IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA573/2018
[2020] NZCA 86

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

Hearing: 24–26 September 2019

Court: Kós P, Courtney and Goddard JJ

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

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

Judgment: 3 April 2020 at 3.00 pm

JUDGMENT OF THE COURT

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

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

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

D **We award costs as follows:**

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

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

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

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REASONS OF THE COURT

(Given by Goddard J)

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

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

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

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

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

The appeals before this Court

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

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

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

3 EEZ Act, s 12.

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

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

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

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

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

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5 EEZ Act, s 20C.

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

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

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

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

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

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

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

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

Summary of outcome

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

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

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

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

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

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

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

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

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

The structure of this judgment

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

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

The EEZ Act

International law context for New Zealand's EEZ Act

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

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

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

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

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

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

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

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

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

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

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

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

[21] Article 194 provides:

> *Article 194*
> *Measures to prevent, reduce and control pollution of the marine environment*
>
> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.
>
> …
>
> 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:
>
> (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
>
> (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
>
> (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;
>
> (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.
>
> …
>
> 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

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

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

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

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

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

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

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

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

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

15 Article 1.

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

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

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

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

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

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

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

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

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

The EEZ Act

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

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

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

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

> the discharge of harmful substances and the dumping or incineration of waste or other matter.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

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

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

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

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

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

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

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

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

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

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

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[23] EEZ Act, s 4.

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

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

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

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

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

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

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

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

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

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

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

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

20 Restriction on activities other than discharges and dumping

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) the causing of an explosion.

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

(a) the discharge of harmful substances; or

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

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

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

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

20C Restriction on mining discharges from ships

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

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

(b) into or onto the continental shelf.

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

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

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

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

34 Information principles

(1) When developing regulations under sections 27, 29A, and 29B, the Minister must—

(a) make full use of the information and other resources available to him or her; and

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

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

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

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

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

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

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

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

39 Impact assessment

(1) An impact assessment must—

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

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

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

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

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

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

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

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

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

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

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

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

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

…

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

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

31 Section 40.
32 Section 41.

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

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

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

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

[33] Sections 45–71.

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

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

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

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

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

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

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

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

(k) relevant regulations; and

(l) any other applicable law; and

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

(3) The EPA must have regard to—

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

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

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

…

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

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

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

(a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing:

(b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62:

(c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991:

(d) the settlement of a historical claim under the Treaty of Waitangi Act 1975:

(e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:

(f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011

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

60 Matters to be considered in deciding extent of adverse effects on existing interests

In considering the effects of an activity on existing interests under section 59(2)(a), the Environmental Protection Authority must have regard to—

(a) the area that the activity would have in common with the existing interest; and

(b) the degree to which both the activity and the existing interest must be carried out to the exclusion of other activities; and

(c) whether the existing interest can be exercised only in the area to which the application relates; and

(d) any other relevant matter.

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

61 Information principles

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

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

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

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

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

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

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

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

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

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

63 Conditions of marine consents

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

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

(a) requiring the consent holder to—

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

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

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

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

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

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

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

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

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

64 Adaptive management approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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34 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013.
35 EEZ Act, s 87C.

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

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

87E Information principles relating to discharges and dumping

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

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

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

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

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

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

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

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

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

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

(b) refuse the application.

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

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

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

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

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

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

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

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

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

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

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

[36] Section 88.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Challenges to the decisions below

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

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

Approach to s 10 purpose statement

The issue

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

DMC decision

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

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

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

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

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

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

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

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

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

60 At [5.1].

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

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

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

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

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

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

Conclusion

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

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

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

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

High Court decision

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

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

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

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

[103] The Judge said:

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

Submissions in this Court

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Failure to apply information principles

The issue

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

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

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67 EEZ Act, s 87E(2).

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

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

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

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

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

DMC decision

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

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

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

70 1996 Protocol, art 3(1).

71 EEZ Act, s 87E(2).

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

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

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

High Court decision

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

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

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

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

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

Submissions on appeal

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

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

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

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

Analysis

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

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

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

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

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

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

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

Approach to the Treaty of Waitangi, tikanga Māori and kaitiakitanga

The issue

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

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

DMC decision

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

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

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

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

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

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

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

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

> - The relationship of Māori to both the environment and area through whakapapa. Whakapapa is what ensures the interconnectedness of all living things and is central to Māori life and the role of kaitiaki.
>
> - The practice of tikanga and kawa, and the application of mātauranga Māori by kaitiaki, ensures the mauri of the ecosystem and environment.
>
> - The rights and interests of Māori, whether as existing interests, activities defined in the EEZ Act, or as lawfully established activities, whether authorised or not.
>
> - The adverse effects from noise and vibration, primarily on marine mammals.
>
> - Impacts from the sediment plume on the environment, with particular reference by some submitters on customary areas/sites of significance.
>
> - The conflict between the Te Tai Hauāuru Fisheries Forum report and the submissions (individual and joint) received from members/ representatives on the Forum.
>
> - The role of kaitiaki.
>
> - The principle of protection.
>
> - The lack of a bond mechanism, or insurance cover towards environmental restoration, should something go wrong.
>
> - Inadequate consultation undertaken by TTRL with tangata whenua.
>
> - Lack of transparency and disclosure of information by TTRL.

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

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

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

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

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

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

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89 At [638]–[639].
90 At [628].

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

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

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

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

(Footnotes omitted.)

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

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

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

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

(Footnotes omitted.)

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91 At [648]–[649].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

High Court decision

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

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

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

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

Submissions on appeal

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

117 At [185].

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

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

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

Other marine management regimes: RMA and NZCPS

The issue

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

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

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118 Williams, above n 114, at 21–22; and *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111.
119 EEZ Act, s 59(2)(h).
120 RMA, s 57.
121 High Court decision, above n 6, at [162].

DMC decision

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

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

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

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

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

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

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

…

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

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

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

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

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

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

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

High Court decision

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

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

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

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

Submissions on appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

Did the DMC adopt an adaptive management approach?

The issue

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

[135] EEZ Act, s 64.

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

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

DMC decision

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

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

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

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

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

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

High Court decision

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

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

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

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

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

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

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

Submissions on appeal

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

(c) the degree of uncertainty; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conditions in relation to bond and insurance

The issue

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

[149] EEZ Act, s 63.

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

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

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

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

DMC decision

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

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

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

High Court decision

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

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

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

Submissions on appeal

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

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

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

Analysis

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

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

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

Effects on seabirds and marine mammals

The issue

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

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

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

DMC decision

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

[245] The DMC noted that:[161]

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

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

[246] The DMC concluded that:[162]

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

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

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

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

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

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[162] At [579].

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

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

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

that utilise the South Taranaki Bight.

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

i. Noise;

ii. Collision and entanglement;

iii. Spills; and

iv. Sediment in the water column,

are avoided to the greatest extent practicable.

…

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

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

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

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

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

High Court decision

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

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

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

Submissions on appeal

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

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

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

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

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

Analysis

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

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

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

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

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

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

Other issues raised by cross-appeals

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

Obtaining information from submitters

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

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

Best available information

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

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

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

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

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

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

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

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

Relevance of international law

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

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

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

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

Pre-commencement monitoring

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

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

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

Casting vote

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

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

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

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

Iterative approach to information gathering from TTR

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

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

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

Failure to identify net economic benefits

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

Result

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

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

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

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

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

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

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

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

GLOSSARY

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

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