Before the Environment Protection Authority

Application for Marine Consents and Marine Discharge Consents to Extract and Process Iron Sand Within the South Taranaki Bight – EEZ 000011

Evidence of Jacinta Ruru and Sarah Down

On behalf of

Te Kaahui o Rauru

23 January 2017

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We, **Jacinta Arianna Ruru and Sarah Down**, affirm

I, Jacinta Ruru, am a Professor at the Faculty of Law, University of Otago and Co-Director of Ngā Pae o te Māramatanga New Zealand's Māori Centre of Research Excellence. My qualifications include PhD (University of Victoria, Canada), LLM (University of Otago, New Zealand), BA (Victoria University of Wellington, New Zealand) and I am an elected fellow of the New Zealand Royal Society. I have been employed at the Faculty of Law, University of Otago, since 1999 and commenced co-directorship of Ngā Pae o te Māramatanga in 2016.

My research is focused on exploring the rights and responsibilities of Indigenous peoples to govern, own and manage land, water and natural resources. I have published extensively in this area including specifically on mineral law and Maori: see Katharina Ruckstuhl et al *Maori and Mining* (2013) (download here: http://otago.ourarchive.ac.nz/handle/10523/4362). I am editor of the *Resource Management Journal*, co-editor of *Resource Management Theory and Practise*, and consultative editor for the *Maori Law Review*.

I, Sarah Down, am a PhD candidate at Australian National University, Canberra where I am undertaking research on Maori mineral rights. My current qualifications are a LLB (1st Hons) and a BA from the University of Canterbury. My work experience includes roles as a Research Assistant at the Ngāi Tahu Research Centre, University of Canterbury and as the National Legal Secretariat Officer for National Aboriginal and Torres Strait Islander Legal Services (NATSILS). I have also undertaken research for a number of organisations on a contractual basis including Te Rūnanga o Ngā Maata Waka (the Ōtautahi (Christchurch) National Urban Māori Authority), Ngā Hau e Whā National Marae and Community Law Canterbury.

This evidence does not constitute legal advice. This evidence is presented in our roles as academic researchers.

We have read, understand and agree to comply with the Environmental Court Practice Note 2014.

## 1.0 Summary

1. This evidence provides some context and consideration as to how the Decision Making Committee (DMC) should take into account its responsibilities to Maori in decision-making. We provide commentary on the statutory provisions of especial relevance to Maori and how the Environmental Protection Authority (EPA) has interpreted and applied these provisions in its decisions to date.

2. The evidence we provide contends that:

2.1 The DMC must take into account the effects of this proposal on the existing interests of Maori under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) in a manner that gives effect to Treaty principles including the partnership between Māori and the Crown, along with the duties this entails of acting reasonably and in good faith towards relevant iwi and hapū, of being sufficiently informed of the Treaty of Waitangi impacts of any decision if in favour of Trans Tasman Resources Limited (TTR), and of actively protecting Māori interests in their lands, waters and taonga to the *fullest extent practicable*.

2.2 The DMC should consider the cultural values and existing interests of all affected iwi.

2.3 The conclusions reached in the Impact Assessment submitted by TTR must be tested by the DMC including whether it is correct to conclude that if issued the marine consent activity will not result in any effects on the existing customary fishing interests. This will require the DMC to consider the information provided by TTR under s. 39(1)(c) and (d) and s. 39(2)(a) and (b) of the EEZ Act.

2.4 The DMC should consider whether the conditions proposed by TTR to mitigate the concerns raised by iwi are appropriate.

2.5 The DMC should take a wide view of environmental effects so as to include Maori perspectives. Adopting this approach allows the DMC to consider what effect the disturbance of the seabed and marine environment posed by the activities described in the TTR application would have on the values of Māori. Alternatively the DMC may use s. 59(2)(m) of the EEZ Act to take the cultural interests and values of Maori into account. We endorse this approach and argue that cultural values are of direct relevance to the DMC in its decision-making.

2.6 The DMC should have regard to the parallel jurisdiction of the Resource Management Act 1991. The RMA and the EEZ Act should be understood as complementary pieces of legislation. The Environment Court and appeal court jurisprudence on Treaty principles should be of relevance and interest.

2.7 While the EEZ Act lacks comparable directions to s 6(e) of the RMA for decision-makers to recognise and provide for Maori's relationship with their ancestral waters, wahi tapu and other taonga, or to s 7(a) to have particular regard to kaitiakitanga, the DMC should still do so pursuant

to legislative commitments to the Treaty of Waitangi in the EZZ and EPA Acts and He Whetu Marama.

