Your Comment on the Taranaki VTM Project

Please include all the contact details listed below with your comments.

1. Contact Details	
Please ensure that you have authority to comment on the application on behalf of those named on this form.	
Organisation name (if relevant)	Kiwis Against Seabed Mining Incorporated and Greenpeace Aotearoa Incorporated
First name	[redacted]
Last name	[redacted]
Postal address	[redacted]
Phone number	[redacted]
Email ***(a valid email address enables us to communicate efficiently with you)***	[redacted] [redacted]

2. We will email you draft conditions of consent for your comment			
☒	I can receive emails and my email address is correct	☐	I cannot receive emails and my postal address is correct

3. Please select the effects (positive or negative) that your comments address:			
☒	Economic Effects	☒	Sedimentation and Optical Water Quality Effects
☒	Effects on Coastal Processes	☒	Benthic Ecology and Primary Productivity Effects
☐	Fished Species	☒	Seabirds
☒	Marine Mammals	☒	Noise Effects
☐	Human Health Effects of the Marine Discharge Activities	☐	Visual, Seascape and Natural Character Effects
☐	Air Quality Effects	☐	Effects on Existing Interests
☐	Other Considerations (please specify):		

Please provide your comments below. You may include additional pages if needed. If you are emailing this form and attaching any supporting documents, please list the names of those files below to help us ensure all materials are received.

Thank you for your comments

BEFORE THE FAST TRACK PANEL
AT WELLINGTON

I MUA I TE KŌTI TAIAO O AOTEAROA
TE WHANGANUI-A-TARA ROHE

UNDER	the Fast Track Approvals Act 2024 (the "**Act**")
IN THE MATTER	of an application by Trans-Tasman Resources Limited (TTRL) for marine and discharge consents to undertake iron sand extraction in the South Taranaki Bight
BETWEEN	**TRANS-TASMAN RESOURCES LIMITED (TTRL)**
	Applicant
AND	**THE ENVIRONMENTAL PROTECTION AUTHORITY (EPA)**

LEGAL SUBMISSIONS AND COMMENT OF KASM AND GREENPEACE
Dated 6 October 2025

[redacted]

[redacted]

Contents

Legal Submissions Filed on behalf of KASM and Greenpeace

Executive Summary

1. Trans-Tasman Resources Limited (TTRL) seeks marine consent for seabed mining within the South Taranaki Bight for a period of 20 years, extracting up to 50 million tonnes of material per year and depositing the majority of that material back into the sea. The mining activity will completely remove all benthic life within the mining area, and the plume will have potentially significantly adverse effects on marine life including benthic ecology, eco-system function and resilience, marine mammals and seabirds[1], noise and plume effects may result in "potentially displacing whales from critical habitat and impairing reproduction"[2].

2. Gaps in information have plagued the application since 2013 and resulted in a decline in 2014 and a quashing of the DMC decision to grant (2017) by the High Court, Court of Appeal and Supreme Court. The Fast Track Application suffers the same errors and there has been no updated evidence in relation to the plume modelling, noise modelling or baseline data.

3. Given this, under application of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) criteria alone, the application and conditions are uncertain, caution and environmental protection is not provided for including through conditions and therefore the application fails to demonstrate environmental protection so as to avoid material harm under s 61(2) and s10(1)(b) EEZ Act.

4. TTRL relies heavily on the provisions of the Fast Track Approval Act 2024 (FTAA) to address gaps in their application and the Schedule 10, clause 6 criteria must be weighed "giving greatest weight" to the purpose of the FTAA to facilitate development of "significant national and regional benefit" and declines are limited to s85 FTAA pathways (mandatory and discretionary). The mandatory pathways are restricted to demonstrative breach of existing treating settlements, otherwise the discretionary

[1] See Appendix A.
[2] SOE, Leigh Torres, 6 Oct 2025 at [17].

pathway requires a threshold test that adverse effects are "sufficiently significant" and out of proportion to the national or regional benefits.

5. The TTRL application however fails under the FTAA criteria and the EEZ criteria and should be declined:
    a. Firstly: TTRL's application fails to demonstrate significant regional or national benefits (s 3) - benefits which must take into account costs - and therefore does not meet the purpose of the FTAA . Economic evidence is reviewed in **Appendix B**.

    b. Secondly: The TTRL proposal will result in potentially significant adverse effects (as set out in **Appendix A**), and is inconsistent with EEZ criteria: does not apply the information principles under s61 EEZ Act, including that it is not the best available information, does not favour caution or environment protection under s 61(2), absent baseline data, conditions are to address uncertainty and do not favour caution or environment protection (EEZ Act s 61(2)) therefore the material harm bottom line test in s10(1)(b) EEZ is not met, does not continue or enable NZ's obligations under international law under section 11 - including to protect and preserve the marine environment under article 192 - and is in breach of the bottom line under s 59(2)(h) EEZ.

        The effects met the threshold of sufficiently significant and out of proportion with the national or regional benefits that a Panel "may" decline consent under s85(3) FTAA.

    c. Where the proportionality threshold has been established under s85(3) the panel has residual discretion to decline or grant consent with conditions. However, the EEZ criteria that is mandatory for the Panel to take into account has directive strength and requires decline if favouring caution and environmental protection conditions are unable to avoid material harm, which is the case here, failing to meet the test established by the Supreme Court in para [5].

6. For these reasons the TTRL application must be declined.

Introduction

7. We act for Kiwis Against Seabed Mining, Inc. (KASM) and Greenpeace Aotearoa Inc. (Greenpeace) in relation to the substantive application for the Taranaki VTM Project (Application) by Trans-Tasman Resources (TTRL) under the Fast-Track Approvals Act 2023 (FTAA).

8. These submissions are provided in response to Minute 3 inviting comments on the Application, issued by the Panel on 8 September 2025 pursuant to section 53 of the FTAA.

9. TTRL seeks marine consents under the FTAA for a highly experimental and unprecedented seabed mining operation, targeting 66 km² of the South Taranaki Bight to extract 50 million tonnes of seabed material each year for 20 years. This proposal represents what would be one of the most significant industrial activities ever contemplated in our exclusive economic zone (**EEZ**).

10. TTRL has been attempting to advance this project since 2013, without success. The approval of their 2016 application was quashed by the Supreme Court in 2021 and later withdrawn from the 2024 reconsideration hearing before a decision could be made. Over more than twelve years, versions of this proposal have been repeatedly scrutinised by decision making panels and countless experts have provided detailed feedback on both the proposal and its conditions. Despite this extensive process, little has changed. Critical information gaps that could reasonably have been addressed have simply not been filled.

11. The EPA Report responding to the Panel's request under s 51 FTAA was filed on 22 September 2025. The Report notes that while the proposed activity is broadly described and key components identified, "there are several areas where the Expert Panel may require further technical clarification and environmental justification to ensure that all potential effects are fully understood, properly assessed and appropriately managed."

12. The report identified "discrepancies in the application", "dated information..10 years or more", "no new assessment of risks" "no new data or updated analysis" and "no

information about additional activities in the area.. that could affect the relevance or reliability of the older data relied on in the application". The report questioned whether the information provided was the "best available information in line with s61 of the EEZ Act".

13. TTRL has said that it will address these matters in its s55 FTAA response.[3] This raises natural justice issues where evidence moves beyond the scope of reply evidence and into new evidence on how the proposal will avoid, mitigate or remedy adverse effects not previously understood or known. These matters are dealt with in the Joint memorandum of counsel[4]. However, given the extensive time that TTRL has already had to address these issues, we are highly doubtful that reply evidence will be able to address these information gaps, some of which have been present since as early as its 2013 application.[5]

14. Applying the Supreme Court's reasoning, the application cannot remedy gaps in data and uncertainty through conditions in the absence of baseline information or adequate evidence to fill those gaps. Under the strict application of the EEZ Act criteria, the proposal would fail to give effect to the principles of caution and environmental protection and would not avoid material harm. It would therefore be inconsistent with the purpose of the EEZ Act in s 10 and the bottom line it establishes, requiring decline. However, under the FTAA, the Panel must apply both the provisions of the FTAA and the EEZ Act criteria identified in Schedule 10, clause 6 and apply the FTAA decision-making framework under s81 FTAA.

15. Section 85(4) of the FTAA prevents the Panel from forming an opinion that adverse effects may meet the threshold for decline solely on the basis of inconsistency with a

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[3] At [14] of Minute 6 of the Panel, The Panel sought that the Applicant explain how it proposes to address the observations in the EPA's s51 Report. On 1 October TTR filed a memorandum setting out that it will address such matters in its s55 response including through further statements of evidence.

[4] To be filed alongside or shortly after submissions.

[5] There was substantial uncertainty in TTR's original 2013 application. The DMC declined consent in 2014 due to unresolved uncertainty about the effects of the sediment plume and changes to seafloor bathymetry on iwi and fishing interests, and on marine mammals and habitats of threatened species. 2014 DMC decision regarding TTRL application for seabed mining in the STB at paragraph [9], [108]–[110], [846].

provision in the EEZ Act and s81(2)(f) sets out that panels can decline consent only in accordance with s85.

