flying devices are to be flown over the wāhi tapu without the prior consent of the hapū;

(b) no food, drinks, alcohol, picnics, loud music, or bonfires;

(c) no animals (especially horses, dogs);

(d) no gutting of fish or leaving empty shells of kina, mussels, and pipi;

(e) no building of public toilets;

(f) no 4WDs, motorbikes, campervans, or vehicles;

(g) no horse sports or beach sports directly in front of wāhi tapu;

(h) no taking of sand, shells, plants, harakeke, reed, driftwood, or beach ecology;

(i) no events such as weddings, or music festivals;

(j) within one mile (1.6km) in the sea in front of the wāhi tapu:

   (i) no swimming in the area directly in front of the wāhi tapu area;

   (ii) no jet skis, kayaks, boats, surfing, and other water sports;

(k) no anchorage; and

(l) He Whakatūpato: A warning, cautionary provision noted in all resource consents and planning documents of the significance of this kaitiaki and who to contact should any strange phenomena occur, missing persons, strandings of boats and mammal life. Tohunga are to be contacted immediately.

[284] Starting with the proposed restrictions on "drones or other small flying devices" being flown over the wāhi tapu without the consent of the hapū, the marine and coastal area is defined in s 9 as including the airspace above the marine and coastal area so the activity which is proposed to be restricted does occur within the takutai moana. But there was no evidence explaining why this restriction was required to protect the wāhi tapu or what the reasons for it were. It therefore does not meet the requirements of ss 78(2) and 79(1)(b) of the Act.

[285] Many of the proposed restrictions appear to attempt to restrict activities that would normally occur on areas outside the takutai moana. This includes restrictions on weddings, music festivals, building of public toilets, horse sports, or the use of campervans. Unless the activities that are proposed to be restricted or prohibited take place in the takutai moana, they cannot be part of a wāhi tapu condition on a CMT.

[286] Some of the proposed restrictions do not relate to activities which would normally occur in the area between MHWS and MLWS, which is the only area which Ngāti Patumoana are able to have recognised within the CMT order as a wāhi tapu. An example is making anchorage. Boats or other water vessels are not typically anchored in the area between MHWS and MLWS. Nor would bonfires take place in an area that is covered by water on a daily basis. No reasons have been advanced as

to why a restriction on swimming or the use of jet skis, kayaks, boats, surf boards or other water activities to a distance of one mile should apply to a wāhi tapu that is established for the purpose of the CMT order, only to be in the area between MHWS and MLWS.

[287] The restriction described in subparagraph (1) purports to require local authorities issuing resource consents or preparing planning documents to include certain content in those documents. That is not something authorised by ss 78 or 79.

[288] As discussed above at [258], a CMT group does not acquire ownership of natural resources or other organic materials, upon the sealing of a CMT order.[110] The Act provides that the common marine and coastal area is incapable of being owned in a sense that would result in the ownership of all organic and/or natural materials. Therefore, a restriction on the taking or removal of sand, shells, plants, harakeke, reeds, driftwood, or beach ecology, being organic materials and natural resources, is inconsistent with an award of CMT, and is unable to apply to a wāhi tapu site or area.

[289] Activities sought to be prohibited such as the gutting of fish or leaving empty shells of kina, mussels and pipi can be addressed under existing legislation. As the Court discussed in *Re Ngāti Pāhauwera* appropriate existing mechanisms include regulations made under the Fisheries Act 1996 or the Resource Management (Marine Pollution) Regulations 1998.[111]

[290] Part Four of the Ōpōtiki District Council's Consolidated Bylaws 2021, which relates to beaches, already prohibits the use of vehicles in the area directly in front of Onekawa urupā, between MHWS and MLWS.[112] A large portion of the Ōhiwa Spit is a vehicle prohibited area, and this area has been depicted in a map, attached to the

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110 With the exception of minerals existing in their natural condition other than petroleum, gold, silver, and uranium.

111 Above n 8, at [159].

112 "Beach" is defined by s 1.5.1 of the Ōpōtiki District Council Consolidated Bylaw 2021 as the foreshore being an area covered and uncovered by the tide between mean high-water springs and mean low water springs and any adjacent area that can reasonably be considered part of the beach environment including areas of sand, pebbles, shell, shingle, dune, or coastal vegetation and to which the public has a right of access but does not include private property.

Consolidated Bylaw by the Council.[113] The Council's bylaws in respect of vehicle prohibited areas provide the following:

> **4.5 Vehicle prohibited areas**
>
> 4.5.2 The Council may by publicly notified resolution declare any part of the beach to be a vehicle prohibited area.
>
> 4.5.3 A person must not take or drive any vehicle in a vehicle prohibited area, other than for surf lifesaving operations, emergency situations, law enforcement activities, or coastal conservation management activities.
>
> 4.5.4 Schedule 1 of Part 4 Beaches identifies vehicle prohibited areas.

[291] The map of the vehicle prohibited area on the Ōhiwa Spit, shows the area directly in front of Onekawa urupā, and marks out an area extending from the headland, and into the takutai moana for a short distance. This map was also submitted with Ngāti Patumoana's closing submissions. Restrictions or prohibitions on the use of vehicles are created pursuant to s 22AB(1)(f) of the Land Transport Act 1998, which provides, among other things, that a road controlling authority may make any bylaw it thinks fit for the purpose of prohibiting or restricting the use of vehicles on beaches. Contravention without reasonable excuse of a bylaw made under s 22AB results in a maximum penalty on conviction a fine of $1000, or in the case of an infringement, a $150 fine.[114]

[292] This is an effective and appropriate mechanism for the restriction of the use of vehicles in areas of the takutai moana. Onekawa urupā and the area in front of it, extending past MHWS, has already been declared a vehicle prohibited area by the Ōpōtiki District Council. Accordingly, it cannot be said that a prohibition or restriction on 4WD, motorbikes or vehicles is necessary to protect it.

[293] As to the control of animals other than dogs on beaches, the Consolidated Bylaw 2021 provides:

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[113] Ōpōtiki District Council Consolidated Bylaws 2021, pt 4 sch 1, at Map 2.

[114] Land Transport Act 1998, s 22A(3A); and Land Transport (Offences and Penalties) Regulations 1999, sch 1.

4.7 Control of animals

4.7.1 A person must not bring a horse or other animal (excluding dogs) or allow any horse or other animal (excluding dogs) in his or her control into or on:

(a) Any area where endangered birds are nesting, including dotterel areas identified in [the maps contained in] schedule 1 of Part 4 Beaches.

(b) Any designated conservation area.

(c) Any coastal vegetation or rehabilitation area.

(d) The sand dunes.

4.7.2 Any person riding, driving, or leading a horse must enter and exit the beach using designated and/or formed access ways.

4.7.3 Where any horse or other animal is found on any beach in contravention of Part 4 Beaches, it may be seized and impounded by any person duly authorised by the Council.

[294] There are also further provisions which relate to the control of horse riding in public places:

8.10 Control of horse riding in public places

8.10.1 A person must not ride a horse in a public place recklessly or in a manner that intimidates, or causes a danger or nuisance to other people.

8.10.2 The person in control of any horse in a public place must remove or safely dispose of any manure deposited by that horse as soon as practicable.

8.10.3 Except [with] the written consent of the Council or an authorised officer, a person must not ride a horse in a public place in:

(a) The section of Church Street between Kelly Street and Richard Street.

(b) Those sections of Kelly Street, Elliott Street, King Street and Richard Street between Church Street and St John Street.

(c) The Ōhiwa Harbour mudflats.

8.10.4 Following consultation with the public and interested parties, the Council may by resolution prohibit horse riding in any public place additional to those specified in clause [8.10.3].

8.10.5 The Council will install signs to indicate the areas where the prohibitions in clauses [8.10.3] and [8.10.4] apply.

[295] Any prohibition or restriction proposed by a CMT group must be required to protect the wāhi tapu or wāhi tapu area. There are appropriate existing mechanisms for the restriction of the presence of horses upon beaches and public places generally, which are available for the applicants to utilize, in consultation with Ōpōtiki District Council. It cannot be said that a restriction on the presence of horses is required to protect a wāhi tapu.

[296] Part Nine of the Consolidated Bylaw 2021 refers to dog control. The purpose of Part Nine is to "[regulate] the control of dogs so they do not cause danger, distress, or nuisance to the community, stock, domestic animals, or protected wildlife."[115] The power of a territorial authority such as the Ōpōtiki District Council to make bylaws in respect of dog control derives from s 20(1) of the Dog Control Act 1996. Section 20(1)(a) of that Act provides that a territorial authority may make bylaws for the purpose of prohibiting dogs from specified public places. A territorial authority is required to adopt a policy in respect of dogs within its district.[116]

[297] As in respect of vehicles, the Council, "may by publicly notified resolution declare any public place to be a dog prohibited area".[117] For example, there are dog prohibited areas on both Waiaua Spits on each side of the river mouth, and also on the Waiotahe spit.[118] Accordingly, there are appropriate existing mechanisms for the restriction of the presence of dogs in public places, which are available for the applicants to utilise, in consultation with Ōpōtiki District Council. It cannot be said that a restriction on the presence of dogs is required to protect a wāhi tapu.

[298] Although the Act does not provide for wāhi tapu conditions in a CMT to compel local authorities to insert wording into resource consents or planning documents, it can be expected that once a CMT is issued and wāhi tapu sites identified, that the local authorities will engage in dialogue with the CMT holders as to the appropriate mechanisms for enforcement of necessary wāhi tapu protections. There is also scope to utilise s 85.

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115 Ōpōtiki District Council Consolidated Bylaw 2021, Part 9 Dog Control, s 9.2.1.
116 Dog Control Act 1996, s 10(1).
117 Ōpōtiki District Council Consolidated Bylaw 2021, Part 9 Dog Control, s 9.6.1.
118 Ōpōtiki District Council Consolidated Bylaw 2021, Part 9 Dog Control, sch 1, maps 6 and 8.

[299] In giving evidence for Ngāti Patumoana, Te Ringahuia Hata stated that the kind of provision sought by Ngāti Patumoana was of the nature that:[119]

> …it [wouldn't] restrict people from physically entering that area. if something happens in that area, like a drowning or ships are stranded or people go missing, what the whakatūpato provision might say in there is, what is the tikanga process that [must be followed] in order to make that area either noa or what tikanga or karakia ritual is needed and who [someone] would go to see to have those rites performed.

[300] This sort of objective may be able to be achieved pursuant to the power set out in s 85 of a CMT group to prepare a planning document. A planning document may include matters relevant to the sustainable management of the natural and physical resources of the group, and/or the protection of the cultural identity and historic heritage of the group.[120] This includes matters that may be regulated under the Heritage New Zealand Pouhere Taonga Act 2014.[121] A planning document among other things, has the purpose of setting out the regulatory and management objectives of the CMT group for the CMT area, and the policies for achieving those objectives.[122]

[301] Where a CMT group satisfies the requirements for the recognition of a wāhi tapu within a CMT order, that is something that may be included in a planning document. A completed planning document is lodged with the relevant regional council and "any of the agencies referred to in ss 88 to 91 whose jurisdiction is relevant to the contents of the planning document".[123] The agencies referred to in ss 88 to 91 thereby have various obligations to have regard to, and take into account the planning document when performing their statutory and regulatory functions. This is a mechanism through which the Act provides for local and central government to be aware of and have regard to the rights of a CMT group, and their objectives for the management of their CMT area.

[302] A planning document is also a mechanism whereby a CMT group may put on notice any person or entity seeking a resource consent within the CMT area, of a

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[119] *Re Edwards* Stage Two Notes of Evidence, at 271.
[120] Section 85(3).
[121] Section 85(5)(b).
[122] Section 85(2).
[123] Section 86(1). The agencies referred to in ss 88-91 are local authorities, Heritage New Zealand Pouhere Taonga, the Director-General of Conservation, and the Minister of Fisheries.

requirement of a warning as to specified areas within the takutai moana. Such a provision would be consistent with the exercise of the RMA permission right.[124]

[303] The right to create and lodge a planning document, and also the RMA permission right, vests with the CMT group, rather than the individual entities that make up the CMT group. Further, nothing in the Act limits or affects any resource consent granted before the commencement of the Act.[125] Accordingly, any such warning provision included in a planning document or sought pursuant to the RMA permission right cannot have any effect on existing resource consents.

[304] Because the Act provides a clear mechanism for the inclusion and application of a warning provision of the type sought by Ngāti Patumoana, as well as some of the other applicants, it cannot be said that its inclusion as a restriction or prohibition is necessary to protect a wāhi tapu.

[305] If the applicants are able to describe and propose restrictions or prohibitions that are supported by evidence and capable of enforcement, then they may be included on the CMT. Such prohibitions or restrictions would apply to the area described directly in front of Onekawa urupā between MHWS and MLWS.

Ngāti Ruatakenga

[306] Ngāti Ruatakenga claims the following sites as wāhi tapu within CMT 1:

(a) the area surrounding the mouth of the Waiaua River as a single area, including Te Rangimatanui, Waiwhero and Rāhui Whākarōto as individual wāhi tapu;[126]

(b) Tirohanga Stream; and

(c) Te Roto, an ancient urupā of Ngāti Ngahere.[127]

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[124] See s 66.
[125] Section 20.
[126] For maps see Stage Two Hearing exhibits 6, 26, and 27.
[127] For a map see Stage Two hearing exhibit 9.

[307] Ms Feint on behalf of Ngāti Ruatakenga relied on the evidence noted above given by Tā Pou Temara and Te Riaki Amoamo, in submitting "that the Court should approach [wāhi tapu] by considering how far offshore the evidence shows is required to be protected."

[308] Ngāti Rua in reference to the restrictions and prohibitions proposed stated that:

> Ngāti Rua support the table that the late kaumātua Hetaraka Biddle attached to his evidence, but [have] adapted it by adding two further prohibitions, to prohibit consumption of food, and fishing or whitebaiting.

[309] Ngāti Rua submit that the evidence shows that all the restrictions and prohibitions contained in the table apply to their claimed wāhi tapu as a matter of tikanga. The restrictions have been designed to prevent the desecration of wāhi tapu by seeking to prevent inappropriate development or activities, by ensuring that the hapū can regulate what is permissible.

[310] All of Ngāti Ruatakenga's claimed wāhi tapu were also claimed by other applicants. They are addressed in the section below referring to wāhi tapu sites claimed by more than one applicant, as well as their proposed restrictions and prohibitions.

Te Ūpokorehe

[311] Te Ūpokorehe claims the following sites within CMT 1 as wāhi tapu:

(a) Onekawa Pa;

(b) Te Ara Kotipu;

(c) Taumata Kahawai;

(d) Karihi Potae;

(e) Te Ahiaua;

(f) Tarewarewa;

(g) Te Rua o Parewarewa;

(h) Maromahue Marae;

(i) Te Parenui o Pukeni Otao;

(j) Paepae Aotea;

(k) Te Tukina Rae o Kanawa;

(l) Te Rae o Kanawa;

(m) Pukeahua;

(n) Maraetōtara;

(o) Te Toka o Waiotahe;

(p) Hamatatua; and

(q) Rururerehe.

[312] Te Ara Kotipu, Karihi Potae, and Maraetōtara are addressed in the section referring to wāhi tapu claimed by multiple applicants below.

[313] Te Ūpokorehe submit that their "[wāhi tapu] overlap and intertwine. Those on land radiate into the moana, and vice versa.". The only prohibition or restriction sought by Te Ūpokorehe in relation to these sites is the ability to place temporary rāhui when required by tikanga in six specific circumstances. These are:

(a) when natural disasters occur, to protect the Harbour, wāhi tapu and the public;

(b) to restrict public access to risk areas for the introduction of dangerous species;

(c) in the case of unforeseen health and safety threats;

(d) to ensure the sustainability of the ecology in Ōhiwa Harbour;

(e) to restrict development which may impact the ecology of the Ōhiwa Harbour; and

(f) when a death occurs, to restrict swimming and gathering of kaimoana.

[314] As is immediately apparent, the ability to impose prohibitions and restrictions by way of the imposition of temporary rāhui is sought in circumstances which go well beyond the need to protect wāhi tapu. For example, in (a), in addition to protecting wāhi tapu, the conditions are sought to be imposed "to protect the Harbour … and the public". An acceptable condition might read, "when natural disasters occur, to protect wāhi tapu".

[315] Proposed condition (b) "to restrict public access to risk areas for the introduction of dangerous species", does not relate to the protection of wāhi tapu at all. The same can be said for proposed conditions (c), (d), and (e).

[316] Proposed condition (f) "when a death occurs, to restrict swimming and gathering of kaimoana" is connected with the protection of wāhi tapu with the tapu arising as a result of the death. However, the relevant death would need to occur in the takutai moana rather than somewhere else. So a more appropriate restriction might read, "when a death occurs in the takutai moana, to restrict swimming and gathering of kaimoana in the relevant area of the takutai moana."

[317] The reasons put forward for the proposed restrictions also indicate that the focus goes well beyond what is needed to protect wāhi tapu. They were said to be needed to "protect and ensure the mauri of the resources that sustain the entire ecosystem of the [Ōhiwa] Harbour".[128]

[128] Joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022 at [72].

[318] Another issue that arose in the context of the wāhi tapu claims made by Te Ūpokorehe was the quality of their mapping. Te Ūpokorehe filed two sets of maps. The first were nine maps filed with an affidavit of Mr Jimmy Hills. Those maps illustrated wāhi tapu through diagrams drawn on topographical maps, and labelled with numbers corresponding to a list of over 100 sites contained in the joint affidavit of Wallace Aramoana and Maude Edwards. These maps were said to have been filed given that the formal survey maps prepared by Maven were not available until a short time prior to the Stage Two hearing.

[319] On 22 February 2022, Te Ūpokorehe then filed a further document showing their claimed wāhi tapu, again with diagrams labelled by numbers corresponding to the list of Wallace Aramoana and Maude Edwards. On this document, the diagrams are drawn upon a single satellite image depicting the area between Maraetōtara and the Waiōweka River, including the entire Ōhiwa Harbour.

[320] In the analysis below, I refer primarily to the document filed on 22 February 2022, given that the satellite-imagery provides a clearer basis for the identification of the location of Te Ūpokorehe's wāhi tapu claims. Unfortunately, some of the wāhi tapu claimed through the numbered list of Wallace Aramoana and Maude Edwards do not appear on the document filed on 22 February 2022. Where that is the case, it is necessary to refer to the maps filed by Jimmy Hills.

[321] The main issue in terms of these maps is that many of the wāhi tapu are not in the takutai moana, and the vast majority of their locations are not identified with sufficient certainty so as to allow the Court to identify them. Unless the applicants file a map or set of maps that provides a sufficient basis for the conclusion that their wāhi tapu are in the takutai moana and provide sufficient certainty as to the location of their boundaries, the Court cannot incorporate them into a CMT.

[322] The list of sites provided by Wallace Aramoana and Maude Edwards for Te Ūpokorehe categorised each site according to a list of types of wāhi tapu, these were:[129]

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129 Joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022 at [83].

(a) Pā sites/Waahi Nohanga;

(b) Pipi beds;

(c) River mouths and streams;

(d) Urupā;

(e) Archaeological sites;

(f) Mahinga Mataitai/Mahinga Kai;

(g) Spawning grounds; and

(h) Taunga ika.

[323] Beyond linking each wāhi tapu claim to a multitude of these categories, little evidence was provided as to their distinct nature or location. This created confusion and uncertainty in respect of sites that were, based on the location in which they were mapped, clearly unable to fall within the categories that they were said to. For example, a number of sites were said to fall within the category of 'river mouths and streams', but were mapped in areas in which there was no rivers or streams. The same can be said for sites that were said to be pā, but were mapped as being located in areas of the takutai moana always covered by water.

Onekawa Pā/Te Mawhai Pā

[324] Onekawa Pā and Te Mawhai Pā are located above MHWS on the Ōhiwa Spit. The cover page of a Historic Report filed by Kahukore Baker for the Stage One hearing depicts a wedding-photo at the pā site, which shows that it is clearly on dry land. As it is not in the takutai moana, the Court has no jurisdiction recognise it within a CMT order. No evidence was provided by Te Ūpokorehe alleging that the tapu of Onekawa Pā and/or Te Mawhai Pā extended into the takutai moana.

Taumata Kahawai

[325] Taumatai Kahawai was said to meet all eight wāhi tapu categories other than being a taunga ika. No further information or evidence was provided as to the nature of the tapu or its location. Te Riaki Amoamo's evidence for Ngāti Patumoana was that Taumata Kahawai was an elevated pā site behind both Tuamutu urupā and State Highway 2, near the Waiotahe River.[130]

[326] Te Ūpokorehe mapped the site as being located along the coastline between the Waiotahe and Waiōweka Rivers, including a significant area that is above MHWS. No evidence was provided alleging the presence of tapu at Taumata Kahawai that originated on land and extended into the takutai moana. As it appears that Taumata Kahawai is not in the takutai moana, it is unable to be recognised within a CMT order.

Te Ahiaua

[327] Te Ahiaua was said to meet all eight wāhi tapu categories other than being a taunga ika. It was also said to be a pipi bed at Waiotahe, where Te Ūpokorehe had recently placed a rāhui due to pollution.[131]

[328] At Stage One, Te Ūpokorehe was described as "[harvesting] from the kaimoana beds of Te Ahiaua", and evidence was provided showing previous incidents of pollution at the "sacred pipi beds of Te Ahiaua".[132] Te Ūpokorehe therefore addressed 'Te Ahiaua' on a different basis and in a slightly different location than the pā site named 'Te Ahiaua' that was claimed by Ngāi Tamahaua to be a wāhi tapu. Tā Pou Temara, in giving evidence for Ngāti Ira at the Stage Two hearing, described the Te Ahiaua pipi beds as "extremely tapu".[133] In an affidavit in reply to Ta Pou's evidence, Wallace Aramoana stated:[134]

> We don't take issue with the substance of this evidence, beyond stating that where examples are given, such as Te Ahiaua pipi bed, care needs to be taken to ensure that the correct kaitiaki are identified.

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130 *Re Edwards* Stage Two Notes of Evidence, at 267.
131 Affidavit of Wallace Aramoana, 9 February 2022, at [67]; and joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022, at [74].
132 Exhibit A to the affidavit of Kahukore Baker, 21 February 2020, at [4.1] and [13.9].
133 *Re Edwards* Stage Two Notes of Evidence, at 124.
134 Affidavit of Wallace Aramoana, 9 February 2022, at [67].

> Te Ūpokorehe are the kaitiaki of this pipi bed. As set out in previous [evidence], we run observations of harvesting, survey of pipi numbers, and have placed rāhui over the beds to allow stock to replenish.

[329] Te Ahiaua was numbered as site 105 in the list of Wallace Aramoana and Maude Edwards noted above. The number 105 does not appear in the document filed on 22 February 2022. However, it does appear on the maps filed by Jimmy Hills, and is depicted to be entirely on dry land, on the eastern side of the Waiotahe River. On the basis of this evidence, the site appears to fall outside the takutai moana, and the Court is unable to recognise it within a CMT order.

[330] However, if the site claimed by Te Ūpokorehe as Te Ahiaua is a set of pipi beds, then they will be located within the takutai moana. If pipi beds that are tapu are to be described on a CMT, the applicants will need to file an updated map that shows that the pipi beds are in the takutai moana, and which provides the Court with certainty as to their location. Information will also need to be provided to establish why the pipi beds are regarded as tapu rather than noa.

Tarewarewa

[331] Tarewarewa was said to be a cave and the location of a kaitiaki named 'Te Rua o Parengarenga'.[135] It was mapped in the eastern portion of the mouth of the Waiotahe River. No further evidence was provided as to the location of Tarewarewa's boundaries. Accordingly, the Court cannot be sufficiently certain as to the location of the boundaries of Tarewarewa, and it is unable to be recognised within a CMT order.

Te Rua o Parewarewa

[332] Te Rua o Parewarewa was said to be tapu for the same reason as Tarewarewa – being the location of the same kaitiaki. It was mapped as being in a significant portion of the Waiotahe River, and including areas of dry land above MHWS. No further evidence was provided by Te Ūpokorehe as to the nature or location of the tapu of Te Rua o Parewarewa, particularly whether or not the tapu was limited to the areas of the Waiotahe River that are within the takutai moana. It cannot be included on the

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135 Joint affidavit of Wallace Aramoana and Maude Edwards, 22 January 2022, at 50, site numbered 106.

CMT in the absence of a map confirming that it is located in the takutai moana and what the exact location is. There is no evidence as to the reasons for any proposed prohibitions or restrictions.

Maromahue Marae

[333] Maromahue Marae was said to be part of lands that were confiscated from Te Ūpokorehe by the Crown and given to Tūhoe for the purposes of re-settlement.[136] Marae, like Pā, are generally not located within the takutai moana. Maromahue Marae was mapped as being on the western spit at the Waiotahe River mouth, extending into the takutai moana. No further evidence was provided by Te Ūpokorehe as to where exactly the tapu of Maromahue Marae originated from, being either on dry land, or being a portion of the takutai moana that was previously land but had eroded over time. On the basis that marae are not otherwise located in the takutai moana, and the available evidence illustrating that Maromahue Marae is not in the takutai moana, the Court is unable to recognise it within a CMT order.

Te Parenui o Pukeni Otao

[334] Te Parenui o Pukenui Otao was said to meet all eight wāhi tapu categories other than being an urupā. It was mapped as being entirely within the takutai moana, off the coast of the Ōhiwa spit, slightly east of the frontage of Onekawa Pā and Te Mawhai Pā.

[335] No further evidence or information was provided as to the nature of the wāhi tapu or the location of its boundaries. There was no evidence provided as to why this area fell into the category of a pā site, being located entirely in the takutai moana, or as to why it fell into the category of a river mouth or stream, being entirely disconnected from any river or stream.

[336] As Te Parenui o Pukenui Otao is located within the takutai moana, it is in an area that is capable of being recognised within a CMT order. However, the basis for its tapu has not been clearly articulated and nor has the location of its boundaries been

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136 Exhibit A to the affidavit of Kahukore Baker, 21 February 2020, at [7.2].

established with certainty. As such, the Court is unable to recognise it within the CMT order.

Paepae Aotea

[337] Te Paepae o Aotea was not within the area of the CMT awarded at Stage One.[137] As it is not within the CMT area, it is unable to recognised within the CMT order.

Te Tukina Rae o Kanawa

[338] Te Tukina Rae o Kanawa was said to be a pipi bed, a river mouth and stream, a mahinga mataitai/mahinga kai, a spawning ground, and a taunga hi ika. It was mapped as being in the takutai moana directly out to sea from the entrance to Ōhiwa Harbour. There is conflicting evidence as to the location of this site – with Te Ūpokorehe identifying it in a location that falls within CMT 1, in front of the entrance to the Ōhiwa Harbour – and Ngāti Awa identifying it as extending from the Ōhiwa Spit, within the Harbour and CMT 2. Given that each applicant group identified the site as falling within a different CMT order, I have addressed each claim separately. Wallace Aramoana, giving evidence for Te Ūpokorehe, stated in an affidavit in reply that:[138]

> 58. We do not acknowledge the location or korero that Ngāti Awa has provided regarding this wāhi.
>
> 59. The area that Te Ūpokorehe identifies as [Te Tukina Rae o Kanawa] has a different location and name, that aligns with Te Ūpokorehe history and footprint in and around the harbour.

[339] Beyond disputing the location, no evidence was provided by Te Ūpokorehe as to the nature of the tapu or the location of the boundaries of Te Tukina Rae o Kanawa itself. The Court is unable to recognise it within the CMT order.

Te Rae o Kanawa

[340] Te Rae o Kanawa was said to be an urupā, pā site and a river mouth/stream. It was mapped as being located above MHWS, and on dry land on the western spit at the

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137 Above n 1, at [476].
138 Affidavit of Wallace Aramoana, 9 February 2022.

entrance of the Ōhiwa Harbour. On the map filed by Te Ūpokorehe, Te Rae o Kanawa itself is not in the takutai moana. No evidence was provided establishing that the tapu of Te Rae o Kanawa extended into the takutai moana. The area said to be Te Rae o Kanawa is also within a reserve that extends from the Ōhiwa Spit into the takutai moana.[139] As Te Rae o Kanawa itself is not in the takutai moana, it cannot be recognised within a CMT order.

Pukeahua

[341] Pukeahua was said to be a pā site and an archaeological site. It was mapped as extending from an area of the coastline fronting Ōhope Beach, and extending out into the takutai moana, including an area above MHWS.

[342] The map filed by Te Ūpokorehe does not show the exact location of the pā site or the archaeological site. Pā sites are generally located on dry land, above MHWS. No evidence was provided by Te Ūpokorehe indicating otherwise in respect of Pukeahua. No evidence was provided as to justify a conclusion that the tapu extends into the takutai moana. As Pukeahua does not appear to be in the takutai moana, the Court has no jurisdiction to recognise it in a CMT.

Te Toka o Waiotahe

[343] Te Toka o Waiotahe was described by Jimmy Hills as a "well-known fishing ground" and an "important food source for Ūpokorehe".[140] It was not mentioned in the document filed on 22 February 2022, but was identified in the maps filed by Mr Hills as being located off the coast of the Ōhiwa Spit, within CMT 1, over the entrance of the Ōhiwa Harbour. On that map, the site was only marked by a pin, rather than a small diagram attempting to show the extent of its boundaries. No further evidence was provided by Te Ūpokorehe as to the location of the boundaries of Te Toka o Waiotahe. It is also not clear why an area identified as a fishing ground and food source is tapu rather than noa. Therefore, the Court is unable to recognise it within a CMT order.

139 Being Section 1 SO 355091 Local Purpose Reserve.
140 Affidavit of Jimmy Hills, 25 January 2022, at [8(b)].

Hamatatua and Rururerehe

[344] Hamatatua and Rururerehe were not included in the list provided by Maude Edwards and Wallace Aramoana, but were added to that list by Jimmy Hills. Their location was not included in the document filed on 22 February 2022. In the final map provided by Mr Hills, Hamatatua and Rururerehe were identified by two pins, each located a long distance out into the moana. No further information or evidence was provided as to the extent, location, or nature of the boundaries of those areas, or whether they fell within the boundaries of CMT 1. This does not satisfy the requirements of the Act as to certainty of location. In the absence of evidence as to the nature and location of Hamatatua and Rururerehe, the Court is unable to recognise them within a CMT order.

Analysis of wāhi tapu claims within CMT 1 that were made by more than one applicant

Te Kārihi Pōtae/Te Kahiripōtae Urupā

[345] Te Kārihi Pōtae was claimed as a wāhi tapu by Ngāi Tamahaua, Ngāti Ira, and Te Ūpokorehe, as an urupā and a historic battle site. It is a site that is sacred for the hapū of Te Whakatōhea as it is said to be where Tuamutu "avenged the death of his father Repanga (son of [the tīpuna] Muriwai)". Donald Kurei, a witness for Ngāti Ira, identified that Te Kārihi Pōtae was a sacred battle site, where utu was extracted for the killing of Repanga.[141] Hetaraka Biddle, in providing evidence for Ngāi Tamahaua stated that Te Kārihi Pōtae was where "Tuamutu killed Rongopopoia" and that "kaitiaki taniwha are located there".[142]

[346] Te Ūpokorehe disputed the evidence of Ngāi Tamahaua and Ngāti Ira generally. In respect of Ngāti Ira's evidence provided by Te Rua Rakuraku and Donald Kurei, Wallace Aramoana stated:[143]

> Where the maps filed for Ngāti Ira do not correspond to the maps that we have filed, we oppose them.

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141 *Re Edwards* Stage Two Notes of Evidence, at 151.
142 Exhibit HB2-1, attached to the second affidavit of Hetaraka Biddle, 24 January 2022.
143 Affidavit of Wallace Aramoana, 9 February 2022, at [64]-[65].

> The maps that have been filed by Ngāti Ira do not provide sufficient korero or evidence for Te Ūpokorehe to respond in detail. However, again, I say that Te Ūpokorehe occupation across our rohe, including our MACA area, predates the period of those applicants who descend from the Mataatua Waka.

[347] In respect of the evidence provided by Hetaraka Biddle for Ngāi Tamahaua, Wallace Aramoana said:[144]

> We pay respect to Hetaraka Biddle, and like many others wish he was here to finish the kaupapa for his people.
>
> We feel, however, that the sites that he listed are more appropriately protected by Te Ūpokorehe.

[348] Wallace Aramoana was cross-examined on this point at the Stage Two hearing by Ms Panoho-Navaja, counsel for Ngāi Tamahaua. During that portion of the hearing, Mr Aramoana accepted that multiple hapū could consider a single place to be wāhi tapu, and either share the same kōrero or have their own kōrero about their connection to that wāhi tapu.[145] Mr Aramoana said that generally:[146]

> Though they may connect to those pā sites, I am not against that but at the end of the day [they are] in [Te Ūpokorehe's] rohe and we are the caretakers of that area… as long as they understand [that] we aren't barring them from going there [or teaching] their children or anyone else…their part of the history…that wāhi tapu [is] in [Te Ūpokorehe's] rohe [and] as custodian we will continue to look after it as we have all along.

[349] This is yet another example where Te Ūpokorehe appear to challenge the Court's finding that CMT 1 and CMT 2 were awarded on a basis of shared exclusivity and not with one hapū/iwi having primary rights over the others. It also ignores the fact that the right to identify wāhi tapu sites and the restrictions or protections that may be required, vests in the CMT group as a whole, not individual hapū/iwi. Where there is no agreement by the CMT group on these matters the requirements of s 109 have not been met and the Court cannot make the orders sought.

[350] Here, the various hapū that make up the CMT group disagree on basic issues about the proposed wāhi tapu. This includes the location of Te Kārihi Pōtae.

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144 At [72]-[73].
145 *Re Edwards* Stage Two Notes of Evidence, at 179-180.
146 At 180.

[351] Ngāi Tamahaua, Ngāti Ira, and Te Ūpokorehe each produced different maps:

(a) Ngāi Tamahaua's map showed the urupā being located above MHWS on the western spit of the Waiotahe River, extending out into the takutai moana;

(b) Ngāti Ira's map showed the urupā as being in the area of the takutai moana in front of the western spit, and extending across the entirety of the mouth of the Waiotahe River; and

(c) Te Ūpokorehe mapped the area slightly differently, as being located above MHWS on the eastern spit of the Waiotahe River, and extending slightly both into the mouth of the river, and the takutai moana.

[352] The evidence provided as to the nature and location of Te Kārihi Pōtae being on the beach opposite a pā site on one side of the Waiotahe River was described by Bruce Stirling as "not entirely accurate".[147] Mr Stirling, who provided evidence on behalf Te Kahui at Stage One, referred to a narrative presented by kaumatua Monita Delamere at a Māori Land Court hearing in 1980, which was that:[148]

> The original bodies buried in the cemetery were drowned deliberately by a chief of Whakatōhea 'Tuamutu' and his men at a fish-netting planned and organised by Tuamutu at the river where the cemetery is.

[353] On the basis of the evidence, it is not possible to conclusively identify the location of the urupā, including whether or not it is on land or in the takutai moana, or exactly where the drowning of Rongopopoia by Tuamutu occurred. While the applicants all identified the wāhi tapu as being broadly proximate to the Waiotahe River mouth, they each mapped different areas in that vicinity. The lack of certainty and the conflict between the different members of the CMT group as to the location of the boundaries of the area means that the Court is unable to recognise Te Kārihi Pōtae within the CMT order.

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147 Exhibit A to the affidavit of Bruce Stirling, 31 January 2020, Te Mana Moana o Te Kahui Takutai Moana o ngā whenua me ngā hapū o Te Whakatōhea: Historical Issues, at [140].

148 At [141].

Tuamutu/Tuamotu Urupā

[354] Tuamotu/Tuamutu urupā is claimed as a wāhi tapu by Ngāi Tamahaua and Ngāti Patumoana. It was described by Ngāi Tamahaua as including the dunes and parts of the takutai moana at the eastern end of the Waiotahe spit, and to be "the site where Hineiahua was killed and [where] Ngāti Patu are said to have taken their name from" Te Riaki Amoamo for Ngāti Patumoana described it as an "ancient pā site of the tīpuna Tuamutu"[149], which is below the ancient pā site of Taumata Kahawai.[150]

[355] Ngāi Tamahaua and Ngāti Patumoana each mapped the area slightly differently:

(a) Ngāi Tamahaua did not identify the urupā, but depicted a wāhi tapu area entirely within the takutai moana, as a straight line across the mouth of the Waiotahe River, extending out into the moana;

(b) Ngāti Patumoana depicted the urupā as being above MHWS and just behind State Highway 2 on the eastern Waiotahe Spit, with a wāhi tapu area extending from there, slightly crossing a different portion of the river, and extending out into the moana.

[356] Mr Amoamo's evidence was that the burial took place in the sand dunes, and that the area which was once the urupā is now covered by State Highway 2.[151] Mr Amoamo did not address in his evidence the nature of the tapu at the urupā, being located above MHWS, or what distance, if any, it extends into the takutai moana. Ngāi Tamahaua, similarly, did not provide any such evidence. Therefore, because it appears that the urupā is a wāhi tapu that is located above MHWS and is covered in part by State Highway 2, it is unable to be recognised by the Court within a CMT order.

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149 Third affidavit of Te Riaki Amoamo, 25 January 2022, Exhibit A, at [TRA010].
150 *Re Edwards* Stage Two Notes of Evidence, at 267.
151 At 267.

Te Arakotipu

[357] Te Arakotipu is a site located at the Waiotahe drifts and which was claimed to be a wāhi tapu by Ngāi Tamahaua and Te Ūpokorehe. It is where three tūpāpaku were found during the initial stages of the coastal housing development which is located there.[152] Hetaraka Biddle in his evidence for Ngāi Tamahaua, described the area as "[the area] from Paerata (surf club) all the way to the urupā Akeake [including] the area all the way to Tawhitinui".[153] Tracy Hillier in her evidence for Ngāi Tamahaua, stated:[154]

> Te Arakotipu is a significant site for Ngāi Tamahaua. It was a meeting place and a place of safety. It [also] became a wāhi tapu and a burial site and we are finding kōiwi still to this day. It's a place that Ngāi Tamahaua has been strong over for many years, acknowledging our relationship with Ūpokorehe to keep that site protected.

[358] Ngāi Tamahaua mapped Te Arakotipu as a rectangular site, inclusive of a large area above MHWS, containing within it a number of houses on Appleton Road and Waiotahe Drifts Boulevard, and extending out into the moana. Te Ūpokorehe mapped a significantly larger area, including the entirety of the housing development at the Waiotahe drifts, and extending back onto dry land in a curved fashion, following the angle by which State Highway 2 continues towards Ōpōtiki. No part of the area mapped by Te Ūpokorehe appears to fall within the takutai moana. Similarly, the area described by Ngāi Tamahaua and the way in which it has been mapped shows that the site does not fall within the takutai moana. On this basis, the Court is unable to recognise it within a CMT order.

Te Roto

[359] Te Roto is claimed as wāhi tapu by Ngāi Tamahaua, and Ngāti Ruatakenga. It is a site where koiwi have been found, across the Otara River from Pakowhai. Hetaraka Biddle's evidence for Ngāi Tamahaua was that Te Roto was an area where kōiwi have been found in the "sand dunes between the mouth of the Otara River and the moana".

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152 Affidavit of Tracey Hillier, 20 February 2020, at [63].
153 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022 at 10-11.
154 *Re Edwards* Stage Two Notes of Evidence, at 82.

[360] Ngāti Ruatakenga provided in closing submissions that:

> Te Roto is an ancient urupā of Ngāti Ngahere located in the sand dunes. Mr Amoamo included it in his list because it is within the Ngāti Rua rohe as well, and there was no one else giving evidence for Ngāti Ngahere. His evidence was that the mana of the tapu extends to the sea because it is so close to the shore.

[361] Mr Amoamo's evidence for Ngāti Ruatakenga in respect of Te Roto was that:

> …Te Roto is a Ngāti Ngahere ancient urupā and [that is] still functioning at times in this generation because [I have] seen somebody taken there…

[362] When questioned as to the nature of the tapu at Te Roto, Mr Amoamo agreed that Te Roto was the same as Te Rangimatanui – in that it has the mana to go out to sea.[155] While Mr Amoamo stated that the mana/tapu of Te Roto was in such close proximity to the takutai moana that the tapu would extend into the moana, the maps filed show that the urupā is located above MHWS. Neither Mr Amoamo for Ngāti Ruatakenga, or those who gave evidence for Ngāi Tamahaua at Stage Two described the distance to which the tapu extended or provided any further indication as to the location of the Te Roto's boundaries.

[363] While the tapu may extend from the sand dunes at Te Roto into the takutai moana, the Court has not been provided with sufficient information so as to be certain as to the location of the boundaries of the wāhi tapu. Therefore, the Court is unable to recognise it within the CMT order.

Paerata and Ōpōtiki Mai Tawhiti/Te Arautauta Waka Landing

[364] It was said that Paerata was the landing place of the Te Arautauta waka, on which the tīpuna Tarawa travelled, and that Ōpōtiki Mai Tawhiti was the spring in which Tarawa placed two fish that travelled with him from Hawaiki. Ngāi Tamahaua described these two sites as tapu because "they maintain the spiritual [connection] to this significant ancestor of Ngāi Tamahaua". This area was also identified as wāhi tapu by Ngāti Patumoana, under the name Te Arautauta Waka Landing.

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[155] *Re Edwards* Stage Two Notes of Evidence, at 82.

[365] Conflicting evidence was provided by the parties in respect of the location of Paerata. Ngāi Tamahaua identified Paerata in closing submissions as:

> the landing site of Tarawa [the] eponymous ancestor belonging to Ngāi Tu which became Ngāi Tamahaua. Paerata is the location where Tarawa is said to have landed on Te Araumauma (uma referring to the chest) and [to have been] mistaken for a rata tree washed up on the shore. Therefore, while the ridge is also referred to as Paerata, the connection to the foreshore is obvious.
>
> (footnotes omitted)

[366] Hetaraka Biddle's evidence was that Paerata:[156]

> Is where they used to put the pito and koiwi to hang.
>
> The site where Tarawa floated and landed.

[367] Te Riaki Amoamo stated in his oral evidence for Ngāti Ruatakenga that:[157]

> it's the landing of Te Arautauta canoe, I'm just above it, the landing, I'm at Paerata Ridge Road and there are two carved poles and it's in memory of the landing of Te Arautauta canoe over here. And Tarawa, he had pet fish tai ngahangaha, and he put his fish in the spring, the puna wai here at Ōpōtiki Mai Tawhiti and that name [was used for the] township of Ōpōtiki. Really the township at Ōpōtiki is Pākōwhai but the name Ōpōtiki [was] taken there…[Tarawa's] pet fish came with him on the journey from Hawaiki nui, Hawaiki roa, Hawaiki pāmaomao and landed here on the beach at Paerata and the name of the canoe is Te Arautauta and Tarawa was the person on that canoe…

[368] Tracey Hillier instead described Paerata as a pā site "up on the ridge".[158] This was echoed later in the hearing when Te Riaki Amoamo and Te Ringahuia Hata jointly gave evidence for Ngāti Patumoana. The following exchange occurred:[159]

> Q. Okay Uncle. If we go back to our table at number 3 to 6 we have Paerata Pā, Maraerohutu Pā, Ōtore Pā and Irirangi Pā on our table, Uncle?
>
> A. I can see it.
>
> Q. But we are going to skip that cluster of pā because they're situated along the ridge.
>
> A. Okay.

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156 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022.
157 *Re Edwards* Stage Two Notes of Evidence, at 84.
158 At 13.
159 At 259.

[369] The thread that can be drawn together from this evidence is that Paerata, while an important area for Te Whakatōhea, is not in the takutai moana. Accordingly, the Court is unable to recognise it within a CMT order.

[370] The map filed by Ngāi Tamahaua for Paerata and Ōpōtiki Mai Tawhiti is a single area of the coastline which does not distinguish between the two sites. It does not identify exactly where Tarawa is said to have landed the Te Arautauta waka or the spring which is said to be Ōpōtiki Mai Tawhiti.

[371] The map filed by Ngāti Patumoana does not identify Paerata, but shows that Ōpōtiki Mai Tawhiti is located above MWHS, on dry land behind State Highway Two.[160] This is the most specific evidence given to the Court as to where Ōpōtiki Mai Tawhiti is. Because Ōpōtiki Mai Tawhiti is not located within the takutai moana, and no evidence was provided to the Court that its tapu extended into the takutai moana, it cannot be recognised within a CMT order.

[372] Te Arautauta is in a different category in that it appears to fall within the takutai moana. There is no dispute that the site where the Te Arautauta Waka landed in a wāhi tapu. What is not clear is why the tapu extends beyond the landing site itself. In the absence of such evidence, the Court is not able to grant the wāhi tapu protection sought.

Maraetōtara

[373] The extent of the Maraetōtara Stream that falls within the CMCA was claimed as a wāhi tapu by Ngāi Tamahaua and Te Ūpokorehe. Maraetōtara is regarded by the Whakatōhea applicants as the westernmost boundary of the customary rohe of the entities associated with Te Whakatōhea – the area to west of Maraetōtara is the customary rohe of Ngāti Awa. As such, it is an important boundary. At the Stage One hearing, and also in their evidence in reply at the Stage Two hearing, Ngāti Awa contested the location of the boundary as being at this point.

[160] Ngāti Patumoana Maps, Stage Two Exhibit 16, at 4, marked X.

[374] The stream at Maraetōtara is a historic site, where a battle took place between a number of groups, including Tūhoe, Te Whakatōhea, Ngāti Awa and Te Ūpokorehe. The battle was won by the rangatira and tīpuna Te Rupe, who both Te Ūpokorehe and Ngāi Tamahaua have whakapapa connections to.[161] Ngāi Tamahaua's evidence was that there is an urupā on the eastern bank of the stream. This was confirmed in the evidence of Te Riaki Amoamo on behalf of Ngāti Patumoana and Ngāti Ruatakenga, who said that a pouwhenua is located at the urupā, dedicated to Ngāti Hokopū and Ngāti Wharepaia, which are hapū of Ngāti Awa.[162]

[375] Maraetōtara was another site to which Te Ūpokorehe claimed primacy of rights, stating:[163]

> We can appreciate that many hapū would wish to hold wāhi tapu protection at this important boundary. However, it is for Te Ūpokorehe, as the group who has traditionally lived in the buffer zone between Ngāti Awa and Te Whakatōhea, to hold rights here.

[376] Ngāi Tamahaua's position was consistent with the findings of the Stage One judgment as to the jointly held CMT orders. In her evidence for Ngāi Tamahaua, Tracey Hillier stated:[164]

> The tīpuna Te Rupe is a significant leader of the taua that created the boundary point of Maraetōtara. We acknowledge [his] whakapapa connections to Ūpokorehe. We also acknowledge [those] same connections of whakapapa of Te Rupe to Ngāi Tamahaua. Te Rupe is the uncle of Tītiko through the whakapapa to ākonga of Ngāi Tamahaua. We acknowledge Tāwhai Te Rupe and his son Hūrae and in [Ngāi Tamahaua's last engagement with] raupatu Hūrae was with Ngāi Tamahaua and so were the leaders of Ūpokorehe. It is what connects us to that area.

[377] The location of Maraetōtara is clearly identifiable by reference to the natural landscape of the area. However, the maps filed by Julia Glass, and the evidence of the Attorney-General show that there is a Local Purpose Reserve (Part Lot 48 DP 5504), vested in the Whakatāne District Council, that begins on the eastern bank of the Maraetōtara Stream, and encompasses the entirety of the stream on the ocean-side of the road running over the stream. This area, accordingly, is not within the takutai

161 *Re Edwards* Stage Two Notes of Evidence, at 11.
162 Third affidavit of Te Riaki Amoamo 25 January 2022, at [18].
163 Affidavit of Wallace Aramoana, 9 February 2022, at [28].
164 *Re Edwards* Stage Two Notes of Evidence, at 11.

moana. Neither Te Ūpokorehe or Ngāi Tamahaua addressed this issue in their evidence or submissions. Because the area of the stream that would otherwise fall within the takutai moana is subject to a surveyed reserve, the Court is unable to recognise it within a CMT order.

[378] In any case, the lack of consensus among the groups jointly awarded CMT as to wāhi tapu status in this area means that the requirements of s 109 have not been met and the Court cannot make the orders sought.

Waiaua River

[379] Ngāti Ruatakenga claimed three sites in close proximity at the mouth of the Waiaua River as a wāhi tapu single area. These were Te Rangimatanui, Waiwhero and Rāhui Whākarōto.

[380] Waiwhero was said to be the site of an ancient battle between Te Whakatōhea and Ngāi Tai, on the western bank of the Waiaua River, after which the river ran red with blood.[165] Te Rangimatanui was said to be an estuary that runs alongside an ancient urupā of Ngāti Ruatakenga, on the eastern bank of the river.[166] Rāhui Whākarōto was said to be another ancient urupā, located on the western bank of the river.[167]

[381] Ngāi Tamahaua claimed the extent of the Waiaua River that is within the CMCA as a wāhi tapu, on the basis that it is a historic battle site.[168] There was no disagreement between Ngāi Tamahaua and Ngāti Ruatakenga as to the wāhi tapu sites in this area.

[382] As discussed above at [118], Te Riaki Amoamo's evidence was that the tapu of the three sites at the mouth of the Waiaua River extends into the moana, but he also provided conflicting evidence as to the distance the tapu extended. There was no

165 Third affidavit of Te Riaki Amoamo, 25 January 2022, at [17].
166 *Re Edwards* Stage Two Notes of Evidence, at 75.
167 At 77.
168 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022, at 11.

agreement between the tikanga experts who gave evidence at Stage Two, as to how to measure the distance from MHWS that the tapu might extend.

[383] There was sufficient consistency between the evidence to conclude that parts of the area said to be wāhi tapu can be included as such on the CMT. The two relevant areas are: firstly, the extent of the Waiaua River that is within the takutai moana. Secondly, and separately, the area between MHWS and MLWS, between the Waiwhero and Te Rangimatanui urupā.

[384] However, there are three portions of surveyed land that are located in that part of the Waiaua River that would otherwise be within the takutai moana that need to be considered. These were identified in the evidence of the Attorney-General, and the maps of Julia Glass. In respect of the area at the mouth of the Waiaua River, Brendan Mulholland, who gave evidence for the Attorney-General, stated:[169]

> There has been considerable movement of the river at [its] mouth, from its last cadastral position. The river is tidal and has two branches running to the sea. The coastal marine area line established by the [Bay of Plenty Regional Council] is up by the road bridge at the main (left) branch. In this area there is a length of unformed legal road that is part in the river, part on [a section of accretion], and [which also partly] intersects freehold land. There are also many parcels of Māori freehold land, all affected in part by erosion from the river or tributary stream.
>
> The coast from the river mouth to [Ōpēpē] Point is held in multiple Māori freehold titles. There has been a build-up along the coast immediately east of the river mouth in front of Māori parcel 'Opape Papakāinga'. Conversely the majority of the remaining coastline involving thirteen Māori freehold [blocks] or Māori Reservation land has eroded to some degree with [the current line of MHWS likely] encroaching into these parcels.

[385] The first relevant surveyed block is titled 'Allotment 421 Waiōweka Parish'. This is conservation land, held by the Department of Conservation. Conservation areas are excluded from the common marine and coastal area.[170] As such, the area of the Waiaua River that falls within the conservation area, is unable to be included within the CMT order.

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169 Exhibit BM-01 to the affidavit of Brendan Mulholland, 31 January 2022, at 13-14.
170 Section 9.

[386] The second parcel is the unformed road described by Mr Mulholland, which extends off Allotment 421, across one portion of the river, some land, and then into another part of the river. The road that extends from Allotment 421, and across the Waiaua River remains unformed. No certificate signed and dated by the Minister has been put in evidence. Therefore, the unformed road that extends from Allotment 421 is deemed to be stopped, and as of 1 April 2022, became part of the CMCA. The area that is subject to the unformed road may be recognised within the CMT order.

[387] Thirdly, there is a block of Māori freehold land, titled 'Ōpape 3k1 Block' that extends into the part of the Waiaua River that is within the takutai moana. Māori freehold land is included within the definition of 'specified freehold land' for the purposes of the Act. Specified freehold land is excluded from the CMCA.[171] Therefore, the area of Ōpape 3k1 Block that is located within the Waiaua River cannot be recognised within a CMT order.

[388] The evidence provided by the Attorney-General illustrates that the area at the mouth of the Waiaua River is constantly changing through natural processes, and that there has been significant change since the last cadastral survey. Mr Mulholland's evidence was that a new cadastral survey needs to be undertaken to definitively identify the current boundaries of areas in which erosion or accretion have occurred.[172] Where accretion or erosion has occurred, the provisions of the Act relating to reclamation and the common law relating to erosion and accretion apply. If, by natural occurrence, a portion of land is eroded, it becomes part of the CMCA, whereas if new land is created by a natural process of accretion, and it does not have a title, it is vested in the Crown.[173] Areas of land that have been created by accretion are not able to be included within a CMT order.

[389] Therefore, the two wāhi tapu areas at the mouth of the Waiaua River that can be recognised in the CMT order are:

(a) that part of the Waiaua River that is within the takutai moana, excluding

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[171] Section 9.
[172] *Re Edwards* Stage Two Notes of Evidence, at 423.
[173] Above n 8, at [278].

the area of Allotment 421, the Ōpape 3k1 Block, and any area of land created through accretion; and

(b) separately, the area between MHWS and MLWS, between the Waiwhero and Te Rangimatanui urupā.

[390] If the applicants are to be awarded wāhi tapu recognition within the CMT order for these sites, they will need to file a survey plan that accurately depicts the boundaries of the wāhi tapu in accordance with the Court's findings set out above.

Tirohanga Stream

[391] Ngāi Tamahaua and Ngāti Ruatakenga claimed the part of the Tirohanga Stream that is within the takutai moana as a wāhi tapu. It was said that the stream is the location where the taniwha Tama-Ariki resides, who was Tītoko's pet taniwha, and also a tīpuna of Ngāti Ruatakenga.[174] In his evidence for Ngāti Ruatakenga, Te Riaki Amoamo stated that Tama-Ariki is "the guardian of the Tirohanga Stream," and that the tapu of the stream ends "once it touches the salt water".[175] He also stated that people do not whitebait or fish in the stream, owing to the presence of the taniwha.[176]

[392] Ngāi Tamahaua and Ngāti Ruatakenga mapped the wāhi tapu area as being within the stream between State Highway 35 and the mouth of the stream, and extending out into the moana for a short distance.

[393] However, the map of this area filed by Julia Glass shows that there is a section of Crown-owned conservation land that sits over the entire portion of the stream that is claimed as wāhi tapu by Ngāi Tamahaua and Ngāti Ruatakenga. Accordingly, the only portion of the stream that may be recognised within the CMT order as wāhi tapu, is the area between the mouth of the stream, and MLWS, with a width that is the equal to the mouth of the stream. That is consistent with Mr Amoamo's evidence that the tapu ends at the point the stream comes into contact with salt water. As this point may

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174 Exhibit HB2-1 to the second affidavit of Hetaraka Biddle, 24 January 2022; and *Re Edwards* Stage Two Notes of Evidence, at 78.

175 *Re Edwards* Stage Two Notes of Evidence, at 79.

176 At 79.

vary depending on whether the tide is in or out, a pragmatic solution can be to identify the point where the fresh water meets the salt water at MLWS.

Restrictions and prohibitions

[394] Ngāi Tamahaua and Ngāti Ruatakenga have jointly identified the areas at the Waiaua River, and a limited portion of the Tirohanga Stream as wāhi tapu, as areas able to be recognised within a CMT order. The restrictions and prohibitions proposed by Ngāi Tamahaua were discussed above at [248]-[260].

[395] The restrictions and prohibitions proposed by Ngāti Ruatakenga were the same as those proposed by Ngāi Tamahaua, barring the proposal of two further prohibitions, being:

(a) no fishing or whitebaiting; and

(b) no consumption of food.

[396] As described above at [391], Te Riaki Amoamo's evidence was that a prohibition on fishing or whitebaiting around the Tirohanga Stream is already observed, owing to the presence of the taniwha Tama-Ariki. No conflicting evidence was put before the Court at the Stage Two hearing.

[397] Mr Amoamo's evidence was also that fishing and/or whitebaiting in the Waiaua River only occurs by the bridge that crosses the river, and not at the mouth of the river, because that area is tapu, and also because there is no public access.[177] That position was confirmed by Nepia Tipene, who gave evidence for Ngāti Muriwai, when he was cross-examined by Ms Feint, counsel for Ngāti Ruatakenga.[178] The bridge is located approximately 600-700 metres south of the mouth of the river, and forms part of State Highway 35.

[398] On the basis of this evidence, the applicants have established a connection between the proposed prohibition and the protection of the wāhi tapu. A prohibition

[177] *Re Edwards* Stage Two Notes of Evidence, at 100 and 354.
[178] At 235.

on fishing and/or whitebaiting is already observed in the relevant areas of the Waiaua River and the Tirohanga Stream, as a result of the tapu nature of those areas. It is also a prohibition is capable of being enforced.

[399] Accordingly, a prohibition on fishing and whitebaiting at the wāhi tapu areas at the Waiaua River and Tirohanga Stream is amendable to enforcement and able to be recognised within a CMT order, relative to those areas.

[400] Provided an accurate map of the relevant wāhi tapu is able to be produced, the enforcement of a prohibition against the consumption of food may be amenable to enforcement through the Courts. The reasons for it will need to be set out in the CMT order as required by s 79(1)(b). If these pre-conditions are met, it may be included in the CMT order as a wāhi tapu condition.

CMT 2 – Ōhiwa Harbour

[401] This section of the judgment addresses the wāhi tapu claims made by the applicants within CMT 2.

[402] Wāhi tapu that were claimed by multiple members of the successful joint CMT groups are addressed separately from wāhi tapu that were claimed by only a single applicant group.

[403] For CMT 2, the wāhi tapu that were claimed by multiple applicants were:

(a) Ihukatia Pā;

(b) Te Kopu o Te Ururoa/the area of the coastline surrounding Tauwhare Pā;

(c) Omere; and

(d) Otao.

[404] There were areas within CMT 2 that were claimed as wāhi tapu by multiple applicants but under different names or with different locations being specified. Where claims are made under the same name and in same area, they are addressed together. Where claims are made under the same name but in different areas, they are addressed separately.

Ngāi Tamahaua

[405] Within CMT 2, Ngāi Tamahaua claimed the site of Ihukatia Pā, and the area of the coastline surrounding Tauwhare Pā, as wāhi tapu. They did so on the same basis and with the same proposed restrictions as in respect of their CMT 1 claims. These areas were also claimed by Ngāti Awa and Te Ūpokorehe – they are addressed below in the section discussing claims made by multiple applicants.

Ngāti Awa

[406] Ngāti Awa claims the following sites within CMT 2 as wāhi tapu:[179]

(a) the discrete area of the moana around the coastline of Uretara Island;

(b) Te Tukirae o Kanawa;

(c) Taipari;

(d) Te Kopu o Te Ururoa, being the area of the takutai moana to which the tapu from Tauwhare Pā extends into;

(e) Ihukatia;

(f) Omere; and

(g) Otao.

[179] For maps see Stage Two, Exhibit 13. Ngāti Awa withdrew their further claim to Te Horonga ō Te Hapū on the basis that it falls outside of the CMT area relating to the Ōhiwa Harbour.

[407] The only prohibition or restriction sought by Ngāti Awa in relation to these sites was:

> The ability to place temporary restrictions through rāhui (that are recognised at law) over the area. This restriction is sought to ensure tapu placed via rāhui in specified areas is able to be enforced under te ture Pākehā by Ngāti Awa.

[408] Ngāti Awa submits that the evidence presented by tohunga in these proceedings, reinforced by references made to the works of Tā Hirini Moko Mead, form the basis upon which wāhi tapu protections can be granted.

[409] Te Kopu o Te Ururoa, Ihukatia, Omere, and Otao are discussed below in the section referring to joint claims within CMT 2.

Uretara Island

[410] Ngāti Awa claimed a discrete area of the moana around the coastline of Uretara Island as wāhi tapu. In respect of Ngāti Awa's connection to Uretara Island, Te Runanga o Ngāti Awa's closing submissions stated:

> A Statutory [Acknowledgement] and Deed of Recognition for Uretara Island are included as part of the [Ngāti Awa Claims Settlement Act 2005] and summarise the importance and connection of Ngāti Awa to Uretara Island. Specifically, the Statutory Acknowledgement records Uretara [Island] as one of the many Ngāti Awa wāhi tapu sites within Ōhiwa Harbour and of great cultural and historical importance. To the people of Ngāti Awa, Uretara Island is of the utmost importance because of its physical, spiritual, and social significance in the past, present, and future. The mauri of Uretara Island represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life.

[411] The Statutory Acknowledgement and Deed of Recognition for Uretara Island show that Ngāti Awa have an established connection to Uretara Island in tikanga. [180] However, the more relevant issue is at the Stage Two hearing, Ngāti Awa did not submit evidence or indication beyond the map that was filed, as to the location of the boundaries of the wāhi tapu area surrounding Uretara Island.

[412] When Ms Irwin-Easthope was questioned on this point, she acknowledged that the Court has no jurisdiction over the island itself, given it is above MHWS. When

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[180] See Ngāti Awa Claims Settlement Act 2005, sch 9.

questioned on the extent of the wāhi tapu area around Uretara Island, Ms Irwin-Easthope simply referred to the map that was filed and submitted that it provided sufficient certainty for the purposes of the Act. I do not accept that submission. The map filed by Ngāti Awa does not provide a sufficient level of certainty as to the location of the boundaries of the wāhi tapu area surrounding Uretara Island or explain the basis on which the takutai moana around the island, as opposed to, or because of the island itself, is tapu. It is therefore unable to be recognised within the CMT order.

Te Tukirae o Kanawa

[413] Te Tukirae o Kanawa was a site claimed as wāhi tapu by Te Ūpokorehe and Ngāti Awa. Te Ūpokorehe mapped the site as falling within CMT 1, and this is discussed above at [340]. Ngāti Awa mapped the site differently, locating it within CMT 2. In evidence, Ngāti Awa stated that:[181]

> Te Tukirae o Kanawa is located at the mouth of the Ōhiwa Harbour.
>
> Kanawa was a kuia on the Horouta waka that decided to pull into Ōhiwa. When the waka got to the mouth [of the Harbour], there is a rock there. The waka hit the rock and the kuia fell over and hit her forehead on the rock. Hence the name, Te Tukirae o Kanawa.

[414] The map of this area filed by Julia Glass shows that a portion of the area described as Te Tukirae o Kanawa falls outside of the takutai moana as a result of the presence of an unformed road, extending from the end of Ōhiwa Harbour Road, into what would otherwise be the takutai moana. However, that road remains unformed following the first quinquennial anniversary of the commencement of the Act. No certificate signed and dated by the Minister has been put in evidence before the Court. Therefore, the area described as Legal Road SO 3077, became part of the common marine and coastal area on 1 April 2022. The presence of the unformed road is not a bar to recognising the area where Ngāti Awa have mapped Te Tukirae o Kanawa within a CMT order.

[415] The area mapped by Ngāti Awa includes a significant portion of the Ōhiwa Spit that is above MWHS. No evidence was provided which explained why or how the

[181] Joint Brief of Evidence of Dr Te Kei (o Te Waka) Wirihana Merito and William Bruce Stewart, 24 January 2022, at [51]-[52].

tapu of Te Tukirae o Kanawa extended onto, or from, that area above MHWS. Te Tukirae o Kanawa was not mapped in a different fashion to Uretara Island, so as to provide the Court with certainty as to the location of its boundaries, and nor was the rock where Kanawa hit her head specifically identified or located. Therefore, it is unable to be recognised within the CMT order.

Taipari

[416] Taipari is located on the western side of the mouth of the Ōhiwa Harbour, and was said to be "the area where Ngāti Awa hapū would read the signs of the ocean, which is reflected in the name 'Taipari' which means the rising and falling of the tides."[182] It was also said to be named for a Rangatira of Ngāti Hokopū, a hapū of Ngāti Awa.[183]

[417] The area mapped by Ngāti Awa appears to fall partly within CMT 1 and partly within CMT 2. Ngāti Awa was not included within the group of successful applicants who were jointly awarded CMT along the coastline between Maraetōtara and Tarakeha. Any area of the wāhi tapu that falls within CMT 1 is unable to recognised within the CMT 2 order.

[418] In addition, the area of Taipari that is within CMT 2 is subject to a piece of reserve land, held by the Department of Conservation, titled 'Allotment 644 Waimana Parish'. Brendan Mulholland's evidence for the Attorney-General was that a large portion of this piece of reserve land has eroded, and is now likely to be located below MHWS, but that the remainder of that area remained above MHWS.[184] It is not clear whether the portion of the reserve that has eroded, was eroded after the commencement of the Act – therefore the area of that reserve is unable to be included within the CMT order. The area of Allotment 664 that remains above MHWS is unable to be recognised within the CMT order, as those areas do not fall within the takutai moana.

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182 At [44].
183 At [45].
184 Exhibit BM-01 to the Affidavit of Brendan Patrick Mulholland, 1 February 2022.

[419] As a result of the presence of Allotment 644, and the lack of clarity regarding whether there is a portion of Taipari that is both within CMT 2 and the takutai moana, the Court does not have certainty regarding the location of the boundaries of the proposed wāhi tapu. The area at the mouth of the Ōhiwa Harbour is likely to be an area in respect of which an updated cadastral survey is required in order to definitively assess the boundaries of the CMCA, as well as where boundaries of CMT 1 and CMT 2 lie. In the absence of this information, the Court is unable to recognise Taipari within the order for CMT 2.

Te Ūpokorehe

[420] In the Ōhiwa Harbour Te Ūpokorehe made a further ninety-eight wāhi tapu claims, including that the harbour in its entirety was a wāhi tapu. These claims are listed below in Appendix A. I do not propose to address each of these claims individually as part of this judgment. I have adopted this approach for the reasons discussed below.

The entire Ōhiwa Harbour

[421] Te Ūpokorehe claimed the entire Ōhiwa Harbour as a wāhi tapu. In the alternative, they submitted that the number of individual claims throughout the harbour meant that the practical or pragmatic approach would be to recognise the entire harbour as a wāhi tapu. This was a further example of Te Ūpokorehe appearing to adopt an approach that refused to acknowledge the finding that they were awarded CMT jointly, rather than in their own right.

[422] The claim of the entire harbour as a wāhi tapu was not supported by the evidence, which showed that there were everyday noa activities that take place in the harbour. The Attorney-General made the point that noa activities took place in the harbour, and this was accepted by Te Ūpokorehe, who submitted that this did not conflict with their contention that the entire harbour is tapu.

[423] Te Ūpokorehe submitted that there should not be a blanket assumption that a place cannot be tapu if kai is gathered at the place or close to it. That is clearly so, given the well-known practice of the placing of rāhui over particular food resources,

that otherwise would not be considered tapu, in order to conserve them. Witnesses at the hearing also gave evidence that whether there was a prohibition on the gathering or consumption of kai at an area considered tapu depended on the nature of the site. Food would not be cultivated near or on an urupā, for example.

[424] The harbour is commonly referred to as a 'food basket' or 'Te Kete Kai o Tairongo'. Tairongo was the eponymous ancestor of Te Ūpokorehe. As a result, the contention that the entire harbour is a wāhi tapu is difficult to maintain. The gathering, preparation, or cultivation of kai is generally understood to be a noa activity. Mr Aramoana conceded as much when under cross examination, it became clear that Te Ūpokorehe's goal in asserting that all of Ōhiwa Harbour was tapu was more to provide a method of protecting the harbour in the future through rāhui, or to establish that they have primacy of rights within the harbour. That is a different assertion to the harbour itself being a wāhi tapu.

[425] While the hapū of Whakatōhea, including Te Ūpokorehe, have established a connection to the Ōhiwa Harbour in that they regularly undertake kaitiaki activities within it, this has been adequately acknowledged by the CMT order. The contention that the entire harbour is a wāhi tapu (other than in respect of the periodic imposition of rāhui), is not in accordance with the evidence. Primarily this is because, as was accepted by Te Ūpokorehe, noa activities take place within the harbour regularly.

[426] Also, Mr Rapihana offered largely uncontroversial evidence relating to tapu generally, that directly relates to this issue. He said:[185]

> Wāhi tapu areas were traditionally kept very separate from areas where fishing, kaimoana collection and other daily activities were performed because such activities are noa (common or ordinary), and never exercised in the same area as a wāhi tapu (sacred place). This is why you will rarely find wāhi tapu in coastal areas where there is lots of movement of people for fishing or transport, such as river mouths. If there are wāhi tapu [present] in such areas, they will have clearly defined boundaries so that people can avoid them and continue to use the kai gathering or travel routes that were essential to the everyday functioning of traditional Māori life.

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[185] Above n 39, at [4.3].

[427] The evidence supports a conclusion that the harbour only becomes tapu in its entirety when specific events occur, such as the Whakaari eruption, a whale stranding, or when resources are polluted or running low and a rāhui is imposed. The evidence did not establish that the harbour itself has always been sacred and 'set aside', but rather that Te Ūpokorehe and sometimes others, have regularly used their customary interests and mana in the area to protect an important food resource where it is endangered by a cause that originates externally. This conclusion is consistent with the evidence of Tā Pou Temara that eating near a wāhi tapu such as Waiwhero would be 'appalling' and also Mr Aramoana's evidence that whitebaiting occurs in streams and waterways in and around Ōhiwa Harbour.

[428] I accept the proposition that an area cannot be wāhi tapu if it is shown that noa activities are regularly undertaken there, is not necessarily a strict tikanga principle, and that the real nature of any particular tapu depends on the purpose for which it was identified or placed. However, in the example of the Ōhiwa Harbour it is accepted that activities like the gathering of kaimoana, fishing, travelling by waka and foot, swimming, and gathering other resources are all activities that take place there, and these activities are noa activities. This supports the conclusion that the whole harbour is not a wāhi tapu all of the time.

[429] The placing of rāhui is accepted to be a temporary measure, by which tapu is placed over a certain area by a tohunga in response to an event or circumstance. When that circumstance has passed, the rāhui is lifted, removing the tapu over the area. This is contrasted with the type of wāhi tapu where tapu remains on a permanent basis. It was Mr Rapihana's evidence that only "true wāhi tapu remain tapu on a permanent basis".[186] This would seem to accord with Tā Pou Temara's view at the hearing that:[187]

> …if you are close to a wāhi tapu these are places that you don't go to. These are places that you are told to keep away from. These are places that are shunned and ought not to be challenged. They are places that are well-known and as such generations of Māori are made aware of where they are and the connections that must be observed. They are made aware of the [fact that] stumbling upon these wāhi tapu, these places of sacredness and holiness will result in some form of utu.

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[186] Above n 39, at [7.4].
[187] *Re Edwards* Stage Two Notes of Evidence, at 120-123.

> … It is thus important when setting out a wāhi tapu that the knowledge keeper or tohunga who has proclaimed those areas has given an indication of what are to be the permitted or conversely limited parameters of any human activity with a particular space; waterway or land area. It is an integral part of the authority processes that are established to ensure those protocols are communicated to those that may come into contact with such places for an effective protective regime to operate. In traditional times wānanga provided the forum for those understandings to be conveyed. In modern times, it is orders of the kind before the Court, and hapū management plans that will set the guidance.
>
> …

[430] The evidence is, in tikanga, that an area cannot be a wāhi tapu if it is shown that noa activities are **regularly** undertaken there.

[431] Te Ūpokorehe's claim that the entire harbour is a wāhi tapu was not supported by the other members of the joint group for CMT 2, which would seem to be an important factor in assessing whether the harbour itself is considered to be sacred and set aside in tikanga. Te Ūpokorehe provided evidence that other hapū have always fished and gathered kaimoana throughout the harbour. The claim that the entire harbour was wāhi tapu did not appear to be widely held by all of the entities that are in some way associated with Te Whakatōhea.[188]

[432] The fact that Te Ūpokorehe also submitted over 100 individual discrete sites that require protection within the Ōhiwa Harbour that are wāhi tapu and require wāhi tapu restrictions or prohibitions also militates against the contention that the entire harbour is in fact wāhi tapu. This does not mean that Te Ūpokorehe cannot apply rāhui over the harbour in tikanga when the circumstances that require that arise, merely that the Court has not been satisfied that the entire Ōhiwa Harbour is appropriately classified as a wāhi tapu for the purposes of the Act.

The balance of Te Ūpokorehe's claims

[433] Little to no evidence was provided in respect of many of the individual claims made by Te Ūpokorehe within the harbour. The documentation filed by Te Ūpokorehe does not provide the Court with the requisite level of certainty as to the location of the boundaries of each of these individual wāhi tapu. A significant number of these sites

188 Compare *Re Ngāti Pāhauwera*, above n 8, at [97].

do not appear to be within the takutai moana. On that basis, a sufficient evidential foundation was not raised by Te Ūpokorehe to warrant the Court enquiring into each of these claims individually, within an already lengthy, and interim judgment. The exception to this are the wāhi tapu sites to which more than one successful applicant made claim.

[434] Listed in Appendix A is the remainder of the wāhi tapu claims made by Te Ūpokorehe within the Ōhiwa Harbour. If the Court is to be able to enquire into those claims, the applicants must file accurate maps which clearly depict the locations of the boundaries of their claimed wāhi tapu within the Ōhiwa Harbour, only including sites that are within the CMCA. The Court must also be informed of exactly why each of these individual sites are said to be wāhi tapu, and how Te Ūpokorehe's proposed restrictions and prohibitions are linked to, and required for, their protection. Regard must also be had to the fact that CMT 2 was awarded jointly to a group of applicants of which Te Ūpokorehe was only one. Any disagreement between members of the joint group as to the location of a wāhi tapu or the conditions required for its protection will likely result in the Court's inability to award wāhi tapu status or prohibitions and restrictions in respect of that site.

Analysis of wāhi tapu claims within CMT 2 that were made by more than one applicant

Ihukatia Pā

[435] Ihukatia Pā is a historic Pā site for some of the hapū of Te Whakatōhea, and also the site of a battle between Ngāti Awa and Te Whakatōhea. It was claimed as a wāhi tapu by Ngāi Tamahaua, Ngāti Awa, and Te Ūpokorehe.

[436] Ihukatia Pā is located along the Ōhope Spit, and was used as a position from which to defend access to the resources of the harbour. Ngāti Awa provided evidence that Ihukatia was also associated with the Horouta waka, stating that:

> Ihukatia is linked to the time of the Horouta waka. After it entered the Ōhiwa Harbour, and after the accident with Kanawa, one of the [masts] snapped so the Horouta came into the Harbour and put [its] anchor down. The following saying was recounted - "katia te ihu" (put down the anchor). The waka was not to leave until [it] was fixed.

[437] Ngāti Awa and Ngāi Tamahaua both mapped Ihukatia Pā as being located on the Ōhope Spit, facing inwards towards the harbour, including an area of land above MHWS, extending into the takutai moana. Te Ūpokorehe mapped the area in a different location, being closer to the town of Ōhope, on an area of the coastline that is within CMT 1, again, including an area of land above MHWS and extending into the takutai moana. No evidence was provided by any of the applicants establishing that the tapu of the pā site extended into the moana, and if so, how far.

[438] While Ngāti Awa and Ngāi Tamahaua appear to have been in agreement as to the location and wāhi tapu status of the area in which they located Ihukatia, Te Ūpokorehe refused to acknowledge both of their claims for wāhi tapu status for that site.[189] The lack of consensus among the groups jointly awarded CMT, as to wāhi tapu status in this area, means that the requirements of s 109 have not been met, and that the Court cannot make the orders sought.

The area of the coastline surrounding Tauwhare Pā and enclosing Te Kopu ō te Ururoa

[439] Ngāi Tamahaua, Ngāti Awa and Te Ūpokorehe made wāhi tapu claims in this area, for the small bay described as Te Kopu ō Te Ururoa, and the area of the coastline surrounding Tauwhare Pā. This area is located in the far west of the Ōhiwa Harbour, Te Kopu ō Te Ururoa being a small bay which was said to be a breeding ground for sharks. Tauwhare Pā and the surrounding area is also associated with Muriwai, Tairongo and Mereaira Rangihoea, all of whom are tīpuna of significance.

[440] Again, each applicant mapped their claimed wāhi tapu areas slightly differently:

(a) Ngāti Awa identified Te Kopu ō Te Ururoa as a distinct area completely within the takutai moana, being the small bay directly beside Tauwhare Pā, the boundaries of which are able to be identified by reference to the natural landscape of the area;

(b) Ngāi Tamahaua marked out the entire area of the coastline within the

189 Affidavit of Wallace Aramoana, 9 February 2022, at [60] and [81].

Harbour that surrounds Tauwhare Pā;

(c) Te Ūpokorehe identified three distinct sites in this area, being:

(i) a large area around Tauwhare Pā, mostly above MHWS;

(ii) a smaller area within the area said to be Tauwhare Pā, also mostly above MHWS, called Te Horo, which was said to be an old Te Ūpokorehe settlement; and

(iii) an area of the takutai moana directly in front of Tauwhare Pā, said to be Te Kopua ō Te Ururoa, completely detached from the area said by Ngāti Awa to be Te Kopu ō Te Ururoa.[190]

[441] As to Tauwhare Pā, Te Roto, and the area of the coastline surrounding them, no evidence was provided beyond the maps filed as to the location of the boundaries of the wāhi tapu areas or the distance the tapu extends from MHWS. No evidence was provided establishing that tapu originating on land extends into the takutai moana. Therefore, the Court is unable to recognise these areas within the CMT order as wāhi tapu.

[442] In respect of Te Kopu ō Te Ururoa, Ngāti Awa and Te Ūpokorehe each mapped the area in different locations. Te Ūpokorehe refused to acknowledge Ngāti Awa kōrero in this area. Because there is no consensus between the successful applicants as to the wāhi tapu in this area, they are unable to be recognised within the CMT order as wāhi tapu.

Omere and Otao

[443] Omere and Otao are two sites where kaimoana is gathered in the west of the Ōhiwa Harbour. Both of these sites were claimed as wāhi tapu by Ngāti Awa and Te Ūpokorehe. Neither of Ngāti Awa or Te Ūpokorehe identified the locations of the boundaries of these sites with sufficient certainty pursuant to the terms of s 79(1)(a).

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[190] Ngāti Awa and Te Ūpokorehe used slightly different spellings of this wāhi tapu.

Te Ūpokorehe also refused to acknowledge Ngāti Awa's kōrero in relation to these two sites. The Court is therefore unable to recognise them within the CMT order as wāhi tapu.

CMT 3

[444] This section of the judgment addresses the wāhi tapu claims made by Ngāi Tai within CMT 3.

[445] Ngāi Tai claims four sites as wāhi tapu within the CMT area, these are:

(a) Te Rangi;

(b) Tarakeha;

(c) Awaawakino; and

(d) Te Toka a Rūtaia.

[446] The restrictions sought in respect of these areas were set out at Exhibit 24 during the Stage Two hearing and are replicated in the table below. The same restrictions and prohibitions are to apply to all four sites.

Restrictions/Prohibitions
• No eating or drinking • No processing, consuming of catch • No disposal of organic or inorganic waste material • No loud gatherings • No driving/parked vehicles • No sewage/purging the bilges • No scattering/burying ashes or sea burials • Not modify/destroy site • No introduction of new species • No building structures, earthworks, fracking • No activities that effect the mauri • Rāhui restrictions apply when appropriate

- No rituals without Ngāi Tai Takutai Kaitiaki Trust permission
- No anchorage

[447] Ngāi Tai submit that the evidence provided throughout Stage One and Stage Two provides a basis upon which to conclude that they have established the requirements in ss 78 and 79. They seek the ability to "bring everyone in line with the tikanga that the applicants already practise in that area", in protecting the mauri of the relevant areas.

Te Rangi

[448] Te Rangi was said to be the resting place of the tīpuna Tarawa, and the landing place of the Nukutere waka, in a small bay at the easternmost boundary of CMT 3. Te Rangi was also said to be a wāhi tapu by Ngāi Tamahaua and Ngāti Ruatakenga, who acknowledged that they were not awarded CMT within the area between Tarakeha and Te Rangi.

[449] No evidence was provided as to exactly how far the tapu extends from MHWS. However, the area mapped by Ngāi Tai is clearly within the takutai moana, and the evidence of Mr Tapuke for Ngāi Tai at the Stage Two was that protection was only sought for the area that was identified in that map.[191]

[450] I am satisfied that Ngāi Tai have established their connection to Te Rangi as a wāhi tapu in tikanga, and that the Court has the ability to be certain as to the locations of the boundaries of that area. The wāhi tapu recognised on the CMT order is to be the area between MHWS and MLWS within the area of the bay that Ngāi Tai has identified as Te Rangi. However, Ngāi Tai will need to file a map that depicts the wāhi tapu on a surveyed area of CMT 3, so that there is certainty as to the location of its boundaries.

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[191] *Re Edwards* Stage Two Notes of Evidence, at 330 and 340.

Tarakeha

[451] Tarakeha was said to be a wāhi tapu for its association to the significant tīpuna, Apanui, who was the rangatira of Te Whānau-a-Apanui. Muriwai Jones, who gave evidence for Ngāi Tai, stated that:[192]

> Tarakeha means the sacred scent of the female, it reminds all of Ngāi Tai of the high respect and tapū o te wahine…
>
> …The wāhi tapū includes the Tarakeha ridgeline down to the moana (the foreshore). There exists a spiritual connection here due to this significant [tīpuna] that Ngāi Tai do not want threatened.