2.8 Given Ngā Kaihautū plays an expert specialist role in the process it is appropriate for the DMC to give *considerable weight* to the Ngā Kaihautū's findings and recommendations.

2.9 If the DMC proceeds to grant this marine consent, we urge serious consideration of strong conditions in protection of iwi interests.

## 2.0 Statutory Background

3. The Environmental Protection Authority Act 2011 (EPA Act) established the Environment Protection Authority under s. 7. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) gives effect to New Zealand's obligations under the United Nations Convention on the Law of the Sea to manage and protect the natural resources of its Exclusive Economic Zone (EEZ).

4. The EEZ Act allows for activities within the EEZ to be permitted, prohibited or rendered discretionary by way of regulations. The Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 under s. 5 lists marine scientific research, prospecting and exploration as permitted activities under the EEZ Act, subject to conditions set out in the regulations. Under s. 36 of the EEZ Act, activities not classified by way of regulations under the Act fall under the category of "discretionary activities" (s. 36(1)(c)) and require a marine consent before they may be undertaken (s. 36(2)).

5. On 18 June 2014 an independent DMC appointed by the EPA refused the marine consent sought by TTR and expressed the opinion that TTR's application was premature. The DMC's decision cited numerable concerns with the overall uncertainty and inadequacy of information presented by TTR in its application, including lack of clarity about the extent of economic benefits it posed for New Zealand as opposed to impacts, and the potential adverse effects it could have on existing interests such as iwi and fishing interests. TTR reapplied to undertake iron ore extraction and processing in the South Taranaki Bight on the 23rd of August 2016.

6. As the proposal of TTR to undertake iron ore extraction and processing in the South Taranaki Bight involves activities requiring a marine consent, TTR has applied for a marine consent to the Environmental Protection Authority (EPA) pursuant to s. 38 of the EEZ Act and the EPA is conducting a hearing regarding this application pursuant to s. 50 of the Act.

7. As distinct from the right to appeal RMA consent decisions to the Environmental Court, appeals from EPA decisions on marine consents may only be made to the High Court on the limited grounds of a point of law (s. 105 of the EEZ Act). This has not occurred to date in any published case we could find.

8. In considering TTR's application for a marine consent, the EPA must take various matters into account as set out in s. 59 of EEZ Act. Matters particularly relevant to submissions on behalf of Māori may include "(a) any effects on […] existing interests of allowing the activity", which include "(i) cumulative effects", and "(b) the effects on […] existing interests of other activities undertaken in the area covered by the application or in its vicinity", which include "(i) the effects of activities that are not regulated under this Act".

9. The Act defines "existing interests" under s. 4(1) as including an interest a person has in "(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", and "(f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011". Guidance as to the manner in which these existing interests should be taken into account is provided for under s. 60. Under s. 59(3) the EPA must also have regard to "(a) any submissions made and evidence given in relation to the application" and "(c) any advice received from the Māori Advisory Committee."

10. Moreover, both the EPA Act and the EZZ Act specifically make relevant the Treaty of Waitangi.

11. The EPA Act states under s. 12:

> **Treaty of Waitangi (Te Tiriti o Waitangi)**
> In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi,—
> (a) section 18 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and
> (b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under that Act.

12. Ngā Kaihautū is the statutory Māori Advisory Committee established under s. 18 of the EPA Act. The Ngā Kaihautū has developed He Whetū Mārama as a framework to guide the EPA in the undertaking of its statutory and other obligations. He Whetū Mārama commits the EPA to four guiding Treaty of Waitangi principles: partnership, protection, participation and potential, along with commitments to informed decision making and productive relationships.

13. The EEZ Act under s. 12 states:

> **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 39, 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.

## 3.0 Previous relevant EPA decisions

### Trans-Tasman Resources Ltd 2013/2014

14. The EPA's first consideration of the EEZ Act was in relation to the TTR's first application for a marine consent. The DMC set a strong precedent as to how the EEZ Act should be interpreted to provide for meaningful Maori input.

