BEFORE AN EXPERT PANEL **FTAA-2504-1048**

UNDER	the Fast Track Approvals Act 2024
IN THE MATTER	of a substantive application for marine consents that would otherwise be applied for under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
BY	Trans-Tasman Resources Limited

SUBMISSIONS FOR TRANS-TASMAN RESOURCES LIMITED ON IDENTIFIED LEGAL ISSUES

14 November 2025

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MAY IT PLEASE THE PANEL

1. These legal submissions respond to the questions contained in Appendix A of the Notice of Hearing dated 11 November 2025.

2. Many of these matters were addressed in the legal submissions filed as part of TTR's response to comments on 13 October 2025, but for ease of reference that material has been replicated here (where appropriate) following the order of questions posed by the Expert Panel.

JURISDICTION AND STATUTORY FRAMEWORK

1. What is the relevance, if any, of factual findings by Decision-Making Committees on previous applications by the Applicant (TTR)?

3. The 2014 DMC's findings of fact are of no relevance, for two reasons:

   (a) The EEZ Act at that time did not require consent for TTR's discharge activity, and allowed adaptive management, so it was a materially different legal context than the present application; and

   (b) The evidence on which the 2014 decision was based was substantially reviewed, revised and updated by TTR in response to the 2014 decision.[1]

4. The 2017 DMC's findings of fact are also of no relevance, as that DMC's decision was quashed by the Supreme Court,[2] and the application subsequently withdrawn. In a legal sense, none of the factual findings of the 2017 DMC 'survive'.

5. Further, even if the evidence before the current Expert Panel were identical to the evidence before the 2017 DMC (which

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[1] As described in 1.5.2 of the present application.

[2] Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127, (2021) 23 ELRNZ 47 ("TTR (SC)").

it is not), the current Panel is required by law to make its own findings — and might conceivably reach different views even on the same evidence. Added to this, the 2017 DMC was a Panel differently constituted than the present Expert Panel and also applying a different legal framework (i.e. not the Fast-track Approvals Act (FTAA)).

6. For all the above reasons, no factual findings by either of the prior DMC's have any relevance to the present matter.

2(a). Is the Panel required to determine whether TTR's proposal requires approval under the Resource Management Act 1991 ("RMA")?

2(b). If so, does TTR's proposal require approval under the RMA, and is s 5(1)(l) of the Fast-track Approvals Act 2024 ("FTAA") relevant?

7. The Expert Panel is not required, in any general sense, to determine whether TTR's proposal requires approval under the RMA, for the following reasons:

   (a) The provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2014 (**EEZ Act**) that address cross-boundary activities[3] are not applicable under the FTAA.

   (b) Even if TTR required an approval under the RMA (which is not agreed), the FTAA enables TTR to lodge a substantive application for any single approval it needs,[4] so TTR may apply only for marine consent if it chooses.

   (c) TTR has applied only for approval for marine consent that would otherwise be applied for under the EEZ Act.

   (d) The EPA has decided that TTR's application complies with sections 42-44 of the FTAA; and all steps in relation

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[3] Sections 88 – 100.

[4] Sections 42-43, and in particular s 42(4).

to TTR's application have proceeded on the basis that TTR is seeking marine consent alone.

(e) The Panel's substantive decision-making obligation is limited to determining the approval that TTR has sought.[5]

8. The Expert Panel is required to determine whether approving the proposal would constitute approving an activity prohibited under s 15B, RMA, for the following reasons:

(a) A specific requirement arises under ss 81(1)(2)(f) and and 85(1)(a) to consider whether "the approval is for an ineligible activity".

(b) The only part of the definition of ineligible activity that has any potential relevance here, is to an activity that is "described in section 15B of the [RMA] and is a prohibited activity under that Act or regulations made under it".[6]

9. Granting approval to TTR's proposal would not amount to approving an activity to which s 15B, RMA applies, because that provision relates solely to discharges in the coastal marine area. The discharges involved in TTR's proposal will occur outside the coastal marine area.

10. Despite this, the effects of TTR's proposal are required to be assessed wherever in the environment they occur (i.e. regardless of the CMA boundary).

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[5] FTAA, s 81(1).

[6] FTAA, s 5(1)(l)(ii). NB. Section 5(1)(l)(i) and (iii) do not apply.

3(a). Do other participants agree with the Applicant's position on the consents it requires under the EEZ Act?

3(b). If not, identify the points of disagreement and reasons?