[452] Tarakeha was also an area that was said to be of significance to Ngāi Tamahaua and Ngāti Ruatakenga, although not within the area in which they were awarded CMT. The only way of accessing this area is to walk around the headland at low tide.[193]

[453] Ngāi Tai mapped the wāhi tapu at Tarakeha as including only the rocks on the eastern side of the headland. These rocks are within the takutai moana. I am satisfied that Ngāi Tai have established their connection to Tarakeha as a wāhi tapu in tikanga, and that the Court has the ability to be certain as to the locations of the boundaries of that area. However, there was no evidence as to the exact boundaries of the wāhi tapu beyond the map that was filed by Ngāi Tai. Therefore, in order for the wāhi tapu at Tarakeha to be recognised within the CMT order, the applicants must file a map that depicts the wāhi tapu on a surveyed area of CMT 3, so that there is certainty as to the location of its boundaries. That area should be no greater than what was described and/or mapped at the Stage Two hearing.

Awaawakino and Te Toka a Rūtaia

[454] Awaawakino and Te Toka a Rūtaia were said to be mahinga kai along the coast within the CMT 3 area. Ngāi Tai's evidence at Stage Two provided that these were seeding areas where shellfish, spats, and kina grow, and feed other types of kaimoana.[194] Te Toka a Rūtaia was also said to be a prominent rock at the Tarakeha headland, which was the anchor of the Nukutere waka. Wāhi tapu protections were

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192 Affidavit of Muriwai Jones, 26 January 2022, at [8]-[9].
193 At [4].
194 *Re Edwards* Stage Two Notes of Evidence, at 330.

sought in these areas to protect the ongoing sustainability of the mahinga kai, given that this is an area in which kaimoana is not gathered regularly.[195]

[455] Awaawakino was mapped as being located directly next to the wāhi tapu area at Te Rangi, to the east. Te Toka a Rūtaia was mapped as being located directly next to the wāhi tapu area at Tarakeha, to the west. Both of these areas are within the takutai moana.

[456] I am satisfied that Ngāi Tai have established their connection to Awaawakino and Te Toka a Rūtaia as wāhi tapu in tikanga, and that the Court has the ability to be certain as to the location of the boundaries of those areas. However, as with Tarakeha, there was no evidence as to the exact boundaries of the wāhi tapu beyond the map that was filed. Therefore, in order for the wāhi tapu at Awaawakino and Te Toka a Rūtaia to be recognised within the CMT order, the applicants must file a map that depicts the wāhi tapu on a surveyed area of CMT 3, so that there is certainty as to the location of its boundaries. That area should be no greater than what was described and/or mapped at the Stage Two hearing.

Restrictions and prohibitions

[457] The reasoning set out earlier in this judgment as to the restrictions and prohibitions proposed by the other successful applicants applies in equal measure to the restrictions and prohibitions proposed by Ngāi Tai. After the removal of restrictions and prohibitions already discussed, the remaining restrictions and prohibitions proposed by Ngāi Tai are:

(a) no processing or consuming of catch;

(b) no sewage or purging of the bilges;

(c) no introduction of new species;

(d) rāhui restrictions to apply when appropriate; and

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195 At 346.

(e) no rituals without the permission of Ngāi Tai Takutai Kaitiaki Trust.

[458] The Court has previously said that the imposition of rāhui is an available right for CMT holders who have established the requirements of the Act for wāhi tapu protections in defined areas.[196] Ngāi Tai provided evidence that rāhui are often imposed over their defined wāhi tapu areas either following a death in the takutai moana, or for conservation purposes in respect of the mahinga kai.[197] Provided that an accurate map of the CMT 3 area is filed, the imposition of rāhui is a prohibition that may be recognised within the CMT order.

[459] However, there are limitations on the extent to which the boundary of any tapu arising from a rāhui can actually be recorded. That is because the source of the tapu derives from a triggering event such as a drowning in a particular locality or a need for protection of a particular food source as a result of some external event such as pollution or overuse. It is obviously impossible in advance to know exactly where or when a rāhui might be imposed, or the nature of the rāhui. That has obvious implications for enforcing a breach of rāhui through the ordinary Court system. It is also not possible for the CMT itself to record the location of the tapu area.

[460] A compromise solution which acknowledges the entitlement at tikanga to impose temporary tapu status by way of a rāhui would be for the title to record that those applicant groups who are jointly awarded CMT may impose rāhui in accordance with tikanga, the details and location of the rāhui to be determined between all joint CMT holders in accordance with tikanga. In Ngai Tai's case, as they are the sole CMT holder (along with their hapū Ririwhenua) in the area between Tarakeha and Te Rangi, they alone will make such decisions.

[461] No evidence was provided as to why a prohibition against the introduction of new species was required to protect Ngāi Tai's wāhi tapu, or how it would be amenable to enforcement through the Courts. This proposed prohibition is therefore unable to be included within the CMT order.

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196 Above n 1, at [389]; above n 8 at [72] and [123].
197 Affidavit of Muriwai Jones, 26 January 2022, at [18]-[22].

[462] Evidence was provided by Te Riaki Amoamo for Ngāti Ruatakenga at the Stage Two hearing regarding a visit by Te Whakatōhea to Te Rangi. His evidence was that Te Whakatōhea needed to ask permission from Ngāi Tai to go to Te Rangi, given that is in the area in which Ngāi Tai hold customary authority. Mr Amoamo recounted that Ngāi Tai kaumatua Bill Maxwell had granted permission for Te Whakatōhea to visit Te Rangi, and that he and other members of Ngāi Tai met Te Whakatōhea there, and went through the process of a pōwhiri, as well as karakia and mihi.[198] This evidence illustrated to the Court that generally tikanga provides that rituals do not occur in the CMT area sought to be granted wāhi tapu protections by Ngāi Tai, without permission from Ngāi Tai. However, in terms of the Act, there is difficulty regarding the enforceability of such a prohibition, given the possibility of prosecution. Mr Amoamo's evidence was also related to a ritual exchange that took place on the beach adjacent to the takutai moana, rather than within it. No evidence was provided by Ngāi Tai as to the reasons why this prohibition was sought or required in respect of the areas which they sought wāhi tapu protections for, which are all located within the takutai moana. On balance, I am not satisfied that Ngāi Tai have established that this prohibition is required to protect the wāhi tapu areas which are able to be recognised within the CMT order. The evidence was that the prohibition is already adhered to in tikanga, which is a more appropriate forum for a prohibition of this nature.

[463] Provided an accurate map of the relevant wāhi tapu is able to be produced, the enforcement of prohibitions against the processing or consumption of catch and purging of the bilges may be amenable to enforcement through the Courts. The reasons for it will need to be set out in the CMT order as required by s 79(1)(b). If these pre-conditions are met, it may be included in the CMT order as a wāhi tapu condition.

PCR orders

[464] A PCR order may be made under s 98 of the Act recognising an 'activity, use or practice' if the Court is satisfied that the requirements under s 51 have been met, and the activity, use or practice sought to be met is not one that is excluded by the Act. It must be an activity that takes place in the takutai moana.

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198 *Re Edwards* Stage Two Notes of Evidence, at 72-74.

[465] At Stage One, the Court made findings as to which applicants had satisfied the tests pursuant to s 51, and in what areas. The applicants were then directed to submit draft orders.

[466] It is not necessary for there to be a survey plan supporting the extent of a PCR order, unlike CMT orders. Certain activities are excluded from being recognised as a PCR by s 51(2). This includes an activity that relates to wildlife within the meaning of the Wildlife Act 1953.

[467] Unfortunately, most of the applicants who submitted draft orders have included activities or practices that the Court did not award at Stage One. These will be dealt with in turn.

Limitations on the exercise of PCR

[468] An issue arose during the course of the hearing as to whether the grant of a PCR authorised activities which went beyond the precise activities for which a PCR had been granted but which might be regarded as ancillary to the exercise of a PCR.

[469] Ms Ella Tennent, giving evidence on behalf of the Bay of Plenty Regional Council, referred in particular to activities such as the construction of access roads or huts to facilitate the undertaking of whitebaiting or of ramps or jetties to facilitate the launching of waka.

[470] Counsel for the Attorney-General correctly submitted that a PCR as defined in s 9 of the Act, is "an activity, use or practice". Secondly, an activity, use or practice, in order to meet the requirements of the Act, must be exercised in the common marine and coastal area.[199] A PCR recognised by the Court therefore cannot authorise any activity outside the takutai moana.

[471] The various PCR orders made by the Court in this case reflect the specific PCR orders sought by each applicant and the evidence tendered in support of each application. No applicant sought ancillary orders in relation to any activity, use or

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[199] Section 51(1)(b).

practice. Therefore, there is no basis upon which the Court could grant an ancillary order of the type raised by Ms Tennent.

Ngāti Muriwai

[472] The Stage One decision found that the applicant group that identified themselves as Ngāti Muriwai had established an entitlement to certain limited PCR rights namely:

(a) collecting firewood, stones, and shells along the foreshore of the whole of their claimed area; and

(b) whitebaiting at the Waiaua River and Waiōtahe Estuary.[200]

[473] Although the Court had adopted the pukenga's conclusion that Ngāti Muriwai were not a hapū and had not met the test of establishing that they had exclusively used and occupied the specified area since 1840,[201] they did not have to establish exclusive use and occupation in order to obtain a PCR. At [512], the Court specifically found that it was Ngāti Muriwai applicant group that had established the entitlement to PCR rights.

[474] Although the original Ngāti Muriwai application area included the area of the takutai moana some way out to sea, including Whakaari and Te Paepae o Aotea, as noted at [497] of the Stage One decision, in closing submissions, the application was amended so as to extend from the mouth of the Maraetōtara Stream to Tarakeha. I was most surprised, when in submissions to the Stage Two hearing, counsel asserted that the PCR right in respect of the collection of firewood, stones, and shells that the Court had granted extended to include all the offshore islands including Whakaari and Te Paepae Aotea.

[475] There are two reasons why this claim is incorrect. The reference to "within the application area" at [505] obviously refers to the amended application area set out just a few paragraphs earlier at [497] and secondly, no evidence was led by this applicant

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200 At [512].
201 At [499], [465] and [459].

that it had ever collected firewood, stones and shells from Whakaari, Te Paepae Aotea, or any other offshore island. The PCR only relates to the foreshore between Maraetōtara and Tarakeha.

[476] Ngāti Muriwai have nominated the holders of the order to be Nepia Tipene, Adriana Edwards, Christiana Davis, Glenis Reeve, and Milly Hunia as Trustees of the Ngāti Muriwai Authority Trust, or any other persons appointed as trustees. Certainty of identity is required as to who the holders of the PCR are. The reference to "any other persons appointed as trustees" needs to be deleted. Where the identity of the nominated holder changes, Ngāti Muriwai may apply under s 111(c)(a) of the Act to vary the name(s) of the holder. The restrictions, limitations or terms on the scale, extent, and frequency of the activities in the order are that the activities are to be carried out in accordance with the tikanga of Ngāti Muriwai. That statement does not provide any meaningful description of the intended scale extent or frequency of the exercise of the proposed right. That information will need to be provided.

[477] The draft PCR order submitted with Ngāti Muriwai's closing submissions contained another error. It purported to expand the eastern boundary of the application area from Tarakeha to Haurere Point (Te Rangi). The boundaries for the PCR for the collection of firewood, stones and shells as clearly set out at [497] of the decision extend from the mouth of the Maraetōtara Stream to Tarakeha, including Ōhiwa Harbour, but not further east. The draft PCR order and map will need to be amended to reflect this.

[478] There are also difficulties in the draft order in relation to the PCR for whitebaiting. What the Court found, on the basis of the evidence tendered to it, was that the whitebaiting took place at the Waiaua River and the Waiōtahe estuary. The draft order at [4.2(b)] incorrectly refers to the Waiōweka Estuary instead of the Waiōtahe Estuary.

[479] There is also a problem with the claim for a PCR for whitebaiting in the Waiaua River. During the course of the Stage Two hearing, Mr Nepia Tipene gave evidence for Ngāti Muriwai and conceded under cross-examination that the mouth of the Waiaua River was wāhi tapu, that Ngāti Muriwai therefore did not whitebait there and

that they only whitebaited upstream of the Jackson's Road/Motu Road Bridge. He identified the name of the bridge that they only whitebaited upstream of as the Waiau Bridge[202] and its location as being on the Pacific Coastal Highway.

[480] Mr Nepia accepted that the Waiaua River was non-navigable and that therefore, under the Act, the upper limit of the coastal marine area was a distance extending upstream by a distance that was five times the mouth of the river. He acknowledged that he had not measured the mouth of the river.[203]

[481] The need for evidence calculating the mouth of the river in order to establish that the area upstream of the Waiau Bridge on the Pacific Coastal Highway (where the whitebaiting was said to take place) was still in the CMA was drawn to the attention of counsel who said he would look into the matter.

[482] Attached to the closing submissions of counsel was an aerial photograph of the Waiaua River which had been produced by the Attorney-General at the Stage One hearing.

[483] Counsel accepted that it depicted the CMA ending at Waiau Bridge but the submissions then went on to say:

> However, the instructions of the NMAT trustees are that whitebaiting is carried out in both the immediate upstream and downstream from the bridge area.

[484] Effectively counsel was attempting to contradict the evidence of his own witness given under oath, with what was said in submissions. That is not permissible. As the area in which Mr Nepia said the whitebaiting took place is not in the takutai moana, it cannot be the subject of a PCR.

[485] On 8 March 2022, pursuant to leave granted, counsel for Ngāti Muriwai filed a further memorandum and affidavit of Nepia Tipene. Mr Tipene deposed that the draft order that counsel had filed had been sent to Ngāti Muriwai members. He said that the feedback from members was that they did not agree to the amendment that

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202 *Re Edwards* Stage Two Notes of Evidence, at 235 and 236.
203 At 237.

had been made and wanted to revert to the original draft order which disregarded Mr Tipene's oral evidence that Ngāti Muriwai did not whitebait in the area below the Waiau Bridge because it was wāhi tapu.

[486] Both the memorandum and affidavit are fundamentally misconceived. Cases in the High Court are determined on the basis of the requirements of the Act and the evidence given to the Court. Section 51 of the Act requires that, in order to obtain a PCR, the right must have been exercised since 1840 and continues to be exercised in a particular part of the takutai moana in accordance with tikanga.

[487] In the present case, Mr Tipene's clear evidence was that whitebaiting was not undertaken in that part of the Waiaua River that falls within the takutai moana (below the Waiau Bridge) because that area was wāhi tapu. The activity therefore did not meet the test in s 51(1)(b). Once Mr Tipene made that acknowledgement, counsel properly amended the applications. The fact that members of Ngāti Muriwai might not agree with that cannot alter the fact that the statutory test is not met.

[488] Section 109 of the Act requires that the recognition order contain certain information. Subject to the comments above at [476] in respect of persons appointed as trustees in the future, the draft order clearly identifies the applicant group as being Ngāti Muriwai and the holders of the order are appropriately described as Nepia Tipene, Adriana Edwards, Christina Davis, Glenis Reeve, and Milly Hunia as trustees of the Ngāti Muriwai Authority Trust. Contact details are also given. However, the draft will need to be resubmitted complying with the findings set out above and will also need to be accompanied by a sufficient diagram or map.

Ngāti Ira o Waiōweka

[489] At Stage One, Ngāti Ira o Waiōweka was held to have met the tests for PCR in respect of:[204]

(a) whitebaiting at the Waiaua and Waiōtahe Rivers;

[204] Above n 1 at [669(b)] and [545].

(b) gathering driftwood throughout their claimed area;

(c) gathering sand off the mouth of the Waiōweka River and at Waiōtahe;

(d) gathering mud, rocks, and shells from wetlands, estuarine margins and the sea throughout their claimed area; and

(e) landing vessels and making passage throughout their claimed area.

[490] The draft order filed by Ngāti Ira goes further than the matters listed by the Court and set out in the preceding paragraph.

[491] In particular, [9(b)(iii)] refers to the harvesting of flax. There was no award of a PCR in respect of gathering flax. At [537], the judgment mentioned that there was evidence that flax was gathered to make things like bowls and baskets for hangi. However, there was no evidence that the flax that was gathered grew in the takutai moana. That is why no PCR was granted.

[492] At [9(b)(iv)], the draft order refers to the collecting of seaweed such as karengo. Ngāti Ira was not awarded a PCR in respect of gathering seaweed. At [536], there was discussion of the evidence of Carlo Gage that karengo was gathered but the decision at [369] explained why there were difficulties in granting orders for PCR in respect of seaweed. Activities regulated by the Fisheries Act cannot be made the subject of a PCR order.

[493] Paragraph [368] of the Stage One decision explains that seaweed is regulated by that Act and that the only category of seaweed not covered was, "seaweed of the class Rhodophyceae while it is unattached and cast ashore".

[494] The judgment noted that:

> It is possible that karengo, a type of seaweed referred to evidence is part of this class but there was no evidence on this point.

[495] Another issue arises in respect of Ngāti Ira's PCR to gather sand off the mouth of the Waiōweka River,[205] given that the reclamations involved in the Harbour Development will result in the closing of the mouth of the Waiōweka. Counsel for ODC submitted that because the area to which this PCR is to apply has not been identified with sufficient certainty, there is a possibility that when the reclamation process is finished, the area in which the PCR is generally understood to be exercised will no longer exist. This submission is correct. Ngāti Ira did not, as s 109 requires, file an adequate map or diagram. It may be that once such a document is filed, the issue will resolve itself. But, until that is done, this paragraph in the draft PCR order cannot be approved.

[496] There was a further issue with the wording of proposed [9(b)(ii)]. The words "to make concrete to support building structures for Ngāti Ira Waiōweka in the Waiōweka River and at Waiotahi" could convey the impression that the PCR authorises Ngāti Ira to build structures in the Waiōweka River. That of course, is not correct. The PCR relates only to activities in the takutai moana. A more appropriate form of wording in replacement of that set out above would be "to make concrete to support building structures for Ngāti Ira o Waiōweka in their rohe".

[497] I note that two of the paragraphs, [4] and [7], have slightly different descriptions of the PCR to all the others. In both of those paragraphs the word "safeguarding" has been inserted. Paragraph [4] reads:

> An order for a PCR safeguarding the gathering and harvesting of whitebait at the Waiaua and Waiotahi Rivers.

[498] The word "safeguarding" does not appear in the Stage One judgement. It is not a concept recognised by the Act. In order to align the PCR with what the Court actually found, it should more appropriately read:

> An order for a PCR for the gathering and harvesting of whitebait at the Waiaua and Waiotahi Rivers.

A similar amendment needs to be made to [7].

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205 At [9(b)(ii)] of the draft order.

[499] In relation to whitebaiting in the Waiaua River, the limitations in relation to wāhi tapu and those parts of the river and its estuary that are not part of the CMT which are discussed above at [384]–[389] and [479]–[488] also need to be recognised.

[500] There are a couple of other typographical amendments in [9(b)], line 2. There appears to be a word missing. It should read, "ways of life **and** practices".

[501] In [10], the first line should read, "any limitations on the scale, extent **or** frequency …". The balance of the proposed terms satisfactorily meet the requirements of s 109.

Te Uri o Whakatōhea Rangatira Mokomoko

[502] At Stage One, Te Uri o Whakatōhea Rangatira Mokomoko were found to have met the tests for PCR in respect of:

(a) whitebaiting at Waiaua and in and around the Ōhiwa Harbour;

(b) taking of wai tai for rongoā purposes in the claimed area to 100 metres from MHWS, and using wai tai for bathing and healing purposes within Ōhiwa Harbour;

(c) using the takutai moana within the claimed area for transport and purposes of navigation;

(d) travelling to Hokianga Island for wānanga to pass down mātauranga to future generations;

(e) traditional practices such as wānanga, hui, tangihanga and burying of whenua at Taiharuru;

(f) planting of pohutukawa, harakeke, pingao, spinifex and toitoi within the claimed takutai moana area as an exercise of kaitiakitanga; and

(g) launching of boats and waka at the Ōhiwa Harbour.

[503] In the draft order submitted by Te Uri o Whakatōhea Rangatira Mokomoko, the activity of "traditional practices such as wānanga, hui, tangihanga and burying of whenua at Taiharuru" noted at Stage One, has been split into two separate rights being:

(a) burying of whenua at Taiharuru; and

(b) traditional practises such as wānanga, hui and tangihanga, to apply within the takutai moana between Maraetōtara Stream to Tarakeha and including the Ōhiwa and Ōpōtiki Harbours.

[504] The Court stated at Stage One:[206]

> In relation to using areas for various types of traditional practices such as wānanga, hui and tangihanga, there was clear evidence (particularly from Raiha Ruwhiu) of returning whenua (placenta) to the foreshore at Taiharuru and placing the umbilical cord in crevices of the rocks on the seashore. Ms Ruwhiu confirmed that these practices have been carried out since 1840 and were ongoing. No particular site other than Taiharuru was mentioned. The applicant group is entitled to a PCR in respect of this practice at Taiharuru.

[505] That was a clear statement that the practises noted above were limited on the evidence to those that were undertaken at Taiharuru. There was no evidence that any of the traditional practices referred to were carried out anywhere other than Taiharuru. The draft order therefore needs to be amended to reflect this.

[506] That part of the draft order that refers to the taking of waitai for rongoā does not accurately reflect what the Court granted. It refers to "Taking of wai tai for rongoā purposes in the claimed area …" whereas, what the Court held at [552] was:

> …this applicant has met the test in s 51 in relation to the taking of wai tai for Rongoa throughout their application area to 100 m from mean high-water springs …

[507] The draft order needs to be amended to accurately reflect what was granted.

[508] The other information requirements in s 109 have been met other than the filing of a diagram or map sufficient to identify the relevant areas.

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206 At [561].

Ngāi Tamahaua/Te Hapū Tītoko o Ngāi Tama

[509] At Stage One, Ngāi Tamahaua established that they had met the tests for PCR orders in respect of:

(a) whitebaiting in the Ōpape River and at Waiōweka, Pakihi, Kutarere, Waiōtahe and Wainui, to the extent that those activities take place in the takutai moana;

(b) gathering of indigenous plants and shells between Maraetōtara and Tarakeha;

(c) gathering firewood between Ōpape and Ōmarumutu;

(d) collecting wood for artwork from Ruatuna, Waiōtahe, Tawhitinui, Hukuwai, Tirohanga and Waiaua; and

(e) exercising kaitiakitanga activities in the takutai moana including the monitoring of the activities of other users of the takutai moana, rubbish collection, and environmental projects such as those for planting of pingao and spinifex.

[510] In the draft order submitted to the Court, Ngāi Tamahaua have altered slightly the locations to which the PCR order is to apply. The Otara River was included as a location on the whitebaiting PCR, even though it is not in the takutai moana, and therefore is unable to support a grant of PCR.

[511] Secondly, the PCR for exercising kaitiakitanga activities in the takutai moana has been stated as being between Maraetōtara and Te Rangi, extending out to 12 nautical miles. The Court, at Stage One, explicitly found that Ngāi Tamahaua's PCR rights could not extend beyond Tarakeha to Te Rangi, given that the evidence was that Tarakeha was the commonly known and observed boundary between Whakatōhea and Ngāi Tai, despite long held dispute between the groups.[207] In this

[207] At [587]-[589].

conclusion the Court placed emphasis on the evidence of Mr Amoamo, stating "I therefore do not accept Ngāi Tamahaua's argument that, as at the present day, it has mana moana east of Tarakeha".[208] The PCR for exercising kaitiakitanga activities in the takutai moana for Ngāi Tamahaua can only be between Maraetōtara and Tarakeha, out to 12 nautical miles. As noted by the Court in the Stage One decision, this is not an exclusive right, and kaitiakitanga activities may be exercised in that same area by other successful applicants who were awarded PCR in respect of that activity.[209]

[512] The wording in the draft order as to where the various activities protected by a grant of PCR take place refers to "on the foreshore". The concept of "foreshore" is not defined. In order to avoid uncertainty the words "below mean high-water springs" should be added after the words "on the foreshore". This makes it clear that the PCR only relates to activities in the takutai moana.

[513] The draft order nominated the holders of the orders for both Ngāi Tamahaua and Te Hapū Tītoko o Ngāi Tama as being Tracey Hillier and Hetaraka Biddle. As Mr Biddle passed prior to the Stage Two hearing, a new holder will need to be nominated.

[514] The other information requirements set out in s 109 have been complied with apart from the failure to file a sufficient map or diagram.

Te Ūpokorehe

[515] At the Stage One hearing, Te Ūpokorehe established that it had met the tests for PCR orders in respect of:

(a) catching whitebait in the Ōhiwa Harbour;

(b) exercising kaitiakitanga within the takutai moana;

(c) gathering flora and fauna that is not otherwise excluded from being the subject of an order for PCR within the takutai moana; and

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208 At [588].
209 Above n 1, at [606].

(d) collecting shells, mud, wood on the foreshore, and stones within the application area.

[516] Unfortunately the draft order goes well beyond the findings of the Court and includes a number of activities that do take place within the takutai moana and in respect of which no PCR order was granted.

[517] [632] of the Stage One decision addressed the application for orders in respect of plants. It pointed out that any draft order could only relate to plants that actually grew in the takutai moana rather than on adjacent areas of land. That paragraph also made it clear that only flora and fauna not otherwise excluded could be the subject of an order for PCR. As noted above, [368] of the Stage One decision referred to the definition in s 2(1) of the Fisheries Act 1996 which excludes "aquatic life" from a PCR. Aquatic life is defined as any species of plant or animal life, that at any stage of its life must inhabit water, whether living or dead. Seaweed is defined as including all kinds of algae and sea grasses that grow in New Zealand waters at any stage of their life history, whether living or dead. The definition of 'fishing' in the Fisheries Act 1996 includes the harvesting of aquatic life or seaweed.

[518] The applicant has listed the names of over 30 tree and plant species in its draft order. The joint affidavit of Maude Edwards and Wallace Aramoana of 22 January 2022 asserts that they grow in the takutai moana.

[519] Notwithstanding the Court drawing to the attention of the applicant the limitations as to the activities in relation to plant or animal life that can actually support an order for PCR, no regard appears to have been paid to this matter in preparing the draft order. Obvious examples are the reference to wiwi (sea rush) which falls within the definition of seaweed. Mangroves also clearly fall within the definition of aquatic life. That part of the schedule which lists the plants will need to be amended so as to delete any reference to plants that fall within the definition of seaweed or aquatic life. The section will also need to have a preface added which makes it clear that only specimens of the listed plant specifies that are actually growing below MHWS are covered by the PCR.

[520] I now address those matters in Appendix A of the draft order which either go beyond the PCR rights recognised in the Stage One judgment or are incapable of forming the basis of an order for PCR.

A – "Customary harvest of whitebait in the Ōhiwa Harbour and surrounds"

[521] The exact wording at [669(e)(i)] of the Stage One judgment was "catching whitebait in the Ōhiwa Harbour".

[522] At [624], the judgment noted that the only area identified as to where whitebait was caught was in Ōhiwa Harbour. The words "and surrounds" therefore go further than the PCR recognised by the Court.

B – "Access to taonga and archaeological sites in rohe for kaumatua assessment of kaitiaki obligations"

[523] The Court has no jurisdiction to make any ruling in respect of access to taonga or archaeological sites that are not in the takutai moana. The activity supported by an order for PCR must also take place in the takutai moana. The Court cannot make orders for access to the takutai moana. This has to be deleted.

D – "Control and removal of mangroves in Ōhiwa Harbour"

[524] Mangroves fall within the definition of aquatic life and activities such as harvesting or removing them are excluded.

F – "Kaitiaki over the harvest of wiwi (sea rush) for use and preparation of traditional kai"

[525] As mentioned, wiwi is a form seaweed and an activity in relation to it cannot be the subject of a PCR order.

G – "Protection of mussels through control of starfish in Ōhiwa Harbour"

[526] Starfish are a species of aquatic life. Their removal would be harvesting.

I – "Collection of iron deposits at Te Tawai for use in kōwhaiwhai"

[527] Te Ūpokorehe was not granted a PCR order in respect of iron deposits.

J – "Protection of rare plants, wild orchids, wiwi (sea rush) that does not grow anywhere else, and other rare plants in and around the area of Te Karaka Stream. Extraction of invasive species and clean-up pollution"

[528] There was no evidence that wild orchids grew in the takutai moana. There is no indication what the "rare plants" are that are being referred to, or any information that would confirm them as growing in the takutai moana. The reference to "other rare plants in and around the area of Te Karaka Stream" would seem to clearly refer to plants growing outside the takutai moana.

[529] There are difficulties with the reference to "extraction of invasive species and clean-up pollution". There is no explanation as to what "invasive species" are being referred to. It is possibly referring to species like mangroves and, for the reasons discussed above, anything that amounts to harvesting or removing of aquatic life cannot be the subject of a PCR. The words "clean-up pollution" are not sufficiently specific to explain what particular activities are involved, or even what the "pollution" being referred to is. Accordingly, they cannot be the subject of a PCR.

[530] The second of the PCR orders granted was "exercising kaitiakitanga within the takutai moana in relation to the activities set out at [625]-[627]." Those activities included:

(a) engaging with the Department of Conservation and Bay of Plenty Regional Council regarding conservation initiatives;

(b) actively undertaking the control of mangroves in Ōhiwa Harbour including obtaining a resource consent;

(c) establishing a resource management team which liaised with central and local government, and also undertook its own conservation initiatives;

(d) participating in a number of Regional and District Council environmental initiatives including participation in the Ōhiwa Harbour Implementation Forum and the Ōhiwa Harbour Strategy Co-ordination Group; and

(e) undertaking regular site visits including checking on waste management issues and interference with wāhi tapu, as well as activities in relation to stranded whales.

[531] Any order must closely reflect the wording in the decision and also have regard to the restrictions relating to seaweed, aquatic life, and wildlife discussed above.

K – "Rāhui and customary recovery processes for reburying koiwi"

[532] The right to impose a rāhui is an incident of CMT not PCR. The PCR recognised does not refer to customary recovery processes for reburying koiwi.

L – "Harvest of red ochre at Te Oneone"

[533] No right to harvest red ochre was granted.

N – "Culling of black backed gull"

[534] Finally, Te Ūpokorehe have listed the culling of the black backed gull as a kaitiaki activity to be recognised as a PCR within its draft recognition order. No order for PCR in relation to culling of black backed gull was made. In any event, this is an activity that appears to relate to wildlife within the terms of s 51(2). In the terms of the Wildlife Act 1953, wildlife means:

> any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority granted under this Act or otherwise.

[535] The black backed gull (larus dominicanus) would appear to meet this definition, and its culling, would therefore be an activity that relates to wildlife. That the black backed gull is "wildlife" is supported by s 7 of the Wildlife Act, and also Sch 5. The fact that it is not protected by the Wildlife Act does not mean that it can

be included within a PCR activity when the Wildlife Act clearly includes it within the definition of wildlife.

O – "Customary harvest and use of natural and physical resources where they grow or are found within the PCR area"

[536] This part of the draft order refers to the list of plants discussed above. As already mentioned, this right needs to be qualified by the wording actually used in the grant of PCR set out at [669(e)(iii)] which was:

> Gathering flora and fauna that is not otherwise excluded from being the subject of an order for PCR within their claimed area.

P – "Customary harvest of the following resources from within application area …"

[537] At [642] of the Stage One decision said:

> …Ūpokorehe are entitled to a PCR for the collection of shells, mud, wood on the foreshore, and stones within the application area.

[538] There was no mention of "sulphur and other non-Crown owned minerals", nor seaweed. Seaweed, as discussed above, cannot be the subject of a PCR order. The draft needs to be amended to reflect this.

[539] The various information requirements set out in s 109 have been met apart from the requirement to file a diagram or map that is sufficient to identify the relevant area. This needs to be done.

Ngāti Ruatakenga

[540] At Stage One, Ngāti Ruatakenga established that they had met the tests for PCR orders in respect of:

(a) collection of rongoā materials within the claimed area;

(b) performing baptisms within the claimed area;

(c) conservation activities in the area around the Ōmaramutu Marae Papakainga and Waiaua estuary;

(d) kaitiaki activities such as the creation of maps for sites in the takutai moana using customary methods; and

(e) customary rituals, as well as tangihanga, within the claimed area.

[541] A PCR can only authorise activities which are "exercised in a particular part of the common marine and coastal area."[210] Some of the activities set out in [9.3] and [9.4] of the draft order relate to activities that clearly take place somewhere other than the takutai moana such as planting native plants and pest control in [9.3] and setting stoat traps in [9.4]. These two paragraphs need to be rewritten so as to conform to the order actually granted and to delete reference to activities which do not take place in the CMCA.

[542] The draft order contains the necessary information required by s 109 other than the necessary diagram or map. Neither of the two maps referred to in the draft order were filed with the draft order. This needs to be attended to.

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210 Section 51(1)(b).

PART IV

CONCLUSION AND SUMMARY

[543] On the basis of the information presented at the Stage Two hearing, the Court is not presently able to finalise any of the recognition orders. The findings and observations set out in this decision are intended to address the various issues relating to the content of the recognition orders where there has been uncertainty. It will hopefully allow accurate survey plans and maps of the type required by the Act to be prepared and submitted.

[544] In some instances, the Court has indicated that if further evidence is submitted on a particular topic that may permit the recognition on a CMT of a wāhi tapu or wāhi tapu conditions. Any further evidence must be limited to filling the gaps identified by the Court, and must be explicit in doing so.

[545] In other instances, the Court has explained why either wāhi tapu status or wāhi tapu conditions are not available. The fact that parties have been invited in some instances to file further evidence on a particular point should not be taken as an invitation to all parties to challenge any findings of the Court that they disagree with. Those sorts of challenges are matters for an appeal.

[546] I adjourn this matter to a case management conference on a date to be allocated by the Registrar in approximately six months' time. The Registrar will advise whether that CMC is to be held in Rotorua, by VMR, or by a combination of those means.

[547] I expect all successful applicants to have filed and served the required additional information identified in this decision no later than one week prior to the date to be notified for the CMC. Any interlocutory applications in relation to matters arising out of this decision must also be filed and served within the same timeframe.

[548] I anticipate that, following the CMC, the recognition orders can be made on the papers on the basis of the further information supplied.

[549] The joint memorandum of counsel dated 21 January 2022 filed with the proposed draft CMT orders, indicated that there were ongoing discussions in relation to matters such as the key principles that would guide the CMT holders in making decisions. The memorandum also indicated that it was intended that the CMT orders be recorded in te reo Māori first with an English translation accompanying them. If that is still the parties' intention, they will need to file draft orders reflecting that.

[550] If the parties continue to be unable to reach agreement, in order to finalise the CMT, the Court will have to make a decision as to who the nominated holders of CMT 1 and CMT 2 will be. It is likely that this will be six named individuals, each of the individuals representing one of the successful applicant groups, in respect of CMT 1 and, in respect of CMT 2, seven named individuals, each individual representing one of the successful applicants.

[551] It is not for the Court to impose a structure on the applicant groups as to an incorporated or other entity that might hold the CMT. However, if the parties, in accordance with tikanga, agree upon an appropriate entity, the Court is able to consider that and, if satisfied that it meets the requirements of the Act, approve it.

Churchman J

Solicitors:
Legal Hub Lawyers, Auckland for CIV-2011-485-817, CIV-2017-485-375, CIV-2017-485-264, and CIV-2017-485-278
Wackrow Williams & Davies Ltd, Auckland for CIV-2017-485-262 and CIV-2017-485-377
Kāhui Legal, Wellington for CIV-2017-485-318
Oranganui Legal, Paraparaumu for CIV-2017-485-270 and CIV-2017-485-272
Te Mata Law Ltd for CIV-2017-485-238
Lyall & Thornton, Auckland for CIV-2017-485-201
Te Haa Legal, Otaki for CIV-2017-485-269
McCaw Lewis, Hamilton for CIV-2017-485-355
Whāia Legal, Wellington for CIV-2017-485-196
Annette Sykes & Co, Rotorua for CIV-2017-485-299
Bennion Law, Wellington for CIV2017-485-253
Tu Pono Legal Limited, Rotorua for CIV-2017-485-292
Ranfurly Chambers Ltd, Auckland for CIV-2017-404-482
Greig Gallagher & Co, Wellington for CIV-2017-485-185
Franks Ogilvie, Wellington for Landowners Coalition Incorporated
Cooney Lees Morgan, Tauranga for Bay of Plenty Regional Council and Ōpōtiki District Council
Chapman Tripp, Wellington for Seafood Industry Representatives
Crown Law, Wellington for Attorney-General

Counsel:
K Feint KC
R Roff
M Sharp
B Tupara

APPENDIX A

[1] The wāhi tapu claims made by Te Upokorehe within the Ōhiwa Harbour CMT, that have not been addressed, and in respect of which further information and accurate maps, are required, are:

(a) Waikaria;

(b) Wairapuhia;

(c) Tunanui;

(d) Kawakawa Pā;

(e) Panekaha Pā;

(f) Te Unga Waka;

(g) Hauauru Pā;

(h) Wainui Marae;

(i) Te Poka;

(j) Te Hauhau Pā;

(k) Whitiwhiti;

(l) Paparoa;

(m) Ohakana;

(n) Taupari;

(o) Nga Kanohi o Makuiri;

(p) Awaroa;

(q) Paparoa Pā;

(r) Te Kauri Point;

(s) Waikirikri Pā;

(t) Motuorei Point;

(u) Nga Kuri a Taiwhakea;

(v) Toritori Point;

(w) Whakarae Pā;

(x) Te Araioio o Panekaha;

(y) Te Karamea Pā;

(z) Paripari Pā;

(aa) Te Tahora Reserve;

(bb) Motuotu;

(cc) Te Peke;

(dd) Otane te ihi;

(ee) Te Motu;

(ff) Rae Toka;

(gg) Te Ru (Nukuhou River);

(hh) Tarua;

(ii) Pa o Karatehe;

(jj) Turangapikoi;

(kk) Te Waingangara Stream;

(ll) Matekerepu;

(mm) Kererutahi;

(nn) Te Hou;

(oo) Oparaoa;

(pp) Onerau;

(qq) Te Karaka;

(rr) Roimata Pā;

(ss) Piniko;

(tt) Awa Awaroa;

(uu) Hiwaru;

(vv) Te Tawai;

(ww) Taumata Hinaki;

(xx) Poukoro Tu;

(yy) Parahamuti;

(zz) Patua Island;

(aaa) Kutarere Marae;

(bbb) Te Kakaho;

(ccc) Wairua iti;

(ddd) Te Rere Koau;

(eee) Te Wehi;

(fff) Oheu Pa;

(ggg) Te Mauku Pā;

(hhh) Te Kaokaoroa o Pahora;

(iii) Te Ruatuna;

(jjj) Maunga Karetu;

(kkk) Paewiwi;

(lll) Kopua o Te Pu;

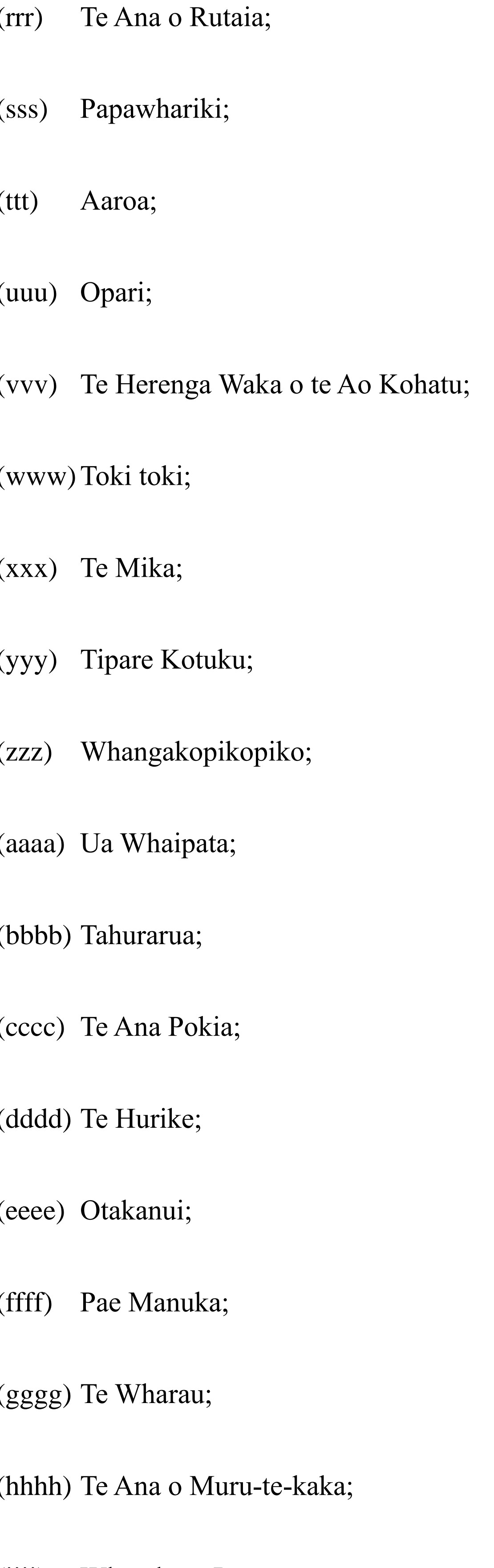
(mmm) Hokianga;

(nnn) Pukerotu;

(ooo) Taheke;

(ppp) Mairerangi;

(qqq) Pukeruru Point;



(rrr) Te Ana o Rutaia;

(sss) Papawhariki;

(ttt) Aaroa;

(uuu) Opari;

(vvv) Te Herenga Waka o te Ao Kohatu;

(www) Toki toki;

(xxx) Te Mika;

(yyy) Tipare Kotuku;

(zzz) Whangakopikopiko;

(aaaa) Ua Whaipata;

(bbbb) Tahurarua;

(cccc) Te Ana Pokia;

(dddd) Te Hurike;

(eeee) Otakanui;

(ffff) Pae Manuka;

(gggg) Te Wharau;

(hhhh) Te Ana o Muru-te-kaka;

(iiii) Wharekura Pā;

(jjjj) Te Korokoro;

(kkkk) Te Kai Ara Ara;

(llll) Te Ipu o Te Mauri; and

(mmmm) Paerata Pā.[211]

211 Paerata Pā was numbered as site 102 in Maude Edward and Wallace Aramoana's list of wāhi tapu sites, but was not marked on any of the maps submitted by Te Ūpokorehe.

- 9 JAN 1997 ORIGINAL

Decision No. A107/96

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120

BETWEEN **TE ROHE POTAE O MATANGIRAU TRUST**
(Appeal RMA 1472/95)

Appellant

AND **THE NORTHLAND REGIONAL COUNCIL**

Respondent

AND **F B and K V NICHOLSON**

Applicants

BEFORE THE ENVIRONMENT COURT

Environment Judge DFG Sheppard (presiding)
Environment Judge J R Jackson
Mr I G McIntyre

HEARING at Whangarei on 20, 21 and 22 November 1996

COUNSEL

Mr G T Winter for the appellants
Mr R M Bell for the respondent
Miss E Henderson for the applicants

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DECISION

Introduction

This is an appeal against a grant of a coastal permit for an extension to a long-established oyster farm in Touwai Bay in the Whangaroa Harbour. The applicants' existing oyster lease covers an area of 4.9 hectares, but about 0.8 of a hectare has proved too shallow for cultivation. The proposal is to add 2.3 hectares to the deeper end of the oyster farm, and to surrender the lease in respect of the shallow 0.8 of a hectare. The extension is a discretionary activity in terms of the proposed regional coastal plan.

An application for a coastal permit for the extension was notified, and drew four submissions, one from the secretary of Te Rohe Potae O Matangirau Trust (the Matangirau Trust). Following a hearing, the Northland Regional Council granted a coastal permit for the extension to the oyster farm for a period to expire on 1 November 1997, to coincide with the expiry of the deemed coastal permit for the existing oyster farm. The grant was subject to some 17 conditions. The applicants accept those conditions.

The present appeal by the Matangirau Trust seeks "withdrawal" of the resource consent in its entirety. Although the notice of appeal asserts five grounds, the appellant's case as presented was mainly directed to adverse effects on the environment (especially siltation and discharge of cleaning water) and particularly to alleged interference with tangata whenua customary use of the coastal marine area. We describe the site and the proposal in more detail, and then address those issues.

The site

Touwai Bay is a relatively narrow bay, oriented to the north-west, in the outer Whangaroa Harbour. It is bounded by reasonably steep hills and broadens out into mangroves, saltmarsh and pasture at the head of the bay. The catchment is reasonably small. There is an island (Wairaupo or Milford Island) at the entrance to the bay, which is covered with native vegetation. The hills surrounding the bay have been cleared for pasture, and a substantial part of the Matangirau Peninsula (on the southern side of Touwai Bay) has reverted to gorse. Pine tree afforestation was recently commenced on that peninsula.

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The site is a seaward extension of the applicants' existing oyster farm, which lies centrally in Touwai Bay. It would extend the length of the farm by 75 metres, and its width by 341 metres. Behind the oyster farm the bay is shallow, and there are mangroves fringing the upper bay. There are shallow channels on either side of the oyster farm that extend from mudflats in front of the mangroves. There are patches of salt marsh shoreward of the mangroves. The seabed at the site is sandy mud, with no eel grass. The application area extends in slightly deeper water from the outer edge of the oyster farm. Most of the northern corner of the extension would be 3 or 4 metres under water at spring low tides, although the remainder would be exposed.

The proposal

The existing oyster farm consists of 47 rows of racks supported about 1 metre above the sea bed on posts set in the harbour bed. The farm cultivates Pacific oysters. The spat is raised on sticks, then on trays, and the oysters are grown in mesh (netlon) bags placed on the racks. The farm is serviced from a barge, and seawater is pumped to clean spat sticks and harvested oysters. The used cleaning water is returned to the waters of the bay.

The applicants' intention in extending the oyster farm is to be able to produce more oysters of better quality, and to extend the season. Racks are to be erected in two blocks with a gap between to allow public access between them from sea to shore.

Effects on the environment

Section 104(1) of the Resource Management Act directs that subject to Part II, when considering an application for a resource consent and any submissions received, a consent authority is to have regard (among other things) to any actual and potential effects on the environment of allowing the activity.

It was the appellant's case that the existing oyster farm has adverse effects on the environment, and that the proposed extension would increase those effects. By section 3 the term "effect" is to include any cumulative effect. In particular the main effects asserted by the appellant were that the oyster farm causes siltation of the harbour; and deprives native oysters and other

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marine fauna of nutrients. Other effects advanced by the appellant were increased noise and visual intrusion, and increasing the area of Touwai Bay which cannot be used by the public for recreational or other uses.

The appellant's case in the main respects mentioned was supported by the evidence of the only expert witness called on its behalf, Mrs S M Harris, who is a consultant planner and environmental scientist having experience of environmental effects of marine farming in Northland. Mrs Harris had investigated the effects of the applicants' oyster farm by making comparisons of the substrate and anoxic zones, and the abundance and diversity of shellfish and other marine life, in three locations: the applicants' oyster farm at Touwai Bay; the site of an abandoned oyster farm in Pumanawa Bay; and an area of Rere Bay in Pekapeka Bay where there had not been any marine farming, and which Mrs Harris treated as a control site.

Mrs Harris found that the two marine farm sites at Pumanawa Bay and Touwai Bay represented completely different habitat type and community structures compared with the control site at Rere Bay. The habitat at Rere Bay had clear water, a sandy substrate with a small portion of mud, and well-defined pipi and cockle beds typical of northern harbours. The former oyster farm site at Pumanawa Bay had less clear water, a muddy substrate dominated by islands of remnant pacific oyster, and no pipi or cockle beds. The witness reported that the muddy substrate appeared to extend well outside the boundaries of the previous marine farm.

Mrs Harris also reported that the site at Touwai Bay was similar to Pumanawa Bay, with a muddy zone extending some distance outside the boundaries of the marine farm. She had been given to understand that pipi and cockle beds had been present prior to the marine farms being established, and she found that they were almost completely gone from these areas. The witness ascribed that to two main factors : competitive pressure, and siltation. On the first she deposed that the artificially introduced commercial oyster species compete for space and nutrients at the site, and reduce the availability of those resources for naturally occurring bivalves in the area. On the second, Mrs Harris gave the opinion that artificial structures in the bays decrease tidal flow velocities in the area sufficient to trap silt around the marine farm structures, that debris is dropped into the water column on the site, and that, combined with sediment input from farmed catchments above the sites, has covered the naturally occurring sandy substrates, smothering any pipi or cockle beds previously present.

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Mrs Harris concluded that the applicants' oyster farm has resulted in replacement of naturally occurring edible shellfish beds, leading to a change of species occurrence and community structure on the site; and that the combined effects of land development in the catchment and oyster farming activities has changed the habitat from a naturally occurring "clean sand-mudflat" embayment to a "muddy-silted" embayment. She added that the proposed extension of the oyster farm at Touwai Bay is most likely to extend the siltation zone and area of habitat change further seaward.

In cross-examination Mrs Harris acknowledged that she did not have evidence that Touwai Bay had not always been in its present state, but had relied on what she had been told by members of the Matangirau hapu. She agreed that to draw conclusions about siltation there would need to be measurements and observations over a period of time to compare the site before the oyster farm was there with what can be seen today; and that although she had seen the site in 1991, she had not made detailed measurements then, nor had anyone else as far as she was aware.

Mrs Harris accepted that the oyster farm is a minor source of sediment compared with farmland runoff in the catchment, that tidal flushing is important, and several other factors need to be considered. She agreed that Touwai Bay differs from Rere Bay in several respects, including aspect, extent of vegetation clearance in the catchments, quantity of inflow from catchment, and rate of tidal flushing. She also agreed that there would be Pacific oysters in Touwai Bay regardless of the presence of the oyster farm; and that there are many small cockles in Touwai Bay in front of the Nicholsons' shed.

Evidence was given to the Court about the condition of Touwai Bay prior to establishment of the oyster farm. One of the applicants, Mr F B Nicholson, described finding a muddy bottom when he first visited the site in about 1971, and that when he stepped out of his boat, the silt was up over the tops of his gumboots. He had not seen anything which he regarded as valuable as food.

Evidence for the respondent was given by the coastal permits officer who processed the application, Mr I W Briggs, who is qualified as an expert witness in marine biology and water quality in harbours. He deposed that marine habitat and wildlife values within the site are not as high as in other parts of the Whangaroa Harbour, or in other harbours, observing that

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benthic diversity around the site is limited by a lack of eel-grass. He acknowledged that intertidal oyster farms have been thought by some to be a significant source of siltation in the Whangaroa Harbour (among others), but he asserted that this is not the case. He relied on a report by Tonkin and Taylor, consulting engineers, who had been commissioned by the respondent in 1991 to report on water quality in the Whangaroa Harbour, and who had concluded from their investigations that oyster farming did not appear to be contributing to localised sedimentation, which typically occurs in response to mass inflow caused by major erosion events in the catchment of the harbour.

Mr Briggs deposed that artificial structures in the intertidal area, such as oyster racks, attract encrusting organisms which in turn attract predators such as fish and birds. He did not accept that the upright oyster farm structures would trap sediment, although there could be settlement of sediment on the surfaces of the oyster shells and on the netlon bags containing them. The witness also stated that oyster farms may change the environment through shell drop, siltation, oyster excrement and detrital accumulation. The extent of those effects can be reduced by farm management practices, such as picking up any stock, sticks or bags that may fall from the racks.

Mr Briggs gave the opinion that the applicants follow good management practices and that their farm is one of the best managed in Northland. That was accepted by Mrs Harris. However we consider that it would be inappropriate to place much weight on the applicants' management practices, commendable though they are. Although the applicants may have no present intention of selling their oyster farm, circumstances may change, and they are entitled to do so when they choose. A consent authority can have no assurance that a successor would follow the same practices, or would achieve the same high standards.

Mr Briggs gave the opinion as a scientist that a comparison of Rere Bay with Touwai Bay is not helpful, because there are a number of characteristics that are dissimilar, including the soil types, the lack of sedimentation runoff from the Rere Bay catchment, the vegetation on the land, land tenure, existing land use, sediment size, and (to a minor extent) harbour vegetation. He also referred to the effect on tidal flushing of Milford Island in the mouth of Touwai Bay. He questioned use of Rere Bay as a control site for comparison with Touwai Bay, and explained the importance of sediment size as controlling the types of animal habitat it provides; deposing that the Rere Bay bottom being coarse sand, and Touwai Bay bottom being mud, he

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would expect the former to have more bivalves that live in coarse sediment, such as cockles and pipis.

Mr Briggs also deposed that a Regional Council draftsman had measured the area of Touwai Bay inside the outer lines of the proposed oyster farm extension as 67.9 hectares, and excluding the area occupied by mangroves and saltmarsh as 40.1 hectares. Mr Briggs also expressed the opinion that the oyster farm could lead to enhancement of the environment by attracting fish.

Mr Nicholson did not accept that conditions in Rere Bay could fairly be compared with those in Touwai Bay to assess the effects of the oyster farm. He remarked that Rere Bay has high sides, no rivers flow into it, it has no mudflats, and when it rains there is little runoff. The inlets of Touwai Bay are very muddy, the Touwai River drains into the top of the bay, and in time of flood it is quite a big river. Mr Nicholson also deposed that at the time of Mrs Harris's visit on 5 and 6 November, there had been heavy rainfall in the previous three days, with the result that the water of the bay was very cloudy.

Mr Nicholson denied that his farming practices amounted to overgrazing, and stated that their aim is to grow better quality oysters. He had observed a lot of cockabullies in the water when recovering oyster bags, and he had seen the odd cockle, but had never seen anyone collecting shellfish in the bay.

Mr H Tua, who is 78 years old and has lived in the Matangirau area all his life, stated that there are still mataitai (shellfish beds) in the bay, but that no-one uses them any more. He considered that there are enough cockles if people want them, also pipis are still there in front of the Nicholsons' farm. Similar evidence was given by Mr H Poata, who had lived in the area all his life, apart from absence on service during the Second World War. Mr Poata deposed that there are mataitai around the bay, that they are still there, the bay remains rich in kaimoana, but they are well away from the Nicholsons' oyster farm and it does not interfere with them. Mr Poata stated that he has not observed a change in the bay from the oyster farm, and affirmed that it has always been the same.

The secretary of the appellant, Mrs L T Collier, deposed that during the 1920-1940 period, crayfish were plentiful, as were sea eggs, mussels, scallops, pipi, cats eyes, sand snails, fish and rock oysters. She explained that her source of information was stories related to her by her father, grand-aunts, and grand-uncle. She added that in the period from 1940 to 1980,

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crayfish, scallops and sea eggs slowly disappeared, and that in the period 1970 to 1996, mussels, some species of pipi, cats eyes, sand snails, and fish were slowly disappearing, and the rock oyster and pipi are struggling to survive. Mrs Collier acknowledged excessive harvesting as a source of depletion, siltation and pollution, and expressed the view that for the past 10 years the depletion has accelerated due to oyster farming. In support of that she testified that seeding of sea eggs has not succeeded in this immediate area, but in the Wairaupo area they had good results; that in the subject site scallops have not re-established, nor sand snails or cats eyes, but pipi have with only minor success. They have multiplied more abundantly in bays furthest from oyster farming. Asked about the evidence of Messrs Tua and Poata, Mrs Collier held to her evidence that cockles and pipis are not as plentiful today as before the oyster farm was started; and that if the oyster farm is removed, she considered that native oysters would be more abundant on the rocks.

Having summarised the evidence relevant to the contested issues of environmental effects, we now make our findings on them.

We start with the appellant's assertion that the oyster farm causes siltation of the harbour. On that topic, there was a conflict between the opinions given in evidence by Mrs Harris and by Mr Briggs. Mrs Harris's opinion was based on her comparison of Touwai and Pumanawa Bays and Rere Bay. Mr Briggs's opinion was based on his own experience and on the investigations made by Tonkin and Taylor.

We find that the control site adopted by Mrs Harris has relevant characteristics that are significantly different from those of the Touwai Bay, and that the comparison of the extent of sediment in them is not probative evidence of her hypothesis that the oyster farm causes significant siltation. In particular, we refer to the relative extent of vegetation affecting rate of runoff, to relative catchment sizes, to the aspects of the bays, to the rates of tidal flushing (limited in Touwai Bay by the position of Milford Island across the mouth of the bay). The investigation by Tonkin and Taylor was more extensive, and their report provides a cogent basis for their conclusion that oyster farms in Whangaroa do not appear to be contributing to localised sedimentation. That was supported by Mr Briggs's own experience. We find Tonkin and Taylor's conclusion and Mr Briggs's opinion persuasive, and because of the significant differences between Rere Bay and Touwai Bay we do not find Mrs Harris's contrary opinion persuasive.

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We accept that the Nicholsons' oyster farm contributes some solid material to the waters of the bay, particularly oyster excrement and shells or parts of them. However on the evidence before the Court we do not find that those sources amount to a significant adverse effect on the environment. We reject the assertion that the cumulative effects of the existing oyster farm and the proposed extension of it would cause siltation of the harbour to a significant extent.

We turn to the appellant's assertion that the oyster farm deprives native oysters and other marine fauna of nutrients. An important basis for Mrs Harris's opinion to that effect was her understanding that Touwai Bay formerly contained more abundant shellfish beds than it does now. The witness did not have personal knowledge of the condition of the bay prior to the start of the oyster farm in about 1971, but relied on what she had been told by representatives of the appellant. The only witness for the appellant who gave evidence on that topic was Mrs Collier. Mrs Collier had not made any measurements on a scientific basis on which a comparison could be made of the abundance and diversity of shellfish in Touwai Bay before establishment of the oyster farm and now. She relied mainly on anecdotal accounts by elder members of her family. Those accounts, as related to us by Mrs Collier, lacked particularity. In addition there was her evidence of lack of success in establishing new stocks of various species.

On the other hand there was the direct first-hand evidence of Mr H Tua and Mr Poata, who have lived around Touwai Bay all their lives (apart from war service). Their evidence conflicts with the assertion that the oyster farm has deprived native oysters and marine fauna in the bay of nutrients, leading to their depletion. We accept Mr Nicholson's evidence that he is careful not to overgraze the farm, and it is plainly in his own interest not to do so.

Even if the shellfish beds are less productive now than in the past, that would not necessarily establish that the cause is the Nicholsons' oyster farm. As Mrs Collier acknowledged, excessive harvesting, and siltation from cleared land in the catchment, are likely causes. Similarly the lack of success of the efforts of Mrs Collier and others to establish new stocks of shellfish near the oyster farm may be due to a number of causes, and does not by itself show that the oyster farm has deprived the bay of nutrients.

Even if extended as proposed, the Nicholsons' oyster farm would occupy only 6.4 hectares in the 67.9 hectares of Touwai Bay, which itself is only a small arm of the large Whangaroa Harbour. Even as increased, the oyster farm would not be larger then the average size of

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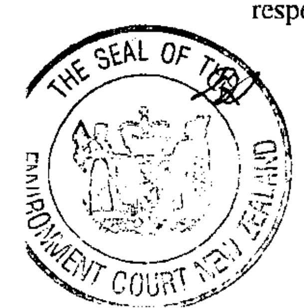
oyster farms in that harbour. We are not persuaded that the enlarged oyster farm would have any significant adverse effect on the nutrients available in the bay for native oysters and other marine fauna, and we do not accept the appellant's assertion in that respect.

Next we consider the appellant's claims that the proposed extension of the oyster farm would have adverse effects of increased noise and visual intrusion. We accept that the additional structures in the extension would increase the extent of the artificial structures in the bay that would be visible at least at the lower parts of the tidal cycle. We also accept that adding to the area of the oyster farm would extend the period in which the sound of small motors for servicing the oyster farm would be able to be heard. However Touwai Bay is not a wilderness reserve. It is a rural area where sights and sounds of rural production can be expected. Some might consider the pine trees that have been planted on parts of the Matangirau Block to be more of a visual intrusion than the oyster farm structures. The noise of plant used in clearing gorse on that land, and in trimming and harvesting the pine trees there, would be at least as intrusive as that from servicing the oyster farm. In our judgment it would be disproportionate to treat the sight and sound of the extended oyster farming operation as adverse environmental effects which ought to influence the outcome of the present application.

It is also true that extending the oyster farm would increase the area of Touwai Bay which could not be used by the public for recreational and other uses. The extended farm would still occupy less than one-sixth of the area of the bay (excluding mangroves and saltmarsh) available for boating and other recreation. Mrs Collier gave evidence of kayak races having been held in the bay in two recent summers. The extension of the oyster farm would still leave ample room for those and similar activities. The layout of the oyster farm structures has been designed so as to allow lanes between them for boats to use. The Director of the Maritime Safety Authority reported to the respondent in terms of section 395 of the Act that he was satisfied that the proposed marine farm will not unduly interfere with or restrict any public right of navigation. We are not persuaded that there is a serious basis for concern about exclusion of the public from use of the bay.

In summary, we consider that the appellant's claims about adverse environmental effects of the proposal were overstated, and do not warrant a finding against the proposal in any of the respects cited.



Maori customary use

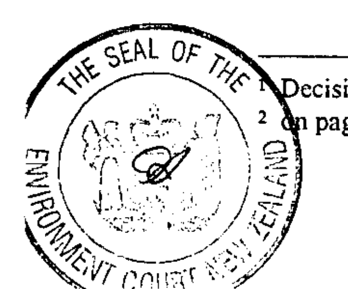
The other main issue raised by the appellant was its claim that the proposal would interfere with customary use by the tangata whenua of the coastal marine area, and with cultural and spiritual significance of the site and area. In particular the appellant's counsel, Mr Winter, presented three main contentions : that the proposed extension site is in a traditional food gathering area; that waahi tapu would be directly infringed by the extension; and that the proposal would affect the role of the Trust as gazetted caregiver of the area and the customary role of the kaitiaki for protection and sustainable management of resources.

In introducing the evidence to support those contentions, Mr Winter submitted that the Court may not have to reconcile opposing views about sacredness or cultural importance, that it is sufficient if the appellant has reasonable grounds for its beliefs. Counsel argued that provided the belief or perception of reality is genuine, then the Court should respect it and weigh the evidence accordingly. He relied on a passage in the Planning Tribunal decision in *Greensill v Waikato Regional Council and Witchell* [1] where the Tribunal said [2] :

> It appears that various members of the tangata whenua are entrusted with details of waahi tapu but that information is not generally shared with iwi or hapu. Thus a kaumatua may be aware of areas of importance within the concept of waahi tapu and may pass that information on to a person or persons whom he selects but the reasons for, and the importance of, any particular waahi tapu may not be generally known. The tangata whenua as between themselves accept without question the concept of waahi tapu and further accept without question the word of a person who has particular knowledge of a particular site or area. Thus if a kaumatua simply says that a place is waahi tapu then that is an end of the matter.

That approach was not accepted by the applicants. In her submission in reply their counsel, Miss Henderson, contended that to say that belief alone is the hallmark of waahi tapu is nonsense, and degrading to the sophistication and historical accuracy of Maori knowledge and traditions. Counsel submitted that the appellant's interpretation of the *Greensill* case is mistaken, and the decision does not mean that a kaumatua's knowledge and expertise cannot be challenged.

Our own understanding of the law is that it is sometimes necessary for a consent authority to make findings about the existence and nature of waahi tapu, and of cultural and spiritual attitudes to water and other taonga, as part of the process of deciding a resource consent



[1] Decision W17/95 given on 6 March 1995.
[2] On page 12.

application; and in those cases the question has to be decided in the same way as the consent authority decides any other question of fact, on evidence of probative value. On such matters the evidence of kaumatua is frequently helpful, especially where there is no conflict. However where claims are challenged, the question is not to be resolved simply by accepting an assertion of belief or tradition by a kaumatua or by anyone else. The consent authority, and this Court on appeal, has then to hear the witnesses that the parties call, whether kaumatua, kuia, or others who have testimony to give which may assist in deciding the question. The consent authority or the Court has then to make a finding on the balance of probabilities. The Court has the advantage that in its proceedings witnesses are crossexamined.

The Planning Tribunal decision in *Greensill*'s case does not indicate a different approach. The statement in the passage quoted "if a kaumatua simply says that a place is waahi tapu then that is an end of the matter" is not a description of the Planning Tribunal's method, but a description of what it understood to be the practice among members of the hapu of the appellant in that case.

In accordance with our understanding of our duty in such a matter, we now summarise the evidence which was given at the appeal hearing on this question, and then proceed to make our findings. The evidence for the appellant on this question was given by its secretary, Mrs Collier. The evidence for the applicants on the topic was given by Messrs H Tua, H Poata, and C Tua, and Mrs F Tua. For clarity, we deal separately with the three contentions, that the extension site is a traditional food gathering area; that waahi tapu would be directly infringed by the extension; and that the proposal would affect the roles of the appellant as gazetted, and of the kaitiaki.

Food gathering area

Although Mrs Collier gave extensive evidence about traditional food gathering from Touwai Bay in general, she gave no evidence about the particular area of 2.3 hectares which is the subject of these proceedings. The witness described the customary gathering of seafood, and the wish of the elderly of her whanau to see those customs restored in their life times. She also deposed that when, in 1980, the top part of the Nicholsons' farm was extensively used, it prevented access to flounder beds. However Mrs Collier's testimony did not demonstrate that the proposed extension would prevent access to flounder beds or that it would occupy any customary shellfish bed.

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It was the applicants' case that the extension site is not used for gathering food, and that the proposed extension of the oyster farm poses no threat to traditional food gathering in Touwai Bay. Mr Nicholson deposed that while kaimoana might have been gathered from Touwai Bay in the past, it has certainly not been during the 25 years when he has been there on a virtually daily basis. In that time he had never seen anyone gather kaimoana in the bay or its surrounds, other than occasional thefts of his oysters. The witness held to that evidence in cross-examination. He considered that the shellfish in the area do not grow big enough to be worthwhile harvesting.

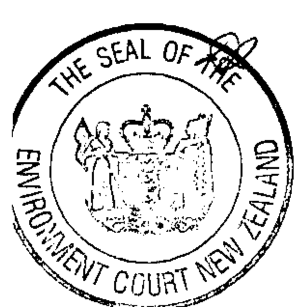
Mr H Tua testified that there are mataitai in the bay, that they are not interfered with by the Nicholson's farm, and that there is no reason to stop the farm because there are mataitai in the bay. Mr Poata also testified that that there are mataitai around Touwai Bay, and that they are well away from the Nicholsons' oyster farm, and it does not interfere with them at all.

That being the evidence before the Court on this topic, we have no basis for finding that the site of the proposed extension of the Nicholsons' oyster farm is a traditional food-gathering area; and we reject the appellant's assertion to that effect.

Waahi tapu

Mrs Collier asserted in evidence that the proposed extension infringes directly upon the Waahi Tapu Wharau. She added that other waahi tapu are extensive in the area, but it turned out that by "the area" she was not referring to the particularly 2.3-hectare site the subject of the resource consent application, but to the Matangirau and Touwai area generally, and particularly on land. Evidence about those waahi tapu is not probative of the claim that waahi tapu would be directly infringed by the extension.

Concerning the Waahi Tapu Wharau, Mrs Collier explained that it allowed for safe haven and had been accorded to Hongi Hika due to his prowess in defending these areas. She deposed that this had been related to her father by his tupuna, and he had imparted it to her.



In cross-examination Mrs Collier explained that when Hongi Hika had come to Touwai Bay, which was some 170 years ago, canoes of his warriors had been moored in Touwai Bay generally.

It was Mr Nicholson's evidence that he had never been told of the landing place until the Trust Board made its submission on the present application. He deposed that access to the claimed site of Hongi's landing would be totally unrestricted by the proposed extension, and to his knowledge there had never been any problems about access past the existing oyster farm.

Mr H Tua testified that he is kaumatua of the paramaount marae of the area, that he is ahi kaa, and has mana whenua. He deposed that there is no waahi tapu anywhere on the foreshore, and he contradicted Mrs Collier's claim about a canoe landing. He asserted that Hongi Hika was never in the bay, and that he had that from his grandfather. Mr Tua held to that evidence in cross-examination and explained that Hongi had not been welcome in this bay, and had landed on the far side of the harbour.

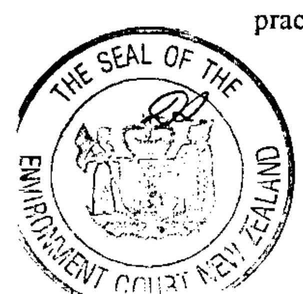
Mr Poata also testified that there is no waahi tapu anywhere in the bay, and no tauranga waka as Mrs Collier claimed; that Hongi Hika was his tupuna, that he had not come to the area of Nicholsons' oyster farm, but ended up on the Totara side of the harbour.

Mrs F Tua testified that she respected Mr H Tua and Mr Poata as kaumatua and leaders, and she denied that the oyster farm extension site is waahi tapu. Mrs Collier stated that she would have to accept the statements of Mr H Tua and Mr Poata that they are kaumatua.

We conclude that the appellant's own evidence does not support its claim that waahi tapu would be directly infringed by the proposed oyster farm extension; and the evidence for the applicants clearly and authoritatively negates that claim. We reject it accordingly.

Roles of Trust Board and kaitiaki

Mrs Collier deposed that the Regional Council's consent had ignored the rights of the trustees under section 338 of Te Ture Whenua Act 1993; that the appellant trust has been "...gazetted as a reservation for the protection/preservation..." of customary food gathering areas and practices, particularly in respect of native rock oysters (tio).



The witness referred to a gazette notice issued in 1994 [3] by which part of the land known as Matangirau was set apart as a Maori reservation; and to an order of the Maori Land Court [4] pursuant to section 338 of Te Ture Whenua Act 1993 vesting that land in trustees and setting out the terms of the trust. However neither of those instruments applies to the part of the harbour bed the subject of the resource consent application before this Court.

Mrs Collier also referred to the Fisheries (Maori Oyster Reserves) Notice 1983 [5] by which certain areas were set aside as Maori oyster reserves. That instrument applies to Jones Peninsula in the Whangaroa Harbour. That peninsula is on Wairaupo (or Milford) Island, which lies across the mouth of Touwai Bay; and the notice does not apply to the part of the harbour bed the subject of the present application.

Mrs Collier also claimed to be kaitiaki by virtue of being Ngati Kawau. She asserted in her evidence that kaitaiki are greatly disadvantaged by the resource consent, their rights had been ignored and eroded, and that to protect mahinga, mataitai, tauranga waka, waahi tapu and other taonga, the application should be declined.

Mr H Tua contradicted Mrs Collier's claim to be kaitiaki of Touwai Bay; and Mr Poata claimed to be kaitiaki of Touwai Bay himself, and to have the same mana whenua as Mrs Collier.

However, the evidence does not establish that granting resource consent for the oyster farm extension would interfere with kaitiakitanga. Therefore it is not necessary for us to make a finding on the contested claim by Mrs Collier that she is herself kaitaiki of Touwai Bay. Nor does the evidence establish the appellant's claim that the proposal would affect the role of the appellant under the statutory instruments referred to, or in terms of the Maori Land Court's order. We therefore reject those claims as well.

[3] *NZ Gazette*, 10 February 1994, No 11, p 726.
[4] Order made on 14 July 1994 at Kaikohe by Judge A D Spencer.
[5] SR 1983/302.

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Other issues

Although not raised in the notice of appeal or counsel's submissions, Mrs Collier raised other issues in her evidence. Some of them are not relevant to the Court's functions in these proceedings. Examples are questions about the Nicholsons' right to use the land where their processing shed stands; suggestions of a general Maori attitude against oyster farming; the claim that after 25 years the area of harbour should come back for customary use; the intentions of the appellant and of other local Maori interests when they sought to purchase the Nicholsons' oyster farm; the motives of Maori of the area who do not support the appeal against the resource consent; and other intra-tribal issues. We make no finding on any of those questions. Similarly we reject the suggestion that our decision should be influenced by concern that disallowing the appeal would set a precedent for renewal of the resource consent for the oyster farm when the present terms expire. Our duty is to consider and decide on the present application for consent for an extension to the present oyster farm, on the evidence before the Court and in terms of the purpose and provisions of the Resource Management Act.

However two other questions deserve brief mention : Mrs Collier's attitude that the application would be more acceptable culturally if the applicants were cultivating native rock oysters rather than Pacific oysters; and her objection to the applicants practice of cleaning oysters and spat sticks by seawater pumped from the bay and returned to it.

Pacific oysters not native oysters

Mrs Collier expressed the opinion that the Pacific oyster should never have been introduced into the catchment area of the tio. She referred to effects on mahinga mataitai, resulting in a loss of a valuable food supplement, especially for marae use. She explained to the Court that her whanau had never objected to farming tio, that their objection was to farming an introduced species of oyster; and that if the Nicholsons were still farming tio, there would not be as strong an objection.

Mr Nicholson gave evidence that when he first set up the oyster farm he was cultivating local native oysters, but that about 1977 Pacific oysters migrated to Kaipara Harbour and the other northern harbours and they cultivated them because they take less time to mature. Mr H Tua deposed that the oyster farm operated by the Whangaroa runanga at the mouth of the Kaeo Creek cultivates the same sort of oysters as the Nicholsons.

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We accept that trustees and beneficiaries of the appellant trust are entitled to prefer cultivation of the native rock oyster over the introduced Pacific oyster. However the applicants have a market for the species which they have chosen to cultivate. We find no reason why resource consent for the extension should be declined on account of cultivation of Pacific oysters rather than native rock oysters.

Taking and Discharging seawater for cleaning oysters

Mr Nicholson described in evidence the process by which oysters and spat sticks are cleaned on the barge used to service the oyster farm. Water is taken from the harbour by a pump driven by a petrol engine, and is sprayed on to the oysters and spat sticks to spray sediment off them. The sediment floats away on the tide. Mr Nicholson explained that they have been doing this outside the boundaries of the oyster farm area to avoid petty theft of tools which used to occur when the barge was left in the inner bay in the oyster farm area. He understood that separate permission was not required for the process as they were only returning to the harbour waters what came out of them.

The implication of the appellant's reference to this practice was that it is not authorised by the resource consent and requires separate consent. However that implication was not the subject of submissions by counsel, nor was it attitude of the respondent, which is the relevant authority. As the matter was not fully argued, and as it is not necessary to do so in order to decide this application, we refrain from determining the point. If any of the parties wishes to pursue it, they may make an application for a declaration. It is sufficient for us to express the tentative view that the activity is ancillary to the normal operation of an oyster farm; that the sediments discharged are not contaminants within the defined meaning of that term; and that the process does not appear to contravene section 14 unless it contravenes a regional rule which was not brought to our attention.

Planning instruments

Section 104(1) of the Resource Management Act directs that subject to Part II, when considering a resource consent application a consent authority is to have regard (among other things) to various classes of planning instruments. In this case the relevant instruments are the New Zealand Coastal Policy Statement, the proposed Northland regional policy statement, the proposed Northland regional coastal plan, the transitional regional coastal plan, the Whangaroa

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County section of the Far North transitional district plan, the proposed Far North district plan, and the Northland regional planning scheme.

We have considered the detailed evidence of Mrs Harris and Mr Briggs about the application of provisions of those instruments to the present application. Those provisions are more or less general in their terms. None of them is decisive of the application or of any issue which would itself be decisive. None of them requires that a consent authority have regard to any issue or question that does not fall for consideration in terms of effects on the environment or the provisions of Part II of the Act. To address each of them in detail would add to the length of this document without adding to the reader's understanding of the reasons which influence our decision of the appeal. It is sufficient for us to record our conclusion, based on the findings we have made in respect of effects on the environment and on Maori cultural and spiritual interests, that the proposal is consistent with the objectives, policies and other provisions of those instruments.

Part II

The discretionary judgment to grant or refuse resource consent should be informed by the purpose of the Resource Management Act, set out in section 5. Referring to the meaning given in section 5(2) to the term *sustainable management*, and on the basis of the findings we have made in this decision, it is our judgment that granting consent for the proposed extension to the Nicholsons' oyster farm would enable management of the natural and physical resources of the site in a way and at a rate which enables them to provide for their economic wellbeing without compromising the social, economic, or cultural wellbeing or the health or safety of others; and while achieving the aims set out in paragraphs (a), (b) and (c) of section 5(2). Accordingly we judge that resource consent for the proposed extension to the oyster farm should be granted, on the conditions attached to it by the respondent.

Determination

Therefore the appeal is disallowed, and the respondent's decision in confirmed. The question of costs is reserved. If the applicants or the respondent seek an order for payment of costs, that may be done by memorandum lodged with the Registrar and served on the appellant within 10

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working days after the date of this decision. Any submissions in response may be lodged and served within 10 working days after receipt of such a memorandum.

DATED at Auckland this 18th day of December 1996.

DFG Sheppard,
Environment Judge

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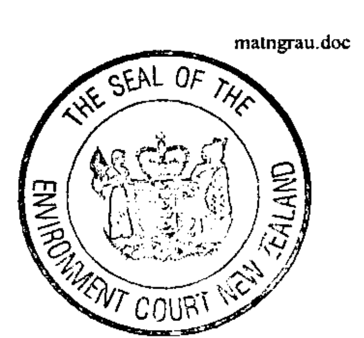
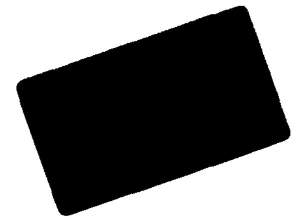


IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY



AP191/02

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under s299 of the Resource Management Act 1991 from a decision of the Environment Court
BETWEEN	TAKAMORE TRUSTEES
	Appellant
AND	KAPITI COAST DISTRICT COUNCIL
	Respondent

AP192/02

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under s299 of the Resource Management Act 1991 from a decision of the Environment Court
BETWEEN	WAIKANAE CHRISTIAN HOLIDAY PARK
	Appellant
AND	KAPITI COAST DISTRICT COUNCIL
	First Respondent
AND	TRANSIT NEW ZEALAND
	Second Respondent

Hearing: 17 and 18 March 2003

Counsel: L H Watson for Appellant (AP191/02)
DJS Laing and JGA Winchester for Respondent (AP191/02)
A Hazelton for Historic Places Trust (AP191/02)
M McClelland and B E Ross for Appellant (AP192/02)
DJS Laing and JGA Winchester for First Respondent (AP192/02)
J J Hassan and C J Sinnott for Second Respondent (AP192/02)

Judgment: 4 April 2003

RESERVED JUDGMENT OF RONALD YOUNG J

Solicitors:
Duncan Cotterill, Wellington, for Appellant (AP191/02)
Simpson Grierson, Wellington, for Respondent (AP191/02)
A Hazelton for Historic Places Trust (AP191/02)
M McClelland and B E Ross for Appellant (AP192/02)
DJS Laing and JGA Winchester for First Respondent (AP192/02)
J J Hassan and C J Sinnott for Second Respondent (AP192/02)

Background

[1] The Kapiti Coast District Council ("KCDC") and the National Roads Board ("NRB") want to provide a link road from Poplar Avenue near Raumati in the south to Peka Peka Road in the north. This link road will enable Kapiti Coast residents to travel much of the north/south line of the coast without using State Highway 1 ("SH1"). This, it is agreed, will benefit Kapiti Coast residents and SH1 users.

[2] The KCDC and the NRB lodged a notice of requirement ("NOR") for a designation for the link road. The application was granted by Hearing Commissioners. Their decision was appealed to the Environment Court. They confirmed the NOR. This is an appeal from that decision. The two Appellants are affected by the proposed road in different ways. Their appeals have been heard together.

[3] The need for such a road seems to have been recognised from the 1950s. By 1956 a road had been anticipated and statutory protections in various forms have existed over a 15km north/south corridor of land since. Originally, the land was intended for a State Highway, but needs have changed and a local link road is now seen as more appropriate. Thus the 15 kilometre corridor of land exists primarily free of manmade obstructions within which it is now desired to build the link road.

[4] The favoured road runs through the eastern side of the Christian Holiday Park ("CHP") dividing the camp. CHP do not want the road through their property because they say it will make the effective use of the property difficult and the noise and air pollution will destroy its character as a peaceful and tranquil site. The Takamore Trustees who represent local iwi do not want the road built through an area identified as waahi tapu ("sacred site"). They say this area contains taonga (treasures) and includes koiwi (human bones).

[5] The Hearing Commissioners appointed by the KCDC to hear the application involving the link road approved the NOR in terms of the Resource Management Act

("the Act") as broadly sought by the KCDC and the NRB. The Environment Court confirmed the NOR. It said in its judgment of 4 July 2002:

> "Therefore the corridor as shown in Plan 35A together with the carriageway alignment shown on that plan, is the proposal confirmed by this Court. Minor carriageway deviations necessitated by engineering requirements or deviations caused by discovery of taonga or koiwi are to be permitted. The appeals are dismissed accordingly except in relation to the conditions we now address. These are to be drafted, agreed by the parties if possible, and referred to the Court within 21 days."

[6] As to the CHP the court imposed additional conditions primarily involving mitigation of effect of the road on the land and its activities.

[7] I take from the Appellant's submissions a description of who the Takamore Trustees are and whom they represent:

> 1.1 The appellant in this appeal (AP191/02) is a group known as the Takamore Trustees, the guardians of the Takamore urupa reservation, and the Takamore waahi tapu. In 1969 the Takamore Trustees were formed in order to administer funds for the Takamore urupa and maintain the cemetery grounds for the land block known as Block A24C Ngarara West (partitioned on 8th October 1897). On 5 April 1973, the urupa was declared a Maori Reservation pursuant to section 439 Maori Affairs Act 1953, (NZ Gazette 29/694) and called the Takamore Urupa Reservation. The land is Maori Freehold Land. It is proposed that through the Takamore waahi tapu part of an arterial road is to be constructed."

[8] Apart from an urupa, the land said to be waahi tapu is not owned by Maori although the land owners are apparently sympathetic to Maori concerns. Waahi tapu areas in the roading corridor have been recognised by the local authority in their District Plan and by the New Zealand Historic Places Trust by registration under the New Zealand Historic Places Act. This area is one of only four such areas recognised and registered by the Historic Places Trust throughout New Zealand.

[9] The judgment of the Environment Court was a majority judgment and the minority Commissioner's view is contained in the judgment.