16. But this is not a case of sole inconsistency with one provision of the EEZ Act. There are numerous adverse effects identified in the evidence, inconsistency with s61, s62 and s10 EEZ Act. S 85(4) does not prohibit consideration of inconsistency or contrariness with EEZ Act criteria; it only prevents reliance on inconsistency alone as sufficient grounds for decline. Iinconsistency remains a relevant consideration under s85(3), including inconsistency with bottom lines.

17. Inconsistency with such bottom lines warrants significant weight in the proportionality assessment and will more than likely lead to a finding that the adverse effects are “sufficiently significant and out of proportion” to the project’s benefits.

18. While the decision to decline consent under s85(3) of the Fast-Track Act is discretionary, it remains mandatory that the Panel take into account the provisions of the EEZ Act — including the requirement to provide for environmental protection (which the Supreme Court laid down as a test of material harm). A weighing exercise does not neutralise those obligations. Here competing criteria include “facilitating the delivery of ..development.. with significant national or regional benefit”, “favouring caution and environmental protection” where there is uncertainty and “protect the environment from pollution” (material harm). So where the threshold under s85(3) is met, the panel must then apply the relevant criteria, including bottom lines which mandate decline.

19. In this case, the adverse environmental effects are clearly disproportionate to the purported benefits. The claimed economic benefits are unsubstantiated, costs are not taken into account, uncertainties are manifest and material harm will be caused - as well as the proposal being inconsistent with identified EEZ bottom lines. The only lawful outcome of an assessment taking into account these matters is that the application must be declined.

20. TTRL argues that the purported economic benefits of the project outweigh, and therefore justify setting aside, the environmental, cultural, and social impacts, i.e the threshold for decline is not met. That claim cannot withstand scrutiny. First, the economic analysis

presented is speculative and does not establish significant benefit even on a gross benefit basis. Secondly, TTRL has not undertaken a net benefit analysis; the evidence of submitters is that if such an analysis were properly conducted, it would not demonstrate a significant net benefit. Finally, even if — contrary to the evidence — a significant net economic benefit were found, that would not outweigh the significant adverse environmental, cultural, and social effects. Those effects are disproportionate to the claimed benefits, and on that basis the application should be declined under s85(3).

21. These submissions adopt the arguments of the Māori submitters that the application also fails under s7, 85(1) and 85(2) of the FTAA, triggering mandatory grounds for decline. We have not addressed these matters here as they have been more appropriately and fully covered in the submissions of the Māori parties.

22. Such failures are not unexpected — they are indicative of the type of application this is: one that should never have progressed beyond its first failure in 2014. This is not a finely balanced case, it is one where the environmental, cultural, and social costs have never been properly assessed, and where the potential adverse effects remain unaddressed. On the information available it is not possible to impose conditions capable of avoiding, remedying, or mitigating those effects. A fast-track pathway cannot cure such fundamental flaws.

23. The Fast Track process should not be used as a fallback for applicants whose proposals have repeatedly failed, but should be reserved for those projects that have done the work, filled the information gaps, and can clearly meet the standard set for fast track approval.[6]

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[6] Other Panel decisions have noted that given the time frames under Fast Track there is an expectation that applications will be complete and set at potentially a higher standard than if the application was made under a different process. In the draft Delamore decision [FTAA-2502-1015 at [12] the Panel noted:

> [12] "The time constraints set out in the FTAA do not provide an expert panel with time to ensure all of the documents are in order and up to date throughout the process. It is imperative that for projects of this magnitude the application documents are thorough and that extreme care is taken to ensure no documents are missing. The Panel appreciates that the Applicant team has had an onerous task and have attempted to make the provision of information as simple as they can."

24. Alongside these legal submissions, KASM and Greenpeace have filed statements of evidence from experts on key issues. Most of these experts participated in the 2017 and 2023 EPA hearings, and have now reviewed the Fast Track application and updated their earlier evidence to address the current proposal.

25. In addition, two new experts have been engaged who did not participate in the previous hearings: Jill Cooper, an industry expert providing evidence on the feasibility of the proposed operations; and Andrew Buckwell and Chris Fleming, economists addressing the economic aspects of the application. Their evidence calls into question the claim by TTRL that the project can provide significant gross economic benefit and demonstrates that any analysis of net economic benefit will not be significant.

26. Statements of evidence produced by KASM and Greenpeace are:
    a. Jill Cooper; Industry Expert.
    b. Dr Chris Fleming and Andrew Buckwell: Economics.
    c. Dougal Greer: Plume Modelling.
    d. Tara Anderson: Benthic Ecology.
    e. John Luick: Plume Modelling.
    f. John Cockrem: Seabirds
    g. Dr Leigh Torres: Marine Mammals.

27. At the direction of the Panel, KASM and Greenpeace have also sought to work collaboratively with other parties wherever possible. As part of this approach, we have asked our experts to review drafts of statements of evidence from other parties where possible and make comments.

28. Process issues regarding expert conferencing, hearing and responses to TTRL, s55 reply evidence filed by TTRL (where that evidence contains matters not solely related to reply), are addressed in the joint memorandum of counsel dated 6 October 2025.

The Application

29. TTR seeks all necessary approvals for:

> [a]ll activities associated with the Project to provide for the extraction of up to approximately 50 million tonnes ("Mt") of seabed material a year for 20 years, recovery of up to approximately 5Mt of vanadium-rich titanomagnetite concentrate, return the 45Mt de-ored sediment to the seabed, and monitor environmental recovery for up to 5 years post-extraction.[7]

30. TTRL requires marine consent for removal of the seabed and discharge of material back into the marine environment under s20, s20B and s20C EEZ Act.

31. As of 2024, TTRL has rebranded its proposal as the "Taranaki VTM Project," claiming it will establish New Zealand as a leading producer of vanadium. In reality, the underlying proposal is unchanged from the applications advanced in 2013 and 2016. At its core it remains an iron ore mining project, with vanadium extraction presented as a secondary component rather than the primary focus. Indeed, TTRL does not itself propose to extract vanadium from the iron ore, and any claim that it will become a vanadium producer is therefore tenuous. The viability of the vanadium aspect of the project, and the significant challenges it presents, are addressed in the evidence of Jill Cooper, in the Sanofex report (attached to Whanganui District Council's submission), and in the economic analysis of Dr Chris Fleming and Andrew Buckwell.

32. In preparing these comments, we have reviewed the entirety of TTRL's application. Counsel notes that TTRL's mining permit has lapsed,[8] as the timeframe for commencing mining activities has expired. TTRL would therefore be required to obtain a new or updated mining permit before any works could lawfully begin. This fact is directly relevant to the assessment of opportunity costs, particularly given that the wind energy sector is also advancing proposals to operate in the same area. At present, neither TTRL nor prospective wind energy operators hold valid permits or consents, and accordingly neither has any sort of argument as to legal priority to occupy the area of marine space.

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[7] TTRL cover letter dated 15 April 2025, at https://www.fasttrack.govt.nz/__data/assets/pdf_file/0018/4338/Taranaki-VTM-Cover-Letter-to-EPA.pdf

[8] Appendices 1.1 of the Application documents, Mining permit 55581, schedule 3, clause 3: "within 60 months of the commencement date of the permit (which is 14 July 2024) the permit holders shall…. commence mining..".

Relevance of Prior Decisions and Evidence

33. Schedule 10, clause 2 FTAA requires that information provided as part of the application includes information about whether the applicant has already made an application for consent under the EEZ Act in relation to the project and if so (i) details of any application made and (ii) the decisions made on that application.

34. "Details of any application made" is broad and includes expert evidence filed as part of those applications (as filed by TTRL as part of its application) and arguably submitter evidence and joint witness statements, where relevant. Under s81(2)(a) the Panel must consider all information provided including that provided by submitters. The Panel also has broad powers to request information it considers relevant in relation to the application under s67 FTAA.

35. Given the acceptance by TTRL that the application has not been updated since 2023 other than with respect to pre-feasibility study, the metallurgical review, a new assessment of economic impacts and a number of incidental matters identified in Table at para [27][9], and the filing of statements of evidence by TTRL of evidence filed in 2016 and 2023 associated with its previous application, the responses to those statements of evidence namely the joint witness statements and submitter evidence are highly relevant.

36. TTRL argued in its memorandum of 4 August 2025 that the 2021 Supreme Court decision, the issues in the previous reconsideration hearing and the matters on which the reconsideration hearing sought further evidence, "will not provide as much guidance for the Panel on the present application as others may think." These submissions show otherwise.[10]

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9 Legal memorandum of the TTRL to the Fast Track Panel, dated 4 August 2025 from para [23]-[27].

10 [7] The Supreme Court's findings only remain relevant to the extent that they align with the FTAA framework.

[12] TTR considers that this updated information, in combination with the new FTAA framework, will enable the FTAA Panel to have confidence that all matters previously raised by the Supreme Court (other than tikanga, which is addressed below) have been resolved, to the extent they remain relevant under the new legislation.

37. The joint witness conferencing and matters on which the reconsideration hearing sought further evidence must be considered in light of the purpose and context in which they were provided which is not under a FTAA decision making structure, however, they are helpful starting points for this panel to identify the key issues.