15. The DMC interpreted the EEZ Act's Treaty provision to be "more fulsome" than its counterpart in s. 8 of the RMA, noting that the EEZ Act sets out both procedural and substantive provisions for Māori input in order to give effect to the Treaty's principles.[1] The DMC reasoned that the

[1] Environmental Protection Agency *Trans –Tasman Resources Limited Marine Consent Decision* (EEZ000004, 17 June 2014) at [95].

matters of concern or interest to Māori that are explicitly set out in s. 6 and 7 of the RMA are addressed in the EEZ Act through the EPA's obligations to notify relevant Maori groups of marine consent applications, to receive advice from Ngā Kaihautū, and to take into account existing interests of Māori among others.[2]

16. The DMC understood the EEZ Act to anticipate the special relationship of Maori with the moana and other marine taonga and their role as kaitiaki as "an integral part of the factual matrix within which decisions on natural resource use, development and protection should be made".[3] Furthermore, it acknowledged the necessity of understanding how Māori existing interests are defined and how they might be affected by a proposal within the paradigm of mātauranga Māori.

17. In keeping with the broad scope of its mandate, the DMC canvassed a wide variety of issues the project posed for Māori in its decision. For example, the DMC accepted the evidence of Ngā Kaihautū that TTR's application failed to consider effects on Māori customary and commercial fishing, wāhi tapu, social and economic implications and exercising of kaitiakitanga in concluding that iwi's existing interests "would potentially be adversely affected in more than a minor way."[4] The DMC also noted problems with TTR's consultation with iwi as weakening its proposal, at least in terms of TTR's ability to assess and provide for iwi's existing interests.[5] Similarly, the DMC expressed concerns with the fact that TTR had proposed conditions for its project that would provide a significant role for iwi if the marine consent was granted, but had not involved iwi in designing these conditions, nor had they demonstrated that iwi were willing and able to be involved in the manner proposed or that they felt the conditions were appropriate.[6] In assessing the proposal's potential effects on customary fishing as an existing interest, the DMC interpreted this to include consideration of catch, quota entitlement, mahinga kai, tangata kaitiaki and kaitiakitanga.[7]

18. The decision also took an expansive interpretation to the settlement of a historical claim under the Treaty of Waitangi Act 1975, finding that it included potential future settlement of historical claims, in addition to settlements that have been enacted by legislation.[8] In the TTR 2014 decision the two applications lodged by for Customary Marine title under the Marine and

[2] At [96].
[3] At [97].
[4] At [624] and [642].
[5] At [128] and [624]
[6] At [632], [636] and [641].
[7] At [688].
[8] At [586].

Coastal Area Act (MCA) was acknowledged, but whether and if so how this was taken into account in decision-making was not made explicit.

19. For discussion of this decision, see Benjamin Ralston and Jacinta Ruru "Landmark EPA decision" [2014] NZLJ 284-285. This article is annexed to this submission.

### Chatham Rock Phosphate 2014

20. Chatham Rock Phosphate Ltd (CRP) lodged a marine consent application to mine phosphorite nodules from the Chatham Rise on 14 May 2014. The DMC refused the marine consent on 11 February 2015. In refusing the application the DMC cited a number of reasons, prominent among which was the "technical and practical uncertainties associated with the mining operation itself"[9] and the significant further information and modification of proposed conditions that would have been required in "order for the DMC to be confident that it knew what kind of operation it was authorising, and with appropriate safeguards."[10]

21. The decision was important in terms of how the DMC engaged with matters relevant to Maori. In interpreting s 12 of the EEZ Act the DMC found that "the Treaty of Waitangi is taken into account in terms of both the decision-making process and its outcome."[11]

22. It was noted that a range of existing interests were involved in the application a number of which involved iwi and imi (dialect for iwi). With respect to existing interests in fisheries the DMC explored the significant interests that iwi and imi held in fisheries, in particular acknowledging that fisheries were crucial to the livelihood of Chatham Island, Moriori and Ngāti Mutunga. It was noted that, "[f]or iwi and imi holding fishing quota, there was a concern that adverse effects from the proposed mining operation would reduce the value of their present assets and future development rights as well as undermine important concepts such as Rangatiratanga and Kaitiakitanga." The DMC also discussed the "Rohe Moana" which had been established by Moriori and Ngati Mutunga in the Chatham Rise noting that the "interests that arise in respect of the Rohe Moana (both in the sense of the physical activity of food gathering and in terms of the special relationship between tangata whenua and the Rohe Moana)

[9] Environmental Protection Agency *Decision on Marine Consent Application Chatham Rock Phosphate Limited: To Mine Phosphorite Nodules on the Chatham Rise* (EEZ00006, 11 February 2015) at [137].
[10] At [143].
[11] At [69].