[10] Appellants have a right of appeal from the Environment Court to the High Court on a point of law only (*see* s299(1) Resource Management Act 1981). There are four potentially relevant categories in this case:

(a) Applying a wrong legal test.

(b) A conclusion reached without evidence or one to which on the evidence given the "court" could not reasonably have come, or

(c) the court took into account matters which it should not have taken into account, or

(d) the court failed to take into account matters which it should have taken into account

See *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

[11] Categories (b), (c) and (d) above, depending upon the particular case, can be close to the line between matters of fact and law. I keep these issues in mind and turn now to consider the individual appeals. I deal with the appeal by the Takamore Trustees first. Some of the appeal points they have raised are also raised by the CHP. Where they are in common I consider them together.

Ground 1

[12] Both Appellants say the Court applied the wrong legal test when it found this project was of national importance. The Court said:

> "The traffic evidence we received was extensive but we will deal with this in more detail when we consider the adequacy of Council consideration. It is accepted that the State Highway system is of national importance although not specifically mentioned in the RMA under that heading. That matter was considered in terms of s.5 in the case of Marlborough District Council v NZ Rail (1995) NZRMA 357. The Court was there considering the Interisland ferry link which is the sea link for New Zealand-wide road and rail services. It was held that in a particular circumstance it is possible to hold that a particular

activity assumes such importance in the context of sustainable management of New Zealand as a whole that it can of itself assume national importance and be considered accordingly. The State Highway system as it travels south towards Wellington is therefore, in the opinion of the Court, a matter of national importance in terms of s.5 of the Act and indeed we detected no challenge to that concept in the course of the hearing. It follows therefore that any activity designed to increase the efficiency and safety of the State Highway system must of itself assume particular importance, the extent of that importance being a matter of degree. The whole matter continues to be covered by s.5. The finding of the Court is that the development of the State Highway together with the link road form an integrated traffic management system and is of national importance."

[13] The Appellant says that in identifying the link road as a matter of national importance, the significance of the particular resource (the link road) was elevated improperly to the same status as those specific matters of national importance identified in the Resource Management Act at s6(a) to (e).

[14] The Appellant says that there is nothing to justify extending the national importance category beyond those matters referred to in s6. Thus the Appellant says by elevating the importance of the road inappropriately "the Courts balancing exercise was fatally flawed". The Appellant says as a result, s6 and in particular the s6(e) matters (the relationship of Maori to their culture and traditions to their land waahi tapu and other taonga) were effectively downgraded. This submission requires a consideration of Part II of the RMA, ss5 and 6 in particular, and to a lesser extent ss7 and 8.

[15] Part II of the RMA is headed "Purpose and Principles". The purpose of the Act is expressed in s5(1). Subsection (2) defines sustainable management. The section reads:

"**5 Purpose**

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

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

economic, and cultural wellbeing and for their health and safety while—

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

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

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

[16] Environment, mineral, national and physical resources persons and water use are all defined in s2 of the Act. Of particular interest in these matters is the definition of environment as follows:

"**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".

[17] Self-evidently, the other sections (ss 6, 7, 8) in Part II are subordinate to this single purpose of the promotion of sustainable management. They are however of significance. They provide;

"**6 Matters of national importance**

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

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

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

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

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

7 **Other matters**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) Kaitiakitanga:

(aa) The ethic of stewardship:

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values:

(d) Intrinsic values of ecosystems:

(e) Recognition and protection of the heritage values of sites, buildings, places, or areas:

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon.

8 **Treaty of Waitangi**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

[18] Thus in achieving sustainable management, those who exercise functions under the Act are required to "recognise and provide" for the five listed matters of national importance when considering s6. Section 7 is in a similar vein. In achieving sustainable management persons exercising functions under the Act are to have "particular regard to" the nine matters there listed. And finally in s8 using identical language to s6 and s7 but providing the decision-maker "shall take into account the principles of the Treaty of Waitangi".

[19] The process for approving (or otherwise) such a public work begins with the appropriate body that has financial responsibility for the work giving notice to the relevant local authority of its desire to undertake the work; a notice of requirement (NOR see s168 RMA). In this case, the body giving and receiving the NOR was the same – the KCDC. Section 168A anticipates and provides for this situation. Because the territorial authority was the same as the requiring authority Commissioners heard and made recommendations on the requirement.

[20] There are public notice requirements including the right to make submissions at hearing regarding the proposed NOR (see ss168, 169). And s171(1) states:

> **"171 Recommendation by territorial authority**
>
> (1) Subject to Part II, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to—
> ...."

[21] Four matters are listed. After considering the request for the designation, the territorial authority can confirm the requirement, modify imposing conditions or withdraw the notice of requirement. Section 171 matters are explicitly made subject to Part II matters. Thus the s168 and s171 matters and the submissions in relation to the NOR must all be considered by the territorial authority against the purpose of the Act and also against those matters listed in s6, 7 and 8 of the Act.

[22] To return to the particular ground of appeal. The Court made it clear in its judgment (paragraph 130) that it was considering the issue of national importance

not as a judicial "add-on" to s6 but in relation to s5. Section 5 defines sustainable management in such a way that the extent of the project being considered under the RMA will have a bearing on how a decision under the Act affects sustainable management. This in turn will affect some of the balances to be struck within the statute. A large roading project designed, for example, to save lives and improve the economic viability of a community is likely to be a powerful factor within s5. (I accept, of course, such projects cannot be viewed in isolation in this way). In other words, the size and the potential benefits of a project cannot be ignored in s5. All the court has done in using the phrase "national importance" is to indicate the relative importance of the project for the purpose of s5.

[23] I can, however, appreciate the confusion that the use of the term "national importance" has caused when considering Part II matters. National importance has been given a statutory context in s6. Outside of the identification of certain matters of national importance, there is no further definition of that term in the Act. Therefore, there is an obvious danger in any context outside of s6(a)-(e) in identifying a project as one of national importance. And how is identifying something of national importance to be done? Is it a case of knowing it when you see it, or are there some economic or other criteria relevant in deciding whether something is of "national importance"? Obviously, not all roading projects will have "national" effect. How broad is the effect to be before the project is seen as one of national importance? Is National Road Board funding to be the criteria? These questions illustrate the problem. Rather than a national importance "characterisation" it may be preferable for an identification of the size of the project and the effect it will have on the lives of people and the environment in every sense. This will give the project perspective and thus enable its proper consideration in terms of s5. And it will avoid an indeterminate artificial and potentially confusing criteria of "national importance".

[24] I can see no error of law, though, in the way in which the Court approached this question. The Court's focus was on the significance of the project in the context of s5. This was in my view perfectly proper. There was no suggestion that the Court was attempting to add to the statutory matters identified as of national importance in terms of s6. And therefore, I reject the Appellant's claim that there was an

inappropriate reduction of the importance of s6(e) matters. This ground of appeal therefore fails.

Ground 2

[25] There are two parts to this ground of appeal and they are supported by both Appellants.

[26] The first part is an allegation that the Court, when considering the corridor of land improperly took into account that the corridor had been protected from development since 1956. This was raised by the Takamore Trustees and is similar to although not identical with CHP grounds of appeal. Their ground of appeal was that the Environment Court took into account an irrelevant consideration "namely the expectations of the community arising from the length of time the designation had been in place".

[27] The Respondents make the point that the original points on appeal used words such as "undue weight" and that these words have been changed to "irrelevant consideration" or a "failure to take into account relevant consideration" in the submissions. It is well established that what weight a particular matter is given cannot be a point of law on an appeal such as this. However, taking into account irrelevant considerations and failing to take account of relevant considerations maybe. I accept that the Respondents are correct in identifying the change in phraseology. I do not consider the Respondents have suffered any prejudice. They made full submissions on the changed characterisation of these grounds of appeal. Accordingly I consider the appeal should proceed on the basis of the submissions of the Appellants.

[28] Some background is required. The original designation "of the corridor of land" was gazetted in 1956. It was for motorway purposes. Part of the designation included a midline proclamation. The position of this line has changed somewhat over the years. Although this proclamation was lifted from the title of CHP land a designation was placed on the land in turn under the District Plan. The NOR for the link road was issued by the territorial authority because the road proposed was no

longer a motorway but a local road. However, Transit New Zealand will be contributing to its funding reflecting no doubt the advantages to SH1. The Court said:

> "...the NOR has been in place in one form or another since 1956 and at stages its potential route has been much closer to the buildings on the park than at present. We do not accept that property owners can, in the face of such a warning, go about their business as if there was no future possibility that a major road may eventuate and, having committed considerable money and time to the creation of a facility, then use the presence of that facility as a reason for removing the NOR from its historic alignment. Put another way, the trustees are now facing the physical reality of a public work which has been signalled clearly since 1956, some years before the land was acquired for the purpose of the park."

[29] And at paragraph 134 it said:

> "The appellants tended to set this to one side and point for instance to the Christian Holiday Park as being of more importance than the disruption of say 25 households. This is a balancing exercise but a reading of s.5 of the Act indicates to us that those who have placed reliance on longstanding planning provisions should not lightly have their interests brushed aside merely on a numerical count. People and communities in this area have relied upon the provisions of this Act as reflected in the District Plan roading provisions and have provided for their social, economic and cultural wellbeing and for their health and safety. Others who have continued to develop their properties without regard to the NOR corridor now seek amenity detraction shifted from their properties to the properties of those others. For our part we do not see that the Christian Holiday Park and/or the Takamore Trustees can claim any form of priority in terms of Part II of the Act in relation to amenity detraction except to the extent that their interests are acknowledged as important within the meaning of the various provisions of Part II."

[30] The Appellant says s171 sets out an exhaustive list of factors to be considered and submits that community expectations are not among them. It also submits that community expectations do not come within Part II matters. In any event it submitted that the change from motorway to local arterial route was such a significant change that community expectations would not have been consistent over time in any event.

[31] In reviewing a significant number of comments made by the Court about community expectations, I am satisfied that they said little more than the CHP could not go about their business as if there was no possibility of a road being built over their property. The Court was right to, and did take into account, here was a roading corridor protected for over 45 years by various planning mechanisms. And it was right to take into account in the balance that CHP did have notice of the potential development of a road over its property before it undertook its extensive building. While I accept the Court did come back a number of times to its proposition concerning notice I cannot see it unduly dominated its decision.

[32] The Court was right to observe that the essence of CHP submission was its facilities and atmosphere would suffer should the NOR be confirmed. And it was right to observe the atmosphere and the facilities had been developed knowing a corridor identified as being required in the future for roading went through the camp. And it reached the obvious conclusion that CHP could hardly claim priority in Part II for amenity detraction.

[33] Having reached the conclusion, therefore, that the existence of the roading corridor pre-dated CHP's development was a relevant consideration, the remainder of the Appellants' argument is effectively one of weight. Weight alone cannot found a successful appeal here. Stripped of its formality, the proposition that a property owner who develops a property knowing the possibility a road may be built through that property, may have less cause to complain than someone whose property has never been in danger seems unobjectionable.

[34] The second part of the Takamore Trustees appeal in ground 2 was the claim that the Court could have confirmed the majority of the intended NOR route but could have modified or withdrawn that part between the Waikanae River and Te Moana Road being the part objected to by the Trustees. In particular this was the area the Trustee claimed a confirmation of the NOR would have the greatest effect on their ancestral lands. The Appellant says that it skews the s5 assessment when the comparison is between the need to build the whole of the link road against the environmental effects of the small section of road objected to by Maori.

[35] The first and most obvious point in relation to this ground is that it goes to weight and is therefore not a point of law. In this case the majority concluded that there were no grounds to set aside the designation over the total route. In those circumstances there could hardly be a need to consider the NOR section by section. And if a section of the NOR was not to be confirmed (if there was power to do so) the immediate consequence was whether the link road was any longer a link road at all performing the functions intended. No doubt the prospect of bringing volumes of traffic through an area at 70 kilometres an hour (the link road limit) to be suddenly faced with traffic passing through "ordinary" city streets at 50 kilometres an hour to get to the next link road section is a potentially daunting prospect for traffic management and local citizens. And clearly the decision of the environment court did consider a number of alternate routes in this area.

[36] The Environment Court's power to approve the NOR in such a limited way is also in doubt. Section 174(4) Resource Management Act states:

> "**174 Appeals**
>
> ...
>
> (4) In determining an appeal, the [Environment Court] shall have regard to the matters set out in section 171 and may—
>
> (a) Confirm or cancel a requirement; or
>
> (b) Modify a requirement in such manner, or impose such conditions, as the [Court] thinks fit."

[37] On the face of it the Court had no power to cancel part of the requirement. For good reasons it will be all or nothing. Nor could it be suggested that a cancellation of part of the NOR was simply a modification of the overall scheme. The cancellation of a significant piece of the NOR is well beyond modifying a proposal. The words used in s174(4) are "cancel" not "cancel in whole or in part". I do not consider the Court had power to cancel part of the requirement in the way proposed.

[38] Finally, a redirection of the Waikanae/Te Moana Road route could not be undertaken by the Court. If it was not satisfied that part of the route met the RMA requirements, then its task was to refuse to confirm the NOR. The Court had no power to substitute its own alternative route. The Court said at paragraph 152 of its judgment:

> "We cannot direct choice of another alternative therefore, in the absence of exercise of a power of adjournment, we would be left without powers under ss.172 and 174 to do anything but cancel or confirm the requirement. Also this subsection is directed at alternatives – not the route covered by the requirement."

[39] I agree. I reject this ground of appeal.

Ground 3

[40] This ground of appeal has been variously described. In the original notice of appeal the Takamore Trustees said:

> "1.1 The decision erred in finding that the section of the NOR between the Waikanae River and Te Moana Road did not offend against the provisions of Part II of the Resource Management Act 1991 ("the Act"), and in particular erred:
>
> ...
>
> 1.1.3 In misapplying subsection 6(e) of the Act by:
>
> (a) Erroneously requiring evidence of, and/or concluding there was no evidence of, the presence of human remains within the swamplands of the Takamore area, thereby purporting to recognise and provide for specific waahi tapu, rather than recognising and providing for the *relationship* of Maori and their culture and traditions to the Takamore area; and
>
> (b) Finding on the one hand that there are likely to be human remains in the sand-dunes of the Takamore area, but then focusing on the swampland of the Takamore area as being most affected by the NOR route, thereby placing little or not weight on the fact that the NOR route will cut through the north/north-eastern sand-dune:

(c) Placing little or no weight on the existence of a 'cultural and historical landscape' linking the waahi tapu area with the Maketu Tree, Tuku Rakau village, the Takamore urupa and Te Puna o Rongomai;"

[41] In the submissions of the Appellant filed and served on 3 March 2003 the ground is described as:

> "The third ground of appeal is derived from paragraph 1.1.3(a) of the Notice of Appeal. It is submitted that the majority made findings of fact which, on the evidence before it, the Court could not reasonably have made: *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153.
>
> The majority found that, on the balance of probabilities, the swamps in the Takamore waahi tapu do not contain burials [para. 88], and that the evidence of Takamore witnesses in relation to the location of human remains was "cryptic, assertive bereft of back-up history and tradition." [para 77]."

[42] And as the submissions from counsel developed the issue became a failure by the Court to give reasons for its conclusion that it was not satisfied on the balance of probabilities that there were koiwi buried in the swamps of the waahi tapu area at Takamore. Counsel for the Respondents objected to this characterisation of this ground of appeal. I will return to this aspect later.

[43] Again some background is necessary. The essence of the case for Takamore Trustees was that taonga and koiwi were buried across the proposed roading corridor in the swamp areas south of Te Moana Road (Takamore wetlands). It is an area of 360 x 150 metres, of the total of 15 kilometres of road corridor. And Takamore Trustees submitted that in balancing the Part II matters, the balance should come down in favour of rejecting the NOR. They said the prospect of disturbing these taonga and koiwi were of great importance to the iwi. In particular they referred to paragraph 6(e), 7(a) and 8 of Part II as well of s5 of the Act in support of this submission.

[44] The Environment Court therefore had to establish firstly what facts it accepted in relation to Takamore Trustees' claims. This was an important part of its factual findings given the essential nature of this evidence. The Takamore Trustees

were saying that the waahi tapu of the area was particular in the sense that it related to koiwi and taonga in the wetlands. This was in addition to the urupa area identified and independently protected. Also of importance was the fact that the Historic Places Trust had registered the land in question as waahi tapu under the Historic Places Act. This included a significant part of the area Takamore Trustees claimed themselves as containing koiwi and taonga. The Historic Places Trust waahi tapu registered area crossed the proposed road corridor.

[45] The majority of the Environment Court concluded:

> "We do not therefore accept on the balance of probability that the swamps contain koiwi."

[46] To return to the Respondent's objection to the grounds of appeal here.

[47] The grounds of appeal could be seen as alleging that the conclusion reached by the Court was not justified by the evidence. Apart from the question of whether this was a question of law, the difficulty the Appellant faced was that there had been no application pursuant to s303 to make available to this Court evidence heard before the Environment Court on this point. The Appellant therefore out of a sense of precaution asked the Court of its own motion to consider calling for this evidence to be lodged in the High Court and for this appeal to be adjourned part-heard accordingly. The Respondent submitted there was no power for the Court to make such an order because it was too late and in any event objected to the application even if there was jurisdiction to make such an order also because of lateness.

[48] Essentially, the Respondent submitted that the inference from s307 of the Act was that s303 applications had to be filed and heard before any appeal could be set down for hearing. I do not have to decide this question because of the way in which I propose to deal with the Appellant's submission. However, I doubt the Respondent's submission that the Court at this stage had no jurisdiction to direct the Environment Court to provide the relevant evidence. Section 307 provides:

> **"307 Date of hearing**
>
> When a party to an appeal notifies the Registrar of the High Court at Wellington—

(a) That the notice of appeal has been served on all parties to the proceedings; and

(b) Either—

(i) That no application has been lodged under section 303; or

(ii) That any application lodged under section 303 has been complied with—

the appeal is ready for hearing and the Registrar shall arrange a hearing date as soon as practicable."

[49] And s303(1) provides:

"**303 Orders of the High Court**

(1) The High Court may, on application to it or on its own motion, make an order directing the Environment Court to lodge with the Registrar of the High Court at Wellington any or all of the following things ..."

[50] Section 307 is essentially procedural and importantly deals only with applications under s303. In this case the Appellant was inviting the Court of its own motion to make a s303 order. This would therefore appear to be outside any implied restriction in s307. Assuming jurisdiction, however, I express no view on whether this was an appropriate occasion for the Court to call for the evidence of its own motion.

[51] The Appellants complaint about the Court's rejection of the koiwi evidence is that it was rejected without reason. The Respondents say this was not the essential point of the Appellant's case and the Appellant should not now be allowed to argue it. While the Appellant's submissions may not identify the issue as rejection of evidence without reason directly, its submissions and points of appeal do identify the following at least:

(a) That the finding of no burials in the swamp land was in conflict with the direct evidence of tangata whenua.

(b) No logical difference between the evidence of the presence of taonga and koiwi in the swamp can be drawn and yet the Court accepted one and rejected the other.

(c) The finding of fact that there were no burials in the wetlands was describe by the Appellant as "material error".

(d) The alleged inconsistency between a finding of burials in the sand dunes but a rejection of burials in the swamps.

[52] These and other points in combination, in my view, would have left the Respondents with the clear view that the Appellants claimed the Court had not given proper or any reasons to reject the evidence as to koiwi in the wetlands. I therefore propose to approach the Appellant's point on appeal here as if it alleged no reasons were given for the rejection of the evidence of the presence of koiwi in the wetlands. In those circumstances, therefore, there is no need for any order for evidence to be brought from the Environment Court.

[53] The Environment Court in its judgment considered the evidence of Mr Robert Ngaia, Chairperson of the Takamore Trustees, and Mr Porotene and Mr Te Taku Parai called by Takamore Trustees on this aspect. They were accepted as koumatua holding the collective oral tradition of the iwi. The Court acknowledged the urupa (burial ground) situated just to the east of the proposed road corridor was

> "...without question waahi tapu and in the opinion of this Court must also without question remain physically undisturbed by the carriageway or associated works of the NOR. ... In the present case neither we nor any of the parties are in any doubts that the Takamore area is part of Maori ancestral lands. ... We are further disadvantaged in a judicial approach to the general area by the fact that waahi tapu can be ephemeral, permanent, site specific, or all embracing. What may be waahi tapu to one person or iwi may not be so important to others."

[54] And at paragraph 64 the Court said:

> "The common thread which ran through all the evidence is that Maori, and in particular tangata whenua and manu whenua believe that the assertion of waahi tapu status by those with authority so to do is an

> end to the matter and must not be further questioned by those affected by the waahi tapu status so given to any particular area."

[55] The Court also considered the evidence of Mr Buddy Mikaere who apparently challenged the proposition that taonga or koiwi were contained in the wetland at all, or indeed in the Takamore area. It observed Mr Mikaere was not tangata whenua of the area and that his assertions raised the ire of tangata whenua by challenging their koumatua's evidence. The Court said it was probable if there were any koiwi in the swamp it is more likely they would be from the Muaupoko iwi who lived along the western coast of Horowhenua, Kapiti and Wellington and whose occupation of the land predated Te Ati Awa's. It recorded Mr Mikaere's criticism of the Historic Places Trust registration of the Takamore area as waahi tapu. The Court observed Mr Mikaere misconstrued the definition of waahi tapu in the Historic Places Act. It recognised that waahi tapu registration in the Historic Places Trust sense meant an area of land containing one or more waahi tapu. The Court observed as far as waahi tapu and koiwi were concerned:

> "In that regard koiwi are one of the higher categories of waahi tapu with other taonga normally, but not necessarily, of a lower category."

[56] The Court made no findings of credibility or credibility in relation to Mr Mikaere's evidence. Considering the Historic Places Trust registration of the site, the Environment Court acknowledged that considerable care would have been taken by the Trust to identify the site as waahi tapu given that there were only four such waahi tapu <u>area</u> sites so identified in New Zealand.

[57] The current proposed carriageway brings the road through a wetland to the west and north-west of the urupa. And it brings the road through an area south-west of the urupa through CHP wetlands. At paragraphs 77 and 78 the Court said:

> "We have evidential difficulty insofar as koiwi (human remains) are concerned within the swamp area, because none of the evidence we heard (with the exception of some hearsay evidence concerning the activities of a seer) directly related to swamp burial, even in the times of Muaupoko occupation in the general area. Such evidence as there was referred to burials within the registered waahi tapu area which covers dunes and swamps. There is some oral evidence of the burial of taonga in a wetland (in which one we are not certain but suspect the one by the urupa), namely waka and parts of buildings. The only

"evidence" we heard was cryptic and assertive bereft of any back-up history or tradition which would cause us to give some support to the concept of swamp burials in the area affected by the requirement. In particular during the time of Te Ati Awa occupation there appeared no reason why swamp burials would be preferred in that Te Ati Awa, being the dominant tribe, would have little reason to hide human remains from potential enemies but a burial could take place for preservation. Indeed it is significant to us that when Te Ati Awa migrated back to Taranaki, they disinterred human remains which appeared to be of importance to them and took them back to Taranaki. There was no record suggesting that they were disinterred from a swamp location. This conclusion accords with the evidence of Mr Mikaere.

Therefore, historically, it would probably be Muaupoko remains in the swamp and wetland areas, if any are there at all."

[58] At paragraph 79 of the judgment, the Court accepted that there was nothing to prevent swamp burials, although in its view they would not be the "norm". The Court then quoted from and commented on Mr Ngaia's evidence as follows:

> "We are frankly surprised that in a matter of such importance to the Maori community and to the community as a whole, the evidence is so sparse. The evidence of Mr Robert Herata Ngaia, Chairperson of the Takamore Trustees, was as follows:
>
> > '5.2 The old people who had passed the waahi (sic) tapu information to me had always said that the whole waahi tapu was an area of about 25 acres. I was shown the exact extent of the area. This was the place we submitted for registration. The area was known by us to contain many burials. We have been told by Rameka and the other old Kaumatua that the area was sacred and Koiwi were buried there. We also know of houses and a waka that are buried within the area. There are also other treasures.
> >
> > 5.3 The relationship that we the Takamore Trustees have with this Waahi Tapu land is what defines us as a hapu and as Kaitiaki. We cannot imagine how this place could have a road put through it. Caring for this land and those who lie in it, as well as passing on the information about this place is a sacred duty. It is a responsibility passed on to us and one we will in turn pass on. Everything about this place and our role as Kaitiaki goes to the heart of our values as Maori.' ".

[59] And in paragraph 81 the Court gave its conclusions:

> "It will be noted that that evidence is very general and refers to a 25 acre area within which some 360 metres of road corridor will pass. Other evidence leads us to believe that the houses and waka may be within what is referred to as the Takamore wetland immediately adjacent to the urupa and affected by the NOR, but we can find nothing in the evidence of that witness, even giving full weight to oral tradition, to suggest that there are burials within that wetland. The witness did not address local tradition except in the most general way."

[60] The Court then considered Mr Porotene's evidence at paragraph 82:

> "The next witness was Mr Porotene, who referred to one recent burial near Mackay's Crossing (which is some distance from the Takamore site) with remains subsequently reburied in accordance with Maori custom. He referred to the occupation of areas by Muaupoko. He is trustee of that tribal authority, the tribe being occupants of the area prior to Te Ati Awa. He told us that names and locations of specific waahi tapu were provided to the Hearing Commissioners for this road designation and that it had not been shared in that kind of public forum before. This is a hearing de novo and we assume the same evidence is before us. It takes the matter no further, other than in a very general way, concerning burials in land affected by the NOR corridor and the proposed carriageway."

[61] And then the evidence of Mr Parai:

> "The evidence of Te Taku Parai commences with the statement that many ancestors are buried at Takamore. We found his evidence (apart from that comment) extremely detailed and interesting covering key concepts of Maori knowledge and cultural practice but not geographically precise. However, the evidence is again very general in relation to the precise location of any potential burial grounds which may be potentially affected by the NOR. An example is clause 5.1 of his evidence where there is a cryptic comment "*in addition to our mate (deceased) the swamp itself contains tribal taonga (treasures)*". Indeed his evidence is equally consistent with the fact that should the carriageway be shifted from its present location on to other undeveloped land, it may in that event again strike burial grounds of cultural importance to Maori people.
>
> He referred to the inappropriate nature of a fenced urupa as limiting areas in which bodies are buried. He refers to the land of Takamore itself being a taonga and that taonga would lie buried with the dead.

In relation to the specific area with which we are concerned – namely where the carriageway traverses swampland and other areas near the urupa – he states:

> "5.7 Takamore has been and still is known amongst our people as a treasure trove of taonga. Its outlying area and swamplands have long been the resting home for our ancestors. Along with them are whare taonga (treasured houses). Oral tradition of our elders of Te Ati Awa talk about the abundance of taonga that lie at the bottom of the swamp at Takamore. The most well known are the remains of old wharenui (meeting houses) and the remnants of waka (canoes). In addition there is little doubt that many other prize pieces that were buried in the lake for reasons of preservation and safety away from marauding tribes. Quite aside from the presence of the sand-dunes and swamps of Takamore, the area is of immense importance to us culturally. As present day Kaitiaki by virtue of our whakapapa to that area, it is our responsibility to protect, maintain and uphold the integrity of these taonga for there are physical affidavit of what we have endured and a testimony of mana for our people."

A note by the Presiding Judge beside this paragraph of evidence reads:

> "Original meeting house in that area by waterside. S H 1 Marae the new position. The old would have been preserved in swamp."

Again, we are bereft of evidence rather than assertion that koiwi are in fact in this swamp. We have no evidence as to why koiwi were interred in the swamp rather than on dry land, nor any evidence as to who they may be, other than a strong presumption that they would be Muaupoko. The view of the majority of the Court is that in a matter of this importance, we are surprised at the paucity of evidence given to us. In relation to such evidence as we have, we have considerable doubt as to the presence of koiwi in the relevant swamp areas, but on a balance of probabilities, accept that there may be taonga in the form of buildings and/or waka. These as we have observed, should be protected and if necessary removed with appropriate ceremony to another site chosen by the tangata whenua."

[62] An analysis of the Environment Court's decision, therefore, to reject the evidence seems to be based on the following:

(a) the evidence was cryptic and assertive

(b) the evidence was "sparse"

(c) the evidence had no backup history (to support it)

(d) the evidence had no tradition (to support it)

(e) the evidence was not geographically precise

(f) there was no evidence why there were burials in swamps (rather than dry land)

(g) swamp burials would not be the "norm"

(h) there was no evidence the disinterment of human remains from Te Ati Awa were from swamps.

[63] And in addition to these propositions the Court also concluded that there was no evidence "to suggest that there are burials within that wetland". "That wetland" seems to refer to the Takamore wetland immediately adjacent to the urupa.

[64] I have quoted these sections at length to ensure that all possible passages and references to the evidence relating to koiwi in the wetlands of Takamore is included in this judgment. Essentially, the koumatua collectively and individually say koiwi are buried in the swamp(s) at Takamore and that taonga will be buried with them. And they say there will be separately buried taonga such as whare (house), old wharenui (meeting houses), and remnants of waka (canoes). This evidence seems clear that there are koiwi in the swamps through the area where the road is proposed.

[65] The Court says (paragraph 77) that none of the evidence it heard directly related to swamp burials even in Muaupoko occupation of the area. It says the evidence it heard was:

> "...cryptic and assertive bereft of any back-up history or tradition which would cause us to give some support to the concept of swamp burials in the area affected by the requirement."

[66] The Court expresses surprise at the "sparseness" of the evidence and says there is nothing in the evidence to suggest burials in the wetland immediately adjacent to the urupa. Finally the Environment Court express doubt about the presence of koiwi in the particular swamp area of relevance south-west and north-west of the urupa.

[67] It is clear from the evidence quoted that the koumatua identified koiwi in the wetlands of Takamore area. The wetlands are about 360 metres in length and

considerably less in width. The evidence it seems did not identify each individual wetland within this limited area and say there are koiwi buried there. The evidence was the swamp lands "have long been the resting place for our ancestors". It is difficult to see, given we are concerned with an oral history which pre-dates European presence, more specificity is reasonably possible. The area within which the koiwi are said to be buried is geographically well defined. The evidence was cryptic, but this is hardly a reason for rejecting it. Each of the three witnesses gives relevant evidence. Mr Parai gives a rationale for swamp burials (preservation and safety from marauding tribes). There is no evidence identified which the Court accepts to contradict this.

[68] The Court complains about a lack of "backup history" or "tradition". Again, it is difficult to understand what this means. Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence. The Court complained it was bereft of "evidence" and had "assertion" only of the presence of koiwi. The evidence was given by koumatua based on the oral history of the tribe. What more could be done from their perspective. The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area. To require a precise location of burial in such circumstances before satisfaction with the evidence is to potentially reduce many claims of waahi tapu areas to unproven and reduce s6(e), (7) and (8) matters accordingly. If the test applied to koiwi presence by the Court was also applied to the presence of taonga, the Court would have logically been required to find their presence not proved. The fact it did not seems difficult to understand.

[69] Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the koumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

Is there an obligation to give reasons?

[70] Counsel for the National Road Board submitted that in the circumstances the Environment Court had no obligation to give reasons for its decision not to accept the evidence of the koumatua. Counsel did not provide useful authority for the proposition. Perhaps the most convenient summary of the law in this area in the United Kingdom is in de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed. 1995) pp 464–466 (para 9-049)). The authors state:

> "It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced. However, it is still difficult to state precisely the standard of reasoning the court will demand. Much depends upon the particular circumstances and the statutory context in which the duty to give reasons arises. The courts have not attempted to define a uniform standard or threshold which the reasons must satisfy. For example, it may be unrealistic to require a tribunal faced with conflicting evidence on a matter that is essentially one of opinion, to state much more than that on the basis of what it has heard and of its own expertise it prefers one view to the other or that it finds neither wholly satisfactory and therefore adopts its own. On the other hand, the reasons must generally state the tribunal's material finding of fact (and, if the facts were disputed at the hearing, their evidential support), and meet the substance of the principal arguments that the tribunal was required to consider. In short, the reasons must show that the decision maker successfully came to grips with the main contentions advanced by the parties, and must "tell the parties in broad terms why they lost or, as the case may be, won."

[71] This passage was cited with approval by the Henry LJ delivering the judgment of the Court of Appeal in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373. In this case the appellants appealed a decision of a county court. The appellants had sued the valuers of a property they had purchased in negligence. The county court judge dismissed the claim stating that he preferred the evidence of the valuers' expert witness but, as the appellants claimed in the Court of Appeal, he failed to give adequate reasons. Henry LJ granted the appeal. In giving the judgment he made some useful comments in regard to the duty to give reasons. He stated at 378:

> "The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge

must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

[72] Australia has long recognised an obligation on Judges to give reason decisions supported by appropriately assessed factual conclusions (see *Public Service Board (NSW) v Osmond* (1985-86) 159 CLR 656, 666-7 HCA). And in Canada now the duty to give reasons seems established (see *R v Sheppard* (2002 SCC 26)).

[73] In New Zealand, the need to give reasons was recently considered in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 CA. While the comments were made in the context of a criminal case they have equal relevance to non criminal cases. Elias CJ said:

"[79] The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.

[80] The second main reason why it said Judges must give reasons is that failure to do so means that the lawfulness of what is done cannot be assessed by a Court exercising supervisory jurisdiction. Those who exercise power must keep within the limits imposed by law. They must address the right questions and they must correctly apply the law. The assurance that they will do so is provided by the supervisory and appellate Courts. It is fundamental to the rule of law. The supervisory jurisdiction is the means by which those affected by judicial orders, but who are not parties to the determination and who have no rights of appeal or rehearing, obtain redress. Their right to seek such review is affirmed by s 27 of the New Zealand Bill of Rights 1990. It is important that sufficient reasons are given to enable someone affected to know why the

> decision was made and to be able to be satisfied that it was lawful. Without such obligation, the right to seek judicial review of a determination will in many cases be undermined.
>
> [81] The reasons may be abbreviated. In some cases they will be evident without express reference. What is necessary, and why it is necessary was described in relation to the Civil Service Appeal Board (a body which carried out a judicial function) by Lord Donaldson MR in R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310 at p 319:
>
>> ". . . the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree."
>
> [82] The third main basis for giving reasons is that they provide a discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice. In the present case it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so."

[74] And GES Taylor *Judicial Review* Butterworths 1991 para 8.05 states:

> "The Courts are careful to say that reasons of the detail normally given in High Court judgments are not required and that often a comparatively brief statement may suffice. The reasons are to be appropriate to the nature of the hearing, having regard to the importance and seriousness of the matter, including being adequate for any appeal. A brief statement was sufficient where there was a transcript from which a clear picture of the reasons emerged. A statement setting out the material assessed and stating a conclusion "on balance" has been held to be adequate."

[75] Considering these authorities, I reach the conclusion in this case, in my view, there was a clear need to explain why (if it was to be done) the evidence of the koumatua as to the presence of koiwi in the swamp area at Takamore was being rejected. This evidence was at the heart of the case for the Trustees. The only evidence or otherwise as to the presence of koiwi in the wetlands was likely to be from the oral tradition of tangata whenua. The presence of a written record (of whatever source) might support the oral history but its absence could hardly detract from it. Geographical precision beyond burials in the wetlands at Takamore was

always going to be unlikely. These are burials that go back beyond European occupation, beyond 200 years. There was evidence supporting the presence of swamps in the area before European presence (para 79 of the Environment Court's judgment). And reasons were given for swamp burial (para 85 Environment Court judgment). Both support the credibility and reliability of the evidence given by koumatua . It seems the only evidence to contradict koumatua was given by Mr Mikaere. There was no description of what in particular he said nor any finding that he was a credible or reliable witness in whole or in part.

[76] From the perspective of the Takamore Trustees they gave evidence from the appropriate witness (koumatua) that:

(1) There were koiwi in the swamp wetland area at Takamore.

(2) Buried with koiwi were other taonga.

(3) Koiwi and other taonga were buried in the swamp to protect them from "marauders".

[77] This was comprehensive and clear. It seems illogical of the Tribunal to accept the evidence that taonga were buried in the wetlands and koiwi were buried in the sand dunes but reject the evidence that there were koiwi buried in the swamp when there was no further evidence nor additional geographical precision to justify acceptance.

[78] The bold statement by the Tribunal at para 77

> "We have evidential difficulty insofar as koiwi (human remains) are concerned within the swamp area, because none of the evidence we heard (with the exception of some hearsay evidence concerning the activities of a seer) directly related to swamp burial, even in the times of Muaupoko occupation in the general area"

is simply not true. Mr Te Taku Parai gave evidence in relation to the particular area in the carriageway that the swamp lands had long been the resting home for his ancestors. This the Court described as an assertion rather than evidence. Here, as I have observed, suitably chosen koumatua have given their evidence as part of their

oral tradition. If oral history is to be reduced to assertion rather than evidence, then much of the evidence by Maori in support of s6(e), 7(a) and s8 matters will be rejected as assertion and not evidence. This is not at all the proper approach to oral history such as this.

[79] I am therefore satisfied that the Environment Court:

(1) Failed to give reasons for rejecting the evidence as to the presence of koumatua in the swamp areas.

(2) Given the pivotal nature of the evidence was required to give reasons for rejecting it.

(3) Made an error of law in failing to give such reasons.

(4) Wrongly concluded there was no evidence of the presence of koiwi in the Takamore swamp area.

[80] Whether such a failure is material, or whether what affect it potentially has in the Environment Court's decision, I will return to at the end of this judgment.

Ground 4

[81] In this ground of appeal, the Takamore Trustees say that the Environment Court misconstrued s7(a) of the Act (Katiakitanga) as no more than the obligation of the Kapiti Coast District Council ("KCDC") to consult with local Maori. This in turn the Appellant says led the Court to view the Takamore Trustees refusal to accept any road through the wetlands area as a veto and conclude the Trustees were unreasonable in their demands and uncooperative.

[82] The Appellant submits that the s7(a) obligation required the Kapiti Coast District Council and the Environment Court to have regard to the Trustees exercise of guardianship of the area in accordance with tikanga Maori. Looked at in that way, talk of veto and lack of co-operation were inappropriate and misunderstood iwi's function. The Trustees simply saw any compromise which allowed the construction

of road over the waahi tapu area as compromising their exercise of guardianship in accordance with tikanga Maori.

[83] As to s7, the Court said (para 105):

> "The Council must have particular regard to those matters which renders consultation a necessary element of any particular development. We are satisfied that the consultation process in respect of the NOR has been extensive and that the Council has been fully appraised of Maori concerns in relation to managing the use, development and protection of the land within the NOR corridor. The concerns of Takamore Trustees relate to spiritual and cultural matters. The attitude of the tangata whenua is a total prohibition upon any use or development. *[Emphasis added]*
>
> There is agreement that the land is historically ancestral land (although most is no longer in Maori ownership) with elements of waahi tapu. We therefore bring to the attention of the District Council the necessity for future consultation with the tangata whenua should the NOR proceed in order that the provisions of subsections (a) and (aa) may be given full weight. The areas of land not required for the carriageway itself and within the waahi tapu registered area would remain very much the concern of the tangata whenua. We do not intend however, to impose any condition in that regard."

[84] The Respondents submit that para 105 of the decision does not say that Katiakitanga was limited to consultation and in any event what more could the Council do than consult given the Trustees response of a total prohibition on a road in the Takamore wetland.

[85] The plain words used by the Court in para 105 seem clear. The Court is saying (against a s7(a) background) that the Council must have particular regard to those matters where consultation is a necessary part of a development. However the Court only expresses satisfaction about the consultative process and nothing further. The Court expresses itself as satisfied that the Council knows fully Maori concerns. However, s7(a) creates not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision-making. Thus, in terms of s7 the territorial authority, and in turn the Environment Court, had to understand (presumably through consultation) and then have particular regard to, in achieving the purpose of sustainable management of the natural and physical resources of the area, the view of the trustees that this development compromised the exercise of

guardianship of this land. And once the Trustees concluded that there were taonga and koiwi in the area of the proposed road, they could hardly do anything other than oppose the road if they were to be true to their obligations of guardianship of the land.

[86] I reject the submission, therefore, that consultation is all that could or should have been done here with Maori. Consultation by itself without allowing the view of Maori to influence decision-making is no more than window dressing. Section 7 requires the decision-maker to have particular regard to Maori view about the way in which the land is to be used. The Court appears to have limited its consideration of this issue to consultation. This was less than required by law. This does not mean that in terms of s7(a) Maori exercising guardianship have a right of veto. Section 7 does not say this. But their view (those exercising guardianship) must be paid particular regard to in the balance of factors in deciding whether the NOR should be confirmed. This is what s7(a) explicitly requires.

[87] There is no evidence the Environment Court assessed the territorial authority's obligation in this regard at all. It should have. There is nothing to conclude the Environment Court had particular regard to Kaitiakitangi. It should have. To illustrate the point s7(e) requires the decision-maker to have particular regard to the protection of the habitat of trout and salmon. It would be absurd to suggest that a decision-maker's obligation is no more than to hear the effect of a project on trout or salmon habitat. Obviously the purpose of hearing the effect is to take it into account in the decision-making, and so with Katiakitanga. This was an error of law to limit the interpretation of s7(a) by the Court in this way. I will consider its materiality at the end of this judgment.

Ground 5

[88] This ground of appeal alleges that the Court "erred in its application of s8 of the Act by failing to take into account the principles of the Treaty of Waitangi. The Appellant claimed that there were 3 main treaty principles of relevance in this case that the Court had ignored; partnership, protection of Maori interests and mutual benefit. Section 8 of the Act requires those performing functions under the Act to

take the principles of the Treaty "into account". The function of the Environment Court or the Kapiti Coast District Council Commissioners was to identify how the Treaty principles may apply to this case, and once identified bring then into the overall mix ultimately for the purpose of assessing sustainable management (s5).

[89] The concept of "recognise and provide" for in s6 is a strong directive to the decision-maker that it must take into account the s6 factors when reaching its final decision. Section 7 is concerned to ensure that the decision-makers have "particular regard". This is a less firm directive, but all the same clearly requires the decision-maker to take into account in reaching its decision s7 matters. And in s8 the decision-maker is commanded to take these principles "into account". This is also a lesser legislative direction than s6 perhaps unsurprising given the specific matters covered in s6 compared with the general proposition in s8. For all that, relevant principles of the Treaty must be identified for only then can those principles be taken into account by the decision-maker in the decision.

[90] Here the Court said:

> "Lastly in respect of s.8 relating to the Treaty of Waitangi, a large part of the decision of this Court is devoted to that part of the Treaty which is encapsulated in s.6(e). There is also the question of consultation. The majority of the Court records at this stage that we consider the Council has carried out its obligations in terms of the RMA and in terms of the Treaty of Waitangi."

[91] It has been suggested that if the decision-maker properly takes into account s6(e) and s7(a) matters it may well have fulfilled its s8 obligations in any event. This will depend very much on the facts of each case. Section 6(e) matters, the relationship between Maori and their culture and traditions, are considered in some detail by the Environment Court in this case. I have concluded the Court without reason rejected evidence which established an important waahi tapu site. Therefore its consideration of s6(e) matters may have been less than ideal. And the Court, as I have found, has failed to adequately identify their responsibility as regards to s7(a) Katiakitanga with respect to the land.

[92] I accept the proposition of the Environment Court that there was extensive consultation with Maori. I have, however, the clear impression for the reasons I have given already that the process stopped at consultation rather than balancing s6(e), s7(a) and s8 matters with other competing interests. Or at least the Court's analysis of what was done by KCDC focuses on consultation without the need to actually have regard to Maori issues in its decision making. And once again when considering compliance with s8 the Court stressed consultation.

[93] The Appellant's proposition here is therefore expressed in this way. There should have been active identification of Maori interests and those interests taken into account in balancing as required by the Act. The Environment Court's approach has been to accept the primacy of the road development and consider ways in which it can avoid, remedy but mostly mitigate adverse effects. Thus, the Environment Court considered that any taonga found as part of the construction of the road could be removed and reburied with proper ceremony. While this is a proper and valid way of mitigating adverse effective it cannot be a substitute for the balancing process required when considering whether to confirm the NOR itself.

[94] Because of the errors made in assessing whether koiwi were present in the area of proposed road, because of the error in equating Kaitiakitangi (s7(a)) with consultation alone and because of the express failure to identify potentially relevant Treaty of Waitangi principles and take them "into account" in the decision making, I find the Environment Court failed to consider s8 matters.

[95] I am therefore satisfied there was an error of law here. I will consider its effect at the end of this judgment.

Ground 6 – No other reasonable alternative

[96] The Appellant says the Court wrongly concluded that there were no available alternative routes for the section of the proposed road between Waikanae River and Te Moana Road. The Appellant describes this ground of appeal as a misapplication of a legal test, or an unreasonable conclusion based on the evidence in concluding there was no alternative route within the meaning of s171(c).

[97] Firstly, dealing with the Environment Court's powers with respect to an appeal arising from s171 matters:

> "**174 Appeals ...**
>
> (4) In determining an appeal, the Environment Court shall have regard to the matters set out in section 171 and may—
>
> (a) Confirm or cancel a requirement; or
>
> (b) Modify a requirement in such manner, or impose such conditions, as the Court thinks fit."

[98] Section 171(1)(c) states:

> "**171 Recommendation by territorial authority**
>
> (1) Subject to Part II, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to—
>
> ...
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; ..."

[99] The Court said:

> "In relation to s.7(b) in connection with the use and development of natural and physical resources, the view of the majority of the Court is that the existence of a roading corridor protected by law since 1956 is an important issue to which the Court must have particular regard. Setting aside the question of taonga and koiwi which may be present in swamp areas, the majority have no doubt that it would be a gross mis-management of resources to embark upon the whole gamut of legal procedures relating to another road route with potential disruption to people and communities and with no guarantee of success when there is an area available which has been set aside for a

period of almost 50 years for that purpose. There is no other reasonable alternative which is presently legally available, therefore to accept that there is a viable alternative for the purpose of s.171(c) is not supported by evidence.

...

Section 171(1)(c)

This subsection reads:-

> *"whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method ..."*

...

To address the manner in which the subsection could hypothetically apply in the present case, it is helpful to consider a situation where it would be relevant to the question of alternative sites, or routes. "*Site*" in the context of this section appears to refer to a specific entity such as the site of a sewage treatment plant, landfill or highway corridor. If we had a situation where there was an alternative presently available (not speculative) which did not offend any of the provisions of Part II of the Act (and that is not the present case) but which was far more expensive, then, taking into account the fact that the nature of the public work itself along the NOR will be obtrusive and potentially offensive in terms of Part II, it would not be unreasonable to expect the requiring authority to use that alternative route despite additional cost. In the present case however that is not the situation and it would in our view be unreasonable to expect the requiring authority to enter another thorn thicket of Part II considerations by attempting to shift the route into settled residential areas. Also, with any alternative it would be advisable for the District Council to again embark upon requirement procedures with no guarantee of success. We do not therefore consider there to be any available alternative within the meaning of this subsection."

[100] The primary section for consideration of alternative routes is subsection (b). Subsection (c) is concerned with a particular public work or project where because of its nature it would be unreasonable to expect a requiring authority to use an alternative route (as relevant here). Thus the subsection requires an analysis of the nature of the project to see if there is anything about it which means it would be unreasonable to use an alternative route.

[101] It is somewhat difficult to follow the Court's analysis in this part of its judgment. The Court concludes that it does not consider there is any available

alternative within the meaning of the subsection. However, that does not appear to be the subsection's focus. It could be argued that the nature of this public work, a link road, which has had a designation over a corridor of land 15 kilometres in length since the 1950's in one form or another does mean it would be unreasonable to expect an alternative route to be used. The Court suggested in paragraph 147 that it would be unreasonable to expect the territorial authority to consider shifting the road to another route because the Council could not be expected to "enter another thorn thicket of Part II considerations". This seems to misconstrue s171(1)(c). The subsection is concerned with the nature of the work causing unreasonableness in requiring an alternative route. The unreasonableness relates not to the process that may have to be gone through to gain approval for an alternative route, but to the expectation of an alternative route because of the nature of the public work. I therefore reject the Environment Court's conclusion that there must be a viable alternative route before subsection (c) can effectively be considered. This, as I have observed, seems to put the emphasis and obligations in the section around the wrong way. And as the Appellants have pointed out, it is extremely unlikely there will ever be an alternative in the sense used by the Court given the territorial authority has not attempted to identify such an alternative, nor seek planning permission.

[102] The Appellants say that the Court should have asked the question: Is there anything in the nature of this link road which means it would be unreasonable to expect the territorial authority to use an alternative route in the Takamore/CHP area? The Court answers this proposition directly by saying there is no alternative route which is reasonably available. And that is the effective end of any such enquiry from the Court's perspective.

[103] The Respondents say here that there was nothing objectionable in the way the Court analysed subsection (c). They say the reference to "no available alternative" is simply a recognition that other alternatives would be required to go through the NOR process. Self-evidently that is true. However, every alternative route will need to go through the resource management process. It is unavoidable. If the Court's interpretation of subsection (c) is correct, then there will never be an alternative under subsection (c) available unless the territorial authority applies for a NOR for

two alternatives at the same time, hardly practical or real. In this case there are other alternatives identified and discussed by the Court especially under subsection (b).

[104] What the Court has not done is asked the question posed by subsection (c): Is there anything in the nature of the work which means it would be unreasonable to expect the territorial authority to use an alternative? If the answer was "yes" the nature of the work would affect the alternative routes, then is it unreasonable to expect the territorial authority to use the alternative? If the answer was "yes" the nature of the work would affect alternative routes then the question would be: Is it unreasonable to expect the territorial authority to use the alternative? The Court did not approach the section in this way at all. As a result, subsection (c) did not get either the attention it deserved or the analysis required. It may well be that the long protected roading corridor and the substantial link road mean the nature of the work will convince a Court that it is unreasonable to consider alternatives. However, I consider the Court misunderstood the import of this section and thereby there was an error of law. I will consider its materiality at the end of this judgment.

Ground of appeal 7 : Interrelationship of s171 and Part II of the Resource Management Act 1991

[105] The essence of the Appellant's objection to the Environment Court's decision here is that by considering Part II matters before s171 matters in its judgment, the Court effectively and inappropriately limited proper consideration of s171 matters. As I have observed, s171 is made "subject to Part II". Where there is a conflict between the provision, Part II dominates. The Environment Court's judgment deals with Part II matters first and then s171 matters. There is a detailed consideration of each subsection in s171 and how each relates to the facts of this case through the Environment Court's judgment. There can be no doubt that the Court did comprehensively consider each s171 matter. And if it came upon any s171 matter which was in conflict with a Part II provision it was in a position (having analysed Part II) to "deal" with the conflict.

[106] The important question is not whether Part II or s171 matters were considered first, but whether both were fully considered and given their proper

statutory importance and priority. While it may theoretically be possible to improperly limit consideration of s171 matters by considering Part II matters first, there is in fact no evidence this happened here. Obviously it would be possible if the Court considered Part II matters first to effectively exclude consideration of potentially all s171 matters. But this did not happen here. The judgment clearly considers Part II and s171 matters in detail. Courts may legitimately disagree on which should be considered first. But the essential point is that each should be considered and s171 is legislatively made subject to Part II matters. There was no error of law here in my view.

Ground 8 – Compensation

[107] The CHP submits that the Environment Court took into account when considering how the designation would affect CHP that it may be entitled to compensation if the road went ahead. The CHP says that nothing in s171 or in Part II entitles the Court to take into account in balancing the competing interests that CHP may be entitled to compensation for its "loss" should the designation proceed. And the Appellant says issues of compensation are outside the Environment Court's jurisdiction and should not come into account in the NOR approval process.

[108] The Respondents say:

(1) In this context the Environment Court was entitled to recognise there was a separate compensation scheme in operation pursuant to the Public Works Act 1981.

(2) The Court did balance all relevant factors and after such an exercise it concluded the NOR should be confirmed. In those circumstances the Respondents say the Court simply observed CHP would be entitled to compensation. This, the Respondents say, was unobjectionable.

[109] As to compensation, the Court said:

> "[60] Because land is being taken, the question of injurious effect to the balance of the land will fall to be considered when

> compensation is addressed. We make clear however that the trustees of the park are not interested in that issue but wish to retain the facility they have created for the purpose for which it was created, namely a peaceful rural type setting which can be enjoyed by adults and children alike without the intrusion of one of the more aggressive facets of civilisation.
>
> ...
>
> [227] All other matters pertaining to the activities of the Christian Holiday Park can in our opinion be covered by compensation."

[110] In my view, the reference in paragraph 227 to compensation, contains nothing to aid the Appellant's submission. The reference in paragraph 227 is nothing more than a reflection of the process such a NOR will go through in relation to properties affected by it. The decision-maker must first consider whether balancing all the relevant material and the predominant s5 the NOR should be confirmed. It will need to consider avoidance, mitigation of affect and other matters set out in paragraph 5. If mitigation, then it will be implicit that some affect remains, and in all probability compensation will be all that will be left to an affected party. Compensation will be considered only after it is concluded (if it is) that the balance lies in confirming the NOR and all effort to avoid or mitigate has been undertaken.

[111] The reference in paragraph 60 of the judgment to compensation is in my view in a similar vein. The Court concluded that the balance favoured the NOR, and although every effort would be made to mitigate the effect on CHP amenity detractions could not be entirely avoided. In those circumstances the observations in paragraph 60 are made. And s60 assumes also that land is being taken for the NOR and that along with the amenity detractions mitigated but not avoided will, as the Court says "fall to be considered when compensation is addressed". This seems unobjectionable also. It simply affirms the process that will take place. It does not mean that compensation was taken into account when balancing was undertaken on the question of whether or not the NOR should or should not be confirmed. Nor was compensation being taken into account when there is consideration of mitigation or avoidance. Compensation is recognised as a probability when the balance favours the road and where amenity detractions and compulsory land purchase exist. I reject this ground of appeal.

Ground 9 – The NOR and Physical Resources

[112] The Appellant says that the Environment Court wrongly concluded that the intended route of the road was a physical resource in terms of s5 and treated it accordingly. The Court said:

> "We thus have a classic example of the effectiveness of mechanisms designed to protect future public works from developments which may be in conflict with those works. Transit and/or its predecessors, as the requiring authority for State Highway purposes, purchased land affected from time to time and now own a large part of the land covered by the NOR. Considering that mechanism under the provisions of the RMA, the history fits well within the purposes of s.5, which is the cornerstone of the Act. The intended route of a highway of significance has been managed in a way which protects that physical resource for future generations. Thus the protective mechanisms set in place in 1956 have sustainably managed a significant physical resource (s.5(1)). That section applies in respect of the corridor thus created, and we are directed to have particular regard to the efficient use and development of that physical resource and to the fact that it has finite characteristics."

[113] I agree with the Respondents' submissions on this ground of the appeal. The Court clearly distinguished between the land itself through the 15 kilometre corridor and the mechanisms by which the corridor was created. The road corridor is a strip of land which is obviously a finite resource. The mechanisms by which the land came to be protected are obviously not. The use of these devices is simply to enable the land to be protected for road use. The Court knew and distinguished between these two. There is, therefore, no error of law in this ground.

[114] Takamore Trustees abandoned ground 7 and 8 of its appeal namely; an alleged failure by the Court to take into account the decision of *McGuire v Hastings District Council* [2001] NZRMA 557; an alleged misapplication of the Historic Places Act.

Materiality

[115] As to the Takamore Trustees appeal. I have concluded that the Environment Court rejected evidence without sufficient reasons. I have concluded the Environment Court wrongly concluded that consultation by the KCDC was

sufficient compliance with its obligations under s7(a). And the Court failed to properly take into account Treaty of Waitangi matters (s8). Before I allow an appeal based on these grounds, I must be satisfied that the errors made were material. (*Manos v Waitakere District Council* [1996] NZRM 145). The evidence rejected was fundamental to the Takamore Trustees case. In the trustees view it established the presence of koiwi in the area where the road is proposed. The Environment Court itself recognised the importance of this issue. It is relevant to both s6(e) and s7(a). Section 6(e) required the Commissioners and the Court to recognise and provide for Maori and their welfare and amongst other matters waahi tapu. If the Court accepted that there were koiwi in the area of the proposed road then there were powerful reasons for local Maori to view this area as especially tapu. Their kaitiakitanga would unsurprisingly demand protection of the waahi tapu area. This would therefore be a powerful factor to bring into the balance when considering whether to approve the NOR. And reducing the meaning of "particular regard" in s7(a) to consultation effectively avoided the section altogether. Consultation alone is worthless in this context.

[116] I have concluded the Court did not apply the correct legal test to the special consideration of alternative routes in s171(1)(c). As a result, the Court, based on a wrong legal test, concluded that it was unreasonable to expect the KCDC to use an alternative route. This was an important matter. Both WHP and Takamore Trustees' case was that it was reasonable to expect KCDC to consider alternative routes and that there was nothing about the nature of the work which eliminated consideration of alternative routes. In these circumstances, this was a significant matter in the balance for the Court. By itself, it may not have convinced me to allow the appeal. However, along with the other matters I have identified clearly requiring reconsideration by the Court, I consider it should have the opportunity of reconsidering its view s171(1)(c) in light of this judgment.

[117] My conclusion is that s6(e) factors may not have had the consideration demanded because of the erroneous evidential evaluation by the Court. And s7(a) did not get the place it deserved in the balancing by the Court. And in part as a consequence of the two failures s8 did not get the consideration it deserved. These failures go to the essence of the decision by the Environment Court. A different

view of any of these could effect the confirmation of the NOR. There is no doubt therefore that these errors were material, indeed they were vital. The only proper course now is for these issues to be reconsidered by the Environment Court in light of the observations in this judgment. How a proper consideration of the s6(e) and 7(a) and s8 and s171(1)(c) matters affect the ultimate decision will be a matter for that Court to determine. I therefore allow the appeal on grounds 3, 4, 5 and 6. Grounds 3, 4 and 5 are solely Takamore Trustees' grounds of appeal, ground 6 affects both. The decision of the Environment Court is quashed. I refer this appeal back to the Environment Court for reconsideration. The Court will need to reconsider its decision to "confirm(s) the requirement in regard to the NOR". The reconsideration need involve only those aspects where this Court has concluded the Environment Court was in error.

Costs

[118] I invite counsel for the Appellants in both proceedings to file submissions on costs within 14 days and the Respondents in reply a further 14 days. It may be that CHP will require a right of reply given its limited success in this appeal, and I allow a further 7 days should that be necessary.

....
Ronald Young J

Signed at 10-40 am/~~pm~~ this 4th day of April. 2003

Raikes v Hastings District Council

[2022] NZHC 3075

High Court, Napier (CIV-2021-441-61) 15, 16 August;
Grice J 23 November 2022

High Court — Appeal — Recognition of an area of land as a wāhi taonga or "site of significance" under the Proposed Hastings District Plan — District plans under the Resource Management Act 1991 — The Proposed District Plan — First Environment Court appeal — High Court Decision on the Interim Decision — Environment Court's Revised Decision on appeal — Whether the Court failed to consider and properly apply relevant law and case law about the critical assessment a decision-maker should apply to evidence given by a party asserting a relationship with a site that should be recognised and provided for under s 6(e) of the Resource Management Act 1991 — Whether the Court erred in its consideration and application of s 13 of the New Zealand Bill of Rights Act 1990 — Whether the reasoning provided by the Court was insufficient to explain how the Court came to its conclusion at [76] (that what Maori regard as waahi tapu and other taonga is for them) — Whether the reasoning provided by the Court was insufficient to explain how the Court came to its conclusions at [79] — Whether the Court took into account a matter which it should not have taken into account when it considered the proportion of the total farm area owned or leased by the appellants affected by proposed site MTT88 — Whether the Court's calculation of that proportion was correct — Whether the reasoning provided by the Court was insufficient to explain how the Court came to its conclusions at [81] on the extent and boundary of proposed site MTT88 — Statutory framework for Plan appeals — Environment Court's determination of the site as a wāhi taonga — Environment Court's approach to cultural evidence — Environment Court's application of relevant law and case law in its assessment of the cultural evidence — Extent of the site — Religious beliefs — Factual errors by the Environment Court.

Words and Phrases — "*Legible*".

This judgment concerns an appeal against an Environment Court decision to recognise an area of land as a wāhi taonga or "site of significance" under the *Proposed Hastings District Plan* (the Proposed Plan). Mr and Mrs Raikes (the Raikes) submitted that the cultural evidence in relation to the site, part of which was located on their farm, Titiokura Station (the Station), was insufficient, and that the Environment Court had failed to test robustly the evidence which was given by witnesses called by the Maungaharuru-Tangitū Trust (MTT). Further, the Raikes said that the evidence included unsubstantiated cultural beliefs and myths which did not accord with their own religious beliefs.

The relevant site was comprised of some 70 ha known as Tītī-a-Okura or the Tītīokura Saddle, named site MTT88 in the Proposed Plan. Section 16.1 of the Proposed Plan identified and protected listed wāhi taonga sites from the effects of certain land use activities. It was proposed the MTT88 site would be listed in the Proposed Plan as a wāhi taonga with specific rules applying to the area restricting activities on the land beyond the restrictions that would usually apply to rural land.

The MTT88 site covered a total area of 70 ha. Approximately 16.22 ha of this land was located in part of 470 ha owned by the Raikes. The MTT88 site also covered an adjoining area of land which at the time of the hearing the Raikes leased and ran as part of the Station. The Raikes subsequently bought that adjoining block of land, which amounted to 326 ha. The MTT88 site also runs across two other properties which were not the subject of this appeal. It was not entirely clear how much of site MTT88 was included in the Station, but it was common ground that it would amount at the very most to approximately 8.45 per cent of the land presently held by the Raikes.

The Raikes said that the Environment Court made a number of errors in its Revised Decision, in particular, errors made in its assessment and in relying on the cultural evidence adduced at the hearing, as well as failing to take into account their own beliefs. In addition, the Raikes said that even if it were appropriate to recognise the site as an area of cultural significance, the evidence did not justify recognition of the site to the extent of the area approved on its land. In this respect the Raikes contended that particular cultural activities pointed to, namely tītī (mutton bird) hunting and an historical trail through the saddle, happened within defined areas mainly along the present State Highway (the old Napier-Taupō road) which adjoined the Raikes' property. They said that the evidence relating to any larger area was based on myth and legend which could not be properly substantiated. Therefore, as a result of these errors by the Environment Court, the Revised Decision should be set aside and the High Court should substitute its own determination. The Revised Decision followed *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79 (the Interim Decision).

The provisions of the rules contained in Section 16.1 of the Proposed Plan were not the subject of appeal.

The Amended Notice of Appeal filed by the Raikes raised seven questions of law: (i) did the Court fail to consider and properly apply relevant law and case law about the critical assessment a decision-maker should apply to evidence given by a party asserting a relationship with a site that should be recognised and provided for under s 6(e) of the Resource Management Act 1991 (the RMA)?; (ii) did the Court err in its consideration and application of s 13 of the New Zealand Bill of Rights Act 1990 (the NZBORA)?; (iii) was the reasoning provided by the Court insufficient to explain how the Court came to its conclusion at [76] (that what Maori regard as waahi tapu and other taonga is for them); (iv) was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at [79]?; (v) did the Court take into account a matter which it should not have taken into account when it considered the proportion of the total farm area owned or leased by the appellants affected by proposed site MTT88?; (vi) was the Court's calculation of that proportion correct?; and (vii) was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at [81] on the extent and boundary of proposed site MTT88?

The Raikes submitted that: (i) the Environment Court could not divest itself of its judicial functions to determine whether an area is wāhi taonga simply because Maori claim it is culturally significant to them and that the Court could not uncritically accept assertions made by witnesses for MTT, but had to determine whether the evidence established probatively the existence of a wāhi taonga site and the extent of its boundaries; (ii) the Environment Court failed to evaluate the evidence critically put before it by the parties. In so doing, the Environment Court failed to apply relevant case law; (iii) the Environment Court erred in that it did not separately consider the

extent of the wāhi taonga site or the evidence from MTT about how the boundary for that site had been drawn; (iv) the Environment Court "jumped" a step and, having concluded there was sufficient evidence to establish a wāhi taonga in the vicinity, "jumped" directly to consider which rules should apply to the site; (v) the Revised Decision still contained insufficient reasoning to enable them, as landowners affected by the decision, to understand why that decision was made and whether it was lawful. They said: "If unwanted controls are to be placed on [their] land, based on others' beliefs, that decision should be made in a careful and considered fashion after a proper assessment of all of the evidence, and in a manner consistent with NZBORA"; and (vi) the Environment Court made material errors of law in its Revised Decision and that the High Court should allow the appeal and set aside the Environment Court decision that the 70-ha site MTT88 is wāhi taonga. Their "strong preference" was that the High Court substitute its own decision rather than remitting the matter back to the Environment Court.

The respondent, the Hastings District Council (the Council), in its capacity as the territorial authority responsible for preparing the Plan, took a neutral position in relation to whether any of the errors of law alleged had been made out. However, although it was neutral as to the Court's conclusion on this point, if the Court found material errors of law were made, the Council supported the appellants' position that the High Court should substitute its own decision rather than remit the case for rehearing in the Environment Court. This was said to be in the interests of bringing some finality to this matter and allowing the Plan to become fully operative as soon as possible.

MTT, as an interested party, submitted that: (i) the alleged errors of law could not be supported and that the Revised Decision should stand; (ii) the Court had recorded and properly assessed the cultural evidence, which was sufficient to enable the finding that the site was wāhi taonga; (iii) in relation to s 13 of the NZBORA, MTT emphasised the importance of s 6(e) of the RMA (providing for the relationship of Maori and their culture and traditions) and argued that the Canadian case law relied on by the appellants on this aspect was not on point; (iv) while the Court was not required to give more detailed reasons, nor refer to and analyse all of the cases cited by the parties, in any case the Court undertook a proper analysis, including a clear summary of the relevant evidence of both MTT and of the Raikes, and applied the appropriate legal principles; (v) MTT accepted that though the Court made an error in its calculation of the proportion of the Raikes' land over which the site extended, the Court did not rely on this calculation, nor was it material to the decisions it made. MTT says it is the relationships the Hapū have with the site that should determine the extent of wāhi taonga, not what may be convenient or acceptable to private landowners. The size of the site merely reflects the area subject to those relationships; and (vi) even if the High Court found the errors of law alleged to be made out, they were not material to the Court's ultimate determination because the evidence clearly supported a finding that MTT88 was a wāhi taonga to the Hapū.

Held, (1) the Environment Court related the cultural evidence before it, and based its analysis on that evidence, as well as the further evidence relating specifically to the MTT88 site. In relation to the significance of this site and its shared value between MTT hapū and Ngāti Hineuru through their common ancestor Okura, the Environment Court referred to the whakapapa evidence given by Mr Taylor, a kaumātua, as a basis for this finding. The Court also referred to the evidence in relation to the site's location on the ridgeline of the maunga, which is tapu. The association with Maungaharuru was through settlement by those who arrived on the waka *Takitimu*. The cultural evidence was that Tūpai, a tohunga who was the kaitiaki of the sacred

symbols of the gods onboard the waka, threw the staff, named Papauma, and it landed at the summit of Tītī-a-Okura. Papauma embodied the mauri of birdlife. The prolific birdlife in the forest was therefore said to be the result of the mauri (life force) planted by Tūpai. The value of the site as a hunting area for tītī (mutton bird), a taonga bird species, was well-established on the evidence before the Court. The arguments that recognition should be confined to the line of particular activities overlooked the fact that the occupation would not be limited to those lines. The evidence supported a wider recognition across the area delineated by the kaumātua and supported by the landscape evidence. Overall, it was clear that the Environment Court had referred to and assessed the relevant cultural evidence before it in making its determinations. (paras 94-97, 99-102)

(2) The Raikes submitted in general terms that there was no critical assessment or evaluation of the evidence of MTT's witnesses in the Revised Decision on appeal. The Court had merely summarised MTT's evidence and then reached conclusions uncritically on that evidence. The first issue related to the standard of proof required when considering issues of tikanga Maori. In this case, the Environment Court had sufficient evidence before it on which to reach its decision. The fact that the evidence was in part based on hearsay, opinion and oral statements and whakapapa did not make it inadmissible. In one sense the cultural evidence could be described as biased in the legal sense, in that the witnesses were giving evidence in support of MTT's case to recognise the site. However, the cultural evidence was given by witnesses who were themselves qualified experts. It was consistent and drew on whakapapa, stories handed down in the oral tradition and records of earlier evidence of kaumātua, as well as other research. It was open to the appellants to call cultural evidence. Other landowners did call cultural evidence of their own in respect of other contested sites proposed by MTT. In contrast, the Raikes did not call any cultural evidence. (paras 111, 114-117)

Ngati Hokopu Ki Hokowhitu v Whakatane District Council (2002) 9 ELRNZ 111 (EnvC), considered

Takamore Trustees v Kapiti Coast District Council [2003] 3 NZLR 496 (HC), referred to

(3) Under the provisions in the RMA, the decision-maker is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands, water, sites, waahi tapu and other taonga (s 6(e)); have particular regard to kaitiakitanga (s 7); and must take into account the principles of the Treaty (s 8). The Court must assess the credibility and reliability of mana whenua evidence. However, the evidence of mana whenua, if consistent and credible, using the approaches set out in *Takamore Trustees v Kapiti Coast District Council* and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (both cited below), will be strong evidence. The RMA requires protection of cultural interests where the case presented has merit. In any case, the weight to be given to the evidence will be "unique to that case". The fact that the wāhi taonga covered 70 ha, part of which was on the Raikes' property, reflects the evidence that was before the Court. The second stage in determining what is required to "protect" large sites as compared to smaller sites is a matter for the rules to be applied to those sites. The Court recognised this by rejecting the proposed rules put forward by MTT and instead adopting the Council's proposed rules, noting that the size of wāhi taonga sites and their "consequential resilience to, an ability to absorb, minor alterations bought about by small scale earthworks and buildings" was an "important factor that is clearly relevant in deciding what is necessary to protect them from damage". The rules were not under review in this appeal. The Court had before it evidence supporting the finding that the MTT88 was a wāhi taonga based on the evidence adduced by the various witnesses for MTT. That evidence was tested by

cross-examination. The Raikes were entitled to call cultural evidence, but chose not to do so. Other landowners did call cultural evidence, which the Environment Court took into account in its findings. (paras 119-123, 126)

McGuire v Hastings District Council [2002] 2 NZLR 577, (2002) 8 ELRNZ 14 (PC), considered

Ngati Hokopu Ki Hokowhitu v Whakatane District Council (2002) 9 ELRNZ 111 (EnvC), referred to

Takamore Trustees v Kapiti Coast District Council [2003] 3 NZLR 496 (HC), referred to

(4) The Raikes said that the historic strategic trail followed the route of the present State Highway, and therefore any recognition of the area as wāhi taonga should be limited to the State Highway. Counsel for the Raikes pointed out that Ms Lucas, a landscape architect, under cross-examination had confirmed that there was seasonal occupation of the area only. Counsel submitted on that basis that seasonal occupation by people was not a matter for which MTT claimed wāhi taonga status for the MTT88 site. There was no reason why seasonal occupation only by the people meant that the area should not be recognised as a wāhi taonga. Moreover, the issue of being only seasonally occupied was a matter of evidence before the Environment Court along with all the other evidence. The Environment Court was entitled to put such weight on that evidence as it thought appropriate. The Raikes also criticised Ms Hopmans' evidence, in reference to the size of the site to be recognised as wāhi taonga, as not just the point at which the State Highway crossed but other features including the ridgeline, this being based on viewing the maunga as well as the name of the saddle. Again, that evidence was before the Court and it chose to accept Ms Hopmans' evidence, along with the other evidence it had, rather than accepting the Raikes' legal submissions that the site should be narrowed to the travel route. Similar criticisms were made in relation to the tītī (mutton bird) hunting, the appellants pointing to Mr Parsons evidence, who identified the low pass in the mountain as the part that the tītī would have flown over and where they would have been captured. There was ample evidence before the Court to enable it to be satisfied that the extent of the MTT88 site as proposed was a wāhi taonga. (paras 128-131, 135)

(5) The Raikes said that the cultural and spiritual whakapapa and the "myths" relied upon to determine the site was wāhi taonga were merely the beliefs of the Hapū which could not be substantiated. They also said their own Christian views were not properly taken into account by the Court; that they should have been given the opportunity by the Court to expand on those views; and that the Environment Court erred in its consideration of s 13 of the NZBORA. The Environment Court noted that the Raikes' Christian views were to be respected. However, in the context of the statutory framework here, they were simply not a factor to be taken into account in the determination required of the Environment Court when considering cultural issues under ss 6(e), 7(a) and 8 of the RMA. These requirements under the RMA recognise in this context, the "special regard to Māori interests and values". It was apparent that the Court only referred to s 13 of the NZBORA to make the point in passing that a right to have one's beliefs respected is a fundamental right of all people under the NZBORA. That section was not engaged in the Environment Court's assessment of the matter under consideration. The Environment Court quite rightly put the Raikes' Christian beliefs to one side in making its determinations. (paras 136-138, 141, 142)

(6) The final issue was whether the Court sufficiently articulated its reasoning as to accepting the cultural evidence of witnesses called by MTT. The duty to give reasons or to engage in a particular line of analysis is contextual. In this case, the Environment Court set out the evidence relied upon and the "intellectual route taken" to reach its

conclusions was apparent. The Court was not required to spell out every item of evidence, nor to set out every argument made by the Raikes, who were challenging the merits of the decision. However, it was for the Environment Court, having assessed the evidence, to put such weight on the evidence as it considered appropriate and to reach a determination. The Environment Court is responsible for the balancing process required under the statute, and the weight to be given on relevant considerations is a matter for that Court and not for reconsideration by the High Court as a point of law. (paras 143, 145, 146)

Murphy v Rodney District Council [2004] 3 NZLR 421, (2004) 10 ELRNZ 353 (HC), referred to

(7) The Raikes contended that the Environment Court made two factual errors in its Revised Decision, which were material to the decision and therefore the decision should be set aside. The first alleged factual error was the Court's comment that the area of the Raikes' land affected by the MTT88 site was two per cent. It was now accepted this was an error and the percentage was in fact higher than what the Court stated, although not higher than nine per cent of the Station. However, the Environment Court did not apparently rely on this calculation in its determination of either the classification of the site as wāhi taonga or its extent. The size of the wāhi taonga may have had some bearing on what the appropriate rules applying to the site were to be. Indeed, this appears clearly to have been the case in the Court's determination of what rules should apply. However, as long as the wāhi taonga was established on the evidence, the proportion of the land owned or leased by the Raikes that is to be included in the site has little relevance to the final determination of its status as wāhi taonga. The Raikes also raised as a factual error the reference to Te Waka-a-Te O being within Tītī-a-Okura. Counsel accepted that this too was an error. The Court's error was to refer to Te Waka-a-Te O as being within MTT88 rather than adjacent to. However, the significance of the place name, as it referred to Okura, remained relevant. The point being made by the Court in the Revised Decision was that the Waka of Okura was in the area. It was an adjacent ridge. The mistake was not material to the decision reached. While there were two particular mistakes as to factual matters in the Environment Court's Revised Decision, these were not material to the decision. As none of the grounds of appeal were made out, the appeal was dismissed. (paras 147-150, 153, 156, 157)

Cases referred to

Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721

Chorus Ltd v Commerce Commission [2014] NZCA 440

Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)

Estate Homes Ltd v Waitakere City Council [2006] 2 NZLR 619, (2005) 12 ELRNZ 157 (CA)

Friends of Pakiri Beach v Auckland Regional Council [2009] NZRMA 285 (HC)

Guardians of Paku Bay Assoc Inc v Waikato Regional Council [2012] 1 NZLR 271, (2011) 16 ELRNZ 544 (HC)

Heybridge Developments Ltd v Bay of Plenty Regional Council [2010] NZEnvC 195

Heybridge Developments Ltd v Bay of Plenty Regional Council (2011) 16 ELRNZ 593 (HC)

Horticulture New Zealand v Manawatu-Wanganui Regional Council [2013] NZHC 2492, (2013) 17 ELRNZ 652

Hutt City Council v Mico Wakefield Ltd [1995] NZRMA 169 (HC)

Marris v Ministry of Works and Development [1987] 1 NZLR 125 (HC)

May v May (1982) 1 NZFLR 165 (CA)

McGregor v Rodney District Council [2004] NZRMA 481 (HC)

McGuire v Hastings District Council [2002] 2 NZLR 577, (2002) 8 ELRNZ 14 (PC)

Moriarty v North Shore City Council [1994] NZRMA 433 (HC)

Murphy v Rodney District Council [2004] 3 NZLR 421, (2004) 10 ELRNZ 353 (HC)

Ngati Hokopu Ki Hokowhitu v Whakatane District Council (2002) 9 ELRNZ 111 (EnvC)

Ngati Maru Trust v Ngati Whātua Orakei Whaia Maia Ltd [2020] NZHC 2768, [2021] 3 NZLR 352, (2020) 22 ELRNZ 110

Ngati Whātua Orakei Trust v Attorney-General (No 4) [2022] NZHC 843, [2022] 3 NZLR 601

Poutama Kaitiaki Charitable Trust v Taranaki Regional Council [2020] NZHC 3159, (2020) 22 ELRNZ 202

Primeproperty Group Ltd v Wellington City Council [2022] NZHC 1282, (2022) 23 ELRNZ 828

Royal Forest & Bird Protection Society Inc v WA Habgood Ltd (1987) 12 NZTPA 76 (HC)

Serenella Holdings Ltd v Rodney District Council EnvC Auckland A100/2004, 30 July 2004

SKP Inc v Auckland Council [2018] NZEnvC 86

SKP Inc v Auckland Council [2019] NZHC 900

Smith v Takapuna City Council (1988) 13 NZTPA 156 (HC)

Speargrass Holdings Ltd v Van Brandenburg [2021] NZHC 3391, (2021) 23 ELRNZ 454

Takamore Trustees v Kapiti Coast District Council [2003] 3 NZLR 496 (HC)

Te Rohe Potae o Matangirau Trust v Northland Regional Council EnvC Whangarei A107/96, 22 November 1996

Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti Coast District Council (2002) 8 ELRNZ 265 (EnvC)

Vodafone New Zealand Ltd v Telecom New Zealand Ltd [2011] NZSC 138, [2012] 3 NZLR 153

Winstone Aggregates Ltd v Franklin District Council EnvC Auckland A80/02, 17 April 2002

Appeal

This was an unsuccessful appeal against an Environment Court decision to recognise an area of land as a wāhi taonga or "site of significance" under the *Proposed Hastings District Plan*.

L J Blomfield for appellants (Peter and Caroline Raikes)
A J Davidson for respondent (Hastings District Council)
K M Anderson and *M J Dicken* for Interested Party (Maungaharuru-Tangitu Trust)

Cur adv vult

GRICE J

Introduction

[1] This is an appeal against a decision of the Environment Court[1] to recognise an area of land as a wāhi taonga or "site of significance" under the *Proposed Hastings District Plan* (the Proposed Plan). Mr and Mrs Raikes submit that the cultural evidence in relation to the site, part of which is located on their farm, Titiokura Station (the Station), was insufficient, and the Environment Court failed to robustly test the evidence which was given by witnesses called by the Maungaharuru-Tangitū Trust (MTT). In addition, the appellants say, the evidence included unsubstantiated cultural beliefs and myths which do not accord with their own religious beliefs.

[2] The relevant site comprises some 70 hectares known as Tītī-a-Okura, or Tītīokura Saddle, named site MTT88 in the Proposed Plan. Section 16.1 of the Proposed Plan identifies and protects listed wāhi taonga sites from the effects of certain land use activities. It is proposed the MTT88 site will be listed in the Proposed Plan as a wāhi taonga with specific rules applying to the area which restrict activities on the land beyond the restrictions that would usually apply to rural land.

[3] The MTT88 site covers a total area of 70 hectares. Approximately 16.22 hectares of this is located in part of 470 hectares owned by Mr Peter Raikes and Mrs Caroline Raikes. The MTT88 site also covers an adjoining area of land which at the time of the hearing Mr and Mrs Raikes leased and ran as part of the Station. Mr and Mrs Raikes have since bought that adjoining block of land, which amounts to 326 hectares. The MTT88 site also runs across two other properties which are not the subject of this appeal. It is not entirely clear how much of site MTT88 is included in the Station, but it is common ground that it would amount at the very most to approximately 8.45 per cent of Mr and Mrs Raikes presently-held land.[2]

[4] Mr and Mrs Raikes say the Environment Court made a number of errors in its Revised Decision. In particular, Mr and Mrs Raikes say the Environment Court made errors in its assessment and in relying on the cultural evidence adduced at the hearing, as well as failing to take into account their own beliefs. In addition, Mr and Mrs Raikes say that even if it were appropriate to recognise the site as an area of cultural significance, the evidence did not justify recognition of the site to the extent of the area approved on its land. Mr and Mrs Raikes say in this respect that particular cultural activities pointed to, namely tītī (mutton bird) hunting and a historical trail through the saddle, happened within defined areas mainly along the present State Highway (the old Napier-Taupō road) which adjoins Mr and Mrs Raikes' property. They say the evidence relating to any larger area was based on myth and legend which could not be properly substantiated. Mr and Mrs Raikes say that as a result of these errors on the part of the Environment Court, the Revised Decision should be set aside and this Court substitute its own determination.

[5] The provisions of the rules contained in Section 16.1 are not the subject of appeal.

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1 *Maungaharuru-Tangit Trust v Hastings District Council* [2021] NZEnvC 98 [the Revised Decision].

2 At [77]. It is common ground that the Environment Court made an error stating that site MTT88 comprised about 2 per cent of the total farm area, as it failed to account for the proportion of the site which covered part of the adjoining land. I refer to this in more detail below.

Background to this appeal

[6] The Revised Decision followed an interim decision released by the Environment Court on 28 May 2018 (the Interim Decision).[3] The Revised Decision followed the matter having been remitted following successful appeal to the High Court brought by both parties against the earlier Interim Decision of the Environment Court.[4] The parties had agreed that the appeal should be allowed and the matter should be sent back to the Environment Court for further consideration.[5]

[7] The earlier appeal which led to the Revised Decision involved eight sites categorised as wāhi taonga, all of which were the subject of the determination in the Revised Decision.[6] The only subject of this appeal, however, is the MTT88 site insofar as it affects Mr and Mrs Raikes' property.