38. Schedule 10, clause 2 necessarily brings into play the previous DMC decisions of 2014 and 2017, together with the higher court decisions on appeal of the 2017 decision. Read together, the 2017 DMC findings and the Supreme Court's judgment establish conclusions on the current evidence package before you that have not been displaced by any further material provided by the applicant. Evidence of the applicant provided in its 2016 application and 2023 reconsideration have effectively been carried through into the present application, which remains substantively unchanged. Accordingly, weight can and should be placed on those earlier findings, which remain unaffected in light of the unchanged nature of the application. Further, the Supreme Court judgment is the binding decision of the Supreme Court on the interpretation of the EEZ Act, which is applicable under Schedule 10.

Legal Framework and Decision-Making under the FTAA

39. Decision-making under the FTAA requires both a weighing exercise, giving greatest weight to the purpose of FTAA (Schedule 10 Clause 6(1)), and a threshold assessment to either grant consent ("significant national or regional benefit") and a threshold assessment to decline consent "(sufficiently significant adverse effects out of proportion to regional and national benefit)" - s 85(3)(b). S85 (1) and (2) also include mandatory grounds for decline which are addressed in the Māori party submissions.

40. Section 81 of the FTAA describes the decision-making framework under the FTAA and the process by which the Panel must decide whether to either grant the approval and set of conditions to be imposed or decline the approval (s81(1) FTAA). The Panel must follow a structured process, weighing the purpose of the Act and specific criteria, before granting or declining approvals.

41. When making its decision its is mandatory under s81 FTAA on the panel to:

a. Consider the application and any relevant reports, advice, or information received under sections 51 -53, 55, 58, 67-70, 72 or 90.
b. Apply the correct decision-making clause. For a marine consent this is schedule 10, clause 6, which sets out the mandatory relevant criteria that the Panel "*must take into account, giving the greatest weight to the purpose of the FTAA Act.*"[11]
c. The Panel must comply with section 82 (relating to treaty settlement, the Marine and Coastal Area (Takutai Moana) Act 2011, or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019) if applicable;
d. In terms of conditions, the Panel:
    i. must comply with section 83 when setting conditions; and
    ii. may impose conditions under section 84 if applicable, to recognise or protect a relevant Treaty settlement and any obligations arising under the Marine and Coastal Area (Takutai Moana) Act 2011 or Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019:
e. The Panel may only decline the application in accordance with section 85 (s81(2)(f).

42. With regard to section 7 FTAA, this matter has been addressed by the Māori parties in their submissions, and we adopt these submissions. Nothing in section 81, 82 or 85 limits section 7.

Assessment of Marine Consent Application

43. The Panel is required by sections 81(2)(b) and 81(3)(a) to apply schedule 10, clause 6 of the FTAA.

44. Clause 6(a) of Schedule 10 requires the Panel, and for the purpose of section 81, when considering the marine consent application and setting any conditions in accordance with clause 7), to, "take into account" the following mandatory relevant considerations, giving the greatest weight to (a):
    a. The purpose of the FTAA, being "to facilitate the delivery of infrastructure and development projects with significant regional or national benefits" (section 3 FTAA).

[11] FTAA, sch 10, clause 6(1).

b. Sections 10 and 11 of the EEZ Act; the purpose section 10 and requirement to consider New Zealand's international obligations under international law.

c. Any relevant policy statements issued under the EEZ Act; and

d. Sections 59, 60, 61(1)(b) and (c) and (2) to (5), 62(1A) and (2), 63 and 64 to 67 of the EEZ Act.

Meaning of "take into account"

45. In *Bleakley v Environmental Risk Management Authority* 3 NZLR 213 the High Court held that a statutory obligation in the Hazardous Substances and New Organisms Act 1996 to "take into account" a relevant matter indicated an obligation to:

> ….. consider the factor concerned in the course of making a decision to weigh it up along with the other factors-with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate.

46. The Supreme Court in *King Salmon*[12] in the context of interpreting s8 of the RMA, considered that the words "take into account" imposed a different and lesser standard than the words "have particular regards to" in s7"[13] and neither was it as strong as the obligation in s6 that decision-makers "shall recognise and provide for" matters of national importance.

47. In R*oyal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241, the Court noted that "take into account required [it] to directly consider the matters so identified and give them "genuine" consideration.[14]

48. *In Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board*[15] the Supreme Court addressed the meaning of s 59(2)(h) of the EEZ Act, which requires decision-makers to "take into account…(h) the nature and effect of other marine management regimes". Ellen France and Williams JJ, held this obligation is not satisfied

12 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

13 Ibid at [27].

14 R*oyal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241.

15 *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board v Environmental Protection Authority (**SC**)* 28/2020 [2021] NZSC 127

by mere acknowledgment; it requires a substantive evaluative process.[16] This includes identifying relevant environmental bottom lines and considering whether the proposal breaches them.[17] The minority and majority deferred on whether or not inconsistency with a bottom-line was defeasible by the other s59 factors in a "take into account" assessment. The majority Glazebrook J at [280], Williams J at [298] and Winkelmann CJ at [331] found that the bottom line under s59(2)(h) was because the NZCPS and the EEZ Act s 10(1)(b) are in lockstep with each other and there is a requirement of synergy between regime.

49. Although the current TTR application falls under the Fast-track Approvals Act, the interpretive guidance to the EEZ Act from the Supreme Court remains relevant. The bottom lines in s 10 EEZ are not defeasible by the other schedule 10, clause 6 criteria.

Interpretation of the requirement to give "greatest weight" to purpose of FTAA

50. Clause 6(1) of Schedule 10 of the FTAA expressly requires that the greatest weight be given to the purpose of the FTAA.

51. Section 34(1) of the now-repealed HASHAA (Housing Accords and Special Housing Areas Act 2013) sets out a hierarchy of considerations for resource consent decisions. It required decision-makers to give greatest weight to the purpose of HASHAA, followed by Part 2 RMA matters, then proposed plans, and finally other RMA or relevant enactment considerations and urban design principles.

52. In *Enterprise Miramar Peninsula Inc v Wellington City Council*,[18] the Court of Appeal confirmed that
    a. the purpose of the HASHAA must be given greatest weight and the other criteria followed on a descending order of importance;
    b. other considerations have deliberately been included;[19]

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16 Ibid [181]-[183].
17 SC at [187]
18 *Enterprise Miramar Peninsula Inc v Wellington City Council* [2019] 2 NZLR 501
19 *Enterprise Miramar* at [41].

c. a decision maker must not rely solely on the purpose of the act at the expense of due consideration of the other matters;[20]

d. each matter should be considered on an "individual basis…prior to the exercise of weighing them in accordance with the prescribed hierarchy"[21]

e. the decision maker must consider each matter "uninfluenced by the purpose" of the overriding Act.[22]

53. This approach is discussed and adopted in the final decision of the panel in the *Bledisloe North Wharf and Fergusson North Berth Extension* decision [FTAA-2503-1028]. The Panel in *Bledisloe* observed that the key difference between HASHA and the FTAA is in the weighting of criteria: under the FTAA, all but the first criterion carry equal weight, whereas under HASHA the criteria are ranked in descending order of importance. Aside from this distinction, the Panel considered the reasoning in *Enterprise Miramar* to be directly applicable under the FTAA.

54. The weighing assessment cannot be used to neutralise or diminish other statutory imperatives such as "favour caution and environmental protection" and "protection from pollution" / avoid material harm. These must be taken into account by the panel throughout its assessment of the application and its decision.

Section 85: Pathways to Decline Consent

55. Section 85 describes mandatory and discretionary powers through which an application could be declined. Mandatory powers are dealt with in the submissions of the Māori parties and adopted. Section 81(2)(f) states that a panel may only decline consent in accordance with s85.

56. Under its discretionary powers, if the Panel determines that the adverse effects are sufficiently significant and out of proportion to the Project's regional or national benefits, it may decline the application. This is a threshold assessment: once that threshold is

20 Ibid at [41] and at [122] of the Bledisloe decision [FTAA-2503-1028] and [FTAA-2502-1015] of Delamore.

21 Ibid at [53] adopted at [122] of the Bledisloe decision [FTAA-2503-1028]

22 Ibid at [52].

met, the Panel retains a residual discretion to either decline consent or grant it subject to conditions. Section 85(3) does not require that consent *only* be declined on this basis; rather, it provides that consent *may* be declined where this threshold is surpassed. The exercise of that residual discretion must nevertheless be guided by the mandatory EEZ Act criteria, including the principles of caution, environmental protection, and the avoidance of material harm.

57. The proportionality test requires the panel to consider (s 85(3):
    a. The nature and significance of adverse impacts identified through the s81(2) process;
    b. The project's national or regional benefits as assessed under s81(4);
    c. Whether the proposed conditions or applicant modifications could adequately address adverse impacts (s 83(3)(b)(ii); and
    d. Whether the proportionality threshold is met even after accounting for conditions and other mitigation measures (s 83(3)(b).