constitute "existing interests" under the EEZ Act."[12] Ngai Tahu was also identified as having an interest with regard to marine eco-tourism, specifically in Kaikoura Whale Watch Ltd.[13]

23. After discussing in detail these existing interests the DMC determined that "the evidence presented...particularly the views of relevant expert groups, did not support the full extent of claims made by existing interest groups as to the likely adverse effects of the mining operation. There were however uncertainties and therefore risks involved in the proposal that had the potential to impact on existing interests."[14] Overall it was found, "that the effects of the mining proposal on existing interests generally are unlikely to arise to the extent submitted and are not determinative of the application. However, the DMC acknowledges the concerns of existing interest holders regarding the mining proposal which they see as involving a number of uncertainties and posing risks to their livelihood and wellbeing."[15]

24. With regards to the level of consultation with existing interests required by the applicant the DMC noted that while, "there is no requirement under the EEZ Act for an applicant to consult with existing interests in developing its case for a marine consent, it is clear that in order to understand and address the concerns of existing interest groups, a certain level of consultation is necessary."[16] Furthermore, the DMC found that in order to be effective consultation needs to be undertaken with a degree of sensitivity and care particularly with regards to tangata whenua.[17]

25. The decision was also notable for how the DMC used s. 59(2)(m) of the EEZ Act which provides that the EPA may consider "any other matter the EPA considers relevant and reasonably necessary to determine the application." The DMC used this provision to consider the general effect on the Chatham Island community acknowledging, "the importance attached by members of the Chatham Islands community to activities on the Chatham Rise that might affect their livelihood."[18] Overall however, the DMC found that it could not establish with any certainty what particular additional adverse effects the mining project would have had on the interests of the Chatham Islands community.[19] Consequently, the DMC concluded that "[i]n the

[12] At [622].
[13] See [635] and [637].
[14] At [700].
[15] At [707].
[16] At [638].
[17] At [638].
[18] At [785].
[19] At [785].

particular circumstances of this application, the Chatham Islands community's concerns did not materially influence the DMC's decision."[20]

26. The DMC decision also discussed how the hearing had included significant debate "as to whether, and if so to what extent, cultural beliefs, values and interests should be taken into account in consideration of the application."[21] It was noted in the decision that it was contended by the applicant, "that cultural concerns, which do not qualify as an existing interest, should not be given undue weight in the decision-making process."[22] On the other hand, the DMC noted that "a number of submitters argued that their cultural interests were directly relevant to the application whether or not an "activity" could be shown to have taken place."[23] In this regard, it was noted by the DMC that a feature of the testimony and the Ngā Kaihautū Report was "the impact of the proposal on tikanga and a range of cultural beliefs, interests and values."[24]

27. In its findings the DMC accepted that while the EEZ Act definition of an existing interest is constrained, s. 59(2)(m) allows the DMC to consider cultural matters if it considers them relevant and reasonably necessary in its determination of the application. The DMC noted that there was "no specific guidance in the EEZ Act as to just how adverse effects of this nature should be assessed and weighed."[25] The DMC nonetheless accepted "that the impact of this proposal on the cultural and spiritual values and sense of identity of iwi and imi is a matter of concern and importance to a number of individuals and groups with a direct interest in the application and that it is a matter that the DMC needed to take into account as relevant and reasonably necessary in terms of s. 59(2)(m) of the EEZ Act."[26] While the DMC did not see these matters as determinative in the decision, it was stated that it did "wish to recognise the importance attached to these effects by a large number of submitters and witnesses."[27]

28. The decision was also notable for its discussion of the RMA. It was noted by the DMC that a number of parties had referred to precedents and case law involving the RMA. It was found however, that while many parallels may be drawn between the RMA and the EEZ Act they are also very different pieces of legislation.[28] In this regard, the DMC noted that the "Acts have

[20] At [785].
[21] At [797].
[22] At [793].
[23] At [801].
[24] At [795].
[25] At [808].
[26] At [808].
[27] At [809].
[28] At [78].

different stated purposes; the term "natural resources" is defined more narrowly in the EEZ Act; and the EEZ Act does not refer specifically to either communities or social and cultural wellbeing as factors in decision-making."[29] On the other hand it was noted "the EEZ Act is more explicit than the RMA in spelling out the matters to be taken into account, and information principles to be observed by decision-makers."[30] On the basis of these differences the EPA concluded that while "the precedents and case law which have developed in light of the RMA may be relevant, they cannot automatically be applied in an EEZ Act context."[31]

**OMV (Maari)**

29. OMV New Zealand Ltd (OMV) lodged a marine consent application on 4 June 2014 to complete a development drilling programme at the Maari field in the South Taranaki Bight in accordance with its petroleum mining permit. The Decision-making Committee granted the marine consent, subject to conditions on 18 December 2014.