11. (Not applicable to TTR.)

BENEFITS AND ECONOMIC ASSESSMENT

4. Is the project's feasibility a relevant consideration?

12. No. None of the assessments the Panel is required to make under the FTAA (and relevant EEZ Act) provisions requires feasibility to be considered. An approval under the FTAA is conceptually the same as other sorts of environmental approvals such as consents under the RMA. Such approvals permit an activity, they do not require the applicant to undertake the activity. Whether the applicant undertakes the activity is a commercial decision that has no place in decision-making.[7]

5. How should "benefits" be interpreted under the FTAA when considering the extent of the project's regional or national benefits and the purpose of the FTAA, including:

(a) whether a gross benefit approach is required;

(b) whether disbenefits or other costs are relevant; and

(c) whether a net benefit or cost-benefit approach is required?

13. The FTAA does not prescribe what specific approach should be taken when considering the extent of a project's regional or national benefits.

14. Given the lack of prescription, the Expert Panel should be guided by a number of matters, including:

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[7] See *NZ Rail v Marlborough District Council* [1994] NZRMA 70 at 88; *Todd Energy Ltd v Taranaki Regional Council* ENC Wgtn W101/05, 7 December 2005 at [19]; *Save The Point v Wellington City Council* Environment Ct Wellington W82/07, 20 September 2007 at [221]; *Meridian Energy v Wellington City Council* [2011] NZEnvC 232 at [39].

(a) It would not have been difficult to prescribe a specific approach if the legislative intent was for a single approach to be applied for all cases. The lack of prescription indicates that the legislation does not intend a "one size fits all" approach.

(b) The Panel should adopt an approach that best accords with the purposes for which the Act requires regional or national benefits to be considered, namely:

i. To assess the proportionality of the project's adverse impacts relative to its benefits; and

ii. To uphold the s 3 purpose of the FTAA.

(c) These purposes do not inherently require economic quantification of every consideration. As is well-recognised in RMA jurisprudence, environmental assessments often require consideration of matters which are not capable of quantification.[8] The situation here is no different. As an example, there is strong opposition to the Project by South Taranaki iwi, part of whose opposition is rooted in metaphysical aspects of cultural identity and belief. No matter how thoroughly the economics are assessed, it seems unlikely that those aspects of concern to iwi could ever be distilled to a dollar value.

(d) The findings of the Court of Appeal and Supreme Court on the assessment of "economic benefit to New Zealand" under the EEZ Act is instructive.[9] That

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[8] See, for example: *Contact Energy Limited v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [47]-[51] and [88]-[92] where even the most prescriptive references to cost-benefit evaluation in the RMA (s32) were held not to depend on a cost-benefit analysis but a wider exercise of judgment; and *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at [107]-[108].

[9] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 ("*TTR (CA)*") at [280]-[285], and *TTR (SC)* above n 2 at [195] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.

provision explicitly frames the consideration of benefits as a matter of economic analysis, which was held to require a net assessment, but not necessarily a CBA. The higher courts had no concerns with economic benefits being quantified, and weighed against environmental, social and cultural impacts that were assessed in a qualitative way:[10]

> 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.

15. Taking all these factors into account it is submitted that an appropriate approach for the present application is neither a gross benefit approach, nor a full-blown cost-benefit approach. In particular, the application of the proportionality test in s 85(3) does not rely on a fully quantified analysis, and there is strong judicial support for relying on qualitative analysis to ensure non-economic components of an assessment are accounted for.

16. Consistent with this, Ms Leung's and Ms Huang's evidence addresses what they consider are likely to be the main economic costs, and have accounted for those in order to quantify the 'net economic benefits' of the Project.

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[10] TTR (CA) above n 62 at [283], followed in TTR (SC) above n 2 at [195] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.

6. (a) Does the same approach apply when the Panel takes into account "the economic benefit to New Zealand of allowing the application" under s 59(2)(f) EEZ Act?

(b) If not, are two separate economic assessments needed?

17. The Expert Panel is bound to apply the findings of the Court of Appeal and Supreme Court on the approach required under s 59(2)(f) (described above).

18. On this basis, and for the reasons covered in response to question 5, two separate economic assessments are not required.

CLIMATE CHANGE

7. (a) Are international climate conventions relevant under s 11 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("EEZ Act")?

(b) If so, how?

