BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY
AT WELLINGTON

IN THE MATTER of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

AND

IN THE MATTER of applications for marine consents and marine discharge consents by Trans-Tasman Resources Limited to undertake iron ore extraction and processing operations offshore in the South Taranaki Bight

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MEMORANDUM OF COUNSEL ASSISTING THE DECISION-MAKING COMMITTEE – FURTHER RESPONSE TO MINUTE 40

17 May 2017

Environmental Protection Authority
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MAY IT PLEASE THE COMMITTEE:

INTRODUCTION

1. This is the second memorandum to respond to Minute 40, in which the Decision-Making Committee ("**DMC**") asked counsel assisting the DMC to provide advice on a number of legal issues. Advice on issues specifically relating to conditions was set out in our memorandum dated 13 April 2017, and this memorandum addresses the remaining matters raised in Minute 40.

2. Those matters are as follows:

    (a) Provide a description of the inter-relationship between the marine consenting regime and other marine management regimes ("**MMRs**"), in the context of the requirement in section 59(2)(h) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("**the Act**") to take into account *"the nature and effect of other marine management regimes"*.

    (b) In the context of the inter-relationship between the marine consenting regime and the Resource Management Act 1991 ("**RMA**") and, in particular, in light of the proposal's effects on the coastal marine area ("**CMA**"), what is the relevance to the DMC's decision of instruments made under the RMA relating to the CMA?

    (c) When determining the duration of a consent, what are the relevant considerations for the DMC to take into account under section 73(2)(c) of the Act in respect of the duration of any other legislative authorisations?

    (d) What is the relevance to the DMC's decision of New Zealand's international obligations, including in respect of:

        (i) the precautionary principle?

        (ii) human rights, including the United Nations Declaration on the Rights of Indigenous Peoples?

    (e) What legal principles apply to interpreting the scope of section 59(2)(m) of the Act?

    (f) What is the effect of section 12 of the Act, in the context of the ability for the DMC to take into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi in its decision (including under section 59(2)(m) of the Act)?

(g) Does the definition of *"existing interest"* or any other aspect of the Act enable the DMC to consider:

(i) a historical or contemporary claim under the Treaty of Waitangi/Te Tiriti o Waitangi that has not yet been settled?

(ii) a potential future interest (such as a whale-watching venture)?

(h) Does the Act enable the DMC to take into account effects of the proposal on cultural/spiritual/metaphysical values?

(i) Does section 59(2)(f) (or any other aspect of the Act) differentiate between the relevance to the DMC's decision of the economic benefits of the proposal, at a national, regional, and local level?

(j) What is the precedent value (if any) of the following decisions of the Environmental Protection Authority ("**EPA**"):

(i) the completeness decision of the EPA for this application?

(ii) previous decisions on marine consent applications (including any conditions imposed) on the decision for this DMC?

(iii) the decision to be made by this DMC for future decisions on marine consent applications?

(k) Does the Act enable the DMC to take into account a *"permitted baseline"* concept?

3. These matters are addressed in turn below.

PROVIDE A DESCRIPTION OF THE INTER-RELATIONSHIP BETWEEN THE MARINE CONSENTING REGIME AND OTHER MMRs, IN THE CONTEXT OF THE REQUIREMENT IN SECTION 59(2)(H) OF THE ACT TO TAKE INTO ACCOUNT "THE NATURE AND EFFECT OF OTHER MARINE MANAGEMENT REGIMES"

Introduction

4. Other *"marine management regimes"* have legal effect within the area to which the Act applies, namely New Zealand's territorial sea, exclusive economic zone ("**EEZ**"), and continental shelf, and accordingly the Act provides some guidance on how certain functions under the Act inter-relate with those MMRs.

5. The definition of marine management regime (in section 7) *"includes the 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."

6. Section 7(2) provides that *"the marine management regimes referred to in this section include those established under"* 15 specified statutes (including the RMA, discussed further below).

7. As noted in the question posed by the DMC, section 59(2)(h) of the Act requires the DMC, when considering an application for marine consent and submissions on the application, to *"take into account (…) the nature and effect of other marine management regimes"*.

8. Other relevant directives in the Act relating to MMRs are as follows:

   (a) an impact assessment must *"specify the measures that the applicant intends to take to avoid, remedy, or mitigate the adverse effects identified"*, including *"any measures required by another [MMR] and any measures required by or under the Health and Safety at Work Act 2015 that may have the effect of avoiding, remedying, or mitigating the adverse effects of the activity on the environment or existing interests"* (section 39(4)); and

   (b) as discussed in our memorandum of counsel dated 13 April 2017, section 63(4) provides that, *"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"*.[1]

Take into account

9. The phrase *"take into account"* in legislation has a well-established meaning, and requires a decision-maker to consider a stated factor, weigh it with other relevant factors, and exercise its discretion in deciding what weight (if any) each factor should be given.

10. The High Court in *Bleakley*[2] examined the phrase in the context of the Hazardous Substances and New Organisms Act 1996, and observed:

> *"There is a deliberate legislative contrast between s5 "recognise and provide for" and s6 "take into account". When Parliament intended that actual provision be made for a factor, Parliament said so. One does not "provide for" a factor by considering and then discarding it. In that*

[1] See also sections 28(1)(c) and 33(3)(i) relating to regulations.
[2] *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213.

light, the obligation "to take into account" in s6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision – to weigh it up along with other factors – with the ability to give it considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate."[3]

11. Similarly, the phrase *"must have regard to"*, used in section 59(3), has been held in the RMA context to indicate a requirement for the decision-maker to *"give genuine attention and thought to the matters set out (...), but they must not necessarily be accepted"*.[4] Thus the DMC must, under section 59(3), give genuine attention and thought to all submissions made and evidence given in relation to TTRL's marine consent application, any advice, reports, or information it has sought and received in relation to the application, and any advice received from Ngā Kaihautū Tikanga Taiao, but need not accept all of those matters; rather, the DMC must evaluate all of the information and determine what weight to ascribe to the various aspects of it in making its decision.