58. In the draft decision of Fast Track Panel in *Delamore* [FTAA-2502-1015], the Panel quoted from council submissions that s85(4) provision does not "prohibit consideration of inconsistency or contrariness with other criteria", such assessments are required by the Act in Schedule 10 clause 6(1), it only prevents reliance on the inconsistency alone as sufficient ground for decline. "This suggests that Parliament intended that inconsistency remains a relevant consideration. It simply cannot be the only factor supporting a decline decision*".*[23]

59. A Panel may find that an application is inconsistent with s 10 of the EEZ Act and with the information principles in s 61(2). However, it may only decline consent once it has established that the proportionality threshold under s 85(3) is satisfied — that is, where the adverse effects are sufficiently significant and out of proportion to the Project's regional or national benefits.

60. Adverse impact is defined in section 85(5) as meaning "any matter considered by the panel in complying with section 81(2) that weighs against granting the approval." The

[23] Draft decision of Delamore at [101]

term is therefore broad, and could encompass matters such as adverse effects on the environment, matters arising from planning instruments, any matters listed in s59 (which are mandatory), and being contrary to international law under s11 EEZ.

61. See the approach adopted in *Enterprise Miramar* when considering bottom lines under the RMA:

> [54] We accept that, under HASHAA, ss 104–104F of the RMA do not directly apply, therefore a development that could not proceed under those provisions of the RMA could still be consented under s 34 of the HASHAA. However, those RMA provisions are still mandatory considerations under s 34(1)(d)(i), **and cannot be neutralised by reference to the purpose of HASHAA.** We also note the instruction in s 34(1)(d)(i) to consider the matters that arise under ss 104–104F of the RMA "were the application being assessed under that Act". The Council's approach, which considered the matters in ss 104–104F of the RMA by reference to HASHAA, is inconsistent with that instruction.
>
> **(*Emphasis Added)***

62. Section 85(4) states that the Panel "may not form the view that an adverse impact meets the threshold in subsection (3)(b) solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document."

63. The word "solely" in s 85(4) cannot be ignored. This is not a situation where a consent is being considered for[24] decline solely on the basis of for instance a bottom line. There are numerous adverse effects and the proportionality test as explained elsewhere results firmly in a decision to decline.

64. Where this submission is not accepted, and where the Panel considers that s 85(4) applies notwithstanding the word "solely", we strongly submit that on a proportionality

[24] This interpretation is consistent with the international law provisions set out above where the interpretation of the FTAA must aim at consistency with those provisions, which include protection and preservation of the marine environment. The FTAA cannot be presumed to be intending to override international law, particularly considering section 11 of the EEZ Act.

basis, the environmental effects are significant and out of proportion to the economic benefits.[25]

Assessment of Bottom lines under the EEZ

65. Bottom lines have significant continuing force in any assessment despite s85(4): their existence heightens the gravity of adverse environmental effects and raises the bar for any countervailing benefits to displace them. This is particularly so with respect to the bottom line which is part of the purpose of the EEZ Act (s 10(1)(b)).

66. *King Salmon* endorsed an "environmental bottom line" approach.[26] The approach entails that the safeguards in s5(2)(a)-(c) relating to the protection of the environment all have to be met before the purpose of the RMA is fulfilled.[27] A bottom line gives effects to environment protection by requiring avoidance of adverse effects.[28] Similarly in the EEZ Act the Supreme Court found that there was a bottom line in the purpose of the Act that ensured environmental protection. A bottom line prescribes a value, environment, or species of such importance that, if lost, it is so contrary to the purpose of the legislation, it necessitates refusal.

67. A breach of a bottom line is not simply another adverse effect to be placed in the scales. It is more than a finding of significant adverse effect. It is a higher threshold failure — one that precludes consent under the governing legislation. The character of bottom lines as threshold failures is directly relevant to the proportionality assessment.

68. Bottom lines must be assessed against the context in which they sit. The bottom lines in the EEZ Act are to provide for international law obligations as well as environmental protection. This is discussed further at [91]. The purpose and context of bottom lines and the adverse effects that they purport to address are thus relevant to any assessment of proportionality under s85(5) definition of adverse effects.

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25 This section applies where an application would be granted except that it is contrary to one avoid policy bottom-line. Under Fast Track s 85(4) sets the bottom line aside in those circumstances.

26 King Salmon, at [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ

27 King Salmon, at [132] per Elias CJ, McGrath, Glazebrook and Arnold JJ

28 *King Salmon*.

Summary of Steps in Decision-Making under the FTAA

Step 1 – Assessment of Each Criterion

- *Undertake a thorough and individual assessment of each of the relevant criteria listed in schedule 10, clause 6(1).*
- *This involves reviewing all evidence and submissions relating to environmental effects, cultural considerations, economic factors, and statutory requirements (see s81(2)(a))*
- *Each criteria must be given direct and genuine consideration*
- *The weighting does not come into the individual assessment, i.e the overall purpose is not "logically relevant to the assessment of environmental effects.*

Step 2 – Findings on Each Criterion

- *Draw specific conclusions on each criterion.*
- *It must consider the application of conditions posed, or modifications proffered by the applicant (see s81(2)(d) and s83)*
- *Determine what are effects after the application of conditions, modifications or mitigation measures.*
- *Determine whether there is a **breach of any bottom lines** (e.g., environmental limits, cultural thresholds, statutory prohibitions).*
- *apply s s61(1(c), s 61(2) and s 62 (2) of the EEZ Act where there is uncertainty or inadequate information.*

Step 3- Weighing Exercise, giving greatest weight to purpose of the FTAA and applying each criteria

Step 3 – Section 85 – Mandatory Decline

Determine whether the outcome requires a mandatory decline under s85(1) or (2) of the Act, i.e., whether there are grounds to decline the application outright because the effects are such that approval cannot be granted.

Step 4 – Section 85 – Discretionary Decline

If there is no mandatory decline, determine whether the application may be declined under s85(3). Consider whether:

a. *The nature and significance of adverse impacts identified through the s81(2) process;*
b. *The projects national or regional benefits as assessed under s81(4);*
c. *Whether the proposed conditions or applicant modifications could adequately address adverse impacts;*
d. *Whether the proportionality threshold is met even after accounting for mitigation measures.*

Applying Schedule 10, clause 6(1) Criteria; Legal Issues; Definition and Application

69. There are a number of matters of definition and legal application that arise in the assessment of the schedule 10, clause 6(1) criteria. These are:
    a. the Definition of “significant regional or national benefit”
    b. the application of the EEZ Act Criteria
    c. Relevance of international law under s11 EEZ
    d. Application of the Information Principles, uncertainty and environmental protection under s61 and s62 EEZ and
    e. Identified bottom lines under the EEZ, s10, s61 &62, and s55(1)(h).

Significant regional or national benefit

70. Section 81(4) of the FTAA requires the Panel to consider the extent of the Project’s regional or national benefits when taking the purpose of the FTAA into account under clause 6(1)(a), Schedule 10. The Project’s regional or national benefits are also relevant to any decision by a panel to decline an approval under section 85(3).

71. The purpose of the FTAA is stated in s 3 to be “The purpose of this Act is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits.” Benefits can be regional or national to satisfy the test. Benefits do not need to be both. But benefit does have to be significant in both cases.

72. “Significant” means more than minor — it denotes something above average. In assessing adverse effects, significance lies beyond what is merely adverse. However, there is no defined standard for what constitutes a *significant benefit*; it is a threshold judgment to be made within the context of section 3 of the Fast-Track Approvals Act (FTAA).

73. Under the Resource Management Act 1991 (RMA), speculative arguments carry little or no weight when a consent authority is making a decision on a resource consent application. Instead, an authority must be presented with substantial evidence that the claimed future events are real and probable.[29]

74. Economic and feasibility assessments of the TTRL application and its economic analysis[30] identify speculation which undermines the reliance that can be placed on the claimed economic gross benefit:
    - The Sanofex Report states that “TTR product has not been normalised to fair market pricing for an iron fines product with its contained impurities and specification. The realised price of iron ore sales from the Project will be materially different to TTRs claimed figures by a large margin to the downside due to the chemical content of the product[31]. Jill Cooper also discusses a current glut in the market.[32]
    - Christopher Fleming and Andrew Buckwell note that there is also an international trend of seabed mining projects “generating a meagre direct financial gain, which can easily be reduced to zero by plausible changes in prices of extracted material, operational costs or combination thereof”[33].
    - Sanofex Report on Jill Cooper note that the proper costs of extraction of Vanadium are not included[34] making the outcomes more variable and unknown.
    - TTRL have also, once again, over-estimated the number of jobs created by the project, despite previously accepting that these were speculative figure.

29 *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) at [85].
30 The NZIER Economic Impact Assessment of TTRLs Taranaki VTM project report analysis with updated inputs March 2025.
31 Sanofex Report, In the Summary, attached to comment of Whanganui District Council.
32 SOE, Jill Cooper 6 Oct 2025 at [9].
33 SOE, Chirstopher Fleming and Andrew Buckwell, dated 6 Oct 2025, at [27](e).
34 Ibid and in the evidence of Jill Cooper.