19. The meaning of s 11 was addressed in the Supreme Court's decision on TTR's 2016 application. In common with the High Court and Court of Appeal, the Supreme Court followed the principles summarised by McGrath J in *Helu v Immigration and Protection Tribunal*. He said:[11]

> [143] Parliament takes differing approaches to the implementation of international obligations. It sometimes gives them effect by incorporating their exact terms into New Zealand law. At other times, it enacts legislation, with the purpose of giving effect to such obligations using language which differs from the terms of substance of the international text. In such cases, the legislative purpose is that decision-makers will apply the New Zealand statute rather than the international text. Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner

[11] Helu v Immigration and Protection Tribunal [2016] NZLR 298.

> consistent with New Zealand's international obligations. But the international text may not be used to contradict or avoid applying the terms of the domestic legislation.
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> [144] … [If] Parliament has provided that a decision-maker is to have regard to specific considerations drawn from international obligations, the legislation must be applied in its terms, although they may be clarified by reference to the international instrument.

20. This guidance is relevant to the present application. Parliament has not provided, in the EEZ Act, that regard must be had to specific considerations drawn from international obligations. Rather, section 11 sends a clear signal that the Act itself is intended to implement New Zealand's obligations under the relevant instruments.[12] Further, that intention is not replicated in the FTAA, which sends an equally clear signal that Parliament is not relying on the FTAA to implement New Zealand's obligations under those same instruments.

8. (a) Is the effect on the climate of releasing seabed-stored carbon or reducing carbon flux to the seabed a relevant consideration?

(b) If so, to which aspects of the assessment?

21. To the extent that releasing seabed-stored carbon or reducing carbon flux to the seabed results in a discharge of greenhouse gases into the air, the Expert Panel is required <u>not</u> to take the effects of such discharge into account.[13]

22. In all other respects, any effect on the climate of releasing seabed-stored carbon or reducing carbon flux to the seabed would constitute an effect on the environment within the meaning of s 59(2)(a) of the EEZ Act, and on that basis would be required to be taken into account.

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[12] Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board [2020] NZCA 86 at [39], upheld on appeal.

[13] EEZ Act, s 59(5)(b).

23. If the Panel were to find that there is such an effect, then the Panel would need to consider its significance and account for it in the application of the proportionality test in FTAA s 85(3)(b) (including the consideration of any conditions or modifications as described in that provision). However, TTR is advised that:

    (a) the science in this area is still developing and subject to much uncertainty and debate;

    (b) work of the sort that might be required to quantify effects of this sort has not been done anywhere in the world other than one experimental location in the Baltic Sea (which is not comparable to the current proposal) and otherwise via a theoretical global model;

    (c) many of the data necessary to allow even a first-order estimate of release of carbon from the proposal are lacking.

9. Given the asserted climate-related benefits, should a net approach to climate effects be adopted?

24. If the Panel receives evidence that enables climate-related benefits and disbenefits to be netted off one against the other, then that approach could be adopted in order to assess whether the Project overall creates a climate-related benefit or disbenefit (and, of what magnitude or significance that is). However, achieving a combined assessment of climate-related benefits and disbenefits in that way is not fundamental to the assessment. More important is that the approach accounts for both sides of the equation (if that is supported evidentially).

TREATY, CULTURAL AND PLANNING INSTRUMENTS

10. What is the relevance of Treaty principles, cultural values and kaitiakitanga to the Panel's consideration, and where do they fit within the assessment framework? In particular, what is the correct legal test

to distinguish an effect on an "existing interest" (as defined and used in the EEZ Act) from an effect on an "obligation arising under a Treaty settlement" (FTAA s 7(1)(a))?

25. The FTAA does not incorporate the principles of the Treaty of Waitangi.[14] Without direct incorporation the principles are not to be read into the legislation, and there is no case law which supports reading in the principles without direct incorporation.

26. None of the criteria in clause 6 of Schedule 10 of the FTAA make any specific reference to cultural values or kaitiakitanga. The definitions of environment and sustainable management that apply here also do not share the RMA's specific references to cultural dimensions of those two concepts.

27. Counsel submit that the definition of "existing interest" in the EEZ Act is clear on its face, as is an "obligation arising under a Treaty settlement" in the FTAA. Where there is an obligation arising under a Treaty settlement, that is one consideration. Where there is an existing interest, as contemplated by the EEZ Act, that is another consideration. Whether there is an overlap between the two depends on the facts.