30. The DMC took into account a broad number of considerations with respect to Maori interests. It noted that the EPA's Staff Report and the Ngā Kaihautū report provided considerable analysis on Maori interests. The EPA Staff Report, for example, explored how preserving iwi fisheries interests was critical to kaitiakitanga, rangatiratanga and the maintenance of mātauranga Māori.[32]

31. Importantly, the DMC, in response to an assertion by OMV that they were not legally obliged to consult,[33] noted that, 'while the duty to consult under the EEZ Act is not a legal requirement, there is an expectation that appropriate consultation with iwi must occur.'[34] The DMC noted that the expectation that applicants will consult was, 'consistent with the principles of the Treaty of Waitangi.'[35]

32. The DMC acknowledged the Maori values and world views that made consultation critical stating that, "[t]he site is a cultural site of significance for iwi, and in order for them to undertake their kaitiakitanga responsibilities, to protect the mauri of the area and to maintain their mana, they must be kept informed on an ongoing basis of activities in a timely and meaningful way."[36]

[29] At [78].
[30] At [78].
[31] At [78].
[32] Environmental Protection Agency *Decision on Marine Consent Application OMV New Zealand Limited: Development Drilling at the Maari Field in the Taranaki Bight* (EEZ000007, 16 December 2014) at [224].
[33] At [216].
[34] At [230].
[35] At [230].
[36] At [230].

The DMC was also of the view that "all iwi and Māori entities that may be affected by the drilling programme" should be kept informed on an ongoing basis in a timely and meaningful way.[37]

### Shell Todd Oil Service 2014

33. Shell Todd Oil Services (STOS) lodged a marine consent application on 15 December 2014 to continue offshore activities associated with the Māui natural gas field operating under Petroleum Mining Licence (PML) 381012. The Decision-making Committee granted the marine consent, subject to conditions, on 5 June 2015.

34. The DMC made a number of important findings in relation to Maori.

35. With regard to s. 4(f) of the EEZ Act, which relates to customary marine title, the DMC noted that two applications for customary marine title had been lodged that were in the general vicinity of the Māui offshore facilities.[38] In light of this potential customary marine title, the Ngā Kaihautū Report had made a number of recommendations for the EPA and STOS. These were:[39]

    (a) Recognise that there is a process for local Māori to confirm and institute their customary rights in the marine and coastal area. Provide a mechanism over the tenure of the consent to respond to this customary right;

    (b) Alternatively, reduce the duration of the marine consent to five years to take into account the potential changing rights in the marine and coastal area, as well as the redress and settlement of WAI796 claim;

    (c) Recognise the request by Taranaki Iwi to protect its taonga (treasures);

    (d) Consider involving kaitiaki in environmental management practices for the Māui offshore facilities. If mutual benefit is identified between parties, this will enable active protection and empowerment as a representative is always present out in the ocean (exercise mana moana). May also identify taonga resources and species for STOS to incorporate in environmental monitoring programmes.

    (e)Develop environmental indicators using both mātauranga māori and western science. This will require the participation of local Māori; and

[37] At [280].
[38] Environmental Protection Agency *Shell Todd Oil Service: Maui Marine Marine Consent* (EEZ000010, 4 June 2015) at [283].
[39] At [284].

(f) Develop an economic strategy with Taranaki Iwi to recognise the interests in the petroleum resource.

36. The DMC took advice from Buddle Findlay as to how it could take into consideration the Ngā Kaihautū's report's recommendations.[40] The DMC summarised the opinion of Buddle Findlay in the following way:[41]