- If one equates for the overpricing of ironsand revenue and removal of vanadia, the Sanofex report finds that this will overall have impact on GDP , royalties and tax revenues which are much lower than suggested by TTRL[35] and will result in minimal royalties, tax losses and potential job losses.[36]

75. Given the above uncertainties, TTRL has failed to demonstrate that it will provide significant national or regional gross economic benefit. This is without even doing a net benefit assessment, which we say is required. Furthermore, there is uncertainty in the findings.

76. Dr Fleming and Mr Buckwell conclude of the NZIER Report[37]:

> The current economic impact assessment of TTRL's Taranaki VTM Iron Sands Project to TTRL provides insufficient evidence on which to base a decision to proceed and, therefore, does not support approval of TTRL's submission.

77. When undertaking the weighing exercise in the face of uncertainty under s61(2), the panel must favour caution and environmental protection.

"Benefit" is not defined

78. Benefit is not defined in the FTAA and s81 and Schedule 10 do not give any specific direction on whether or not benefit is to be assessed on a gross or net basis. There is general agreement between a number of the expert economists that any assessment should be of net benefit and not limited to gross economic benefit.

79. The only reasonable approach is to assess economic benefits on a net basis. A gross-benefit approach risks perverse outcomes, where projects that may deliver significant gross economic outputs but impose economic costs that outweigh those outputs could nonetheless be elevated under the FTAA's purpose. Parliament could not have intended

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35 Sanofex Report, In the Summary, attached to comment of Whanganui District Council.
36 Sanofex Report, At page [9], attached to comment of Whanganui District Council.
37 SOE, Chirstopher Fleming and Andrew Buckwell, dated 6 Oct 2025, at [8].

that result, absent express language (such as a specific reference to “gross economic benefits”). Economic costs and benefits must be assessed.

80. Under the Resource Management Act 1991 s1, benefits and costs “includes benefits and costs of any kind, whether monetary or non-monetary”.

81. The FTAA provides for a broad understanding of “benefit” when the Minister is determining if a project meets the purpose of the Act and provides significant regional or national benefit under section 22.

82. Section 22(2)(a) lists matters that a Minister may consider when determining if a project will provide ‘significant regional or national benefit’. These include:

> (ii) will deliver new regional or nationally significant infrastructure or enable the continued functioning of existing regionally or nationally significant infrastructure;
> (iii) will increase the supply of housing, address housing needs, or contribute to a well-functioning urban environment;
> (iv) Will deliver significant economic benefits
> (v) will support primary industries, including aquaculture
> (vii) will support climate mitigation and adaptation at (viii)
> (ix) will address significant environmental issues
> Is consistent with local or regional planning documents,
> Any other matter the Minister considers relevant.

83. Under s 22(6) of the FTAA a Minister .. “may compare the activity involved in the project **against the current and other likely uses of the space**, taking into account:

> (a) The economic benefits and strategic importance of the proposed project; and
> (b) The likely impact of the proposed project on current and proposed marine management regimes; and
> (c) The environmental impacts of the competing activities.

84. The decision-making process under Section 22 is not limited to gross economic benefit. It requires evaluation of environmental, social, and economic factors, as well as the broader context of competing uses and future impacts.

85. Without an expressly limitation of the definition of "benefit" in section 81 or Clause 6, to gross economic benefit, it follows that the broad approach "benefit", as found in other sections of the Act, is also the intended approach under section 81 and Clause 6.

86. Two Fast Track Panels in the decision of *Bledisloe* and the draft substantive decision in *Delmore* have taken similar approaches to the definition of benefit.

87. In *Delmore* [FTAA-2502-1015]:[38]
    - The applicant argued that the project provided for benefits beyond just gross economic benefits (transport, ecological and urban environment benefits).[39]
    - There is a discussion about Treasury's comparison of Economic Impact Analysis and cost benefit analysis that concludes that while Economic Impact Analysis can provide useful "contextual information for decision-makers, it is not suitable as a tool for measuring the balance of costs and benefits of a decision to a society. By contrast a cost benefit analysis would also identify the opportunity costs of land and labour, as well as infrastructure costs and environmental effects.
    - The Panel agreed that a detailed cost-benefit analysis was required and in the absence of such it "would be imprudent to suggest the economic benefits of the proposal are of such significance that it needs to be developed in advance of appropriate supporting infrastructure."

88. *Bledisloe* took a similar position that net benefits rather than gross economic benefits are relevant.[40]

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38 https://www.fasttrack.govt.nz/__data/assets/pdf_file/0015/11148/Delmore-Decision-Draft-Decision-29-August-2025-Final-version.pdf

39 Ibid at [502].

40 Delmore draft decision [294]

89. The scope of benefit must be assessed in the context of the specific application. Applications for marine consent under the EEZ Act give effect to New Zealand's international legal obligations. Accordingly, the benefits of upholding international law — and the costs and consequences of failing to do so — are a relevant consideration and may be taken into account. Where bottom lines under s10 EEZ are not given effect to, the result is that international law, as incorporated through the EEZ Act, is also not upheld.

90. Section 59 of the EEZ Act is a mandatory criterion under clause 6(1)(d) of the FTAA. Under s59(2)(f) of the EEZ Act, the Panel must also take into account the "economic benefit to New Zealand of allowing the application". Distinct from the purpose of the FTAA, benefit is preceded in the EEZ Act by the word economic. The Supreme Court agreed that economic benefits were a consideration of economic cost and benefits.[41] "We agree that the DMC would need to satisfy itself that there was an economic benefit so that, if there were material economic costs, the DMC would be obliged to take those into account."

91. The Supreme Court was largely in agreement on the requirement to consider economic benefit under s 59(2)(f) [10]. (At [188]–[197] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.) Young and France JJ said that "[w]e agree that the DMC would need to satisfy itself that there was an economic benefit so that, if there were material economic costs, the DMC would be obliged to take those into account." [189] They considered the DMC had not erred in law in its approach (e.g. "193] Our attention has not been drawn to evidence of material economic costs which should have been taken into account.) The other Justices largely concurred.

92. Therefore the legal position is that under the EEZ Act, a consideration of economic benefit includes consideration of material economic costs. The Supreme Court did not conclude whether a cost benefit analysis should be undertaken under s59. With respect to environmental, social and cultural costs and benefits, the inability to precisely quantify these costs and benefits does not mean that they are incapable of consideration.

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

Particularly when the very purpose of the FTAA is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits, it is important to consider regional and national benefits, and costs, in the round. According to s 5(1) of the Interpretation Act 1999, the meaning of an enactment must be ascertained from its text and in the light of its purpose. Reading down or restricting regional or national benefits, or costs, would not fulfil the purpose of the Act.

93. Benefits and costs includes benefits and costs of any kind, whether or not monetary: Under the Resource Management Act 1991 s 1, benefits and costs "includes benefits and costs of any kind, whether monetary or non-monetary". It would be consistent with the FTAA to take such an approach here.

94. The *Delmore* draft decision[42] found that "Dr Denne also notes that Mr Thompson has conducted a form of Economic Impact Analysis to estimate GDP effects rather than a cost benefit analysis. He references Treasury's comparison of Economic Impact Analysis and cost benefit analysis, which concludes while Economic Impact Analysis can provide useful contextual information for decision-makers, it is not suitable as a tool for measuring the balance of costs and benefits of a decision to society. By contrast a cost benefit analysis would also identify the opportunity costs of land and labour, as well as infrastructure costs and environmental effects." [498]

95. It followed then that "Based on the reports by the four economists, the Panel agrees that the methodology adopted by Mr Thompson is not sufficiently robust to analyse and consequently value benefits. The Panel finds that in the absence of a detailed cost-benefit analysis, it would be imprudent to suggest that economic benefits of the proposed development are of such significance that it needs to be developed in advance of the timing and availability of appropriate supporting infrastructure."

96. There is no concern with double counting, because:
    a. Each criteria has to be assessed individually in its own context.

[42] Delmore Export Panel. Record of Decision of the Expert Panel under Section 87 of the Fast-Track Approvals Act 2024. 17 September 2025.

b. Both the FTAA and the EEZ Act require consideration of economic costs and benefits in light of very distinct purposes.

c. The FTAA regime is then given the greatest weight in the overall consideration under clause 6 and s81(5).

d. As noted, under the EEZ Act, economic benefit is a distinct criterion under s 59(2(f). Economic benefits and costs must be considered on their own. There is no more double counting than if the counting of regional or economic benefits would constitute double counting of the matters under s 82 - or any effect on the people in the neighbourhood and the wider community, including any social, economic, or cultural effects under Schedule 5 clause 7, would result in a double counting of those matters.

The Application of International Law

97. Section 11 of the EEZ Act, a mandatory consideration by the Panel under clause 6(1)(b), provides that:

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

98. The essential scheme of the 1982 United Nations Convention on the Law of the Sea (LOSC) lies in 3 provisions: articles 192, 193 and 194.

> **General duty (Art 192):** States have the obligation to protect and preserve the marine environment.
>
> **Sovereign rights (Art 193):** 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.