28. Further, it is not considered that there are any relevant obligations arising under existing Treaty settlements, nor any customary rights yet recognised under the MACA Act (noting that effects on customary rights claimed but not yet recognised under the MACA Act may nevertheless be a relevant consideration under section 59(2)(a) of the EEZ Act).

29. In addition, it appears from section 7(2) that the obligations in section 7 may in any event not apply to an FTA Panel, on the basis that the members of such a Panel are exercising a quasi-judicial function in determining a marine consent application.

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[14] For contrast, see provision for the Crown's responsibility to give effect to the principles of the Treaty of Waitangi in s12 of the EEZ Act.

11. What, if any, is the significance of the High Court's judgment in *Te Ohu Kaimoana Trustee Ltd v Attorney-General* [2025] NZHC 657?

30. It is not relevant to the matters before the Panel.

12. (a) Are Iwi Environmental Management Plans relevant considerations?

(b) If so, how should they be taken into account?

31. There is no express requirement to consider Iwi Environmental Management Plans under the FTAA provisions, or any of the EEZ Act provisions that are applicable under the fast-track framework. A Plan of this sort could be taken into account as an "other matter" under EEZ Act s 59(2)(m) if the Panel found on the evidence that the contents of such a Plan are both relevant and reasonably necessary to determine the application, if that is also consistent with the purpose of the FTAA.

13. When considering national or regional planning instruments prepared under the RMA under s 59(2)(h) EEZ Act, to what extent, if any, should the Panel be guided by the Supreme Court's decision in *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26?

32. To the extent that the decision concerns the approach to be taken to "bottom line" policies, it is of no relevance to the present matter, as the FTAA does not enable any RMA plan provisions — no matter how they are expressed — to be applied as bottom lines.

33. Some guidance can be taken from the decision's approach to the "have regard" standard, which from a practical perspective is equivalent to the standard to take matters "into account".

14. (a) Must "habitats of particular significance to fisheries management" be formally identified to be relevant under s 59(2)(h) EEZ Act?

(b) If so, what form must such identification take?

34. Until/unless formally identified, a habitat cannot constitute a "habitat of particular significance to fisheries management" under the Fisheries Act, and cannot therefore be taken into account as part of a "marine management regime" under s 59(2)(h). Identification must take the form of addition to the register managed by the Ministry for Primary Industries.

EXISTING INTERESTS AND INFRASTRUCTURE

15. (a) To what extent, if any, is the potential for offshore wind energy generation in or near the project area relevant, whether as an "existing interest" under s 59(2)(a) or (b) or under s 59(2)(g) EEZ Act, or otherwise?

(b) If the potential for offshore wind energy generation is relevant, how should it be taken into account?

35. At present, any interest in the potential for offshore wind energy generation in or near the project area does not constitute an "existing interest" for the purposes of s 59(2)(a) or (b). No party has the lawful ability to establish an offshore windfarm (as legislation is yet to be passed that would even enable an application to be made) so no party has any lawfully established interest in that activity. An interest in something that may become lawful at some future time, and if so may (eventually) be established, does not suffice.

36. Section 59(2)(g) of the EEZ Act does not require the Panel to consider whether enabling the Project would preclude more efficient development in the future.

37. There is no authority that supports reading s 59(2)(g) in such a broad way. If the Panel were required under the FTAA (or the EEZ Act) to consider the relative efficiency of a proposed activity against the efficiency of other (or all) potential uses of

the same resource, one would have expected the legislation to say so in a much more direct manner. Section 7(c) of the RMA has stated a similar obligation for the past 34 years, and no precedent has developed under that provision that would support such a broad approach to the EEZ equivalent in s 59(2)(g).

38. The requirement to take into account the nature and effect of other marine management regimes (EEZ Act, s 59(2)(h)) also does not provide a basis for the Panel to consider potential effects on offshore wind energy generation under the auspices of the Offshore Renewable Energy Bill. The Bill is not marine management regime, until it is passed into law.

39. The provisions addressed above provide the only conceivable bases for the Panel taking into account the potential for offshore wind energy.

16. How are the potential effects on oil and gas permit infrastructure and associated safety regimes weighed within the FTAA and EEZ Act decision frameworks?

40. The interests of oil and gas operators in existing and lawfully established oil and gas infrastructure are existing interests under the EEZ Act. Effects of TTR's proposal on those interests are required to be taken into account under the relevant provisions of the FTAA and EEZ Act.[15] Their place in the assessment is ultimately a matter for the Panel to determine on the evidence, after giving the matter genuine attention and thought,[16] but it is not open to the Panel to give this greater weight than the purpose of the FTAA.