The section 59(2)(h) requirement

12. It follows that the DMC, while required by section 59(2)(h) to take into account *"the nature and effect of other marine management regimes"*, has a broad discretion to give such weight to those matters in its decision as it sees fit.

13. In any given case, for example, regulations forming part of a particular MMR may have no relevance to the application being determined by a DMC, in which case they should be disregarded by the DMC and afforded no weight in its decision. In a different scenario, those regulations may be relevant to the DMC's decision, in which case the weight to be given to the regulations is a matter to be determined by the DMC.

14. Further, given the breadth of the definition of *"marine management regime"* (to include *"the regulations, rules, and policies made and the functions, duties, and powers conferred under an Act"*), in our view the DMC is empowered to consider a wide range of aspects of such regimes in determining whether to grant marine consent and, if so, which conditions to impose.

[3] *Bleakley* at [72].
[4] *Foodstuffs (South Island) Limited v Christchurch City Council* (1999) 5 ELRNZ 308 (HC).

15. These aspects could include how those regimes regulate the activities for which marine consent is sought. Considering any measures under other MMRs to regulate potential adverse environmental effects of those activities (which must be described in an impact assessment), for example, could inform an evaluation of those effects and decisions relating to marine consent conditions. As discussed in our memorandum of 13 April 2017,[5] it may be that a marine consent condition merely duplicating a requirement of an MMR does not further the purpose of the Act or serve any useful function.

16. Other relevant factors might include how other MMRs regulate other activities that may be *"existing interests"* affected by the activities for which marine consent is sought.

IN THE CONTEXT OF THE INTER-RELATIONSHIP BETWEEN THE MARINE CONSENTING REGIME AND THE RMA, AND IN PARTICULAR, IN LIGHT OF THE PROPOSAL'S EFFECTS ON THE CMA, WHAT IS THE RELEVANCE TO THE DMC'S DECISION OF INSTRUMENTS MADE UNDER THE RMA RELATING TO THE CMA?

17. As discussed above, section 59(2)(h) requires the DMC to take into account the nature and effect of any *"regulations, rules, and policies"* made under the RMA.[6]

18. In our view such *"regulations, rules, and policies"* include planning instruments prepared by local authorities under the RMA, as well as policy direction provided by central government such as through the New Zealand Coastal Policy Statement 2010 ("**NZCPS**").[7] The nature and effect of the NZCPS and other planning instruments must therefore be taken into account by the DMC, notwithstanding that those documents do not apply within the area regulated by the Act.

19. That said, as discussed above, the Act gives little guidance on **how** the DMC should take into account the nature and effect of MMRs, including RMA instruments. 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.

20. The DMC considering the earlier marine consent application by Trans-Tasman Resources Limited ("**TTRL**") sought advice on a different issue,

[5] At paragraphs 7 to 18.
[6] Section 7(2)(l).
[7] The NZCPS is an instrument *"to state policies in order to achieve the purpose of the [RMA] in relation to the coastal environment of New Zealand"*; section 56 of the RMA; page 5 of the NZCPS 2010.

namely the relevance of the NZCPS to activities within the EEZ.[8] The advice concluded that the NZCPS does not apply within the EEZ because *"the coastal environment of New Zealand"*, to which the NZCPS applies, excludes *"any area beyond the territorial sea"*.[9] The advice also noted that the NZCPS might be relevant "*to the assessment of marine consent activities under the EEZ Act (…) as information about the policy framework applying within proximate parts of the CMA*". We agree, for the reasons discussed above.

WHEN DETERMINING THE DURATION OF A CONSENT, WHAT ARE THE RELEVANT CONSIDERATIONS FOR THE DMC TO TAKE INTO ACCOUNT UNDER SECTION 73(2)(c) OF THE ACT IN RESPECT OF THE DURATION OF ANY OTHER LEGISLATIVE AUTHORISATIONS?

21. Should the DMC be minded to grant the application before it, sections 73 and 87H of the Act apply to the duration of the marine consent and the marine discharge consent (respectively).

22. Section 73 provides as follows:

> ***73 Duration of marine consent***
>
> *(1) The duration of a marine consent is—*
>
> *(a) 35 years after the date of the granting of the consent; or*
>
> *(b) a period less than 35 years that is specified in the consent.*
>
> *(2) When determining the duration of the consent, the Environmental Protection Authority must—*
>
> *(a) comply with sections 59 and 61; and*
>
> *(b) take into account the duration sought by the applicant; and*
>
> *(c) take into account the duration of any other legislative authorisations granted or required for the activity that is the subject of the application for consent.*

23. Section 87H provides as follows:

> ***87H Duration of marine discharge consents and marine dumping consents***
>
> *(1) The duration of a marine discharge consent or a marine dumping consent is the term specified in the consent.*

[8] Memorandum of counsel in response to questions from the decision-making committee, 1 April 2014, page 17.
[9] At 18.