[8] This appeal is also only concerned with the categorisation of the MTT88 site as a wāhi taonga in the Proposed Plan and its extent. The appeal does not extend to the rules which would apply to MTT88 if it were categorised as a wāhi taonga as determined by the Environment Court. Neither does the appeal extend to any other part of the Proposed Plan, including Section 17.1, relating to landscape and outstanding natural features (a section which I understand is now operative), Section 5.2, relating to Rural Zone Land (which includes the land on which MTT88 is located), or Section 27.1 (which relates to earth works mineral aggregate and hydrocarbon extraction). Therefore, any proposed activities on MTT88 would be subject to those sections, and any restrictions applied under those. However, if MTT88 is included in the Proposed Plan as a wāhi taonga it will also be subject to Section 16.1.[7]

[9] The Hastings District Council (the Council) is the named respondent, in its capacity as the territorial authority responsible for preparing the Plan. It takes a neutral position in relation to this appeal. Ms Davidson for the Council helpfully compiled a number of documents, including the Revised Decision's version of Section 16.1, the cultural provisions of the Proposed Plan with tracked changes recording agreed changes and the rules approved by the Environment Court in both its Interim and Revised Decisions. If MTT88 is confirmed as being wāhi taonga it will be listed as a "Part 4" site and the rules which will apply to MTT88 will be those that refer to Part 4 sites. The documents provided by the Council following the hearing also included a summary of the applicable objectives and policies from the Hawke's Bay Regional Policy Statement and the Hastings District Plan that were addressed in the planning evidence before the Environment Court as well as a table summarising the rules which would apply to the proposed activities within site MTT88 both under the cultural section, Section 16.1 and other sections of the Hastings District Plan.[8]

[10] MTT represents a collective of hapū in northern Hawke's Bay, including Ngāi Tauira, Ngāti Marangatūhetaua (also known as Ngāti Tū), Ngāti Kurumōkihi, Ngāi Te

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3 *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79 [the Interim Decision].

4 *Maungaharuru-Tangitu Trust v Hastings District Council* [2019] NZHC 2576 [the High Court Decision].

5 At [9]. This refers to consent memoranda dated 9 September 2019 and 11 September 2019, which set out the basis upon which the parties had agreed that the appeal should be allowed and the proceedings remitted back to the Environment Court.

6 The Revised Decision, above n 1, at [5].

7 Memorandum of counsel providing documents for Court's assistance, 16 August 2022, prepared and filed with the agreement of all parties at Attachment C, headed "Activities on Site MTT88 if listed as Wāhi Taonga as regulated by Section 16.1 and other sections of the Proposed District Plan".

8 Memorandum of counsel providing documents for Court's assistance, dated 16 August 2022, prepared and filed with the agreement of all parties.

Ruruku ki Tangoio, Ngāti Whakaari and Ngāi Tahu (collectively, the Hapū). MTT is a post-settlement governance entity, established to hold and manage the assets of the Hapū received under settlements of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and to be a representative body for the Hapū. There are approximately 6,000 members registered with MTT.

[11] The traditional area of the Hapū extends from north of the Waikari River to the Waitaha Stream, southwards to Keteketerau. It stretches from Maungaharuru in the west to the coast and beyond Tangitū (the sea) in the east. The history of the Hapū is recorded in a report of Te Rōpū Whakamana i te Tiriti o Waitangi | the Waitangi Tribunal, *The Mohaka ki Ahuriri Report*.[9] As the Waitangi Tribunal ultimately found in their report, the Crown breached the Treaty on many occasions. As a result of the historic actions or inactions of the Crown, the Hapū have suffered the loss of virtually all of their lands and the degradation of their taonga, maunga, places of significance, lakes, rivers and coast.[10]

Background

District plans under the Resource Management Act 1991

[12] Under s 73(1) of the Resource Management Act 1991 (the RMA), there must be at all times one district plan for each district. Section 79(1) provides that the district plan must be reviewed every 10 years.

[13] Under s 74(1)(b), a district plan must be prepared in accordance with the provisions of pt 2 of the RMA. Part 2 includes four sections. Section 5 provides that the purpose of the RMA is "to promote the sustainable management of natural and physical resources". Section 6(e) is of particular relevance to this proceeding. It provides:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

[14] Such persons also, under s 7, "shall have particular regard to — (a) kaitiakitanga" and, under s 8, "shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".

The Proposed District Plan

[15] The previous Hastings District Plan was made operative in 2003. In line with the requirements under s 79(1), the Council notified the Proposed Plan now at issue in November 2013.

[16] The Council says the Proposed Plan achieves s 6(e) in part through Section 16.1 and Appendix 50. Section 16.1 is headed "Wāhi Taonga District Wide Activity". It sets out various provisions including objectives and policies, rules, performance standards and assessment criteria against which applications for consent are assessed. Appendix 50 lists a series of "Wāhi Taonga" sites, which the Plan defines as:

> … a site or area of significance to tangata whenua and includes but is not limited to:
>
> • Old pa sites, excavations and middens (pa tawhito)

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9 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 201, 2004).

10 As the Environment Court also referred to at [38] of the Revised Decision.

- Old burial grounds and caves (ana tupapaku)
- Current cemeteries (urupa)
- Battlefields (wāhi pakanga)
- Sacred rocks, trees or springs (toka tapu, rakau tapu and waipuna tapu)
- Watercourses, springs, swamps, lakes and their edges (awa, waipuna, repo, roto).

[17] Under Rule SLD22 of the Plan, subdivision of land containing a wāhi taonga requires discretionary activity consent. Where a land use is proposed within a wāhi taonga area, Section 16.1 of the Plan applies. In essence, where land contains a wāhi taonga, there are certain extra requirements that have to be satisfied before subdivision and certain land uses are permitted. Section 16.1 applies district-wide regardless of, and in addition to, any underlying zone rules.

[18] When the Proposed Plan was first notified in November 2013, Appendix 50 included 57 sites. None of these sites were on land owned by Mr and Mrs Raikes. MTT then made a submission seeking that an additional 61 sites be included. One of those sites was identified as MTT88-Titī-a-Okura. MTT88 extends over 70 hectares covering four titles, including, as I have described above, one 470-hectare title owned by Mr and Mrs Raikes, to the extent of approximately 16.22 hectares, and to an extent which is unclear into 326-hectares which was leased by Mr and Mrs Raikes at the time of the Environment Court hearing.

First Environment Court appeal

[19] On 21 October 2015, MTT appealed the Council's decision on Section 16.1 to reject as wāhi taonga (either in whole or in part) 29 sites, including MTT88. MTT cross-appealed and challenged the appropriateness of the rules put in place to protect the listed sites.

[20] MTT and the Council went to mediation, which resulted in agreed changes to Section 16.1 and the inclusion of 21 more sites in Appendix 50. When the matter was heard by the Environment Court in March and April 2018, eight sites remained contested, including MTT88. The parties agreed that if the Court confirmed these as wāhi taonga, they should be separately listed in Appendix 50 as a "Part 4", on the basis that (with one exception) they were much larger sites, ranging from 44 to 506 hectares, so should be subject to different rules to those applying to the smaller sites.[11]

[21] By the time of the hearing, the Council and MTT had agreed that all of the unresolved sites, including MTT88, had cultural significance and met the definition of wāhi taonga in the Plan and should be listed as wāhi taonga in Appendix 50. The only issue between them was which rules should apply to these "Part 4" sites. The Council submitted to the Environment Court that as they (generally) affected a greater area of private land, a more permissive approach should be taken for them than smaller sites where the wāhi taonga in question was smaller and so the added restrictions could largely be avoided by landowners.

[22] The Environment Court in its May 2018 Interim Decision determined that all eight sites at issue were wāhi taonga and determined the rules to apply to those sites.[12] While the Court found that MTT88 was a wāhi taonga site, it held the level of protection and control sought by MTT88 overreached what was needed to provide for MTT's relationship with Titī-a-Okura and would impose an unreasonable interference with the rights of the landowners.[13]

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11 There was one smaller unresolved site seven hectares in size.

12 The Interim Decision, above n 3.

13 At [63].

High Court Decision on the Interim Decision

[23] Both Mr and Mrs Raikes and MTT88 appealed the Interim Decision to the High Court. In allowing the appeal and remitting the matter back for determination, the High Court noted the matter came before it in unusual circumstances, as the parties to the Environment Court decision had agreed the High Court appeal should be allowed and the matter remitted to the Environment Court for reconsideration.[14] In that decision Cooke J said:

> [64] The key difficulty with the Environment Court's conclusions is that the Court appears to have proceeded straight to a question of balancing the rights and interests of the private landowners and tāngata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this. The reasoning has a conclusory character, and accordingly it is potentially arbitrary. The circumstances called for a more precise analysis. For those reasons, and the additional reasons identified above, the appeals are allowed.

The Environment Court Revised Decision on appeal

[24] The Environment Court reviewed its decision in light of the High Court's comments.[15] No further evidence was adduced, nor was there any further hearing, but the parties were invited to file further legal submissions. The Court heard submissions only relying on the evidence from the earlier hearing.

[25] The Environment Court in its Revised Decision summarised the High Court's directions as follows:[16]

> [2] In summary, the High Court said:
>
> - The issue was whether the level of proposed protection under the Proposed District Plan was appropriate for the particular sites;
> - What was required was for the reasons set out in the written decision of this Court to demonstrate that the analysis required as a matter of law had been undertaken;
> - It was necessary for this Court to first make what are effectively factual findings on the nature of the wāhi taonga/wāhi tapu status of the particular sites. Importantly, the issues are inherently site specific. Because it includes questions of historical associations with the relevant areas of land there is the potential for uncertainty in relation to the facts. But this Court must do its best based on the evidence that is available. There may not need to be definitive findings on all matters of detail. A degree of uncertainty in this Court's factual findings in relation to the particular sites may be involved.
> - The second related requirement is for this Court to assess, as precisely as possible, how the proposed provisions in the District Plan could potentially adversely affect the wāhi tapu/wāhi taonga sites as recognised by the factual findings.
> - Given that, it is not appropriate for this Court to proceed straight to balancing interests without first engaging specifically with the potential impacts that activities contemplated or controlled by the proposed provisions will have on the wāhi tapu status found to exist. That will likely involve a consideration of particular activities, and the consequences of the proposed provisions.

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14 The High Court Decision, above n 4, at [63].

15 The Revised Decision, above n 1.

16 Footnotes omitted.

- Whilst it is ultimately a matter for this Court, it seemed to the High Court that Policy 64 of the Regional Policy Statement may be of particular moment. It states that "Activities should not have any significant adverse effects on wāhi tapu, or tauranga waka".

[3] The High Court said that the key difficulty with this Court's conclusions is that it appears to have proceeded straight to a question of balancing the rights and interests of the private landowners and tāngata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this.

[4] We have reviewed the decision in the light of the High Court's views, and the further submissions made to this Court after the matter was returned to it. Rather than riddle the new decision with cross-references to aspects of the first decision, we believe it will produce a more coherent document if, on relevant issues, we repeat the substance of the first decision, with, where appropriate, additions and modifications to take account of the High Court's views and the further submissions received.

[26] The Environment Court made decisions in relation to all eight unresolved sites.[17] The appellants' appeal against the recognition of MTT88 is the only outstanding issue in the Proposed Plan.

[27] In its Revised Decision, the Environment Court noted the submission of MTT that Māori are specialists in the tikanga of their hapū or iwi and are best placed to assert their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga.[18]

[28] The Court then traversed the relevant primary and secondary legislation to be considered, including the Coastal Policy Statement as well as the Regional Policy Statement for the Hawkes Bay region, both of which applied to certain or all of the sites in question.[19] The Court noted the provisions of the District Plan, including relevantly Section 16.[20] It said the two agreed Objectives of Section 16 "fundamental to the issues to be resolved" were:[21]

> OBJECTIVE WT01 To recognise Wāhi Tapu and Wāhi Taonga sites and areas in the Hastings District as being of cultural significance to nga hapū through whakapapa and ensure their protection from damage, modification or destruction from land use activities.
>
> OBJECTIVE WT02 To promote the protection of Waahi Tapu and Waahi Taonga sites and areas in a way that accounts for the customary practices of ngā hapū.

[29] The Court also recorded two further settled provisions of the Proposed Plan which were relevant to consider the "*efficient and effective* ways of dealing with the present issues".[22] The first was Objective TW01:

> TW01: The expectations and aspirations of Tangata Whenua with Mana Whenua are acknowledged when making decisions on subdivision, land use and development, and the management of natural and physical resources throughout the Hastings District.

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17 The Revised Decision recognised a number of coastal sites as wāhi taonga which are not the subject of appeal. References to the New Zealand Coastal Policy Statement 2010 are not relevant to this appeal as the policy does not apply in relation to MTT88: see the Revised Decision, above n 1, at [13].

18 At [11], referring to *SKP Inc v Auckland Council* [2018] NZEnvC 86; and *SKP Inc v Auckland Council* [2019] NZHC 900.

19 At [13]-[15].

20 At [18].

21 At [19].

22 At [19] (emphasis in original).

[30] The Court recorded the explanation of this Objective TW01 was:[23]

> The protection of sites of past Māori occupation and use for their cultural and archaeological values will be achieved by putting into place appropriate mechanisms for the Tangata Whenua to be involved in the identification and management of these sites. This also applies throughout the District to areas recognised as taonga or as a source of mahinga kai to the Tangata Whenua, particularly where ngā hapū whānui have the status of kaitiaki of these areas, features and resources.

[31] The second relevant provision was Policy WTP1, to:[24]

> … identify, in consultation with Tāngata Whenua, land within the District which contains Wāhi Taonga.

[32] The Court considered the rules proposed and in general terms the effects the rules would have on those landowners who would be subject to them. It said that the permitted activities under the rules would be "significantly less burdensome" for any farming activity than had been the case in the notified and decision versions of the Proposed Plan.[25] In relation to a restricted discretionary activity application, the focus would be "squarely" on the issues "to which the decision-maker's discretion is solely confined".[26]

[33] The Court narrated the relationship of the Hapū with the relevant sites as follows:

> [37] As noted above the MTT represents a collective of hapū. The whakapapa, from Io (the creator), down to the Māori pantheon of gods through to the *eponymous or source tipuna* (ancestors) of the four hapū associated with MTT, is to be found in the evidence of Mr Bevan Taylor. These stories and whakapapa lay the basis for identifying the relationship of the MTT hapū and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga — see s 6(e).
>
> [38] Prior to 2014, the MTT hapū were engaged in researching, presenting, negotiating and settling their Treaty claims against the Crown. During those proceedings, they contested the purchase by the Crown of several large blocks including the Arapaoanui block and the Moeangiangi block in 1859, and the confiscation of their remaining lands in 1867.[27] MTT finally settled their claims, as recorded in their Deed of Settlement in May 2013, and the settlement was given effect by the Maungaharuru-Tangitū Hapū Claims Settlement Act 2014.
>
> [39] The MTT hapū still see themselves as kaitiaki of all their ancestral lands, although they own only a remnant of them.[28] Ms Tania Hopmans in her evidence addressed how they have attempted to exercise this kaitiakitanga responsibility in recent years before various fora, particularly the Environment Court.[29] As a result of their experience they decided to engage with the Proposed District Plan process.[30]
>
> [40] To engage in this manner, they undertook literature reviews, reviews of research reports, reviews of briefs of evidence from previous litigation, conducted site visits, engaged archaeologists, recorded kaumatua and oral historians, commissioned photographic and mapping projects, held wānanga

23 At [19].

24 At [19].

25 At [20].

26 At [20].

27 Statement of Evidence of Tania Hopmans on behalf of Maungaharuru — Tangitū Trust (7 March 2017) [Statement of Evidence of Ms Hopmans] at [15].

28 At [17]-[21].

29 At [22]-[30].

30 At [35]-[36].

and prepared information files for each site, and provided information to the Hastings District Council and land owners.[31]

[41] They contend, among other matters, that these 8 sites are of significance to them. The extent of the footprints of each site, they contend, must be viewed through their eyes, and with their values and beliefs in mind.[32] Mr Taylor added to his written evidence that the mapping of the sites was set by reference to the natural features of the land, including rocks and streams etc, and bearing in mind the cultural history of the sites. He further claimed that they took into account impacts on landowners.

[42] Thus, their case relies upon the cultural evidence of kaumatua, such as Mr Taylor, the material presented at the Council hearing by the now deceased Mr Fred Reti, and the writings of Te Aturangi Anaru. Mr Pat Parsons also addresses the cultural and historical significance of the eight sites that are involved in this appeal.

[34] The Court then noted in general terms that the s 274 parties to the appeal, as owners of land on or near which the sites in question were situated, were "concerned that they may be affected in various ways by the plan provisions which could restrict, if not outright prevent, various activities on those sites".[33]

[35] The Court discussed the cultural significance generally of the Maungaharuru range, of which MTT88 is a part. This background provides the context for the cultural importance and history of the site now in issue:

The Maungaharuru sites generally

[45] The name *Maungaharuru* is associated with the settlement of the area by those who arrived on the waka *Takitimu*. The commander of the waka was Tamatea-arikinui.[34] He was accompanied by the high priest, or tohunga, Ruawharo and his brother Tūpai.

[46] According to J H Mitchell in the book *Takitimu*, Tūpai was granted the "guardianship of the gods of the heavens and of the whare-wānanga" (house of higher learning).[35] Mitchell records that during the voyage of the waka, Tūpai was the kaitiaki of the sacred symbols of the gods onboard.[36] One of these symbols was Papauma, the representation of birdlife.[37] The record in Mr Reti's material is that:[38]

> … the tohunga Tūpai cast the staff [named] Papauma high into the air. It took flight and landed on the maunga at the summit of Tītī-a-Okura. Papauma embodied the mauri of birdlife. The maunga rumbled and roared on receiving this most sacred of taonga and the maunga was proliferated with birdlife. Hence the name, Maungaharuru (the mountain that rumbled and roared).

[47] Mr Parsons added that the place where Papauma landed was known as Tauwharepapauma. This place is listed in a series of boundary names crossing the

31 At [37].

32 At [38(a)].

33 At [44].

34 Statement of Evidence of Patrick Parsons on behalf of Maungaharuru — Tangitū Trust (6 March 2017) [Statement of Evidence of Mr Parsons] at [39].

35 See discussion at [40].

36 See discussion at [41].

37 Statement of Evidence of Bevan Taylor on behalf of Maungaharuru — Tangitū Trust (6 March 2017) [Statement of Evidence of Mr Taylor] at [27].

38 At [27].

Tītīokura Saddle from the west.[39] Mr Parsons noted that workmen at the Ohurakura mill in the 1940s recalled how prolific the birdlife was in the forest, and the belief of the Māori people that it was the result of the mauri (life force) planted by Tūpai.[40] He concluded that the mountain range was of high spiritual significance.[41]

[48] Mr Taylor advised that, to his people, the top of the mountain is sacred.[42] Their reference to *the mountain* includes, from south to north — Te Waka, Tītī-a-Okura (often abbreviated to Tītīokura) Maungaharuru and the mountain peaks Ahu-o-te-Atua and Tarapōnui and Te Heru-a-Tūreia.[43] MTT hapū reference all areas of the ridgeline as Maungaharuru.[44]

[49] The evidence given was that the mountain range is central to the MTT hapū identity and that it is constantly referenced by those on the paepae at Tangoio Marae down to the tamariki (children) at the kōhanga reo operated from that marae.[45] Maungaharuru peaks and their environs "are integral to the distinct identity and mana of the people". It is described as the "iconic, most sacred and spiritual maunga (mountain) of the Hapū".[46]

[50] Thus the spiritual and cultural importance of the maunga to the hapū is depicted in their art on the marae, in their names, tribal proverbs and symbols, oral history and in their waiata.[47] It is remembered as a major cultural and economic food gathering area epitomised by the whakatauākī (proverb) that encompasses their relationship with their ancestral lands and waters:[48]

> Ka tuwhera a Maungaharuru, ka kati a Tangitū[49] — ka tuwhera a Tangitū, ka kati a Maungaharuru.
>
> When the season of Mangaharuru opens, the season of Tangitū closes — when the season of Tangitū opens, the season of Maungaharuru closes.

[51] The hapū claim that they, with their neighbours, are the tāngata whenua of this region with ahi-kaa-roa (long occupation) making them the holders of mana whenua and kaitiaki over the eastern side of the mountain range to the sea.[50] The mountain is a taonga, we were advised, with its own mauri.[51]

[52] As already noted, the Maungaharuru sites are in the high country to the north and south of what is now generally known as the Tītīokura Saddle, where SH5 (the Napier Taupo Road) crosses and then descends towards the Mohaka River bridge.

[36] In relation to the extent of the proposed wāhi taonga sites, the Court then noted:

[53] In the evidence in chief of Mr Taylor we were advised that the extent of the footprint for the four proposed waahi taonga sites were drawn by him and

39 Statement of Rebuttal Evidence of Patrick Parsons on behalf of the applicant (30 June 2017) [Statement of Rebuttal Evidence of Mr Parsons] at [21].

40 Statement of Evidence of Mr Parsons, above n 34, at [42].

41 At [42].

42 Statement of Evidence of Mr Taylor, above n 37, at [23].

43 At [28].

44 At [23] and Appendix 5 Statement of Association — Peaks of Maungaharuru Range at 30.

45 At [24].

46 At Appendix 5 Statement of Association — Peaks of Maungaharuru Range at 29.

47 At [26(b)-(d)] and Appendix 5 Statement of Association — Peaks of Maungaharuru Range at 29.

48 At [26(a)] and Appendix 5 Statement of Association — Peaks of Maungaharuru Range at 29-32.

49 Tangitū refers to the sea associated with the Hapū.

50 Statement of Evidence of Mr Taylor, above n 37, at [26(a)] and [30] and Appendix 5 Statement of Association — Peaks of Maungaharuru Range at 29-32.

51 At [26] and Appendix 5 Statement of Association — Peaks of Maungaharuru Range at 29-32.

> the late Fred Reti.[52] During the presentation of his evidence he extended that group to include Pat Parsons and Tania Hopmans. Mr Taylor went on to advise that their intent was to capture the extent of the culturally significant features on the mountain range using natural features for mapping the sites …

[37] The Court discussed and reached its conclusions in relation to MTT88 as follows:[53]

> **Site MTT88 Tt-a-Okura (70ha) Tt-a-Okura Saddle**
>
> [63] Following the High Court appeal, all issues (whether the site is wāhi taonga, the extent of site, and the rules to apply) are still live. This is the only site where its identification as wāhi taonga remains in dispute.
>
> [64] We first note the evidence of the Trust relating to this site. Mr Taylor advised in his evidence in Chief that the footprint of this site captures the saddle, including the ridgeline on either side of the saddle. He said that Tītī-a-Okura is sometimes used as the name of the whole mountain range. As noted, it was the evidence for the MTT that Tupai cast his staff, named Papauma, high into the air and it landed on the maunga at the summit of Tītī-a-Okura — and the mountain rumbled and roared and was filled with birdlife.
>
> [65] The area was traditionally favoured for mutton bird hunting and is associated with a chief named Te Mapu, and his son Okura. As Okura grew, he was instructed on, and then became expert in, the skill of hunting these birds. According to Mr Parsons, Te Mapu and his son camped and caught mutton birds in this area and that is how the name Tītī-a-Okura ("the mutton birds of Okura") was derived. The late Mr Fred Reti, in his submission to the Council hearing, noted that Te Mapu and Okura would light fires and the birds would be attracted to the light and become snared in the nets strung across their flight path. Mr Taylor agreed and added, during the presentation of his evidence, that the birds would fly south in the morning and back over the saddle in the evening.
>
> [66] Mr Parsons, in rebuttal evidence, added that he was told by an elder (now deceased) that tītī "penetrated the interior by three well-defined flight paths to their nesting grounds". Tītī-a-Okura was one of those flight paths. To catch the birds, nets were strung across the flight path and bon-fires were lit to attract the birds who would be snared in the nets. Under cross-examination he acknowledged that he did not identify this site as a waahi tapu in his book *In the Shadow of the Waka* and that he referred to a bird snaring site near Te Pohue.
>
> [67] Tītī-a-Okura is also associated with the traditional route from the coast to the interior and, according to Mr Taylor, was the route used from Tangitū to Maungaharuru by his people. That route (or thereabouts) later became the old Taupō Coach Road and is now the pass where State Highway 5 crosses the Maungaharuru range.

[38] Mr and Mrs Raikes had challenged the evidence put forward by MTT88 and the significance of the site to the Hapū. The Court said:

> **Positions of Other Parties**
>
> [70] We first note the position of the s 274 parties who have a particular interest in this site. Mr Peter Raikes and his wife, Mrs Caroline Raikes, own Tītīokura Station, near Te Pohue.
>
> [71] Mr Raikes goes on to critique the matters put forward by the Trust about the significance to Māori of Maungaharuru. He labels them as … *suspect and false in entirety*. He explains that view by regarding traditional Maori lore and related stories and traditions — eg about Ranginui (the Sky Father) and Papatuanuku (the Earth Mother) as being contrary to the Holy Bible, which he believes to be

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52 At [31].

53 Footnotes omitted.

> *divinely inspired* … and as being … *incontestably true and as coming from* … *God's own Word.*
>
> …
>
> [73] In closing, Ms Blomfield, for Mr Raikes, submitted that none of the MTT witnesses could explain how the activities for which resource consents would be required would affect the hapū's relationship with the proposed waahi taonga sites. While acknowledging that Mr Taylor referred to earth works and other activities affecting the mauri of all the maunga sites, thereby destroying the tapu and affecting their relationship with the sites, she submitted that this was stated "in passing" and was not part of his original evidence. Ms Blomfield also queried whether there had been any robust assessment by MTT of the reasonableness of imposing the level of regulation proposed over such large areas of land.
>
> [74] Ms Blomfield further suggested that there were variations and inconsistencies in the manner the evidence was prioritised between Ms Tania Hopkins, Mr Parsons and Mr Taylor. She reiterated her client's position that there was nothing special about the site as bird snaring was an everyday activity as was its use as a travel route. In terms of the story of Tūpai she contended the Court should accord appropriate weight to it being a myth.
>
> [75] Mr Raikes proposes an area of land that would be made available to MTT to "share information about the history of the area and its significance to iwi" (he describes it as a parking bay where motorists can stop, stretch their legs and read about the area's history). Alternatively, he says that site could be recognised as wāhi taonga site MTT88. MTT submits that the area has been chosen not because of its values, but because it is outside the area of proposed windfarm construction. MTT refers to the Raikes' proposal as a "token gesture". The Raikes dispute that.

[39] The Court then said, in a section headed "Discussion":[54]

> [76] We do not wish to be in any way disparaging of Mr Raikes' personal beliefs and religious faith. He is as entitled to those beliefs as Māori are to theirs, and as are the adherents of any other religion or belief system. But Mr Raikes' evidence rather misses the point of s 6(e) of the RMA. What is to be recognised and provided for, as a matter of national importance, is … *the relationship of Maori and <u>their</u> culture and traditions with <u>their</u> … waahi tapu and other taonga* (emphasis added). What Māori regard as *waahi tapu and other taonga* is for them. What the law requires is the recognition of, and provision for, that relationship and neither this Court nor any other RMA decision-maker can dismiss s 6 factors, simply because they may not share the beliefs of Māori, and their traditions and lore.

[40] The Court noted that MTT88 had a total area of approximately 70 hectares, approximately 16.22 hectares of which was on Mr and Mrs Raikes's 470-hectare Station.[55] Mr and Mrs Raikes leased an adjoining 326 hectares. The Court calculated that the extent of the site was approximately two per cent of the total farm area.[56]

[41] The Court noted the concerns of Mr and Mrs Raikes that if the site was subject to the Plan provisions proposed it would allow "only a very limited range of *permitted* activities, with other activities requiring resource consent as *restricted discretionary*

54 Emphasis in original.

55 The Revised Decision, above n 1, at [77].

56 At [77]. The Court's calculation appears to have been reached by taking the 16.22 hectares of the site as a proportion of the total land owned or leased by the Raikes at the time (796 hectares). All parties now accept this calculation was made in error, as it failed to account for the proportion of the site on the part of the station which was on land that was leased.

activities".[57] The Court noted Mr Raikes regarded the proposed assessment criteria as "so broad that an applicant could have no certainty that a resource consent would be forthcoming".[58]

[42] The Court said:

> [78] Speaking of site MTT88 in particular, Mr Raikes acknowledges that it may have been an area used by tangata whenua to capture Tītī (mutton birds) as they flew inland from the sea, but sees that as not, of itself, a factor giving the area unique or special significance, particularly as regards the size of the area sought to be protected … He says also that the significance of the site seems to have emerged only recently, he having been told by a representative of the Trust only 2.5 years ago that there were no sites of significance on the Station's land …

[43] Ultimately, the Court accepted MTT's position that MTT88 should be recognised as a wāhi taonga site and listed in Part 4 of Appendix 50.[59] The Court said:

> [79] We agree that to the MTT hapū the significance of the site is: its location on the ridgeline of the maunga, which is tapu; its shared value between the MTT hapū and Ngāti Hineuru through their common ancestor Okura; its value as a tītī or mutton bird food gathering area, tītī are a taonga bird species; and its value as a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru. The somewhat recent awareness of, or at least the bringing to wider notice of, the value of the area to Māori is not something we regard as lessening credibility or accuracy. Rather it is, we accept, the product of the Trust's recently acquired ability, because of the settlement of its Treaty claims, to research, record and present its history and positions to fora such as this Court.

[44] The Court turned to the rules that should apply to MTT88 as a wāhi taonga. It noted the evidence of Mr Raikes regarding the potential effects on his farming operation if MTT's proposed rules were adopted.[60] The site was used as part of the station for sheep and cattle grazing. Although Mr Raikes did not see a present need for new fencing or farm tracks in the MTT88 site, he noted the possibility that the land may need to be drained, which would require a resource consent for earthworks, and he suggested that future development on the site might include a mini hydro dam on the station, and possibly a wind turbine.[61]

[45] While acknowledging that resource consents for those activities which he suggested might be options for the site would be required in any event, Mr Raikes nevertheless saw the requirements of gaining consent if the site were subject to Section 16.1 as "*significant challenges* for a would-be developer".[62]

[46] The Environment Court concluded:

> [81] Weighing all these matters up we consider that the site is a waahi taonga site but that the evidence suggests that the level of protection and control sought by the Council are sufficient to provide for MTT's relationship with Tītīokura and that their draft rules would be an unreasonable interference with the rights of the land owners. The site is already quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a waahi taonga. In short, we accept the position of MTT and the Council as being appropriate to

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57 At [77] (emphasis in original).

58 At [77].

59 At [79] and [81].

60 At [80].

61 At [80]. In submissions at the appeal hearing counsel for the appellants indicated that Mr and Mrs Raikes were contemplating the profits of such development might go to support charitable purposes aligned with their Christian beliefs.

62 At [80] (emphasis in original).

recognise the significance of the site, without unreasonably restricting other activities. It follows that we do not accept the Raikes' position.

[47] The appellants do not challenge the Environment Court's decision to adopt the rules for the site. This appeal is limited to the determination by the Environment Court that MTT88 was a wāhi taonga site and, in the event that the determination is upheld, that the area of the site should be limited to focal points for particular activities which had been established as occurring in the area, such as the tītī or mutton bird snaring and the path used by the Hapū for the trail over the saddle.

[48] The Revised Decision dealt not only with Tītīokura Saddle but also generally with the area and specifically with a number of other sites in the Maungaharuru range. A number of more general comments made by the Court in this respect are also relevant to the assessment of a site as wāhi taonga. As the Court noted:[63]

> [84] As noted above, in its further submissions following the HC appeal, MTT submits that the differentiation of wāhi taonga sites based on their size, rather than their values, is neither a logical, nor robust, planning approach. MTT submits that wāhi taonga are not limited to a single site or area or "highest points" or "central or focal points". It submits that wāhi taonga need to be viewed holistically, as a whole, and in context. Just as the Court would not identify just the focal or central point of an outstanding natural landscape, it is submitted that just identifying the focal or central point of a wāhi taonga is not appropriate.

[49] When discussing the rights of landowners in relation to the Maungaharuru Peak sites (MTT90 and MTT91) the Court also noted that, in relation to the Council rules, they would not unreasonably restrict:[64]

> … realistic uses of the land in question. It needs to be borne in mind, in considering that issue, that the Rules not [sic] create an absolute ban on any activity: — it will always be possible to seek resource consent if some possible activity appears over the horizon that is outside the limits of the Rules.

Grounds of appeal

[50] The Amended Notice of Appeal filed by the appellant raises seven questions of law:

(a) *Question 1*: Did the Court fail to consider and properly apply relevant law and case law about the critical assessment a decision-maker should apply to evidence given by a party asserting a relationship with a site that should be recognised and provided for under s 6(e)?

(b) *Question 2*: Did the Court err in its consideration and application of s 13 of the New Zealand Bill of Rights Act 1990 (the NZBORA)?

(c) *Question 3*: Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusion at [76] (that what Maori regard as waahi tapu and other taonga is for them)?[65]

(d) *Question 4*: Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at [79]?[66]

(e) *Question 5*: Did the Court take into account a matter which it should not have taken into account when it considered the proportion of the total farm

63 In the course of a discussion concerning sites MTT90 and MTT91 Maungaharuru Peaks — Tarapōnui and Ahu-o-te-Atua (footnotes omitted).

64 At [105].

65 Paragraph [76] of the Revised Decision refers to s 6(e) of the Resource Management Act 1991, which deals with the relationship of Māori and their culture and traditions with wahi tapu and other taonga.

66 Paragraph [79] of the Revised Decision is a summary of the cultural issues, the cultural significance of the site to the MTT hapū and its evidence which the Environment Court says it accepts.

area owned or leased by the appellants affected by proposed site MTT88?

(f) *Question 6*: Was the Court's calculation of that proportion correct?

(g) *Question 7*: Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at [81] on the extent and boundary of proposed site MTT88?[67]

Submissions and material filed by the appellants following the hearing

[51] Following the hearing, at my request the parties by consent provided some information concerning the relevant plans, policies and rules.

[52] Separately from this, however, the appellants also filed a further memorandum on 9 September 2022. It included Attachments A, B and C, being photographs and sketch plans, and Attachment E, which included new submissions on the part of the appellants.[68]

[53] I had the benefit of full written and oral submissions from the appellants. It is inappropriate for me to accept the filing of further submissions which appear merely to expand on the arguments made at the hearing. The other parties have had no chance to respond, nor was leave granted for the filing of these further submissions.

[54] Accordingly, I do not take the additional attachments and further submissions annexed to the appellants' memorandum of 9 September 2022 into account.

Positions of the parties

Appellants' submissions

[55] Mr and Mrs Raikes submit that the Environment Court cannot divest itself of its judicial functions to determine whether an area is wāhi taonga simply because Māori claim it is culturally significant to them. They say the Court could not uncritically accept assertions made by witnesses for MTT but had to determine whether the evidence probatively established the existence of a wāhi taonga site and the extent of its boundaries.

[56] The appellants say the Environment Court failed to critically evaluate the evidence put before it by the parties. In so doing, the Environment Court failed to apply relevant case law. This meant the Raikes' evidence was dismissed or discounted as immaterial to the case.

[57] The appellants also say the Environment Court erred in that it did not separately consider the extent of the wāhi taonga site or the evidence from MTT about how the boundary for that site had been drawn. The appellants say the circumstances here, recalling the words of Cooke J in the High Court Decision, "called for a more precise analysis".[69] In addition, they say the Environment Court "jumped" a step and, having concluded there was sufficient evidence to establish a wāhi taonga in the vicinity, "jumped" directly to consider which rules should apply to the site. This, Mr and Mrs Raikes say, renders the Environment Court's ultimate conclusions "questionable".

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67 Paragraph [81] of the Revised Decision refers to the site being already "quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a Wāhi Taonga". The Court went on to accept the position of MTT and the Council as being appropriate to "recognise the significance of the site, without unreasonably restricting other activities". It indicated it did not accept Mr and Mrs Raikes's position.

68 Attachment D comprised the full Notes of Evidence from the Environment Court hearing.

69 The High Court Decision, above n 4, at [64].

[58] The appellants submit that the Revised Decision still contains insufficient reasoning to enable them, as landowners affected by the decision, to understand *why* that decision was made and whether it is lawful. They say:[70]

> If unwanted controls are to be placed on [their] land, based on others' beliefs, that decision should be made in a careful and considered fashion after a proper assessment of all of the evidence, and in a manner consistent with NZBORA.

[59] Mr and Mrs Raikes say the Environment Court made material errors of law in its Revised Decision. They submit that this Court should allow the appeal and set aside the decision of the Environment Court that the 70-hectare site MTT88 is wāhi taonga. Their "strong preference" is that this Court substitute its own decision rather than remitting the matter back to the Environment Court. The appellants say the case has been remitted back to the Environment Court once already, and the direction from the High Court to provide reasons demonstrating that a proper analysis was taken was not followed in the Revised Decision now on appeal.

Respondent's submissions

[60] The Council, in its capacity as the territorial authority responsible for preparing the Plan, takes a neutral position in relation to whether any of the errors of law alleged have been made out.

[61] However, although it is neutral as to the Court's conclusion on this point, if the Court finds there were material errors of law made, the Council supports the appellants' position that the High Court should substitute its own decision rather than remit the case for rehearing in the Environment Court. This is said to be in the interests of bringing some finality to this matter and allowing the Plan to become fully operative as soon as possible.

MTT's submissions

[62] MTT, as an interested party, submits that the alleged errors of law cannot be supported and that the Revised Decision should stand.

[63] The Trust says the Court recorded and properly assessed the cultural evidence. This was sufficient to enable the finding that the site was wāhi taonga. MTT says an appeal to the High Court on a matter of law does not present an opportunity for reconsidering the weight to be given to evidence, unless the conclusion reached by the Environment Court was clearly insupportable, which the Trust says it was not.

[64] In relation to s 13 of the NZBORA, MTT emphasises the importance of s 6(e) of the RMA (providing for the relationship of Māori and their culture and traditions) and argues the Canadian case law relied on by the appellants on this aspect is not on point.

[65] MTT says while the Court was not required to give more detailed reasons, nor refer to and analyse all of the cases cited by the parties, in any case the Court undertook a proper analysis, included a clear summary of the relevant evidence of both MTT and of Mr and Mrs Raikes, and applied the appropriate legal principles.

[66] MTT accepts the Court made an error in its calculation of the proportion of the Raikes' land over which the site extends, but says the Court did not rely on this calculation, nor was it material to the decisions it made. MTT says it is the relationships the Hapū have with the site that should determine the extent of wāhi taonga, not what may be convenient or acceptable to private landowners. The size of the site merely reflects the area subject to those relationships.

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70 Submissions for the Appellants, 25 March 2022, at [70].

[67] Finally, MTT says that even if this Court finds the errors of law alleged to be made out, they were not material to the Court's ultimate determination. This is because the evidence did clearly support a finding that MTT88 is a wāhi taonga to the Hapū.

Appeal on question of law

[68] Under s 299 of the RMA, a party may appeal from Te Kōti Taiao | the Environment Court to Te Kōti Matua | the High Court on a question of law.[71]

[69] Te Kōti Mana Nui | the Supreme Court summarised what amounts to a question of law for appeal purposes in *Bryson v Three Foot Six Ltd*,[72] which has since been applied in an RMA context.[73] There will be an error of law where the Court:

(a) Applied a wrong legal test;[74]

(b) Reached a factual finding that was "so insupportable — so clearly untenable — as to amount to an error of law";[75]

(c) Came to a conclusion that it could not reasonably have reached on the evidence before it;[76]

(d) Took into account irrelevant matters;[77] or

(e) Failed to take into account matters that it should have considered.[78]

[70] An appeal on a question of law is not a general appeal and it is not the role of a Court on appeal on a question of law "to undertake a broad reappraisal of the [lower tribunal or Court's] factual finding or the exercise of its evaluative judgments".[79] The onus is on the appellant to establish an error of law.[80] The error of law must be a material error which impacts the final result reached by the Environment Court before the High Court will grant relief.[81]

[71] It must generally be the want of evidence rather than the weight of evidence that will support a ground of appeal based on factual errors said to constitute an error of law.[82] The weight the Environment Court chooses to give relevant evidence is a matter for it. That evaluation should not be reconsidered as a question of law and the merits of the case dressed up as an error of law will not be considered. Planning and resource management policies are matters that will not be considered by the appellate court.[83]

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71 The High Court recently retierated the principles relevant to an appeal under s 299 in *Speargrass Holdings Ltd v Van Brandenburg* [2021] NZHC 3391, (2021) 23 ELRNZ 454 at [110]-[116].

72 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]-[27], confirmed in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

73 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619, (2005) 12 ELRNZ 157 (CA) at [198].

74 *Bryson v Three Foot Six Ltd*, above n 72, at [24].

75 At [26].

76 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 157.

77 *May v May* (1982) 1 NZFLR 165 (CA) at 170.

78 At 170.

79 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [112].

80 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC) at 159; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202 at [30]; and *Speargrass Holdings Ltd v Van Brandenburg*, above n 71, at [116].

81 *Speargrass Holdings Ltd v Van Brandenburg*, above n 71, at [115]; and see *Hutt City Council v Mico Wakefield Ltd* [1995] NZRMA 169 (HC); and *Royal Forest & Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81-82.

82 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 80, at [37].

83 *Poutama Charitable Trust v Taranaki Regional Council*, above n 80, at [39].

[72] That is not to say that a question about facts in the evidence or inferences in conclusions drawn from them by the decision-maker may not sometimes amount to a question of law. A mere allegation of a lack of factual basis or incorrect or inappropriate inferences or conclusions will not turn an issue of fact into a question of law.[84]

[73] When determining planning questions, deference to expertise where appropriate must be accorded to the Environment Court as a specialist court and the expert tribunal.[85] The Environment Court's decision will often depend on "planning, logic and experience, and not necessarily evidence".[86] In *Guardians of Paku Bay Assoc Inc v Waikato Regional Council*, the High Court noted that no question of law arose from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and that the weight to be attached to the particular planning policy will generally be for the Environment Court.[87] As the Court said in *Countdown Properties (Northlands) Ltd v Dunedin City Council*, the Environment Court "should be given some latitude in reaching findings of fact within its areas of expertise".[88] And in *Moriarty v North Shore City Council*, the Court held that the weight to be afforded to relevant considerations is a question for the Environment Court.[89]

[74] The High Court has indicated the appeal provision under s 299 "indicates a decision by the legislature to leave the factual decision making to the Environment Court and for that decision making to not be revisited on an appeal".[90] This is because of the specialist nature of the Environment Court and its members with expertise in particular disciplines.[91]

[75] The High Court has recognised that a Judge of this Court is not equipped to revisit the merits of a determination made by a specialist Court on a subject within its sphere of expertise.[92] In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, Kós J cited with approval the statement of Harrison J in *McGregor v Rodney District Council* that:[93]

> … [t]o succeed on appeal an aggrieved party must prove that the Court erred in law — never an easy burden where the presiding Judge has unique familiarity with the statute governing the Court's jurisdiction.

Statutory framework for Plan appeals

[76] An appeal in respect of a district plan prepared pursuant to the RMA requires consideration of the following obligations on a local authority:

(a) To prepare the Proposed Plan in accordance with the provisions of pt 2 of the RMA,[94] which include:

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84 At [34], citing *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 (HC) at 127.

85 At [42].

86 *Guardians of Paku Bay Assoc Inc v Waikato Regional Council* [2012] 1 NZLR 271, (2011) 16 ELRNZ 544 (HC) at [33].

87 At [33].

88 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 76, at 157.

89 *Moriarty v North Shore City Council*, above n 82, at 437.

90 *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].

91 At [28].

92 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, (2013) 17 ELRNZ 652 at [28].

93 *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [1], cited in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, above n 92, at [28].

94 Resource Management Act 1991, s 74(1)(b).

(i) Section 6(e) — to recognise and provide for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga";

(ii) Section 6(f) — to recognise and provide for "historic heritage", the definition of which means "those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities", including "cultural", and includes "sites of significance to Māori, including wāhi tapu";[95]

(iii) Section 7(a) — to have particular regard to kaitiakitanga;

(iv) Section 8 — to take into account the principles of Te Tiriti o Waitangi | the Treaty of Waitangi;

(b) To give effect to any national policy statement, coastal policy statement and regional policy statement;[96]

(c) To ensure that the policies implement the objectives, and the rules are to implement the policies;[97]

(d) To have regard to the actual or potential effects on the environment when making rules;[98] and

(e) To examine each policy, method or rule, having regard to its efficiency and effectiveness as to whether it is the most appropriate method for achieving the objectives of the district plan.[99]

[77] Section 17.1 of the Proposed Plan deals with Natural Features and Landscapes. The definition of Outstanding Natural Features and Landscapes includes:[100]

> Mana Whenua Values
>
> Natural Features and Landscapes are clearly special or widely known and exceptionally influenced by their connection to the Māori values inherent in the place.
>
> Historical Associations
>
> Natural Features and Landscapes are clearly and widely known and exceptionally influenced by their connection to the historical values inherent in the place.

[78] Under Objective LSO 1 such outstanding Natural Features and Landscapes are identified and "are protected from inappropriate subdivision, use, and development".

[79] Section 3 of the Proposed Plan — tangata whenua and mana whenua reads as follows. Objective TW01 provides that:

> The expectations and aspirations of Tangata Whenua with Mana Whenua are encouraged when making decisions on subdivision, land use and development, and the management of natural and physical resources throughout the Hastings District Council.

[80] These particular references to the significance of cultural issues and listening to tangata whenua given further weight to the appropriate recognition of wāhi taonga. No appeal has been lodged against those provisions.

The Environment Court's determination of the site as a wāhi taonga

[81] The first four questions raised by the appellants in their amended notice of appeal relate to whether, in determining that the site was a wāhi taonga, the Court properly assessed the cultural evidence, applied the correct legal principles, considered

95 Section 2 definition of "historic heritage".

96 Section 75(3).

97 Sections 75(1) and 76(1).

98 Section 76(3).

99 Section 32.

100 *Proposed Hastings District Plan*, Section 17.1 — Natural Features and Landscapes Policy LSP 1.

the application of s 13 of the NZBORA relating to religious freedom and gave sufficient reasons for its conclusions. These matters overlap. I therefore deal with them together.

The Environment Court's approach to cultural evidence

[82] Mr and Mrs Raikes say they were in no position to provide opposing cultural evidence but nevertheless the Court should have taken proper account of the case law that was cited to it by the appellants. The appellants further say that the Court did not undertake a robust analysis of the evidence, nor did it provide proper reasons for accepting the evidence of MTT. They say the Environment Court uncritically accepted the evidence of MTT as mana whenua without running a "ruler" over it, in a situation where mana whenua were giving evidence in their own cause.

[83] In addition, the appellants say that the cultural evidence given by MTT's witnesses in part related to cultural beliefs that were unable to be substantiated and included mere beliefs which were contradictory to the Christian beliefs and culture of the appellants.

[84] Mr and Mrs Raikes submitted that the Environment Court did not confine the site to the particular area of specific activity on which tītī (mutton bird) hunting occurred or to the line of the trail or path Māori seasonally used, which is now located on the State Highway (the Napier-Taupō road).

[85] Three witnesses gave evidence relating to cultural issues. Mr Bevan Taylor gave evidence as to the research he had undertaken on his hapū and that he had learnt from kaumātua.[101] He gave evidence as to the whakapapa from its very beginning to the eponymous or source tīpuna of the hapū concerned.[102] Mr Taylor said he was able to speak on behalf of all of the hapū and set out the whakapapa in an appendix to his evidence.[103] He said he gave his evidence based on kōrero tuku iho, having received the kōrero through many of the old people and through research undertaken for the claims and settlement negotiations for the hapū.[104] Secondly, he was given the rakau (a tokotoko) by the old people about 1992-1993 to speak on behalf of Tangoio Marae and all of the hapū.[105] Mr Taylor said the rakau acknowledged prominent leadership within the hapū and that the person holding it has the first and last word for the hapū.[106] Mr Taylor said it was his duty to safeguard the tikanga, the kōrero tuku iho and the taonga of the hapū, and that was why he was giving his evidence.[107]

[86] Ms Tania Hopmans also gave evidence.[108] Ms Hopmans has a law degree and practised as a solicitor for some time. She has advised iwi groups and Treaty settlement negotiations with the Crown. In 1992, Ms Hopmans was an original claimant for the hapū based on raupatu of their lands by the Crown, and had been the lead negotiator, along with Mr Taylor, in the subsequent negotiations with the Crown.[109] Ms Hopmans had held governance positions with Maungaharuru-Tangitū Inc, the predecessor to MTT. She gave evidence of her whakapapa to the hapū. Ms Hopmans noted that the documented historical evidence in relation to the hapū and sites of significance was rare because their land was never properly

101 Statement of Evidence of Mr Taylor, above n 37, at [6].
102 At [14].
103 At [14].
104 At [18].
105 At [18(b)].
106 At [18(b)].
107 At [18(b)].
108 Statement of Evidence of Ms Hopmans, above n 27.
109 At [6]-[8].

investigated by the Native Land Court or an independent authority, as a result of the raupatu and other actions of the Crown.[110] Therefore, the history and knowledge about the association with the various sites was largely kōrero tuku iho, told from one generation to the other.[111] Ms Hopmans stated that historical evidence was also gained in preparation for the Waitangi Tribunal hearings and settlement negotiations with the Crown, when the hapū commissioned research about the history and kōrero from the kaumātua, many of whom have since passed away.[112] Ms Hopmans noted "the landscape is our history book, every feature tells a story".[113]

[87] Ms Hopmans said the Trust had spent considerable time, effort and its own resources to collect information about their sites of significance over several years through various methods, including identification of relevant land, interviews with kaumātua, taking GPS coordinates of various features on site, coordinating archaeologists to visit and report on archaeological remains, and obtaining high quality photographs of the sites and their environs.[114] This involved preparing information files for each site.[115] In addition, Ms Hopmans attached to her evidence statements of association[116] referring to Tītī-a-Okura being the pass where tītī (mutton birds) flew over Maungaharuru and where Te Mapu and his son Te Okura caught tītī there using a net attached between two poles held high by them in front of a fire. Ms Hopman's evidence also included reference to the evidence of kaumātua evidence given previously before courts and tribunals by the late Mr Fred Reti confirming the evidence of Mr Taylor in relation to the Maungaharuru sites generally.

[88] Ms Diane Lucas, a landscape architect, also gave evidence.[117] Ms Lucas referred to the areas of the wāhi taonga sites. She did not herself determine where the boundaries for the proposed wāhi taonga sites should lie but she had considered the boundaries that had been drawn by other people in order to assess their appropriateness.

[89] Ms Lucas noted that the wāhi taonga site of Tītī-a-Okura was almost all within ONFL6.[118] She further noted the area had a long tradition of being occupied and in the past utilised for the annual tītī harvest.[119] Ms Lucas said "the recognition of the land formed feature as delineated as Wāhi Taonga" was in her opinion "appropriate".[120]

[90] Ms Lucas noted that the delineated extent of the area sought by MTT made sense as "legible cultural units of the mountain and coastal landscapes bookends" the rohe. The sites sought made sense collectively and individually, she said.[121]

[91] "Legible" is defined in the Hawke's Bay Regional Resource Management Plan by reference to expressiveness as follows:[122]

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110 At [31].

111 At [31].

112 At [32].

113 At [32].

114 At [37].

115 At [37] and at [48]-[51] specifically relating to the MTT88 site.

116 The Statements of Association were attached to the Deeds of Settlement with the Crown and attached to Ms Hopmans' Evidence in Chief in the Environment Court.

117 Statement of Evidence of Diane Lucas (Landscape Planning) on behalf of Maungaharuru-Tangitū Trust (8 March 2017) [Statement of Evidence of Ms Lucas].

118 At [64].

119 At [63].

120 At [63].

121 At [5].

122 No appeal has been lodged to that part of the Plan and therefore it will become operative.

> Expressiveness (Legibility)
>
> Natural features and landscapes clearly demonstrate the natural processes that formed them. Exceptional examples of natural process and landscape exemplify the particular process that formed that landscape.[123] Relating to the identification and recognition of the District's Outstanding Natural Features and Landscapes by various criteria factors, values and associations.

[92] In relation to Tītī-a-Okura (MTT88), Ms Lucas noted the range of Maungaharuru involved a distinctive saddle between inland and coastal country with a ridge pattern through the saddle.[124] As Ms Lucas noted, Tītī-a-Okura had long provided the coast to inland route through the Maungaharuru range, and that saddle was highly legible "from out at the coast".[125]

[93] The Environment Court summarised its reasons for accepting the cultural evidence of MTT and recognising the site as follows:

> [79] We agree that to the MTT hapū the significance of the site is: its location on the ridgeline of the maunga, which is tapu; its shared value between the MTT hapū and Ngāti Hineuru through their common ancestor Okura; its value as a tītī or mutton bird food gathering area, tītī are a taonga bird species; and its value as a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru. The somewhat recent awareness of, or at least the bringing to wider notice of, the value of the area to Māori is not something we regard as lessening credibility or accuracy. Rather it is, we accept, the product of the Trust's recently acquired ability, because of the settlement of its Treaty claims, to research, record and present its history and positions to fora such as this Court.

[94] As I have set out at [33] and [35]-[36], the Environment Court related the cultural evidence before it, and based its analysis on that evidence, as well as the further evidence relating specifically to the MTT88 site as I have referred to above at [37].

[95] In relation to the significance of this site and its shared value between MTT hapū and Ngāti Hineuru through their common ancestor Okura, the Environment Court referred to the whakapapa evidence given by Mr Taylor as a basis for this finding.[126]

[96] The Court also referred to the evidence in relation to the site's location on the ridgeline of the maunga, which is tapu. The association with Maungaharuru was through settlement by those who arrived on the waka *Takitimu*. The cultural evidence was that Tūpai, a tohunga who was the kaitiaki of the sacred symbols of the gods onboard the waka, threw the staff, named Papauma, and it landed at the summit of Tītī-a-Okura. Papauma embodied the mauri of birdlife and:[127]

> … [t]he maunga rumbled and roared on receiving this most sacred of taonga and the maunga was proliferated with birdlife. Hence the name, Maungaharuru (the mountain that rumbled and roared).

[97] The prolific birdlife in the forest was therefore said to be the result of the mauri (life force) planted by Tūpai.[128]

[98] The value of the site as a hunting area for tītī (mutton bird), a taonga bird species, was well-established on the evidence before the Court that I have referred to above. In response, Mr Raikes acknowledged it may have been used as an area by

123 The Proposed Plan, Section 17.1 — Natural Features and Landscapes Policy LSP1.

124 Statement of Evidence of Ms Lucas, above n 117, at [60].

125 At [61].

126 The Revised Decision, above n 1, at [37]-[43].

127 At [46].

128 At [47].

tangata whenua to capture tītī but he considered that was not a factor by itself giving the area unique or special significance, particularly in relation to the size of the area sought to be protected.[129] The Court acknowledged that it "must accept" the area was not unique in the sense of being an area in which birds were snared.[130] However, it noted the significance "might though be in the name, which would suggest that it was somewhat out of the ordinary".[131] The Court noted this was "a matter to be considered along with the remainder of the evidence".[132]

[99] The Environment Court also described evidence in relation to the hunting of these birds. In particular, the Court noted the evidence that Te Mapu and his son Okura camped and caught the birds in the area, and the fact the birds would fly south in the morning and back over the saddle in the evening.[133] Further evidence the Environment Court referred to in support of its determination was that the saddle area was a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru.[134]

[100] Mr Raikes says, pointing out that Mr Parsons accepted in cross-examination that the mutton birds would likely fly low over the saddle where they were caught, that if the site was to be designated as a wāhi taonga area, it should therefore be limited to this saddle, which is now the line of the State Highway.

[101] However, the arguments that recognition should be confined to the line of particular activities overlooks the fact that the occupation would not be limited to those lines and the evidence supported a wider recognition across the area delineated by the kaumātua and supported by the landscape evidence.

[102] Overall, it is clear the Environment Court referred to and assessed the relevant cultural evidence before it in making its determinations. I turn to assess whether that evidence supported the determinations below.

The Environment Court's application of relevant law and case law in its assessment of the cultural evidence

[103] Ms Blomfield for the appellants submitted that the Environment Court did not refer to relevant cases, nor did it apply the appropriate principles, when it assessed the cultural evidence, which assessment it then relied on to reach its conclusions. Ms Blomfield points to a number of cases in this respect, which I now turn to consider.

[104] In *Heybridge Developments Ltd v Bay of Plenty Regional Council*, the Environment Court had concluded that the iwi held a genuine belief that their founding ancestor (Tutereinga) might be buried on a site on which Heybridge sought consent to develop.[135] The Environment Court heard conflicting cultural evidence on the issue.[136] It found it was unable to conclude that the site did contain the actual burial site of Tutereinga, which was the same conclusion the Environment Court had earlier reached in relation to that site.[137] Nevertheless, the Environment Court found that the iwi had "honest belief" that Tutereinga was buried there, despite evidence to

129 At [78].

130 At [78].

131 At [78].

132 At [78].

133 At [65]-[66].

134 At [69] and [79].

135 *Heybridge Developments Ltd v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593 (HC) at [19].

136 At [35], quoting the Environment Court decision (*Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 [the *Heybridge* Environment Court decision]) at [59].

137 At [36], quoting the *Heybridge* Environment Court decision at [47], and at [46], quoting the *Heybridge* Environment Court decision at [71].

the contrary, and the possibility of such burial had not been disproved.[138] The Court went on to say that s 6(e) of the RMA imposed an obligation to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands and other taonga.[139] However, the Environment Court held that, in the absence of detailed submissions before it on the issue, such an obligation did not extend to providing for a relationship "which is founded on a belief, no matter how genuinely held".[140] On appeal, the High Court found that the difficulty with the Environment Court's approach was that it had already found there was insufficient evidence that Tutereinga had been buried on the site and that the site was wāhi taonga.[141] Therefore, the Environment Court had in fact sought to impose an onus on the appellant to disprove the belief of the iwi, and that was an error of law.[142] The High Court noted that a party who asserts a fact "bears the evidential onus of establishing that fact by adducing sufficiently probative evidence". The Court noted "[t]he existence of a fact is not established by an honest belief", and found that the Environment Court had erred as a matter of law in this respect.[143]

[105] The second case to which the appellant referred in this line of argument was *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*.[144] The particular proposition for which this was cited was that while s 6(e) of the RMA requires the relationship of Māori and the culture and traditions with their ancestral sites, wāhi tapu and other taonga be provided for, the weaker the relationship, the less it needs to be provided for.[145] In that decision, the Environment Court went on to develop what was subsequently referred to as the "rule of reason" approach in order to assess cultural evidence, which has been applied with approval in the High Court.[146] The Court described that approach as follows:[147]

> [53] That "rule of reason" approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):
>
> - whether the values correlate with physical features of the world (places, people);
> - people's explanations of their values and their traditions;
> - whether there is external evidence (e.g Maori Land Court Minutes) or corroborating information (e.g waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value-holders;
> - the internal consistency of people's explanations (whether there are contradictions);
> - the coherence of those values with others;
> - how widely the beliefs are expressed and held.

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138 At [51]-[53], quoting the *Heybridge* Environment Court decision at [120] and [125]-[126].

139 At [52].

140 At [55].

141 At [56].

142 At [57].

143 At [51].

144 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvC).

145 At [45].

146 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 80, at [106]; and *Ngāti Maru Trust v Ngāti Whātua Orākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352, (2020) 22 ELRNZ 110 at [64] and [116]-[117].

147 Footnotes omitted.

> In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are "rules" as to how to weigh or assess evidence.

[106] The appellant also cited the decision of the Environment Court in *Serenella Holdings Ltd v Rodney District Council* as authority for the submission that matters of national importance in s 6(e) of the RMA that are to be recognised and provided for "should not generally include everyday activities" with the consequence of preventing new endeavours on the land.[148] In that decision the Court was required to consider cultural evidence from a number of witnesses. As a matter of fact the Court found that it might have been possible that there were burials under the extensive sand dunes (as was contended) but the evidence did not provide a basis for that.[149] It was not consistent as to the area in question and the archaeological assumptions were flawed.[150] In addition, the geological and geomorphological evidence did not support the allegations about the presence of graves.[151] It also considered that it was doubtful that the site had been used traditionally for singing and speeches as alleged.[152] It found that the relationship had been eroded and was of insufficient importance to require consent authorities to recognise and provide for it as a matter of national importance.[153] Therefore the Environment Court found as a fact that the site proposed for sand mining was not wāhi tapu and therefore there was no requirement to recognise and provide for such under s 6(e) of the RMA.[154] It is apparent that the findings in *Serenella* were intensely fact-specific and based on contested cultural evidence which the Court found did not establish the basis for the claim of wāhi tapu. Nevertheless, the Court recognised the principle of kaitianga under s 7(a) of the RMA and imposed appropriate protocols as conditions.[155]

[107] The appellants also cited the High Court's decision in *Gock v Auckland Council* for the proposition that the RMA does not confer on tangata whenua or kaitiaki a power of veto over use or development of natural and physical resources in their area.[156] As the Court said:[157]

> … That is for the stated reason that the Court acts as arbiter for the community as a whole so that although Māori views are important they will not in every case prevail.

[108] The appellants also referred to *Winstone Aggregates Ltd v Franklin District Council* to the effect that although as a general principle identification of wāhi tapu is a matter for tangata whenua, as the Court cautioned:[158]

> … claims of waahi tapu must be objectively established, not merely asserted. There needs to be material of a [probative] value which satisfies us on the balance of probabilities. We as a Court need to feel persuaded that the assertion is correct.

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148 *Serenella Holdings Ltd v Rodney District Council* EnvC Tāmaki Makaurau | Auckland A100\2004, 30 Hurae | July 2004 at [106].

149 At [105].

150 At [100].

151 At [100].

152 At [103].

153 At [103]-[106].

154 At [100] and [102].

155 At [108].

156 *Gock v Auckland Council* [2019] NZHC 276, (2019) 21 ELRNZ 1.

157 At [117].

158 *Winstone Aggregates Ltd v Franklin District Council* EnvC Tāmaki Makaurau | Auckland A80/02, 17 Āperira | April 2002 at [251].

[109] In that case the Court, referring to the decision in *Te Rohe Potae o Matangirau Trust v Northland Regional Council*, found that "[g]eneral evidence of waahi tapu over a wide and undefined area … was not probative of a claim that waahi tapu existed on a specific site".[159]

[110] In *Takamore Trustees v Kapiti Coast District Council*, the Environment Court had rejected evidence of the cultural witnesses, including kaumātua, as being insufficiently specific concerning the presence of kōiwi in swamplands.[160] The Environment Court made a number of criticisms of the evidence, saying it was, among other things, "sparse" and "not geographically precise".[161] The High Court, however, said the approach of the Environment Court was in error as evidence was available, albeit given by kaumātua based on the oral history of the tribe.[162] Ronald Young J said:

> [68] The Court complains about a lack of "back-up history" or "tradition". Again, it is difficult to understand what this means. Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence? The Court complained it was bereft of "evidence" and had "assertion" only of the presence of koiwi. The evidence was given by kaumatua based on the oral history of the tribe. What more could be done from their perspective? The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area. To require a precise location of burial in such circumstances before satisfaction with the evidence is to potentially reduce many claims of waahi tapu areas to unproven and reduce ss 6(e), 7 and 8 matters accordingly. If the test applied to koiwi presence by the Court was also applied to the presence of taonga, the Court would have logically been required to find their presence not proved. The fact it did not seems difficult to understand.
>
> [69] Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the kaumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

[111] Mr and Mrs Raikes submitted in general terms that there was no critical assessment or evaluation of the evidence of MTT's witnesses in the Revised Decision on appeal. The Court had merely summarised the Trust's evidence and then reached conclusions uncritically on that evidence. I now turn to consider the particular issues in relation to the evidence that the appellants raised.

[112] The first issue relates to the standard of proof required when considering issues of tikanga Māori. On this point, in *Ngāti Whātua Orākei Trust v Attorney-General (No 4)* Palmer J stated:[163]

> [390] I doubt there is much practical difference between proving on the balance of probabilities that a consensus exists in an iwi or hapū about tikanga, and a court simply being satisfied of that. The crucial point is that the finding expressed by the Court is effectively about tikanga as determined by the iwi or hapū.

159 At [252], citing *Te Rohe Potae o Matangirau Trust v Northland Regional Council* EnvC Whangarei A107/96, 22 November 1996.

160 *Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti Coast District Council* (2002) 8 ELRNZ 265 (EnvC).

161 At [80] and [83].

162 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [67].

163 *Ngāti Whātua Orākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

[113] An analysis of the burden of proof is not particularly useful in this context. The Court must be satisfied based on the evidence before it. The appropriate approach has been approved in terms of "the rule of reason" previously adopted by this Court, which allows the Court some flexibility in its analysis.

[114] In this case the Environment Court had sufficient evidence before it on which to reach its decision. The fact that the evidence was in part based on hearsay, opinion and oral statements and whakapapa does not make it inadmissible. In *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, the Environment Court said:[164]

> … Maori generally, have a culture in which oral statements are the accepted method of discourse on serious issues, and statements of whakapapa are very important as connecting individuals to their land. In the absence of other evidence from experts on tikanga Maori, the evidence of tangata whenua must be given some weight (and in appropriate cases considerable, perhaps even determinative, weight). In the end the weight to be given to the evidence in any case is unique to that case.

[115] In one sense the cultural could be described as biased in the legal sense, in that the witnesses were giving evidence in support of MTT's case to recognise the site. However, the cultural evidence was given by witnesses who were themselves qualified experts. It was consistent and drew on whakapapa, stories handed down in the oral tradition and records of earlier evidence of kaumātua as well as other research. In assessing the evidence, the Court will look at all the evidence, including, as in this case, the landscape expert evidence, which here supported the cultural evidence.

[116] It was open to the appellants to call cultural evidence. Other landowners did call cultural evidence of their own in respect of other contested sites proposed by MTT. For instance, in relation to the Te Wharangi Pā site at Waipātiki, the owner of the land, Sunset Investments Partnership, opposed the inclusion of the site as a wāhi taonga in the Proposed Plan.[165] It called two cultural witnesses on its behalf, whose evidence the Court accepted on some contested issues, and whose views were accepted as to the extent of the site.[166] In contrast, Mr and Mrs Raikes did not call any cultural evidence.

[117] The cultural evidence before the Court was through whakapapa (genealogy), kōrero tuku iho (the Hapū history), pepeha (tribal sayings), waiata (songs), whakatauākī (proverbs) and whakairo (carvings). The position was also supported by historical records, archaeological evidence, and statements of associations set out in the Maungaharuru Tangatu Hapū deed of settlement which indicate the association of the Hapū to identified areas. This was evidence which the Court was entitled to and did accept.

[118] The evidence that the Court accepted was of a similar nature as that referred to in *Takamore Trustees v Kapiti Coast District Council*, referred to above, in which Ronald Young J found the Environment Court erred in rejecting the "clear evidence" of kaumātua (notwithstanding that evidence was based on the oral history of the tribe).[167]

[119] Under the provisions in the RMA, the decision-maker is under a general duty to recognise and provide for the relationship of Māori with their ancestral lands, water, sites, waahi tapu and other taonga (s 6(e)), have particular regard to kaitiakitanga

164 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, above n 144, at [56].

165 The Revised Decision, above n 1, at [117]-[118].

166 At [121]-[124], [126]-[127] and [131].

167 *Takamore Trustees v Kapiti Coast District Council*, above n 162.

(s 7), and must take into account the principles of the Treaty (s 8).[168] Referring to this trilogy of provisions in *McGuire v Hastings District Council*, Lord Cooke in the Privy Council described these as "strong directions, to be borne in mind at every stage of the planning process".[169] As Lord Cooke stated, they "do mean that special regard to Maori interests and values is required".[170]

[120] The Court must assess the credibility and reliability of mana whenua evidence, but the evidence of mana whenua if consistent and credible, using the approaches set out in *Takamore Trustees v Kapiti Coast District Council* and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, will be strong evidence.[171]

[121] The RMA requires protection of cultural interests where the case presented has merit.[172] In any case, the weight to be given to the evidence will be "unique to that case".[173]

[122] The fact that the wāhi taonga covers 70 hectares, part of which is on Mr and Mrs Raikes' property, reflects the evidence that was before the Court. The second stage as to determining what was required to "protect" large sites as compared to smaller sites was a matter for the rules to be applied to those sites. The Court recognised this by rejecting the proposed rules put forward by MTT and instead adopting the Council's proposed rules, noting that the size of wāhi taonga sites and their "consequential resilience to, an ability to absorb, minor alterations bought about by small scale earthworks and buildings" was an "important factor that is clearly relevant in deciding what is necessary to protect them from damage".[174]

[123] The rules are not under review in this appeal. Nevertheless, it is relevant to note from the information the Council provided that the recognition of MTT88 would allow the continuation of most activities related to present farming activities, although restricted discretionary consents would be required in relation to buildings greater than $50m^2$ in floor area or if there was a change to intensive rule production.[175] Earthworks exceeding various cubic meterage would also be a restricted discretionary activity. The site would also be covered by other parts of the plan, including Section 17.1, natural features and landscapes, and Section 27.1, the general rural zoning and earthworks mineral aggregate and hydrocarbon extraction. Mr Raikes gave evidence he might be considering activities on the site, including draining, a mini hydro dam and possibly a wind turbine. He accepted he would need resource consents in any event for those activities, regardless of the wāhi taonga categorisation.[176] However, the Court was of the view that the rules as ultimately adopted were at a level which would sufficiently provide for MTT's relationship with Tītī-a-Okura, while not presenting an unreasonable interference with the rights of the landowners.[177]

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168 *McGuire v Hastings District Council* [2002] 2 NZLR 577, (2002) 8 ELRNZ 14 (PC) at [22].

169 At [21].

170 At [21].

171 *Takamore Trustees v Kapiti Coast District Council*, above n 162; and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, above n 144, at [53].

172 *McGuire v Hastings District Council*, above n 168, at [20].

173 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, above n 144, at [56].

174 The Revised Decision, above n 1, at [29].

175 Intensive rule production includes commercial high-density livestock operations which preclude the maintenance of pasture or ground cover requiring keeping and feeding of the livestock and buildings or outdoor enclosures on a site; land and buildings for commercial boarding and/or breeding of cats, dogs and other domestic pets; mushroom farming or commercially growing crops indoors in pots and/or on a permanent floor.

176 The Revised Decision, above n 1, at [80].

177 At [81].

[124] Any further comment on the content of the rules is outside this appeal. However, it is apparent that the restrictions on the site imposed by the cultural requirements are focused on the cultural issues and do not appreciably limit the activities which are likely to be undertaken on the site.

[125] The appellants pointed out that the site was not identified as being of cultural significance until a few years ago. As the Court noted, however, the research carried out by the Trust over the past few years was able to be done because it has only recently had the funds to do it.

[126] As I have pointed out above, the Court had before it evidence to support the finding that the MTT88 was a wāhi taonga based on the evidence adduced by the various witnesses for the Trust. That evidence was tested by cross-examination. Mr and Mrs Raikes were entitled to call cultural evidence but chose not to do so. As I have noted above, other landowners did call cultural evidence, which the Environment Court took into account in its findings.

[127] The Court summarised the main factors in support of the finding that MTT88 was a wāhi taonga.[178] In summary, the evidence before the Court in relation to those factors was:

(a) That the location is on the ridgeline of the maunga, which is tapu:

> In addition to the cultural experts describing the site, Ms Lucas noted the site involved a distinctive saddle between coastal country, which was highly legible from the coast. It was appropriately recognised as a wāhi taonga given the cultural history of the landform delineated by the kaumātua.[179]

(b) The shared value between the hapū through their common ancestor Okura:

> As noted by Mr Taylor and Mr Parsons, the summit of Tītī-a-Okura was where the staff, Papauma, landed on the maunga, and it embodied the mauri of birdlife. This is reflected in names in the area as well as, among other things, the prolific birdlife. The Court noted the evidence of Mr Parsons, who referred to workmen at Ohurakura mill in the 1940s recalling how prolific the birdlife was in the forest and the belief of the Māori people that it was as the result of mauri (life force) as a result of the staff Papauma planted by Tūpai. Mr Parsons concluded the mountain range was of high spiritual significance. The Court also noted that the importance of the maunga was depicted in art in marae, names, tribal proverbs and symbols, oral history and in their waiata as well as whakatauākī.[180]

(c) As a tītī (mutton bird) or food gathering area:

> All of the cultural witnesses gave evidence in this regard, including Mr Taylor and Mr Parsons. Mr and Mrs Raikes say Mr Parsons agreed that the birds might become snared in nets slung low, which therefore meant only the State Highway or a smaller area on the saddle should be wāhi taonga. However, the birdlife was said to be over the mountain, and birdlife was not limited to the place of the snares. The Environment Court was satisfied that the name reinforced the significance of the place beyond

178 As it found at [79].

179 Statement of Evidence of Ms Lucas, above n 117, at [69].

180 The Revised Decision, above n 1, at [50].

the ordinary, which was another matter to be considered along with the remainder of evidence.[181]

(d) As a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru:

This evidence was criticised as the trail was used by Māori on only a seasonal basis. The fact that it was used by different hapū and on a seasonal basis does not diminish the importance of the evidence from a cultural perspective. In any event, the area was well-populated, according to the evidence, regardless of the fact it may have been seasonal.

(e) The extent of the site:

I deal with this in more detail below. The evidence supported the whole of the recognised MTT88 site as wāhi taonga, not just the line of the State Highway or some smaller area.

Extent of the site

[128] Mr and Mrs Raikes said that the historic strategic trail followed the route of the present State Highway, and therefore that any recognition of the area as wāhi taonga should be limited to the State Highway. Ms Blomfield pointed out that Ms Lucas, under cross-examination, had confirmed that there was seasonal occupation of the area only. Ms Blomfield submitted on that basis that seasonal occupation by people was not a matter for which MTT claimed wāhi taonga status for the MTT88 site.

[129] There is no reason why seasonal occupation only by the people means the area should not be recognised as a wāhi taonga. Moreover, the issue of being only seasonally occupied was a matter of evidence before the Environment Court along with all the other evidence. The Environment Court was entitled to put such weight on that evidence as it thought appropriate.

[130] Mr and Mrs Raikes also criticised the evidence of Ms Hopmans, in reference to the size of the site to be recognised as wāhi taonga, as not just the point at which the State Highway crossed but other features including the ridgeline, this being based on viewing the maunga as well as the name of the saddle. She said that had been arrived at through discussions with kaumātua. Again, that evidence was before the Court and it chose to accept the evidence of Ms Hopmans, along with the other evidence it had, rather than accepting the legal submissions of the appellants that the site should be narrowed to the travel route.

[131] Similar criticisms were made in relation to the tītī (mutton bird) hunting, the appellants pointing to the evidence of Mr Parsons, who identified the low pass in the mountain as the part that the tītī would have flown over and where they would have been captured. Again, the appellants submit this was located on the pass where the State Highway crosses the Maungaharuru range.

[132] The appellants therefore submitted that the wāhi taonga should be limited to those relatively small areas following the State Highway that had been identified for the tītī hunting and the trail. They criticised the evidence concerning the ridgeline being tapu and of the site's shared value between the Hapū and Ngāti Hineuru through their common ancestor, as well as the evidence concerning the staff Papauma, as not being proven but based on myths and stories.

[133] However, Mr Taylor's evidence was that the fact that the trail would have been aligned with the current State Highway did not mean that the wider area was not of cultural significance. In cross-examination, Mr Taylor said that Māori occupied the

181 At [78].

whole area, not just one part of it. This accords with common sense, that the occupation and related activities would be diffuse and not limited to a particular line.

[134] Ms Lucas also confirmed the site was "legible" from a landscape point of view.

[135] There was ample evidence before the Court to enable it to be satisfied that the extent of the MTT88 site as proposed was a wāhi taonga.

Religious beliefs

[136] Mr and Mrs Raikes say that the cultural and spiritual whakapapa and the "myths" relied upon to determine the site was wāhi taonga were merely the beliefs of the Hapū which cannot be substantiated. Mr and Mrs Raikes say their own Christian views were not properly taken into account by the Court.

[137] Mr and Mrs Raikes submit they should have been given the opportunity by the Court to expand on those views. In submissions on appeal Ms Blomfield said that Mr and Mrs Raikes were considering using profits from any enterprise on their land such as a mini hydro dam or a wind turbine to generate money for charities aligned with their Christian faith.

[138] Mr and Mrs Raikes also say that the Environment Court erred in its consideration of s 13 of the NZBORA, which provides for freedom of religion and belief. I have set out above at [39] the Court's consideration of Mr and Mrs Raikes' religious beliefs. The Court made it "very clear" that the Court was "not a place to resolve differences in view about deities and divinity".[182] However, the Court noted, with reference to s 13 of the NZBORA, that "Maori are as entitled to have their beliefs respected as Mr Raikes is entitled to have his".[183]

[139] The Court then went on to refer to and quote the provisions of ss 6, 7(a) and 8 of the RMA, which it said contained "highly relevant requirements".[184] In doing so, as well as s 6(e), which has been a significant provision in this appeal, the Court also referred to the provisions in s 6 requiring the decision-maker to recognise and provide for (f) the protection of historic heritage from inappropriate subdivision, use, and development, and (g) the protection of protected customary rights.

[140] The Court was not engaged in a jural determination as to cultural and religious beliefs per se. It was operating within the framework of the RMA which, as Whata J said in *Ngāti Maru*, requires the decision-maker to respond to claims and determine the appropriate course of action which will best discharge the statutory obligations of the decision-maker under that statute.[185] While this is not a case of divergence of Māori cultural information, as there was no evidence contradicting that of the MTT witnesses, the proper approach is summarised in the following passage from that decision:[186]

> … when exercising functions under the RMA, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), (g), 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those

182 At [72].

183 At [72].

184 At [72].

185 *Ngāti Maru Trust v Ngāti Whātua Orākei Whaia Maia Ltd*, above n 146, at [68] and [102].

186 At [102].

> obligations, and this may mean a choice has to be made as to which of those courses of action best discharges the statutory duties under the RMA. As *Te Ngai Hapu* aptly illustrates, that may (for example) require evidential findings about who, on the facts of the particular case, are kaitiaki of a particular area and how their kaitiakitanga, in accordance with tikanga Māori, is to be provided for in the resource [management] outcome.

[141] The Christian views of Mr and Mrs Raikes are to be respected, as the Environment Court noted.[187] However, in the context of the statutory framework here, they were simply not a factor to be taken into account in the determination required of the Environment Court when considering cultural issues under ss 6(e), 7(a) and 8 of the RMA. These requirements under the RMA recognise in this context, the "special regard to Māori interests and values".[188]

[142] It is apparent that the Court only referred to s 13 of the NZBORA to make the point in passing that a right to have one's beliefs respected is a fundamental right of all people under the NZBORA. That section was not engaged in the Environment Court's assessment of the matter under consideration. The Environment Court quite rightly put Mr and Mrs Raikes' Christian beliefs to one side in making its determinations.

Reasons

[143] The final issue is whether the Court sufficiently articulated its reasoning as to accepting the cultural evidence of witnesses called by MTT.

[144] Baragwanath J in *Murphy v Rodney District Council* summarised the requirement for reasons to be provided by a decision-maker as follows:[189]

> … the duty of a decision maker to give reasons … requires the decision maker to outline the intellectual route taken, which provides some protection against error. The reasons may be succinct; in some cases they will be evident without express reference.

[145] The duty to give reasons or to engage in a particular line of analysis is contextual. In this case the Environment Court set out the evidence relied upon, and the "intellectual route taken" to reach its conclusions is apparent. The Court was not required to spell out every item of evidence, nor to set out every argument made by the appellants.

[146] The appellants in fact are challenging the merits of the decision. However, it was for the Environment Court, having assessed the evidence, to put such weight on the evidence as it considered appropriate and to reach a determination. The Environment Court is responsible for the balancing process required under the statute, and the weight to be given on relevant considerations is a matter for that Court and not for reconsideration by this Court as a point of law.[190]

Factual errors by the Environment Court

[147] The appellants also contend that the Environment Court made two factual errors in its Revised Decision, which were material to the decision and therefore the decision should be set aside.

[148] The first alleged factual error was the Court's comment that the area of Mr and Mrs Raikes' land affected by the MTT88 site was two per cent. It is now accepted

187 The Revised Decision, above n 1, at [72] and [76].

188 *McGuire v Hastings District Council*, above n 168, at [21].

189 *Murphy v Rodney District Council* [2004] 3 NZLR 421, (2004) 10 ELRNZ 353 (HC) at [25]; and see *Primeproperty Group Ltd v Wellington City Council* [2022] NZHC 1282, (2022) 23 ELRNZ 828 at [9].

190 *Speargrass Holdings Ltd v Van Brandenburg*, above n 71, at [113], citing *Guardians of Paku Bay Assoc Inc v Waikato Regional Council*, above n 86.

this was an error and the percentage is in fact higher than the Court stated, although not higher than nine per cent of the Station. The Court had correctly noted that MTT88 had a total area of approximately 70 hectares, approximately 16.22 hectares of which was on Mr and Mrs Raikes's station, noting the station is held in one 470-hectare title.[191] In so stating, however, it is clear the Court neglected to account in its calculation for the adjacent land leased by Mr and Mrs Raikes, over which the proposed site MTT88 also lay. Therefore the proportion of land involved at the time that would be affected by the wāhi taonga classification was in fact a greater percentage than that stated by the Court.