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[15] FTAA s 81(2) and clause 6 of Schedule 10; EEZ Act s 59(2).

[16] See *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at [72].

CONDITIONS, ADAPTIVE MANAGEMENT AND MONITORING

17. Which, if any, of the conditions proposed by the applicant constitute adaptive management within s 61(3) and s 64(2) EEZ Act?

41. None of the conditions proposed by TTR constitute adaptive management.

42. The Supreme Court found that the conditions imposed by the DMC in 2017 did not amount to adaptive management.[17] None of the refinements made since 2017 have altered in any material way how the conditions operate relative to the concept of adaptive management, so the Supreme Court's finding on that particular legal issue remains authoritative for present purposes.

18. Are proposed conditions requiring pre-commencement monitoring lawful?

43. Yes. We acknowledge that the Supreme Court was critical of the pre-commencement conditions, but submit that the Panel is not bound to reach the same view as the Supreme Court on this matter, for the reasons that follow.

44. This subject matter mixes fact and law. How the conditions function—i.e. what they "do"—is a matter of fact. Whether they conform with requirements for principled condition-making and do not undermine participation rights are matters of law. Plainly, the Supreme Court was concerned that the pre-commencement conditions did undermine participation rights. However, those conclusions were based on the Court's understanding of how the conditions would operate as a matter of fact. To that extent, the Court's findings on conditions are not binding on the Panel. The Panel must form its own views about what the conditions "do" as a matter of fact.

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[17] At [199]-[213] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]-[297] per Williams J and [332] per Winkelmann CJ.

45. In our submission, the Supreme Court's understanding of conditions was inherently hampered by its appellate role, and consequent reliance on the record (such as it was) of the 2017 decision. Unlike the present Panel, the Court was not in a position to directly evaluate evidence concerning conditions.

46. In the following paragraphs we discuss an example of pre-commencement monitoring to demonstrate why such conditions, properly understood, do not give rise to the legal issues that concerned the Supreme Court.[18]

47. The Supreme Court considered the 2017 DMC did not have sufficient information to rely on a condition which (formerly) required that there be "no adverse effects at a population level" on certain threatened marine mammals. The Court considered the pre-commencement monitoring was an improper attempt to gather the information necessary to make the population condition work, and that such information should have been gathered prior to seeking consent.[19]

48. From TTR's perspective, this does not reflect the true function of the "population level" condition or the pre-commencement monitoring.

49. The condition stating that there must be "no adverse effects at a population level" expressed an outcome. The expression of that outcome was never intended to be the means by which the outcome would be achieved. Rather, the outcome would be achieved through a large number of other specific operational conditions such as conditions requiring: marine

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[18] Though we have focussed on a single example (namely, the way in which pre-commencement monitoring contributes to the management of effects on marine mammals), TTR's position is that its evidence supports a conclusion that pre-commencement monitoring for managing effects on seabirds, and for managing sediment discharge (such as by populating the SSC limits with numerical values) are also appropriate (i.e. they do not defer work that ought to have been done before applying for consent).

[19] See for example at [129]-[130] per William Young and Ellen France JJ, [238] and [274]-[276] per Glazebrook J, [295] per Williams J and [328]-[329] per Winkelmann CJ.

mammal observers on all vessels, recording and reporting marine mammal sightings, reducing vessel speeds in proximity to any sighted marine mammals, compliance with underwater noise limits, certification of vessels and equipment to ensure those limits would be met, "soft starts" of equipment, controlled rates and limits on discharge, development of a marine mammal management plan in consultation with the Department of Conservation, and training of personnel in relation to marine mammal matters.[20]

50. The purpose of the pre-commencement monitoring was not therefore to quantify the populations of marine mammals (as the Supreme Court seemed to think) because quantifying the populations in any reliable way is neither possible, nor in fact necessary to achieve the stipulated outcome. This is evident from the 'baseline' and operational monitoring plans prepared and submitted by TTR in support of its 2016 application (and on which TTR continues to rely). These draft plans require a range of monitoring methodologies (incidental sightings, aerial surveys and acoustic surveys before and after commencement, and systematic sighting during extraction), but repeatedly emphasise that the intent of all such monitoring is to better understand abundance and distribution in "relative" and "variable" terms, not in absolute terms. For example (with emphasis added):

(a) The objective in both draft plans is:

> To conduct surveys to describe the **variability** of marine mammal **relative** abundance and distribution in the STB…

(b) The pre-commencement plan says of aerial surveys:[21]

> Aerial surveys will be designed in order to describe the **variability of relative abundance and distribution** of

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[20] As addressed in the evidence Dr Mitchell provided for the reconsideration hearing in 2024: Expert Evidence of Philip Hunter Mitchell on behalf of Trans Tasman Resources Limited, 19 May 2023 at [21]-[22].