> *(2) However, the duration must not be more than 35 years.*
>
> *(3) If no duration is specified in a consent, its duration is 5 years.*
>
> *(4) When determining the duration of a consent, the Environmental Protection Authority must comply with sections 73(2)(b) and (c), 87D, and 87E."*

24. The effect of section 73(2)(c) (and section 87H(4)) is that the DMC must, when determining the duration of marine consents and marine discharge consents, *"take into account the duration of any other legislative authorisations granted or required for the activity (…)"*

25. TTRL has advised of a number of other legislative authorisations that it has already obtained, or will require, in order to carry out the mining and discharge activities that are the subject of its application for marine consents and marine discharge consents.[10] The opening legal submissions for TTRL set out that it:[11]

> *"currently holds a minerals mining permit (#55581) for the extraction of iron sands from the STB. The permit was granted under the Crown Minerals Act 1991 for a 20 year term commencing on 2 May 2014."*

26. Section 73(2)(c) requires that the DMC *"take into account"* the duration of those other legislative authorisations. As noted above, that obligation is:[12]

> *"(…) not intended to be higher than an obligation to consider the factor concerned in the course of making a decision – to weigh it up along with other factors – with the ability to give it considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate."*

27. If considering the appropriate duration of the marine consent and marine discharge consent, therefore, the DMC must be cognisant of, and take into account, the fact that (for example) the minerals mining permit referred to above was granted on a 20-year term that is due to expire in 2034. The DMC may wish to consider specifically, for example, whether or not there is merit in aligning the duration of the marine and marine discharge consents with the term of the minerals mining permit.

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[10] The activities subject to the marine consent and marine discharge consent applications are set out in the application documents. Those activities are listed by reference to the activities listed in section 20 and subpart 2 of part 2 of the Act, in keeping with the definition of the term "activity" in section 7 of the Act.
[11] At paragraph 30. In his evidence for TTRL, Mr Patrick refers to other authorisations under the Maritime Transport Act 1994, Hazardous Substances and New Organisms Act 1996, and Health and Safety at Work Act 2015.
[12] *Bleakley* at [72].

28. The DMC is entitled to consider and weigh that information in a manner it sees fit, together with the other mandatory considerations set out in section 73(2) and 87H(4). The DMC should apply its judgment, in light of the evidence and submissions it has received, in doing so.

WHAT IS THE RELEVANCE TO THE DMC'S DECISION OF NEW ZEALAND'S INTERNATIONAL OBLIGATIONS IN RESPECT OF THE PRECAUTIONARY PRINCIPLE?

International obligations

29. Section 11 of the Act provides that:

> *"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)."*[13]

30. The DMC considering the application for marine consent by Chatham Rock Phosphate Limited in 2014 obtained legal advice on the relevance of New Zealand's obligations under international instruments, including the precautionary principle or approach, to decisions under the Act.[14] That advice considered both the express reference in section 11 to New Zealand's obligations, and common law principles regarding applicability of international obligations domestically.[15]

31. The advice noted that the traditional legal position, that a state's international obligations have no part in its domestic law unless incorporated by statute, is now recognised as being too rigid:

> *"The courts are willing to have regard to international instruments in the development of the common law, and there is said to be a "presumption of statutory interpretation that so far as its wording allows*

[13] Subsections (c) and (d) were introduced by the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013, and brought into force on 31 October 2015.
[14] Memorandum of Counsel to assist the Decision-making Committee, 12 November 2014.
[15] At [3].

legislation should be read in a way which is consistent with New Zealand's international obligations"."[16]

32. The advice then expressed the following views:[17]

> *"7. We agree with [counsel for the applicant] that s 11 of the Act* generally[18] *evinces a parliamentary intent not to require decision-makers to do anything more than apply the decision-making criteria in order to implement New Zealand's international obligations. We consider s 11 is intended to indicate that in formulating the Act, Parliament has turned its mind to New Zealand's relevant international obligations and fashioned the legislation to enable those obligations to be met*.
>
> *8. That is supported by the evolution of s 11 (…), and in addition is supported by the content of the Supplementary Order Paper describing the final changes to the section:*[19]
>
> > *New clause 11 records that the Act continues or enables the implementation of New Zealand's international obligations so that a decision-maker under the Act does not need to look beyond the Act to be sure that he or she is complying with those obligations.*
>
> *9. However, for two reasons that is not a complete answer (…)"*

33. Those reasons were that:

(a) while the Act does not **require** decision-makers to look beyond the Act to consider New Zealand's international obligations, nor does it expressly **preclude** decision-makers from having regard to international instruments; and

(b) section 59 does not set strict assessment criteria, but rather lists a range of matters to be taken into account, and having a discretion to have regard to an international instrument *"seems consistent with the 'enabling' function referred to in s 11"*.[20]

34. The *"evolution of s 11"* noted in paragraph 8 of that advice refers to the fact that clause 11 in the bill originally read *"This Act must be interpreted, and all*

[16] At [6], relying on decisions in *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [6], and *Takamore v Clarke* [2012] 1 NZLR 573 (CA) at [241].
[17] From [7].
[18] The emphasis is in the original text.
[19] Explanatory Note to Supplementary Order Paper No.100, Tuesday 14 August 2012.
[20] Memorandum of counsel to assist the Decision-making Committee, 12 November 2014, at [10].

persons performing functions and duties or exercising powers under it must act, consistently with New Zealand's international obligations under the Convention (…)".

35. We respectfully agree with that advice, and consider that the DMC:

    (a) is not, generally speaking, required to look beyond the Act to consider the nature and effect of New Zealand's international obligations, including under the conventions listed in section 11;

    (b) is not precluded, however, from taking guidance from an international instrument as relevant to a matter required to be taken into account in its decision; and

    (c) must interpret the Act in a way that is consistent with New Zealand's international obligations only *"so far as its wording allows"*. That is, the DMC should be mindful of indications in the Act that Parliament has deliberately taken an approach to subject matter that differs from that provided in an international instrument.