[149] However, the Environment Court did not apparently rely on this calculation in its determination of either the classification of the site as wāhi taonga or its extent. The size of the wāhi taonga may have had some bearing on what the appropriate rules applying to the site were to be. Indeed, this appears clearly to have been the case in the Court's determination of what rules should apply. However, as long as the wāhi taonga is established on the evidence, the proportion of the land owned or leased by Mr and Mrs Raikes that is to be included in the site has little relevance to the final determination of its status as wāhi taonga.

[150] The appellants also raise as a factual error the reference to Te Waka-a-Te O being within Tītī-a-Okura. It is accepted by counsel this too was an error.

[151] By way of explanation, Mr Taylor said in his evidence that another feature commemorating Te Okura, who was the skilled tītī hunter, and from whom the name Tītī-a-Okura was derived, is Te Waka-a-Te O, the canoe of Okura. Te Waka-a-Te O is part of the Maungahururu range but is, according to the evidence of Mr Taylor, located to the north of, and adjacent to, site MTT88.[192] Mr Taylor goes on in his evidence to say that Titī-a-Okura (on which MTT88 is situated) had always been part of the main traditional route from the coast inland to the interior, which is now State Highway 5.[193] As Mr Taylor said, that was part of the reason Titī-a-Okura had been a significant, strategic location, and the Hapū had defended their interests in that land over many generations.[194]

[152] The error itself appears in the following comment in the Revised Decision:

> [68] Mr Taylor also referred to an area within the site which is referred to as Te Waka-a-Te O or the "Waka of Okura".[195] Mr Taylor is a direct descendent of this ancestor,[196] as was Mr Reti.[197]

[153] The Court's error was to refer to the Te Waka-a-Te O being *within* MTT88 rather than *adjacent to*. However, the significance of the place name, as it referred to Okura, remains relevant. The point being made by the Court in the Revised Decision was that the Waka of Okura was in the area. It is an adjacent ridge. The mistake is not material to the decision reached.

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191 The Revised Decision, above n 1, at [77].

192 At [38], which the Environment Court cited in its Revised Decision, above n 1, at [68].

193 At [38].

194 At [38].

195 Statement of Evidence of Mr Taylor, above n 37, at [38].

196 Statement of Rebuttal Evidence of Mr Parsons, above n 39, at [27].

197 Statement of Evidence of Mr Taylor, above n 37, at Appendix 4, Submission of Fred Reti dated 31 March 2015 to the Hastings District Council in relation to the District Plan at [36].

[154] A further point raised by Mr and Mrs Raikes was the reference by the Court to the site being "already quite dominated by the State Highway, and its designation as [a wāhi taonga] effectively prevents any other development on the site which would be likely to further interfere with its value as a waahi taonga".[198]

[155] The parties indicated that they were not certain of the meaning of this comment. It is not for this Court to speculate. Nevertheless, the point does not appear to have had any weight in the final assessment. The possible activities to which Mr Raikes had referred as possibilities for developments on the site were specifically dealt with by the Court and it was satisfied the requirements of the relevant rules for this site would not be unduly restrictive in the context of activities permitted on the site, and would be limited to cultural matters only. The reference to the State Highway was not material to the decision reached.

[156] I conclude under this head that while there were two particular mistakes as to factual matters in the Revised Decision of the Environment Court, these were not material to the decision.

Conclusion

[157] None of the grounds of appeal are made out. Accordingly, I dismiss the appeal.

[158] In summary, there were seven questions of law for determination in this appeal. I now summarise my conclusions in respect of each:

(a) *Question 1*: Did the Court fail to consider and properly apply relevant law and case law about the critical assessment a decision-maker should apply to evidence given by a party asserting a relationship with a site that should be recognised and provided for under s 6(e)?

No. While the Court did not refer to all the relevant case law cited by the appellants, it was not required to. The Court adopted the correct approach and summarised the main factors in support of its finding that the MTT88 site was a wāhi taonga.

(b) *Question 2*: Did the Court err in its consideration and application of s 13 of the NZBORA?

No. The Court noted the Christian views of Mr and Mrs Raikes were to be respected but that was not an issue under consideration. In the context of the statutory framework the Court was entitled to place weight on the evidence of the tangata whenua as to cultural issues. The Court only referred to s 13 of the NZBORA to make the point that the right to have one's beliefs respected is a fundamental right of all people under the NZBORA, not as a reason supporting its determination of site MTT88 as a wāhi taonga, or as to its extent.

(c) *Question 3*: Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusion at [76] (that what Maori regard as waahi tapu and other taonga is for them)?[199]

No. The Court set out the evidence it had heard from expert cultural witnesses and its conclusion at [76] was in line with the authorities and statutory framework. Its reasoning was sufficient in this regard.

198 The Revised Decision, above n 1, at [81].

199 Paragraph [76] of the Revised Decision refers to s 6(e) of the Resource Management Act 1991 which deals with the relationship of Māori and their culture and traditions with wāhi tapu and other taonga.

(d) *Question 4*: Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at [79]?[200]

No. The Court set out the evidence clearly and the "intellectual route taken" to reach its conclusions is apparent. The decision must be read as a whole. The Court's findings were supported by the evidence before the Court.

(e) *Question 5*: Did the Court take into account a matter which it should not have taken into account when it considered the proportion of the total farm area owned or leased by the appellants affected by proposed site MTT88?

While the Court made an error in calculating the proportion of the total farm area affected, this was not a matter which the Court materially relied on in reaching its conclusions as to the determination of the site as wāhi taonga, or its extent.

(f) *Question 6*: Was the Court's calculation of that proportion correct?

No. However, the error was not material to the decision reached.

(g) *Question 7*: Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at [81] on the extent and boundary of proposed site MTT88?[201]

No. The Court was entitled to rely on the evidence as to the extent of the site to make its determination that the area as delineated by the kaumātua was appropriate in its extent.

Costs

[159] Counsel agreed at the end of the hearing that costs should follow the event on a 2B basis. I make directions accordingly. Orders for costs together with reasonable disbursements on that basis are made in favour of the respondent and interested party against the appellants. If any matters are outstanding, leave is reserved to any party to make submissions by way of memorandum on or before seven days from the date of this decision, with any response to be within a further three days.

Appeal dismissed; questions of law answered accordingly; costs should follow the event on a 2B basis

Reported by P. A. Ruffell

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200 Paragraph [79] of the Revised Decision is a summary of the cultural issues, the cultural significance of the site to the MTT hapū and its evidence which the Environment Court says it accepts.

201 Paragraph [81] of the Revised Decision refers to the site being already "quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a Wāhi Taonga". The Court went on to accept the position of MTT and the Council as being appropriate to "recognise the significance of the site, without unreasonably restricting other activities". It indicated it did not accept Mr and Mrs Raikes's position.

IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No [2021] NZEnvC 98

IN THE MATTER	of an appeal under clause 14(1) of the First Schedule to the Resource Management Act 1991
BETWEEN	MAUNGAHARURU-TANGITŪ TRUST (ENV-2015-WLG-054) Appellant
AND	HASTINGS DISTRICT COUNCIL Respondent

REVISED DECISION ON APPEAL

Decision issued: 12 July 2021

Costs are reserved:

Introduction

[1] This Court issued its decision in this matter on 28 May 2018.[1] The Court determined that all the sites in issue were wāhi taonga, and which rules should apply to each. The Court did not determine the extent of the sites. Maungaharuru-Tangitū Trust (the Trust, or MTT) and Mr and Mrs Raikes (the Raikes) appealed that decision to the High Court. The High Court noted that this matter came before it in unusual circumstances. The parties to the two appeals had agreed the High Court appeals ought to be allowed and the matter should be remitted to the Environment Court for reconsideration. The High Court was satisfied that the parties were correct, and that the appeals ought to be allowed.[2]

[2] In summary, the High Court said:

- The issue was whether the level of proposed protection under the Proposed District Plan was appropriate for the particular sites;[3]
- What was required was for the reasons set out in the written decision of this Court to demonstrate that the analysis required as a matter of law had been undertaken;[4]
- It was necessary for this Court to first make what are effectively factual findings on the nature of the wāhi taonga/wāhi tapu status of the particular sites. Importantly, the issues are inherently site specific. Because it includes questions of historical associations with the relevant areas of land there is the potential for uncertainty in relation to the facts. But this Court must do its best based on the evidence that is available. There may not need to be definitive findings on all matters of detail. A degree of uncertainty in this Court's factual findings in relation to the particular sites may be involved.[5]
- The second related requirement is for this Court to assess, as precisely as possible, how the proposed provisions in the District Plan could potentially adversely affect the wāhi tapu/wāhi taonga sites as recognised by the factual findings.[6]
- Given that, it is not appropriate for this Court to proceed straight to balancing interests without first engaging specifically with the potential

1 *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79
2 *Maungaharuru-Tangitū Trust v Hastings District Council* [2019] NZHC 2576 at [63]
3 HC at [23]
4 HC at [24]
5 HC at [25] fn omitted
6 HC at [26]

impacts that activities contemplated or controlled by the proposed provisions will have on the wāhi tapu status found to exist. That will likely involve a consideration of particular activities, and the consequences of the proposed provisions.[7]

- Whilst it is ultimately a matter for this Court, it seemed to the High Court that Policy 64 of the Regional Policy Statement may be of particular moment. It states that "Activities should not have any significant adverse effects on wāhi tapu, or tauranga waka".[8]

[3] The High Court said that the key difficulty with this Court's conclusions is that it appears to have proceeded straight to a question of balancing the rights and interests of the private landowners and tāngata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this.

[4] We have reviewed the decision in the light of the High Court's views, and the further submissions made to this Court after the matter was returned to it. Rather than riddle the new decision with cross-references to aspects of the first decision, we believe it will produce a more coherent document if, on relevant issues, we repeat the substance of the first decision, with, where appropriate, additions and modifications to take account of the High Court's views and the further submissions received.

[5] On the return of the matter to this Court, MTT helpfully provided this table, summarising the live issues:[9]

7 HC at [27]

8 HC at [27]

9 MTT 3/3/20 at [25]. Note that the table says "MTT90 & 91" but the correct numbers are "MTT89 & 90" (MTT 3/3/20 at [28])

Site no.	Site description	Owned by	What is in dispute?		
			Whether it is wāhi taonga	Extent of wāhi taonga	Rules that apply to site
MTT35	Te Wharangi pā, Waipātiki	Sunset	×	✓	×
MTT88	Tītī -a-Okura, Tītī -a-Okura Saddle on the Maungaharuru Range	The Raikes	✓	✓	✓
MTT90 & 91	Tarapōnui and Ahu-o-te-Atua, peaks on the Maungaharuru Range	Toronui and Rimu	×	✓	✓

Site no.	Site description	Owned by	What is in dispute?		
			Whether it is wāhi taonga	Extent of wāhi taonga	Rules that apply to site
MTT38	Te Puku-o-te-Wheke, coastal pā, Arapawanui	Owner not involved	×	×	✓
MTT44 & 45	Moeangiangi 1 and Moeangiangi 2 pā, Moeangiangi	Owner not involved	×	×	✓
MTT86	Te Waka-o-Ngārangikataka, Maungaharuru Range	Owner not involved	×	×	✓

KEY:

✓ = in dispute

× = not in dispute

MTT suggested that the issues are more refined than those in the 2018 hearing.[10] We agree.

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10 MTT 3/3/20 at [26]

Original decision

[6] This Court's 2018 decision recorded that in a decision dated 12 September 2015 the Hastings District Council (HDC) made decisions on issues relating to what were then described as *waahi tapu* (also spelt, in some places and documents, *wāhi tapu*) to be included in Section 16.1 of its Proposed District Plan (PDP). MTT had made submissions on the proposed plan which, broadly stated, sought to identify and protect around 60 *sites of significance* under the terms of the Plan.

[7] The Trust was not satisfied with some of the decisions made by the Council and lodged an appeal against the decision, in which it initially identified 28 sites which it considered had not been adequately dealt with. As will be apparent from the first decision and the Table under para [5], there are 8 sites remaining in issue.

[8] All of the sites, except MTT 35 – *Te Wharangi*, are in the *Rural* zone of the Hastings District and are generally on privately owned pastoral farming properties. Te Wharangi is on privately owned land, but is significantly smaller than the others and is located on a *Rural* zoned, but undeveloped *lifestyle* site.

[9] The sites MTT35 Te Wharangi, MTT 38 Te Puku-o-te-Wheke, MTT 44 Moeangiangi 1, and MTT 45 Moeangiangi 2, are on, or relatively close to, the coast north of Napier. The Maungaharuru sites are in the high country to the north and south of what is now generally known as the Tītīokura Saddle, where SH5 (the Napier-Taupo Road) crosses the range from the east and then descends towards the Mohaka River bridge.

The primary and secondary legislation to be considered

[10] The term *waahi tapu* is used in s6(e), but is not defined in the Act. It should not, in our understanding, always be regarded as the equivalent of *sacred* in the religious sense. Nor is it confined to the sites of cemeteries or burial places. Rather, we would generally take it as a description of a place or feature as described in s338 Te Ture Whenua Maori Act 1993 - *...being a place of special significance according to tikanga Maori.* We note though that the Glossary of Section 16 of the PDP does use the term in the stricter sense – defining it as meaning... *sacred site.* The term *waahi taonga* is not separately referred to or used in the RMA, but is defined and used in the PDP, and we shall return to that topic at para [18].

[11] In its submissions after the matter was returned to this Court, MTT referred to caselaw including *SKP Inc v Auckland Council.*[11] MTT submits that Māori are specialists in the tikanga of their hapū or iwi and are best placed to assert and establish their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga.[12]

[12] MTT also referred to s6(f) (historic heritage – with reference particularly to cases about size and surroundings of historic heritage) and s7(a) and s8.[13]

Coastal Policy Statement

[13] As noted, four of the eight sites in issue are, wholly or partly, within the coastal environment and so the New Zealand Coastal Policy Statement 2010 (NZCPS) must be given effect to (see s75 RMA). Of those *coastal pa* sites, MTT35 Te Wharangi at Waipatiki is fully within the coastal environment as defined in the PDP. MTT38 Te Puku-o-te-Wheke has approximately 40 percent of its area within the coastal environment. MTT44 and 45 - Moeangiangi 1 and 2, have only a small percentage of their areas within that environment. It appears to be agreed that of the NZCPS provisions, Objectives 3 and 6, and Policies 2 and 17, are particularly relevant. The Council's position is that the NZCPS provisions have been given effect to. We have set out those provisions in full at Appendix 1.

[14] In its further submissions after the Appeal, MTT notes that it disagreed with the Council's position. Mr Russell, MTT's planner, concluded that the provisions proposed by MTT give effect to the NZCPS but the Council's proposed provisions do not.[14] Mr Russell's view was that the wide range of activities that are permitted under the Council rules provided no controls on activities being carried out on wāhi taonga, which is inconsistent with the NZCPS (and the Regional Policy Statement (RPS)).[15] We pause here to note that the HDC submitted, again, that Mr Russell's evidence was not sufficiently objective to qualify as expert evidence.[16] MTT disputes that.[17] We do not agree that we should decline to accept that he has the expertise to give evidence on these topics. But if any witness called as an expert appears to lose objectivity and

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11 MTT 3/3/20 at [42]. *SKP Inc v Auckland Council* [2018] NZEnvC 89, [2019] NZHC 900
12 MTT 3/3/20 at [42.1]
13 MTT 3/3/20 at [51] – [65]
14 MTT 3/3/20 at [73]
15 MTT 3/3/20 at [73]. Referring to Russell EIC at 69 – 72 for Mr Russell's evidence on MTT rules and NZCPS.
16 HDC 31/3/20 at [52]
17 MTT 15/4/20 at [59] – [62]

to become an advocate for a particular outcome, that will obviously be very relevant to the weight to be given to that person's views.

Regional planning provisions

[15] The Regional Policy Statement for the Hawkes Bay region is incorporated in the *Hawkes Bay Regional Resource Management Plan*, which includes the following three key Regional Policy Statement Objectives:

> OBJ 1: To achieve the integrated sustainable management of the natural and physical resources of the Hawke's Bay region, while recognising the importance of resource use activity in Hawke's Bay, and its contribution to the development and prosperity of the region.
>
> OBJ 2: To maximise certainty by providing clear environmental direction.
>
> OBJ3: To avoid the imposition of unnecessary costs of regulation on resource users and other people.

[16] It is not in dispute, we think, that in terms of Objective 1 waahi taonga are a *resource* that requires *sustainable management*, while recognising what uses may be appropriate in enabling resource use activity. Of particular note is Policy POL 64 of the RPS which states:

> Activities should not have any significant adverse effects on waahi tapu, or tauranga waka.

[17] The proposal to include *waahi tapu* within the wider term *waahi taonga* gives effect to POL 64, while including sites that are significant but not necessarily *tapu.* We note too that the use of *waahi taonga* as an all-encompassing term may lessen one concern of at least some of the farm-owning parties: – ie their belief that the term *waahi tapu* is regarded as signalling the effective prohibition of any activity on a site so described. We do not accept that view: - there may be some activities that would not be acceptable under either terminology, and others that would be acceptable.[18]

District Plan provisions

[18] As noted the term *waahi taonga* is not separately referred to or used in the RMA, but it was used in the proposed PDP and was given the meaning, in the Glossary to Section 16 of the PDP, of: *A treasured, prized and protected site.* We infer from the way the term was there used that it might have been intended to describe a place or feature of some lesser (or at least different) significance than a *waahi tapu.* But the

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[18] We note that there are variances in the spelling of wāhi and waahi in various source documents. We use them according to the source document for each reference.

post-mediation version of Section 16 of the PDP has dropped the *waahi tapu* terminology completely, and all sites covered by that Section now come under the rubric of *waahi taonga* (we note the change of spelling from *wahi*) and are expressly intended to include:

- Old pā sites, excavations and middens (pā tawhito)
- Old burial grounds and caves (ana tūpāpaku)
- Current cemeteries (urupā)
- Battlefields (wāhi pakanga)
- Sacred rocks, trees or springs (toka tapu, rakau tapu, waipuna tapu)
- Watercourses, springs, swamps, lakes and their edges (awa, waipuna, repo, roto)

The term *waahi tapu* is not now intended for use in the PDP. The term *waahi taonga* has been given a somewhat expanded definition in the same version of Section 16, which is this – (with added translations for the items mentioned):

> *Wāhi Taonga*: a site or area of significance to Tāngata Whenua and includes but is not limited to awa (river), awamutu (wetland), herenga waka (waka mooring area), kāinga (occupation site), mahinga kai (food gathering place), marae pā (fortified living area), puna (spring), rakau pito (a tree where placenta are placed), rakau tapu (a revered tree), roto (lake), tauranga waka (waka launching area), toka (rock), toka tohi (boundary marker), urupā (place of burial), wāhi pakanga (battle site), wāhi tapu and wāhi tohi (ritual site).

[19] We record here the two now agreed Objectives of Section 16 of the PDP which are fundamental to the issues to be resolved:

> OBJECTIVE WT01 To recognise Wāhi Tapu and Wāhi Taonga sites and areas in the Hastings District as being of cultural significance to nga hapū through whakapapa and ensure their protection from damage, modification or destruction from land use activities.
>
> OBJECTIVE WT02 To promote the protection of Waahi Tapu and Waahi Taonga sites and areas in a way that accounts for the customary practices of ngā hapū.

It may also be useful to record two further settled PDP provisions which are relevant in considering the *efficient and effective* ways of dealing with the present issues. They are from Chapter 3, and are Objective TWO1 and its accompanying explanation; and in Chapter 16, Policy WTP1:

> TWO1: The expectations and aspirations of Tangata Whenua with Mana Whenua are acknowledged when making decisions on subdivision, land use and development, and the management of natural and physical resources throughout the Hastings District.

The explanation states:

> The protection of sites of past Māori occupation and use for their cultural and archaeological values will be achieved by putting into place appropriate mechanisms for the Tangata Whenua

> to be involved in the identification and management of these sites. This also applies throughout the District to areas recognised as taonga or as a source of mahinga kai to the Tangata Whenua, particularly where ngā hapū whānui have the status of kaitiaki of these areas, features and resources.

Policy WTP1 provides:

> ... identify, in consultation with Tāngata Whenua, land within the District which contains Wāhi Taonga.

[20] Both in the notified and decisions versions of the PDP, the *permitted* activities on waahi tapu and waahi taonga sites were very limited. Other than the maintenance, replacement or repair of existing utilities (which were subject to General Performance Standards) and the maintenance of existing farm fences and tracks, all other farming activities had (full) *discretionary* status - ie there were no other *permitted, controlled* or even *restricted discretionary* activities. What is now being put forward in terms of both *permitted* and *restricted discretionary* status would be significantly less burdensome for any farming operation, in the sense that an application for a *restricted discretionary* activity can be squarely focussed on the issues to which the decision-maker's discretion is solely confined. The questions of course are still whether what is proposed conforms with and gives effect to the Regional Policy Statement (see para [15] is most appropriate in terms of s32; gives effect to higher order documents in terms of s75, and consideration of effects in terms of s76(3).

Certainty of obtaining consent

[21] In our original decision, we commented on various landowners' concerns that if they sought a resource consent for some *discretionary* or *restricted discretionary* activity on land affected by what the Appellant seeks, they should have *certainty* [our emphasis] that the consent would be forthcoming.

[22] We noted that, as a matter of law, that is simply not possible to achieve. Any application for a resource consent would have to demonstrate that the *effects* of the proposed activity met the Plan's criteria for such an activity, and the requirements of the Act. We also noted in our original decision the difference between *restricted discretionary* and *discretionary* status. Various parties also raised the issue of the costs of applying for resource consents. That may certainly be one factor to be weighed when choosing which provisions are most appropriate.

Rules proposed

[23] In its further submissions to this Court, MTT notes that the Court found that the MTT rules would create an "unreasonable interference" with the rights of landowners. MTT submits that the restrictions have to be looked at in the context of the significance of the relationship being protected and the practical use of the land (which goes to reasonableness).[19] MTT says the sites are generally steep, eroding and exposed, are not on highly productive soils and are unlikely to be used for anything but current activities (e.g. grazing and existing forestry).[20]

[24] MTT says its proposed *permitted* rules include: any activity that does not damage/ modify/ destroy the wāhi taonga site; maintenance etc of network utilities; grazing (except of pigs and horses); existing forestry; conservation planting; some scrub clearance and some earthworks on some sites.[21]

[25] The HDC provided an updated comparison table showing rules supported by MTT and the HDC. It says that the primary difference between the rules is the point at which a land use activity is required to obtain *restricted discretionary* consent under section 16.1 rather than being able to proceed as a *permitted* activity.[22] Council assessed its rules against the statutory framework, mentioning clarity, certainty and costs.[23] The Council says its rules are efficient as they provide a "bright line" test of when consent must be obtained.[24] The Council assessed some possible activities against the MTT rules including tree planting, vegetation removal and fencing.[25] The Council submits that the Court can be satisfied that its rules, and to a lesser extent MTT's rules, meet the relevant objectives.[26] The question is which are most appropriate.[27]

Parties' positions on Rules

[26] The s274 parties clearly do not want the MTT rules imposed upon them. Nor do they want the HDC's rules, although they accept that they are preferable. They

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19 MTT 3/3/20 at [177]
20 MTT 3/3/20 at [178]
21 MTT 3/3/20 at [169]
22 HDC 31/3/20 at [15]
23 HDC 31/3/20 at [10], [42]
24 HDC 31/3/20 at [8] and [40]
25 HDC 31/3/20 at [19]
26 HDC 31/3/20 at [31]. Referring to WTO1 and other relevant HDP objectives
27 HDC 31/3/20 at [31]

argue that rules such as those applying to ONFL 6, or archaeological authorities for ground modification, would cater for the majority of the MTT concerns.

[27] MTT's view is that HDC's rules give free reign to all but a few activities and that the Council is overly focused on size and costs to the land owners. In closing, counsel for the MTT noted that s6 of the RMA does not impose a limit on the size of a waahi taonga. Rather, he submitted, it is the nature of the relationship, traditions and values that will determine the extent of a waahi taonga.

[28] The Council did not dispute that the sites should be recognised as waahi taonga. What it does not agree with is the notion that the MTT rules were the most appropriate way to achieve objectives WTO1 and WTO2. Ms Davidson submitted that the Council rules were the outcome of a comprehensive s32 analysis and took into account all relevant matters. The Council considers that the MTT has given no examples of what consequences would flow from any activity permitted under the Council's rules that would impact on their relationship with the sites, and thus the Council is satisfied that their rules meet the required statutory tests.

[29] Counsel justified the difference between the rules for smaller waahi taonga sites by arguing that what is required to "protect" large sites is not the same as what is needed to "protect" much smaller sites. The size of wāhi taonga sites and their consequential resilience to, and ability to absorb, minor alterations brought about by small scale earthworks and buildings is an important factor that is clearly relevant in deciding what is necessary to protect them from damage.[28]

[30] Counsel noted that if the Court considers there is difficulty with objective WTO1, the option of adopting a different name for these sites, together with a new objective more appropriate for larger sites is open to the Court.

The Maungaharuru-Tangitū Trust's general position

[31] The MTT represents a collective of Hapū, being Ngāi Tauira, Ngāti Marangatūhetaua (also known as Ngāti Tū), and Ngāti Kurumōkihi (also known as Ngāi Tatara) and Ngāi Te Ruruku ki Tangoio. There are approximately 5000 enrolled members associated with MTT.[29] Its geographical area of influence extends from the north of the Waikari River, southwards towards the former outlet of the Napier inner

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28 HDC 31/3/20 at [28]

29 Transcript 69

harbour, and from Maungaharuru in the west to Tangitū in the east. The MTT itself is a post-settlement governance entity, established to hold and manage the Treaty settlement assets of the Hapū, and to be a representative body for the Hapū.

[32] The MTT accepts that the Objectives of Section 16.1 (particularly WT01 and WT02) of the PDP can be taken as settled. There are though contested issues about the location and size of the Te Wharangi Pa site, and with the extent of two of the Maungaharuru sites, Tarapōnui-a-Kawhea and Ahu-o-te-Atua.

[33] The MTT's issue with the terms of Section 16 of the PDP is the provisions designed to give effect to s6(e) and (f), and s7 and s8 RMA. In that regard, the fundamental point remaining at issue is the types and extent of activities that might be *permitted* on the sites and, for those activities not *permitted*, what activity status they should be given to ensure that the values and attributes of those sites can be protected into the future. Putting the issue another way, one might say that the fundamental point is whether, in the sense contained in s32 of the Act, the requirements of Part 2 and the agreed objectives of the PDP are being given effect through the most efficient and effective means available.

[34] The MTT asserts that the best solution is to classify any activity on an area that is waahi taonga as *restricted discretionary*, unless specified as *permitted*, as that would ensure that the activities are assessed against suitable criteria – ie criteria that relate to cultural matters. That solution, they say, would not be unreasonably burdensome to landowners.

[35] In its further submissions following the High Court appeal, MTT submits that the differentiation of wāhi taonga sites based on their size, rather than their values, is neither a logical, nor robust, planning approach.[30] MTT says that the relevance of size to the determination of wāhi taonga status has not previously been considered by the Courts, but the approach to determining outstanding natural landscapes provides some guidance.[31] It argues that the relationship of Māori should be the determining factor, not what might be convenient or acceptable to landowners.[32]

[36] The MTT also points out that sites within Outstanding Natural Features and Landscapes (ONFL) and those within Coastal Character Landscapes (CCL) appear

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30 MTT 3/3/20 at [119]
31 MTT 3/3/20 at [120]
32 MTT 3/3/20 at [123] and [126]

to have stronger protection in the PDP's provisions than sites of significance to Māori receive from Section 16. We shall further review the Trust's positions in considering each site in issue.

The relationship of MTT Hapū with the 8 Sites & the claim that they are waahi taonga

[37] As noted above the MTT represents a collective of hapū. The whakapapa, from Io (the creator), down to the Māori pantheon of gods through to the *eponymous or source tīpuna* (ancestors) of the four hapū associated with MTT, is to be found in the evidence of Mr Bevan Taylor. These stories and whakapapa lay the basis for identifying the relationship of the MTT hapū and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga – see s6(e).

[38] Prior to 2014, the MTT hapū were engaged in researching, presenting, negotiating and settling their Treaty claims against the Crown. During those proceedings, they contested the purchase by the Crown of several large blocks including the Arapaoanui block and the Moeangiangi block in 1859, and the confiscation of their remaining lands in 1867.[33] MTT finally settled their claims, as recorded in their Deed of Settlement in May 2013, and the settlement was given effect by the Maungaharuru-Tangitū Hapū Claims Settlement Act 2014.

[39] The MTT hapū still see themselves as kaitiaki of all their ancestral lands, although they own only a remnant of them.[34] Ms Tania Hopmans in her evidence addressed how they have attempted to exercise this kaitiakitanga responsibility in recent years before various fora, particularly the Environment Court.[35] As a result of their experience they decided to engage with the Proposed District Plan process.[36]

[40] To engage in this manner, they undertook literature reviews, reviews of research reports, reviews of briefs of evidence from previous litigation, conducted site visits, engaged archaeologists, recorded kaumatua and oral historians, commissioned photographic and mapping projects, held wānanga and prepared information files for each site, and provided information to the Hastings District Council and land owners.[37]

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33 Tania Hopmans – Evidence in Chief para 15

34 Tania Hopmans – Evidence in Chief para 17-21

35 Tania Hopmans – Evidence in Chief para 22-30

36 Tania Hopmans – Evidence in Chief para 35-36

37 Tania Hopmans – Evidence in Chief para 37

[41] They contend, among other matters, that these 8 sites are of significance to them. The extent of the footprints of each site, they contend, must be viewed through their eyes, and with their values and beliefs in mind.[38] Mr Taylor added to his written evidence that the mapping of the sites was set by reference to the natural features of the land, including rocks and streams etc, and bearing in mind the cultural history of the sites. He further claimed that they took into account impacts on landowners.

[42] Thus, their case relies upon the cultural evidence of kaumatua, such as Mr Taylor, the material presented at the Council hearing by the now deceased Mr Fred Reti, and the writings of Te Aturangi Anaru. Mr Pat Parsons also addresses the cultural and historical significance of the eight sites that are involved in this appeal.

The Council's general position

[43] For those sites remaining in contention, the Council has the general view that the outcome argued for by the Trust would impose unreasonable restrictions, inconvenience and/or cost on the landowners who may wish to undertake otherwise unexceptional farming activities. In his evidence, Mr McKay, planner witness for the Council, says that the Council's proposed Rules provide the most appropriate Rules option for these areas because, while avoiding blanket restrictions, they also seek to provide appropriate protection to the sites by limiting the effects of activities such as buildings and earthworks. They would allow day-to-day farming activities to continue, without requiring resource consents for minor buildings or earthworks.

The section 274 parties' general positions

[44] In general terms the s274 parties to the appeal are owners of land on or near which the sites still in question are situated. They are concerned that they may be affected in various ways by the plan provisions which could restrict, if not outright prevent, various activities on those sites. We shall give an outline of what we see as those parties' positions and concerns in the course of discussing each site.

The Maungaharuru sites generally

[45] The name *Maungaharuru* is associated with the settlement of the area by those who arrived on the waka *Takitimu*. The commander of the waka was Tamatea-arikinui.[39] He was accompanied by the high priest, or tohunga, Ruawharo and his brother Tūpai.

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38 Tania Hopmans – Evidence in Chief para 38(a)

39 Patrick Parsons – Evidence in Chief para 39

[46] According to J H Mitchell in the book *Takitimu*, Tūpai was granted the "guardianship of the gods of the heavens and of the whare-wānanga" (house of higher learning).[40] Mitchell records that during the voyage of the waka, Tūpai was the kaitiaki of the sacred symbols of the gods onboard.[41] One of these symbols was Papauma, the representation of birdlife.[42] The record in Mr Reti's material is that:[43]

> ... the tohunga Tūpai cast the staff [named] Papauma high into the air. It took flight and landed on the maunga at the summit of Tītī-a-Okura. Papauma embodied the mauri of birdlife. The maunga rumbled and roared on receiving this most sacred of taonga and the maunga was proliferated with birdlife. Hence the name, Maungaharuru (the mountain that rumbled and roared.)

[47] Mr Parsons added that the place where Papauma landed was known as Tauwharepapauma. This place is listed in a series of boundary names crossing the Tītīokura Saddle from the west.[44] Mr Parsons noted that workmen at the Ohurakura mill in the 1940s recalled how prolific the birdlife was in the forest, and the belief of the Māori people that it was the result of the mauri (life force) planted by Tūpai.[45] He concluded that the mountain range was of high spiritual significance.[46]

[48] Mr Taylor advised that, to his people, the top of the mountain is sacred.[47] Their reference to *the mountain* includes, from south to north - Te Waka, Tītī-a-Okura (often abbreviated to Tītīokura) Maungaharuru and the mountain peaks Ahu-o-te-Atua and Tarapōnui and Te Heru-a-Tūreia.[48] MTT hapū reference all areas of the ridgeline as Maungaharuru.[49]

[49] The evidence given was that the mountain range is central to the MTT hapū identity and that it is constantly referenced by those on the paepae at Tangoio Marae down to the tamariki (children) at the kōhanga reo operated from that marae.[50] Maungaharuru peaks and their environs "are integral to the distinct identity and mana

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40 See discussion Patrick Parsons – Evidence in Chief para 40
41 See discussion Patrick Parsons – Evidence in Chief para 41
42 Bevan Taylor – Evidence in Chief para 27
43 Bevan Taylor – Evidence in Chief para 27
44 Patrick Parsons – Rebuttal Evidence para 21
45 Patrick Parsons – Evidence in Chief para 42
46 Patrick Parsons – Evidence in Chief para 42
47 Bevan Taylor – Evidence in Chief para 23
48 Bevan Taylor – Evidence in Chief para 28
49 Bevan Taylor – Evidence in Chief, para 23 & Appendix 5 Statement of Association p 30
50 Bevan Taylor – Evidence in Chief para 24

of the people." It is described as the "iconic, most sacred and spiritual maunga (mountain) of the Hapū."[51]

[50] Thus the spiritual and cultural importance of the maunga to the hapū is depicted in their art on the marae, in their names, tribal proverbs and symbols, oral history and in their waiata.[52] It is remembered as a major cultural and economic food gathering area epitomised by the whakatauākī (proverb) that encompasses their relationship with their ancestral lands and waters:[53]

> Ka tuwhera a Maungaharuru, ka kati a Tangitū[54] – ka tuwhera a Tangitū, ka kati a Maungaharuru.
>
> When the season of Mangaharuru opens, the season of Tangitū closes – when the season of Tangitū opens, the season of Maungaharuru closes.

[51] The hapū claim that they, with their neighbours, are the tāngata whenua of this region with ahi-kaa-roa (long occupation) making them the holders of mana whenua and kaitiaki over the eastern side of the mountain range to the sea.[55] The mountain is a taonga, we were advised, with its own mauri.[56]

[52] As already noted, the Maungaharuru sites are in the high country to the north and south of what is now generally known as the Tītīokura Saddle, where SH5 (the Napier Taupo Road) crosses and then descends towards the Mohaka River bridge.

[53] In the evidence in chief of Mr Taylor we were advised that the extent of the footprint for the four proposed waahi taonga sites were drawn by him and the late Fred Reti.[57] During the presentation of his evidence he extended that group to include Pat Parsons and Tania Hopmans. Mr Taylor went on to advise that their intent was to capture the extent of the culturally significant features on the mountain range using natural features for mapping the sites. We turn now to discuss each site and the evidence.

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51 Bevan Taylor – Evidence in Chief, Appendix 5 Statement of Association p 29
52 Bevan Taylor – Evidence in Chief para 26(b)(c)(d) & Appendix 5 Statement of Association p 29
53 Bevan Taylor – Evidence in Chief para 26(a) & Appendix 5 Statement of Association pp 29-32
54 Tangitū refers to the sea associated with the hapū
55 Bevan Taylor – Evidence in Chief para 26(a) & 30 & Appendix 5 Statement of Association pp 29-32
56 Bevan Taylor – Evidence in Chief para 26 & Appendix 5 Statement of Association pp 29-32
57 Bevan Taylor – Evidence in Chief para 31

Site MTT86 Te Waka-o-Ngārangikataka Te Waka Range (506ha)

[54] Since the High Court decision, whether the site is wāhi taonga, and extent of the site, are no longer in issue. MTT submits that it was unclear if this Court accepted the extent of this site.[58] For clarification, we do accept it. The rules that should apply to the site are still in issue.[59]

[55] The footprint of this site begins at a point close to the Tītīokura Saddle and runs south along the ridgeline, and the skyline. The site covers the feature known as the Waka of Ngārangikataka. The name of the Waka predates the coming of the Takitimu Waka from the Pacific. It reaches back to the emergence of the North Island from the sea. According to tradition, Ngārangikataka was an uncle of Maui, who fished up the North Island. The tradition of the MTT hapū is that the waka became stranded on the *fish* after it was hauled to the surface. Maui warned his uncle and the others not to cut up the fish. They did not listen - proceeding instead to cut it up, so creating the peaks and valleys we see today. As a result, Maui became angry and turned his uncle and the waka to stone.[60]

[56] Mr Taylor's evidence was that the extent of the footprint for this site covers 506 hectares. This large area, he claims, captures the entirety of the waka including its tauihu (prow), hull, and taurapa (stern post) as well as the wake trailing the waka.[61]

[57] According to Mr Taylor, Ngāi Tauira and Ngāti Tū (along with Ngāti Hineuru on the western face) are the tāngata whenua of Te Waka-o-Ngārangikataka and Tītī-a-Okura.[62] As a result, Te Waka has at least two pā related to the eponymous ancestor of Ngāi Tauira, namely Pirinoa on the tauihu (prow) of the waka, and Taurua-o-Ngarengare at the southern end of the wake that follows the waka.[63] The latter pā, we were told, was named after Tauira's son. The southern ridge line, which includes Te Waka, is also known as "te mauri o te māra o Tauira."[64] This translates as *the garden over which the life force of Tauira still remains.*[65]

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58 MTT 3/3/20 at [161]
59 MTT 3/3/20 at [25]
60 Bevan Taylor – Evidence in Chief para 33 referencing Fred Reti
61 Bevan Taylor – Evidence in Chief para 33
62 Bevan Taylor – Evidence in Chief para 34
63 Bevan Taylor – Evidence in Chief para 34
64 Bevan Taylor – Evidence in Chief para 35
65 Bevan Taylor – Evidence in Chief para 35

[58] In terms of Ngāti Tū's occupation, Mr Taylor advised that they occupied the pā Te Pohue and the kainga (villages) of Kaitahi and Whāngai Takapu.[66]

[59] Ms Diane Lucas is a very experienced landscape architect who was called by the Trust to express her views about a number of the sites in question. We shall note her views in discussing those of them she mentioned. For this site, she noted that it is dissected and involves a series of parallel ridges; that it is an uplifted block and that the proposed footprint of the waahi taonga site reads logically into the landscape.[67]

Position of Other Parties

[60] The Council agrees that this site meets the definition of a waahi taonga in the PDP, but submits that different (ie less restrictive) plan provisions should be applied to it, so as to avoid blanket restrictions on large areas of privately owned land. There were no other parties who gave evidence or made submissions about this site specifically.

Discussion

[61] Te Waka and its history and values was the subject of an earlier decision of the Court – see *Outstanding Landscape Protection Soc and Ors v Hastings District Council* (Decision No W24/2007) and we need not repeat what was said then. Its sharp and distinctive ridgeline – visible from as far away as Napier Hill and other spots in Hawkes Bay – makes it a remarkable piece of the landscape, quite apart from the significance it has for Māori. Our clear view is that the ridgeline/skyline, with the shape of the Waka Ngārangikataka, its stern-post and its wake so clearly visible, does require protection for its value to Māori. The protection needs to be such as to keep the ridgeline clear of disruptions such as structures, production forestry and the like. The protected area would have to descend from the ridgeline for a distance sufficient to leave the top shape clear and sharply visible.

[62] Before the High Court, the parties agreed that given MTT called evidence to support the extent of sites MTT86, 38, 44 and 45, and there was no challenge to that evidence, this Court could not conclude that those sites were too extensive.[68] The High Court was not sure if it was correct to say that this Court must accept all evidence unless it is challenged (it had not had argument on the issue).[69] It will nevertheless

66 Bevan Taylor – Evidence in Chief para 34
67 Diane Lucas – Evidence in Chief, para 50 & 57
68 HC at [57]
69 HC at [60]

be significant that the evidence is unchallenged[70]. We agree, and explicitly confirm that we do accept it. We heard no evidence to make us think that there is good reason to disagree with the Rules proposed by the Council, and confirm them.

Site MTT88 Tītī-a-Okura (70ha) Tītī-a-Okura Saddle

[63] Following the High Court appeal, all issues (whether the site is wāhi taonga, the extent of site, and the rules to apply) are still live.[71] This is the only site where its identification as wāhi taonga remains in dispute.[72]

[64] We first note the evidence of the Trust relating to this site. Mr Taylor advised in his evidence in Chief that the footprint of this site captures the saddle, including the ridgeline on either side of the saddle. He said that Tītī-a-Okura is sometimes used as the name of the whole mountain range. As noted, it was the evidence for the MTT that Tupai cast his staff, named Papauma, high into the air and it landed on the maunga at the summit of Tītī-a-Okura - and the mountain rumbled and roared and was filled with birdlife.

[65] The area was traditionally favoured for mutton bird hunting and is associated with a chief named Te Mapu, and his son Okura. As Okura grew, he was instructed on, and then became expert in, the skill of hunting these birds.[73] According to Mr Parsons, Te Mapu and his son camped and caught mutton birds in this area and that is how the name Tītī-a-Okura ("the mutton birds of Okura") was derived.[74] The late Mr Fred Reti, in his submission to the Council hearing, noted that Te Mapu and Okura would light fires and the birds would be attracted to the light and become snared in the nets strung across their flight path.[75] Mr Taylor agreed and added, during the presentation of his evidence, that the birds would fly south in the morning and back over the saddle in the evening.

[66] Mr Parsons, in rebuttal evidence, added that he was told by an elder (now deceased) that tītī "penetrated the interior by three well-defined flight paths to their nesting grounds." Tītī-a-Okura was one of those flight paths.[76] To catch the birds, nets were strung across the flight path and bon-fires were lit to attract the birds who

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70 HC at [60]
71 MTT 3/3/20 at [25]
72 MTT 3/3/20 at [29]
73 Patrick Parsons – Evidence in Chief para 45
74 Bevan Taylor – Evidence in Chief para 37 quoting Fred Reti
75 Bevan Taylor – Evidence in Chief, Annex 4, Fred Reti Evidence before the District Plan Hearings Committee, para 36
76 Patrick Parsons – Rebuttal Evidence para 25

would be snared in the nets.[77] Under cross-examination he acknowledged that he did not identify this site as a waahi tapu in his book *In the Shadow of the Waka* and that he referred to a bird snaring site near Te Pohue.[78]

[67] Tītī-a-Okura is also associated with the traditional route from the coast to the interior and, according to Mr Taylor, was the route used from Tangitū to Maungaharuru by his people.[79] That route (or thereabouts) later became the old Taupō Coach Road and is now the pass where State Highway 5 crosses the Maungaharuru range.

[68] Mr Taylor also referred to an area within the site which is referred to as Te Waka-a-Te O or the "Waka of Okura."[80] Mr Taylor is a direct descendent of this ancestor,[81] as was Mr Reti.[82]

[69] Ms Lucas noted that the site involves a distinctive saddle between inland and coastal country and is highly legible from the coast.[83] She considers that, given the cultural history, the recognition of the ... *landform feature as delineated as Wahi Taonga ...* is appropriate.[84]

Positions of Other Parties

[70] We first note the position of the s274 parties who have a particular interest in this site. Mr Peter Raikes and his wife, Mrs Caroline Raikes, own Tītīokura Station, near Te Pohue.

[71] Mr Raikes goes on to critique the matters put forward by the Trust about the significance to Māori of Maungaharuru. He labels them as ... *suspect and false in entirety.* He explains that view by regarding traditional Maori lore and related stories and traditions – eg about Ranginui (the Sky Father) and Papatuanuku (the Earth Mother) as being contrary to the Holy Bible, which he believes to be *divinely inspired* ... and as being ... *incontestably true and as coming from .... God's own Word.*

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77 Patrick Parsons – Rebuttal Evidence para 26
78 Transcript p 94-95
79 Bevan Taylor – Evidence in Chief para 38
80 Bevan Taylor – Evidence in Chief para 38
81 Patrick Parsons – Rebuttal Evidence para 27
82 Bevan Taylor – Evidence in Chief, Annex 4, Fred Reti Evidence before the District Plan Hearings Committee, para 36
83 Diane Lucas – Evidence in Chief, para 60-61
84 Diane Lucas – Evidence in Chief, para 63

[72] We need, again, to make it very clear that this Court is not a place to resolve differences in view about deities and divinity; about how the universe came to exist, or about how various cultural groups might remember and respect the works and traditions of their ancestors. Those are non-judiciable issues. Perhaps it might help to emphasise that if we mention some statutory provisions. First, as we attempted to point out in the earlier decision, Māori are as entitled to have their beliefs respected as Mr Raikes is entitled to have his – this is a fundamental Right in the New Zealand Bill of Rights Act 1990:

> s13 Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference.

In terms of resource management decision-making, sections 6, 7 and 8 of the RMA contain highly relevant requirements:

> *6 Matters of national importance*
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:
>
> (g) the protection of protected customary rights:
>
> *7 Other matters*
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> *(a) kaitiakitanga: ...*
>
> *8 Treaty of Waitangi*
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[73] In closing, Ms Blomfield, for Mr Raikes, submitted that none of the MTT witnesses could explain how the activities for which resource consents would be

required would affect the hapū's relationship with the proposed waahi taonga sites. While acknowledging that Mr Taylor referred to earth works and other activities affecting the mauri of all the maunga sites, thereby destroying the tapu and affecting their relationship with the sites, she submitted that this was stated "in passing" and was not part of his original evidence. Ms Blomfield also queried whether there had been any robust assessment by MTT of the reasonableness of imposing the level of regulation proposed over such large areas of land.

[74] Ms Blomfield further suggested that there were variations and inconsistencies in the manner the evidence was prioritised between Ms Tania Hopkins, Mr Parsons and Mr Taylor. She reiterated her client's position that there was nothing special about the site as bird snaring was an everyday activity as was its use as a travel route. In terms of the story of Tūpai she contended the Court should accord appropriate weight to it being a myth.

[75] Mr Raikes proposes an area of land that would be made available to MTT to "share information about the history of the area and its significance to iwi" (he describes it as a parking bay where motorists can stop, stretch their legs and read about the area's history).[85] Alternatively, he says that site could be recognised as wāhi taonga site MTT88.[86] MTT submits that the area has been chosen not because of its values, but because it is outside the area of proposed windfarm construction.[87] MTT refers to the Raikes' proposal as a "token gesture".[88] The Raikes dispute that.[89]

Discussion

[76] We do not wish to be in any way disparaging of Mr Raikes' personal beliefs and religious faith. He is as entitled to those beliefs as Māori are to theirs, and as are the adherents of any other religion or belief system. But Mr Raikes' evidence rather misses the point of s6(e) of the RMA. What is to be recognised and provided for, as a matter of national importance, is ... *the relationship of Maori and their culture and traditions with their ... waahi tapu and other taonga* (emphasis added). What Māori regard as *waahi tapu and other taonga* is for them. What the law requires is the recognition of, and provision for, that relationship and neither this Court nor any other

85 Raikes evidence 20/12/19 at [8].
86 Raikes evidence 20/12/19 at [9].
87 MTT 3/3/20 at [144]
88 MTT 3/3/20 at [148]
89 Raikes 31/3/20 at [69] – [71]

RMA decision-maker can dismiss s6 factors, simply because they may not share the beliefs of Māori, and their traditions and lore.

[77] Site 88 - Tītī-a-Okura, which has a total area of approximately 70 ha, covers approximately 16.22 ha of the station. It is an area largely of high peaks. The Station is held in one title comprising 470 ha. The couple also lease an adjoining 326 ha. The extent of Titi-a-Okura is therefore c 2% of the total farm area. Their concern is that the Plan provisions proposed for the site allow what Mr Raikes regards as only a very limited range of *permitted* activities, with other activities requiring resource consent as *restricted discretionary* activities. He regards the assessment criteria as being so broad that an applicant could have no certainty that a resource consent would be forthcoming.

[78] Speaking of site MTT 88 in particular, Mr Raikes acknowledges that it may have been an area used by tangata whenua to capture Tītī (mutton birds) as they flew inland from the sea, but sees that as not, of itself, a factor giving the area unique or special significance, particularly as regards the size of the area sought to be protected. As he puts it ... *The Māori people snared wildlife as food sources all over New Zealand. Why single out Titiokura if all such sites are of significance?* He says also that the significance of the site seems to have emerged only recently, he having been told by a representative of the Trust only 2.5 years ago that there were no sites of significance on the Station's land. Certainly, we must accept that the area is not unique in the sense of being an area in which birds were snared. The significance might though be in the name, which would suggest that it was somewhat out of the ordinary. That is a matter to be considered along with the remainder of the evidence.

[79] We agree that to the MTT hapū the significance of the site is: its location on the ridgeline of the maunga, which is tapu; its shared value between the MTT hapū and Ngāti Hineuru through their common ancestor Okura; its value as a tītī or mutton bird food gathering area, tītī are a taonga bird species; and its value as a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru. The somewhat recent awareness of, or at least the bringing to wider notice of, the value of the area to Māori is not something we regard as lessening credibility or accuracy. Rather it is, we accept, the product of the Trust's recently acquired ability, because of the settlement of its Treaty claims, to research, record and present its history and positions to fora such as this Court.

[80] We note Mr Raikes' evidence regarding the potential effects on his farming operation if the MTT rules were adopted. He did not see a present need for new fencing or farm tracks on the affected area of the Station, but he pointed out that there may be a need for it to be *drained*, which would require a resource consent for earthworks. He speaks of the possibility of a mini hydro dam on the Station, with the headwaters of affected streams possibly being within site MTT 88; and possibly a wind turbine within the site. He accepts that resource consents for those activities would be required in any event, but opposes the possibility of also requiring consent under Section 16.1, because that would pose what he sees as *significant challenges* for a would-be developer.

[81] Weighing all these matters up we consider that the site is a waahi taonga site but that the evidence suggests that the level of protection and control sought by the Council are sufficient to provide for MTT's relationship with Tītīokura and that their draft rules would be an unreasonable interference with the rights of the land owners. The site is already quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a waahi taonga. In short, we accept the position of MTT and the Council as being appropriate to recognise the significance of the site, without unreasonably restricting other activities. It follows that we do not accept the Raikes' position.

Sites MTT90 & MTT91 Maungaharuru Peaks - Tarapōnui and Ahu-o-te-Atua (413ha combined area)

[82] Following the HC appeal, whether this site is wāhi taonga is not in issue. The extent of the sites and rules to apply are still in issue.[90]

[83] Mr Andrew Thomas, for the Toronui Station Partnership, proposes alternative boundaries for sites MTT90 and MTT91. For MTT90 Mr Thomas, suggests above the 1280m contour.[91] For MTT91 he suggests above the 1260m contour.[92] In her further evidence, Ms Lucas repeats her view that Tarapōnui (MTT89) and Ahu-o-te-Atua (MTT90) should be wāhi taonga from the 1100m contour.[93] Rimu/ Toronui challenge Ms Lucas' evidence (inter alia) because she bases it on landscape factors.[94] MTT

[90] MTT 3/3/20 at [25]
[91] Thomas EIC 20/12/19 at [7]
[92] Thomas EIC 20/12/19 at [8]
[93] Lucas evidence 28/2/20 at [8]
[94] Rimu Station 31/3/20 at [12] – [13]

submits that Mr Thomas's boundaries are inadequate, because (inter alia) raising the elevation would lose the connection of the peaks and the Thomas proposal does not address the distinctive skyline.[95] Rimu/ Toronui note that Council accepted MTT's extent for this site but Mr McKay acknowledged under cross-examination that he had not tested MTT's evidence and Council had not had it reviewed by a cultural expert.[96]

[84] As noted above, in its further submissions following the HC appeal, MTT submits that the differentiation of wāhi taonga sites based on their size, rather than their values, is neither a logical, nor robust, planning approach.[97] MTT submits that wāhi taonga are not limited to a single site or area or 'highest points' or 'central or focal points'.[98] It submits that wāhi taonga need to be viewed holistically, as a whole, and in context.[99] Just as the Court would not identify just the focal or central point of an outstanding natural landscape, it is submitted that just identifying the focal or central point of a wāhi taonga is not appropriate.[100]

[85] In further submissions, Rimu/Toronui argue that the protection applied to a large wāhi taonga site should not be at the same level as that applied to a discretely defined wāhi tapu or wāhi taonga site.[101] They argue that some modification on very large sites may be acceptable.[102]

[86] In our original decision, we traversed the evidence presented that MTT said showed that MTT90 and MTT91 are waahi taonga and deserving of protection.

[87] These two peaks are separate but adjacent to each other and their footprints have been drawn as one site. The intent of this approach was to capture the two peaks and the associated ridgeline.[103] The hapū who hold recognised tāngata whenua status in relation to these peaks is Ngāti Kurumōkihi (also known as Ngāi Tatara). Their pā were at the foot of the mountain and were named Kokopuru and Matarangi. Mr Taylor noted that the oratory of all the MTT hapū refer to the *tihi-tapu o Maungaharuru* or *the sacred peaks of Maungaharuru.*[104]

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95 MTT 3/3/20 at [157]
96 Rimu Station 31/3/20 at [18] – [19]
97 MTT 3/3/20 at [119]
98 MTT 3/3/20 at [43]
99 MTT 3/3/20 at [43]
100 MTT 3/3/20 at [44]
101 Rimu Station 31/3/20 at [20.6]
102 Rimu Station 31/3/20 at [20.7]
103 Bevan Taylor – Evidence in Chief para 39
104 Bevan Taylor – Evidence in Chief para 23

[88] The relationship of the MTT hapū with the peaks is recorded in one of the Statements of Association as follows:[105]

> The Hapū have cultural, spiritual, traditional and historic associations with Maungaharuru and its environs, its waters, associated land and flora and fauna. The Hapū have a responsibility as kaitiaki in accordance with their kawa and tikanga to restore, protect and manage all those natural and historic resources and sites. This relationship is as important to present day whānau as it was to their tīpuna. The continued recognition of the Hapū, their identity, traditions and status as kaitiaki is entwined with the peaks of Maungaharuru.

[89] Tarapōnui-a-Kawhea (to give it its fuller name) is the highest peak of the mountain range and, according to Mr Taylor, it is very tapu.[106] He said that this peak is also associated with the hapū's track from Tūtira to Te Haroto, through Waitara.[107] Mr Parsons notes that the name of this peak comes from the journey of Kurupoto, who came to Aotearoa on the Te Arawa Waka.[108] He explored the Tarawera area with his son Kawhea and then named several places, including this peak.[109] The peak is also the ancestral boundary between the MTT hapū and Ngāti Hineuru on the western side of the mountain range.[110]

[90] Te Ahu-o-te-Atua (The Altar of God) is another high peak situated south of Tarapōnui-a-Kawhea. An altar was there and Mr Taylor said that tohunga gathered there to carry out their spiritual ceremonies. It is, he contended, a very tapu place on the mountain range.[111] His evidence was very definitive on this point, but that it is to be contrasted to the submission of the late Mr Reti, when he presented to the District Plan Hearing Committee. Mr Taylor acknowledged him to be the repository of korero and the cultural history of the MTT hapū. In his submission, Mr Reti stated that no reason was given by the old people for the name of this peak, but "it was regarded by them as being special and significant." Mr Reti went on to state that:

> Te ahu or tuahu is an altar. It is probable that this is where the tohunga gathered to carry out their spiritual ceremonies.

105 Bevan Taylor – Evidence in Chief, Appendix 5 Statement of Association p 32
106 Bevan Taylor – Evidence in Chief para 41
107 Bevan Taylor – Evidence in Chief para 41
108 Patrick Parsons – Evidence in Chief para 48
109 Patrick Parsons – Evidence in Chief para 48
110 Patrick Parsons – Evidence in Chief para 50
111 Bevan Taylor – Evidence in Chief para 40

[91] Mr Taylor, under cross-examination, contended that Mr Reti made a mistake, and that it was his understanding that the tohunga did use this peak for sacred ceremonies. Mr Taylor was older than Mr Reti and the oral sources he relied upon included those upon which Mr Reti was schooled.

[92] Ms Lucas noted the significance of the peaks and the fact that the 'double mound' landforms that form the summit are important landmarks and heritage features in the Hastings District landscape.[112] In her opinion the 1100m contour level of the footprint reflects the dominance of the landform features, especially at the highest point of the range; the extensive views of the landform, and its prominence as the skyline, within the wider region of the district; the legibility of the ruggedness of the two domes as landscape forms and features, and their identity with the surrounding landscape, and the visual integrity and landform consistency of the two peaks and the prominence of the saddle between them.[113] She considered that to move the boundary of the area being protected higher would fail to reflect the landscape within which the site sits, and fail to protect the site and its surroundings as a waahi taonga.

Positions of Other Parties

[93] The Council agrees that this site meets the definition of a waahi taonga as defined in the Proposed District Plan but considers that different plan provisions should be applied to it, so as to avoid blanket restrictions on large areas of privately owned land.

[94] Mr Andrew Thomas gave evidence on behalf of the Toronui Station Partnership, acknowledging the importance of the peaks to MTT but wanting the Court to note that it is important to the owners of the Station as well, who treat the area with respect and care. Mr Thomas is a farmer and a member of the Toronui Station Partnership, which owns the Toronui Station property. The proposed sites - Tarapōnui-a-Kawhea and Ahu-o-te-Atua - together cover an extensive part of the Station. Notably, they are both also within an existing outstanding natural landscape area (ONFL 6) recognised in the PDP. There is also a Recommended Area for Protection (RAP) on the Station. Mr Thomas points out that if one includes those ONFL and RAP areas, Toronui Station is subject to rules relating to the Rural Zone, the rules of the two areas

112 Diane Lucas – Evidence in Chief, para 66 & 69
113 Diane Lucas – Evidence in Chief, para 72

mentioned and, if the Trust's relief is granted, to rules governing activities which can be carried out within sites MTT 90 and MTT 91.

[95] Toronui Station is approximately 1509 ha in area and is a sheep and beef farm. The two sites in issue cover approximately 413ha of land within ONFL 6 and approximately 215ha of Toronui Station land. Mr Thomas says that the land in the proposed sites is high, of mixed contour, and is exposed to extreme weather events of snow, wind and rain.

[96] Rimu Station adjoins Toronui Station Partnership and is 1420ha in area. The two proposed sites MTT 90 and MTT 91, would cover 118.2 ha of Rimu Station's land.

[97] Mr Thomas' view was that while the evidence of the MTT is short on detail and specific events, he is not in a position to be able to challenge it. His evidence mainly dealt with the potential hardship that could be caused to the owners and the stultifying effect that it could have on development. Mr Denis Bell also gave similar evidence for Rimu Station and noted the efforts made by him to care for the land.

[98] Further evidence was presented by Mr Thomas concerning the impact of new draft rules presented by the MTT prior to concluding the hearing. In brief, it was his evidence that while the new rules attempted to deal with some of the earlier concerns of the owners, the rules were not an improvement. Rather they created difficulty working out what land was in or out of the ridgeline setback areas and were potentially more restrictive, or did not go far enough in addressing the concerns he expressed. Mr Thomas reiterated that he considered the rules as they apply in ONFL6 are more than sufficient to achieve the MTT objectives.

[99] In closing, Ms Blomfield for the two Station owners pointed out that although witnesses for MTT described why the two peaks are significant and that the peaks were considered tapu, that did not explain why MTT required over 400 ha of land to be included as a waahi taonga site. Furthermore, she submitted, nowhere in the MTT evidence was there an explanation of why the proposed rules were necessary to protect the relationship with these sites. All MTT could point to, she submitted, was Ms Hopmans stating that MTT's lack of control over the way in which the maunga was managed affected their relationship. We note that what Ms Hopmans said was:[114]

[114] Transcript pp 47-48

> ... there are many things that have had an adverse effect on our relationship with our maunga. First and foremost that it was subject to raupatu or confiscation, that it was denuded of forest, that we had no control over the way that it was managed, so I would say that yes, the way in which the maunga has been used has had an effect because when I spoke with Rere Puna, one of our kaumatua who passed away, when the first Unison application was made and I asked him how he would feel about turbines on the maunga, he said, "Well, that wouldn't be good, but he was – the biggest mamae he had was when the remnant vegetation on Maungaharuru was stripped away and with that went bird life and the cloaking of Maungaharuru. So, in isolation, when you ask that question we have to put it together with the other effects that have happened and as a combined effect, yes, it does have an impact, but as we have said in trying to be able to work with land owners is that we don't oppose the maintenance or the carrying on of existing use for those sites. So, the track is there, that is a fact, so we have already said that we would be comfortable with track maintenance.

[100] Ms Blomfield also acknowledged that Mr Taylor referred to certain activities affecting the mauri and tapu of the sites, but she contended that this was stated in passing and was not part of his original evidence.

[101] Ms Blomfield then submitted, inter alia, that the impact of the proposed rules is significant and that those responsible for the mapping did not take into account the costs to landowners associated with the rules framework. She also contended that it was not enough to assert a relationship with a site and propose rules to protect that relationship, without explaining how the two are connected and why those provisions are justified. Counsel concluded by noting that the two Station owners remained concerned that the waahi taonga status and attendant rule framework would have the effect of "sterilising" over 400 ha of farming land, or attracting significant additional costs.

[102] Ms Davidson, for the Hastings District Council, in her closing submissions agreed that this site meets the definition of a waahi taonga in the PDP and submitted that the Council's rules for these sites do give effect to objective WTO1.

[103] On return from the High Court, counsel for Rimu/Toronui Stations reiterated the submission that the rules MTT proposes will impose costs on the owners of the land for ordinary farming operations, and are not workable.[115] Farmers would be

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115 Rimu Station 31/3/20 at [32] – [35]

required to get resource consent for normal farming operations.[116] Rimu/ Toronui says none of the witnesses giving evidence for MTT have explained how continuation of farming activities would 'significantly affect' the relationship with the sites and why the rules regime is necessary to protect the relationship.[117]

Discussion

[104] In weighing up all these matters we consider the status and extent waahi taonga on this site are the two peaks that are part of the ridgeline of Maungaharuru. We acknowledge the evidence regarding tohunga on Te Ahu-o-te-Atua may be equivocal, but the name is not, and it clearly records the site as the *Altar of God*. We also accept that the MTT hapū consider these peaks are tapu.

Rules to apply

[105] The opposing parties argued that the level of protection and control, and the extent of the area affected sought by MTT, overreach what is needed to provide for the relationship of the MTT hapū with the peaks, and that their rules would be an unreasonable interference with the rights of the land owners. In this latter respect, we consider that the Rules proposed by the Council will adequately protect the values of the waahi taonga, without unreasonably restricting realistic uses of the land in question. It needs to be borne in mind, in considering that issue, that the Rules not create an absolute ban on any activity: - it will always be possible to seek resource consent if some possible activity appears over the horizon that is outside the limits of the Rules.

The Coastal Sites generally

[106] In terms of the coastal sites, Mr Taylor's cultural evidence was that the area of the coast over which the Hapū have a relationship, and customary associations, is referred to as Tangitū within the domain of the god Tangaroa:[118]

> Tangitū is within the domain of Tangaroa-i-te-Rupetu and the descendants of Tangaroa and our hapū are connected by whakapapa. Tangaroa's descendants include the whales, waves, ocean currents and fish-life within Tangitū.
>
> Tangitū is a taonga to the hapū. It is seen as a whole and indivisible entity including the moana, coastal waters, beds, rocks, reefs and beaches, springs, streams, rivers, swamps, estuaries, wetlands, flood plains, aquifers, aquatic life, vegetation and coastal forests.

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116 Rimu Station 31/3/20 at [37]

117 Rimu Station 31/3/20 at [22] – [29]

118 Bevan Taylor – Evidence in Chief para 44-45

[107] Tangitū, for the MTT hapū, is as much a part of their identity they claim, as is Maungaharuru, and that is reflected in their kōrero tuku iho (oral history) songs and tribal proverbs; in their art and symbols; in the name of the wharekai (dining house) on the marae, and in the name of their representative bodies.[119] It was, and is, a mahinga kai (food gathering area); it provided medicines and other resources; it was an integral part of the local economy and it contributed to the mana of the hapū in terms of their manaakitanga (hosting) responsibilities and other associated tikanga and kawa (laws, rules and practices).[120]

[108] There are several Statements of Association in the MTT Deed of Settlement associated with the coast and other sites and these were produced through Mr Taylor.[121] We refer to these below where relevant.

Site MTT35 (W83 & SS6) Te Wharangi Pa Site, Waipatiki. (7ha)

[109] Following the High Court appeal, whether the site is wāhi taonga is not in dispute, and neither are the rules to apply. The extent of the site is in issue.[122] MTT says that the issue appears to be whether it is appropriate to list only the area at the top of the hill, with visible archaeological remains, the middle plateau, which has some visible pits, or to include 'the sides' as well.[123]

[110] The land is privately owned by Sunset Investment Partnership who oppose the inclusion of this site as a *waahi taonga* in the PDP. They note the footprint of the proposed site covers the majority of their property (c4 of c7ha) including the only area where a building may be possible.[124] The evidence of the owners challenges the extent of the site and whether it can be described as Te Wharangi. Having noted that, Mr Simon Tremain acknowledged the existence of archaeological sites on the property did indicate some form of Māori occupation of the property in the past.[125] As a result he offered to reach a settlement with the MTT to protect the ridge line of the site, with a right of access. That offer was declined.[126] That offer, we were told, remains open if the appellants are not successful in this appeal.

[119] Bevan Taylor – Evidence in Chief para 46-47, 49-52
[120] Bevan Taylor – Evidence in Chief para 47
[121] Bevan Taylor – Evidence in Chief, Appendices 10, 11, 13
[122] MTT 3/3/20 at [25] and Sunset 24/3/20 at [2]
[123] MTT 3/3/20 at [132]
[124] Simon Tremain – Evidence in Chief para 14, 45
[125] Simon Tremain – Evidence in Chief para 9
[126] Simon Tremain – Evidence in Chief para 11

[111] Following the High Court appeal, Sunset explains it does not dispute MTT's submissions as to statutory framework and the mandatory requirements for preparation of District Plans.[127] Sunset's case is that the framework requires the Environment Court to apply those provisions to wāhi taonga, and not to seasonal fishing camps, or gardens or cultivated areas.[128] There are many such areas both within the immediate vicinity and along much of the coastline.[129] Sunset submits that the evidence points to the extent of the Pa site being limited to the ridgeline.[130]

[112] MTT responds to Sunset submitting that there are some circumstances in which evidence of 'everyday activities' does not preclude an area being protected.[131]

[113] This site is a pā located on a cliff escarpment on the northern side of the mouth of the Waipātiki Stream. Mr Taylor indicates that the MTT position is that the extent of the pā starts at the bottom of the hill and extends all the way to the top.

[114] MTT consider that this site is Te Wharangi Pā and its significance for them is the occupation of this vicinity by the eponymous ancestors of the MTT hapū, Ngāti Marangatūhetaua (also known as Ngāti Tū), Ngāti Kurumōkihi (Ngāi Tātara) and Ngāi Te Ruruku. In the Statement of Association for the Waipātiki Reserve the story is narrated as follows: [132]

> The key pā, located on the coast on the northern side of the river mouth is Te Wharangi. During the time of the Ngāti Marangatūhetaua (Ngāti Tū) chief, Marangatūhetaua and Ngāi Tatara chief Tataramoa - their fishing grounds at Tūtira and Tangoio were being plundered by another hapū. To help protect their fishing grounds, Marangatūhetaua made an alliance with Te Ruruku, a chief from Wairoa. In exchange for helping to repel the invaders, tribal archives record "Ko Waipātiki nā Marangatū i tuku ki a Te Ruruku" – Marangatūhetaua gifted the land at Waipātiki to Te Ruruku. Included within the gift was Te Wharangi pā. This was considered a prized gift as the area was renowned as an excellent source of kaimoana (seafood), manu (birds), and other kai (food).

The pā, we were told, signifies a key time for the hapū and the forming of a pact that has continued to the present day.[133] Mr Parsons gave a fuller account of this story

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127 Sunset 24/3/20 at [3]
128 Sunset 24/3/20 at [3]
129 Sunset 24/3/20 at [3]
130 Sunset 24/3/20 at [8] – [23]
131 MTT 15/4/20 at [52]
132 Bevan Taylor – Evidence in Chief, Appendix 13 Statement of Association Waipātiki Scenic Reserve p 48
133 Bevan Taylor – Evidence in Chief para 60

and described the area gifted, based on the manuscripts of Te Aturangi Anaru, as follows:[134]

> After this battle Te Wharangi, a pa, was surrendered ... This pa is at Waipatiki. The boundaries start at the mouth of the Waipatiki river, continuing up the river to where Rautoetoe appears, then breaks away to the east and then to the top of the hill. It breaks away to Whakarua, linking up with Te Waihirere, then to the sea and then veers to the south closing off at the mouth of the Waipatiki river where it started from.

[115] Mr Parsons considers that this boundary includes Te Wharangi Pā, and he produced a map from April 1874 made by A. Koch that broadly indicates the location of the pā, although it is incorrectly named Te Wharanga.[135] His evidence was that all the other pā in the Waipātiki Valley fall outside this boundary of the gift.

[116] In his oral evidence at the hearing, Mr Taylor noted that Te Ruruku was given a large area to protect, and that he moved between pā. This he offered as a possible explanation as to why the site was relatively small and more likely to have been occupied on a seasonal basis. He also stated that building a house on the platform of the site would breach tapu and destroy the nature of the place. Wharangi, he said, was tapu.

The s274 parties' positions

[117] Mr Simon Tremain represented the owners, which are family trusts comprising the Sunset Investments Partnership, of a property of 6.12 ha, behind and above the beachfront, at Waipatiki Beach. He knows the area well - he and his family have been holidaying in the area for many years. The partnership's intent is to build a holiday home, and associated structures, on the flatter *plateau* area of the property below the raised ridgeline which, most seem to agree, was likely the site of a small pa. There is a suggestion, which the partnership disputes, that the plateau area could have been a kainga, perhaps including gardens and an urupa.

[118] Mr Tremain acknowledges that there are up to three pits on the ridgeline at the top of the property, and that there is evidence of former Maori occupation of at least that part of the property. He expresses the reservation though that at least some of the pits may be of European origin, possibly having been dug by the Home Guard during World War II. Mr Tremain would support the designation of the ridgeline of the

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134 Patrick Parsons – Evidence in Chief, Appendix 1, p 31

135 Patrick Parsons – Evidence in Chief, Appendix 4

property as a *waahi taonga* site, but does not support the wider classification of the majority of the property as a site of significance. There have been discussions with the Trust, he says, about possible ways of resolving matters to the satisfaction of both, but they have been unsuccessful. He and the other owners of the property have engaged Mr Mikaere and Dr Clough to assist in the analysis of the position. Mr Tremain believes that the changes sought by the Trust would mean that *any development on the land would be a discretionary activity.* He believes that that would remove any confidence that the owners would be able to build anything on the site.

[119] Dr Clough's view about this lower part of this site is that there is no archaeological evidence that it was used as a pa – in the sense of there being traces of an urupa or habitation there. He has the view that the evidence can only suggest that the ridgeline might have been a sentinel or lookout pa, with the concentration of habitation being elsewhere in the valley, back from the shoreline.

[120] Mr William Perry is a retired farmer who lives at Waipatiki. His family have owned land in the area since 1910 and have been farming it for all of that time. Mr Perry's belief is that there has never been a permanent Maori presence, such as a pa site, at Waipatiki. Rather, he believes that it was simply used as an area for gathering kaimoana and that the pa site was elsewhere. Mr Perry also mentioned the possibility of the pits having been dug by the Home Guard during WW II.

Mr Mikaere's evidence

[121] Mr Buddy Mikaere was called by the Sunset Partnership to give evidence about the cultural and historical material advanced by it. He has a good deal of background and qualifications on those topics. Mr Mikaere has some reservations about the coastal sites as being waahi tapu, but we note that the Sunset Partnership has expressly said that it has no issues with those sites being noted as waahi taonga. Of particular relevance to the issues we need to resolve however, he addresses the issues around Site MTT 35 - the traditional Pa site at Te Wharangi, as being a site of significance and being waahi tapu.

[122] In preparing his evidence, Mr Mikaere examined the historical sources, undertook site visits, reviewed the evidence before this Court and interviewed various local people to produce a Summary Report.[136] In terms of the location of Te Wharangi Pā and the 1874 Koch map produced by Mr Parsons, he considers that the map

[136] Buddy Mikaere – Evidence in Chief para 4.3-4.5

demonstrates that 'Wharanga' Pā was further inland than the proposed site now subject to this appeal.[137] Mr Mikaere did not contest the Te Ruruku story. He contended that even if the proposed site were Te Wharangi, Te Ruruku built a pā further south and that he never settled at Te Wharangi.[138] He highlighted the importance of the period of settlement history from 1820 - 1840, including the incursions by various tribes into the area and the resulting flight of many of the hapū of Ngāti Kahungunu to Māhia, where they aligned with the Ngā Puhi and their muskets before they returned.[139] This gap in traditional occupancy, he contended, meant that Waipātiki was abandoned by most and not reoccupied, leaving a gap in traditional knowledge.[140] He also described the history of the alienation of the land from Māori ownership and the addressing of this issue in the MTT Deed of Settlement.[141] As to the manuscript evidence of Te Aturangi Anaru, he noted that the manuscript was not the original and that it may have been copied. Mr Parsons' response was that a part of the manuscript was written in Mr Anaru's own handwriting, while the other handwriting merely records official sources in the manuscript.[142]

[123] Mr Mikaere contests the view that the site was a major fortified pā.[143] He did so by linking two tribal proverbs with the archaeological evidence discussed below in order to contend that the people "put their trust in their manoeuvrability rather than in their stockades or fortresses."[144] The proverbs referred to are those we mentioned once before:[145]

(1) Ka tuwhera a Maungaharuru, ka kati a Tangitū – ka tuwhera a Tangitū, ka kati a Maungaharuru.
When the season of Mangaharuru opens, the season of Tangitū closes – when the season of Tangitū opens, the season of Maungaharuru closes.

(2) Ko tō rātou pā kai nga rekereke.
Their fortified villages were in their heels

[124] He also contests the proposed waahi tapu areas within the site covering the pits and the terrace features. He notes that these are merely storage features, or garden or living spaces, which are normally considered free of tapu. He reviewed the nature of the other archaeological sites in the Waipātiki Valley and concluded that

137 Buddy Mikaere – Evidence in Chief para 5.7
138 Buddy Mikaere – Evidence in Chief para 5.5-5.6
139 Buddy Mikaere – Evidence in Chief, Appendix 1, p 22
140 Buddy Mikaere – Evidence in Chief, Appendix 1, pp 22-26
141 Buddy Mikaere – Evidence in Chief, Appendix 1, pp 26-29
142 Patrick Parsons – Rebuttal Evidence para 12
143 Buddy Mikaere – Evidence in Chief para 6.2-6.6
144 Buddy Mikaere – Evidence in Chief para 6.8
145 Buddy Mikaere – Evidence in Chief para 6.7-6.8

alternative sites are more likely to be Te Wharangi Pā - and that their location matches the 1874 Koch map.[146] He concluded that there was insufficient evidence to justify the significant waahi taonga site overlay and the designation of waahi tapu within that overlay.[147]

Other Evidence

[125] Ms Lucas noted that the site is a significant landform feature rising steeply from the mouth of the Waipātiki River.[148] She considers that there is strong underlying landscape support for the site extending as it does, from the top down the sides to the coastal area.[149]

[126] There are several archaeological features on this site.[150] Ms Elizabeth Pishief gave archaeological evidence for the MTT. We note that there is a consensus between her and Dr Clough (who gave evidence for the land owners) that the ridgeline has *moderate to high archaeological significance.*[151] The lower area of the site was damaged in or around 2005 with the creation of a building platform, but remains from midden were found.[152] Inspections on the site following this event indicated that topsoil stockpiled on the edge of the platform contained shell midden and fire cracked stones.[153]

[127] The experts disagree over the extent of the footprint of the site and whether this pā was Te Wharangi Pā. Dr Pishief considers that the cultural evidence combined with the archaeological evidence indicates that the site is Te Wharangi.[154] She considers the pā footprint would have included the defended areas of the ridgeline down to at least the pits below, and including the platform that was formed in 2005. Dr Clough considers that it is unlikely to be Te Wharangi Pā, given its small size and the number of other significant archaeological sites in the Waipatiki Valley.[155] He also considers that the footprint of the pā was limited to the ridgeline and gully and does not include the pits below.[156]

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146 Buddy Mikaere – Evidence in Chief, Appendix 1, pp 40-45
147 Buddy Mikaere – Evidence in Chief para 13.1
148 Diane Lucas – Evidence in Chief, para 34
149 Diane Lucas – Evidence in Chief, para 37
150 Elizabeth Dale Pishief – Evidence in Chief, p 7; Rodney Clough – Evidence in Chief para 32
151 Elizabeth Dale Pishief – Rebuttal Evidence para 13; Rodney Clough – Evidence in Chief para 50
152 Elizabeth Dale Pishief – Evidence in Chief para 34
153 Elizabeth Dale Pishief – Evidence in Chief para 34
154 Elizabeth Dale Pishief – Evidence in Chief para 40 & Rebuttal Evidence para 26
155 Rodney Clough – Evidence in Chief para 44-46
156 Rodney Clough – Evidence in Chief para 43

[128] In his submissions for the land owners, Mr Lawson submitted that there was no evidence to support the contention that this is a site of significance. He pointed to the lack of features associated with fortified pā as countering the appellant's argument for significance. It is a matter, he contended, of giving appropriate effect to the provisions of the RMA, to the s6 matters of national Importance, and about achieving sustainable management. The MTT draft rules, he submitted, do not achieve this purpose.

Positions of other parties

[129] The Council agrees that this site meets the definition of a *waahi taonga* as defined in the Proposed District Plan.

Discussion

[130] We accept the story of Te Ruruku as recorded by Te Aturangi Anaru. We are not in a position to assess whether this site is Te Wharangi or not, but we accept that the MTT hapū consider that it is and that they have presented sufficient evidence to demonstrate that it may be, particularly through the evidence of Mr Parsons.

[131] What we do know is that this particular site was occupied by Māori but that occupation not extensive.[157] The site was a small sentinel or refuge pā, as all the archaeological and cultural experts seem to agree.[158] MTT even say the pā was not a large one.[159] If it was a part of Te Wharangi Pā, then it could not have been the main centre of the pā complex because it is just too small. The definition of the boundary given by Te Aturangi Anaru is not inconsistent with this finding. We also note that Mr Taylor opined that the people lived in kainga (villages) outside the fortified area on the top of the pā. However, the archaeological use of the term pā defines these sites as fortifications. Similarly, the Statements of Association attached to Mr Taylor's evidence referred to pā being fortified villages.[160] Mr Taylor was adamant that they see the pā as running from the "bottom to the top." However, he could not explain why that approach did not apply to the opposite side of the site, planted in production forestry. We are not convinced that the pā extended from the bottom to the top of the site in the manner claimed. We accept the Sunset witnesses' views of the extent of the site.

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[157] Rodney Clough – Evidence in Chief para 9-10
[158] Rodney Clough – Evidence in Chief para 40
[159] MTT Closing Submissions p 23
[160] Bevan Taylor – Evidence in Chief, Appendices 11, 13, 16

[132] As to Rules, they were not in issue for theis site and we approve the agreed version.

Site MTT38 (W86 & SS3) Te Puku-o-te-Wheke Pa Site, Aropaoanui (44ha)

[133] Following the High Court appeal, whether the site is wāhi taonga and the extent of the site are no longer in issue. Which rules should apply to it are in issue.[161] MTT notes that the extent of MTT38 was amended, in agreement with the Council, to exclude a house (and MTT produced a map for MTT38).[162]

[134] This proposed *waahi taonga* site overlay includes a large pā, described as a well-fortified terraced pā.[163] It is situated on the cliff tops to the north of the Aropaoanui river-mouth. It is here that the high priest of the Takitimu Waka, Ruawharo, chose to place his son Makaro, the mauri whose function is to attract kaimoana (sea food) to the area.[164] It is associated with the MTT hapū, Ngāi Te Ruruku, and also Ngāti Rangitohumare and Ngāi Te Aonui.

[135] There are two Statements of Association forming part of the MTT Deed of Settlement relevant to this site.[165] They describe the historical and cultural importance of Aropaoanui and Te Puku-o-te-Wheke, or the Stomach of the Octopus, as a well-known tauranga waka (anchorage site) where Tamatea (the captain of the Takitimu Waka) and his son Kahungunu, among others, stopped for supplies.[166] Kahungunu is of course, the founding ancestor of the Ngāti Kahungunu iwi. It is also associated with the battle of Wai-kōau and the movement of the warrior chief Taraia 1 and the settlement of the Ngāti Kahungunu people into the area.[167] The hapū of the MTT are all associated subtribes of this iwi.

Other Evidence

[136] Ms Lucas noted that the site is a significant landform rising steeply from the mouth of the Arapawanui River.[168] When considering the extent of the site, it is her

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161 MTT 3/3/20 at [25]
162 MTT 3/3/20 at [30.1]
163 Bevan Taylor – Evidence in Chief para 63
164 Patrick Parsons – Evidence in Chief para 25
165 Bevan Taylor – Evidence in Chief, Appendices 14 and 15
166 Bevan Taylor – Evidence in Chief, Appendix 14, p 51
167 Bevan Taylor – Evidence in Chief, Appendix 15 p 71 & see Patrick Parsons - Evidence in Chief para 26
168 Diane Lucas – Evidence in Chief, para 39

view that there is strong underlying landscape support for it extending as it does, from the top down to the sides and to the coastal area and river.[169]

[137] It was described in 1977 as a *fairly extensive pā*.[170] It has a number of archaeological features, including 16-23 pits, several terraces,[171] and midden still in existence.[172] The records confirm parts of the site were occupied by Māori in former times.