[21] At 10.3.2.

> marine mammals in the STB during the two year period prior to iron sand extraction activities commencing. …
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> It is not the intention of aerial surveys to obtain **absolute abundance estimates** of marine mammal species. Instead, **relative abundances** between surveys are sought to detect any apparent **trends** in density. …
>
> **Trend** detection analysis will not occur during baseline monitoring, but will be critical during operational monitoring.

(c) The operational plan says of aerial surveys:[22]

> It is not the intention of aerial surveys to obtain **absolute abundance estimates** of marine mammal species in the Project Area. Instead, **relative abundances between sampling periods are sought to detect any apparent trends** in density.
>
> The frequency of surveys will take into account seasonal **variability** and will ensure there is sufficient statistical power for the **detection of trends**. For detecting **trends** in the survey results, the survey efforts will be undertaken over multiple years in order for sufficient power to be achieved.

(d) The operational plan says in respect of interpreting findings:[23]

> the results of each marine mammal monitoring component will be evaluated over the course of the monitoring programme for **trends** and effects. However, **given the low density of marine mammals in the STB, it is unlikely that statistically significant cause and effect relationships will be detected**. For this reason it is important that the instigation of additional mitigations, in relation to marine mammal concerns, is not strictly limited to statistically significant relationships.

51. These drafts demonstrate that TTR knew it would be very difficult to detect an impact and correlate it to the Project, yet TTR agreed (in its 2016 application) to include the condition requiring "no adverse effects at a population level" for certain marine mammals. This was not because TTR's experts had altered their views on the difficulty of detecting a cause-and-effect relationship, but because TTR was confident—based on all the relevant evidence of its experts—

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[22] At 13.4.3.
[23] At 13.7.

that the suite of other actionable and detailed conditions, in combination with the relative absence of marine mammals in the area, would ensure this outcome would be achieved.

52. The approach TTR has adopted (for marine mammals) since the Supreme Court's decision, based on the expert advice of Dr Childerhouse and Dr Mitchell, is to remove the reference to "population level" from the conditions, and retain the pre-commencement monitoring requirements, in order to support ongoing work to identify any detectable trends in marine mammal presence and abundance.

53. TTR's position is that such conditions are fit for purpose, and, properly understood, the pre-commencement requirements are

    (a) not an improper attempt to 'operationalise' a "no adverse effects" condition, and

    (b) not an attempt to obtain baseline data needed to support a conclusion that the stated outcome will be met.

    TTR's position is that there is already ample information (despite the assertions of others) to support a conclusion that there will be no adverse effect on the specified marine mammals if the operational conditions (and associated management plans) are implemented.

54. For the same reasons, it is submitted that the proposed pre-commencement monitoring to support detection of trends in marine mammal presence and abundance does not amount to delaying the gathering of necessary baseline data, and does not cut across any rights of public participation.

55. Regarding those participation rights we also emphasise that the FTAA adopts a far more restrictive approach towards participation than the EEZ Act, with no allowance for public notification, no allowance for submissions (as opposed to

comments), and no requirement to hold hearings; so the statutory context for assessing pre-commencement monitoring requirements has also changed substantially since the Supreme Court's decision.

DECISION TESTS, INCONSISTENCY AND DISCRETION

19. To what extent, if any, is the decision of the Supreme Court in *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 binding on the Panel or of highly persuasive significance?

56. The Supreme Court's decision is the most authoritative guidance on the correct application of some key provisions of the EEZ Act in particular:

(a) Section 10(1)(b) (protection of the environment from pollution)

(b) Section 11 (international obligations)

(c) Section 59(2)(a) and (l) (Tikanga)

(d) Section 59(2)(h) (the nature and effect of other marine management regimes)

(e) Section 61(2) (favouring caution and environmental protection)

(f) Section 63 (conditions)

(g) Section 64 (adaptive management)

57. However all of these are matters to be "taken into account", which is not an absolute standard,[24] as the statutory framework for the present applications is not set by the EEZ Act, but by the FTAA. The relevance of the Supreme Court's guidance on each provision must be considered in that light.