36. Previous decisions of the EPA on notified applications for marine consent have applied a similar interpretation.[21]

The precautionary principle

37. In our view the principles summarised above apply equally to the specific question posed about the relevance to the DMC's decision of the precautionary principle or approach.

38. MARPOL and the London Convention – two of the conventions referred to in section 11 – contain references to the precautionary approach. The preamble to the Protocol of 1997 to amend MARPOL invokes the Rio Declaration:

    > *"The Parties to the Present Protocol (…) RECALLING Principle 15 of the Rio Declaration on Environment and Development which calls for the application of a precautionary approach".*[22]

39. In respect of the London Convention, Article 3(1) of the London Protocol to the Convention also refers to a precautionary approach:

[21] Māui Offshore Facilities – Shell Todd Oil Services Limited, Reasons for Decision on Application for Marine Consent, 4 June 2015, EEZ000010 at 136, 137. Decision on Marine Consent Application by Chatham Rock Phosphate 10 February 2015 EEZ000006 at 77. OMV Maari decision on Application for Marine Consent EEZ000007 15 December 2014 at 105, 106. Trans-Tasman Resources Ltd Marine Consent Decision 17 June 2014 at 93.

[22] Page 55 of the current MARPOL text as amended. Note that New Zealand is not currently a contracting State in respect of the MARPOL Protocol 97 (Annex VI).

"In implementing this Protocol, Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects."

40. As the DMC is aware, section 61(2) provides that *"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"*.

41. The advice provided to the DMC considering Chatham Rock Phosphate Limited's application also addressed the relevance to the DMC's decision of the precautionary principle or approach. It noted, in the context that *"there is no singular authoritative approach"* (internationally or domestically) to applying the precautionary principle, that *"the language used in s 61 can be taken to embody the precautionary principle / approach"*.[23]

42. Such an interpretation is supported by policy documents prepared during the Act's formulation. At that time the Select Committee requested an explanation of the use of the phrase *"favour caution"* rather than a reference to the *"precautionary approach"*, and was advised as follows:[24]

"The policy intent of the Bill is to take a cautious approach to risk management in situations of scientific uncertainty such as when information is uncertain, unreliable or inadequate. Rather than merely noting the term "precautionary principle" or "precautionary approach", the EEZ Bill aims to provide more meaning as to what the concept entails for regulators, the EPA and those applying for, and objecting to, marine consent applications. Similar to s 10 of the Fisheries Act (…) the EEZ Bill requires "caution" where information is uncertain or inadequate. This is just one method of allowing for care and a cautious approach when information about an activity and its effects is uncertain. The EEZ Bill also provides for other ways in which caution can be exercised (…) Thus, like other New Zealand environmental management regimes governing the ocean, the EEZ Bill is consistent with the precautionary approach without explicitly stating it."

[23] At [25].
[24] Ministry for the Environment advice to the Local Government and Environment Select Committee on the EEZ Bill (12 February 2012); www.parliament.govt.nz.

43. Similarly, during Parliamentary debates relating to the Bill it was explained that the term *"favour caution"* was proposed to increase clarity and avoid the legal uncertainty that has resulted from implementation of the precautionary approach elsewhere.[25]

44. We therefore agree with the view expressed by counsel advising the DMC considering Chatham Rock Phosphate Limited's application that *"there appears to be no compelling reason to complement s 61(2) with an extraneous precautionary ideal".* That is, in our view there is no requirement on the DMC to apply a precautionary approach, **in addition to** the requirement to favour caution under section 61(2). Nor is it clear to us what distinction there is in practice between the section 61(2) requirement and the precautionary principle or approach as it is generally understood.

45. That said, in line with the general principle discussed above, we consider that the DMC is not precluded from taking guidance from an international instrument as relevant to the obligation to favour caution.

WHAT IS THE RELEVANCE TO THE DMC'S DECISION OF NEW ZEALAND'S INTERNATIONAL OBLIGATIONS IN RESPECT OF HUMAN RIGHTS, INCLUDING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ("UNDRIP")?

46. The analysis above – including our view that the DMC is not required to look beyond the Act to consider New Zealand's obligations – likewise applies to this question relating to human rights (including UNDRIP), with some provisos explained below.

47. One proviso is that UNDRIP is not among the list of international obligations contained in section 11, the implementation of which is continued or enabled by the Act. That said, the list is non-exhaustive so can be taken, in our view, to include UNDRIP to the extent that it *"[relates] to the marine environment"*.

48. Another relates to our view, expressed above, that the DMC is not precluded from taking guidance from an international instrument as relevant to a matter required to be taken into account in its decision. The proviso is that the DMC should be cautious in doing so if the Act already gives clear guidance about those matters.

49. In relation to UNDRIP, for example, matters such as the right of indigenous peoples to self-determination, indigenous peoples' right to property, and

[25] Smith, Nick: Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill — In Committee (21 August 2012) 683, at 4600.

rights to natural resources must, in our view, be considered in light of various provisions in the Act such as those relating to the Treaty of Waitangi (section 12 and related provisions) and existing interests, discussed further below.

WHAT LEGAL PRINCIPLES APPLY TO INTERPRETING THE SCOPE OF SECTION 59(2)(m) OF THE ACT?

50. Section 59(2)(m) of the Act states that the EPA must take into account any other matter it considers relevant and reasonably necessary to determine the application for marine consent. This paragraph operates as a catch-all provision, after the more specific requirements listed in section 59, to widen the scope of relevant considerations.