> In terms of the recommendation that the EPA recognise the processes under the MACA Act and provide a mechanism over the tenure of the marine consent to respond to newly recognised interests, Buddle Findlay advised that the EPA should not pre-empt the outcome of ongoing and potential future MACA Act processes. However, Buddle Findlay went on to note that the EPA should, in considering STOS' application, take into account any effects of the proposal on existing, lawfully established activities that are existing interests under the EEZ Act. They stated that future applications under the MACA Act are likely to be founded on existing activities or interests within the meaning of that term.
>
> Because effects on existing activities must be considered as part of this process, it was Buddle Findlay's view that it is unnecessary for the marine consent to include a mechanism for recognising potential future MACA Act interests.
>
> In terms of the recommendation in the Ngā Kaihautū Report that marine consent be granted for a five year duration (as an alternative)to account for the possibility of customary interests being recognised under the MACA Act, Buddle Findlay advised that a short-term consent is unnecessary to achieve this end. In this regard, they stated that any effects of the proposal on any existing, lawfully established customary activities are matters to be considered as part of this marine consent process.
>
> Equally, Buddle Findlay was of the view that a "number of legal and factual matters weigh heavily against the EPA taking into account a possible future settlement of the WAI796 claim" in deciding on the marine consent application. Buddle Findlay understands that there is considerable uncertainty over any such settlement of the WAI796 claim, including potential redress, and matters such as revenue sharing in

[40] At [285].
[41] At [316]-[318].

minerals fall within the policy realm of the Government and are beyond the EPA's decision-making functions under the EEZ Act.

37. In response to this advice, the DMC concluded that:[42]

> [w]e have given careful consideration to the NKTT [Ngā Kaihautū] Report and the legal advice from Buddle Findlay, and have adopted the view that not all of the recommendations in the NKTT Report (such as in respect of a possible future settlement of the WAI796 claim) can be legally given effect to under the EEZ Act. However, we recognise that there are lawfully established cultural activities that continue to be exercised either separately or in association with iwi fisheries interests (such as kaitiakitanga, rangatiratanga and the maintenance of mātauranga māori). These are associated with preserving Māori fisheries interests, the right of iwi to make decisions and act on issues affecting their fisheries interests, and the system of knowledge associated with Māori commercial and customary activities.

38. Elsewhere, the DMC clarified that as "these applications for customary marine rights under the MACA Act had not yet been determined...the rights have not yet been 'recognised' for the purposes of clause (f) of the definition of existing interests under s. 4 of the EEZ Act."[43] Nonetheless, the EPA received evidence about Ngāruahine's interests in customary activities that underpinned their application for customary marine title which they accepted can "be considered under clause (a) [of s4 of the EEZ Act] of the definition of existing interests."[44]

39. Buddle Findlay advice also stated that the EPA must "give genuine attention and thought to the information in the report but is entitled, having heard the evidence and considered all relevant matters relating to the Application, to ascribe such weight to that information as it considers appropriate in the circumstances."[45]

40. The EPA acknowledged a range of Maori existing interests and values, including the whakapapa relationship of Māori to the area and the importance of their role as kaitiaki in protecting the mauri of the marine environment, recognising that Māori see the ocean as a holistic whole rather than segregated area and that any activity with an environmental cost impacts directly on this whakapapa relationship and Māori identity, recognising that the Māori

[42] At [319(e)].
[43] At [126].
[44] At [126].
[45] Legal advice from Buddle Findlay to the DMC, 21 April 2015.

perspective on the environment is rooted in a different cultural context to a western scientific paradigm and that ideally both views should inform the use and management of natural resources to achieve the common objective of environmental sustainability; and accepting that from a Māori perspective there are adverse effects on the environment due to the placement and disturbance from structures on the seabed, and that STOS' activities interfere with the exercise of kaitiakitanga.[46]

41. The EPA accepted "that the impact of the activities at the Māui offshore facilities on cultural and spiritual values, and sense of identity, is a matter of concern and importance to iwi, and we have taken into account Māori perspectives on environmental effects in our decision."[47] Having made this acknowledgment, the EPA did not "see these matters as determinative in making our decision, we do wish to recognise the importance attached to these effects by iwi."[48]

### 4. Trans-Tasman Resources Limited 2016

42. Against this background, the DMC must assess the latest TTR application for a marine consent.

43. In September 2016, the EPA published its *'Key Issues Report for Trans-Tasman Resources Limited offshore iron sand extraction and processing project – application for marine consents and marine discharge consents'* ('Key Issues Report'). At paragraph 100, it recognises that there are four ways Maori can have an existing interest:

> 1) customary fishing (being a lawfully established existing activity); 2) settlement of a historical claim under the Treaty of Waitangi Act 1975; 3) settlement of a contemporary claim under the Treaty of Waitangi as provided for by an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; and 4) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011.

44. TTR submitted a Cultural Values Assessment completed by Tahu Potiki,[49] and a further subsequent review undertaken by Buddy Mikaere and lodged with the EPA on the 17th of December 2016.[50]

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[46] At [298(a)-(d)].
[47] At [298(e)].
[48] At [298(e)].
[49] Tahu Potiki *Cultural Values and Assessment Analysis* (August 2016).
[50] Buddy Mikaere *Expert evidence of Buddy Mikaere on behalf of Trans Tasman Resources Limited* (17 December 2016).