Pollution control (Art 194): States must take all necessary measures, individually or jointly, to prevent, reduce, and control marine pollution from any source.

99. The Convention on Biological Diversity (CBD) has the objective of the conservation of biological diversity as well as the sustainable use of its components (Art. 1)

100. The international law considerations underpin the very existence of New Zealand's EEZ and continental shelf, which are established under the 1982 United Nations Convention on the Law of the Sea Part V and VI respectively. As such they are of direct relevance to the EEZ Act and its interpretation, as mandated by s 11 of the EEZ Act. Of particular importance are its implications for s 10(1)(b) upon which the Supreme Court placed considerable weight, as well as to the understanding of the Information Principles in s 61 and of s 62(2), which in essence embody the precautionary principle or approach.

101. The provisions relevant to this application were expounded on by the International Tribunal for the Law of the Sea in the Advisory Opinion on Climate Change,[43] which was delivered in 2024, well after the Supreme Court decision. ITLOS emphasised the importance of articles 192 and 193:

> [385.] The Tribunal is of the view that the obligation contained in article 192 of the Convention has a broad scope, encompassing any type of harm or threat to the marine environment. The obligation under this provision has two distinct elements. The first element is the obligation to protect the marine environment. It is linked to the duty to prevent, or at least mitigate, environmental harm (see para. 246 above). The second

43 International Tribunal for the Law of the Sea. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International law. International Tribunal for the Law of the Sea in the Advisory Opinion on Climate Change. Case 31. 21 May 2024.

element is the obligation to preserve the marine environment, which entails maintaining ecosystem health and the natural balance of the marine environment. [385] ITLOS confirmed that the obligation is one of due diligence: [396] a "stringent" standard [400].[44]

[187] It should be noted that, while article 193 of the Convention recognizes the sovereign right of States to exploit their natural resources pursuant to their environmental policies, it further provides that States must exercise such right "in accordance with their duty to protect and preserve the marine environment." This article thus places a constraint upon States' exercise of their sovereign right. This shows the importance the Convention attaches to the protection and preservation of the marine environment.

102. ITLOS also observed that "article 193 places a constraint upon States' exercise of their sovereign right to exploit their natural resources, which has to be exercised in accordance with their duty to protect and preserve the marine environment." [380]

103. ITLOS also expounded on the obligation to apply the precautionary approach:

"The obligation of due diligence is also closely linked with the precautionary approach. … Therefore, States would not meet their obligation of due diligence under article 194, paragraph 1, of the Convention if they disregarded or did not adequately account for the risks involved in the activities under their jurisdiction or control. This is so, even

44 "[w]hat is required of States under this provision is not to guarantee the prevention, reduction and control of marine pollution at all times but to make their best efforts to achieve such result. In the words of the Seabed Disputes Chamber in the Area Advisory Opinion, this is "an obligation of conduct", and not "an obligation of result". As such, it is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to obtain the intended result." [233] Moreover, "the obligation under article 192 of the Convention includes the specific obligation to take measures "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", as expressly provided for in article 194, paragraph 5." [402]

if scientific evidence as to the probability and severity of harm to the marine environment of such activities were insufficient." [242]

The Relevance of International Law

104. The Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC). clearly set out the requirements of international law provisions[45] under s 11 of the EEZ Act and explained that they inform the interpretation of the EEZ Act.[46] The Supreme Court cited article 192 (following), and linked it to section 10(1)(b) of the EEZ Act ([101]). This Panel should then likewise strive to reach an interpretation of the FTAA which is consistent with New Zealand's obligations.

105. The Supreme Court accepted the relevance of these provisions[47] under s 11 EEZ and that they inform the interpretation of the EEZ Act.[48] The LOSC and the Convention on Biological Diversity "provide support for the proposition that s 10(1)(b) imposes a heightened threshold in favour of environmental protection."[49] This is important as it shows the importance of international law in interpreting legislation - including, now, the FTAA. The Supreme Court found that s 10(1)(b) of the EEZ Act does not create an absolute prohibition on the discharge of a harmful substance[50], but s 10(1)(b) does require protection of the environment from pollution resulting from the discharge of harmful substances (whether by regulating such discharges, if that is enough to protect the environment from pollution, or prohibiting them if it is not). This wording reflects the wording of New Zealand's obligation under Article 192 of the United Nations Convention on the Law of Sea 1982 (UNCLOS) to "protect and preserve" the marine environment: "States have the obligation to protect and preserve the marine environment".

106. A finding by the Panel that the application is contrary to relevant bottom lines in the EEZ Act criteria would also therefore be contrary to these relevant international law

45 SC at [88], [91], [93], [96], footnote 398, [86-93
46 SC at [99], Helu v Immigration and Protection Tribunal [2015] NZSC 28, [2016] 1 NZLR 298
47 SC [88], [91], [93], [96], footnote 398, [86-93
48 SC [99], Helu v Immigration and Protection Tribunal [2015] NZSC 28, [2016] 1 NZLR 298
49 SC [101]
50 SC at [94, 117]

obligations under s11 of the EEZ Act and therefore one would have to find that the application was also contrary to s11.

107. These considerations are also relevant to the Court's assessment of "benefit" as including the social and national implications for New Zealand and in this case any international implications of breaches of international law.

108. The Supreme Court saw the obligation in s 61(2) to be a statutory implementation of the precautionary principle.[51]

109. The Information Principles in the EEZ Act include that the Panel must base its decision on the best available information and take into account any uncertainty or inadequacy in the information available.[52] If the information is uncertain or inadequate, then you must favour caution and environmental protection (s 61(2).

110. Under Schedule 10, Clause 6(1) the information principles are mandatory considerations under the FTAA. Clause 6(1)(d) provides that the Panel must take into account s61 and 62(2) EEZ. Section 62(2) provides that "To avoid doubt, the marine consent authority may refuse an application for a consent if it considers that it does not have adequate information to determine the application".

111. The Panel must consider the requirement in s 61(2) of the EEZ Act to favour caution and environmental protection where information is uncertain or inadequate. This obligation reflects the precautionary approach embedded in the EEZ Act, ensuring that environmental bottom lines are protected when there is uncertainty or gaps in scientific evidence: the Panel must be satisfied that the material harm s 10(1)(b) bottom line test is satisfied (SC [272].

112. In the context of the Schedule 10, clause 6 weighting exercise of EEZ criteria, s 61(2) means that where there is uncertainty, the protection of the environment must be favoured, even where there may be evidence of potential economic or social benefits.

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51 SC [108], [324], note 377.
52 EEZ Act, ss 61 and 87E.

This means that environmental risks cannot simply be “weighed away” by other s59 factors

113. Likewise, the conditions that may be imposed under s 63 apply to a FTAA Panel. This is specifically confirmed under FTAA Schedule 10 paragraph 7.[53]

114. **In summary**: the Panel must base decisions on the best available information, must take into account any uncertainty or inadequacy in the information available, may refuse an application for a consent if it considers that it does not have adequate information to determine the application, and if, in relation to making a decision under the EEZ Act, the information available is uncertain or inadequate, must favour caution and environmental protection.

Identified bottom lines under the EEZ, s10, s61 &62, and s59(2)(h)

115. Bottom lines within the EEZ Act, include:
- Protecting the environment from material harm (s10(1)(b) EEZ Act; Supreme Court..
- Avoiding adverse effects on natural character and outstanding natural areas (policies 13 and 15 NZCPS and another marine management regime under s59(2)(h) EEZ Act.
- In addition, s 61(2) of the EEZ Act must be applied (SC [272])

116. In summary, a consideration of the application against the relevant EEZ criteria assessment results in the following breaches of bottom lines:

a. The Supreme Court held that s10(1)(b) of the EEZ Act creates an environmental bottom line in the sense that if the marine environment cannot be protected from

53 Since Clause 7 of Schedule 10, Sections 63 to 67 of the EEZ Act apply with any necessary modifications as if the references to a marine consent authority in those sections were references to the Panel, and the incorporation of the relevant sections into the FTAA must mean that references to the marine consent authority are taken to be references to the Panel, otherwise they are meaningless: the meaning of the FTAA must be ascertained from its text and in the light of its purpose (Interpretation Act 1999 s 5(1)).

"pollution" (i.e. material harm) through regulation (conditions) then a marine discharge activity must be prohibited.

b. The assessment of whether harm is "material" requires qualitative, temporal, quantitative and spatial aspects to be weighed.[54] The decision-making criteria in s 59 must be weighed in a manner that achieves sustainable management and avoidance of material harm purposes in s 10. The Chief Justice agreed with the Court of Appeal, and with Glazebrook J, that s 10(1)(b) provides an environmental bottom line and the s 59 factors are to be taken into account by the decision-maker in achieving that purpose.

117. The Supreme Court set out a three-step test to assess applications for marine discharge and dumping consents.[55] Glazebrook J stated that "[t]he standard used by the Court of Appeal, "material harm", seems sensible as a bottom line".