51. It is relatively common for legislation to set out decision-making criteria in this way,[26] and courts have interpreted these catch-all provisions consistently to enable other relevant considerations to be addressed by decision-makers.

52. This does not mean, however, that all matters raised in relation to a marine consent application will be *"relevant and reasonably necessary to determine [it]"*; a useful touchstone in determining relevance is whether the issue is relevant to the purpose of the Act.

53. In this context, it may be relevant to note the differences between the purpose of the Act and the purpose of the RMA. For example, adverse social and cultural effects that are not effects on *"the environment or existing interests"* could arguably be relevant in the context of section 59(2)(m), but counter-arguments might focus on the lack of a reference in the purpose of the Act to social or cultural aspects, in contrast to the RMA. This is discussed further below, in the context of the DMC's question about cultural, spiritual, and metaphysical values.

54. Moreover, a catch-all provision also does not provide unlimited scope to expand on (or take a different approach to) a specific requirement that Parliament has chosen to confine or regulate in a particular way. Thus section 59(2)(m) should be read in the context of the long list of specific matters required to be taken into account in section 59(2), and related matters bearing on the DMC's decision.

55. A related point is the general proposition of interpretation that the specific over-rides the general. An example of this is the Court of Appeal decision in *R v Frost*,[27] where the Court discussed the specific limitation set out in

[26] For example section 104 of the RMA includes section 104(1)(c) with the same wording.
[27] R v Frost [2008] NZCA 406 at [14]-[15].

section 21 of the Evidence Act 2006 in relation to the general empowerment in section 18 of that Act.

> *"Section 21 is not expressed as being subject to s 18 because it does not need to be. The specific s 21 comes after the general s 18, taking away part of its subject-matter and dealing with it specially. It creates an exception to the generality of s 18. The applicable principle of statutory interpretation is described in Burrows' Statute Law in New Zealand (3ed 2003) 317.*
>
> *To interpret s 21(1) as subject to s 18 deprives s21 of effect. Section 18 is not expressed to be subject to the general exclusion in s 8. Yet it cannot have been intended that highly prejudicial, but minimally probative, hearsay evidence is admissible because it qualifies under s 18."*

56. One specific issue, discussed further below, is the relevance of the principles of the Treaty of Waitangi to the DMC's decision. Section 12 records that, in order to recognise and respect the Crown's responsibility to give effect to those principles for the purposes of this Act, specified provisions impose certain obligations, including the section 59(2)(b) requirement on the DMC to take into account the effects of activities on existing interests. To interpret section 59(2)(m) to be an avenue to give effect to the principles of the Treaty more generally, however, could be seen as over-riding the express direction from Parliament set out in section 12.

57. Another example is the prohibition on considering effects on a person's existing interest if the person has given written approval under section 59(5)(c). While such effects remain relevant to the purpose the Act, the catch-all provision in (m) cannot be interpreted as broad enough to enable consideration of those effects as that would undermine the clear wording of section 59(5)(c).

58. Further, the express definition of *"existing interest"* in section 4 would be undermined if paragraph (m) was used to introduce a wider array of existing interests for consideration.

WHAT IS THE EFFECT OF SECTION 12 OF THE ACT, IN THE CONTEXT OF THE ABILITY FOR THE DMC TO TAKE INTO ACCOUNT THE PRINCIPLES OF

THE TREATY OF WAITANGI/TE TIRITI O WAITANGI IN ITS DECISION (INCLUDING UNDER SECTION 59(2)(m) OF THE ACT)?

59. TTRL's counsel raised this issue at paragraphs 68 to 71 of their opening legal submissions, and 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.[28] 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

[28] Its formulation is similar to other relatively recent Treaty provisions relating to non-core Crown processes, such as section 4 of the Local Government Act 2002.

(together with various other mandatory considerations). Further, the concept of existing interests provides a very express 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.[29]

DOES THE DEFINITION OF "EXISTING INTEREST" OR ANY OTHER ASPECT OF THE ACT ENABLE THE DMC TO CONSIDER:

(A) A HISTORICAL OR CONTEMPORARY CLAIM UNDER THE TREATY OF WAITANGI/TE TIRITI O WAITANGI THAT HAS NOT YET BEEN SETTLED?

68. As noted above, the DMC must take into account any effects on existing interests of allowing the activity.

69. *"Existing interest"* is defined in section 4 of the Act to mean:

> "*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 [RMA]:*

[29] In relation to effects on human health, see also paragraphs 15 to 18 of our memorandum of counsel dated 13 April 2017.

(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".

70. An interest in a settled historical or contemporary claim under the Treaty of Waitangi is clearly an existing interest, under paragraphs (d) and (e) of the definition. Likewise, protected customary rights and customary marine title, once recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 ("**MACA**"), clearly meet paragraph (f) of the definition.

71. Beyond that, in our view paragraphs (d) to (f) of the definition of *"existing interest"* do not include a **contingent** or **potential** interest, such as an interest that a person has (or asserts) in an unsettled claim under the Treaty, or an application under MACA that has not yet been determined.

72. Even where such an interest is not embodied in settlement legislation or recognised under MACA, it may still come within paragraph (a) of the definition of *"existing interest"* – that is, an interest a person has in *"any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing"*.

73. That definition requires that an activity be *"existing"*, so is not likely to include planned activities or activities that are contingent on a settlement agreement. It also requires that activities be *"lawfully established"*, which does not require a legislative basis for the activity; common law rights will also suffice.