Position of the Council

[138] The Council agrees that this site meets the definition of a *waahi taonga* in the Proposed District Plan but that its plan provisions should be applied to it, so as to avoid blanket restrictions on large areas of privately owned land.

Other parties

[139] There were no other parties with a particular interest in this site represented before us. The site does overlay privately owned land used for sheep farming, but the land owner has not joined as a party to this appeal.

Discussion

[140] In its further submissions, MTT submits that it is significant that the only evidence before the Court in relation to this site is unchallenged.[173] MTT submits that while the Court can take factual evidence and make its own conclusions, that does not normally take the form of creating new factual evidence.[174] It is submitted that it is not reasonably available to the Court to create an entirely new extent.[175] In the absence of any contradictory evidence, we see no reason not to accept the MTT position, which seems quite plausible and reasonable.

[141] We consider that the evidence suggests that the level of protection and control sought by MTT exceeds what is needed to provide for the relationship of the MTT hapū with the site and that the Council's proposed rules are more appropriate.

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169 Diane Lucas – Evidence in Chief, para 42
170 Elizabeth Dale Pishief – Evidence in Chief, p 16
171 Elizabeth Dale Pishief – Evidence in Chief, para 45-46
172 Elizabeth Dale Pishief – Evidence in Chief, para 48-49
173 MTT 3/3/20 at [163]
174 MTT 3/3/20 at [164]
175 MTT 3/3/20 at [165]

Sites MTT44 & 45 Moeangiangi 1 & 2 Pa Site, coastal Tutira (105 ha)

[142] Whether the site is wāhi taonga, and extent of site, are no longer in issue. Rules that apply to the site are.[176]

[143] These sites are located on a ridge, back from the coastal cliffs on the southern side of the Moeangiangi River. Moeangiangi is associated with the occupation by the MTT hapū of Ngāi Te Aonui and Ngāti Kurumōkihi.[177] This site is a complex of inter-related pā along the ridge-top, with a further site at the foot of the hills. The larger pā at this site, we were told, was occupied by the eponymous ancestor Tataramoa of Ngāi Tatara (now known as Ngāti Kurumōkihi).[178] Oral history records that the coastline at this place was a valued kaimoana gathering place, particularly for paua.[179]

Other Evidence

[144] Ms Lucas noted that the site is a significant landform that dominates the landscape.[180] When considering the extent of the site, it is her view that there is strong underlying landscape support for it extending as it does, from the top down to the sides and to the coastal area and river to the sea.[181]

[145] The site has a number of archaeological features, including pits, several terraces, and defensive ditches still in existence.[182] The records confirm the site was occupied by Māori in former times.

Position of the Council

[146] The Council agrees that this site meets the definition of a *waahi taonga* in the Proposed District Plan but that its proposed rules should be applied to it, so as to avoid blanket restrictions on large areas of privately owned land.

Other parties

[147] In respect of these sites, there were no other parties represented before us. The combined area of this site is 105ha of private land, also understood to be used for sheep farming. We are not able to say whether there may be other desired uses, or the percentage of total land area that the sites in question would occupy.

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176 MTT 3/3/20 at [25]
177 Bevan Taylor – Evidence in Chief para 68
178 Bevan Taylor – Evidence in Chief para 69
179 Bevan Taylor – Evidence in Chief para 70
180 Diane Lucas – Evidence in Chief, para 44
181 Diane Lucas – Evidence in Chief, para 46
182 Elizabeth Dale Pishief – Evidence in Chief para 54-59

Discussion

[148] We consider that the evidence suggests that the level of protection and control sought by MTT overreaches what is needed to provide for the relationship of the MTT hapū with the site, and that their rules would be an unreasonable interference with the rights of the land owners. We consider that the Rules proposed by the Council are more appropriate.

Section 290A

[149] Section 290A of the Act requires the Court to *have regard to* the first instance decision that is under appeal. That does not create a presumption that the decision is correct, or impose on an appellant an onus of demonstrating that it is incorrect. It does require that genuine and open-minded attention be paid to it. In this instance, that attention has been particularly helpful in appreciating the different approaches that can be taken to the issues – ie those of Māori wishing to protect, to the extent reasonably possible, their history and values and those of farmers wishing to be able to make the most of the land they have to work with. In the end, we have come to views quite similar to those taken by the Council, and for similar reasons, so no more need be said about it.

Further directions

[150] The HDC sought directions to finalise the remainder of the provisions. The proposed direction in para 13(a) of HDC's memorandum of 31 August 2020 is made. The HDC is to file material described in para 13(b). The HDC is to circulate the documents as suggested in para 13(c), with the parties to have one week in which to provide comment. The HDC will have one further week to make necessary amendments. The Court will issue a final decision following that process.

Costs

[151] In the circumstances, we will leave open any question of costs. If there is to be an application, it should be lodged within 28 days of the date of the final decision, and any response is to be lodged within a further 14 days.

Dated at Wellington this 12th day of July 2021

For the Court

C J Thompson
Alternate Environment Judge

Appendix 1

Coastal Policy Statement Provisions

Objective 3

To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
  - incorporating mātauranga Māori into sustainable management practices; and
  - recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the coastal environment contains renewable energy resources of significant value;
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;
- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected; and
- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development.

Policy 2

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

a. recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
b. involve iwi authorities or hapū on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;
c. with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori[1] in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;
d. provide opportunities in appropriate circumstances for Māori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga[2], may have knowledge not otherwise available;
e. take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and
    i. where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; and
    ii. consider providing practical assistance to iwi or hapū who have indicated a wish to develop iwi resource management plans;
    f. provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
    i. bringing cultural understanding to monitoring of natural resources;
    ii. providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
    iii. having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaitai or other non commercial Māori customary fishing;
g. in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:
    i. recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and
    ii. provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

Policy 17

Protect historic heritage[9] in the coastal environment from inappropriate subdivision, use, and development by:

a. identification, assessment and recording of historic heritage, including archaeological sites;

b. providing for the integrated management of such sites in collaboration with relevant councils, heritage agencies, iwi authorities and kaitiaki;

c. initiating assessment and management of historic heritage in the context of historic landscapes;

d. recognising that heritage to be protected may need conservation;

e. facilitating and integrating management of historic heritage that spans the line of mean high water springs;

f. including policies, rules and other methods relating to (a) to (e) above in regional policy statements, and plans;

g. imposing or reviewing conditions on resource consents and designations, including for the continuation of activities;

h. requiring, where practicable, conservation conditions; and

i. considering provision for methods that would enhance owners' opportunities for conservation of listed heritage structures, such as relief grants or rates relief.

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2021-441-000061
[2022] NZHC 3075

Under	Section 299 of the Resource Management Act 1991
In the matter of	An appeal against a decision of the Environment Court of an appeal under clause 14(1) of the first schedule to the Resource Management Act 1991
BETWEEN	PETER AND CAROLINE RAIKES Appellant
AND	HASTINGS DISTRICT COUNCIL Respondent
AND	MAUNGAHARURU-TANGITŪ TRUST Interested Party

Hearing: 15-16 August 2022
Submissions: 9 September 2022 & 29 September 2022

Appearances: L J Blomfield for Appellant
A J Davidson for Respondent
K M Anderson and M J Dicken for Interested Party

Judgment: 23 November 2022

JUDGMENT OF GRICE J

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Introduction

[1] This is an appeal against a decision of the Environment Court[1] to recognise an area of land as a wāhi taonga or "site of significance" under the Proposed Hastings District Plan (the Proposed Plan). Mr and Mrs Raikes submit that the cultural evidence in relation to the site, part of which is located on their farm, Titiokura Station (the Station), was insufficient, and the Environment Court failed to robustly test the evidence which was given by witnesses called by the Maungaharuru-Tangitū Trust (MTT). In addition, the appellants say, the evidence included unsubstantiated cultural beliefs and myths which do not accord with their own religious beliefs.

[2] The relevant site comprises some 70 hectares known as Tītī-a-Okura, or Tītīokura Saddle, named site MTT88 in the Proposed Plan. Section 16.1 of the Proposed Plan identifies and protects listed wāhi taonga sites from the effects of certain land use activities. It is proposed the MTT88 site will be listed in the Proposed Plan as a wāhi taonga with specific rules applying to the area which restrict activities on the land beyond the restrictions that would usually apply to rural land.

[3] The MTT88 site covers a total area of 70 hectares. Approximately 16.22 hectares of this is located in part of 470 hectares owned by Mr Peter Raikes and Mrs Caroline Raikes. The MTT88 site also covers an adjoining area of land which at the time of the hearing Mr and Mrs Raikes leased and ran as part of the Station. Mr and Mrs Raikes have since bought that adjoining block of land, which amounts to 326 hectares. The MTT88 site also runs across two other properties which are not the subject of this appeal. It is not entirely clear how much of site MTT88 is included in the Station, but it is common ground that it would amount at the very most to approximately 8.45 per cent of Mr and Mrs Raikes presently-held land.[2]

[4] Mr and Mrs Raikes say the Environment Court made a number of errors in its Revised Decision. In particular, Mr and Mrs Raikes say the Environment Court made errors in its assessment and in relying on the cultural evidence adduced at the hearing,

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[1] *Maungaharuru-Tangitū Trust v Hastings District Council* [2021] NZEnvC 98 [the Revised Decision].

[2] At [77]. It is common ground that the Environment Court made an error stating that site MTT88 comprised about 2 per cent of the total farm area, as it failed to account for the proportion of the site which covered part of the adjoining land. I refer to this in more detail below.

as well as failing to take into account their own beliefs. In addition, Mr and Mrs Raikes say that even if it were appropriate to recognise the site as an area of cultural significance, the evidence did not justify recognition of the site to the extent of the area approved on its land. Mr and Mrs Raikes say in this respect that particular cultural activities pointed to, namely tītī (mutton bird) hunting and a historical trail through the saddle, happened within defined areas mainly along the present State Highway (the old Napier–Taupō road) which adjoins Mr and Mrs Raikes' property. They say the evidence relating to any larger area was based on myth and legend which could not be properly substantiated. Mr and Mrs Raikes say that as a result of these errors on the part of the Environment Court, the Revised Decision should be set aside and this Court substitute its own determination.

[5] The provisions of the rules contained in Section 16.1 are not the subject of appeal.

Background to this appeal

[6] The Revised Decision followed an interim decision released by the Environment Court on 28 May 2018 (the Interim Decision).[3] The Revised Decision followed the matter having been remitted following successful appeal to the High Court brought by both parties against the earlier Interim Decision of the Environment Court.[4] The parties had agreed that the appeal should be allowed and the matter should be sent back to the Environment Court for further consideration.[5]

[7] The earlier appeal which led to the Revised Decision involved eight sites categorised as wāhi taonga, all of which were the subject of the determination in the Revised Decision.[6] The only subject of this appeal, however, is the MTT88 site insofar as it affects Mr and Mrs Raikes' property.

3 *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79 [the Interim Decision].
4 *Maungaharuru-Tangitū Trust v Hastings District Council* [2019] NZHC 2576 [the High Court Decision].
5 At [9]. This refers to consent memoranda dated 9 September 2019 and 11 September 2019, which set out the basis upon which the parties had agreed that the appeal should be allowed and the proceedings remitted back to the Environment Court.
6 The Revised Decision, above n 1, at [5].

[8] This appeal is also only concerned with the categorisation of the MTT88 site as a wāhi taonga in the Proposed Plan and its extent. The appeal does not extend to the rules which would apply to MTT88 if it were categorised as a wāhi taonga as determined by the Environment Court. Neither does the appeal extend to any other part of the Proposed Plan, including Section 17.1, relating to landscape and outstanding natural features (a section which I understand is now operative), Section 5.2, relating to Rural Zone Land (which includes the land on which MTT88 is located), or Section 27.1 (which relates to earth works mineral aggregate and hydrocarbon extraction). Therefore, any proposed activities on MTT88 would be subject to those sections, and any restrictions applied under those. However, if MTT88 is included in the Proposed Plan as a wāhi taonga it will also be subject to Section 16.1.[7]

[9] The Hastings District Council (the Council) is the named respondent, in its capacity as the territorial authority responsible for preparing the Plan. It takes a neutral position in relation to this appeal. Ms Davidson for the Council helpfully compiled a number of documents, including the Revised Decision's version of Section 16.1, the cultural provisions of the Proposed Plan with tracked changes recording agreed changes and the rules approved by the Environment Court in both its Interim and Revised Decisions. If MTT88 is confirmed as being wāhi taonga it will be listed as a "Part 4" site and the rules which will apply to MTT88 will be those that refer to Part 4 sites. The documents provided by the Council following the hearing also included a summary of the applicable objectives and policies from the Hawke's Bay Regional Policy Statement and the Hastings District Plan that were addressed in the planning evidence before the Environment Court as well as a table summarising the rules which would apply to the proposed activities within site MTT88 both under the cultural section, Section 16.1 and other sections of the Hastings District Plan.[8]

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7 Memorandum of counsel providing documents for Court's assistance, 16 August 2022, prepared and filed with the agreement of all parties at Attachment C, headed "Activities on Site MTT88 if listed as Wāhi Taonga as regulated by Section 16.1 and other sections of the Proposed District Plan".

8 Memorandum of counsel providing documents for Court's assistance, dated 16 August 2022, prepared and filed with the agreement of all parties.

[10] Maungaharuru-Tangitū Trust (MTT) represents a collective of hapū in northern Hawke's Bay, including Ngāi Tauira, Ngāti Marangatūhetaua (also known as Ngāti Tū), Ngāti Kurumōkihi, Ngāi Te Ruruku ki Tangoio, Ngāti Whakaari and Ngāi Tahu (collectively, the Hapū). MTT is a post-settlement governance entity, established to hold and manage the assets of the Hapū received under settlements of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and to be a representative body for the Hapū. There are approximately 6,000 members registered with MTT.

[11] The traditional area of the Hapū extends from north of the Waikari River to the Waitaha Stream, southwards to Keteketerau. It stretches from Maungaharuru in the west to the coast and beyond Tangitū (the sea) in the east. The history of the Hapū is recorded in a report of Te Rōpū Whakamana i te Tiriti o Waitangi | the Waitangi Tribunal, *The Mohaka ki Ahuriri Report*.[9] As the Waitangi Tribunal ultimately found in their report, the Crown breached the Treaty on many occasions. As a result of the historic actions or inactions of the Crown, the Hapū have suffered the loss of virtually all of their lands and the degradation of their taonga, maunga, places of significance, lakes, rivers and coast.[10]

Background

District plans under the RMA

[12] Under s 73(1) of the Resource Management Act 1991 (the RMA), there must be at all times one district plan for each district. Section 79(1) provides that the district plan must be reviewed every 10 years.

[13] Under s 74(1)(b), a district plan must be prepared in accordance with the provisions of pt 2 of the RMA. Part 2 includes four sections. Section 5 provides that the purpose of the RMA is "to promote the sustainable management of natural and physical resources." Section 6(e) is of particular relevance to this proceeding. It provides:

> **6 Matters of national importance**

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9 Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Mohaka ki Ahuriri Report* (Wai 201, 2004).

10 As the Environment Court also referred to at [38] of the Revised Decision.

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

[14] Such persons also, under s 7, "shall have particular regard to—(a) kaitiakitanga" and, under s 8, "shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

The Proposed District Plan

[15] The previous Hastings District Plan was made operative in 2003. In line with the requirements under s 79(1), the Council notified the Proposed Plan now at issue in November 2013.

[16] The Council says the Proposed Plan achieves s 6(e) in part through Section 16.1 and Appendix 50. Section 16.1 is headed "Wāhi Taonga District Wide Activity". It sets out various provisions including objectives and policies, rules, performance standards and assessment criteria against which applications for consent are assessed. Appendix 50 lists a series of "Wāhi Taonga" sites, which the Plan defines as:

> … a site or area of significance to tangata whenua and includes but is not limited to:
>
> - Old pa sites, excavations and middens (pa tawhito)
> - Old burial grounds and caves (ana tupapaku)
> - Current cemeteries (urupa)
> - Battlefields (wāhi pakanga)
> - Sacred rocks, trees or springs (toka tapu, rakau tapu and waipuna tapu)
> - Watercourses, springs, swamps, lakes and their edges (awa, waipuna, repo, roto)

[17] Under Rule SLD22 of the Plan, subdivision of land containing a wāhi taonga requires discretionary activity consent. Where a land use is proposed within a wāhi taonga area, Section 16.1 of the Plan applies. In essence, where land contains a wāhi taonga, there are certain extra requirements that have to be satisfied before subdivision and certain land uses are permitted. Section 16.1 applies district-wide regardless of, and in addition to, any underlying zone rules.

[18] When the Proposed Plan was first notified in November 2013, Appendix 50 included 57 sites. None of these sites were on land owned by Mr and Mrs Raikes. MTT then made a submission seeking that an additional 61 sites be included. One of those sites was identified as MTT88-Titī-a-Okura. MTT88 extends over 70 hectares covering four titles, including, as I have described above, one 470-hectare title owned by Mr and Mrs Raikes, to the extent of approximately 16.22 hectares, and to an extent which is unclear into 326-hectares which was leased by Mr and Mrs Raikes at the time of the Environment Court hearing.

First Environment Court appeal

[19] On 21 October 2015, MTT appealed the Council's decision on Section 16.1 to reject as wāhi taonga (either in whole or in part) 29 sites, including MTT88. MTT cross-appealed and challenged the appropriateness of the rules put in place to protect the listed sites.

[20] MTT and the Council went to mediation, which resulted in agreed changes to Section 16.1 and the inclusion of 21 more sites in Appendix 50. When the matter was heard by the Environment Court in March and April 2018, eight sites remained contested, including MTT88. The parties agreed that if the Court confirmed these as wāhi taonga, they should be separately listed in Appendix 50 as a "Part 4", on the basis that (with one exception) they were much larger sites, ranging from 44 to 506 hectares, so should be subject to different rules to those applying to the smaller sites.[11]

[21] By the time of the hearing, the Council and MTT had agreed that all of the unresolved sites, including MTT88, had cultural significance and met the definition of

[11] There was one smaller unresolved site seven hectares in size.

wāhi taonga in the Plan and should be listed as wāhi taonga in Appendix 50. The only issue between them was which rules should apply to these "Part 4" sites. The Council submitted to the Environment Court that as they (generally) affected a greater area of private land, a more permissive approach should be taken for them than smaller sites where the wāhi taonga in question was smaller and so the added restrictions could largely be avoided by landowners.

[22] The Environment Court in its May 2018 Interim Decision determined that all eight sites at issue were wāhi taonga and determined the rules to apply to those sites.[12] While the Court found that MTT88 was a wāhi taonga site, it held the level of protection and control sought by MTT88 overreached what was needed to provide for MTT's relationship with Titī-a-Okura and would impose an unreasonable interference with the rights of the landowners.[13]

High Court Decision on the Interim Decision

[23] Both Mr and Mrs Raikes and MTT88 appealed the Interim Decision to the High Court. In allowing the appeal and remitting the matter back for determination, the High Court noted the matter came before it in unusual circumstances, as the parties to the Environment Court decision had agreed the High Court appeal should be allowed and the matter remitted to the Environment Court for reconsideration.[14] In that decision Cooke J said:

> [64] The key difficulty with the Environment Court's conclusions is that the Court appears to have proceeded straight to a question of balancing the rights and interests of the private landowners and tāngata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this. The reasoning has a conclusory character, and accordingly it is potentially arbitrary. The circumstances called for a more precise analysis. For those reasons, and the additional reasons identified above, the appeals are allowed.

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12 The Interim Decision, above n 3.
13 At [63].
14 The High Court Decision, above n 4, at [63].

The Environment Court Revised Decision on appeal

[24] The Environment Court reviewed its decision in light of the High Court's comments.[15] No further evidence was adduced, nor was there any further hearing, but the parties were invited to file further legal submissions. The Court heard submissions only relying on the evidence from the earlier hearing.

[25] The Environment Court in its Revised Decision summarised the High Court's directions as follows:[16]

> [2] In summary, the High Court said:
>
> - The issue was whether the level of proposed protection under the Proposed District Plan was appropriate for the particular sites;
> - What was required was for the reasons set out in the written decision of this Court to demonstrate that the analysis required as a matter of law had been undertaken;
> - It was necessary for this Court to first make what are effectively factual findings on the nature of the wāhi taonga/wāhi tapu status of the particular sites. Importantly, the issues are inherently site specific. Because it includes questions of historical associations with the relevant areas of land there is the potential for uncertainty in relation to the facts. But this Court must do its best based on the evidence that is available. There may not need to be definitive findings on all matters of detail. A degree of uncertainty in this Court's factual findings in relation to the particular sites may be involved.
> - The second related requirement is for this Court to assess, as precisely as possible, how the proposed provisions in the District Plan could potentially adversely affect the wāhi tapu/wāhi taonga sites as recognised by the factual findings.
> - Given that, it is not appropriate for this Court to proceed straight to balancing interests without first engaging specifically with the potential impacts that activities contemplated or controlled by the proposed provisions will have on the wāhi tapu status found to exist. That will likely involve a consideration of particular activities, and the consequences of the proposed provisions.
> - Whilst it is ultimately a matter for this Court, it seemed to the High Court that Policy 64 of the Regional Policy Statement may be of particular moment. It states that "Activities should not have any significant adverse effects on wāhi tapu, or tauranga waka".

15 The Revised Decision, above n 1.
16 Footnotes omitted.

> [3] The High Court said that the key difficulty with this Court's conclusions is that it appears to have proceeded straight to a question of balancing the rights and interests of the private landowners and tāngata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this.
>
> [4] We have reviewed the decision in the light of the High Court's views, and the further submissions made to this Court after the matter was returned to it. Rather than riddle the new decision with cross-references to aspects of the first decision, we believe it will produce a more coherent document if, on relevant issues, we repeat the substance of the first decision, with, where appropriate, additions and modifications to take account of the High Court's views and the further submissions received.

[26] The Environment Court made decisions in relation to all eight unresolved sites.[17] The appellants' appeal against the recognition of MTT88 is the only outstanding issue in the Proposed Plan.

[27] In its Revised Decision, the Environment Court noted the submission of MTT that Māori are specialists in the tikanga of their hapū or iwi and are best placed to assert their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga.[18]

[28] The Court then traversed the relevant primary and secondary legislation to be considered, including the Coastal Policy Statement as well as the Regional Policy Statement for the Hawkes Bay region, both of which applied to certain or all of the sites in question.[19] The Court noted the provisions of the District Plan, including relevantly Section 16.[20] It said the two agreed Objectives of Section 16 "fundamental to the issues to be resolved" were:[21]

> OBJECTIVE WT01 To recognise Wāhi Tapu and Wāhi Taonga sites and areas in the Hastings District as being of cultural significance to nga hapū through whakapapa and ensure their protection from damage, modification or destruction from land use activities.

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17 The Revised Decision recognised a number of coastal sites as wāhi taonga which are not the subject of appeal. References to the New Zealand Coastal Policy Statement 2010 are not relevant to this appeal as the policy does not apply in relation to MTT88: see the Revised Decision, above n 1, at [13].

18 At [11], referring to *SKP Inc v Auckland Council* [2018] NZEnvC 89; and *SKP Inc v Auckland Council* [2019] NZHC 900.

19 At [13]–[15].

20 At [18].

21 At [19].

> OBJECTIVE WT02 To promote the protection of Waahi Tapu and Waahi Taonga sites and areas in a way that accounts for the customary practices of ngā hapū.

[29] The Court also recorded two further settled provisions of the Proposed Plan which were relevant to consider the "*efficient and effective* ways of dealing with the present issues."[22] The first was Objective TW01:

> TW01: The expectations and aspirations of Tangata Whenua with Mana Whenua are acknowledged when making decisions on subdivision, land use and development, and the management of natural and physical resources throughout the Hastings District.

[30] The Court recorded the explanation of this Objective TW01 was:[23]

> The protection of sites of past Māori occupation and use for their cultural and archaeological values will be achieved by putting into place appropriate mechanisms for the Tangata Whenua to be involved in the identification and management of these sites. This also applies throughout the District to areas recognised as taonga or as a source of mahinga kai to the Tangata Whenua, particularly where ngā hapū whānui have the status of kaitiaki of these areas, features and resources.

[31] The second relevant provision was Policy WTP1, to:[24]

> ... identify, in consultation with Tāngata Whenua, land within the District which contains Wāhi Taonga.

[32] The Court considered the rules proposed and in general terms the effects the rules would have on those landowners who would be subject to them. It said that the permitted activities under the rules would be "significantly less burdensome" for any farming activity than had been the case in the notified and decision versions of the Proposed Plan.[25] In relation to a restricted discretionary activity application, the focus would be "squarely" on the issues "to which the decision-maker's discretion is solely confined."[26]

[33] The Court narrated the relationship of the Hapū with the relevant sites as follows:

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22 At [19] (emphasis in original).
23 At [19].
24 At [19].
25 At [20].
26 At [20].

[37] As noted above the MTT represents a collective of hapū. The whakapapa, from Io (the creator), down to the Māori pantheon of gods through to the *eponymous or source tīpuna* (ancestors) of the four hapū associated with MTT, is to be found in the evidence of Mr Bevan Taylor. These stories and whakapapa lay the basis for identifying the relationship of the MTT hapū and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga - see s 6(e).

[38] Prior to 2014, the MTT hapū were engaged in researching, presenting, negotiating and settling their Treaty claims against the Crown. During those proceedings, they contested the purchase by the Crown of several large blocks including the Arapaoanui block and the Moeangiangi block in 1859, and the confiscation of their remaining lands in 1867.[27] MTT finally settled their claims, as recorded in their Deed of Settlement in May 2013, and the settlement was given effect by the Maungaharuru-Tangitū Hapū Claims Settlement Act 2014.

[39] The MTT hapū still see themselves as kaitiaki of all their ancestral lands, although they own only a remnant of them.[28] Ms Tania Hopmans in her evidence addressed how they have attempted to exercise this kaitiakitanga responsibility in recent years before various fora, particularly the Environment Court.[29] As a result of their experience they decided to engage with the Proposed District Plan process.[30]

[40] To engage in this manner, they undertook literature reviews, reviews of research reports, reviews of briefs of evidence from previous litigation, conducted site visits, engaged archaeologists, recorded kaumatua and oral historians, commissioned photographic and mapping projects, held wānanga and prepared information files for each site, and provided information to the Hastings District Council and land owners.[31]

[41] They contend, among other matters, that these 8 sites are of significance to them. The extent of the footprints of each site, they contend, must be viewed through their eyes, and with their values and beliefs in mind.[32] Mr Taylor added to his written evidence that the mapping of the sites was set by reference to the natural features of the land, including rocks and streams etc, and bearing in mind the cultural history of the sites. He further claimed that they took into account impacts on landowners.

[42] Thus, their case relies upon the cultural evidence of kaumatua, such as Mr Taylor, the material presented at the Council hearing by the now deceased Mr Fred Reti, and the writings of Te Aturangi Anaru. Mr Pat Parsons also addresses the cultural and historical significance of the eight sites that are involved in this appeal.

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27 Statement of Evidence of Tania Hopmans on behalf of Maungaharuru–Tangitū Trust (7 March 2017) [Statement of Evidence of Ms Hopmans] at [15].

28 At [17]–[21].

29 At [22]–[30].

30 At [35]–[36].

31 At [37].

32 At [38(a)].

[34] The Court then noted in general terms that the s 274 parties to the appeal, as owners of land on or near which the sites in question were situated, were "concerned that they may be affected in various ways by the plan provisions which could restrict, if not outright prevent, various activities on those sites."[33]

[35] The Court discussed the cultural significance generally of the Maungaharuru range, of which MTT88 is a part. This background provides the context for the cultural importance and history of the site now in issue:

> *The Maungaharuru sites generally*
>
> [45] The name *Maungaharuru* is associated with the settlement of the area by those who arrived on the waka *Takitimu*. The commander of the waka was Tamatea-arikinui.[34] He was accompanied by the high priest, or tohunga, Ruawharo and his brother Tūpai.
>
> [46] According to J H Mitchell in the book *Takitimu*, Tūpai was granted the "guardianship of the gods of the heavens and of the whare-wānanga" (house of higher learning).[35] Mitchell records that during the voyage of the waka, Tūpai was the kaitiaki of the sacred symbols of the gods onboard.[36] One of these symbols was Papauma, the representation of birdlife.[37] The record in Mr Reti's material is that:[38]
>
>> … the tohunga Tūpai cast the staff [named] Papauma high into the air. It took flight and landed on the maunga at the summit of Tītī-a-Okura. Papauma embodied the mauri of birdlife. The maunga rumbled and roared on receiving this most sacred of taonga and the maunga was proliferated with birdlife. Hence the name, Maungaharuru (the mountain that rumbled and roared.)
>
> [47] Mr Parsons added that the place where Papauma landed was known as Tauwharepapauma. This place is listed in a series of boundary names crossing the Tītīokura Saddle from the west.[39] Mr Parsons noted that workmen at the Ohurakura mill in the 1940s recalled how prolific the birdlife was in the forest, and the belief of the Māori people that it was the result of the mauri (life force) planted by Tūpai.[40] He concluded that the mountain range was of high spiritual significance.[41]

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33 At [44].

34 Statement of Evidence of Patrick Parsons on behalf of Maungaharuru–Tangitū Trust (6 March 2017) [Statement of Evidence of Mr Parsons] at [39].

35 See discussion at [40].

36 See discussion at [41].

37 Statement of Evidence of Bevan Taylor on behalf of Maungaharuru–Tangitū Trust (6 March 2017) [Statement of Evidence of Mr Taylor] at [27].

38 At [27].

39 Statement of Rebuttal Evidence of Patrick Parsons on behalf of the applicant (30 June 2017) [Statement of Rebuttal Evidence of Mr Parsons] at [21].

40 Statement of Evidence of Mr Parsons, above n 34, at [42].

41 At [42].

> [48] Mr Taylor advised that, to his people, the top of the mountain is sacred.[42] Their reference to *the mountain* includes, from south to north – Te Waka, Tītī-a-Okura (often abbreviated to Tītīokura) Maungaharuru and the mountain peaks Ahu-o-te-Atua and Tarapōnui and Te Heru-a-Tūreia.[43] MTT hapū reference all areas of the ridgeline as Maungaharuru.[44]
>
> [49] The evidence given was that the mountain range is central to the MTT hapū identity and that it is constantly referenced by those on the paepae at Tangoio Marae down to the tamariki (children) at the kōhanga reo operated from that marae.[45] Maungaharuru peaks and their environs "are integral to the distinct identity and mana of the people." It is described as the "iconic, most sacred and spiritual maunga (mountain) of the Hapū."[46]
>
> [50] Thus the spiritual and cultural importance of the maunga to the hapū is depicted in their art on the marae, in their names, tribal proverbs and symbols, oral history and in their waiata.[47] It is remembered as a major cultural and economic food gathering area epitomised by the whakatauākī (proverb) that encompasses their relationship with their ancestral lands and waters:[48]
>
>> Ka tuwhera a Maungaharuru, ka kati a Tangitū[49] - ka tuwhera a Tangitū, ka kati a Maungaharuru.
>>
>> When the season of Mangaharuru opens, the season of Tangitū closes - when the season of Tangitū opens, the season of Maungaharuru closes.
>
> [51] The hapū claim that they, with their neighbours, are the tāngata whenua of this region with ahi-kaa-roa (long occupation) making them the holders of mana whenua and kaitiaki over the eastern side of the mountain range to the sea.[50] The mountain is a taonga, we were advised, with its own mauri.[51]
>
> [52] As already noted, the Maungaharuru sites are in the high country to the north and south of what is now generally known as the Tītīokura Saddle, where SH5 (the Napier Taupo Road) crosses and then descends towards the Mohaka River bridge.

[36] In relation to the extent of the proposed wāhi taonga sites, the Court then noted:

> [53] In the evidence in chief of Mr Taylor we were advised that the extent of the footprint for the four proposed waahi taonga sites were drawn by him

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42 Statement of Evidence of Mr Taylor, above n 37, at [23].
43 At [28].
44 At [23] and Appendix 5 Statement of Association – Peaks of Maungaharuru Range at 30.
45 At [24].
46 At Appendix 5 Statement of Association – Peaks of Maungaharuru Range at 29.
47 At [26(b)–(d)] and Appendix 5 Statement of Association – Peaks of Maungaharuru Range at 29.
48 At [26(a)] and Appendix 5 Statement of Association – Peaks of Maungaharuru Range at 29–32.
49 Tangitū refers to the sea associated with the Hapū.
50 Statement of Evidence of Mr Taylor, above n 37, at [26(a)] and [30] and Appendix 5 Statement of Association – Peaks of Maungaharuru Range at 29–32.
51 At [26] and Appendix 5 Statement of Association – Peaks of Maungaharuru Range at 29–32.

> and the late Fred Reti.[52] During the presentation of his evidence he extended that group to include Pat Parsons and Tania Hopmans. Mr Taylor went on to advise that their intent was to capture the extent of the culturally significant features on the mountain range using natural features for mapping the sites …

[37] The Court discussed and reached its conclusions in relation to MTT88 as follows:[53]

> *Site MTT88 Tītī-a-Okura (70ha) Tītī-a-Okura Saddle*
>
> [63] Following the High Court appeal, all issues (whether the site is wāhi taonga, the extent of site, and the rules to apply) are still live. This is the only site where its identification as wāhi taonga remains in dispute.
>
> [64] We first note the evidence of the Trust relating to this site. Mr Taylor advised in his evidence in Chief that the footprint of this site captures the saddle, including the ridgeline on either side of the saddle. He said that Tītī-a-Okura is sometimes used as the name of the whole mountain range. As noted, it was the evidence for the MTT that Tupai cast his staff, named Papauma, high into the air and it landed on the maunga at the summit of Tītī-a-Okura - and the mountain rumbled and roared and was filled with birdlife.
>
> [65] The area was traditionally favoured for mutton bird hunting and is associated with a chief named Te Mapu, and his son Okura. As Okura grew, he was instructed on, and then became expert in, the skill of hunting these birds. According to Mr Parsons, Te Mapu and his son camped and caught mutton birds in this area and that is how the name Tītī-a-Okura ("the mutton birds of Okura") was derived. The late Mr Fred Reti, in his submission to the Council hearing, noted that Te Mapu and Okura would light fires and the birds would be attracted to the light and become snared in the nets strung across their flight path. Mr Taylor agreed and added, during the presentation of his evidence, that the birds would fly south in the morning and back over the saddle in the evening.
>
> [66] Mr Parsons, in rebuttal evidence, added that he was told by an elder (now deceased) that tītī "penetrated the interior by three well-defined flight paths to their nesting grounds." Tītī-a-Okura was one of those flight paths. To catch the birds, nets were strung across the flight path and bon-fires were lit to attract the birds who would be snared in the nets. Under cross-examination he acknowledged that he did not identify this site as a waahi tapu in his book *In the Shadow of the Waka* and that he referred to a bird snaring site near Te Pohue.
>
> [67] Tītī-a-Okura is also associated with the traditional route from the coast to the interior and, according to Mr Taylor, was the route used from Tangitū to Maungaharuru by his people. That route (or thereabouts) later became the old Taupō Coach Road and is now the pass where State Highway 5 crosses the Maungaharuru range.

52 At [31].
53 Footnotes omitted.

[38] Mr and Mrs Raikes had challenged the evidence put forward by MTT88 and the significance of the site to the Hapū. The Court said:

> *Positions of Other Parties*
>
> [70] We first note the position of the s274 parties who have a particular interest in this site. Mr Peter Raikes and his wife, Mrs Caroline Raikes, own Tītīokura Station, near Te Pohue.
>
> [71] Mr Raikes goes on to critique the matters put forward by the Trust about the significance to Māori of Maungaharuru. He labels them as ... *suspect and false in entirety*. He explains that view by regarding traditional Maori lore and related stories and traditions - eg about Ranginui (the Sky Father) and Papatuanuku (the Earth Mother) as being contrary to the Holy Bible, which he believes to be *divinely inspired* ... and as being ... *incontestably true and as coming from .... God's own Word.*
>
> ...
>
> [73] In closing, Ms Blomfield, for Mr Raikes, submitted that none of the MTT witnesses could explain how the activities for which resource consents would be required would affect the hapū's relationship with the proposed waahi taonga sites. While acknowledging that Mr Taylor referred to earth works and other activities affecting the mauri of all the maunga sites, thereby destroying the tapu and affecting their relationship with the sites, she submitted that this was stated "in passing" and was not part of his original evidence. Ms Blomfield also queried whether there had been any robust assessment by MTT of the reasonableness of imposing the level of regulation proposed over such large areas of land.
>
> [74] Ms Blomfield further suggested that there were variations and inconsistencies in the manner the evidence was prioritised between Ms Tania Hopkins, Mr Parsons and Mr Taylor. She reiterated her client's position that there was nothing special about the site as bird snaring was an everyday activity as was its use as a travel route. In terms of the story of Tūpai she contended the Court should accord appropriate weight to it being a myth.
>
> [75] Mr Raikes proposes an area of land that would be made available to MTT to "share information about the history of the area and its significance to iwi" (he describes it as a parking bay where motorists can stop, stretch their legs and read about the area's history). Alternatively, he says that site could be recognised as wāhi taonga site MTT88. MTT submits that the area has been chosen not because of its values, but because it is outside the area of proposed windfarm construction. MTT refers to the Raikes' proposal as a "token gesture". The Raikes dispute that.

[39] The Court then said, in a section headed "Discussion":[54]

> [76] We do not wish to be in any way disparaging of Mr Raikes' personal beliefs and religious faith. He is as entitled to those beliefs as Māori are to theirs, and as are the adherents of any other religion or belief system. But

[54] Emphasis in original.

> Mr Raikes' evidence rather misses the point of s6(e) of the RMA. What is to be recognised and provided for, as a matter of national importance, is … *the relationship of Maori and their culture and traditions with their ... waahi tapu and other taonga* (emphasis added). What Māori regard as *waahi tapu and other taonga* is for them. What the law requires is the recognition of, and provision for, that relationship and neither this Court nor any other RMA decision-maker can dismiss s6 factors, simply because they may not share the beliefs of Māori, and their traditions and lore.

[40] The Court noted that MTT88 had a total area of approximately 70 hectares, approximately 16.22 hectares of which was on Mr and Mrs Raikes's 470-hectare Station.[55] Mr and Mrs Raikes leased an adjoining 326 hectares. The Court calculated that the extent of the site was approximately two per cent of the total farm area.[56]

[41] The Court noted the concerns of Mr and Mrs Raikes that if the site was subject to the Plan provisions proposed it would allow "only a very limited range of *permitted* activities, with other activities requiring resource consent as *restricted discretionary* activities."[57] The Court noted Mr Raikes regarded the proposed assessment criteria as "so broad that an applicant could have no certainty that a resource consent would be forthcoming."[58]

[42] The Court said:

> [78] Speaking of site MTT 88 in particular, Mr Raikes acknowledges that it may have been an area used by tangata whenua to capture Tītī (mutton birds) as they flew inland from the sea, but sees that as not, of itself, a factor giving the area unique or special significance, particularly as regards the size of the area sought to be protected … He says also that the significance of the site seems to have emerged only recently, he having been told by a representative of the Trust only 2.5 years ago that there were no sites of significance on the Station's land …

[43] Ultimately, the Court accepted MTT's position that MTT88 should be recognised as a wāhi taonga site and listed in Part 4 of Appendix 50.[59] The Court said:

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55 The Revised Decision, above n 1, at [77].

56 At [77]. The Court's calculation appears to have been reached by taking the 16.22 hectares of the site as a proportion of the total land owned or leased by the Raikes at the time (796 hectares). All parties now accept this calculation was made in error, as it failed to account for the proportion of the site on the part of the station which was on land that was leased.

57 At [77] (emphasis in original).

58 At [77].

59 At [79] and [81].

> [79] We agree that to the MTT hapū the significance of the site is: its location on the ridgeline of the maunga, which is tapu; its shared value between the MTT hapū and Ngāti Hineuru through their common ancestor Okura; its value as a tītī or mutton bird food gathering area, tītī are a taonga bird species; and its value as a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru. The somewhat recent awareness of, or at least the bringing to wider notice of, the value of the area to Māori is not something we regard as lessening credibility or accuracy. Rather it is, we accept, the product of the Trust's recently acquired ability, because of the settlement of its Treaty claims, to research, record and present its history and positions to fora such as this Court.

[44] The Court turned to the rules that should apply to MTT88 as a wāhi taonga. It noted the evidence of Mr Raikes regarding the potential effects on his farming operation if MTT's proposed rules were adopted.[60] The site was used as part of the station for sheep and cattle grazing. Although Mr Raikes did not see a present need for new fencing or farm tracks in the MTT88 site, he noted the possibility that the land may need to be drained, which would require a resource consent for earthworks, and he suggested that future development on the site might include a mini hydro dam on the station, and possibly a wind turbine.[61]

[45] While acknowledging that resource consents for those activities which he suggested might be options for the site would be required in any event, Mr Raikes nevertheless saw the requirements of gaining consent if the site were subject to Section 16.1 as "*significant challenges* for a would-be developer."[62]

[46] The Environment Court concluded:

> [81] Weighing all these matters up we consider that the site is a waahi taonga site but that the evidence suggests that the level of protection and control sought by the Council are sufficient to provide for MTT's relationship with Tītīokura and that their draft rules would be an unreasonable interference with the rights of the land owners. The site is already quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a waahi taonga. In short, we accept the position of MTT and the Council as being appropriate to recognise the significance of the site, without unreasonably restricting other activities. It follows that we do not accept the Raikes' position.

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[60] At [80].

[61] At [80]. In submissions at the appeal hearing counsel for the appellants indicated that Mr and Mrs Raikes were contemplating the profits of such development might go to support charitable purposes aligned with their Christian beliefs.

[62] At [80] (emphasis in original).

[47] The appellants do not challenge the Environment Court's decision to adopt the rules for the site. This appeal is limited to the determination by the Environment Court that MTT88 was a wāhi taonga site and, in the event that the determination is upheld, that the area of the site should be limited to focal points for particular activities which had been established as occurring in the area, such as the tītī or mutton bird snaring and the path used by the Hapū for the trail over the saddle.

[48] The Revised Decision dealt not only with Tītīokura Saddle but also generally with the area and specifically with a number of other sites in the Maungaharuru range. A number of more general comments made by the Court in this respect are also relevant to the assessment of a site as wāhi taonga. As the Court noted:[63]

> [84] As noted above, in its further submissions following the HC appeal, MTT submits that the differentiation of wāhi taonga sites based on their size, rather than their values, is neither a logical, nor robust, planning approach. MTT submits that wāhi taonga are not limited to a single site or area or 'highest points' or 'central or focal points'. It submits that wāhi taonga need to be viewed holistically, as a whole, and in context. Just as the Court would not identify just the focal or central point of an outstanding natural landscape, it is submitted that just identifying the focal or central point of a wāhi taonga is not appropriate.

[49] When discussing the rights of landowners in relation to the Maungaharuru Peak sites (MTT90 and MTT91) the Court also noted that, in relation to the Council rules, they would not unreasonably restrict: [64]

> … realistic uses of the land in question. It needs to be borne in mind, in considering that issue, that the Rules not [sic] create an absolute ban on any activity: - it will always be possible to seek resource consent if some possible activity appears over the horizon that is outside the limits of the Rules.

Grounds of appeal

[50] The Amended Notice of Appeal filed by the appellant raises seven questions of law:

(a) *Question 1:* Did the Court fail to consider and properly apply relevant law and case law about the critical assessment a decision-maker should

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63 In the course of a discussion concerning sites MTT90 and MTT91 Maungaharuru Peaks – Tarapōnui and Ahu-o-te-Atua (footnotes omitted).

64 At [105].

apply to evidence given by a party asserting a relationship with a site that should be recognised and provided for under section 6(e)?

(b) *Question 2:* Did the Court err in its consideration and application of section 13 of the Bill of Rights Act 1990?

(c) *Question 3:* Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusion at paragraph [76] (that what Maori regard as waahi tapu and other taonga is for them)?[65]

(d) *Question 4:* Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at paragraph [79]?[66]

(e) *Question 5:* Did the Court take into account a matter which it should not have taken into account when it considered the proportion of the total farm area owned or leased by the appellants affected by proposed Site 88?

(f) *Question 6:* Was the Court's calculation of that proportion correct?

(g) *Question 7:* Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at paragraph [81] on the extent and boundary of proposed Site MTT 88?[67]

Submissions and material filed by the appellants following the hearing

[51] Following the hearing, at my request the parties by consent provided some information concerning the relevant plans, policies and rules.

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65 Paragraph [76] of the Revised Decision refers to s 6(e) of the RMA, which deals with the relationship of Māori and their culture and traditions with wahi tapu and other taonga.

66 Paragraph [79] of the Revised Decision is a summary of the cultural issues, the cultural significance of the site to the MTT hapū and its evidence which the Environment Court says it accepts.

67 Paragraph [81] of the Revised Decision refers to the site being already "quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a Wāhi Taonga." The Court went on to accept the position of MTT and the Council as being appropriate to "recognise the significance of the site, without unreasonably restricting other activities." It indicated it did not accept Mr and Mrs Raikes's position.

[52] Separately from this, however, the appellants also filed a further memorandum on 9 September 2022. It included Attachments A, B and C, being photographs and sketch plans, and Attachment E, which included new submissions on the part of the appellants.[68]

[53] I had the benefit of full written and oral submissions from the appellants. It is inappropriate for me to accept the filing of further submissions which appear merely to expand on the arguments made at the hearing. The other parties have had no chance to respond, nor was leave granted for the filing of these further submissions.

[54] Accordingly, I do not take the additional attachments and further submissions annexed to the appellants' memorandum of 9 September 2022 into account.

Positions of the parties

Appellants' submissions

[55] Mr and Mrs Raikes submit that the Environment Court cannot divest itself of its judicial functions to determine whether an area is wāhi taonga simply because Māori claim it is culturally significant to them. They say the Court could not uncritically accept assertions made by witnesses for MTT but had to determine whether the evidence probatively established the existence of a wāhi taonga site and the extent of its boundaries.

[56] The appellants say the Environment Court failed to critically evaluate the evidence put before it by the parties. In so doing, the Environment Court failed to apply relevant case law. This meant the Raikes' evidence was dismissed or discounted as immaterial to the case.

[57] The appellants also say the Environment Court erred in that it did not separately consider the extent of the wāhi taonga site or the evidence from MTT about how the boundary for that site had been drawn. The appellants say the circumstances here, recalling the words of Cooke J in the High Court Decision, "called for a more

68 Attachment D comprised the full Notes of Evidence from the Environment Court hearing.

precise analysis".[69] In addition, they say the Environment Court "jumped" a step and, having concluded there was sufficient evidence to establish a wāhi taonga in the vicinity, "jumped" directly to consider which rules should apply to the site. This, Mr and Mrs Raikes say, renders the Environment Court's ultimate conclusions "questionable".

[58] The appellants submit that the Revised Decision still contains insufficient reasoning to enable them, as landowners affected by the decision, to understand *why* that decision was made and whether it is lawful. They say:[70]

> If unwanted controls are to be placed on [their] land, based on others' beliefs, that decision should be made in a careful and considered fashion after a proper assessment of all of the evidence, and in a manner consistent with NZBORA.

[59] Mr and Mrs Raikes say the Environment Court made material errors of law in its Revised Decision. They submit that this Court should allow the appeal and set aside the decision of the Environment Court that the 70-hectare site MTT88 is wāhi taonga. Their "strong preference" is that this Court substitute its own decision rather than remitting the matter back to the Environment Court. The appellants say the case has been remitted back to the Environment Court once already, and the direction from the High Court to provide reasons demonstrating that a proper analysis was taken was not followed in the Revised Decision now on appeal.

Respondent's submissions

[60] The Council, in its capacity as the territorial authority responsible for preparing the Plan, takes a neutral position in relation to whether any of the errors of law alleged have been made out.

[61] However, although it is neutral as to the Court's conclusion on this point, if the Court finds there were material errors of law made, the Council supports the appellants' position that the High Court should substitute its own decision rather than remit the case for rehearing in the Environment Court. This is said to be in the interests

69 The High Court Decision, above n 4, at [64].
70 Submissions for the Appellants, 25 March 2022, at [70].

of bringing some finality to this matter and allowing the Plan to become fully operative as soon as possible.

MTT's submissions

[62] MTT, as an interested party, submits that the alleged errors of law cannot be supported and that the Revised Decision should stand.

[63] The Trust says the Court recorded and properly assessed the cultural evidence. This was sufficient to enable the finding that the site was wāhi taonga. MTT says an appeal to the High Court on a matter of law does not present an opportunity for reconsidering the weight to be given to evidence, unless the conclusion reached by the Environment Court was clearly insupportable, which the Trust says it was not.

[64] In relation to s 13 of the New Zealand Bill of Rights Act (the NZBORA), MTT emphasises the importance of s 6(e) of the RMA (providing for the relationship of Māori and their culture and traditions) and argues the Canadian case law relied on by the appellants on this aspect is not on point.

[65] MTT says while the Court was not required to give more detailed reasons, nor refer to and analyse all of the cases cited by the parties, in any case the Court undertook a proper analysis, included a clear summary of the relevant evidence of both MTT and of Mr and Mrs Raikes, and applied the appropriate legal principles.

[66] MTT accepts the Court made an error in its calculation of the proportion of the Raikes' land over which the site extends, but says the Court did not rely on this calculation, nor was it material to the decisions it made. MTT says it is the relationships the Hapū have with the site that should determine the extent of wāhi taonga, not what may be convenient or acceptable to private landowners. The size of the site merely reflects the area subject to those relationships.

[67] Finally, MTT says that even if this Court finds the errors of law alleged to be made out, they were not material to the Court's ultimate determination. This is because the evidence did clearly support a finding that MTT88 is a wāhi taonga to the Hapū.

Appeal on question of law

[68] Under s 299 of the RMA, a party may appeal from Te Kōti Taiao | the Environment Court to Te Kōti Matua | the High Court on a question of law.[71]

[69] Te Kōti Mana Nui | the Supreme Court summarised what amounts to a question of law for appeal purposes in *Bryson v Three Foot Six Ltd*,[72] which has since been applied in an RMA context.[73] There will be an error of law where the Court:

(a) applied a wrong legal test;[74]

(b) reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error of law";[75]

(c) came to a conclusion that it could not reasonably have reached on the evidence before it;[76]

(d) took into account irrelevant matters;[77] or

(e) failed to take into account matters that it should have considered.[78]

[70] An appeal on a question of law is not a general appeal and it is not the role of a Court on appeal on a question of law "to undertake a broad reappraisal of the [lower tribunal or Court's] factual finding or the exercise of its evaluative judgments."[79] The onus is on the appellant to establish an error of law.[80] The error of law must be a

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71 The High Court recently retierated the principles relevant to an appeal under s 299 in *Speargrass Holdings Ltd v Van Brandenburg* [2021] NZHC 3391 at [110]–[116].

72 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27], confirmed in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

73 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].

74 *Bryson v Three Foot Six Ltd,* above n 72, at [24].

75 At [26].

76 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

77 *May v May* (1982) 1 NZFLR 165 (CA) at 170.

78 At 170.

79 *Chorus v Commerce Commission* [2014] NZCA 440 at [112].

80 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC) at 159; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [30]; and *Speargrass Holdings Ltd v Van Brandenburg*, above n 71, at [116].

material error which impacts the final result reached by the Environment Court before the High Court will grant relief.[81]

[71] It must generally be the want of evidence rather than the weight of evidence that will support a ground of appeal based on factual errors said to constitute an error of law.[82] The weight the Environment Court chooses to give relevant evidence is a matter for it. That evaluation should not be reconsidered as a question of law and the merits of the case dressed up as an error of law will not be considered. Planning and resource management policies are matters that will not be considered by the appellate court.[83]

[72] That is not to say that a question about facts in the evidence or inferences in conclusions drawn from them by the decision-maker may not sometimes amount to a question of law. A mere allegation of a lack of factual basis or incorrect or inappropriate inferences or conclusions will not turn an issue of fact into a question of law.[84]

[73] When determining planning questions, deference to expertise where appropriate must be accorded to the Environment Court as a specialist court and the expert tribunal.[85] The Environment Court's decision will often depend on "planning, logic and experience, and not necessarily evidence".[86] In *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the High Court noted that no question of law arose from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and that the weight to be attached to the particular planning policy will generally be for the Environment Court.[87] As the Court said in *Countdown Properties (Northlands) Ltd v Dunedin City Council*, the Environment Court "should be given some latitude in reaching findings of fact within

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81 *Speargrass Holdings Ltd v Van Brandenburg*, above n 71, at [115]; and see *Hutt City Council v Mico Wakefield* [1995] NZRMA 169; and *Royal Forest and Bird Protection of New Zealand Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81–82.

82 *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council,* above n 80, at [37].

83 *Poutama Charitable Trust v Taranaki Regional Council*, above n 80, at [39].

84 At [34], citing *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 (HC) at 127.

85 At [42].

86 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

87 At [33].

its areas of expertise".[88] And in *Moriarty v North Shore City Council*, the Court held that the weight to be afforded to relevant considerations is a question for the Environment Court.[89]

[74] The High Court has indicated the appeal provision under s 299 "indicates a decision by the legislature to leave the factual decision making to the Environment Court and for that decision making to not be revisited on an appeal."[90] This is because of the specialist nature of the Environment Court and its members with expertise in particular disciplines.[91]

[75] The High Court has recognised that a Judge of this Court is not equipped to revisit the merits of a determination made by a specialist Court on a subject within its sphere of expertise.[92] In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, Kós J cited with approval the statement of Harrison J in *McGregor v Rodney District Council* that:[93]

> … [t]o succeed on appeal an aggrieved party must prove that the Court erred in law – never an easy burden where the presiding Judge has unique familiarity with the statute governing the Court's jurisdiction.

Statutory framework for Plan appeals

[76] An appeal in respect of a district plan prepared pursuant to the RMA requires consideration of the following obligations on a local authority:

(a) to prepare the Proposed Plan in accordance with the provisions of pt 2 of the RMA,[94] which include:

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88 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 76, at 153.
89 *Moriarty v North Shore City Council*, above n 82, at 437.
90 *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28].
91 At [28].
92 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, [2013] 17 ELRNZ 652 at [28].
93 *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [1], cited in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, above n 92, at [28].
94 Resource Management Act 1991, s 74(1)(b).

(i) section 6(e) — to recognise and provide for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga";

(ii) section 6(f) — to recognise and provide for "historic heritage", the definition of which means "those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities", including "cultural", and includes "sites of significance to Māori, including wāhi tapu";[95]

(iii) section 7(a) — to have particular regard to kaitiakitanga;

(iv) section 8 — to take into account the principles of Te Tiriti o Waitangi | the Treaty of Waitangi;

(b) to give effect to any national policy statement, coastal policy statement and regional policy statement;[96]

(c) to ensure that the policies implement the objectives, and the rules are to implement the policies;[97]

(d) to have regard to the actual or potential effects on the environment when making rules;[98] and

(e) to examine each policy, method or rule, having regard to its efficiency and effectiveness as to whether it is the most appropriate method for achieving the objectives of the district plan.[99]

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95 Section 2 definition of "historic heritage".
96 Section 75(3).
97 Sections 75(1) and 76(1).
98 Section 76(3).
99 Section 32.

[77] Section 17.1 of the Proposed Plan deals with Natural Features and Landscapes. The definition of Outstanding Natural Features and Landscapes includes:[100]

> Mana Whenua Values
>
> Natural Features and Landscapes are clearly special or widely known and exceptionally influenced by their connection to the Māori values inherent in the place.
>
> Historical Associations
>
> Natural Features and Landscapes are clearly and widely known and exceptionally influenced by their connection to the historical values inherent in the place.

[78] Under Objective LSO 1 such outstanding Natural Features and Landscapes are identified and "are protected from inappropriate subdivision, use, and development".

[79] Section 3 of the Proposed Plan – tangata whenua and mana whenua reads as follows. Objective TW01 provides that:

> The expectations and aspirations of Tangata Whenua with Mana Whenua are encouraged when making decisions on subdivision, land use and development, and the management of natural and physical resources throughout the Hastings District Council."

[80] These particular references to the significance of cultural issues and listening to tangata whenua given further weight to the appropriate recognition of wāhi taonga. No appeal has been lodged against those provisions.

The Environment Court's determination of the site as a wāhi taonga

[81] The first four questions raised by the appellants in their amended notice of appeal relate to whether, in determining that the site was a wāhi taonga, the Court properly assessed the cultural evidence, applied the correct legal principles, considered the application of s 13 of the NZBORA relating to religious freedom and gave sufficient reasons for its conclusions. These matters overlap. I therefore deal with them together.

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100 Proposed Hastings District Plan, Section 17.1 – Natural Features and Landscapes Policy LSP 1.

The Environment Court's approach to cultural evidence

[82] Mr and Mrs Raikes say they were in no position to provide opposing cultural evidence but nevertheless the Court should have taken proper account of the case law that was cited to it by the appellants. The appellants further say that the Court did not undertake a robust analysis of the evidence, nor did it provide proper reasons for accepting the evidence of MTT. They say the Environment Court uncritically accepted the evidence of MTT as mana whenua without running a "ruler" over it, in a situation where mana whenua were giving evidence in their own cause.

[83] In addition, the appellants say that the cultural evidence given by MTT's witnesses in part related to cultural beliefs that were unable to be substantiated and included mere beliefs which were contradictory to the Christian beliefs and culture of the appellants.

[84] Mr and Mrs Raikes submitted that the Environment Court did not confine the site to the particular area of specific activity on which tītī (mutton bird) hunting occurred or to the line of the trail or path Māori seasonally used, which is now located on the State Highway (the Napier–Taupō road).

[85] Three witnesses gave evidence relating to cultural issues. Mr Bevan Taylor gave evidence as to the research he had undertaken on his hapū and that he had learnt from kaumātua.[101] He gave evidence as to the whakapapa from its very beginning to the eponymous or source tīpuna of the hapū concerned.[102] Mr Taylor said he was able to speak on behalf of all of the hapū and set out the whakapapa in an appendix to his evidence.[103] He said he gave his evidence based on kōrero tuku iho, having received the kōrero through many of the old people and through research undertaken for the claims and settlement negotiations for the hapū.[104] Secondly, he was given the rakau (a tokotoko) by the old people about 1992–1993 to speak on behalf of Tangoio Marae and all of the hapū.[105] Mr Taylor said the rakau acknowledged prominent leadership

101 Statement of Evidence of Mr Taylor, above n 37, at [6].
102 At [14].
103 At [14].
104 At [18].
105 At [18(b)].

within the hapū and that the person holding it has the first and last word for the hapū.[106] Mr Taylor said it was his duty to safeguard the tikanga, the kōrero tuku iho and the taonga of the hapū, and that was why he was giving his evidence.[107]

[86] Ms Tania Hopmans also gave evidence.[108] Ms Hopmans has a law degree and practised as a solicitor for some time. She has advised iwi groups and Treaty settlement negotiations with the Crown. In 1992, Ms Hopmans was an original claimant for the hapū based on raupatu of their lands by the Crown, and had been the lead negotiator, along with Mr Taylor, in the subsequent negotiations with the Crown.[109] Ms Hopmans had held governance positions with Maungaharuru-Tangitū Inc, the predecessor to MTT. She gave evidence of her whakapapa to the hapū. Ms Hopmans noted that the documented historical evidence in relation to the hapū and sites of significance was rare because their land was never properly investigated by the Native Land Court or an independent authority, as a result of the raupatu and other actions of the Crown.[110] Therefore, the history and knowledge about the association with the various sites was largely kōrero tuku iho, told from one generation to the other.[111] Ms Hopmans stated that historical evidence was also gained in preparation for the Waitangi Tribunal hearings and settlement negotiations with the Crown, when the hapū commissioned research about the history and kōrero from the kaumātua, many of whom have since passed away.[112] Ms Hopmans noted "the landscape is our history book, every feature tells a story."[113]

[87] Ms Hopmans said the Trust had spent considerable time, effort and its own resources to collect information about their sites of significance over several years through various methods, including identification of relevant land, interviews with kaumātua, taking GPS coordinates of various features on site, coordinating archaeologists to visit and report on archaeological remains, and obtaining high quality photographs of the sites and their environs.[114] This involved preparing information

106 At [18(b)].
107 At [18(b)].
108 Statement of Evidence of Ms Hopmans, above n 27.
109 At [6]–[8].
110 At [31].
111 At [31].
112 At [32].
113 At [32].
114 At [37].

files for each site.[115] In addition, Ms Hopmans attached to her evidence statements of association[116] referring to Tītī-a-Okura being the pass where tītī (mutton birds) flew over Maungaharuru and where Te Mapu and his son Te Okura caught tītī there using a net attached between two poles held high by them in front of a fire. Ms Hopman's evidence also included reference to the evidence of kaumātua evidence given previously before courts and tribunals by the late Mr Fred Reti confirming the evidence of Mr Taylor in relation to the Maungaharuru sites generally.

[88] Ms Diane Lucas, a landscape architect, also gave evidence.[117] Ms Lucas referred to the areas of the wāhi taonga sites. She did not herself determine where the boundaries for the proposed wāhi taonga sites should lie but she had considered the boundaries that had been drawn by other people in order to assess their appropriateness.

[89] Ms Lucas noted that the wāhi taonga site of Tītī-a-Okura was almost all within ONFL6.[118] She further noted the area had a long tradition of being occupied and in the past utilised for the annual tītī harvest.[119] Ms Lucas said "the recognition of the land formed feature as delineated as Wāhi Taonga" was in her opinion "appropriate."[120]

[90] Ms Lucas noted that the delineated extent of the area sought by MTT made sense as "legible cultural units of the mountain and coastal landscapes bookends" the rohe. The sites sought made sense collectively and individually, she said.[121]

[91] "Legible" is defined in the Hawke's Bay Regional Resource Management Plan by reference to expressiveness as follows:[122]

> Expressiveness (Legibility)

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115 At [37] and at [48]–[51] specifically relating to the MTT88 site.

116 The Statements of Association were attached to the Deeds of Settlement with the Crown and attached to Ms Hopmans' Evidence in Chief in the Environment Counrt.

117 Statement of Evidence of Diane Lucas (Landscape Planning) on behalf of Maungaharuru-Tangitū Trust (8 March 2017) [Statement of Evidence of Ms Lucas].

118 At [64].

119 At [63].

120 At [63].

121 At [5].

122 No appeal has been lodged to that part of the Plan and therefore it will become operative.

> Natural features and landscapes clearly demonstrate the natural processes that formed them. Exceptional examples of natural process and landscape exemplify the particular process that formed that landscape.[123] Relating to the identification and recognition of the District's Outstanding Natural Features and Landscapes by various criteria factors, values and associations.

[92] In relation to Tītī-a-Okura (MTT88), Ms Lucas noted the range of Maungaharuru involved a distinctive saddle between inland and coastal country with a ridge pattern through the saddle.[124] As Ms Lucas noted, Tītī-a-Okura had long provided the coast to inland route through the Maungaharuru range, and that saddle was highly legible "from out at the coast ".[125]

[93] The Environment Court summarised its reasons for accepting the cultural evidence of MTT and recognising the site as follows:

> [79] We agree that to the MTT hapū the significance of the site is: its location on the ridgeline of the maunga, which is tapu; its shared value between the MTT hapū and Ngāti Hineuru through their common ancestor Okura; its value as a tītī or mutton bird food gathering area, tītī are a taonga bird species; and its value as a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru. The somewhat recent awareness of, or at least the bringing to wider notice of, the value of the area to Māori is not something we regard as lessening credibility or accuracy. Rather it is, we accept, the product of the Trust's recently acquired ability, because of the settlement of its Treaty claims, to research, record and present its history and positions to fora such as this Court.

[94] As I have set out at [33] and [35]–[36], the Environment Court related the cultural evidence before it, and based its analysis on that evidence, as well as the further evidence relating specifically to the MTT88 site as I have referred to above at [37].

[95] In relation to the significance of this site and its shared value between MTT hapū and Ngāti Hineuru through their common ancestor Okura, the Environment Court referred to the whakapapa evidence given by Mr Taylor as a basis for this finding.[126]

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123 The Proposed Plan, Section 17.1 – Natural Features and Landscapes Policy LSP1.
124 Statement of Evidence of Ms Lucas, above n 117, at [60].
125 At [61].
126 The Revised Decision, above n 1, at [37]–[43].

[96] The Court also referred to the evidence in relation to the site's location on the ridgeline of the maunga, which is tapu. The association with Maungaharuru was through settlement by those who arrived on the waka Takitimu. The cultural evidence was that Tūpai, a tohunga who was the kaitiaki of the sacred symbols of the gods onboard the waka, threw the staff, named Papauma, and it landed at the summit of Tītī-a-Okura. Papauma embodied the mauri of birdlife and:[127]

> … [t]he maunga rumbled and roared on receiving this most sacred of taonga and the maunga was proliferated with birdlife. Hence the name, Maungaharuru (the mountain that rumbled and roared.)

[97] The prolific birdlife in the forest was therefore said to be the result of the mauri (life force) planted by Tūpai.[128]

[98] The value of the site as a hunting area for tītī (mutton bird), a taonga bird species, was well-established on the evidence before the Court that I have referred to above. In response, Mr Raikes acknowledged it may have been used as an area by tangata whenua to capture tītī but he considered that was not a factor by itself giving the area unique or special significance, particularly in relation to the size of the area sought to be protected.[129] The Court acknowledged that it "must accept" the area was not unique in the sense of being an area in which birds were snared.[130] However, it noted the significance "might though be in the name, which would suggest that it was somewhat out of the ordinary."[131] The Court noted this was "a matter to be considered along with the remainder of the evidence."[132]

[99] The Environment Court also described evidence in relation to the hunting of these birds. In particular, the Court noted the evidence that Te Mapu and his son Okura camped and caught the birds in the area, and the fact the birds would fly south in the morning and back over the saddle in the evening.[133] Further evidence the

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127 At [46].
128 At [47].
129 At [78].
130 At [78].
131 At [78].
132 At [78].
133 At [65]–[66].

Environment Court referred to in support of its determination was that the saddle area was a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru.[134]

[100] Mr Raikes says, pointing out that Mr Parsons accepted in cross-examination that the mutton birds would likely fly low over the saddle where they were caught, that if the site was to be designated as a wāhi taonga area, it should therefore be limited to this saddle, which is now the line of the State Highway.

[101] However, the arguments that recognition should be confined to the line of particular activities overlooks the fact that the occupation would not be limited to those lines and the evidence supported a wider recognition across the area delineated by the kaumātua and supported by the landscape evidence.

[102] Overall, it is clear the Environment Court referred to and assessed the relevant cultural evidence before it in making its determinations. I turn to assess whether that evidence supported the determinations below.

The Environment Court's application of relevant law and case law in its assessment of the cultural evidence

[103] Ms Blomfield for the appellants submitted that the Environment Court did not refer to relevant cases, nor did it apply the appropriate principles, when it assessed the cultural evidence, which assessment it then relied on to reach its conclusions. Ms Blomfield points to a number of cases in this respect, which I now turn to consider.

[104] In *Heybridge Developments Ltd v Bay of Plenty Regional Council*, the Environment Court had concluded that the iwi held a genuine belief that their founding ancestor (Tutereinga) might be buried on a site on which Heybridge sought consent to develop.[135] The Environment Court heard conflicting cultural evidence on the issue.[136] It found it was unable to conclude that the site did contain the actual burial site of Tutereinga, which was the same conclusion the Environment Court had earlier

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134 At [69] and [79].
135 *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2012] NZRMA 123 (HC) at [19].
136 At [35], quoting the Environment Court decision (*Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 [the *Heybridge* Environment Court decision]) at [59].

reached in relation to that site.[137] Nevertheless, the Environment Court found that the iwi had "honest belief" that Tutereinga was buried there, despite evidence to the contrary, and the possibility of such burial had not been disproved.[138] The Court went on to say that s 6(e) of the RMA imposed an obligation to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands and other taonga.[139] However, the Environment Court held that, in the absence of detailed submissions before it on the issue, such an obligation did not extend to providing for a relationship "which is founded on a belief, no matter how genuinely held."[140] On appeal, the High Court found that the difficulty with the Environment Court's approach was that it had already found there was insufficient evidence that Tutereinga had been buried on the site and that the site was wāhi taonga.[141] Therefore, the Environment Court had in fact sought to impose an onus on the appellant to disprove the belief of the iwi, and that was an error of law.[142] The High Court noted that a party who asserts a fact "bears the evidential onus of establishing that fact by adducing sufficiently probative evidence." The Court noted "[t]he existence of a fact is not established by an honest belief", and found that the Environment Court had erred as a matter of law in this respect.[143]

[105] The second case to which the appellant referred in this line of argument was *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*.[144] The particular proposition for which this was cited was that while s 6(e) of the RMA requires the relationship of Māori and the culture and traditions with their ancestral sites, wāhi tapu and other taonga be provided for, the weaker the relationship, the less it needs to be provided for.[145] In that decision, the Environment Court went on to develop what was subsequently referred to as the "rule of reason" approach in order to assess cultural

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137 At [36], quoting the *Heybridge* Environment Court decision at [47], and at [46], quoting the *Heybridge* Environment Court decision at [71].
138 At [51]–[53], quoting the *Heybridge* Environment Court decision at [120] and [125]–[126].
139 At [52].
140 At [55].
141 At [56].
142 At [57].
143 At [51].
144 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (EnvCt).
145 At [45].

evidence, which has been applied with approval in the High Court.[146] The Court described that approach as follows:[147]

> [53] That "rule of reason" approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):
>
> - whether the values correlate with physical features of the world (places, people);
> - people's explanations of their values and their traditions;
> - whether there is external evidence (e.g Maori Land Court Minutes) or corroborating information (e.g waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value-holders;
> - the internal consistency of people's explanations (whether there are contradictions);
> - the coherence of those values with others;
> - how widely the beliefs are expressed and held.
>
> In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are "rules" as to how to weigh or assess evidence.

[106] The appellant also cited the decision of the Environment Court in *Serenella Holdings Ltd v Rodney District Council* as authority for the submission that matters of national importance in s 6(e) of the RMA that are to be recognised and provided for "should not generally include everyday activities" with the consequence of preventing new endeavours on the land.[148] In that decision the Court was required to consider cultural evidence from a number of witnesses. As a matter of fact the Court found that it might have been possible that there were burials under the extensive sand dunes (as was contended) but the evidence did not provide a basis for that.[149] It was not consistent as to the area in question and the archaeological assumptions were

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146 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 80, at [106]; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [64] and [116]–[117].

147 Footnotes omitted.

148 *Serenella Holdings Ltd v Rodney District Council* EnvC Tāmaki Makaurau | Auckland A100\2004, 30 Hurae | July 2004 at [106].

149 At [105].

flawed.[150] In addition, the geological and geomorphological evidence did not support the allegations about the presence of graves.[151] It also considered that it was doubtful that the site had been used traditionally for singing and speeches as alleged.[152] It found that the relationship had been eroded and was of insufficient importance to require consent authorities to recognise and provide for it as a matter of national importance.[153] Therefore the Environment Court found as a fact that the site proposed for sand mining was not wāhi tapu and therefore there was no requirement to recognise and provide for such under s 6(e) of the RMA.[154] It is apparent that the findings in *Serenella* were intensely fact-specific and based on contested cultural evidence which the Court found did not establish the basis for the claim of wāhi tapu. Nevertheless, the Court recognised the principle of kaitianga under s 7(a) of the Act and imposed appropriate protocols as conditions.[155]

[107] The appellants also cited the High Court's decision in *Gock v Auckland Council* for the proposition that the RMA does not confer on tangata whenua or kaitiaki a power of veto over use or development of natural and physical resources in their area.[156] As the Court said:[157]

> … That is for the stated reason that the Court acts as arbiter for the community as a whole so that although Māori views are important they will not in every case prevail.

[108] The appellants also referred to *Winstone Aggregates Ltd v Franklin District Council* to the effect that although as a general principle identification of wāhi tapu is a matter for tangata whenua, as the Court cautioned:[158]

> … claims of waahi tapu must be objectively established, not merely asserted. There needs to be material of a [probative] value which satisfies us on the balance of probabilities. We as a Court need to feel persuaded that the assertion is correct.

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150 At [100].
151 At [100].
152 At [103].
153 At [103]–[106].
154 At [100] and [102].
155 At [108].
156 *Gock v Auckland Council* [2019] NZHC 276, (2019) 21 ELRNZ 1.
157 At [117].
158 *Winstone Aggregates Limited v Franklin District Council* EnvCt Tāmaki Makaurau | Auckland A80/02, 17 Āperira | April 2002 at [251].

[109] In that case the Court, referring to the decision in *Te Rohe Potae O Matangirau Trust v Northland Regional Council*, found that "[g]eneral evidence of waahi tapu over a wide and undefined area … was not probative of a claim that waahi tapu existed on a specific site".[159]

[110] In *Takamore Trustees v Kapiti Coast District Council*, the Environment Court had rejected evidence of the cultural witnesses, including kaumātua, as being insufficiently specific concerning the presence of kōiwi in swamplands.[160] The Environment Court made a number of criticisms of the evidence, saying it was, among other things, "sparse" and "not geographically precise".[161] The High Court, however, said the approach of the Environment Court was in error as evidence was available, albeit given by kaumātua based on the oral history of the tribe.[162] Ronald Young J said:

> [68] The Court complains about a lack of "back-up history" or "tradition". Again, it is difficult to understand what this means. Those in the iwi entrusted with the oral history of the area have given their evidence. Unless they were exposed as incredible or unreliable witnesses, or there was other credible and reliable evidence which contradicted what they had to say, accepted by the Court, how could the Court reject their evidence? The Court complained it was bereft of "evidence" and had "assertion" only of the presence of koiwi. The evidence was given by kaumatua based on the oral history of the tribe. What more could be done from their perspective? The fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence. Nor could the kind of geographical precision apparently sought by the Court be reasonably expected. The claim of burials is within a defined area. To require a precise location of burial in such circumstances before satisfaction with the evidence is to potentially reduce many claims of waahi tapu areas to unproven and reduce ss 6(e), 7 and 8 matters accordingly. If the test applied to koiwi presence by the Court was also applied to the presence of taonga, the Court would have logically been required to find their presence not proved. The fact it did not seems difficult to understand.
>
> [69] Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the kaumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

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159 At [252], citing *Te Rohe Potae O Matangirau Trust v Northland Regional Council* EnvCt A107/90.

160 *Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti Coast District Council* (2002) 8 ELRNZ 265 (EnvCt).

161 At [80] and [83].

162 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [67].

[111] Mr and Mrs Raikes submitted in general terms that there was no critical assessment or evaluation of the evidence of MTT's witnesses in the Revised Decision on appeal. The Court had merely summarised the Trust's evidence and then reached conclusions uncritically on that evidence. I now turn to consider the particular issues in relation to the evidence that the appellants raised.

[112] The first issue relates to the standard of proof required when considering issues of tikanga Māori. On this point, in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* Palmer J stated:[163]

> [390] I doubt there is much practical difference between proving on the balance of probabilities that a consensus exists in an iwi or hapū about tikanga, and a court simply being satisfied of that. The crucial point is that the finding expressed by the Court is effectively about tikanga as determined by the iwi or hapū.

[113] An analysis of the burden of proof is not particularly useful in this context. The Court must be satisfied based on the evidence before it. The appropriate approach has been approved in terms of "the rule of reason" previously adopted by this Court, which allows the Court some flexibility in its analysis.

[114] In this case the Environment Court had sufficient evidence before it on which to reach its decision. The fact that the evidence was in part based on hearsay, opinion and oral statements and whakapapa does not make it inadmissible. In *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, the Environment Court said:[164]

> … Maori generally, have a culture in which oral statements are the accepted method of discourse on serious issues, and statements of whakapapa are very important as connecting individuals to their land. In the absence of other evidence from experts on tikanga Maori, the evidence of tangata whenua must be given some weight (and in appropriate cases considerable, perhaps even determinative, weight). In the end the weight to be given to the evidence in any case is unique to that case.

[115] In one sense the cultural could be described as biased in the legal sense, in that the witnesses were giving evidence in support of MTT's case to recognise the site. However, the cultural evidence was given by witnesses who were themselves qualified

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163 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843.
164 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, above n 144, at [56].

experts. It was consistent and drew on whakapapa, stories handed down in the oral tradition and records of earlier evidence of kaumātua as well as other research. In assessing the evidence, the Court will look at all the evidence, including, as in this case, the landscape expert evidence, which here supported the cultural evidence.

[116] It was open to the appellants to call cultural evidence. Other landowners did call cultural evidence of their own in respect of other contested sites proposed by MTT. For instance, in relation to the Te Wharangi Pā site at Waipātiki, the owner of the land, Sunset Investments Partnership, opposed the inclusion of the site as a wāhi taonga in the Proposed Plan.[165] It called two cultural witnesses on its behalf, whose evidence the Court accepted on some contested issues, and whose views were accepted as to the extent of the site.[166] In contrast, Mr and Mrs Raikes did not call any cultural evidence.

[117] The cultural evidence before the Court was through whakapapa (genealogy), kōrero tuku iho (the Hapū history), pepeha (tribal sayings), waiata (songs), whakatauākī (proverbs) and whakairo (carvings). The position was also supported by historical records, archaeological evidence, and statements of associations set out in the Maungaharuru Tangatu Hapū deed of settlement which indicate the association of the Hapū to identified areas. This was evidence which the Court was entitled to and did accept.

[118] The evidence that the Court accepted was of a similar nature as that referred to in *Takamore Trustees v Kapiti Coast District Council*, referred to above, in which Ronald Young J found the Environment Court erred in rejecting the "clear evidence" of kaumātua (notwithstanding that evidence was based on the oral history of the tribe).[167]

[119] Under the provisions in the RMA, the decision-maker is under a general duty to recognise and provide for the relationship of Māori with their ancestral lands, water, sites, waahi tapu and other taonga (s 6(e)), have particular regard to kaitiakitanga (s 7), and must take into account the principles of the Treaty (s 8).[168] Referring to this trilogy

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165 The Revised Decision, above n 1, at [117]–[118].
166 At [121]–[124], [126]–[127] and [131].
167 *Takamore Trustees v Kapiti Coast District Council*, above n 162.
168 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [22].

of provisions in *McGuire v Hastings District Council*, Lord Cooke in the Privy Council described these as "strong directions, to be borne in mind at every stage of the planning process."[169] As Lord Cooke stated, they "do mean that special regard to Maori interests and values is required".[170]

[120] The Court must assess the credibility and reliability of mana whenua evidence, but the evidence of mana whenua if consistent and credible, using the approaches set out in *Takamore Trustees v Kapiti Coast District Council* and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, will be strong evidence.[171]

[121] The RMA requires protection of cultural interests where the case presented has merit.[172] In any case, the weight to be given to the evidence will be "unique to that case".[173]

[122] The fact that the wāhi taonga covers 70 hectares, part of which is on Mr and Mrs Raikes' property, reflects the evidence that was before the Court. The second stage as to determining what was required to "protect" large sites as compared to smaller sites was a matter for the rules to be applied to those sites. The Court recognised this by rejecting the proposed rules put forward by MTT and instead adopting the Council's proposed rules, noting that the size of wāhi taonga sites and their "consequential resilience to, an ability to absorb, minor alterations bought about by small scale earthworks and buildings" was an "important factor that is clearly relevant in deciding what is necessary to protect them from damage."[174]

[123] The rules are not under review in this appeal. Nevertheless, it is relevant to note from the information the Council provided that the recognition of MTT88 would allow the continuation of most activities related to present farming activities, although restricted discretionary consents would be required in relation to buildings greater than

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169 At [21].
170 At [21].
171 *Takamore Trustees v Kapiti Coast District Council*, above n 162; and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, above n 144, at [53].
172 *McGuire v Hastings District Council*, above n 168, at [20].
173 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, above n 144, at [56].
174 The Revised Decision, above n 1, at [29].

50m^2 in floor area or if there was a change to intensive rule production.[175] Earthworks exceeding various cubic meterage would also be a restricted discretionary activity. The site would also be covered by other parts of the plan, including Section 17.1, natural features and landscapes, and Section 27.1, the general rural zoning and earthworks mineral aggregate and hydrocarbon extraction. Mr Raikes gave evidence he might be considering activities on the site, including draining, a mini hydro dam and possibly a wind turbine. He accepted he would need resource consents in any event for those activities, regardless of the wāhi taonga categorisation.[176] However, the Court was of the view that the rules as ultimately adopted were at a level which would sufficiently provide for MTT's relationship with Tītī-a-Okura, while not presenting an unreasonable interference with the rights of the landowners.[177]

[124] Any further comment on the content of the rules is outside this appeal. However, it is apparent that the restrictions on the site imposed by the cultural requirements are focused on the cultural issues and do not appreciably limit the activities which are likely to be undertaken on the site.

[125] The appellants pointed out that the site was not identified as being of cultural significance until a few years ago. As the Court noted, however, the research carried out by the Trust over the past few years was able to be done because it has only recently had the funds to do it.

[126] As I have pointed out above, the Court had before it evidence to support the finding that the MTT88 was a wāhi taonga based on the evidence adduced by the various witnesses for the Trust. That evidence was tested by cross-examination. Mr and Mrs Raikes were entitled to call cultural evidence but chose not to do so. As I have noted above, other landowners did call cultural evidence, which the Environment Court took into account in its findings.

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175 Intensive rule production includes commercial high-density livestock operations which preclude the maintenance of pasture or ground cover requiring keeping and feeding of the livestock and buildings or outdoor enclosures on a site; land and buildings for commercial boarding and/or breeding of cats, dogs and other domestic pets; mushroom farming or commercially growing crops indoors in pots and/or on a permanent floor.