118. If the environment is materially harmed, then it cannot be said to have been protected from pollution. "What amounts to "material harm" and the period over which this is measured will be for the decision-maker to determine on the facts of each case.… Of course, harm does not have to be permanent to be material. Temporary harm can be material."[56],[57] "…the assessment of whether there is material harm has qualitative, temporal, quantitative and spatial aspects that have to be weighed."[58] She held that "the decision-maker's assessment of whether the discharge of a harmful substance will

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54 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [3].

55 SC at [5] Accordingly, decision-makers must follow a three-step test when assessing applications for marine discharge and dumping consents under the EEZ Act:
(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping? If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.
(b) Is the decision-maker satisfied that conditions can be imposed that mean:
(i) material harm will be avoided;
(ii) any harm will be mitigated so that the harm is no longer material; or
(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?
If not, the consent must be declined. If yes, then step (c) must be undertaken.
(c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

56 SC at [253].

57 Noting that Section 6(1)(b) of the EEZ Act defines "effect" as including "any temporary or permanent effect".

58 SC at [255],[[227] per Glazebrook J.

cause material harm cannot be affected by considerations of economic benefit. If the harm cannot be avoided through regulating the discharge or through imposing conditions requiring mitigation or remediation, consent must be refused: regardless of economic considerations.[59]

119. There are numerous ways that the proposal will fail the material harm test:

   i. Material harm will result to a distinct population of marine mammals including pygmy blue whales and seabirds
   ii. Material harm to the benthos including by the physical damage to the seabed, introduction of toxic wastes and of excess salinity.
   iii. Material harm to the reefs.

Other Marine Management Regimes

120. The nature and effect of other marine management regimes (MMRs) must be considered by the decision maker (s59 EEZ Act). Bottom lines must be identified as well as looking at the objectives of the relevant regime and the outcomes sought to be achieved by those instruments.[60]

121. There are several marine management regimes that are relevant to this proposal including the Impact Marine Mammals Areas (IMMAs) and in particular the South Taranaki Bight IMMA. However, the primary focus to date has been on the Resource Management Act 1991, particularly the application of the New Zealand Coastal Policy Statement and the inconsistency of the proposal with Objectives 13 and 15. Consideration should be given to the Regional Coastal Plan for Taranaki became operative in September 2023 and the Horizons One Plan.

122. The Supreme Court were split as to whether or not the breach of a bottom line under a separate marine management regime was defeasible by reference to the other s59 facts. Glazebrook J at [280], Williams J at [298] and Winkelmann CJ at [331] found that it wasn't' because the NZCPS and the EEZ are in lockstep with each other and there is

[59] SC at [316].
[60] SC at [244], citing DMC decision, above n 38, at [544]. At SC [121].

a requirement of synergy between regimes.[61] This is relevant also to the weighing exercise under the FTAA that, the mere weighing exercise itself does not negate the EEZ criteria and their mandatory directives (such as bottom lines). In the weighing exercise under the EEZ there is no consideration of lockstep, the application is within the EEZ.

123. The Minority considered that a balancing should occur, Ellen France and William Young also noted that where an application is contrary to an MMR this will be a highly relevant factor for the DMC to take into account and the DMC would need to address the inconsistency.The Majority approach should apply.

Conditions

124. The conditions to be taken into account under s 85(3)(b) do not, as was clear from the Supreme Court findings, adequately avoid, remedy, mitigate, offset, or compensate for those adverse impacts: see the test in SC [5 (b)).

125. The Supreme Court addressed the seabirds and marine mammal conditions in this way: [SC [129]:

> The difficulty with the conditions imposed in terms of the requirement to favour caution and environmental protection in this case is twofold. First, given the uncertainty of the information, it was not possible to be confident that the conditions would remedy, mitigate or avoid the effects. Second, the physical environment in the South Taranaki Bight is, as the DMC said, “challenging, dynamic and complex”.The margins involved in relation to seabirds and marine mammals in the area may be extremely fine, with the outcomes turning on those margins extreme. To take just one example, for those dolphin species which are critically endangered, a very small change in population could have a disastrous effect. But conditions 9 and 10 do not respond to or reflect this because the population level that is problematic is not defined. The end result is that the DMC simply could not be satisfied that the harm could be remedied,

[61] SC Glazebrook J at [280].

mitigated or avoided. In addition, “the attempt to rectify information deficits by imposing conditions requiring pre-commencement monitoring which would subsequently inform the creation of management plans inappropriately deprived the public of the right to be heard on a fundamental aspect of the application.” SC [11]

126. Glazebrook J agreed: “the DMC could not have met either step [261](a) or [261](b) above, given the almost total lack of information in this case on seabirds and marine mammals and the similar issues with the sediment plume and suspended sediment levels discussed by Ellen France J.” (SC [274]) (the steps in [261] are the materiality tests).

127. In our submission, nothing significant has changed with the proposal since these findings. The TTR evidence is largely the same. As Glazebrook J in the Supreme Court said at [276], “I think it is strongly arguable that in this case the pre-commencement monitoring conditions (conditions 48 to 51) were ultra vires as they went well beyond monitoring or identifying adverse effects and were for the purpose of gathering totally absent baseline information”. There is also the point made by Glazebrook J at SC [277] that sufficient information, including as to the possible effects of the conditions “was in important respects entirely lacking and would only become available once the pre-commencement monitoring had occurred and the opportunity for public input had passed.” See also SC [11] and Williams J at SC [329].

128. “The pre-commencement monitoring and the management plans for seabirds and marine mammals were designed to gather baseline information that should have been provided by TTR in its application and were to be used, in effect, to set the consent envelope before mining began.” (SC [282])

129. Pre-commencement testing cannot fix the uncertainty that is there, so s 61(2) and s 62(2) to uncertainty. Therefore conditions remain lacking for reasons the Supreme Court has articulated.

130. As Glazebrook J said in the Supreme Court:[62]

> "[w]hile it is not necessary to decide this point, I think it is strongly arguable that in this case the pre-commencement monitoring conditions (conditions 48 to 51) were ultra vires as they went well beyond monitoring or identifying adverse effects and were for the purpose of gathering totally absent baseline information" [276] and
>
> [281] "In this case the real issue was that there was totally inadequate baseline information provided by TTR in a number of respects and therefore, as indicated above, the application should have been declined. The pre-commencement monitoring and the management plans for seabirds and marine mammals were designed to gather baseline information that should have been provided by TTR in its application and were to be used, in effect, to set the consent envelope before mining began."

Conclusion

131. For these reasons, and as set out in the Executive Summary:

a. the application fails to demonstrate a significant regional or national benefit and therefore does not give effect to the purpose of the Act.
b. It will result in significant adverse effects and is inconsistent with multiple provisions of the EEZ Act, including its bottom lines.
c. The adverse effects are sufficiently significant and out of proportion to the claimed benefits, and the application may accordingly be declined under s 85(3).
d. The application must be delcine under directive EEZ Act criteria (s 10 EEZ), which requires decline under the FTAA once the proportionality threshold is met.

Respectfully Submitted

Dated 6 October 2025

[redacted] [redacted]

[redacted] [redacted]

62 SC at [282].

Appendix A: Assessment of Effects under Section 59 of EEZ Act

132. KASM and Greenpeace have looked at effects in a number of key areas under s59 EEZ Act:
    - Effects from Sedimentation / plume modelling
    - Effects on marine mammals
    - Effects on seabirds; and
    - Effects to Benthic Ecology

Effects from Sedimentation / Plume Modelling

133. KASM/Greenpeace evidence on the plume and benthic effects is given by Dougal Greer and Dr John Luick, dated 2023. Mr Greer has provided a further brief dated 2025 which reaffirms the comments he made in 2023.
134. Plume modelling of TTRL dates to 2017.[63] Further modelling was directed by the DMC in the 2023 reconsideration hearings,[64] but TTRL withdrew before this could be undertaken and have not undertaken any further modelling since that time.[65]
135. The size and scale of the sediment plume and its impacts on the marine environment was a key issue in 2013, 2017 and 2024. In the evidence of experts filed in 2023, there remains disagreement on the appropriateness and adequacy of the TTRL modelling.[66] Experts disagreed in 2023 that the worst case modelling is in fact, worst case modelling.

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[63] Dr Macdonald confirms that no new sediment plume modelling has been completed since 2017 evidence at [7] (19 May 2023).
[64] Minute 23 of the DMC: https://www.epa.govt.nz/assets/Uploads/Documents/Marine-Activities-EEZ/Activities/EEZ000011-TTRL-Reconsideration/TTRL-DMC-minute-23.pdf
[65] SOE Dougal Greer, 6 October 2025, at [12].
[66] Dr MacDonald [23] to [25], Mr Jorrisen [19] and Mr Greer [15].

136. Mr Greer considered that neither the plume model nor the worst-case model is fit for purpose and does not consider that the worst-case model favours caution and environmental protection.[67]

> [31] However, this analysis was not included in the worst-case scenario reporting and consequently the model results do not show how the periods of higher release affect median and 99th percentile SSC during those periods.
>
> [32] I do not believe that the 'worst case' modelling represents a worst-case scenario. For reasons outlined above, there is considerable uncertainty in the model parameterisation, calibration and post-processing which give reason to believe that the model underestimates the size and extent of the sediment plume. I do not consider that the worst-case model favours caution and environmental protection.