58. For example, the material harm tests prescribed by the Supreme Court[25] are unquestionably binding on the Panel in

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[24] See *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at [72].
[25] At [261] per Glazebrook J.

terms of how s 10(1)(b) of the EEZ Act is applied. However, it must be kept in mind that the Supreme Court was also applying s 10(1)(b) as an environmental bottom line, and it does not operate as a bottom line for present purposes. In simple terms, it would be legally open to the Panel to conclude that the proposal will give rise to material harm (which TTR maintains is not the case), yet conclude that the benefits are so great that this is an adverse impact that that is not out of proportion to those benefits. In that hypothetical scenario a finding of material harm would not preclude the grant of approval.

59. In addition, care must be taken in relation to aspects of the Supreme Court's decision that are based on the Court's understanding of factual dimensions of the Project. The Supreme Court was reliant on the factual findings of the 2017 DMC (and the extent of the record in relation to such findings), whereas—for reasons addressed above—the Expert Panel cannot rely on such findings, and is in a position to undertake its own evaluation of factual matters on the evidence before it.

20. Is s 62 EEZ Act a standalone ground for declining a marine consent in this process, or are the Panel's powers to decline confined to s 85 FTAA?

60. Section 62(2) of the EEZ Act states:

> "*(2) 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.*"

61. This provision is required to be taken into account, as stated in clause 6(d) of Schedule 10 of the FTA.

62. This creates some tension with sections 81 and 85 of the FTA. Section 81(2)(f) states that an FTA Panel may decline approval "only in accordance with section 85". Section 85 specifies potential reasons for which an approval "must" and "may" be

declined — but none of those potential reasons is that the FTA Panel considers it does not have adequate information to determine the application.

63. The statutory requirement to only "take into account" section 62(2) of the EEZ Act, compared with the more directive requirements of sections 81 and 85 (which must be implemented, not merely weighed alongside other considerations), creates some doubt whether Parliament intended the reference to section 62(2) to operate as a further potential ground for refusing an application. However, it is hard to see what purpose the cross-reference to section 62(2) serves, if it merely enables an FTA Panel to consider whether it has adequate information, but does not enable the Panel to decline approval if it determines that the information is inadequate. The approach that seems to accord the most with the intention of the provisions as a whole is that the cross-reference to section 62(2) should be read as adding to the list in s 85 one additional ground for an FTA Panel to potentially decline an approval, namely inadequate information.

21. In relation to s 85(1)(b) FTAA and the obligation under s 7(2) FTAA to act in a manner consistent with the obligations arising under existing Treaty settlements and customary rights:

(a) Are the members of the Panel "exercising a judicial power or performing a judicial function or duty" in terms of 7(2) FTAA?

64. It is submitted that the members of the Panel are exercising a judicial power or performing a judicial function or duty. The nature of the Panel's role to impartially determine the application, including by evaluating and deciding matters of contested fact supports this interpretation.

(b) If adverse effects on fish stocks or aquaculture stocks are found to exist, would granting the application be inconsistent with obligations

under the Māori Fisheries Settlement or the Māori Commercial Aquaculture Claims Settlement Act 2004?

65. Granting the application would not be inconsistent with obligations under the Treaty settlements relating to fishing in those circumstances (noting that the premise of the question is that the Panel finds there would be an adverse effect).

22. In cl 6(1)(a) of Schedule 10 FTAA, is "the purpose" of the Act limited to the purpose specified in s 3 of the Act?

66. Yes. Given the Act contains an explicit purpose provision, the reference in cl 6(1)(a) must be taken as a reference to that purpose.

23. What is the meaning of "facilitate" in s 3 FTAA?

67. Dictionary definitions of "facilitate" are to make something easier, more likely to happen or less difficult. Applying meanings of that sort to "facilitate" in s 3 would be consistent with the mechanics of the fast-track process established by the FTAA. In this way, the meaning of "facilitate" in section 3 (or the meaning of s 3 as a whole) is not that projects with significant regional or national benefits must be approved (which would be contrary to the provisions that provide the limited grounds on which an approval may be declined). Rather the process by which they *might* be approved is an easier process, and one that makes the granting of approval more likely, than exists under the EEZ Act.

24. In relation to ss 85(3)-(5) FTAA, how should inconsistency with a provision of the EEZ Act, or with a document that the Panel must take into account or consider in complying with s 81(2), be factored into the Panel's s 85(3) assessment?