74. Some matters that are likely to come within paragraph (a) include people's exercise of rights of access to enter, pass over and engage in recreational activities in or on the marine and coastal area; rights of navigation within the marine and coastal area; and fishing rights; and the interest a person has in any activity that does not require consent under the RMA. This broad scope is likely to include customary or cultural practices (noting again our view, expressed above, that the principles of the Treaty support an inclusive interpretation of paragraph (a) in relation to interests asserted by Māori).

75. Even if an interest relating to an unsettled claim is not an *"existing interest"* there may yet be scope for the DMC to consider unsettled Treaty claims

pursuant to the catch-all provision in section 59(2)(m), which leaves some discretion to the DMC to determine the relevance of certain factors that are not otherwise dealt with in the Act. It may be, for example, that in certain circumstances the effects of a proposal on a person's interest in a future Treaty settlement will be considered under section 59(2)(m) – such as if a future settlement has not been finalised but has progressed far enough through the process that its terms have been agreed in a deed or are otherwise well understood.

76. Such circumstances are likely to be exceptional, however; generally, the DMC should not seek to pre-empt the outcome of Treaty settlement negotiations or to give weight to interests that are not well defined, given that the Act is focussed on existing interests rather than potential ones.

(B) A POTENTIAL FUTURE INTEREST (SUCH AS A WHALE-WATCHING VENTURE)?

77. In our view a similar analysis applies to this question; paragraph (a) of the definition of *"existing interest"* requires that the relevant activity be an existing one. If the whale-watching venture has not yet started operating, and no resource consent is held for the activity (such that it would meet paragraph (c) of the definition), it is not an existing interest.

78. Again, there may be some limited scope to consider effects on a potential activity that does not amount to an *"existing interest"* under section 59(2)(m); the DMC should exercise considerable caution, however, before reaching a conclusion that effects on a potential activity come within that provision or ascribing any weight to that matter.

79. In summary, a potential activity such as a whale-watching venture is not an *"existing interest"*. It may nevertheless be relevant to the DMC's assessment in limited, exceptional circumstances.

DOES THE ACT ENABLE THE DMC TO TAKE INTO ACCOUNT EFFECTS OF THE PROPOSAL ON CULTURAL/SPIRITUAL/METAPHYSICAL VALUES?

80. At paragraphs 68 to 71 of their opening legal submissions, counsel for TTRL noted that section 12:

    (a) does not impose any express requirement on the DMC to take into account the principles of the Treaty when making decisions on applications; but

(b) refers to the requirement for the DMC to take into account the effects on *"existing interests"*, which might include cultural values associated with any lawfully established existing activity, such that the potential existence of effects on cultural and spiritual values is a potentially relevant matter under section 59(2)(a) of the Act.[30]

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.[31]

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.

Effects on existing interests

84. As discussed above, effects on Māori interests and values can constitute *"effects on existing interests"* under several heads of the definition of *"existing interest".* The DMC must take such effects into account.

85. To recap, paragraphs (d) to (f) of the definition list particular Māori interests which qualify as existing interests under the Act, including interests that could have cultural value.

86. Paragraphs (d) and (e) relate to claims lodged by Māori with the Waitangi Tribunal that have been legally settled with the Crown. Any individual or group intended to benefit from a settlement can be said to have an *"interest"* in it. As discussed above, however, any effect on an interest in an unsettled

[30] At paragraph 170 of TTRL's opening legal submissions. We note that section 87D provides that the matters in section 59(2) must be considered in respect of the marine discharge consent application.
[31] See the corresponding definition in section 2 of the RMA.

claim is not within the scope of paragraphs (d) and (e), and is therefore not an effect to be taken into account by the EPA under those paragraphs.[32]

87. Likewise, paragraph (f) refers to an interest in a protected customary right or customary marine title that has been recognised under MACA. Such interests that have not been recognised cannot be taken into account under paragraph (f). That said, applications to the High Court for an order recognising such interests (which must by now have been filed[33]) are typically based on interests that of themselves would meet the definition of *"existing interest"*.

88. *"Rights of access, navigation, and fishing"* are expressly provided for in paragraph (a) of the definition of *"existing interest"*. A cultural interest in an access, navigation, or fishing right would give rise to an *"existing interest"*.[34] In that respect we note there is a distinction to be drawn between cultural interests, and commercial interests held by Māori.

89. More broadly, there may be other Māori cultural interests that are captured under paragraph (a) of the definition of *"existing interest"*. Interests of a cultural (rather than, or as well as, commercial) nature can come within that part of the definition. In order to do so:

    (a) there must be a *"lawfully established"* right to undertake an activity, under legislation or the common law. There are broad rights under legislation and the common law to use and occupy the coastal marine area and the EEZ, including rights of access, navigation, and fishing. This means that working out whether an activity is *"lawfully established"* will often involve asking whether the activity is prohibited in some legal way (such as through the restrictions in section 12 of the RMA, or by a regional coastal plan under the RMA); and

    (b) there will typically be an *"activity"* which is *"existing"*, in the sense that the right to undertake the activity is presently being exercised (although the legislation may treat unexercised *"rights of access, navigation, and fishing"* as an *"existing activity"*). Undertaking the activity regularly but intermittently (up to the present time) will suffice.[35]

[32] In that respect, we agree with the distinction between settled and unsettled Treaty claims drawn in legal submissions for TTRL at paragraph 178.
[33] Applications had to be filed within six years of the Act coming into force; section 100(2). The Act came into force on 3 April 2011.
[34] On balance, we think it likely that these types of interest arise even if not given effect to.
[35] But should at least be part of a connected sequence rather than isolated events.