176 The Revised Decision, above n 1, at [80].

177 At [81].

[127] The Court summarised the main factors in support of the finding that MTT88 was a wāhi taonga.[178] In summary, the evidence before the Court in relation to those factors was:

(a) That the location is on the ridgeline of the maunga, which is tapu:

In addition to the cultural experts describing the site, Ms Lucas noted the site involved a distinctive saddle between coastal country, which was highly legible from the coast. It was appropriately recognised as a wāhi taonga given the cultural history of the landform delineated by the kaumātua.[179]

(b) The shared value between the hapū through their common ancestor Okura:

As noted by Mr Taylor and Mr Parsons, the summit of Tītī-a-Okura was where the staff, Papauma, landed on the maunga, and it embodied the mauri of birdlife. This is reflected in names in the area as well as, among other things, the prolific birdlife. The Court noted the evidence of Mr Parsons, who referred to workmen at Ohurakura mill in the 1940s recalling how prolific the birdlife was in the forest and the belief of the Māori people that it was as the result of mauri (life force) as a result of the staff Papauma planted by Tūpai. Mr Parsons concluded the mountain range was of high spiritual significance. The Court also noted that the importance of the maunga was depicted in art in marae, names, tribal proverbs and symbols, oral history and in their waiata as well as whakatauākī.[180]

(c) As a tītī (mutton bird) or food gathering area:

All of the cultural witnesses gave evidence in this regard, including Mr Taylor and Mr Parsons. Mr and Mrs Raikes say Mr Parsons agreed

178 As it found at [79].
179 Statement of Evidence of Ms Lucas, above n 117, at [69].
180 The Revised Decision, above n 1, at [50].

that the birds might become snared in nets slung low, which therefore meant only the State Highway or a smaller area on the saddle should be wāhi taonga. However, the birdlife was said to be over the mountain, and birdlife was not limited to the place of the snares. The Environment Court was satisfied that the name reinforced the significance of the place beyond the ordinary, which was another matter to be considered along with the remainder of evidence.[181]

(d) As a strategic trail (coastal to inland mountains) and link to Ngāti Hineuru:

This evidence was criticised as the trail was used by Māori on only a seasonal basis. The fact that it was used by different hapū and on a seasonal basis does not diminish the importance of the evidence from a cultural perspective. In any event, the area was well-populated, according to the evidence, regardless of the fact it may have been seasonal.

(e) The extent of the site:

I deal with this in more detail below. The evidence supported the whole of the recognised MTT88 site as wāhi taonga, not just the line of the State Highway or some smaller area.

Extent of the site

[128] Mr and Mrs Raikes said that the historic strategic trail followed the route of the present State Highway, and therefore that any recognition of the area as wāhi taonga should be limited to the State Highway. Ms Blomfield pointed out that Ms Lucas, under cross-examination, had confirmed that there was seasonal occupation of the area only. Ms Blomfield submitted on that basis that seasonal occupation by people was not a matter for which MTT claimed wāhi taonga status for the MTT88 site.

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181 At [78].

[129] There is no reason why seasonal occupation only by the people means the area should not be recognised as a wāhi taonga. Moreover, the issue of being only seasonally occupied was a matter of evidence before the Environment Court along with all the other evidence. The Environment Court was entitled to put such weight on that evidence as it thought appropriate.

[130] Mr and Mrs Raikes also criticised the evidence of Ms Hopmans, in reference to the size of the site to be recognised as wāhi taonga, as not just the point at which the State Highway crossed but other features including the ridgeline, this being based on viewing the maunga as well as the name of the saddle. She said that had been arrived at through discussions with kaumātua. Again, that evidence was before the Court and it chose to accept the evidence of Ms Hopmans, along with the other evidence it had, rather than accepting the legal submissions of the appellants that the site should be narrowed to the travel route.

[131] Similar criticisms were made in relation to the tītī (mutton bird) hunting, the appellants pointing to the evidence of Mr Parsons, who identified the low pass in the mountain as the part that the tītī would have flown over and where they would have been captured. Again, the appellants submit this was located on the pass where the State Highway crosses the Maungaharuru range.

[132] The appellants therefore submitted that the wāhi taonga should be limited to those relatively small areas following the State Highway that had been identified for the tītī hunting and the trail. They criticised the evidence concerning the ridgeline being tapu and of the site's shared value between the Hapū and Ngāti Hineuru through their common ancestor, as well as the evidence concerning the staff Papauma, as not being proven but based on myths and stories.

[133] However, Mr Taylor's evidence was that the fact that the trail would have been aligned with the current State Highway did not mean that the wider area was not of cultural significance. In cross-examination, Mr Taylor said that Māori occupied the whole area, not just one part of it. This accords with common sense, that the occupation and related activities would be diffuse and not limited to a particular line.

[134] Ms Lucas also confirmed the site was "legible" from a landscape point of view.

[135] There was ample evidence before the Court to enable it to be satisfied that the extent of the MTT88 site as proposed was a wāhi taonga.

Religious beliefs

[136] Mr and Mrs Raikes say that the cultural and spiritual whakapapa and the "myths" relied upon to determine the site was wāhi taonga were merely the beliefs of the Hapū which cannot be substantiated. Mr and Mrs Raikes say their own Christian views were not properly taken into account by the Court.

[137] Mr and Mrs Raikes submit they should have been given the opportunity by the Court to expand on those views. In submissions on appeal Ms Blomfield said that Mr and Mrs Raikes were considering using profits from any enterprise on their land such as a mini hydro dam or a wind turbine to generate money for charities aligned with their Christian faith.

[138] Mr and Mrs Raikes also say that the Environment Court erred in its consideration of s 13 of the NZBORA, which provides for freedom of religion and belief. I have set out above at [39] the Court's consideration of Mr and Mrs Raikes' religious beliefs. The Court made it "very clear" that the Court was "not a place to resolve differences in view about deities and divinity".[182] However, the Court noted, with reference to s 13 of the NZBORA, that "Maori are as entitled to have their beliefs respected as Mr Raikes is entitled to have his".[183]

[139] The Court then went on to refer to and quote the provisions of ss 6, 7(a) and 8 of the RMA, which it said contained "highly relevant requirements".[184] In doing so, as well as s 6(e), which has been a significant provision in this appeal, the Court also referred to the provisions in s 6 requiring the decision-maker to recognise and provide for (f) the protection of historic heritage from inappropriate subdivision, use, and development, and (g) the protection of protected customary rights.

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182 At [72].
183 At [72].
184 At [72].

[140] The Court was not engaged in a jural determination as to cultural and religious beliefs per se. It was operating within the framework of the RMA which, as Whata J said in *Ngāti Maru*, requires the decision-maker to respond to claims and determine the appropriate course of action which will best discharge the statutory obligations of the decision-maker under that statute.[185] While this is not a case of divergence of Māori cultural information, as there was no evidence contradicting that of the MTT witnesses, the proper approach is summarised in the following passage from that decision:[186]

> … when exercising functions under the RMA, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori in order to discharge express statutory duties to Māori. Thus, where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), (g), 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond still applies when different iwi make divergent claims as to what is required to meet those obligations, and this may mean a choice has to be made as to which of those courses of action best discharges the statutory duties under the RMA. As *Te Ngai Hapu* aptly illustrates, that may (for example) require evidential findings about who, on the facts of the particular case, are kaitiaki of a particular area and how their kaitiakitanga, in accordance with tikanga Māori, is to be provided for in the resource [management] outcome.

[141] The Christian views of Mr and Mrs Raikes are to be respected, as the Environment Court noted.[187] However, in the context of the statutory framework here, they were simply not a factor to be taken into account in the determination required of the Environment Court when considering cultural issues under ss 6(e), 7(a) and 8 of the RMA. These requirements under the RMA recognise in this context, the "special regard to Māori interests and values".[188]

[142] It is apparent that the Court only referred to s 13 of the NZBORA to make the point in passing that a right to have one's beliefs respected is a fundamental right of all people under the NZBORA. That section was not engaged in the Environment Court's assessment of the matter under consideration. The Environment Court quite

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185 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, above n 146, at [68] and [102].
186 At [102].
187 The Revised Decision, above n 1, at [72] and [76].
188 *McGuire v Hastings District Council*, above n 168, at [21].

rightly put Mr and Mrs Raikes' Christian beliefs to one side in making its determinations.

Reasons

[143] The final issue is whether the Court sufficiently articulated its reasoning as to accepting the cultural evidence of witnesses called by MTT.

[144] Baragwanath J in *Murphy v Rodney District Council* summarised the requirement for reasons to be provided by a decision-maker as follows:[189]

> … the duty of a decision maker to give reasons … requires the decision maker to outline the intellectual route taken, which provides some protection against error. The reasons may be succinct; in some cases they will be evident without express reference.

[145] The duty to give reasons or to engage in a particular line of analysis is contextual. In this case the Environment Court set out the evidence relied upon, and the "intellectual route taken" to reach its conclusions is apparent. The Court was not required to spell out every item of evidence, nor to set out every argument made by the appellants.

[146] The appellants in fact are challenging the merits of the decision. However, it was for the Environment Court, having assessed the evidence, to put such weight on the evidence as it considered appropriate and to reach a determination. The Environment Court is responsible for the balancing process required under the statute, and the weight to be given on relevant considerations is a matter for that Court and not for reconsideration by this Court as a point of law.[190]

Factual errors by the Environment Court

[147] The appellants also contend that the Environment Court made two factual errors in its Revised Decision, which were material to the decision and therefore the decision should be set aside.

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[189] *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC) at [25]; and see *Primeproperty Group Ltd v Wellington City Council* [2022] NZHC 1282 at [9].

[190] *Speargrass Holdings Ltd v Van Brandenburg*, above n 71, at [113], citing *Guardians of Paku Bay Association Inc v Waikato Regional Council*, above n 86.

[148] The first alleged factual error was the Court's comment that the area of Mr and Mrs Raikes' land affected by the MTT88 site was two per cent. It is now accepted this was an error and the percentage is in fact higher than the Court stated, although not higher than nine per cent of the Station. The Court had correctly noted that MTT88 had a total area of approximately 70 hectares, approximately 16.22 hectares of which was on Mr and Mrs Raikes's station, noting the station is held in one 470-hectare title.[191] In so stating, however, it is clear the Court neglected to account in its calculation for the adjacent land leased by Mr and Mrs Raikes, over which the proposed site MTT88 also lay. Therefore the proportion of land involved at the time that would be affected by the wāhi taonga classification was in fact a greater percentage than that stated by the Court.

[149] However, the Environment Court did not apparently rely on this calculation in its determination of either the classification of the site as wāhi taonga or its extent. The size of the wāhi taonga may have had some bearing on what the appropriate rules applying to the site were to be. Indeed, this appears clearly to have been the case in the Court's determination of what rules should apply. However, as long as the wāhi taonga is established on the evidence, the proportion of the land owned or leased by Mr and Mrs Raikes that is to be included in the site has little relevance to the final determination of its status as wāhi taonga.

[150] The appellants also raise as a factual error the reference to Te Waka-a-Te O being within Tītī-a-Okura. It is accepted by counsel this too was an error.

[151] By way of explanation, Mr Taylor said in his evidence that another feature commemorating Te Okura, who was the skilled tītī hunter, and from whom the name Tītī-a-Okura was derived, is Te Waka-a-Te O, the canoe of Okura. Te Waka-a-Te O is part of the Maungahururu range but is, according to the evidence of Mr Taylor, located to the north of, and adjacent to, site MTT88.[192] Mr Taylor goes on in his evidence to say that Titī-a-Okura (on which MTT88 is situated) had always been part of the main traditional route from the coast inland to the interior, which is now State Highway 5.[193]

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191 The Revised Decision, above n 1, at [77].
192 At [38], which the Environment Court cited in its Revised Decision, above n 1, at [68].
193 At [38].

As Mr Taylor said, that was part of the reason Titī-a-Okura had been a significant, strategic location, and the Hapū had defended their interests in that land over many generations.[194]

[152] The error itself appears in the following comment in the Revised Decision:

> [68] Mr Taylor also referred to an area within the site which is referred to as Te Waka-a-Te O or the "Waka of Okura."[195] Mr Taylor is a direct descendent of this ancestor,[196] as was Mr Reti.[197]

[153] The Court's error was to refer to the Te Waka-a-Te O being *within* MTT88 rather than *adjacent to*. However, the significance of the place name, as it referred to Okura, remains relevant. The point being made by the Court in the Revised Decision was that the Waka of Okura was in the area. It is an adjacent ridge. The mistake is not material to the decision reached.

[154] A further point raised by Mr and Mrs Raikes was the reference by the Court to the site being "already quite dominated by the State Highway, and its designation as [a wāhi taonga] effectively prevents any other development on the site which would be likely to further interfere with its value as a waahi taonga."[198]

[155] The parties indicated that they were not certain of the meaning of this comment. It is not for this Court to speculate. Nevertheless, the point does not appear to have had any weight in the final assessment. The possible activities to which Mr Raikes had referred as possibilities for developments on the site were specifically dealt with by the Court and it was satisfied the requirements of the relevant rules for this site would not be unduly restrictive in the context of activities permitted on the site, and would be limited to cultural matters only. The reference to the State Highway was not material to the decision reached.

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194 At [38].
195 Statement of Evidence of Mr Taylor, above n 37, at [38].
196 Statement of Rebuttal Evidence of Mr Parsons, above n 39, at [27].
197 Statement of Evidence of Mr Taylor, above n 37, at Appendix 4, Submission of Fred Reti dated 31 March 2015 to the Hastings District Council in relation to the District Plan at [36].
198 The Revised Decision, above n 1, at [81].

[156] I conclude under this head that while there were two particular mistakes as to factual matters in the Revised Decision of the Environment Court, these were not material to the decision.

Conclusion

[157] None of the grounds of appeal are made out. Accordingly, I dismiss the appeal.

[158] In summary, there were seven questions of law for determination in this appeal. I now summarise my conclusions in respect of each:

(a) *Question 1:* Did the Court fail to consider and properly apply relevant law and case law about the critical assessment a decision-maker should apply to evidence given by a party asserting a relationship with a site that should be recognised and provided for under section 6(e)?

No. While the Court did not refer to all the relevant case law cited by the appellants, it was not required to. The Court adopted the correct approach and summarised the main factors in support of its finding that the MTT88 site was a wāhi taonga.

(b) *Question 2:* Did the Court err in its consideration and application of section 13 of the New Zealand Bill of Rights Act 1990 (BORA)?

No. The Court noted the Christian views of Mr and Mrs Raikes were to be respected but that was not an issue under consideration. In the context of the statutory framework the Court was entitled to place weight on the evidence of the tangata whenua as to cultural issues. The Court only referred to s 13 of the NZBORA to make the point that the right to have one's beliefs respected is a fundamental right of all people under the NZBORA, not as a reason supporting its determination of site MTT88 as a wāhi taonga, or as to its extent.

(c) *Question 3:* Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusion at paragraph [76] (that what Maori regard as waahi tapu and other taonga is for them)?[199]

No. The Court set out the evidence it had heard from expert cultural witnesses and its conclusion at [76] was in line with the authorities and statutory framework. Its reasoning was sufficient in this regard.

(d) *Question 4:* Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at paragraph [79]?[200]

No. The Court set out the evidence clearly and the "intellectual route taken" to reach its conclusions is apparent. The decision must be read as a whole. The Court's findings were supported by the evidence before the Court.

(e) *Question 5:* Did the Court take into account a matter which it should not have taken into account when it considered the proportion of the total farm area owned or leased by the appellants affected by proposed Site 88?

While the Court made an error in calculating the proportion of the total farm area affected, this was not a matter which the Court materially relied on in reaching its conclusions as to the determination of the site as wāhi taonga, or its extent.

(f) *Question 6:* Was the Court's calculation of that proportion correct?

No. However, the error was not material to the decision reached.

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199 Paragraph [76] of the Revised Decision refers to s 6(e) of the RMA which deals with the relationship of Māori and their culture and traditions with wāhi tapu and other taonga.

200 Paragraph [79] of the Revised Decision is a summary of the cultural issues, the cultural significance of the site to the MTT hapū and its evidence which the Environment Court says it accepts.

(g) *Question 7:* Was the reasoning provided by the Court insufficient to explain how the Court came to its conclusions at paragraph [81] on the extent and boundary of proposed Site MTT 88?[201]

No. The Court was entitled to rely on the evidence as to the extent of the site to make its determination that the area as delineated by the kaumātua was appropriate in its extent.

Costs

[159] Counsel agreed at the end of the hearing that costs should follow the event on a 2B basis. I make directions accordingly. Orders for costs together with reasonable disbursements on that basis are made in favour of the respondent and interested party against the appellants. If any matters are outstanding, leave is reserved to any party to make submissions by way of memorandum on or before seven days from the date of this decision, with any response to be within a further three days.

Grice J

Solicitors:
Sainsbury Logan & Williams, Napier
Matthew Eugene Casey QC, Auckland
DLA Piper, Wellington

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201 Paragraph [81] of the Revised Decision refers to the site being already "quite dominated by the State Highway, and its designation as such effectively prevents any other development on the site which would be likely to further interfere with its values as a Wāhi Taonga." The Court went on to accept the position of MTT and the Council as being appropriate to "recognise the significance of the site, without unreasonably restricting other activities." It indicated it did not accept Mr and Mrs Raikes's position.

DOUBLE SIDED

Decision No. W024/2002

IN THE MATTER of the Resource Management Act I991

AND

IN THE MATTER of four appeals under section 325 of the Act

BETWEEN **TWISTED WORLD LIMITED**

(RMA026/02, RMA139/02, RMA156/02 and RMA258/02)

C S GRIFFITHS and another

(RMA1 87/02)

ZADAMIS PROPERTIES LIMITED

(RMA188/02)

BONIUM HOLDINGS LIMITED

(RMA189/02)

Appellants

AND **THE WELLINGTON CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge Sheppard (presiding)
Environment Commissioner W R Howie

HEARING at Wellington on 21, 22 and 23 May 2002

(Final submissions in writing 28 May 2002)

Counsel

P Steven for the appellants

P J Milne and T McNeil1 for the respondent

DECISION

Introduction

[1] Twisted World Limited (trading as Roadside Attractions) erected signs and billboards on properties in the central business district of Wellington. The Wellington City Council maintained that resource consents were needed for the signs and billboards, but Twisted World did not apply for resource consents for them. When Council enforcement officers issued abatement notices requiring removal of the signs and billboards, Twisted World and owners of buildings affected appealed to the Environment Court, claiming that resource consent was not needed.

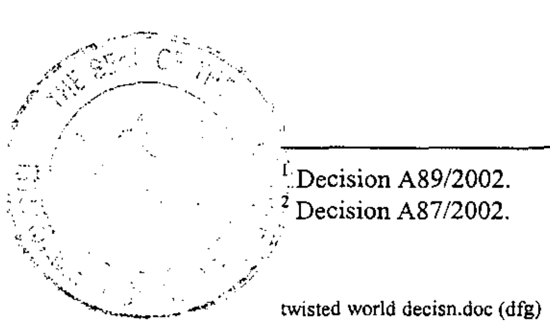
[2] The difference in meaning between signs and billboards is not material in this case. In this decision we refer to all the signs and billboards in question as signs, although at least some of them may be billboards.

[3] The main issue between the parties was the true construction of a district rule and its application to the signs in question. The Council maintained that the signs do not comply with the conditions in the rule for permitted activities, and the appellants maintained that they do. The appellants also maintained that Council employees had previously applied an interpretation of the rule by which the signs in question would comply with the rule, and that was rejected by the Council.

[4] The appellants applied for orders staying the abatement notices pending the Court's decision on the appeals. The Council did not oppose the application in respect of two of the signs. By decision given on 26 April 2002[1] Judge Sheppard stayed the abatement notices in respect of those signs.

[5] The Council opposed the application in respect of the other signs. By decision given on 26 April 2002,[2] Judge Sheppard stayed the abatement notices in respect of those signs on certain conditions pending the decision on the appeals.

[6] There are four main issues to be considered in deciding the appeals:



[1] Decision A89/2002.
[2] Decision A87/2002.

(a) What is the true interpretation of Rule 13.1.1.8. 1? (That also calls for consideration of a claim that part of the rule is invalid, and if so, whether that part can be severed.)

(b) Applying the rule to the signs, do any of them require resource consent?

(c) Should the Court refrain from confirming the abatement notice in respect of any of the signs? (That calls for consideration of whether the Court has a discretion to exercise in that respect, and if so, whether that discretion should be exercised.)

(d) If any of the abatement notices is upheld, should the Court continue the stay of it pending obtaining resource consent?

[7] We consider those issues in that order.

What is the true interpretation of Rule 13.1.1.8.1?

[8] We start our consideration of the true interpretation of the rule in question by setting out its text in the district plan.

The text of Rule 13.1.1.8.1

[9] All the abatement notices rely on Rule 13.1.1.8.1. That rule is in Section 13 of the district plan, which is headed "Central Area Rules". In that section of the plan, subsection 13.1 prescribes permitted activities. Rule 13.1 .1 provides–

> Any activity, except for:
> - those specified as Controlled Activities, Discretionary Activities (Restricted) or Discretionary Activities (Unrestricted)
> - those activities listed in the Third Schedule to the Health Act 1956
> - helicopter landing areas
>
> is a permitted activity provided that it complies with the following conditions.

[IO] There follow a number of subsections of the plan containing rules prescribing the conditions on which various activities are classified as permitted activities.

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[11] Subsection 13.1.1.8 of the district plan applies to signs in the Wellington central area. It contains three rules: one about signs on buildings on or below the fourth storey (Rule 13.1.1.8.1), one about signs on buildings above the fourth storey (Rule 13.1.1.8.2), and the third about free-standing signs not attached to any building (Rule 13.1.1.8.3). Three paragraphs of explanatory material follow the texts of the three rules.

[12] The signs the subject of these appeals are attached to buildings on or below the fourth storey, so Rule 13.1.1X.1 is the applicable rule. We quote the rule–

> For signs on buildings on or below the fourth storey:
> - The maximum area of any one sign is $20m^2$
> - Signs must be displayed only on plain wall surfaces where they do not obscure windows or architectural features
> - No sign shall project above the parapet level or the highest part of the building to which it is attached
> - Any illuminated sign (excluding signs below verandah level) within 50 metres and visible from a Residential area must not flash
> - Any sign attached to a verandah must be at least 2.4 metres above the footpath
> - Signs on buildings above verandah height shall not project from the face of the building by more than 1.5 metres.

[13] We also quote from the explanatory material that follows the three rules in section 13.1.1.8. The second sentence of the first paragraph of that material is about freestanding signs, which are the subject of Rule 13.1.1.8.3. The third paragraph of the explanatory material relates only to signs above the fourth storey level, which are the subject of Rule 13.1 .1 .8.2. Those parts of the explanatory material do not help in understanding Rule 13.1.1.8.1 about signs on or below the fourth storey, so we omit them from the quotation.

> Council believes that in cities, residential owners or occupiers cannot expect the complete exclusion of signs from view and that a balance must exist between providing reasonable protection from annoying signs and encouraging signs as a desirable townscape element.. .
>
> The area below the fourth storey of buildings is very visible to people at street level, Within this area, signs are generally permitted although these rules ensure that they are appropriately situated and, if illuminated, will not annoy residents in nearby Residential Areas.

[14] If a sign does not comply with any of the conditions in Rule 13.1.1.8.1 so as to qualify as a permitted activity, Rule 13.3.1 of the district plan would apply-

> 13.3.1 Activities that do not comply with one or more of the following conditions for permitted activities in rule 13.1.1:
>
> 13.3.1.6 signs

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are Discretionary Activities (Restricted) in respect of the condition(s) not being met.

[15] There was no contest between the parties on that. The effect of that rule is that if any of the signs in question does not comply with any of the conditions of eligibility as a permitted activity in Rule 13.1.1.8.1, then the sign is classified as a restricted discretionary activity, and resource consent is needed.

[16] The issues between the parties relate to the interpretation of the second condition, the interpretation of the third condition, and whether the rule is invalid for uncertainty. We address these issues in turn.

The interpretation of the second condition

[17] The difference between the parties about the second condition is whether the requirement that signs are to be displayed on a plain wall surface is independent of the requirement that signs do not obscure an architectural feature or window.

[18] The appellants maintained that the true interpretation of the condition is that where signs are displayed on a plain wall surface, they must be displayed so as not to obscure an architectural feature or wall. They contended that the condition does not mean that signs must only be displayed on plain wall surfaces.

[19] The Council maintained that the true interpretation is that (except where attached to a verandah) signs may only be displayed on a plain wall surface, and must not obscure either windows or architectural features.

The auoellants' case

[20] The appellants contended that the meaning advanced by the Council (that signs may only be displayed on plain walls) does violence to the rest of the condition in that. If they may only be displayed on plain wall surfaces, there would be no need for the rule to refer to the sign not obscuring windows or architectural features (as a plain wall surface will not include a window or architectural features). They also argued that the rule does not restrict signs to those displayed on plain wall surfaces because it allows signs displayed in two other ways. The fifth condition allows signs attached to a verandah (if at least 2.4 metres above the footpath); and the sixth

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condition contemplates that signs may project from the face of the building by up to 1.5 metres.

The Council's case

[21] The Council contended that the conditions are to be read conjunctively where they are applicable. It referred to another rule in section 13 which, it submitted, has to be interpreted in that way. The Council accepted that the rule allows for signs to be attached to verandahs. It argued that if the meaning advocated by the appellants had been intended, the condition would have started with words like "Where signs are on walls.. ."

[22] The Council submitted that the appellants' interpretation required that the word "either" be implied before the words "be displayed" in the second condition, and the word "or" instead of "where they". It contended that its interpretation of the second condition strains the wording less than the appellants' interpretation does. It argued that it would make no sense not to restrict signs that obscure windows or architectural features only where they are on plain wall surfaces. The reason was that, although signs on a plain wall surface could obscure windows or architectural features, a plain wall surface will not have such features,

The Court's interpretation

[23] Like many contents of district plans, Rule 13.1.1.8.1 is clearly not a polished piece of drafting. Therefore it is inappropriate to seek indications about the intended meaning from applying presumptions used in interpreting polished drafting. For example, we do not accept that a particular intention can be inferred from finding that certain words are repetitive. So we do not accept the appellants' criticism that if signs may only be displayed on plain wall surfaces, there would be no need for the rule to refer to the sign not obscuring windows or architectural features (as a plain wall surface will not include a window or architectural features). We do not accept either, that the presumption that a drafter has used words consistently throughout the instrument would be a reliable guide in interpreting this plan.

[24] Both parties accepted that the interpretation should be guided by the purpose of the district plan, as indicated by relevant objectives and policies. We agree. However, although our attention was called to the relevant objectives and policies, they are stated in such broad generalities that they give little guidance for resolving

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the difference between the parties over the intention of tbe second condition. An example is Policy 12.2.2.8, the material part of which is to "manage the maximum size and placement of signs on buildings".

[25] The only indication elsewhere in the plan that might be usefui is the Design Guide for the Central Area, which contains material about the external appearance of buildings.

[26] The analysis in section 3.0 identifies values such as legibility, and design coherence. Item G1 directs that buildings should communicate with their surrounding public environment, and that opporttmity is to be taken to provide an external expression of spaces and activities within a building. Section 4.0 identifies values of a building's external design as well as the desirability of a building displaying a clear and complete architectural concept. For the street concept, the guidelines value window openings as particularly useful indicators of scale (item G6). They value contrast by layering of architectural elements, use of contrasting surface finishes, colours or patterns, or emphasising part of the overall composition (item G7). The Guidelines for building bulk also identify articulation of a building's surface treatment as an area of concern. Again they value use of contrasting surface finishes, colours or patterns, inclusion of discrete architectural elements, and emphasis of part of the overall composition of a building's form or surfaces (item G1). They also place value on vertical and horizontal patterns on building frontages (item G2).

[27] We can get help in finding the intention of the rule from expecting consistency with the Design Guide. As the rule is not polished drafting, that consistency will be more reliable than making presumptions from the wording of the rule itself.

[28] To be consistent with the Design Guide, it is to be expected that the conditions about the placement of signs as permitted activities would preclude placing them where they would inhibit legibility and coherence of the building's design. Of course the conditions might be expected to ensure that signs do not obscure window openings or articulation of surface treatment such as contrasting finishes, colours or patterns, and discrete architectural elements. But the values identified in the Design Guide go further than that. They extend to the display of a clear and complete architectural concept.

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[29] The explanatory material following Rule 13.1 .1.8.3 (already quoted) refers to a balance between protection from annoying signs; and signs as a desirable townscape element.

[30] The appellants' interpretation of the second condition would preclude signs as of right that obscure windows or architectural features. But it would allow signs placed so that, although they do not obscure windows or architectural features, they inhibit legibility and coherence of the building's design.

[31] Even plain wall surfaces can be a deliberate part of the designed external appearance of a building. The finishes and colours of plain surfaces have their part in expressing the complete architectural concept. In seeking a balance with recognising signs as a desirable townscape element, the Council has been willing to sacrifice the value of plain wall surfaces.

[32] The Council's interpretation, like the appellants', precludes signs that obscure windows or architectural features. By only allowing signs that are displayed on plain wall surfaces, the Council's interpretation also limits the extent to which the placing of signs inhibits legibility and coherence of the building's design concept in other ways. It limits the sacrifice for signs to those on plain wall surfaces (and those on verandahs).

[33] The Council's interpretation is more faithfully consistent with the Design Guide than the appellants' interpretation. We hold that the Council's interpretation represents the intention conveyed by the words of the second condition, and is the true interpretation to be applied. The outcome is that (except when attached to a verandah in accordance with the fifth condition), signs on buildings on or below the fourth storey only qualify as permitted activities if they are displayed on plain wall surfaces, and if they do not obscure windows or architectural features.

The interpretation of the third condition

[34] There are two differences about the third condition. One is whether the prohibition of a sign projecting above the parapet level only to applies to signs attached to the parapet. The other is whether the prohibition of signs projecting above the highest part of a building refers to the highest part of the part of the building to which the sign is attached, or to the highest part of the building.

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[35] The appeliants maintained that the parapet level only applies to signs attached to the parapet, and that where a sign is not attached to a parapet, it is not to project above the highest part of the building.

[36] The Council maintained that where a building has a parapet, a sign is not to project above the level of the parapet, whether or not the sign is attached to the parapet. It also maintained that the condition means that a sign is not to project above the highest part of the part of the building to which the sign is attached, not the highest part of the overall building to which the sign is attached.

The appellants case

[37] Counsel for the appellants submitted that in this rule, the parapet level refers to the level of a parapet at the top of a building not, for instance, to a parapet wall around the edge of a balcony.

[38] It was the appellants' case that the condition about the parapet level only applies where the sign is attached to the parapet, not where there is no parapet on the part of the building where the sign is attached.

[39] On the other point, it was the appellants' case that the Council's interpretation requires reading the condition as if it said –

. the highest part of *that part of* the building to which it is attached.

[40] Ms Steven observed that the additional words "that part of" are not in the condition; and submitted that words that are not there, and which change the meaning, should not be read into the rule.[3]

[41] The appellants also urged that the Council's interpretations on the two points are contradictory, in applying to the parapet level the level of any parapet on the building (even if unrelated to the placing of the sign), but not doing the same in respect of the highest part of the building. They urged that the Council's interpretation would give rise to difficulties in the administration of the plan,[4] and that a liberal interpretation should be preferred to an unnecessarily sophisticated or overly literal one.

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[3] iting Burrows *Statute Law in New Zealand,* (Second edition) 196.
[4] Citing *Nanden v Wellington City Council* [2000] NZRMA *562* (HC).

The Council's case

[42] The Council maintained that it is sensible to interpret the condition so as to refer to the highest part of the building to which the sign is attached, regardless of the fact that there may be a higher part of the building elsewhere. The reason was that this is consistent with the purpose of respecting the architectural design of buildings. Mr Milne urged that it would make no sense to refer to other parts of a building that may be higher (as in a podium and tower building, or a main building and penthouse).

[43] Of the appellants' interpretation, the Council argued that it would make no sense to reference the control to part of the building which the sign is not on. That the effect of the size limit is that there would be no control over placement of signs on the rooftops of the lower parts of split-level buildings, contrary to the purpose of the rule.

[44] The Council contended that the word 'or' in the condition means that a sign must not be higher than either of the levels.'

The Court's interpretation

[45] The Council did not contest the appellants' interpretation that in the context the word 'parapet' refers to the level of a parapet at the top of a building, not to a parapet wall around the edge of a balcony. In the context, we agree.

[46] We find no basis in the text or the context for restricting the application of the parapet level control to signs that are attached to the parapet. The final words of the condition "to which it is attached" refer to the words "the building", not to the words "parapet level".

[47] We simply do not accept that the text supports the appellants' interpretation in that respect. The point is to control the height of signs. Attachment to the parapet or not is beside the point. To qualify as a permitted activity, a sign is not to project above the parapet level, even if the sign is not close to the parapet.

Citing *Logan v Auckland City Council* (CA243/99).

[48] Grammatically, the second part of the condition may be open to two meanings. However the purpose is me appearance of buildings from street level so that their architectural concept is displayed. A sign placed so that it projects above the highest part of the part of the building to which it is attached would inhibit the display of the architectural concept. A sign that projects above the highest part of some other part of the building, to which it is not attached, would not.

[49] We have considered the appellants' claim that the Council's interpretations on the two points are contradictory. From their point of view it may appear that way. However when the purpose approach to interpreting the condition is followed, there is no inconsistency between them. We accept that inserting the words "the part of in the second part of the condition would have made the meaning clearer. The whole rule would benefit from professional editing. But any difficulties in administration of the plan arise from poor drafting, not from giving the condition its correct meaning.

[50] So although the condition is not well expressed, we hold that the Council's interpretation is the correct one, and we do not accept that it has the meanings claimed by the appellants.

[51] We hold that the correct interpretation of the third condition is that to qualify as a permitted activity a sign is not to project above the level of the parapet at the top of the building (if there is one), nor is it to project above the highest part of the part of the building to which it is attached.

Is part of the rule invalidfor uncertainty?

[52] Next we tum to the appellants' claim that part of the rule is invalid for uncertainty. The part in question is the second threshold in the second condition-

> .where they do not obscure windows or architectural features.

<u>The appellants' case</u>

[53] It was the appellants' case that these words are uncertain in the following respects:

THE SEAL OF THE

(a) It is uncertain whether 'obscure' means totally obscure, or extends to partially obscure.

(b) It is uncertain what is meant by 'architectural features'

[54] On the first, Ms Steven submitted that it is unclear whether the condition proscribes placing a sign against the backdrop of a wall so that it obscures a window from some views, though not all.

[55] On the second, Ms Steven submitted that what amounts to an architectural feature is fraught with subjectivity, and is not capable of objective ascertainment. Counsel quoted dictionary meanings of the word 'feature'. She submitted that a Council may not reserve by subjective formulation the decision whether an activity is a permitted activity, and that permitted activities fall for objective ascertainment.

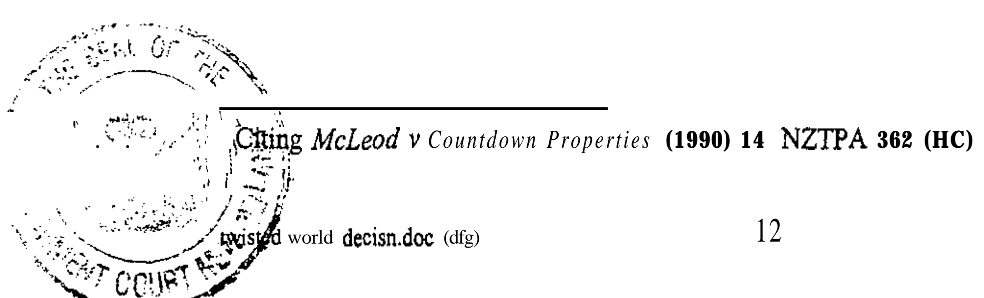
[56] Ms Steven continued by contending that permitted activities may not be defined, even in objective fashion, in terms so nebulous that a reader is unable to determine whether a use may or may not be carried on in the zone. That need not involve any express subjective formula, but simply inherent vagueness. Counsel accepted that the question is one of degree: Is the description of a permitted activity too wide, or too vague, to have "some measure of certainty"?

[57] Counsel acknowledged that concepts of subjective formulation and vagueness have to be distinguished, and that an expression need not be invalid because it is general. She submitted that the question must be whether it is sufficiently certain to be understandable and functional.[6]

The Council's case

[58] The Council rejected the claim that the condition is uncertain, and asserted that it is capable of a sensible and logical meaning.

[59] It accepted that a rule may not reserve a discretion to decide what is a permitted activity, but contended that the condition does not reserve a discretion.



[6] Citing *McLeod v Countdown Properties* **(1990) 14 NZTPA 362 (HC)**

[60] Mr Mile submitted that there is no basis for confining the meaning of 'obscure' to totally obscure or cover, as that would mean that a sign which covered 90% of a window or architectural feature would comply with the condition.

[61] Counsel also rejected the appellants' submission that judgement of what is an architectural feature is fraught with subjectivity. He submitted that this is a matter on which a court can come to an objective view, based on technical and common meanings.

The Court's decision

[62] We accept that concepts of subjective formulation and vagueness should be distinguished.

[63] On the first, we accept the submissions of both parties that a district plan may not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity.' Permitted activities fall for objective ascertainment.[8] On the second, we also accept that if a rule defining a class of activity incorporates an element that is so uncertain that the definition is not functional, the rule might be invalid for inherent vagueness.'

[64] It is in the nature and purpose of district plans that some classifications and rules cannot be expressed in measurable units, such as of height or area. Objectively phrased conditions of permitted activities are not necessarily ruled out merely because they require an exercise of judgement. But they are to be assessed for validity on their own degree of certainty or lack of it.[10] So we accept the submissions of counsel for the appellants that we have to consider whether the condition in question is too wide or too vague to have that element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing competing factors."

[7] *Ruddlesdon v Kapiti Borough* (1986) 11 NZTF'A 301 (HC); *Fairmont Holdings* c **Christchurch City Council** (1989) 13 NZTF'A 461(HC); *McLeod v* **Countdown Properties**,, supra.
[8] *McLeod* pages 372, 373.
[9] Ibid, page 373.
[10] Idem.
[11] Ibid, page 37

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[65] Returning to the condition in question, we have no difficulty with the use of the word 'obscure'. By specifying that signs are to be placed where they do not obscure windows or architectural features, we have no doubt that the intention was that signs are not to obscure (hide, cover) a window or an architectural feature wholly or in part, and from whatever viewpoint. There is no room for holding that the condition is invalid for uncertainty in this respect.

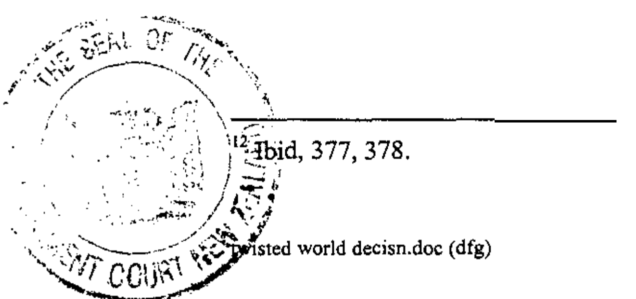
[66] There was a difference between expert witnesses on whether a particular face of a building contained an architectural feature, or whether it was an architectural element. This difference was relied on by the appellants as indicating that the condition is too vague.

[67] We do not accept that it is. In resource management matters, differences of opinions between expert witnesses are common, and where they arise, functionaries have to hear the conflicting opinions, evaluate them by reference to the purpose of the Act and of instruments under it, and the ordinary meaning of non-technical terms, and come to reasonable decisions. It is not always easy, and reasonable people may differ over decisions made. But the use of words and phrases like 'architectural features' is understandable and functional, and in our judgement (unlike the phrase 'nearly all'[12]) is not too wide or too vague to have some element of certainty.

[68] The outcome is that we do not accept the appellants' submissions that the phrase in question is invalid for uncertainty. Therefore the question whether the part questioned can be severed from the rest of the rule does not arise.

Do any of the signs require resource consent?

[69] Now we have to consider each of the signs the subject of the abatement notices and decide whether, on the correct interpretation of Rule 13.1.1.8.1, it qualifies as a permitted activity in the respect questioned in the relative notice, or requires resource consent.



[12] Ibid, 377, 378.

71-81 Cuba Street (RMA26/02 and RMA188/02)

[70] The abatement notice dated 13 December 2001 (which is the subject of Appeals RMA26/02 by Twisted World Limited and RMA188/02 by Zadamis Properties Limited) relates to seven billboard signs erected on the roof of The Oaks complex at 71-81 Cuba Street and facing Manners Street, Dixon Street, Cuba Mall and Te Aro Park. The notice alleges that the signs-

> .project above the parapet level of the building, project above the highest part of the building to which they are attached and are not attached to a plain wall surface.

[71] The appeals allege that properly construed as a whole, reading each component cumulatively, the signs comply with the rule.

[72] The evidence of Ms YB Weeber, an urban designer employed by the Council, stated–

> 28. The Oaks had been designed as a stand-alone building with a ground floor level, verandah and a first-floor level. The first floor level has an angled roof form which terminates the building around the street edge. In the centre of the building is a higher atrium roofline, which runs in an east west direction. The higher atrium roof while forming the spine of the building is only partially visible from the majority of street vantage points.
> 29. The signs project above the angled roofline of the building. The higher central atrium portion of the building can only be seen behind the signs when they are viewed from a distance. When this is viewed from the street, the signs obscure the architectural features and windows of the higher central atrium portion of the building.
> 30. The structural supports and signs are attached to the angled roofline of The Oaks. The placement of signs on this angled roofline makes the signs visually intrusive as the flat vertical sign is placed on top of an angled roofline. The overall design composition of the building is compromised due to the inappropriate placement of all these signs.

[73] In cross-examination Ms Weeber accepted that obscuring an architectural feature is not one of the allegations of non-compliance in the abatement notice.

[74] The evidence of Mr S J Barry, Governing Director of Twisted World, in respect of these signs was-

> 5. This building is a two storied shopping mall complex. It has a large steel, glass and concrete spine that runs the length of the roof. The signs are attached to the roof and extend upwards from the outside verandah awning level around the outside edge of the building. However they do not project above the highest point of the central spine construction. From my perusal of the plans for this building I calculate the height of the highest part of the building to be 12 metres above ground level .

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[75] In cross-examination Mr Barry accepted that one of the signs on this building, having an area of 36 square metres, requires consent.

[76] The affidavit of a planning consultant, Mr C 3 Erskine, sworn on 22 February 2002, contained the following evidence about these signs–

> 4. The building to which all signs are attached has a central spine running the full length, in an east west direction, and extending approximately four metres higher than the roof for the remainder of the building. All seven signs are attached to the main roof, extending three metres vertically from the point to which they are attached. Three signs are attached to the western side of the building, two on the eastern side, and one on the southern and northern sides
> 5. All signs are used for the purpose of advertising off site activities. Typically the advertising is in conjunction with a marketing campaign run concurrently in other forms of media .

[77] We refer to the allegations about the signs in the abatement notice. We find that on their true interpretation, the signs on this building do not meet the second condition of Rule 13.1.1.8.1 in that they are not displayed on plain wall surfaces.

[78] Considering the third condition, the level of the top of the angled roof of the first floor of the building is the parapet level. As the signs are not attached to the central atrium roof, but to the angled roof of the first floor, the top of that angled roof is also the highest part of the building to which the signs are attached.

[79] We find that the signs project above the parapet level of the building, and that they project above the highest part of the part of the building to which they are attached. So we hold that the signs do not meet the third condition of the rule.

[80] In short we find that the seven billboard signs erected on the roof of The Oaks complex at 71-81 Cuba Street and facing Manners Street, Dixon Street, Cuba Mall and Te Aro Park do not qualify as permitted activities under Rule 13.1.1.8.1 in the respects alleged in the abatement notice. In those respects the signs require resource consent as restricted discretionary activities,

[81] Although not the subject of the allegations in the notice, it is apparent that those signs do not qualify either in respect of obscuring the architectural feature of the central atrium roof. In addition, one of the signs does not qualify as a permitted activity because its size is 36 square metres, which exceeds the maximum area of 20 square metres stipulated in the first condition of the rule.

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[82] As those matters were not the subject of the abatement notice against which the appeals have been brought, we make no finding in those respects.

32-34 *Kent Terrace* ***(RMA139/02 and RMA187/02)***

[83] The abatement notice dated 18 December 2002 (which is the subject of Appeals RMA139/02 by Twisted World Limited and RMA187/02 by C S and P A Griffiths) relates to a sign (3 metres by 12 metres) at 32-34 Kent Terrace. The notice alleges that–

> The sign protrudes above the parapet level of the building and also projects above the highest part of the building to which they are attached, being the northern façade of the podium. The sign is not displayed on a plain wall surface and obscures windows.

[84] The appeals allege that properly construed as a whole, reading each component cumulatively, the signs comply with the rule.

[85] Ms Weeber gave evidence that the sign is made up of two flat surfaces that can be used for a single elongated advertisement or for two advertisements. The witness stated that the sign is attached to a wall that is part of the podium of a taller building, and that the sign projects above the podium wall and obscures the windows and architectural features of the main building behind it. She agreed in cross-examination that obscuring architectural features was not one of the allegations in the abatement notice.

[86] In his evidence, Mr Barry explained that the building is nine storeys high, that the bottom two storeys cover a larger ground area, creating a platform on which the other seven storeys stand. He stated that the signs are attached to the parapet wall running around the outside edge of the two-storey lower portion of the building.

[87] In his affidavit Mr Erskine stated that the signs are attached to the northern side of the building at the highest point of the second floor, extending three metres vertically from this point. He explained that this effectively means that there is a gap between the signs and the third floor of the building.

[88] The top edge of the podium is the parapet level. It is also the highest part of the part of the building to which it is attached.

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[89] We find that the sign does not meet the second condition of the rule in that it is not displayed on a plain wall surface, and in that it obscures windows on the tower block. We also fmd that the sign does not meet the third condition of the rule in tbat it projects above the parapet level; and in that it projects above the highest part of the part of the building to which it is attached.

[90] The result is that the sign erected on the building at 32-34 Kent Terrace does not qualify as a permitted activity in the respects alieged in the abatement notice, and requires consent as a restricted discretionary activity.

[91] We make no finding in respect of aspects that were not alleged in the abatement notice. The evidence suggests that, used as a single sign, it also exceeds the maximum area of 20 square metres, and that it obscures architectural features of the tower building behind the podium on which it stands.

68- 74 Willis Street (RMAI 56/02 and RMA189/02)

[92] Appeals RMA156/02 and RMA189/02 challenge an abatement notice dated 22 February 2002 in respect of two billboards on a car-parking building at 68-74 Willis Street. The notice claims that –

> Two billboards have been erected on site that obscure an architectural feature (aluminium slat).

[93] The appeals disputed that the signs are obstructing an architectural feature.

[94] A Council compliance monitoring officer, Ms H E Binmore, gave evidence that she had issued the abatement notice because the signs obscure the louvres which are the most prominent architectural feature of the building. Asked in cross-examination on what basis she made that assessment, the witness replied that she had assessed the overall design of the building, considered the elements repeated, and the features that were there to make a statement in the design of the building. She had considered the prominence of the aluminium slats, and how they had been described in the resource consent for altering the façade above the verandah. Ms Binmore reported that the resource consent application had described the louvres as horizontal, so that they would tie in with horizontal bands on balconies of an adjoining apartment building.

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[95] Ms Weeber stated that the two signs and associated lighting project out over the louvres, and that the signs obscure the louvres. She referred to her own assessment of tbe application for alterations to the building in which she had reported–

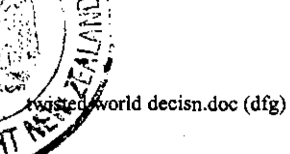
> The existing buiiding [is] in a sense a blank wall with a series of louvres on the wall to add architectural features and a visual pattern and relief to the building. The bland wall is painted a recessive black colour allowing the louvres and surrounding buildings to dominate. The parapet top edge is visible and not hidden by the overall louvre design.

[96] Ms Weeber gave the opinion that as well as screening, the combination of the louvres in a repetitive design sequence on the building facade create an architectural feature of the building. This witness stated that the signs break the design pattern of the louvres, and obscure the most prominent architectural feature of the building.

[97] In cross-examination Ms Weeber stated that she did not agree with the opinion of the architect Mr I C Athfield that the louvres are not an architectural feature. She stated that the louvres had been placed on the building to reduce visibility of cars in the parking building behind, and to give vertical emphasis. She considered that they are not just an infill panel, but an architectural feature of the building.

[98] It was Mr Barry's evidence that the signs are erected on slat screens placed over parts of the frontage of the building to obscure the gaps between the floor plates of the car-parking floors. He did not agree that the signs were obscuring an architectural feature; and he did not consider that the screens have any particular merit aesthetically. In cross-examination he stated that at the time the signs were erected, he had not taken advice on whether or not the louvres were architectural features.

[99] In his evidence Mr Athfield gave the opinion that the slat screens do not constitute an architectural feature of the building, but are an element of the building facade. He stated that an architectural feature articulates the architectural character of the building in a manner which adds to the quality of that building; that its purpose is to enhance a building. He considered that the primary reason for this element is screening, and stated that they modulate the wall in the manner that a window does.



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[100] In cross-examination Mr Athfield stated that the slatted panels to which the signs are attached are a component of the facade of the building and part of the facade composition. Asked if he regarded those components as being a design feature of that facade, the witness replied that a design feature could be any architectural element, whether background or an architectural feature.

[101] The Wellington district plan is not a technical instrument for the architectural profession. It is a public document for use by the public generally. Therefore, in the absence of provision giving a particular meaning to words used in the plan, they have to be *given* their ordinary meaning. That extends to the words "architectural features" in the second condition of Rule 13.1.1.8.1.

[102] Material dictionary meanings of 'feature' are–

> 1 A distinctive or characteristic part of a thing. 2 (usu in pl) a distinctive part of a face, esp. with regard to shape and visual effect [13]
>
> 1. any one of the parts of a face, such as the nose, chin or mouth. *2* a prominent or distinctive part, as of a landscape, book etc.[14]
>
> 1 any of the parts of the face, eg eyes, nose, mouth etc . . . 2 a noticeable part or quality of something.[15]
>
> 1. *a* distinguishing aspect or part.[16]

[103] Qualified by the word 'architectural' (referring to the design and construction of buildings) the sense of the words 'architectural features' is parts of a building facade that are distinctive or give it character or make it noticeable.

[104] To give the words "architectural features" that meaning in the context of the Rule 13.1.1.8.1 is consistent with the value that the Design Guide places on contrasting finishes, colours and patterns.

[105] We do not find support for making, in ordinary use, the distinction between feature and element made by Mr Athfield.

[106] From the evidence about the facade of the building at 68-74 Willis Street (assisted by photographs of it produced by Mr Barry and Ms Binmore) we fmd that the slatted panels on the Willis Street facade of the building are parts of the facade

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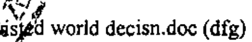
13 *The Concise Oxford Dictionary.*
14 *The New Collins Concise English Dictionary, New Zealand Edition.*
15 *Chambers Combined Dictionary Thesaurus.*
16 *Heinemann's New Zealand Dictionary.*



that are distinctive, that give it character and make it noticeable. They are obscured by the two signs.

[107] For those reasons we hold that the two signs do not meet the second condition of the rule in the respect alleged in the abatement notice, in that they obscure architectural features. So the signs are not permitted activities, and need resource consent.

54 Jervois Quay (RMA258/02)

[108] Appeal RMA258/02 by Twisted World challenges an abatement notice about two signs on a building at 54 Jervois Quay. The notice claims that–

> The signs protrude above the parapet level of the building and also project above the highest part of the building to which the sign is attached. The signs are also not attached to a plain wall surface.

[109] The appeal was based on the appellant's assertion that the signs comply with Rule 13.1.1.8.1, and are a permitted activity.

[110] A Council compliance monitoring officer, Ms R N Murphy, gave evidence that the signs are two 3 x 6 metre billboards erected at right angles to each other on a corner of the roof of a car-parking building fronting Jervois Quay and Willeston Street. She added that the signs obscure horizontal openings in the parking building.

[111] It was Ms Weeber's evidence that the signs are attached to the lower section of the building, where there *is* significant distance between it and the main higher block of the car-parking building. The signs are attached to the wail at the Jervois Quay and Willeston Street comer, and project well above the highest part of that part of the building.

[112] Ms Weeber gave the opinion that the signs obscure a pattern of openings in the wall which could be considered an architectural feature.

[113] Mr Barry explained in his evidence that this part of the building is stepped out from the rest, forming a carpark platform at this lower level, with the rest of the building rising up behind it. He stated that the signs are attached to the parapet wall on the comer outside edge of the lower portion of the building.

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[114] Mr Erskine also described the placement of the signs in his affidavit–

> The third storey of the building extends to the perimeter of the site while the remaining four storeys are stepped in approximately 30 metres from the eastern boundary. This effectively creates an outdoor parking area on the third storey of the building. The signs are attached to the south-east corner of the building, extending three metres vertically from the point to which they are attached.

[115] Assisted by photographs of the signs produced by Mr Barry and Ms Murphy, on the evidence we find that the upper edge of the third storey of the building is a parapet, and that both signs stand on top of that parapet and project above the parapet level. We also find that the highest part of the part of the building to which the signs are attached is the edge of the third storey of the building, and that the signs are placed on that part of the building and so they project above it. As the signs stand free on top of the parapet, we find that neither of them is displayed on a plain wall surface.

[116] Therefore we hold that neither sign complies with the second or third condition for being a permitted activity in the respects alleged in the abatement notice. Both signs require resource consent.

Should the Court refrain from confirming any of the abatement notices?

[117] The appellants submitted that in the light of the conflicting readings of the rule, the Council officers did not have reasonable grounds to consider that the signs breached the rule, as there is no evidence that they had legal advice, and there was no agreed consistent approach to the administration of the rule. They submitted that it would have been more appropriate for the Council to apply for a declaration to clarify the meaning of the rule instead of issuing abatement notices.

[118] The appellants contended that a discretion should be exercised by cancelling the abatement notices in the circumstances, particularly –

(a) On the interpretation of the rule previously adopted by the Council the signs would have been treated as permitted.

(b) Resource consent has not been required for signs similarly placed elsewhere in the central area

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(c) Some Council staff considered the subject signs were permitted activities

(d) A warning that the Jervois Quay signs required resource consent had been cancelled in writing

(e) Commitments had been made before firm notice was given that the Council would require resource consent for the signs in question

(f) The appellants had professional advice supporting their position.

(g) The signs do not have an adverse effect on the environment.

[119] The Council submitted that if the grounds have been made out, the Court does not have a discretion to cancel the abatement notices, but must confirm them. It acknowledged that the Court can amend the terms of the notice to the extent sought by the appeal or so that it achieves its purpose.

[120] The Council submitted that by section 84 it has a duty to observe and enforce the observance of the district plan, in spite of any purported waiver or departure from it; and that even if the Court has a discretion to cancel the notices, the circumstances of the case do not support it doing so.

[121] In respect of the Jervois Quay signs, the Council initially claimed that the signs had been erected early in July 2001, prior to withdrawal of the notice on 20 August 2001. However it was later established that they were erected between 31 July and 19 August.

[122] The Council accepted that cancellation of the warning that resource consent was required for those signs might be relevant to civil or offence proceedings, but submitted that it is not relevant to these appeals as the enforcement officer had to make her own independent decision about issuing an abatement notice.

[123] The Council did not accept that the fact that the appellants took professional advice was relevant. It observed that they were aware of the different interpretations of the rule, and that it would have been prudent for them to have applied for a certificate of compliance or a declaration. They chose not to do so, and erected the signs at their own risk.

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[124] On the appellants' suggestion that the Council could have sought a declaration, the Council responded that it has a discretion as to how it takes enforcement action, and contended that abatement notices were appropriate where the Council was sure the signs did not comply, and it is the appellants who take issue with that.

[125] The Council also contended that appellants had the benefit of revenue from the signs for some months, having erected them in the knowledge that the Council considered they were not permitted activities, and having chosen to proceed and take a risk that the Court would uphold its interpretation.

[126] We have held that none of the signs is a permitted activity. There is no question but that none of them has been authorised by a grant of resource consent. The Council officers did have reasonable grounds to issue the abatement notices. If the Court has a discretion to cancel the notices in such circumstances, we consider that it would not be appropriate to do so in these cases.

[127] We are not persuaded that, on the interpretation of the rule previously adopted by the Council, the signs would have been permitted. But even if they would have been, that interpretation is not correct. On the correct interpretation, the signs are not authorised. To cancel the notice would condone continuation of unauthorised signs, and would undermine performance by the Council of its duty to enforce observance of its plan.

[128] It is understandable that the appellants point to other signs in the central area which they consider indicate that they have been unfairly selected for enforcement action when others have not. Poor drafting of the rule, and uncertainty among Council staff about its interpretation, can lead to uneven compliance and feelings of unfairness. Even so, the solution is education of enforcement officials, and active compliance monitoring, not acquiescing in continuation of unauthorised signs.

[129] We accept that there was some regrettable vacillation about the Jervois Quay signs. This can be taken into account in deciding the terms of compliance, without undermining the plan, or the urban design values that it is designed to achieve.

[130] We also accept that some commitments may have been made before firm notice was given that the Council required resource consent for the signs, and that the appellants had professional advice. These matters may help explain why the

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signs were erected at a time when me appellants knew that the Council required resource consent, and show that erecting them was not a simple act of defiance. They may assist in deciding the terms of compliance, but they are not reasons for cancelling the notices.

[131] We do not accept the appellants' claim that the signs do not have adverse effects on the environment. The basis for the conditions in the rule can be understood from the Design Guide for the central area. The signs in question inhibit the display of the external design of the buildings.

[132] For those reasons we judge that the abatement notices should be confirmed, but we need to review the terms of compliance.

Should the Court continue the stay pending consent?

[133] The appellants maintained that if the notices are to be confirmed, the time for compliance should be postponed to allow resource consent applications to be made to authorise the signs.

[134] Mr Milne submitted that strictly the Court does not have power to continue the stay of me abatement notices. But the Council accepted that the Court should review the terms of compliance and amend them.

[135] We accept that. In our judgement, the time for removing the signs should be set so as to allow a resource consent application to be made; and if one is made, a further period for removal should be allowed so the application can be decided. But both times should be set so that, to get the advantage of them, the appellants would have to prepare and pursue the resource consent application with expedition. In addition, it would be inappropriate for the appellants to continue to gain revenue from the signs in the meantime. (Mr Barry explained that the advertising contracts were conditional on the outcome of these appeals, so that should not cause undue prejudice to the appellants, or to the advertisers.)

[136] In our judgement, the time by which any advertising content of the signs is to be removed should be 10 working days after the giving of this decision. The date by which the structures are to be removed if a fully-complying resource consent application for the sign has not been made should be 20 working days after the

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

giving of this decision. The date by which the structures are to be removed if application is made should be three months after the giving of this decision.

Determinations

[137] For the reasons given, the Court amends each of the abatement notices the subject of these proceedings by deleting the content of paragraph 5 in each case, and by substituting the tunes for compliance stated in the preceding paragraph of this decision. Save to that extent, each of these appeals is disallowed.

[138] The appeals have failed, but the dispute arose because the rule was not drafted and edited to the professional standard appropriate, and the dispute was aggravated by lack of unanimity among the Council staff about its interpretation, and by insufficiently active compliance monitoring. Our tentative view is that the costs of the parties should lie where they have fallen. However, as the parties have not made submissions on costs, we reserve the question in case they wish to do so.

DATED at Wellington this 8th day of July 2002.

For the Court:

D F G Sheppard
Environment Judge

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 096

IN THE MATTER OF	an appeal under Clause 14 of Schedule 1 of the Resource Management Act 1991 (**the Act**) in relation to Topic 8 Agrichemicals of the proposed Northland Regional Plan
BETWEEN	POPULATION AND PUBLIC HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD
	(ENV-2019-AKL-126)
AND	HORTICULTURE NEW ZEALAND
	(ENV-2019-AKL-116)
	Appellant
AND	NORTHLAND REGIONAL COUNCIL
	Respondent

Court:	Judge J A Smith Commissioner S C Myers[1]
Hearing:	Whangarei on 27-28 April 2021
Last case event:	Signed joint consent memorandum of provisions agreed prior to hearing, filed 1 June 2021
Appearances:	MJ Doesburg and ES Lake for the Northland Regional Council (**the Council**) H A Atkins for Horticulture New Zealand (**Horticulture NZ**) W D McKean for the Northland District Health Board (Public and Population Health Unit) (**Health Board**) S T Shaw for LMD Wheelers (s 274 Party) H F Adams, A D Ross and C Smith in person (s 274 Party – referred jointly as **The Residents**) P R Gardner for Federated Farmers of New Zealand (**Federated Farmers**) (s 274 Party)
Date of Decision:	- 9 JUL 2021

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[1] Although Commissioner S K Prime sat on the hearing, he is not available to finalise the decision.

Date of Issue: - 9 JUL 2021

DECISION OF THE ENVIRONMENT COURT

A: A: The parties' agreement as to the definition of Spray Sensitive Areas has been settled in terms of the Proposed Regional Plan. The parties have agreed that the permitted activity standards should be concluded by reference to those Spray Sensitive Areas.

B: The parties have reached agreement by consent memorandum dated 1 June 2021 as to the wording of the plan provisions that relate to:

(a) Rule C.6.5.1 Application of agrichemicals – permitted activity, in part;

(b) Rule C.6.5.2 Application of agrichemicals into water – permitted activity, in part;

(c) New appendix H.X Qualifications required for the application of agrichemicals; and

(d) The definition of "spray-sensitive area".

The wording agreed between the parties is annexed hereto as **A**.

This court concludes this wording is most appropriate under the Act including s 32AA, and the Court adopts that wording for the purposes of this decision. Such changes are to be incorporated within the Proposed Regional Plan forthwith. They are regarded as operative for current purposes.

C: The unresolved wording of Rules C.6.5.1 and C.6.5.2 was considered at this hearing. To the extent the wording is in dispute, the Court concludes that the most appropriate wording is that proposed by the Regional Council in the memorandum filed to the Court during the hearing as annexed in **B,** except to the extent we conclude alternative wording should be adopted as contained in

paragraph 73 and summarised in the table annexed in **C** of this decision.

D: In particular and for the avoidance of doubt, we conclude there shall be:

(a) General requirement for a Spray Assessment for all spray events;

(b) The content of that Spray Assessment should be similar to that proposed by Horticulture New Zealand, annexed as **D**;

(c) Different additional requirements should apply in most circumstances as proposed by the Regional Council (as set out in annexure **B** of this decision), except to the extent we conclude alternative wording which is contained in paragraph 72 and summarised in the table annexed in **C** of this decision. Those requirements should vary depending on various factors;

(d) The key requirement is that spray drift should be limited to avoid Spray Sensitive Areas.

E: The council is to make any amendments in accordance with this decision and circulate them to the parties for consideration within 20 working days.

(a) All parties are to advise the Council within a further 10 working days where any provision does not reflect the decision;

(b) The Council is then to provide a memorandum to the Court and parties within a further 10 working days, identifying the provisions that are in dispute and identifying those provisions that are now agreed and any provisions remaining in dispute. In respect of each provision in dispute, the Council shall provide its preferred wording and outline the position of each party in respect of that wording.

F: The court will then consider the memorandum and either issue a final decision

or convene a teleconference to address finalisation of the provisions.

REASONS

Introduction

[1] The proposed regional plan for Northland (**Proposed Regional Plan**) takes a wide-ranging approach to regional planning for Northland. It addresses water, biodiversity and air as just three examples. It includes the coastal areas covered by New Zealand Coastal Policy Statement and inland waterways as well as a wide range of biodiversity including indigenous, threatened and rare taxa.

[2] As part of this proposal, the Council has addressed the question of the application of agrichemicals within the region and has introduced objectives and policies, definitions and provisions to properly manage and control application.

[3] The general provisions for the plan are not in dispute and the parties have over the past period settled many of the provisions. Those that are the subject of this hearing are the two remaining provisions yet to be resolved in full being:

(a) Rule C.6.5.1, application of agrichemicals to air as a permitted activity; and

(b) Rule C.6.5.2 application of agrichemicals into water as a permitted activity.

The matters subject to consent order

[4] The settled provisions were not before us at hearing, and it was not until 1 June 2021 that they were filed with the Court in the form of a consent memorandum and a draft consent order.

[5] Annexed and marked hereto as **A** is a copy of the various amendments that parties have agreed to make to the plan.

Progress

[6] The consent order annexed as **A** resolves in part the wording of:

(a) Rule C.6.5.1 Application of agrichemicals – permitted activity; and

(b) Rule C.6.5.2 Application of agrichemicals into water – permitted activity.

[7] The parts of Rules C.6.5.1 and C.6.5.2 that remain unresolved relate to the use of agrichemicals in proximity to Spray Sensitive Areas.

[8] In addition, the parties have agreed on new Appendix H.X (in annexure **A**) relating to qualifications required for application of chemicals and the definition of "Spray Sensitive Area".

[9] As it turns out, the definition of spray sensitive areas was a matter of particular importance to resolving the remaining issues in dispute between the parties in relation to the rules. The provisions agreed to be changed and marked in annexure **A** have the changes shown in strike out and colour.

New provisions

[10] Broadly, the mediation produced the addition of Appendix H.X (contained in annexure **A**), which specifies the structure, content, competency and assessment requirements for the training programme for persons applying chemicals. Parties have also agreed on a wording of Spray Sensitive Area and have replaced the reference to wetland to natural wetland.

[11] The end result is that these changes are ones that follow logically from a more appropriate approach to the application of chemicals from both ground based and aerial spraying.

[12] The parties are satisfied that they are consistent with the National Policy Statement for Freshwater Management 2020 (**NPSFM 2020**) and do not create any conflict of duplication with the National Environmental Standards for Freshwater (**NES 2020**).

Evaluation of agreed changes

[13] All the changes and minor changes are now considered in terms of their cost and benefit under s 32AA. Interests of the various aspects of public interest were represented through the mediation process.

[14] We are satisfied from hearing the substantive case that these provisions are essentially a logical and consequential approach. The definition of "Spray Sensitive Areas" is of course a critical consideration for permitted activity status and standards. We conclude that the more comprehensive definition is more appropriate.

[15] Moving to the matters that have been agreed in respect to this substantive rule change, these were for the most part minor changes. They clarify and give a balanced position in respect of the public interest.

[16] Backpack spraying has been changed to handheld spraying because of the definition of that term in the Proposed Regional Plan. It also relates to the type of spraying rather than the fact the container is in a backpack. Overall, the changes in **A** are ones which we consider the most appropriate provisions in terms of the widespread interest represented at the hearing. It includes changes to the rules that were not disputed. We proceed on the basis these changes are operative.

Further changes in the course of the hearing

[17] In respect of the issues that were heard by the court, there was some degree of agreement between the parties. Firstly, on the definition of Spray Sensitive Areas. Moreover, the parties have agreed on certain other aspects of the wording which may overlap and include some of the items in **A**, being matters that they held in common. Accordingly, we attach as **B** a copy of the memorandum filed to the court during the hearing. This suggests the areas of agreement as to wording and areas of dispute.

Issues

[18] The issues remaining between the parties relate to the potential for spray to

leave the target area and affect other people, property or indigenous biota, i.e. non target application. The following issues arise:

(a) What conditions, particularly wind conditions, might trigger different responses for permitted activities?

(b) The separation distances that are appropriate for ground based or aerial spraying;

(c) What other intervening methodologies might be relevant to determining the separation distance or application. This transpired to include such items as shelterbelt, the height of the application, the droplet size, the toxicity of materials and the receiving environment itself; and

(d) Whether application should only occur when it is away from sensitive areas and what type of wind conditions particularly high wind conditions affect the application of the spray. We now consider these issues.

Spray Sensitive Areas

[19] Spray Sensitive Areas have now been resolved by definition in annexure **A** as follows:

Spray sensitive areas are:

(a) Residential buildings and associated garden areas; and

(b) Schools, hospital buildings and care facilities and grounds; and

(c) Amenity areas where people congregate including parks and reserves; and

(d) Community buildings and grounds, including places of worship and marae; and

(e) Certified organic farms; and

(f) Orchards, crops and commercial growing areas; and

(g) Water bodies used for the supply of drinking water and for stock drinking; and

(h) Natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland and apiaries.

The parties' positions

[20] As might be expected in an area with the degree of scientific complexity involved in agrichemicals, the position of the parties has been an iterative one. The position of the parties changed from these at the commencement of the hearing.

[21] The hearing panel's decision on the Proposed Regional Plan allowed for agrichemical application as a permitted activity provided that, within 100 m of a spray sensitive area:

(a) A risk assessment is carried out and measures are taken to minimise adverse effects on spray sensitive areas;

(b) Application only occurs when the wind direction is away from spray sensitive areas; and

(c) Application equipment spray quality is no smaller than "coarse".

[22] There is no dispute that agrichemical use that does not meet the permitted activity rules is a discretionary activity under Rule 6.5.5.

[23] Horticulture NZ, supported by Federated Farmers, seeks a relaxation of the rules by removing the restrictions on wind directions and droplet size. The Health Board seeks retention of the restrictions on wind direction and droplet size, with minor amendments and the inclusion of a new control on secondary spray drift.

[24] The s 274 parties seek the retention of the restrictions with some minor amendments.

[25] The Council's position was between those of the parties. They sought:

(a) That within 100 m of the spray sensitive area, a risk assessment is carried out and measures are taken to minimise adverse effects on spray sensitive areas;

(b) Application only occurs when the wind direction is away from spray

sensitive areas and instead of a blanket droplet size, a buffer distance is implemented depending on the method of spray application and the presence or absence of shelterbelt.

[26] During the hearing, the position of the parties developed, and the Regional Council sought leave to file a memorandum clarifying the areas of agreement and disagreement. The Regional Council filed a memorandum with the Court to update the position on the 24 May 2021; this is attached in annexure **B**. Clearly, Annexure **A** postdates and to some extent settles difference in Annexure **B**.

Agrichemicals in Northland

[27] The development of more intensive horticulture, particularly, at a major commercial/industrial scale is a relatively new phenomena in Northland.

[28] Although citrus fruit was particularly popular around Kerikeri though the 1960s and 1970s, the majority of these orchards had become economic by the 1980s and were subdivided to provide some income for the owners. This has led to relatively small rural landholdings with sites that are residential in nature (what we would describe as large scale residential) and smaller horticulture, or other specialist units.

[29] Throughout Northland as a whole, there has been a move in the last few years from dry stocking to cropping, but particularly towards more intensive cropping such as potatoes, kumaras and horticultural croppings such as avocados.[2] A recent example includes the Court's decision in relation to the Aupori Aquifer in the Far North.[3]

Biodiversity in Northland

[30] On the other hand, Northland contains a large percentage of the remaining significant indigenous biodiversity for New Zealand (along with the west coast of the South Island). This includes areas of sensitive vegetation and threatened species with large areas of native forest (kauri), manuka, mangroves and the like.

[2] Recent moves to consent water storage and reticulation through fast track processes suggested more potential for crops such as berries and avocados.

[3] *Burgoyne v Northland Regional Council* [2019] NZEnvC 028

[31] The interrelationship of these species with both salt and freshwater has been the subject of previous decisions of this court, for example, biodiversity, and a number of other appeals including water quality (at this stage still reserved).

[32] By way of a general statement, there is a need to ensure that any development in Northland does not further marginalise the existing biodiversity or have unintended effects on the ecotones or ecosystems that are either adjacent or nearby.

[33] In this regard, the use of insecticides and weedicides can be seen as having a clear potential to adversely affect indigenous ecosystems and species and the range of biodiverse ecosystems. Without extreme care, there is a potential for agrichemical use to compromise these areas and lead to the need for greater restrictions.

[34] For our part, we do not think that the approach to agrichemical application that has been adopted overseas or in less biodiverse environments is necessarily appropriate for Northland. That said, we acknowledge that the plan has been through an extensive and iterative process and that we are focussed only on the provisions that are before us. Nevertheless, we repeat our earlier comments and other decisions about Te Mana o te Wai and the need to protect not only our waters but our biodiverse ecotones from further loss.

[35] Beyond this, the Health Board is particularly concerned at the potential for agrichemicals to affect humans. They note that the Northland population is among the most deprived in New Zealand and that many of these most deprived populations are near or adjacent to rural areas. Accordingly, the Health Board is concerned that there are already adverse health effects from such deprivation, and these could be significantly exacerbated by exposure to adverse levels of agrichemicals.

Common outcome

[36] All parties agree that the objective of these permitted activities rules seek to ensure that there are no adverse effects on either people or any other biodiversity (including plant, animal and fish species).

[37] The difficulty of course is in providing rules that provide sufficient surety that there will no measurable adverse effects (beyond those that could be regarded as transitory or minimal), while providing for an important economic contributor to Northland's future.

[38] For our part, we have worked from a basis of caution, which we conclude is inherent within the RMA. As we understand the evidence from all the expert witnesses, they too have worked on the same basis. The differences relate to honestly held opinions of those involved as to how this balance might best be achieved with minimal effects while allowing flexibility for economic benefit.

The expert evidence

[39] Fundamentally, the experts did not disagree on the principles applicable. They accept that:

(a) Sprays should be targeted to particular purposes;

(b) They should remain on target so far as is possible;

(c) That the application beyond the target spray area should be reduced to such an extent that those effects are minimal within a reasonable distance;

(d) That those effects should be at least 100 m separated from spray sensitive areas;

(e) That such separation would also ensure that secondary spray drift (arising after the spray has settled on its target) would also be reduced to minimal levels;

(f) The potential to reach off target is affected by both atmospheric and wind conditions;

(g) That a particular site risk assessment plan (We will call this a **Spray Assessment**) is required on each occasion spray is applied both prior to, and during, the spraying to ensure that conditions are appropriate and

that all potential risks are taken into account;

(h) The risk is minimised where wind directions are low but away from any sensitive areas;

(i) At wind speeds between 0 and 1 m/s inversion layers and ponding can be problematic and need to be given particular consideration;

(j) At wind speeds between 1 and 5 m/s agrichemical application is low risk, particularly if wind direction is away from any sensitive areas. Where wind direction is towards sensitive areas, particular steps would need to be taken if it was appropriate to undertake spraying. The experts differ as to whether or not this could be undertaken safely or if it is preferable to avoid this risk. The optimum condition for Agrichemical spraying is between 1 – 3 m/s with wind away from Sensitive Areas;

(k) At wind speed over 6 m/s, all parties agree that the wind strength is such that it cannot be confidently said that spray could be applied in a safe manner even with a risk assessment. Several experts seem to consider that it might still be appropriate provided there were no sensitive areas downwind. However, the distance to sensitive areas would need to increase significantly with increasing wind speed. The risk for aerial spray also increases significantly above 6 m/s and we are unsure that any expert suggested aerial spraying at these wind speeds.

[40] These comments related to the application of spray by land-based methods, and there are particular constraints by each of the experts in relation to it. Helicopter spraying is more problematic and there was disagreement as to whether or not it could be applied in any circumstances, except where wind speed is 1 to 3 m/s and away from sensitive areas. We note that the release height for the sprays is a matter of particular importance. This application height is equally important for helicopter application.

[41] We were advised by the experts that the risk is higher with aerial spraying as the spray plume is above the crop and there is high potential for spray drift. The risk increases for helicopter spraying as the spray release height is higher than for fixed

wing aircraft. It was considered that the use of coarse spray quality is particularly important for aerial application to reduce the risk of spray drift.

Industry background

[42] We now go on to address the background to the provisions and the issue particularly before us. We accept that agrichemical use is widespread in the horticulture, agricultural and forestry sectors. Sprays are also used by the Government and Local Authorities in public parks, reserves, domestic gardens and in road and rail corridors.

[43] In Northland, agrichemical spraying has been regulated in regional plans for some time. There have been levels of concern expressed by the public, particularly about the application of sprays in public areas but also in relation to spray drift from private application. The Section 32 report for the Proposed Regional Plan identified that notification prior to spraying was a key issue for agrichemical use.

[44] There were a number of concerns from residents reflected at this hearing around concerns about spray drift from application. In short, the position adopted both in the notified and now Proposed Regional Plan is that there be:

(a) No noxious, dangerous, offensive or objectionable odour, smoke, spray or dust or any noxious or dangerous levels of airborne contaminants beyond the boundary of the property;

(b) There be no damage to any spray sensitive area beyond the boundary of the property; and

(c) Requirements for notification, signage and training for sprayers.

[45] Council officers recommended that the Proposed Regional Plan be amended to require compliance with mandatory aspects of the New Zealand Agrichemical Standard and that the Regional Plan provides additional requirements for agrichemical use near spray sensitive activities.

[46] Overall, it appears to have been concluded that agrichemical spray could be administered as a permitted activity in certain circumstances. It also seems to be accepted that control is required beyond the standards to require risk assessmentand avoid offensive, objectional, noxious, dangerous and damaging agrichemical sprays. The objective of the relevant Rule 6.5.1 and 6.5.2 is clearly to avoid harm to people and the environment. The identification and clarification of the sensitive receptors (i.e. spray sensitive areas) assists in identifying the levels of care that must be taken to avoid any particular harm to spray sensitive areas.

The scope of the appeal

[47] We wish to make it very clear that no party before us sought to prevent the application of agrichemicals completely. The most restrictive outcome sought was that from the Health Board. Its position was that the question as to the most appropriate form of rules relating to agrichemical use in proximity to people or spray sensitive areas required consideration of mandatory buffer zones.

[48] The Health Board sought to retain the decision of the Council Commissioners who heard from the parties. They seek the following modifications to the decisions version:

(a) To distinguish aerial spraying from ground based spraying in setting the trigger distance to sensitive areas;

(b) Take into account particular risks with people beyond just the buildings or areas they occupy;

(c) To consider those who are particularly vulnerable such as:
   (i) Children;
   (ii) Pregnant women;
   (iii) Elderly;
   (iv) The health compromised;
   (v) People who live in high deprivation.

[49] The Health Board position (which was not disputed) is that many people who

live in residential buildings at the margins of agrichemical application areas are among the most vulnerable. The Health Board submits (and others agree) that the rules need to be clear, certain and enforceable. The Health Board says that some minor amendments to the current rule achieves that. They say that the safest way toachieve this is to distinguish aerial spraying from ground based spraying and require a risk assessment within 100 m of a sensitive area for ground based spraying and 300 m from a spray sensitive area for aerial spraying.

Spraying in different wind conditions

[50] A major issue that arose during the hearing was why a separation distance would be required for assessment of risk if the wind was away from the sensitive area.

[51] Initially, it was suggested that spray may travel upwind. However, it was later clarified by the experts that this could only occur between 0 and 1 m/s wind speed but could not occur between 1 and 5 m/s windspeed. This was also subject to the qualification that wind can change direction especially in lower wind conditions beneath 1 m/s.

[52] In respect of winds over 1 m/s, the experts were clear that the optimum conditions were between 1 – 3 m/s away from any sensitive area.

[53] At wind speeds up to 5m/s plus gusts and towards a spray sensitive area the experts advised that spraying may be acceptable. This acceptability was conditional on the use of appropriate management tools including whether there was "effective shelter", the rate and type of application, droplet size, use of shrouds, the toxicity of the chemical and whether there were particularly susceptible receivers (human or environmental). For the spray sensitive area, distance needed to be calculated from the down wind edge of the target area.

[54] Clearly, the objective of the rule would be to encourage people to spray away from spray sensitive areas and adopt a spraying regime within their property which

seeks to contain all spray. There are good environmental reasons for this but it also maximises the use of the spray itself, to ensure that it is not wasted.

[55] Although there is generally a preference for block spraying at the current time, this may encourage a spraying regime which seeks to spray on the upwind edge of the property when the wind direction is appropriate. This would mean that areas were sprayed more by the orientation to the wind than they are by the planted block areas.

Application requirements

[56] During the hearing several matters were covered which are extremely important for the application of spray and to minimise its deposition beyond the property. There are four main elements:

(a) The administration of the spray at least 1 metre below the height of the shelterbelt;

(b) A complete and full shelterbelt (**effective shelter**) that does not allow general permeability. This in turn requires the definition of effective shelterbelt;

(c) The spray droplet size, particularly with higher toxicity sprays;

(d) The toxicity level of the spray itself (and potential receivers).

Effective shelter

[57] We conclude that the spray can largely be contained within the site between 1 and 5 m/s (plus gusts) where the spray is administered below the shelterbelt height. This is more problematic with aerial spraying which generally has to occur above the shelterbelt. We are satisfied that there is a high level of certainty with light to moderate winds, 1 to 5 m/s (plus gusts), that these would be contained within the shelterbelt area if the target area is short of the boundary and is applied 1 m below the height of the shelterbelt.

[58] We therefore conclude the definition of shelterbelt needs to be addressed. There was some difficulty originally on this but by the end of the hearing the parties are agreed on the following definition of "Effective Shelter":

(a) Taller (at least > 1 m) than the height of the spray plume[4] when the plume interacts with the shelter; and

(b) Have foliage that is continuous top to bottom; and

(c) Achieves in the order of 50% optical and aerodynamic porosity; and

(d) Has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and

(e) Is not deciduous; and

(f) Has a width to height ratio of 1:3.5.

[59] The Health Board and Residents sought a minimum height of 3.5m also.

[60] We conclude that a minimum height is an appropriate requirement given the need to establish growth. Shelter would typically be much higher than 4 -5 m and we consider 3.5 m is a modest height to ensure the functioning of the vegetation.

Pre-approval

[61] The next issue that arises in respect of spray application is whether or not there has been communication with the neighbours and whether approval can be obtained. A consent/approval under s 104(3)(a)(ii) would prevent the authority from taking into account any adverse effect on that person. For the same reason, we consider that such a consent should operate as part of a permitted activity standard where the other spray assessment steps are undertaken.