45. The Key Issues Report discusses how the Impact Assessment (IA) lodged by TTR canvasses the effects of the proposal on Maori existing interests. First, the Report notes that with regards to customary fisheries the IA has identified three iwi (Nga Ruahine, Ngati Ruanui, and Ngaa Rauru) as having an existing interest.[51] The IA concludes that the project 'will not result in any effects on the existing customary fishing interests'.[52] The Key Issues Report also notes that as part of the Impact Assessment provided by TTR a report was prepared by the Te Tai Hauauru Fisheries Forum which identifies 27 sites of significance with regard to customary fisheries and concludes that some of these will potentially be affected by the project.[53] The Report produced by the Forum includes a number of recommendations, including conditions which would require monitoring of culturally important sites. However, Ngati Ruanui has confirmed that it does not endorse the Forum Report or its findings.

46. Secondly, the Impact Assessment finds that no settlements of a historical claim under the Treaty of Waitangi Act 1975 exists within the EEZ but the sediment plume will migrate into the CMA where Māori have statutory acknowledgements. The IA states that "due to the separation distance between the project area and the areas of interest and statutory acknowledgment areas, there will 'typically be no effect on the 'existing interests' of these groups'."[54] The Key Issues Report states that the DMC should test this conclusion with Māori, by considering whether or not the activities, "in particular the sediment plume and its direct and indirect effects, will have adverse impacts on the statutory acknowledgements within the CMA and if so, the extent of those effects."[55]

47. Thirdly, the IA summarises the assessment of cultural values of Ngati Ruanui based on a Cultural Values Assessment (CVA) provided by Tahu Potiki. It is noted that Ngati Ruanui did not prepare the CVA report and that Māori other than Ngati Ruanui may also have cultural values and associations which are not addressed.[56] The Key Issues Report notes the DMC will have to satisfy itself that the CVA adequately represents the views of the Ngati Ruanui "it can move on to assess the magnitude and significance of the effects of the proposal on existing interests held by Māori."[57]

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[51] Environmental Protection Agency *Key Issues Report for Trans-Tasman Resources Limited offshore iron sand extraction and processing project – application for marine consents and marine discharge consents'* (20 September 2016) at [101].
[52] At [101].
[53] At [102].
[54] At [103].
[55] At [104].
[56] At [105].
[57] At [106].

48. While these are important issues and we broadly agree with this assessment, these issues could be discussed in much greater depth. The discussion is also framed mostly around the Impact Assessment lodged by TTR and is reasonably brief.

49. Unfortunately, the Ngā Kaihautū report was only released late on Friday 20th January 2017.[58] We have therefore been unable to make any comments as our evidence has been completed Monday 23rd January for lodging with the EPA by 12pm on Tuesday 24th January 2017.

## 5. Discussion

50. Taking into account the statutory obligations, the growing EPA jurisprudence and the He Whetū Mārama framework, and the EPA document "Incorporating Maori Perspectives into Decision Making", we emphasise the following:

a) Treaty principles are relevant to the interpretation of the EEZ and how marine consent applications should be assessed. This includes how applicants consult with iwi (as per the OMV Maari decision), but is also broader and we argue relates to how the DMC must engage with its decision making responsibilities as a whole. This approach accords with the EPA's own He Whetū Mārama framework. We therefore disagree with the CVA submitted by TTR that claims, "[w]hile there is an obligation to take into account existing interests (which would include Ngāti Ruanui interests) there is no specific obligation to take into account the principles of the Treaty (such as active protection of rangatiratanga)."[59] We argue this is incorrect. Treaty principles are relevant in the assessment of the marine consent and if consented, in considering the conditions subject to this activity.

b) The DMC should consider the cultural values and existing interests of all affected iwi. This includes iwi such as Ngaa Rauru which have been recognised as holding an existing interest, even though it is Ngati Ruanui that holds mana moana in the area directly related to TTR's application. In this regard, we note that the CVA conducted by Tahu Potiki, and the subsequent review undertaken by Buddy Mikaere focus solely on Ngati Ruanui. The Key Issues Report notes that, "Māori other than Ngati Ruanui may also have cultural values and associations within the STB but the IA does not specifically assess the effects of the