68. Section 85(4) prohibits the Panel from forming the view that an adverse impact meets the threshold in subsection (3)(b) "solely" on the basis of inconsistency with a provision of the EEZ Act or another document the Panel is required to take into account.

69. The "threshold" to which subsection (4) refers means the threshold for potentially declining approval (i.e. the "out of proportion" test).

70. At face value subsection (4) does not preclude inconsistency with a relevant provision from being a consideration under s 85(3)(b), alongside other considerations.

71. However, if—in the absence of the inconsistency—the adverse impact would be considered "in proportion" to the project's benefits, and consideration of the inconsistency amplifies the significance of the impact so that it would be considered "out of proportion" to those benefits, that exceeds the limits of the statutory bar in s 85(4).

72. A hypothetical example may assist to illustrate. Suppose the Panel were to conclude on the evidence that:

    (a) the sediment discharge will decrease light levels at the Patea Shoals by a sufficient amount and with sufficient frequency and duration to have a moderate adverse effect on primary production at that location; and

    (b) an adverse effect of this magnitude is not sufficiently significant to be out of proportion to the Project's regional and national benefits.

73. If these were the only inputs to the test, then there would be no grounds to decline consent under s 85(3)(b).

74. However, suppose Patea Shoals was also identified as an area of outstanding natural character under the Regional Coastal Plan. This would make it subject to the protection requirements in Policy 13(1)(a) of the NZCPS, and granting consent to an activity with moderate adverse effects on the natural character of Patea Shoals would be inconsistent with that Policy.

75. An attempt to introduce to the s 85(3) tests the type of consideration of inconsistencies that s 85(4) forbids is only legitimate to the extent that this does not alter the outcome. If accounting for the inconsistency would "tip the balance"—i.e. lead the Panel to conclude that the impact is so significant as to be out of proportion with the benefits—then it is the operation of the inconsistency that is determining the outcome, and this is exactly the situation that s 85(4) seeks to prevent.

76. It seems unlikely that the consideration the Panel may need to undertake under s 85(3)(b) will ultimately have so few inputs as the hypothetical example above; but there is nothing in s 85(4) to suggest that Parliament intended to prescribe fundamentally different approaches depending on how many factors are being considered. It would be perverse to treat the section as if it applies one rule if there is a single 'inconsistency' (i.e. the inconsistency may not be the basis for finding the impacts are out of proportion to the benefits), and another rule if there are two or more inconsistencies (i.e. the inconsistencies may be the basis for finding the impacts are out of proportion to the benefits).

77. To illustrate, if the Panel found on the evidence that the sediment discharge will give rise to a more than minor adverse effect on a threatened whale species (i.e. an inconsistency with NZCPS Policy 11), and that granting consent in those circumstances would not favour caution and environmental protection (i.e. an inconsistency with s 61(2) of the EEZ Act) then there would be one environmental effect, and two 'inconsistencies' arising in relation to that one effect. In our submission s 85(4) would preclude those inconsistencies, alone or together, from amplifying the significance assessment under s 85(3) in a manner that transforms the outcome of the test.

25. What does "out of proportion" in s 85(3) mean and how should it be applied?

78. The proportionality test in subsection (3) demonstrates that even a project that will have significant adverse impacts may be approved, if those impacts are proportionate to the project's benefits. In simple terms, if the project's benefits are significant, then a significant adverse impact may not be out of proportion to those benefits.

79. Further, proportionality is not an exact measure. It is not, for instance, the same as a test based on whether factors of one sort "outweigh" factors of another sort, which connotes a more precise sort of evaluation. By comparison, proportionality invokes an assessment that is more relative in nature, as being "in proportion" does not require two things to be equal or equivalent..

26. (a) Is there, in a substantive sense, any difference between an "impact" and an "environmental effect" under the FTAA?

(b) If so, what if any consequence(s) does that difference have for the Panel's decision on the application?

80. There is a substantive difference between an "adverse impact" (as described in s 85(5), FTAA) and an "environmental effect", as the relevant definition of "environment" excludes everything other than the natural environment. Consequently, matters that are required to be considered under s 59 of the EEZ Act, such as effects on existing interests, may (depending on the evidence) amount to an "adverse impact" for the purposes of s 85(3) and (4), though they are not an environmental effect.

81. The difference does not inherently have any consequence for the Panel's decision. It merely reflects that the range of matters the Panel must consider includes some that are environmental effects and some that are not.

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