137. Professor Luick identifies uncertainties in the plume model, including inadequate treatment of flocculation, limited spatial coverage, and failure to model the full 20-year mining period. He considers that with proper modelling over the full Bight and timeframe, suspended sediment concentrations would likely increase over time, indicating the current model underestimates plume persistence and cumulative effects.

138. The sediment plume is a primary source of potential effects beyond the mining site. Any uncertainty or inaccuracy—particularly in the so-called worst-case scenario—undermines confidence in the predicted effects on the wider marine environment and ecosystem.

Marine Mammals

139. Sufficient baseline data has not been provided, notably there have been no additional marine mammals surveys. Dr Childerhouse on behalf of TTRL, in 2023 acknowledges that "the previous marine mammal survey data is now very dated and therefore is it essential that new baseline data is collected[68] and recommends acoustic monitoring and aerial surveys.

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[67] Mr Greer [15] SOE 6 Oct 2023, and Greer at [14], [15] and [32] SOE 6 Oct [2025].
[68] Evidence of Simon Childerhouse 2023, para. 111.

140. The most recent data set we do have is from Leigh Torres research has demonstrated that:

- There is a distinct population of blue whales that habitat the STB nearly year round;
- This STB population of pygmy blue whales is vulnerable to climate-driven oceanographic changes and cumulative anthropogenic pressures, including vessel strikes, ocean noise, and impacts from sediment plume to be produced by mining on the quality, quantity and distribution of krill prey that blue whales rely on in the STB. These pressures pose significant risks to the long-term viability of the population.[69]
- he sediment and noise from mining operations may cause chronic physiological stress and behavioural disturbance, potentially displacing whales from critical habitat and impairing reproduction. The whales' regular presence within the vicinity of the proposed site means that, in addition to the existing pressures, pollution and noise from the mining operation could undermine the population's viability.[70]

141. These risks are not adequately addressed. The proposed conditions of consent fail to demonstrate sufficient environmental protection or precaution.[71]

142. Dr Torres concludes:[72]

> Given the uncertainty associated with the lack of accurate noise estimates for this specific mining operation, the resulting insufficient estimation of the acoustic footprint of the TTR site, and the lack of data available on potential behavioural and physiological response of cetaceans to increased noise, I do not think there is sufficient evidence to conclude that there will be no material harm or no adverse effects caused by the proposed TTR mining operation and their is a significant risk that

[69] SOE, Dr Leigh Torres, 06 October 2025, at [13].
[70] Ibid at [17].
[71] Ibid at [18].
[72] Ibid at [22].

the proposal will result in the significant adverse impacts including the relocation of these mammals from the region altogether.

143. In the absence of this fundamental information, there can be no certainty about the nature or scale of potential adverse effects, nor any confidence that such effects can be appropriately avoided or mitigated.Glazebrook J stated in the Supreme Court in relation to marine mammals data:

> "This information deficit could not legitimately be compensated for by conditions designed to collect the very information that would have been required before any conclusion at all could be drawn as to the possible effects, any possible material harm and any effect of any possible conditions. No conclusion was therefore possible on whether the bottom line could be met, and a consent could not legitimately be granted."[73]

Seabirds

144. The DMC found in the 2017 application that there had been "no systematic and quantitative studies of the at-sea distributions and abundances of seabirds within the area."[74] This was accepted in the evidence of Dr Thompson for TTRL in 2023[75], who also agreed with Mr Cockrem, that there are no data on seabird foraging efficiencies and how these might relate to turbidity in the water[76] and agreed that the total number of seabirds using the STB is not known.[77]

145. John Cockrem's evidence is that:

- The South Taranaki Bight (STB) is a hotspot for seabirds. The available evidence indicates that approximately half of New Zealand seabird species (and more than 60% of New Zealand marine mammal species) are present in the

[73] SC at [275] per Glazebrook J.

[74] DMC decision, at [563]. The experts for TTR and Kiwis Against Seabed Mining Inc (KASM)/Greenpeace of New Zealand Inc agreed a number of "threatened" and "at risk" taxa occur within the South Taranaki Bight year-round or seasonally (conservatively, 10 and 24 taxa respectively).

[75] At [8] SOE, Dr David Thompson, 19 May 2023.

[76] Rebuttal SOE, dated 23 Jan 2023 D Thompson at [20].

[77] Rebuttal SOE, dated 23 Jan 2023 D Thompson at [10].

STB, with at least 100 species of birds feeding in and along the shores of the STB[78];

- The Cook Strait and Marlborough Sounds key biodiversity areas (KBAs) were recognised in 2016. These KBAs include all the waters of the STB, Cook Strait, and the inner waters of Marlborough Sounds, together with 12 seabird sites on the shores of these waters. [79]
- No systematic observations from boats have been made to determine the abundance and distribution of seabirds in the South Taranaki Bight.[80]
- The importance of the Patea Banks as a feeding area for seabirds is particularly apparent for fairy prions and for kororā (little penguins).[81]
- There is a report of at least 100 000 prions seen less than 10 km from the proposed sand mining area, and more than 10 000 prions and 10 000 sooty shearwaters per hour have been seen passing Waverly Beach.[82]
- Kororā (little blue penguins) are declining.[83]
- They swim long distances to feed in the STB, including in the Patea Shoals,[84] an important feeding area for little penguins and fairy prions.[85]
- Adverse effects of sediment due to sand mining would be particularly strong in the Patea Shoals area from sediment coverage.[86]

146. John Cockrem concludes that the available evidence that we do have indicates that the proposed sand mining in the STB would have adverse and cumulative adverse effects on populations of seabirds and would result in material harm and that effects for Kororā and Fairy prions would be adverse and potentially significant.[87] There remains uncertainty around the numbers of seabirds in this area and therefore around the degree of effect.[88]

78 SOE, John Cockrem, 6 October 2025, at 10(a).
79 At [37] SOE John Cockrem, (6 October 2023).
80 At [21] SOE John Cockrem, (6 October 2023).
81 At [35] SOE John Cockrem, (6 October 2023).
82 Citation [12] SOE John Cockrem, (6 October 2023).
83 At [42] SOE John Cockrem, (6 October 2023), reconfirmed in his SOE 06 october 2025 at X.
84 At [9] SOE John Cockrem, (6 October 2023).
85 At [35] SOE John Cockrem, (6 October 2023).
86 At [67] SOE John Cockrem, (6 October 2023).
87 At [107] SOE John Cockrem, (6 October 2023).
88 Ibid at [105].

Effects to Benthic Ecology

147. Dr Anderson has peer reviewed the evidence on benthic ecology and in summary [paras 21-26] finds:

> Across all areas of assessment, there remains a high level of uncertainty. The sediment plume modelling is outdated (from 2017) and not fit for purpose. Further plume modelling has not been undertaken despite a strong indication that it is necessary, Key data gaps persist for marine mammals, seabirds, and benthic habitats — particularly the absence of updated baseline surveys, long-term sediment exposure studies, and systematic distribution data. These deficiencies mean the best available information has not been provided under s61(1) of the EEZ Act, and the Panel must therefore favour caution and environmental protection under s61(2). The uncertainty surrounding plume behaviour, species distribution, and habitat recovery leads to a finding that the proposed condition set cannot with any confidence avoid material harm.

148. The proposal with its condition set:
- does not favour caution of environmental protection under s61
- does not avoid material harm
- does not avoid adverse effects to outstanding x under NZCPS 13 or 15, which must be considered under s59(2)(h) EEZ Act.

149. And therefore is inconsistent with purpose section 10, section 11 as it relates to giving effect to international law, s 61(2) and s59(2)(h) of the EEZ Act.

Appendix B: Assessment of Benefits under s3 FTAA

150. "The economic assessment method used in the NZIER Report measures the gross economic benefit of the proposal but does not assess the net benefit".[89]

151. TRC's assertion that this application is "finely balanced" is baseless. While TRC has provided relevant comments on the environmental assessment, it has not commissioned or undertaken any independent economic analysis. Its assessment of significant regional benefit is therefore limited to a reliance on the NZIER Report. For that reason, little weight should be placed on this aspect of TRC's comments.

152. The NZIER Report measures only *gross economic activity*, not *net benefit*, and omits substantial costs and risks that are critical to a valid assessment under the Fast-Track Approvals Act. The evidence presented therefore cannot satisfy the statutory threshold that requires demonstrable significant national or regional benefit proportionate to the project's adverse environmental and social effects.

153. Furthermore the current information, if limited to gross economic benefits still does not support a finding that the proposal would enhance overall societal welfare. Instead, the available analysis demonstrates material deficiencies, unquantified externalities, and significant uncertainty regarding both the project's economic viability and its capacity to deliver enduring benefits to Aotearoa New Zealand.

[89] SOE, Chirs Fleming and Andrew Buckwell, 6 Oct 2025, at [6].

154. "The current economic impact assessment of TTRL's Taranaki VTM Iron Sands Project to TTRL provides insufficient evidence on which to base a decision to proceed and, therefore, does not support approval of TTRL's submission."[90]

[90] Ibid at [7].