[58] Accessible at http://www.epa.govt.nz/Publications/Nga_Kaihautu_Report_for%20TTRL_application.pdf
[59] Buddy Mikaere *Expert evidence of Buddy Mikaere on behalf of Trans Tasman Resources Limited* (17 December 2016) at [73].

proposed activities on these." It is useful to also recall the report from Ngā Kaihautū from the TTR 2014 application which stated that the DMC "should be satisfied that meaningful consultation has occurred with all affected iwi or their agent."[60]

c) The conclusions reached in the IA must be tested by the DMC including whether it is correct to conclude that if issued the marine consent activity will not result in any effects on the existing customary fishing interests. This will require the DMC (under s. 39(1)(c) and (d) and s39(2)(a) and (b) of the EEZ Act) to decide whether the applicant has accurately identified existing interests affected by the proposal and whether sufficient information has been provided to identify the effects on these interests (including cumulative effects). As noted in s. 39(2)(a) the detail provided must correspond "to the scale and significance of the effects that the activity may have on the environment and existing interests."

d) The DMC should consider whether the conditions proposed by TTR to mitigate the concerns raised by iwi are appropriate. In this regard, we note that in the TTR 2014 decision the DMC expressed concerns with the fact that TTR had proposed conditions for its project that would provide a significant role for iwi if the marine consent was granted, but had not involved iwi in designing these conditions, nor had they demonstrated that iwi were willing and able to be involved in the manner proposed or that they felt the conditions were appropriate.[61] The DMC should investigate whether the conditions proposed by TTR, particularly with regards to the role of iwi are appropriate given the opposition of iwi in Taranaki to the application.

e) The EPA's jurisprudence indicates that the EPA can take a wide view of environmental effects so as to include Maori perspectives.[62] Adopting this approach allows the DMC to consider what effect the disturbance of the seabed and marine environment posed by the activities described in the TTR application would have on the values of Māori.[63] In the Chatham Rock Phosphate decision the DMC also used s. 59(2)(m) of other matters to take the cultural interests and values of Maori into account. We endorse this approach and argue that cultural values are of direct relevance to the DMC in its decision-making.

[60] Ngā Kaihautū, *Report for TTR Application for a Marine Consent to undertake discretionary activity* (14 February 2014) at [42(b)].
[61] At, [632], [636] and [641].
[62] See Environmental Protection Agency *Shell Todd Oil Service: Maui Marine Marine Consent* (EEZ000010, 4 June 2015) at [287]-[296]. See also Environmental Protection Agency *Decision on Marine Consent Application OMV New Zealand Limited: Development Drilling at the Maari Field in the Taranaki Bight* (EEZ000007, 16 December 2014) at [298(e)].
[63] At [280].

f) The DMC should have regard to the parallel jurisdiction of the Resource Management Act 1991. The RMA and the EEZ Act should be understood as complementary pieces of legislation. The Environment Court and appeal court jurisprudence on Treaty principles should be of relevance and interest. While we note the point that there are differences as between the Acts (as discussed in the Chatham Rock Phosphate decision) we would argue that consideration such as This approach would accord with that taken by the DMC in the first TTR 2014 application.

g) While the EEZ Act lacks comparable directions to s 6(e) of the RMA for decision-makers to recognise and provide for Maori's relationship with their ancestral waters, wahi tapu and other taonga, or to s 7(a) to have particular regard to kaitiakitanga, the DMC should still do so pursuant to legislative commitments to the Treaty of Waitangi in the EZZ and EPA Acts and He Whetu Marama.

h) We agree with Buddle Findlay that the DMC must "give genuine attention and thought" to the advice of Ngā Kaihautū. We would emphasise however, that given Ngā Kaihautū plays an expert specialist role in the process that it is appropriate for the EPA to give *considerable weight* to the Ngā Kaihautū's findings and recommendations. Given that Parliament expressly created the Ngā Kaihautū as a way in which the EPA should take into account their Treaty obligations we argue that Parliament must have intended for Ngā Kaihautū to play a valuable role in the processes of the EPA. We urge the DMC to give serious and considered attention to the findings and recommendations of Ngā Kaihautū in their decision making.

i) If the DMC proceeds to grant this marine consent, we urge serious consideration of strong conditions in protection of iwi interests. We urge that conditions go further than that granted in the STOS decision which merely served to strengthen a requirement that is provided for under s33c of the Crown Minerals Act 1991.

Professor Jacinta Ruru
23 January 2017

Sarah Down
23 January 2017