90. By way of example, the potential effects of an activity on the existing, lawfully established exercise of kaitiaki responsibilities in the coastal environment might fall within the scope of paragraph (a).

Any other matter

91. As discussed above, when considering a marine consent application the DMC must take into account *"any other matter the [DMC] considers relevant and reasonably necessary to determine the application"* (section 59(2)(m)). If the DMC considers Māori interests or values to be an *"other matter"* that is relevant and reasonably necessary to determine the application, then it must take those interests or values into account.

92. That said, we repeat that care should be taken if a decision-maker intends to base its decision on a cultural factor that is relevant only by way of the catch-all *"any other matter"* provision. This is because the relevance of *"any other matter"* must be determined by reference to the context of the Act, and its purpose. That purpose, set out in section 10, does not refer to social or cultural factors.

93. We note also that, if the DMC grants consent, it may impose any condition that it considers appropriate to deal with adverse effects of the activity *"on the environment or existing interests"*. This indicates that a condition could not be imposed to deal with adverse cultural effects if they were taken into account as *"any other matter"*.

DOES SECTION 59(2)(f) (OR ANY OTHER ASPECT OF THE ACT) DIFFERENTIATE BETWEEN THE RELEVANCE TO THE DMC'S DECISION OF THE ECONOMIC BENEFITS OF THE PROPOSAL, AT A NATIONAL, REGIONAL, AND LOCAL LEVEL?

Background

94. TTRL's position on this issue, explained at paragraphs 194 to 202 of its counsel's opening legal submissions, was that there is no specific requirement to consider economic benefits at a local or regional level, but that it had nonetheless provided such an assessment.

95. Counsel for KASM and Greenpeace noted at paragraph 19 of their opening legal submissions that the DMC considering TTRL's first application found that *"the lack of clarity about the extent of economic benefit to New Zealand outside of royalties and taxes and the economic value of the adverse effects, cannot be remedied by the imposition of other lawful conditions that we could*

require based on the evidence before us".[36] Counsel argued that it is therefore incumbent on TTRL to complete those analyses properly.

96. As an initial comment, we do not understand there to be any dispute that information provided about the economic benefits of the proposal generally, be they at a local, regional, or national level, must be taken into account by the DMC under section 59(2)(f).

97. Nonetheless, we understand the DMC to be seeking our view on whether section 59(2)(f), or the Act more generally, **requires** information to be provided and considered on the economic benefits of allowing the application **at each of** a local, regional, and national level. This question may be moot if, as counsel for TTRL assert, that analysis has in fact been undertaken.

Economic benefit to New Zealand

98. In any event, the short answer is that the Act does not explicitly differentiate between the relevance to the DMC's decision of economic benefits at a local, regional, or national level. While section 59(2)(f) refers to the *"economic benefit to New Zealand"*, it does not set any threshold level (such as *"nation-wide"* or *"nationally-felt"*) below which economic benefits become irrelevant to the DMC's decision.

99. Further, as a matter of logic an economic benefit to a region or locality within New Zealand will give rise to a benefit to New Zealand as a whole, unless it purely involves a transfer of economic benefit from one region to another within New Zealand. That said, obviously the scale of the benefit will influence the weight the DMC will be able to give it. In our view, however, a benefit does not have to be of a scale to be felt or recorded nationally to be considered as an *"economic benefit to New Zealand"*.

[36] At paragraph 13 of that decision.

WHAT IS THE PRECEDENT VALUE (IF ANY) OF THE FOLLOWING DECISIONS OF THE ENVIRONMENTAL PROTECTION AUTHORITY ("EPA"):

(I) THE COMPLETENESS DECISION OF THE EPA FOR THIS APPLICATION?

(II) PREVIOUS DECISIONS ON MARINE CONSENT APPLICATIONS (INCLUDING ANY CONDITIONS IMPOSED) ON THE DECISION FOR THIS DMC?

(III) THE DECISION TO BE MADE BY THIS DMC FOR FUTURE DECISIONS ON MARINE CONSENT APPLICATIONS?

100. A number of parties have referred to previous EPA and DMC decisions in evidence, which has raised the question as to the precedent value of such decisions. In the absence of relevant case law specific to the Act on this question, case law under the RMA provides useful, albeit not determinative, guidance on how a court might apply the concept of 'precedent value' in respect of the decisions listed above.

101. In *Norwood v Upper Hutt City Council,*[37] the Court of Appeal held:

> *"[15] (…) that individual applications must be considered on their merits and that a decision in one application will not create a legally binding precedent in respect of a similar application. However, an earlier decision may be relevant to the determination of a later application. Consistency of treatment, in the absence of a reason justifying inconsistency, is generally regarded as an important aspect of good public administration. In that sense "precedent effect" may be relevant.*
>
> *[16] This Court held in* Manos v Waitakere City Council *[1996] NZRMA 145 that precedent effect was a legitimate consideration under s 104(1)(d) (now s 104(1)(b)(iv)) in respect of what was treated as a discretionary activity. In* Dye v Auckland Regional City Council *[2002] 1 NZLR 337 this Court held that the precedent effect of granting a resource consent (in the sense of like cases being treated alike) was a relevant consideration for a consent authority to take into account under s 104(1)(d) when considering an application for consent to a noncomplying activity. Those decisions have been applied subsequently by the High Court and the Environment Court."*

[37] CA 37/06 4 July 2006.

102. Further, in *Stirling v Christchurch City Council*,[38] Chisholm J made the comment that:

> *"[87] This decision [Norwood] dispels any suggestion that precedent effect might not be a legitimate consideration when the application under consideration is an application for a discretionary activity.*
>
> *[88] (…) A precedent can arise when it is probable in the sense of more likely than not, that if an application is granted, other applications would be made in reliance of the first grant:* Jennings v Tasman District Council.[39] *Whether that is so will depend on all the circumstances."*

103. It is important to be mindful that while precedent and case law that has developed under the RMA may be relevant, it cannot automatically be applied in the EEZ context. On the other hand, the principle that *"consistency of treatment, in the absence of a reason justifying inconsistency, is generally regarded as an important aspect of good public administration"* is equally applicable in relation to decisions made under the Act.

104. As a general comment, then, we consider that while the DMC is not bound by previous decisions on legal matters, the DMC should not lightly adopt an inconsistent approach to matters of statutory interpretation to previous DMCs, in order to provide applicants and submitters with a degree of certainty in the sense that like cases should be treated alike except where a change to the law requires a different approach. In relation to matters of fact, however, it will be for each DMC to form a view as to the appropriate weight to give depending on the evidence before it.

105. Turning now to consider the DMC's specific question about the precedent value of the EPA's decision on completeness in relation to this application, we consider the findings of the court in *Greenpeace of New Zealand Inc v Environmental Protection Authority*[40] to be particularly relevant. In this case, MacKenzie J considered the nature of the completeness decision under section 41 of the EEZ Act and found that:

> *"[28] EPA's role under such provisions did not involve any assessment of the merits of the content of the impact assessment. Its role is limited to assessing whether the application contains information about the required matters.*

[38] (2011) 16 ELRNZ 798.
[39] HC Wellington CIV-2003-485-1654 2 June 2004.
[40] 2013 NZHC 3482.

[29] (…) The decision under s 41 is essentially administrative.

[32] (…) The evaluation of the impact assessment for the purpose of determining whether it is complete is essentially mechanical, and does not involve any kind of seal of approval on the content of the impact assessment."

106. While it may be open for the DMC to consider the EPA's decision on completeness in making the decision on the application, and weight the information in that decision accordingly, our view is that the completeness decision is of limited precedent value. This is because the completeness decision is essentially administrative in nature, based only on the information provided with the application, as compared to the decision on the application which is substantive in nature and draws on a much wider base of information.

107. On the question as to whether previous decisions on marine consent applications (including any conditions imposed) would have precedent value for the current DMC, we consider it would be open for the DMC to consider such decisions as another relevant matter under section 59(2)(m) provided the previous decisions (including conditions) are put in evidence before it. However, the question as to what degree the findings of the previous DMC are relevant to the decision on the current application will turn on the particular facts. For completeness, as noted above, we do not consider the approach taken in previous decisions to matters of fact or law to be legally binding on the current DMC.

108. In terms of determining the precedent value of the current DMC's decision on future decisions, we consider the same reasoning in relation to previous DMC decisions as discussed above will apply to future DMC decisions.

DOES THE ACT ENABLE THE DMC TO TAKE INTO ACCOUNT A "PERMITTED BASELINE" CONCEPT?

109. TTRL's legal submissions note that there are a range of activities associated with the application that are permitted activities under the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Permitted Activities) 2013 ("**2013 Regulations**"), and that the effects of those activities are in turn permitted.

110. TTRL contends that this fact is able to be considered by the DMC under section 59(2)(m) and/or section 60(d) (which requires the EPA to have regard to *"any other relevant matter"* when considering the effects of an activity on

existing interests).[41] In doing so, TTRL contends that the DMC is entitled to apply the *"permitted baseline"* concept, which allows effects associated with permitted activities to be disregarded in evaluating a proposal.

111. In the RMA context, the permitted baseline was originally a common law principle. It was then enshrined in section 104(2) of the RMA, which provides that when a consent authority is considering any actual and potential effects on the environment of allowing an activity under section 104(1)(a) of the RMA, it:

> "*(…) may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect*".

112. As reflected in the wording of section 104(2), RMA decision-makers have the discretion to apply or not apply the permitted baseline.[42]

113. There is no equivalent statutory reference to a permitted baseline in the Act. This might be read as indicating Parliament's intention that the permitted baseline should not be applied in the context of the Act.

114. On balance, however, we consider it open to the DMC to apply the principles that inform the permitted baseline concept to its determination of TTRL's application. There are two alternative, or perhaps complementary, ways in which the permitted baseline could be relevant to the DMC's decision, as follows:

    (a) The DMC might apply the common law permitted baseline concept, on the basis that applications for marine consent and marine area consent are analogous to applications for resource consent under the RMA. Applying the common law permitted baseline principle would in turn allow the DMC, when applying section 59(2)(a), to disregard (or at least give less weight to) the effects of the activities permitted by the 2013 Regulations.

    (b) Alternatively, if the DMC considers it to be relevant and reasonably necessary to its decision to consider that those activities, and therefore their adverse effects, would be permitted by the 2013 Regulations, then the DMC should take that into account under section 59(2)(m) and section 60(d). How the DMC would do so would be a matter for the DMC's discretion. However, in our view, drawing on the common law

[41] Opening legal representations on behalf of Trans-Tasman Resources Limited, 15 February 2017, at [216].
[42] This is by contrast to the previous common law principle, whereby decision-makers were **required** to apply the permitted baseline (thereby disregarding the adverse effects of permitted activities).

principle of the permitted baseline, it would be open for the DMC to give less weight to the effects of the activities that would be permitted by the 2013 Regulations.

DATED at Wellington this 17th day of May 2017

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Celia Haden / Michael Allan / David Randal

Counsel assisting the Decision-Making Committee