[62] This really would normally only arise in a situation where the wind is towards that person but could clearly also authorise a situation where the wind is away if appropriate. This is not a licence to pollute as clearly the obligation would remain with the applicator, both prior and during the spray to ensure there was no adverse effect beyond the boundary. All agrichemical applications require a Spray Assessment.

[4] This is not necessarily the same as the projected height (at point of discharge) as it will typically rise ifit drifts

Consents

[63] Any consent would need to be an informed one and would need to note the nature of the spray sensitive area, the distance to the target application area and include an undertaking of provision requiring the applicator to comply with the spray assessment on each occasion. It would be helpful if the agreement also attached a copy of that document.

The spray assessment

[64] The question of a spray assessment is one that was discussed in various ways at the hearing. It transpired that Horticulture New Zealand already have, as part of their certification programme, a spray diary and risk assessment requirement that includes some but not all of the elements that have been discussed in this hearing. We conclude that the Spray Assessment required as part of these provisions should be similar to that proposed by Horticulture NZ and which is attached to the memorandum filed to the court during the hearing and annexed at **D** to this decision.

[65] We consider that the Spray Assessment should make it clear what outcomes of that assessment should be achieved. The particular applicator should turn their minds on every occasion to the particular issues arising. The Spray Assessment may not be entirely complete given the way in which the parties' agreement and subsequently this decision may affect the criteria. Nevertheless, there is no doubt that such criteria could be included as additional items. We envisage a document of this sort being used in the spray assessment on every occasion when spray is applied (not just where the sensitive areas are involved).

Buffers

[66] One of the issues that parties have used in part during this hearing although it was not the subject of particular wording, addressed before us was the question of a buffer. The definition of buffer was agreed by the parties (in Annexure **A**), as follows:

> *buffer zone distance means a specified horizontal distance from a downward spray-sensitive area, measured from the downward edge of the application area closest to the*

spray sensitive area.

[67] The Regional Council has proposed additional permitted activity requirements for buffer distances in their version of the provisions in Table X (in annexure **B**). These require different buffer distances with or without shelter for different wind speeds, and generally follow the buffer distances in the New Zealand Standard Management of Agrichemicals. We agree with this approach.

[68] We also agree that there needs to be a consideration of what the words "away from" mean. Various definitions are given in the parties' submissions. In our own view, "away from" should mean:

(i) Not towards;

(ii) It includes 45 degree either side of direction; and

(iii) The wind speed must be moderately steady over 1 m/s.

[69] One particular concern raised that we thought had been resolved before us was the issue as to whether there should be a buffer even where the wind is away from the site. It seems to have resurrected itself as a 50 m buffer in the proposals of the Health Board and residents. The experts have agreed that there cannot be a flow upwind provided the wind was moderately steady. We have taken it from their evidence that this is windspeeds above 1 m/s. The adoption of a figure of 2 m/s would create additional confusion and the suggestion that wind can nevertheless go upwind is inappropriate.

[70] For our part, we have concluded that provided the wind is moderately steady and over 1 m/s and away from the site the spray application can occur. We consider that the impacts of preventing owners applying spray even when the conditions are away with a 50 m buffer from the neighbouring property would be inappropriate. In practical terms, to create such a blight on neighbouring land when there is no identified adverse effect would not be reasonable and we are not prepared to impose this additional constraint without some scientific justification.

[71] Having discussed these preliminary matters, we now come to discuss in more

detail the remaining differences between the parties. As it can be seen, the areas of disagreement between the parties cover not only the preliminary issues. We do not understand there to be any significant difference in respect of Clause 1 and 2 of C.6.5.1 and overall prefer the Regional Council's wording of Clause 1 and Clause 2 in C.6.5.1.

Conclusions regarding ground and aerial spraying

[72] We have concluded that the requirements for ground based and aerial spraying of agrichemicals should vary depending on wind conditions. To be a permitted activity the following should be applied:

(a) Every spray activity must be undertaken in accordance with a Spray Assessment that is recorded in a spray diary and made available to the Council on request.

(b) The Spray Assessment must be carried out prior to the application and be re-evaluated during the spray application.

(c) The content of the Spray Assessment should be similar to that proposed by Horticulture New Zealand (annexure **D**), and

(d) Address all the elements listed by the Health Board, annexed in **B**, including the likelihood of spray drift occurring and ways of eliminating the risk of spray drift.

(e) For any spray activity the applicator must:

a. take all practicable steps to ensure that agrichemicals are used appropriately and accurately and are confined to target areas;

b. take all practicable steps to ensure that no adverse effects occur beyond the application area, and

c. ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded.

(f) Where a) to e) above is undertaken, the following requirements should apply:

Low risk, ground based spray

1. Where wind speeds are between 1-3m/s, plus gusts, and away from sensitive area(s) then there are no further requirements

Assessed risk, ground based spray

2. For wind speeds between 1-5m/s and towards sensitive area(s), or between 3m/s and 6m/s and away from sensitive area(s), the following additional requirements should be assessed:

i) The buffer on the downward boundary of the target application area and whether effective shelter is present.

ii) Sensitivity of receivers

iii) Spray quality

iv) Toxicity of spray

v) Whether agrichemical direct application methodology is used (e.g. shrouds).

3. If wind speeds are between 0-1m/s application should not occur if inversion or ponding conditions are present. If conditions are suitable spraying may occur and the following additional requirements should be assessed:

i) The buffer distance on all boundaries of the target application area and whether effective shelter is present.

ii) Height of spray release (for boom or blast spraying it should be below the shelter to prevent spray drift)

iii) Sensitivity of receivers

iii) Toxicity of spray

iii) Whether agrichemical direct application methodology is used (e.g. shrouds).

Aerial spraying – assessed risk

4. If wind speeds are 0-1m/s spray application should not to be undertaken in inversion or ponding situations.

5. If wind speed is 1-5m/s and away from sensitive area(s), the following additional requirements should be assessed:

i) Whether effective shelter is present

ii) Height of spray release and risk of spray drift

iii) Sensitivity of receivers

iv) Toxicity of spray

iv) Spray quality.

6. If the wind speed is 0-1m/s (and not inversion or ponding conditions), or 1-3m/s and toward sensitive area(s), the following additional requirements should be assessed:

i) The buffer distance and whether effective shelter is present.

ii) Height of spray release and risk of spray drift

iii) Sensitivity of receivers

iv) Toxicity of spray

v) Spray quality.

High risk – land based or aerial spraying

7. Spraying in wind speeds over 6m/s plus gusts is high risk and not

appropriate to be undertaken as a permitted activity

[73] We summarise this in the attached table annexed as **C** of the decision.

Analysis under s32 and 32AA

[74] We conclude that these provisions are the most appropriate way to achieve the objectives of the Proposed Regional Plan. Objective F.1.12 – Air quality seeks to ensure that human health, ambient air quality, cultural values, amenity values and the environment are protected from significant adverse effects caused by discharge of contaminants to air. Objective F.1.2 Water quality is relevant to Rule C.6.5.2 and seeks to ensure that water quality is maintained or improved, life supporting capacity, ecosystem process and indigenous species are maintained and drinking water sources are protected. If the application of agrichemicals is not managed near spray sensitive areas there is a risk that significant adverse effects will result particularly in relation to human health, water quality and the environment.

[75] Section 32AA requires a limited assessment given matters agreed in **A** and the scope of appeal. We conclude that the most appropriate permitted activity standards should protect humans and biodiversity while allowing the agricultural activities to continue where properly managed. We conclude our modified provisions meet this balance of cost and benefit and are therefore appropriate under the Act.

Overall conclusion

[76] There has been a high level of agreement on this matter and the differences between the parties have narrowed rather than being of significant substance. Nevertheless, the differences between the parties are clearly justified by their different levels of concern over impacts. We consider that the experts in this case will approach the matter in a full and fair way and this is not a case in which one could say that the differences between the parties are based upon any wrong matters, principle or law.

[77] Overall, we have tried to adopt an outcome which is both practical in terms of its benefits for the economic community, and safe for those who must live and operate within it. This of course includes those horticulturists who live and work within these orchards. In the long term, we consider that alternatives should be found to continue to reduce the application of sprays but we acknowledge the need for these permitted activity rules in the meantime as do all the parties. I commend the parties for their thoughtful and helpful approach.

[78] We accordingly conclude:

(a) The parties' agreement as to the definition of Sensitive Areas has been settled in terms of the Proposed Regional Plan. The parties have agreed that the permitted activity standards should be concluded by reference to those Sensitive Areas.

(b) The parties have reached agreement by consent memorandum dated 1 June 2021 as to the wording of the plan provisions that relate to:

(i) Rule C.6.5.1 Application of agrichemicals – permitted activity;

(ii) Rule C.6.5.2 Application of agrichemicals into water – permitted activity;

New Appendix H.X Qualifications required for the application of agrichemicals; and

(iii) The definition of "spray-sensitive area".

The wording agreed between the parties is annexed hereto as A. This court concludes this is most appropriate under the Act including s 32AA and adopts that wording for the purposes of this decision. Such changes are to be incorporated within the Proposed Regional Plan forthwith. They are regarded as operative for current purposes.

(c) The unresolved wording of Rules C.6.5.1 and C.6.5.2 was considered at this hearing. To the extent the wording is in dispute, the court concludes that the most appropriate wording is that proposed by the Regional Council in the memorandum as annexed in B, except to the extent we conclude alternative wording should be adopted as set out in paragraph 72 and summarised in the attached table in annexure C.

(d) In particular and for the avoidance of doubt, we conclude there shall be:

(i) General requirement for a Spray Assessment for all spray events;

The content of that Spray Assessment should be similar to that proposed by Horticulture New Zealand, which is annexed as D;

(ii) Different additional permitted activity requirements should apply in most circumstances as. proposed by the Regional Council (as set out in annexure B of this decision), except to the extent we conclude alternative wording in paragraph 72 and summarised in the attached table annexed as C of this decision;

(iii) The key requirement is that spray drift should be limited to avoid Spray Sensitive Areas.

(e) The council is to make any amendments in accordance with this decision and circulate them to the parties for consideration within 20 working days.

(i) All parties are to advise the council within a further 10 working days where any provision does not reflect the decision;

(ii) The Council is then to provide a memorandum to the Court and parties within a further 10 working days, identifying the provisions that are in dispute and to identifying those provisions that are now agreed and any provisions remaining in dispute. In respect of each provision in dispute, the Council shall provide its preferred wording and outline the position of each party in respect of that wording.

(f) The court will then consider the memorandum and either issue a final decision or convene a teleconference to address finalisation of the provisions.

For the Court:

J A Smith
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Annexure A

Population and Public Health Unit of the Northland District Health Board v Northland Regional Council (Topic 8 Agrichemicals)

BEFORE THE ENVIRONMENT COURT

I MUA I TE KOOTI TAIAO O AOTEAROA

IN THE MATTER of the Resource Management Act 1991

AND of appeals under Clause 14 of Schedule 1 of the Act in relation to the Proposed Regional Plan for Northland

BETWEEN PUBLIC AND POPULATION HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD (ENV-2019-AKL-000126)

HORTICULTURE NEW ZEALAND (ENV-2019-AKL-000116)

HANCOCK FOREST MANAGEMENT NZ (ENV-2019-AKL-000096)

Appellants

AND NORTHLAND REGIONAL COUNCIL

Respondent

Environment Judge – sitting alone pursuant to section 279 of the Act

In Chambers at Auckland

CONSENT ORDER

[A] Under section 279(1) of the Resource Management Act 1991, the Environment Court, by consent, orders that the appeal is allowed in accordance with Annexure A to this Order.

[B] Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

1 The Appellants listed above have appealed provisions of the Proposed Regional Plan for Northland as they relate to Topic 8 Agrichemicals.

2 The Court has read and considered the memorandum of the parties dated 1 June 2021, which proposes to resolve the appeals that relate to:

a. Rule C.6.5.1 Application of agrichemicals – permitted activity;

b. Rule C.6.5.2 Application of agrichemicals into water – permitted activity;

c. new Appendix H.X Qualifications required for the application of agrichemicals; and

d. the definition of "spray-sensitive area".

3 The following people gave notice of their intention to become parties under section 274 of the Act and have signed the memorandum of the parties dated 1 June 2021:

a. Federated Farmers of New Zealand;

b. Horticulture New Zealand;

c. Heather Adams and Duncan Ross;

d. Cinna Smith;

e. Minister of Conservation;

f. Douglas and Linda Wheeler; and

g. Rayonier New Zealand Limited.

4 The Court is making this order under section 279(1)(b) of the Act; such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands that for the present purposes that:

a. All parties to the proceedings have executed the memorandum requesting this order;

b. All parties are satisfied that all matters proposed for the Court's endorsement are within the scope of submissions and appeals, fall within the Court's jurisdiction, and conform to relevant requirements and objectives of the Resource Management Act 1991, including in particular Part 2.

Order

5 Therefore, the Court orders, by consent, that the Proposed Regional Plan for Northland be amended as set out in **Annexure A** to this Order.

6 The order resolves new Appendix H.X and the definition of "spray-sensitive area".

7 The order resolves Rules C.6.5.1 and C.6.5.2 in part. The parts of Rules

C.6.5.1 and C.6.5.2 that remain unresolved relate to Horticulture New Zealand and the Public and Population Health Unit of the Northland District Health Board's appeal points relating to the use of agrichemicals in proximity to spray-sensitive areas. Rules C.6.5.1 and C.6.5.2 were heard in the week of 27 April 2021.

8 There is no order as to costs.

DATED this day of 2021

J A Smith
Environment Judge

ANNEXURE A

Rule C.6.5.1 Application of agrichemicals – permitted activity

The discharge of an agrichemical into air or onto or into land is a permitted activity, provided:

1) for all methods (including hand-held spraying, ground-based spraying and aerial application):
   a) the discharge does not result in:
      i. any noxious, dangerous, offensive or objectionable odour, smoke, spray or dust, or any noxious or dangerous levels of airborne contaminants beyond the boundary of the subject property or in the coastal marine area[1], or
      ii. damage to any spray-sensitive areas beyond the boundary of the subject property or in the coastal marine area, and
   b) there is no direct discharge into or onto water,
   and c) notification is given, either:
      i. other than for spraying in plantation forestry where notification must be given at least 2024 hours and no more than 60 working days before spraying commences, neighbouring properties receive notification no less than 24 hours and no more than three weeks before the spraying activity is to take place, as set out in Table 11: Spraying notification requirements, and or
      ii. according to an alternative notification agreement, that meets the requirements of Table 11: Spraying notification requirements; and
   d) if agrichemicals are applied within 100 metres of a public amenity area, prominent signs are placed prior to the commencement of the spraying and remain in place until spraying is complete. The signs must include the contact details of the property owner or applicator, details of the chemical to be sprayed, the time period during which the spraying is likely to take place, indication of any specific hazards and the application method. A record of the notification signage undertaken must be kept and made available to the Regional Council on request, and
   e) for spraying by any method in public road corridors and rail corridors:
      i. other than for backpack handheld spraying of roadside boundary fence lines adjacent to private land, a public notice must be placed in a newspaper, or a letter drop made to properties within 30 metres (or 200 metres for aerial spraying application) from the area to be sprayed, at least seven days and not more than one month before spraying is to take place, and

ii. the signs, public notice and letter drop must include the contact details of the property owner or applicator, details of the chemical to be sprayed, the time period during which the spraying is likely to take place, and the application method, and

iii. vehicles used for spraying must display prominent signs (front and back) advising that spraying is in progress, and

iv. a record of the ~~notification~~ signage undertaken must be kept and made available to the Regional Council on request.

Table 11: Spraying notification requirements

<table>
<tr><th>Spraying method</th><th>Properties to be notified</th><th>Notification requirements</th></tr>
<tr><td>Hand-held spraying</td><td>Nil (unless a public amenity area or public road corridor or rail corridor under the specific requirements above).</td><td>Nil (unless a public amenity area or public road corridor or rail corridor under the specific requirements above).</td></tr>
<tr><td>Ground-based spraying</td><td>Any property with a spray-sensitive area within 50 metres of the spraying, including when spraying is taking place in public amenity areas but excluding when the spraying is taking place in a public road corridor or rail corridor.</td><td rowspan="3">Either:
1. Notification:
a) is to be undertaken by the owner or occupier of the property where agrichemicals will be applied unless delegated to the applicator, management company, forest manager, or pack house operator, and
b) is to be in writing (which can include email or other electronic means) or by telephone, and
c) includes:
i. the days and times during which the agrichemical application is likely to take place, including alternative days and times if the weather is unsuitable, and
ii. the contact details of the owner or occupier of the property, or</td></tr>
<tr><td>Aerial application</td><td>Any property with a spray-sensitive area within 200 metres of the spraying, including when spraying is taking place in public amenity areas, but excluding when the spraying is taking place in a public road corridor or rail corridor.</td></tr>
<tr><td>Granules, gels and agrichemical baits</td><td>Any property with a spray-sensitive area within 30 metres of the agrichemical application, including when agrichemical application is taking place in public amenity areas, but excluding when the agrichemical application is</td></tr>
</table>

Spraying method	Properties to be notified	Notification requirements
	taking place in a public road corridor or rail corridor.	applicator, or management company forest manager, or packhouse operator, and iii. the details of agrichemicals being applied, and iv. indication of any specific hazards (including toxicity to bees), and v. the application method. 2. Alternative notification agreement: (a) Notification is undertaken according to a notification agreement with the occupier. The notification agreement must: i. contain (as a minimum) method of notification and minimum time for notification prior to spraying ii. be recorded in writing and signed by all parties iii. be reviewed and re-signed annually.

2) for ground-based spraying and aerial spraying:

a) the activity is undertaken in accordance with the following sections of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004) as it relates to the management of the discharge of agrichemicals:

i. Use – Part 5.3, and

ii. Storage – Appendix L4, and

iii. Disposal – Appendix S, and

iv. Records – Appendix C9, and

b) a Spray Plan must be prepared annually for the area where the agrichemical is to be applied, and

c) where the activity is undertaken within 100 metres of a spray sensitive area (:

i. a risk assessment must be carried out prior to the application of an agrichemical and measures must be taken to minimise adverse effects on

spray-sensitive areas. The risk assessment must include Table G1 of the New Zealand Standard. Management of (NZS 8409:2004), and

ii. agrichemicals must only be applied when the wind direction is away from the spray-sensitive area, and

iii. the application equipment must produce a spray quality no smaller than "coarse" according to Appendix Q Application Equipment of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004).

3) for ground-based spraying:

a) an applicator who is a contractor holds a current GROWSAFE Registered Chemical Applicators Certificate or a qualification that meets the requirements of Appendix H.X of this plan ~~(or equivalent)~~, and

b) an applicator who is not a contractor holds a current GROWSAFE Standard Certificate (or its equivalent) or is under direct supervision of a person with a GROWSAFE Registered Chemical Applicators Certificate or GROWSAFE Advanced Certificate or a qualification that meets the requirements of Appendix H.X of this plan ~~(or their equivalent),~~ and

4) for aerial application:

a) an applicator holds a current GROWSAFE Pilot Agrichemical Rating Certificate issued by the Civil Aviation Authority of New Zealand ~~(or their equivalent)~~, and

5) for agrichemicals containing 2,4-D:

a) the agrichemical is non-volatile or is slightly low volatile[2], or
b) application is by hand-held spraying, or
c) application by ground-based spraying or aerial ~~spraying~~ application only occurs between 1 May and 31 August.

Notes:

In addition to the requirements of Rule C.6.5.1 the agrichemical must be approved for its intended use by the Environmental Protection Authority under the Hazardous Substances and New Organisms Act 1996 and all other conditions set for its use must be complied with.

In relation to a non-aerial application, the applicator must hold an Agrichemical Certified Handler certificate (Worksafe New Zealand) where required by any Environmental Protection Authority approval for the agrichemical under the Hazardous Substances and New Organisms Act 1996,

or equivalent as recognised and required by the Environmental Protection Authority or Ministry for Business Innovation and

Employment, and be able to demonstrate competency using agrichemicals to avoid adverse impacts.

In relation to aerial application, the applicator and ground crew must hold qualifications and competencies as required by Environmental Protection Authority and Worksafe New Zealand.

For the avoidance of doubt this rule covers the following RMA activities:

- Discharge of an agrichemical onto or into land or into air (s15(1) and s15(2A)).

[1] Refer to Appendix H.7 Interpretation of noxious, dangerous, offensive and objectionable effects.

[2] Vapour pressure less than 1 x 10-4mmHg

Rule C.6.5.2 Application of agrichemicals into water – permitted activity

The discharge of an agrichemical into water is a permitted activity provided:

1) other than for the control of plant pest species listed in the Regional Pest Management Plan or the National Pest Plant Accord, there is no discharge into coastal water, and
2) the discharge does not cause, beyond the zone of reasonable mixing in the receiving waters from the point of discharge:
    a) the production of conspicuous oil or grease films, scums or foams, of floatable or suspended materials, or
    b) an increase in the temperature by more than three degrees Celsius, or
    c) the pH to fall outside the range of 6.5 - 8.5 or change the pH by more than one pH unit, or
    d) the dissolved oxygen to be less than five milligrams per litre, or
    e) any conspicuous change in the colour or visual clarity, or
    f) the rendering of fresh water unsuitable for consumption by farm animals if the water is used for stock drinking water, and
3) an applicator holds a recognised application qualification (GROWSAFE with an aquatic component or a qualification that meets the requirements of Appendix H.X of this plan ~~its equivalent with an aquatic component~~), and
4) the activity is undertaken in accordance with the following sections of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004) as it relates to the management of the discharge of agrichemicals:
    a) Use – Part 5.3, and
    b) Storage – Appendix L4, and

c) Disposal – Appendix S, and

d) Records – Appendix C9, and

5) where the activity is undertaken within 100 metres of a spray-sensitive area:

a) a risk assessment must be carried out prior to the application of an agrichemical and measures must be taken to minimise adverse spray sensitive areas. The risk assessment must include reference to the Drift Hazard guidance chart in the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004), and

b) agrichemicals must only be applied when the wind direction is away from the spray-sensitive area, and

c) the application equipment must produce a spray quality no smaller than "coarse" according to Appendix Q Application Equipment of the New Zealand Standard. Management of Agrichemicals (NZS 8409:2004).

6) ~~the following notification takes place~~notification is given either:

a) other than for spraying in plantation forestry where notification must be given at least ~~20~~24 hours and no more than 60 working days before spraying commences, every person taking water for potable supply within one kilometre downstream of the proposed discharge is notified no less than 24 hours and no more than two weeks prior to the proposed commencement of any spraying, and

b) every holder of a resource consent for the taking of water for water supply purposes downstream of the proposed discharge is notified at least seven days before the discharge, and

c) notification must be undertaken by the owner or occupier of the property to be sprayed, unless delegated to the applicator, management company, forest manager or packhouse operator, and must be in writing (which can include email or other electronic means) or by telephone, and

d) notification must include:

i. the days and times during which the spraying is likely to take place, including alternative days and times if the weather is unsuitable, and

ii. the contact details of the property owner or applicator, and

iii. the details of agrichemicals being sprayed, and

iv. an indication of any specific hazards (including toxicity to bees), and

v. the application method, ~~and~~or

e) notification is undertaken according to a notification agreement with the occupier. The notification agreement must:

i. contain (as a minimum) method of notification and minimum time for notification prior to spraying

ii. be recorded in writing and signed by all parties

iii. be reviewed and re-signed annually; and

7) in addition, for aerial application into water:

   a) an applicator holds a current GROWSAFE Pilot AgricChemical Rating Certificate (or equivalent qualification) issued by the Civil Aviation Authority of New Zealand (or its equivalent), and

   b) there is no aerial application in urban areas, and

8) if agrichemicals are applied within 100 metres of a public amenity area, prominent signs are placed prior to the commencement of the spraying and remain in place until spraying is complete. The signs must include the contact details of the property owner or applicator, details of the chemical to be sprayed, the time period during which the spraying is likely to take place, an indication of any specific hazards (including toxicity to bees), and the application method. A record of the notification signage undertaken must be kept and made available to the Regional Council on request, and

9) in addition, for spraying by any method in public road corridors or rail corridors:

   a) prominent signs are placed at the beginning and end points of the area to be sprayed, prior to the commencement of the spraying, and remain in place until spraying is complete, and

   b) a public notice must be placed in a newspaper or a letter drop made to properties within 30 metres (or 200 metres for aerial spraying application) from the area to be sprayed at least seven days and not more than one month before spraying is to take place, and

   c) the signs, public notice and letter drop must include the contact details of the property owner or applicator, details on the agrichemical to be sprayed, the time period during which the spraying is likely to take place, an indication of any specific hazards (including toxicity to bees), and the application method, and

   d) vehicles used for spraying must display prominent signs (front and back) advising that spraying is in progress, and

   e) a record of the notification signage undertaken must be kept and made available to the Regional Council on request.

Notes:

In addition to the requirements of Rule C.6.5.2, the agrichemical must be approved for its intended use by the Environmental Protection Authority under the Hazardous Substances and New Organisms Act 1996 and all other conditions set for its use must be complied with.

In relation to a non-aerial application, the applicator must hold an Agrichemical Certified Handler certificate (Worksafe New Zealand) where required by any Environmental Protection Authority approval for the agrichemical under the Hazardous Substances and New Organisms Act 1996, or equivalent (as recognised and required by Environmental

Protection Authority or Ministry for Business Innovation and Employment) and be able to demonstrate competency using agrichemicals to avoid adverse impacts.

In relation to an aerial application, the applicator and ground crew must hold qualifications and competencies as required by the Environmental Protection Authority and Worksafe New Zealand.

For the avoidance of doubt this rule covers the following RMA activities:

- Discharge of an agrichemical into water (s15(1)).

Appendix H.7 Interpretation of noxious, dangerous, offensive and objectionable effects

1) Several rules in this Plan use the terms 'noxious', 'dangerous', 'offensive', and 'objectionable', particularly rules relating to the discharges of contaminants into air. These terms are also included in section 17 of the RMA. Whether an activity is 'noxious', 'dangerous', 'offensive' or 'objectionable' depends on an objective assessment, based on the principles set out by case law. A Regional Council enforcement officer's views will not be determinative but may trigger further action and may be one factor considered by the Court if formal enforcement action is taken.

2) There is no standard definition of 'noxious', 'dangerous', 'offensive', and 'objectionable' terms because of the need to take account of case law precedent as it develops, that is, the Plan cannot override interpretations decided by the Courts. However, the following notes are intended to provide some guidance for interpreting these terms:

    a) NOXIOUS, DANGEROUS – the Concise Oxford Dictionary defines 'noxious' as "harmful, unwholesome". Noxious effects may include significant adverse effects on the environment (for example, on plant and animal life) even though the effects may not be dangerous to humans. 'Dangerous' is defined as "involving or causing exposure to harm". Dangerous discharges include those that are likely to cause adverse physical health effects, such as discharges containing toxic concentrations of chemicals. WorkSafe New Zealand's "Workplace Exposure Standards and Biological Exposure Indices, November 2018, 10th Edition" can be used for interpreting the terms 'noxious' and 'dangerous'.

    b) OFFENSIVE, OBJECTIONABLE – 'Offensive' is defined as "giving or meant to give offence; disgusting, foul-smelling, nauseous, repulsive". 'Objectionable' is defined as "open to objection, unpleasant, offensive". Case law has established that what may be offensive or objectionable under the RMA cannot be defined or prescribed except in the most general of terms. Each case will depend upon its own circumstances. Key considerations include:

i. location of an activity and sensitivity of the receiving environment – for example, what may be considered offensive or objectionable in an urban area, may not necessarily be considered offensive or objectionable in a rural area;

ii. reasonableness – whether or not an activity is offensive or objectionable should be determined by an ordinary person who is representative of the community at large and neither hypersensitive nor insensitive; and

iii. existing uses – it is important to consider what lawfully established activities exist in an area, that is, if a new activity requires a permit, the effect of existing discharges of contaminants into air should be considered.

The Regional Council's investigation of a complaint concerning offensive or objectionable discharges will depend upon the specific circumstances. However, for odour, the approach will generally be as follows:

3) An assessment of the situation will be made by a Council officer who has experience in odour complaints and has had his/her nose calibrated using olfactometry. This assessment will take into account the FIDOL factors – frequency, intensity, duration, offensiveness, location; and those matters identified below:

   a) if the discharge is deemed to be offensive or objectionable by the Council officer, the discharger will be asked to take whatever action is necessary to avoid, remedy or mitigate the effects of the discharge;

   b) if the discharger disputes the Council officer's assessment or the problem is ongoing, then a number of approaches may be taken, including one or more of the following:

      i. assessments by other suitably qualified and experienced Council officers,

      ii. asking people living and working in the subject area to keep a diary which notes details of any offensive or objectionable odours,

      iii. promoting the use of community working groups and other means of consultation between the affected community and the discharger,

      iv. using the services of an independent consultant to carry out an investigation, and/or community survey, v. using the services of the Council's odour panellists who have all had their noses calibrated by olfactometry and are deemed to have an average sense of smell,

      v. undertaking an odour assessment using an olfactometer, or other appropriate technology, or

      vi. leaving the matter to be determined by the Environment Court.

If the discharge is found to be offensive or objectionable, then enforcement action may be taken. This could be in the form of an abatement notice, infringement notice, enforcement order or prosecution. In the case of a permitted activity causing an offensive or objectionable discharge, a resource consent may be required to allow the discharge to continue.

4) Further information can be found in the following guidance documents produced by the Ministry for the Environment:

   a) Good Practice Guidance on Odour;

   b) Good Practice Guidance on Dust;

   c) Good Practice Guidance on Industrial Emissions.

Appendix H.X Qualifications required for the application of agrichemicals

A training programme, must meet the following specifications:

- Structure of the programme
- Content of the

Structure of the programme:

1. The training programme will include delivery of the contents set out below. 2. The training programme and provider of such training should be regularly
   reviewed and appraised by a suitably qualified external party to ensure ongoing quality and relevance of training;
3. The assessment process will be moderated to ensure that it adequately addresses matters covered in the course.
4. The programme will certify competency on the matters set out in the contents below for a period of five years which will then be reviewed through a refresher programme.
5. The programme provider will provide a copy of training materials to the Regional Council.

Content of the programme

A. 'Standard' qualification equivalent

The training programme will include the following content:

1. The hazard classifications of agrichemicals to be used and related requirements
2. Adverse effects that could be caused by agrichemicals
3. Agrichemical best practice for the safe, responsible and effective use of agrichemicals based on NZS8409:2004 Management of Agrichemicals as follows:

Topic	Relevant sections of NZS8409:2004
Managing environmental risks	Section 2 Management of Agrichemicals Section 5 Use of Agrichemicals Appendix F Environmental Management
Property spray plans	Appendix M Notification
Notification	Section 5 Use of Agrichemicals (5.3.1) Appendix M Notification and Signage for the application of agrichemicals
Signage	Section 5 Use of Agrichemicals (5.3.1) Appendix M Notification and Signage for the application of agrichemicals
Storage	Section 4 Storage and supply of Agrichemicals Appendix L General Storage Requirements
Emergency preparedness and management	Section 7 Emergency Preparedness and Management Appendix K Emergency Management
Operating equipment – nozzle selection and calibration, mixing sites	Section 5 Use of Agrichemicals (5.3.3) Appendix Q Application Equipment Appendix R Handling and Mixing Agrichemicals
Minimising spray drift	Section 5 Use of Agrichemicals (5.3.4) Appendix G Spray Drift Hazard and Weather Conditions
Record keeping – inventory, spray diaries, tracking	Section 2 Management of agrichemicals (2.6 Documentation and Licensing) and Appendix C (C9) Section 5 Use of Agrichemicals (5.3.5)
Agrichemical disposal	Section 6 Disposal of agrichemicals and containers Appendix S Disposal of Agrichemicals and Containers

4. Relevant regulatory requirements including under the Northland Regional Plan, EPA Notices and relevant regulations made under the Health and Safety at Work Act 2015
5. Working knowledge of operating equipment

Assessment of competency:

The training programme must include either a practical, verbal or written assessment to enable the participant to demonstrate knowledge and understanding of the contents of the course.

B. 'Advanced' qualification equivalent

In addition to the training content in A above, the training programme for more advanced users (which enables supervision of agrichemical application) must also include the following content:

1. Health and safety, and emergency response;
2. Hazardous Substances and New Organisms Emergency Management and Preparedness procedures;
3. Risk management, including undertaking a risk assessment prior to application;
4. Planning agrichemical applications;
5. Environmental effects, including spray drift minimisation;
6. Equipment calibration;
7. Product label interpretation.

The training programme must include being able to demonstrate:

1. Knowledge of agrichemicals, mode of action and use of additives and adjuvants;
2. Knowledge of developing and implementing spray plans; and
3. Calibration of one type of motorised equipment.

And, attainment of all of the following:

1. New Zealand Certificate in Agrichemical Application with relevant strand or New Zealand Qualifications Authority (NZQA) unit standard 21563 with one of: NZQA unit standard 23620, 28216, 23617, 6239, 6236 or 6242.
2. Certified Handler Test Certificate (only required if using class 6.1A or B products)

The renewal of this qualification must include both theory and practical assessments.

C. 'Contractor qualification equivalent'

In addition to the training content in A and B above, the training programme for Contractors must also include the following content:

1. preparing, implementing and monitoring spray plans;
2. supervision of staff and providing direction;
3. management of agrichemical applications;
4. managing the safety of people and livestock;
5. nozzle selection and drift reduction;
6. notification requirements including signage;

7. transport, storage and disposal of agrichemicals; and
8. selection, calibration and operation of application equipment for specific operations

And, attainment of all of the following:

1. New Zealand Certificate in Agrichemical Application with relevant strand or New Zealand Qualifications Authority (NZQA) unit standard 21563 with one of: NZQA unit standard 27216; unit standard 6237; or unit standard 6238.
2. Certified Handler Test Certificate (only required if using class 6.1A or B products)
3. evidence of 200 hours of practical spraying experience, including spray diary verification

The procedure for renewal of this qualification, required at an interval of no more than five years following certification, must include all of the following:

1. both theory and practical assessments;
2. be subject to an on-site audit by an independent third-party auditor;
3. confirm that a review of the commercial contractor operations has been undertaken; and
4. confirm that the commercial contractor has undertaken continuing professional development.

Additional qualification requirements for aquatic application under Rule C.6.5.2

For agrichemical spraying to water, an equivalent qualification must also include attainment of the New Zealand Certificate in Agrichemical Application with aquatic strand or Unit Standard 6240.

Advice note:

The Plan seeks to ensure that those using and applying agrichemicals are competent to undertake such applications. The plan has a training requirement that forms the basis of competency.

The requirements of this Plan only relate to those matters pertaining to the regional council functions for agrichemicals – discharge to air, land and water. A training programme may include other components relating to requirements of other agencies (for example, WorkSafe) and legislation, (for example, Health and Safety at Work Act 2015 and the Agricultural Compounds and Veterinary Medicines Act 1997). However, such components are not part of the competency required to meet the objectives, policies and rules of the Northland Regional Plan.

Definition of spray-sensitive area

1) Residential buildings and associated garden areas, and
2) schools, hospital buildings and care facilities and grounds, and
3) amenity areas where people congregate including parks and reserves, and
4) community buildings and grounds, including places of worship and marae, and
5) certified organic farms, and
6) orchards, crops and commercial growing areas, and
7) water bodies used for the supply of drinking water and for stock drinking, and

8) Natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and apiaries.

Annexure B

IN THE ENVIRONMENT COURT OF NEW ZEALAND AUCKLAND REGISTRY

I TE KŌTI TAIAO O AOTEAROA TĀMAKI MAKAURAU ROHE

IN THE MATTER of the Resource Management Act 1991

AND of an appeal under clause 14 of Schedule 1 of the Act

BETWEEN **PUBLIC AND POPULATION HEALTH UNIT OF THE NORTHLAND DISTRICT HEALTH BOARD**

HORTICULTURE NEW ZEALAND

Appellants

NORTHLAND REGIONAL COUNCIL

Respondent

MEMORANDUM OF COUNSEL FOR NORTHLAND REGIONAL COUNCIL REGARDING POST-HEARING DISCUSSIONS ON PROVISIONS

TOPIC 8: AGRICHEMICALS

24 MAY 2021

Respondent's Solicitor
PO Box 2401 AUCKLAND 1140
Tel +64 9 300 2600
Fax +64 9 300 2609

Solicitor: M Doesburg
(mike.doesburg@wynnwilliams.co.nz)

MAY IT PLEASE THE COURT

1. During the Topic 8 – Agrichemicals hearing the Court observed that the parties' positions on the provisions relating to spray-sensitive areas in Rule C.6.5.1 Application of agrichemicals – permitted activity and Rule
C.6.5.2 Application of agrichemicals into water – permitted activity were narrowing.

2. In light of this, the Court directed the parties to confer and file by 21 May 2021 either:

    a. agreed provisions, if agreement could be reached; or

    b. a memorandum identifying the areas of agreement and disagreement.

3. On 21 May 2021 the Council requested a one day extension to the filing deadline, to allow further refinement in response to discussions between experts.

4. Full agreement on the provisions has not been reached. However, the parties have reached agreement on a number of issues, which are recorded below.

5. Attached in **Appendix 1** is a table summarising Northland Regional Council (**Council**), Horticulture New Zealand (**HortNZ**), Northland District Health Board (**NDHB**) and Mr and Mrs Wheeler's proposed wording of the provisions relating to spray-sensitive areas. Two proposed frameworks have arisen: the Council and HortNZ have taken a similar approach; as have the NDHB and Mr and Mrs Wheeler (though there are minor differences between each parties' approach).

6. Federated Farmers has confirmed that it is comfortable with the Council and HortNZ's position. Mr Duncan Ross and Ms Heather Adams have confirmed that they support Mr and Mrs Wheeler's position, subject to comments below regarding Figure 1 relating to cross-wind. Ms Cinna Smith supports Mr and Mrs Wheeler's position.

7. This memorandum has been prepared in consultation with the

parties that attended the Topic 8 hearing.

Areas of agreement

8. The parties generally agree on the following issues:

a. Clause 2(c) of the rule applies where agrichemical application is to be undertaken within 100 metres for ground-based methods and 300 metres for aerial application;

b. the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately and are confined to target application areas, to ensure that no adverse effects occur beyond the target application area, and to ensure that TELs and EELs are not exceeded;

c. the activity must be undertaken in accordance with a risk assessment that is documented and made available to Council on request;

d. a risk-based approach requiring increasing mitigation for agrichemical application risk factors ranging from low risk to high risk is a more nuanced approach than the decisions version of the rule;

e. additional requirements do not apply to agrichemical application if the occupier of the spray-sensitive area has provided (and not withdrawn) written approval for the type and method of agrichemical application;

f. agrichemical application must not occur if inversion conditions are present or likely to be present;

g. agrichemical application undertaken in a fully enclosed environment is not subject to the same requirements; and

h. the definitions of "spray-sensitive area" and "buffer"'.

9. In respect of the specifics of agrichemical application, the parties agree that:

   a. all applications of agrichemicals subject to clause 2 (ground-based and aerial spraying) of C.6.5.1 (and the equivalent clause in C.6.5.2) require a risk assessment to be undertaken.

   b. for agrichemical applications where the wind is away from spray sensitive areas and within 1-3 m/s, that no additional requirements need to be stipulated as permitted activity

conditions in the rule.

c. information on the measurement of wind speed should be added, as well as a definition for 'effective shelter' and 'away from', however the specific wording for these has not been agreed.

10. The parties agree that a risk assessment should include the measures set out in **Appendix 2** to this memorandum. The parties agree that the risk assessment be undertaken prior to and during application (some parties also seek this is required after the application); and records should be kept of the risk assessment, which should be made available to the Council on request.

Areas of disagreement

11. There are differences between the parties on matters of detail. In summary, the parties disagree on the following issues:

    a. the detail of the proposed tiered approach to be incorporated into the provisions and the certainty that approach provides;

    b. how the specific conditions (including application method, wind speed, wind direction, and additional requirements) should be included within the provisions and how those relate to the different risk levels, and in particular what the appropriate wind speed thresholds are and what standards (mitigation) should apply in each scenario;

    c. whether application should be able to occur under any circumstances above windspeeds of 5m/s or 6m/s;

    d. whether additional requirements should be included in the risk assessment, including:

        i. the likelihood of spray drift occurring; and

        ii. the ways of eliminating the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas;

    e. whether written approval can be given for the application of agrichemicals with high or very high human toxicity;

f. how wind speed is to be measured;

g. the definitions of "effective shelter" and "away from" and whether a new definition of "agrichemical direct application methodology" should be included; and

h. other minor differences (e.g. the use of "must" vs. "shall" in the provisions, and whether wind speeds should be stated in both m/s and km/h)).

12. HortNZ also put forward, as an alternative to the list of items to be addressed in a risk assessment in Appendix 2 to this memorandum, a more detailed risk assessment framework as **Appendix 3**, which is set out in a table which would be included as an appendix to the plan, including:

a. the inherent hazards of the agrichemicals being used, and

b. consideration of key risk factors (high, medium, low) that could increase or decrease risks of spray movement onto sensitive areas, and guidance actions on how risks could be mitigated.

13. Mr Ross has concerns with Figure 1 in the definition of "away from". He seeks that the figure is amended to show the right-hand side of the diagram as a mirror image of the left and that the term "cross-wind" is replaced with a term like "the turbulent sideways spreading of the spray plume down-wind from the sprayed area". The Wheelers also consider that the diagram is less than clear, particularly the reference to "crosswind" which should perhaps be to "across the wind", and preferred a possible alternative diagram being discussed by the air quality experts.

DATED this 24th day of May 2021

....

M J Doesburg / E S Lake

Counsel for Northland Regional Council

Appendix 1: Table of parties' proposed provisions

Appendix 2: Measures to be included in risk assessment

1. A risk assessment must include:

   a. Confirmation of the target application area;

   b. Appropriateness of product for the weed, pest, or crop;

   c. Location of spray-sensitive areas;

   d. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability);

   e. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones;

   f. Presence and condition of shelter;

   g. Fit for purpose equipment and personal protective equipment;

   h. Confirmation that notification has been carried out and required signage is in place;

   i. Confirmation that any relevant regulatory requirements can be complied with;

   j. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan;

   k. Toxicity of the agrichemical to be applied;

   l. Application rate;

   m. Volatility;

   n. Timing and duration of operation; and

   o. Type of sensitive area and sensitivity of persons / animals / vegetation potentially exposed

Appendix 3: HortNZ Risk Assessment Table

PROPOSED ON-SITE RISK ASSESSMENT MATRIX
Table XX

SITE FACTORS		Risk assessment based on	Documentation requirements	Checklist	Notes
1	Application site (target)	Location and boundaries	Map showing the property and surrounds - this should be part of the property spray plan. **For each application event** the target application area(s) should be documented and referenced to the spray plan map.	☐ Spray plan map ☐ Application areas identified	
2	Sensitive areas	Nature of and location with respec to application area.	Potential sensitive areas should be recorded in the property spray plan with distance references noted for sensitive areas that require operational risk management.	☐ Human toxicity sensitive area(s) ☐ Other crops sensitive area(s) ☐ Aquatic ecotoxicity sensitive area(s) ☐ Terrestrial ecotoxicity sensitive area(s)	
3	Shelter belts	Nature of and location with respec to application area	Shelter between application area and sensitive areas noted and assessed for potential risk reduction relative to type of spraying operation.	☐ Shelter meets definition of effective shelter ☐ Shelter partial ☐ No shelter	

TOXICITY FACTORS			High hazard	Medium hazard	Low hazard	Considerations/Mitigations	Notes
4	Product hazard HUMAN RISK	Products to be applied identified and the relevant HSNO hazard classification or GHS equivalent noted.	HSNO 6.1A, 6.1B	HSNO 6.1C	HSNO 6.1D, 6.1E or no 6.1 hazard rating	Product(s) selected according to application task, taking account of HSNO class, efficacy and other attributes and the at-risk sensitive locations. Select the lowest hazard products as possible.	*Hazard assessment should be based on the highest hazard classes of the products to be used. Risk is a function of hazard X application rate X risk of exposure. Mitigation in any of these three areas has an additive risk reduction effect.*
5	Product hazard ENVIRONMENTAL RISK	Products to be applied identied and the relevant HSNO hazard classification or GHS equivalent noted.	Aquatic HSNO 9.1A Terrestrial HSNO 9.2A OR 9.3A OR 9.4A	Aquatic HSNO 9.1B Terrestrial HSNO 9.2B OR 9.3B OR 9.4B	Aquatic HSNO 9.1C or D Terrestrial HSNO 9.2, 9.3,9.4 C OR D rating, OR unrated	Product(s) selected according to application task, taking account of HSNO class, efficacy and other attributes and the at-risk sensitive locations.	*Hazard assessment should be based on the highest hazard classes of the products to be used. Risk is a function of hazard X application rate X risk of exposure. Mitigation in any of these three areas has an additive risk reduction effect.*
			High risk factors	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
6	Secondary drift risks (Volatile products)	Vapour pressure of applied products	High vapour pressure >10 mPa	Vapour pressure between 0.1-10 mPa	Low vapour pressure <0.1 mPa	Check product label, SDS or manufacturer informatation and instructions for use and risk mitigation when using products with secondary drift risks.	*Specific controls according to the volatility of the product being applied - these include seasonal dates of no use for products like 2,4-D hormone herbicides.*
WEATHER CONDITIONS			**High risk factors**	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
7	Wind direction	Direction (bearing) at the application site at the time of application	Unpredictable	Possible wind direction changes during spraying	Predictable and away from sensitive areas	Tools to monitor wind direction before and during application are in place.	*Spray areas closest to sensitive areas under best possible wind conditions - this is often early on a spraying day.*
8	Wind speed	Speed at the application site at the time of application	High speed > 6 m/s OR Very low 0 to 1 m/s	Variable and/or speeds 3 6 m/s	Stready Speeds 1-3 m/s	Visual indicators and/or Weather station and/or hand held anemometer	*Spray applicators have a documented set of rules eg SPRAY or NO SPRAY for application behaviour near sensitive boundaries under different wind conditions.*
9	Evaporative potential	Air temperature and humidity Delta T	Low humidity Delta T above 8 ºC	Delta T between 4 and 8 ºC	High humidity Delta T < 4ºC	Temperature and Humidity measured and recorded on site at the time of applicaiton	*Guidelines for spraying under different Delta T conditions are well established.*
10	Atmospheric stability	Inversion layer (smoke behaviour)	Inversion present	Potential inversion conditions (night time spraying with low wind speeds)	No inversion present	Wind and temperature data recorded on site indicate that no inversion layer is likely, and/or visual indictors (e.g. smoke) suggest no inversion risk.	*No machine applications should be undertaken outdoors under inversion conditions. If volatility risk is medium or high then an on-site test for an inversion layer should be undertaken.*
APPLICATION FACTORS			**High risk factors**	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
11	Application method and Maximum height ofspray release	Aerial Airblast orchard type Boom	>10 m above target >2 m above target >1m above target, and/or Travel speed > 15km/h	5-10 m above target 1-2 m above target 0.6-1 m above target and/or Travel speed 8 to 10 km/h	<5 m above target <1 m above target <=0.5 m above target and/or Travel speed <=8 km/h	Application equipment selected to minimise product losses between the point of release and the target all fully documented	
12	Spray droplet size	Physical properties of the product being applied	Very fine or smaller spray quality (Significant volumes in droplets <50 µm diameter)	Fine or medium spray quality	Coarse or greater spray quality (Most of output volume in droplets >250 µm diameter)	Refer to nozzle charts for spray quality, pressure related. Can use water sensitive paper to record/demonstrate droplet sizes of spray plume.	
13	Dritt reducing adjuvants				Only use provendrift reducing adjuvants.	Effects same as increasing droplet size and changing spray quality.	
14	Use of shrouds/screens				Shrouds or screens are used	Effect is as for reducing wind speed and should be scored there.	
15	Application targetting	Spray not directed downwind when treating downwind block edges	No adjusment tosprayer or spraying emission patterns.	Air blast sprayers - Inthe edge and second downwind side rows spray is only directedinto the block (upwind).	Boom spraying - Useof end boom nozzles. Air blast sprayers - In the three downwind siderows spray is only directed into the block (upwind).		
BUFFER ZONES			**High risk factors**	**Medium risk factors**	**Low risk factors**	**Considerations/Mitigations**	
16	Proximity of sensitive areas to treated area	Downwind application free zone See buffer zone distances table for different application methods and wind conditions	Sensitive areawithin buffer zone. NO SPRAYING PERMITTED	Downwind sensitive area 1 to 3X recommended buffer zone distance away from downwind edge of treated area.	Downwind sensitive area> 3X the recommended buffer zone distance away from downwind edge of treated area.	Location of application target and sensitive area known and logged, communication/notification confirmed, spray quality, and wind direction known and drift modelling done	

Buffer zone guideance and responses

No risk of harmful effects and virtually no risk of detection of applied products beyond the buffer zone distance provided no high hazard factors identified in the risk assessment above

		No shelter	Shelter		
Aerial spraying	Windspeed <1 m/s	300 m	100 m	From all sprayed area edges	*Measurements taken from the downwind edge or corner of the treated area.*
	Windspeed 1-6 m/s	300 m	100 m	On downwind edges of sprayed area	*Sensitive areas included for wind directions up to 45º downwind from the treated area*
	Windspeed >6m/s	900 m	900 m	On downwind edges of sprayed area provided no high hazard factors	
Airblast spraying	Windspeed <1 m/s	30 m	10 m	From all sprayed area edges	*Measurements taken from the downwind edge or corner of the treated area.*
	Windspeed 1-6 m/s	30 m	10 m	On downwind edges of sprayed area	*Sensitive areas included for wind directions up to 45º downwind from the treated area*
	Windspeed >6m/s	90 m	30 m	On downwind edges of sprayed area provided no high hazard factors	
Boom spraying	Windspeed <1 m/s	10 m	2 m	From all sprayed area edges	*Measurements taken from the downwind edge or corner of the treated area.*
	Windspeed 1-6 m/s	10 m	2 m	On downwind edges of sprayed area	*Sensitive areas included for wind directions up to 45º downwind from the treated area*
	Windspeed >6m/s	30 m	10 m	On downwind edges of sprayed area provided no high hazard factors	

Outcomes driven risk assessment

Two desired outcomes

1) No risk of off target spray deposits at levels that could be expected to cause harm.

This has to be related to the toxicity of the chemical(s) being applied to; humans (class 6), aquatic ecosystems (class 9.1) or terrestial ecosystems (classes 9.2, 9.3 and 9.4).

The key areas of toxicity concern are human and aquatic ecosystems and highly sensitive terrestial ecosystems (as opposed to general land usage around sprayed areas).

2) No risk of contamination of adjacent crops or animals that could lead to market acceptability issues.

3) Minimal risk of contamination of drinking water sources - especially roofing for collection of drinking water.

Annexure B

Population and Public Health Unit of the Northland District Health Board v Northland Regional Council (Topic 8 Agrichemicals)

Topic 8 – Agrichemicals

Table of parties' positions on revised spray drift provision – 24 May 2021

Northland Regional Council	Horticulture NZ	Northland District Health Board	Mr and Mrs Wheeler
Rule C.6.5.1 Application of agrichemicals – permitted activity The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: 1. for all methods (including hand-held spraying, ground-based spraying and aerial application): (aa) The following preconditions must be met for any discharge of agrichemicals into air or onto land: i) the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately, and are confined to target application areas; ii) the applicator shall take all practicable steps to ensure that no adverse effects occur beyond the application area; and iii) the applicator shall ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded. ... 2. for ground-based spraying and aerial application: (a) the activity is undertaken in accordance with the following sections of the *New Zealand Standard Management of Agrichemicals (NZS8409:2004)* as it relates to the management of the discharge of agrichemicals: i) Use – Part 5.3, and ii) Storage – Appendix L4, and iii) Disposal – Appendix S, and iv) Records – Appendix C9, and [References to be updated if 2021 Standard approved] (b) a Spray Plan must be prepared annually for the areas where agrichemicals are to be applied, which shall be made available to the Council on request; (c) Where the activity is undertaken within 100 metres of a spray-sensitive area or 300 metres for aerial application: i) a risk assessment must be carried out prior to the application to determine the site characteristics on the day, particularly wind speed and wind direction, the level of risk present, and use of appropriate methods to mitigate that risk; ii) the applicator must re-evaluate the risk assessment during the application to ensure that the situation has not changed and that the application methods and drift mitigations are still appropriate; iii) the risk assessment must be recorded in a spray diary (in the form that meets the requirements of Appendix X), which shall be made available to the Council on request; iv) the activity must be undertaken in accordance with the risk assessment, spray diary and the spray plan; and v) the application must meet the requirements in Table X; (d) agrichemical application must not occur if: i) wind speeds are greater than 6m/s; or ii) inversion conditions are present or likely to be present during application; (e) the requirements in (2) above do not apply to agrichemical application if: i) the occupier of the spray sensitive area has provided written approval for the type and method of agrichemical application and: 1) the written approval is re-signed annually;	**Rule C.6.5.1 Application of agrichemicals – permitted activity** The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: 1. [as per consent agreement] 2. for ground based spraying and aerial applications: a) the activity is undertaken in accordance with the following sections of the New Zealand Standard Management of Agrichemicals (NZS8409:2004) as it relates to the management of the discharge of agrichemicals: i) Use – Part 5.3, and ii) Storage – Appendix L4, and iii) Disposal – Appendix S, and iv) Records – Appendix C9, and [References to be updated if 2021 Standard approved] b) a Spray plan must be prepared annually for the areas where agrichemicals are to be applied, and made available to the Regional Council on request. c) Where the agrichemical application is to be undertaken by ground-based methods within 100 metres of a spray sensitive area, or by aerial application within 300 metres of a spray sensitive area the following conditions must be met: i) The applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately and are confined to target application areas, to ensure that no adverse effects occur beyond the target application area. ii) A risk assessment must be carried out prior to the application to determine the site characteristics on the day, particularly wind speed and wind direction, the level of risk present, and use of appropriate methods to mitigate that risk based on Table XX (Appendix 3) to ensure that condition 2 c i) is met. iii) An applicator should re-evaluate the risk assessment during the application to ensure that the situation has not changed and that the application methods and drift mitigations are still appropriate. iv) The application must be undertaken in accordance with the spray plan and risk assessment. v) The risk assessment must be documented and made available to the Council on request. vi) The application must meet the requirements in Table X The application is not permitted if the following conditions are present: i) Inversion conditions are present, or	**Rule C.6.5.1 Application of agrichemicals – permitted activity** The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: The following preconditions must be met for any discharge of agrichemicals into air or onto land: • the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately, and are confined to target application areas; • the applicator shall take all practicable steps to ensure that no adverse effects occur beyond the application area • the applicator shall ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded; 2. Where the activity is undertaken within 100 metres of a spray-sensitive area (or 300 metres for aerial application): a. The following risk assessment requirements are met: i) a risk assessment must be carried out prior to, during and after the application of an agrichemical by the person applying the agrichemical; ii) The risk assessment must include assessment of all the factors listed in Table Y; iii) the risk assessment and all actions undertaken to mitigate identified risks must be recorded in a spray diary; iv) the activity must be undertaken in accordance with the risk assessment and spray diary; v) the person completing the risk assessment must sign the entry in the spray diary; vi) the spray diary and electronic or paper records from the digital/electronic wind direction and wind speed measuring device shall be made available to the Council on request; and b. Agrichemical application is a permitted activity provided that the requirements in Table ZA are met: 3. The requirements in Table ZA do not apply to agrichemical application if: a) the occupier of the spray sensitive area has provided written approval for the type and method of agrichemical application and: i) the agrichemical to be applied is not high or very high human toxicity; and ii) the written approval is re-signed annually; and iii) the occupier is provided with a copy of the annual spray plan before signing (or re-signing) and that spray plan identifies the use of any agrichemicals with high human toxicity; and iv) the written approval has not been withdrawn, withdrawal only being effective if three months' notice has been provided; and v) a copy of the relevant spray diary is provided to the occupier of the spray sensitive area upon request. 4. Agrichemical application must not occur in the circumstances in Table ZB.	**Rule C.6.5.1 Application of agrichemicals – permitted activity** The discharge of an agrichemical into air or onto or into land is a permitted activity, provided: The following preconditions must be met for any discharge of agrichemicals into air or onto land: • A Spray Plan must be prepared annually for the areas where agrichemicals are to be applied, which must be made available to the Council and the occupiers of spray sensitive areas on request; • the applicator must take all practicable steps to ensure that agrichemicals are used appropriately and accurately, and are confined to target application areas; • the applicator must take all practicable steps to ensure that no adverse effects occur beyond the application area; • the applicator must ensure that relevant tolerable exposure limits (TELs) and environmental exposure limits (EELs) are not exceeded; 2. Where the activity is undertaken within 100 metres of a spray-sensitive area (or 300 metres for aerial application): a) The following risk assessment requirements are met: i) a risk assessment must be carried out prior to, during and after the application of an agrichemical by the person applying the agrichemical; ii) The risk assessment must include assessment of all the factors listed in Table Y; iii) the risk assessment and all actions undertaken to implement the risk assessment must be recorded in a spray diary; iv) the activity must be undertaken in accordance with the risk assessment and spray diary; v) the person completing the risk assessment must sign the entry in the spray diary; vi) the spray diary and electronic or paper records from the digital/electronic wind direction and wind speed measuring device must be made available to the Council on request; and b) Agrichemical application is a permitted activity provided that the requirements in Table ZA are met: 3. The requirements in Table ZA do not apply to agrichemical application if: a) the occupier of the spray sensitive area has provided written approval for the type and method of agrichemical application and: i) the agrichemical to be applied is not high or very high human toxicity; and ii) the written approval is re-signed annually; and iii) the occupier is provided with a copy of the annual spray plan before signing (or re-signing) and that spray plan identifies the use of any agrichemicals with high human toxicity; and iv) the written approval has not been withdrawn, withdrawal only being effective if three months' notice has been provided; and v) a copy of the relevant spray diary is provided to the occupier of the spray sensitive area upon request. 4. Agrichemical application must not occur in the circumstances in Table ZB.

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2) the occupier is provided with a copy of the annual spray plan; and

3) the written approval has not been withdrawn, withdrawal only being effective if three months' notice has been provided;

(f) agrichemical application undertaken in a fully enclosed environment (for example a greenhouse) is not subject to the requirements of (2) above.

Agrichemical application that does not meet all of the preconditions and is not permitted under (2) above is a discretionary activity under Rule C.6.5.5.

3. [training requirements for ground based as per agreed provisions]
4. [training requirements for aerial as per agreed provisions]
5. [2,4-D provisions as per agreed provisions]

Application method	Wind speed	Wind direction	Additional requirements to be a permitted activity:
Boom spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 2 m with effective shelter, or • 10 m without effective shelter.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 2 m with effective shelter, or • 10 m without effective shelter Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
Airblast spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 10m with shelter, or • 30m without shelter.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind	There is a buffer distance on all boundaries of the target application area of: • 10m with effective shelter, or

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ii) Where a high human risk hazard (Table xx) is present, and the spray quality is fine or smaller, and the wind direction is towards a spray sensitive area; or

iii) Where a high human risk hazard (Table xx) is present, and the chemical has high vapour pressure (>10 mPa)

iv) The requirements in Table X are not met.

d) The requirements in 2 c) above do not apply to agrichemical applications if the occupier of the spray sensitive area has provided written approval for agrichemical applications and:

i) the written approval is re-signed annually

ii) the occupier is provided with a copy of the annual spray plan; and

iii) the written approval has not been withdrawn, withdrawal only being effective if three months notice has been provided.

e) The requirements of 2c) and d) do not apply to agrichemical applications undertaken in a fully enclosed environment (such as a greenhouse).

3. [training conditions as per consent document]
4. [training conditions as per consent document]
5. [2,4-D conditions as per consent document]

Table X – Permitted activity requirements under 2 (c)

Application method	Wind speed	Wind direction	Additional requirements to be a permitted activity:*
Boom spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 2 m with shelter, or • 10 m without shelter.
	1-6m/s	Wind away from sensitive area(s)	No additional requirements apply.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 2 m with shelter, or • 10 m without shelter
	> 6m/s	Wind away from sensitive area(s)	Use coarsest spray quality possible and implement mitigation controls identified in risk assessment.
		Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 10 m with shelter, or • 30 m without shelter And • no high human or high ecotoxic risk products as identified through Table XX to be applied. • use coarsest spray quality possible and implement

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5. Agrichemical application that does not meet all of the preconditions and is not permitted under (2) or (3) above is a discretionary activity under Rule C.6.5.5.

Table ZA – Permitted Activities

Activity	Standards
A. Ground application	
Wind away from spray-sensitive area	
Wind speed 0-1m/s	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-3m/s	Nil
Wind speed 3-5m/s	**EITHER:** i. Effective shelter is present; and ii. Spray quality is as coarse as practicable; and iii. Spray is non-volatile **OR:** The agrichemical is applied using **Agrichemical direct application methodology**
Wind changeable or toward spray-sensitive area	
Wind speed 0-1m/s	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-3m/s	**EITHER:** i. Effective shelter is present; and ii. A 50m buffer is observed; and iii. Spray quality is medium or coarse; and iv. Spray is non-volatile; v. Spray is not high or very high human toxicity or ecotoxicity; and vi. Maximum height of spray release is <=0.5m (boom) or <1 m (airblast) above target.

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5. Agrichemical application that does not meet all of the preconditions and is not permitted under (2) or (3) above is a discretionary activity under Rule C.6.5.5.

Table ZA – Permitted Activities

Activity	Standards
A. Ground application	
Wind away from spray-sensitive area	
Wind speed 0-1m/s (0-3.6km/h)	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-3m/s (0-10.8km/h)	Nil
Wind speed 3-5m/s (10.8-18km/h)	**EITHER:** i. Effective shelter is present; and ii. Spray quality is as coarse as practicable. **OR:** **iii.** The agrichemical is applied using **agrichemical direct application methodology**
Wind toward spray-sensitive area	
Wind speed 0-1m/s (0-3.6km/h)	i. The agrichemical is applied using **Agrichemical direct application methodology**
Wind speed 1-2m/s (3.6-7.2km/h)	**EITHER:** i. Effective shelter is present; and ii. A 50m buffer is observed; and iii. Spray quality is medium or coarse. **OR** **iv.** The agrichemical is applied using **agrichemical direct application methodology**
B. Aerial application	
Wind away from spray-sensitive area	

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		direction unpredictable	• 30m without effective shelter. Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
Aerial spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 100m with effective shelter, or • 300m without effective shelter. Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
		Wind away from sensitive area(s)	No additional requirements apply. Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.
	1-6m/s	Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 100 m with effective shelter, or • 300 m without effective shelter. Use coarsest spray quality possible and implement spray drift mitigation controls identified in risk assessment.

Note: refer to Appendix Y for measurement of wind speed requirements.

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			mitigation controls identified in risk assessment.
Airblast spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 10m with shelter, or • 30m without shelter.
		Wind away from sensitive area(s)	No additional requirements apply.
	1-6m/s	Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer distance on all boundaries of the target application area of: • 10m with shelter, or • 30m without shelter.
		Wind away from sensitive area(s)	Use coarsest spray quality possible and implement mitigation controls identified in risk assessment.
	> 6m/s	Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 30 m with shelter, or • 100 m without shelter. And • no high human or high ecotoxic risk products as identified through Table XX to be applied. • use coarsest spray quality possible and implement mitigation controls identified in risk assessment.
Aerial spraying	0-1m/s	Any wind direction	There is a buffer distance on all boundaries of the target application area of: • 100m with shelter, or • 300m without shelter.
		Wind away from sensitive area(s)	No additional requirements apply.
	1-6m/s	Wind toward sensitive area(s) or wind direction unpredictable	There is a buffer on the downwind boundary of the target application area of: • 100 m with shelter, or • 300 m without shelter
		Wind away	Use coarsest spray quality possible and implement mitigation

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	OR The agrichemical is applied using **Agrichemical direct application methodology**
B. Aerial application	
Wind away from spray-sensitive area Wind speed 1-5m/s	i. Effective shelter is present; and ii Spray quality is as coarse as possible; and iii Spray is non-volatile.
C. Enclosed structure Agrichemical application undertaken in a fully enclosed structure (for example a greenhouse)	i. The structure remains entirely enclosed for the entire duration of the application of the agrichemical

Table ZB – Discretionary Activities	
Activity	**Exemptions (Permitted Activity)**
Wind speed greater than 5m/s	i. The agrichemical is applied using **Agrichemical direct application methodology** ii. The application of citric acid
i. Wind speed 3m/s or greater; and ii. Wind direction away from the spray sensitive area; and iii. The agrichemical has high or very high eco or human toxicity	i. The agrichemical is applied using **Agrichemical direct application methodology**
i. Wind direction changeable or toward the spray sensitive area; and ii. wind speed > 3m/s; or iii. The agrichemical has high or very high human toxicity or ecotoxicity.	i. The agrichemical is applied using **Agrichemical direct application methodology**

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Wind speed 1-5m/s (3.6-18km/h)	i. Effective shelter is present
C. Enclosed structure	
Agrichemical application undertaken in a fully enclosed structure (for example a greenhouse)	i. The structure remains entirely enclosed for the entire duration of the application of the agrichemical

Table ZB – Discretionary Activities	
Activity	**Exemptions (Permitted Activity)**
Wind speed greater than 5m/s (18km/h)	i. The agrichemical is applied using **Agrichemical direct application methodology** ii. The application of citric acid
i. Wind speed 3m/s (10.6km/h) or greater; and ii. Wind direction away from the spray sensitive area; and iii. The agrichemical has high or very high eco or human toxicity	i. The agrichemical is applied using **Agrichemical direct application methodology**
i. Wind direction toward the spray sensitive area; and ii. The agrichemical has high or very high human toxicity; and iii. The spray-sensitive area is one of: 1. residential buildings and associated garden areas, 2. schools, hospital buildings and care facilities and grounds, 3. amenity areas where people congregate including parks and reserves, 4. community buildings and grounds, including places of worship and marae, 5. water bodies used for the supply of drinking water and for stock drinking, or 6. roofing for the collection of drinking water.	i. The agrichemical is applied using **Agrichemical direct application methodology**

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	from sensitive area(s) — controls identified in risk assessment. > 6m/s — Wind toward sensitive area(s) or wind direction unpredictable — There is a buffer on the downwind boundary of the target application area of: • 300 m with shelter, or • 1000 m without shelter And • no high human or high ecotoxic risk products as identified through Table XX to be applied. • use coarsest spray quality possible and implement mitigation controls identified in risk assessment. ˣExcept that where an EPA approval for an agrichemical specifies a buffer distance, this prevails on any buffer distance requirements stated in Table X. Note: refer to Appendix Y for measurement of wind speed requirements.		i. Wind direction toward the spray sensitive area; and ii. The agrichemical has high or very high eco toxicity; and iii. The spray-sensitive area is one of: *1. water bodies used for the supply of drinking water and for stock drinking,* 2. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, or 3. apiaries. — i. The agrichemical is applied using **Agrichemical direct application methodology** Inversion conditions are present or likely to be present during application — i. The application of citric acid
Appendix Y **Measurement of wind speed and risk assessment requirements** **How to measure wind speed** 1. Wind speed for risk assessment is best measured onsite at the observed maximum projected height of the spray plume (ideally 0.5 – 1 m above the target), or at the release height of the spray for downward projected nozzles. 2. Wind speed during spraying operations is best measured onsite at the downwind edges of sprayed areas closest to potential sensitive areas. This can be achieved using remote monitoring, wind socks or other visual indicators where the applicator can see them. 3. Wind direction measurement during both risk assessment, spraying operations is best measured onsite at the downwind edges of sprayed areas closest to potential sensitive areas. This can be achieved using remote monitoring, wind socks, or other visual indicators where the applicator can see them. ***Risk assessment*** **Risk assessment** A risk assessment must include: 1. Confirmation of the target application area; 2. Appropriateness of product for the weed, pest, or crop; 3. Location of sensitive areas; 4. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability); 5. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones; 6. Presence and condition of shelter belts; 7. Fit for purpose equipment and PPE; 8. Confirmation that notification has been carried out and required signage is in place (see C3 and C4); 9. Confirmation that any relevant regulatory requirements can be complied with;	Appendix Y **Measurement of wind speed and risk assessment requirements** ***How to measure wind speed*** 1. Wind speed for risk assessment is best measured onsite at the observed maximum projected height of the spray plume (ideally 0.5 – 1 m above the target), or at the release height of the spray for downward projected nozzles. 2. 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Wind speed and wind direction shall be averaged over a 10-minute period. 5. Wind gust should be measured as the strongest consecutive 3 second reading in any 60 second period. ***Table Y*** ***Risk assessment*** A risk assessment must include: 1. Confirmation of the target application area; 2. Appropriateness of product for the weed, pest, or crop; 3. Location of spray- sensitive areas;	**Measurement of wind speed and risk assessment requirements** 1. Wind speed *for risk assessment* must be measured: i) Onsite; ii) at the observed maximum projected height of the spray plume (maximum 1 m above the target), or at the release height of the spray for downward projected nozzles. iii) using an electronic/digital monitoring device which produces an electronic or printed record. 2. 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Location of spray- sensitive areas;

Northland Regional Council	Horticulture NZ	Northland District Health Board	Mr and Mrs Wheeler
10. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan. Where it is necessary to deviate from the spray plan this must be recorded along with reasoning as to why deviation is necessary; 11. Toxicity; 12. Application rate; 13. Volatility; 14. Timing and duration of operation; and 15. Type of sensitive area and sensitivity of persons/animals/vegetation potentially exposed. 16. The likelihood of spray drift occurring. 17. The ways of minimising the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas		4. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability); 5. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones; 6. Presence and condition of shelter belts; 7. Fit for purpose equipment and personal protective equipment; 8. Confirmation that notification has been carried out and required signage is in place (see C3 and C4); 9. Confirmation that any relevant regulatory requirements can be complied with; 10. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan; 11. Toxicity of the agrichemical to be applied; 12. Application rate; 13. Volatility; 14. Timing and duration of operation; and 15. Type of sensitive area and sensitivity of persons/animals/vegetation potentially exposed. 16. The likelihood of spray drift occurring. 17. The ways of eliminating the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas	4. Weather conditions (wind speed, wind direction, humidity and temperature, atmospheric stability); 5. Appropriateness of particle size and release height, particularly in relation to sensitive areas and buffer zones; 6. Presence and condition of shelter belts; 7. Fit for purpose equipment and personal protective equipment; 8. Confirmation that notification has been carried out and required signage is in place (see C3 and C4); 9. Confirmation that any relevant regulatory requirements can be complied with; 10. Confirmation that all other risk factors, including those identified in the spray plan, are being managed in accordance with the spray plan; 11. Toxicity of the agrichemical to be applied; 12. Application rate; 13. Volatility; 14. Timing and duration of operation; and 15. Type of sensitive area and sensitivity of persons/animals/vegetation potentially exposed. 16. The likelihood of spray drift occurring. 17. The ways of eliminating the risk of spray-drift occurring and selection of the practicable steps to ensure that agrichemicals are confined to target application areas
Definitions **Spray-sensitive area** 1. residential buildings and associated garden areas, and 2. schools, hospital buildings and care facilities and grounds, and 3. amenity areas where people congregate including parks and reserves, and 4. community buildings and grounds, including places of worship and marae, and 5. certified organic farms, and 6. orchards, crops and commercial growing areas, and 7. water bodies used for the supply of drinking water and for stock drinking, and 8. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and 9. roofing for the collection of drinking water; and 10. apiaries. **Effective shelter** Effective shelter must be: 1. taller (at least >1 metre) than the height of the spray plume[1] when the plume interacts with the shelter; and 2. have foliage that is continuous from top to bottom; and 3. achieves in the order of 50% optical and aerodynamic porosity;[2] and 4. has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and 5. is not deciduous; and 6. has a width to height ratio of 1:3.5. Artificial shelter can also be useful in reducing spray drift (for example overhead hail netting for kiwifruit and apples). *[1] NB: This is the not necessarily the same as the projected height (at point of discharge) as it will typically rise if it drifts.*	**Definitions** ***Spray-sensitive area*** 1. residential buildings and associated garden areas, and 2. schools, hospital buildings and care facilities and grounds, and 3. amenity areas where people congregate including parks and reserves, and 4. community buildings and grounds, including places of worship and marae, and 5. certified organic farms, and 6. orchards, crops and commercial growing areas, and 7. water bodies used for the supply of drinking water and for stock drinking, and 8. natural wetlands and significant areas of indigenous vegetation and habitats of indigenous fauna as defined in the Regional Policy Statement for Northland, and 9. roofing for the collection of drinking water; and 10. apiaries. ***Effective shelter*** Effective shelter must be: 1. taller (at least >1 metre) than the height of the spray plume[1] when the plume interacts with the shelter; and 2. have foliage that is continuous from top to bottom; and 3. achieves in the order of 50% optical and aerodynamic porosity;[2] and 4. has a high surface area (note that fine needles are more effective at collecting fine spray than broad leaves); and 5. is not deciduous; and 6. has a width to height ratio of 1:3.5. 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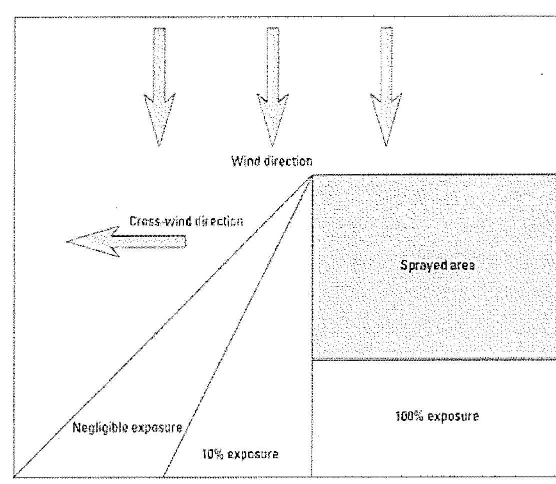
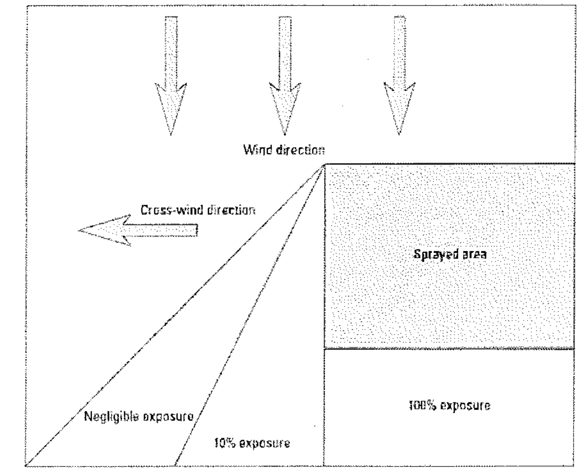
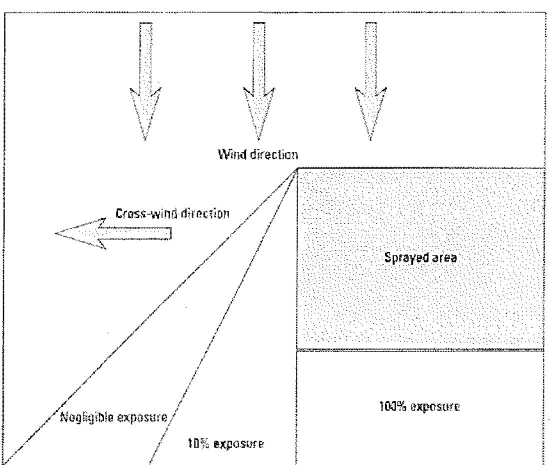
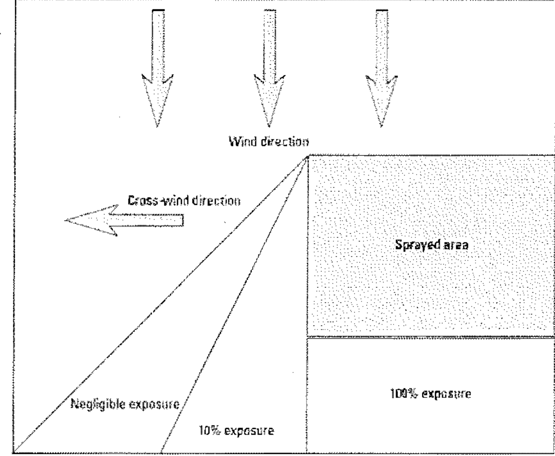
[2] *The thicker the shelter belt, (e.g. multiple lines of plants), optically you can't see thought it but it's still aerodynamically porous.* **Buffer** Buffer zone distance means a specified horizontal distance from a downwind spray-sensitive area, measured from the downwind edge of the application area closest to the spray-sensitive area. **Away from** "Away from" means "not towards" and includes a 45° either side of 100%. **Figure 1:** Exposures cross-wind from sprayed area  	[2] *The thicker the shelter belt, (e.g. multiple lines of plants), optically you can't see thought it but it's still aerodynamically porous.* ***Buffer*** Buffer zone distance means a specified horizontal distance from a downwind spray-sensitive area, measured from the downwind edge of the application area closest to the spray-sensitive area. ***Away from*** "Away from" means "not towards" and includes a 45° either side of 100%. **Figure 1:** Exposures cross-wind from sprayed area  	[2] *The thicker the shelter belt, (e.g. multiple lines of plants), optically you can't see thought it but it's still aerodynamically porous.* ***Buffer*** Buffer zone distance means a specified horizontal distance from a downwind spray-sensitive area, measured from the downwind edge of the application area closest to the spray-sensitive area. ***Away from*** "Away from" means "not towards". "Away from" includes 45° either side of 100% where all of the following requirements are met: a) there is a buffer of at least 50 metres from the downwind edge of the sprayed area to the spray sensitive area; b) wind direction is moderately steady; and c) wind speed is at least 2m/s. **Figure 1:** Exposures cross-wind from sprayed area  ***Agrichemical direct application methodology*** Agrichemical direct application methodology means the use of a shroud, weed wiper or roller which directly applies the agrichemical to the target in a manner which avoids any spray drift	[2] *The thicker the shelter belt, (e.g. multiple lines of plants), optically you can't see thought it but it's still aerodynamically porous.* ***Buffer*** Buffer zone distance means a specified horizontal distance from a downwind spray-sensitive area, measured from the downwind edge of the application area closest to the spray-sensitive area. ***Away from*** "Away from" means "not towards". "Away from" includes 45° either side of 100% where all of the following requirements are met: a) there is a buffer of at least 50 metres from the downwind edge of the sprayed area to the spray sensitive area; b) wind direction is moderately steady; and c) wind speed is at least 2m/s. **Figure 1:** Exposures cross-wind from sprayed area  ***Agrichemical direct application methodology*** Agrichemical direct application methodology means the use of a shroud, weed wiper or roller which directly applies the agrichemical to the target in a manner which avoids any spray drift

Annexure C

Table X Permitted activity requirements under 2(c)

Wind speed	**Wind direction**	**Additional requirements to be assessed**
Ground based – low risk		
1-3m/s	Wind away from sensitive area(s)	nil
Ground based – assessed risk		
0-1m/s	Any wind direction (not inversion or ponding conditions)	The buffer distance on all boundaries of the target application area and whether effective shelter is present Height of spray release (for boom or blast spraying it should be below the shelter to prevent spray drift). Sensitivity of receivers Toxicity of spray Use of agrichemical direct application methodology (e.g. shrouds).
1-5m/s	Wind toward sensitive area(s)	The buffer distance on the downward boundary of the target application area and whether effective shelter is present Spray quality Sensitivity of receivers Toxicity of spray
3-6m/s	Wind away from sensitive area(s)	Spray quality Sensitivity of receivers Toxicity of spray
Wind speed	**Wind direction**	**Additional requirements to be assessed**
Aerial spraying – assessed risk		

0-1 m/s	Any wind direction (not inversion or ponding conditions)	The buffer distance on all boundaries of the target application area and whether effective shelter is present Height of spray release and risk of spray drift Sensitivity of receivers Toxicity of spray Spray quality is as coarse as possible
1-5 m/s	Wind away from sensitive area(s)	Height of spray release and risk of spray drift Sensitivity of receivers Toxicity of spray Spray quality being as coarse as possible
1-3 m/s	Wind toward sensitive area(s)	The buffer distance on the downward boundary of the target application area and whether effective shelter is present Height of spray release and risk of spray drift Sensitivity of receivers Toxicity of spray Spray quality being as coarse as possible

Annexure D – Spray Assessment Guidelines (Horticulture New Zealand)

GROWSafe

Date and time:

Applicator's name:

Applicator's certification:

Location:

Target pest:

Method of application:
Equipment:
Nozzles:
Speed:
Pressure:
Water rate:

PPE worn: (circle) Gloves Hat Boots Cotton overalls Spraysuit Eye protection Respirator Other ____________

Agrichemicals used and rate: (HSR number)

Additives used and rate:

Total chemical used:

Sensitive areas:

Measures taken to avoid spraydrift:

Notification: (who, when, how)

Other notes: (re-entry, withholding, signage, disposal, etc)

Weather

Wind speed and direction (circle)										
NW					N					NE
	4				4				4	
		3			3			3		
			2		2		2			
				1	1	1				
W	4	3	2	1	0	1	2	3	4	E
				1	1	1				
			2		2		2			
		3			3			3		
	4				4				4	
SW					S					SE

0 = No wind
1 = 1-5 km/hour
2 = 5-10 km/hour
3 = 10-15 km/hour
4 = 15+ km/hour

Temperature (circle)
0-5 °C
6-10 °C
11-15 °C
16-20 °C
21-25 °C
26+ °C

Humidity (circle)
Very high (almost drizzling)
High
Average
Low
Very low (dry)

Results achieved: