

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

**LEGAL SUBMISSIONS ON BEHALF OF TRANS-TASMAN RESOURCES
LIMITED IN RESPONSE TO COMMENTS RECEIVED**

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. These submissions on behalf of Trans-Tasman Resources Ltd (**TTR**) address all the key legal issues raised in comments received by the Panel under section 54 of the Fast-track Approvals Act 2024 (**FTAA**).
2. The Department of Conservation was not invited to comment, but has provided to TTR a report that the Department commissioned in anticipation of receiving an invitation. The report, by JASCO Applied Sciences (Australia) Pty Ltd relates to underwater noise and marine mammals. The same report has been submitted by Forest and Bird as part of its comments on the application, and will therefore be addressed as part of TTR's responses to the Forest and Bird comments.
3. TTR also notes that while invitees have had a limited time to prepare comments (20 working days since they were invited), TTR has worked with a more compressed timeframe to compile responses (5 working days). Within that strictly limited timeframe TTR has sought to respond to comments in a way which will best assist the Panel.
4. As a general observation, TTR considers that many of the matters raised by commenters are essentially the same matters that have been raised by submitters and litigants in various forums in relation to TTR's previous applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**). Some commenters are highly critical of the proposal and think it will deliver few benefits, at great environmental cost. Those views are as expected and TTR disagrees.
5. TTR's response to comments comprises a number of elements:
 - (a) These legal submissions;

(b) Statements of evidence from the following witnesses in which the witnesses respond on all major matters relevant to their expertise:

- i. Alison MacDiarmid (Marine Ecology)
- ii. Iain MacDonald (Seabed Morphology)
- iii. Charine Collins (Sediment Modelling)
- iv. David Thompson (Seabirds)
- v. Simon Childerhouse (Marine Mammals)
- vi. Darran Humpheson (Acoustics)
- vii. Shawn Thompson (Project Operations)
- viii. Matt Brown (Mining Resource)
- ix. Alan Eggers (Process issues and Consultation)
- x. Christina Leung and Ting Huang (Economics)
- xi. Philip Mitchell and Luke Faithfull (Planning)

(c) Response tables that provide brief responses (also authored by the witnesses identified above), to all relevant matters that have not been addressed within the statements of evidence.

6. The focus of these submissions is to provide a response to all material legal issues raised throughout the comments. There is some commonality between the legal issues that commenters raise. It is submitted that most of the main legal issues can therefore be covered by responding to the comments of:

- (a) Royal Forest and Bird Protection Society of New Zealand,
- (b) Environmental Defence Society,
- (c) Kiwis Against Seabed Mining and Greenpeace,

- (d) Seafood New Zealand,
 - (e) Talley's Group Ltd,
 - (f) Te Ohu Kaimaona Trustee Ltd,
 - (g) Taranaki Offshore Partnership, and
 - (h) Iwi parties.
7. To the extent that other commenters have raised different or separate legal issues, counsel have contributed responses that are included in the response tables.
 8. To the extent that any of TTR's responses do not address comments the Panel wishes TTR to respond to, or provides a response that requires additional explanation, we invite the Panel to request additional information.
 9. Alternatively, or in addition, the Panel may wish to consider other process options available to it to gather the information it needs to make its decision, and we offer some suggestions on that at the conclusion of these submissions.
 10. We emphasise that it is not the role of these submissions to address in full all the matters of law that may be relevant to the Panel's determination. The focus for present purposes is to respond to the particular matters of law that have been raised by commenters, to the extent that they are material.

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND

11. The Royal Forest and Bird Protection Society of New Zealand (**Forest and Bird**) has filed legal submissions and three statements of evidence, along with the JASCO report referred to above.
12. These submissions do not attempt to address any matters of law raised by any of Forest and Bird's statements of evidence, on the assumption that in all key respects their authors will

have applied an approach that is consistent with Forest and Bird's legal submissions.

13. For efficiency, we have also not addressed aspects of Forest and Bird's legal submissions that are immaterial, or with which we agree. Thus, the sections that follow provide responses to those aspects of Forest and Bird's legal submissions with which we do not agree, and which seem likely to be material to the Panel's determination.

Reliance on findings in 2017 DMC decision

14. Forest and Bird refers in multiple places to findings of fact made by the DMC who determined TTR's previous application in 2017.¹
15. This overlooks that the DMC's decision was quashed by the Supreme Court,² and TTR subsequently withdrew its application. The significance of those events is that there are no factual findings in the 2017 decision that can be relied on for present purposes. Any factual findings by the present Panel must be based on the evidence that is before the Panel, not on historic findings of another decision-making body, under a different statutory framework.

Reliance on findings of the Supreme Court

16. Forest and Bird states that the Supreme Court concluded that the sediment plume would not avoid material harm.³
17. It is not clear what part of the Supreme Court's decision Forest and Bird is relying on for this statement, as the relevant footnote refers to part of the Court's decision that does not relate to this subject matter.

¹ For example, at [18], [20], [133], [136], [137], [138], [142] and [209].

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

³ Forest and Bird Legal Submissions, 6 October 2025 at [24].

18. In any event, it is submitted that Forest and Bird's statement incorrectly describes the conclusion of the Supreme Court.
19. The Court did not conclude that the sediment plume would or would not avoid material harm, and it was not the Court's role to do so. Rather, the Court concluded that s 10(1)(b) of the EEZ Act required the DMC to apply the three-step material harm test,⁴ and the DMC's failure to do so was an error of law.⁵ In that regard, the Court simply referred TTR's application back to the EPA to reconsider.⁶
20. Further, a hypothetical failure to "avoid" material harm would not in any event be determinative of the Supreme Court's three-step test. The test can be 'passed' even if material harm will not be avoided, by one of two other avenues:⁷
 - (a) if the harm is mitigated so that it is no longer material, or
 - (b) if the harm will be remedied within a reasonable timeframe, so that, taking into account the whole period harm subsists, overall the harm is not material.
21. TTR therefore disagrees with Forest and Bird's submissions that the Supreme Court's material harm test requires material harm to be "avoided".⁸
22. Forest and Bird also asserts that TTR's 2016 application "failed to meet the statutory threshold under the EEZ Act".⁹ It is unclear whether this is intended as a reference to the material harm test, but if so, the statement must be understood to be a statement of Forest and Bird's position, not a statement about the findings of the Supreme Court. As addressed

⁴ At [261] per Glazebrook J, [292] per Williams J and [319] per Winkelmann CJ.

⁵ At [266] per Glazebrook J, [292] per Williams J and [320] per Winkelmann CJ.

⁶ At [228]-[229] per William Young and Ellen France JJ, [299] per Williams J and [333] per Winkelmann CJ.

⁷ At [261] per Glazebrook J.

⁸ As implied at [24], explicitly stated at [105] and implied again at [123].

⁹ At [144].

above, the Court held that the proper test had not been applied. It did not find that TTR had failed to meet the test.

23. Forest and Bird also describes s 10(1)(b) of the EEZ Act as a bottom line¹⁰ even though it acknowledges that it is only a matter to be considered, not achieved, under the FTAA.¹¹ This language matters. Despite Forest and Bird's acknowledgement, the persistent reference to the provision as a 'bottom line', particularly in combination with assertions that the provision is breached,¹² at best invites the Panel to take an approach that is inappropriately coloured by matters that have no place in the Panel's assessment, and at worst invites the Panel to actually apply s 10(1)(b) as if it is a bottom line.
24. We submit [204]-[206] of Forest and Bird's submissions are an example of the latter. There, Forest and Bird offer a set of conclusions that simply ignore the FTAA's provisions precluding bottom lines, and purport to apply a test that differs from the actual test stipulated in s 85(3). This includes the statement:

The application does not demonstrate regional or national benefits, which are required to overcome the failure of the application to meet Clause 6(b) and (d) of Schedule 10.

The correct, and in this case the only, test for declining consent is not whether the benefits "overcome" the adverse impacts, but whether the adverse impacts are "out of proportion" to the benefits. Proportionality allows for adverse impacts that may in fact be significant, if the benefits are themselves significant.¹³ Contrary to this actual test, Forest and

¹⁰ At [65], [88], [145], [146], [187], [204] and [206].

¹¹ At [88], [145] and [146].

¹² At [145], [204] and [206].

¹³ See also section 8.2.11 of TTR's application.

Bird states repeatedly that material harm is to be avoided, remedied or mitigated.¹⁴

25. Further, the alleged failures to which Forest and Bird is referring are inconsistencies with ss 10(1)(b) and 61(2) of the EEZ Act. Section 85(4) of the FTAA bars the Panel from reaching a negative conclusion under the proportionality test if that is based on such inconsistency.¹⁵

Reliance on joint witness statements from earlier applications

26. Forest and Bird relies on the outcomes of conferencing that occurred in 2017 as part of the EPA's initial processing of TTR's previous application. It is implied that they consider it is appropriate to rely on this because, in their view, the relevant outcome was confirmed in subsequent conferencing that took place in 2024.¹⁶
27. We have examined the 2017 and 2024 joint witness statements, and cannot find the material that Forest and Bird seems to be relying on.
28. More importantly, from a legal standpoint the sort of reliance that Forest and Bird proposes this Panel should give to evidence that was provided on TTR's 2016 application, could only ever be appropriate if the same experts were now involved in the present application, and confirmed their joint position in the present application. Otherwise, it amounts to Forest and Bird picking and choosing evidence from past processes as if its 'joint' status (which is unclear, see paragraph above) makes it authoritative for present purposes.

¹⁴ At [204] and [206].

¹⁵ For further discussion on these matters see the "The Proportionality Test", below.

¹⁶ At [139].

Adaptive management

29. Forest and Bird say that the conditions imposed by the DMC in 2017 involved adaptive management,¹⁷ and that the Supreme Court rejected conditions on the basis that they involved adaptive management.¹⁸ Neither of these submissions is correct. The Supreme Court found that the conditions imposed by the DMC in 2017 did not amount to adaptive management.¹⁹
30. Forest and Bird also suggest that the conditions now proposed by TTR involve adaptive management.²⁰ However, 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.

International obligations

31. Forest and Bird refers to a statement at [93] of the Supreme Court's decision in relation to the provisions of UNCLOS. We submit no reliance can be placed on that. It is a statement made by Ellen France and William Young JJ as part of their assessment of the proper interpretation of s 10(1)(b), which is a matter on which the majority disagreed with them. It does not therefore represent the Court's position.
32. Forest and Bird submits—partly in reliance on New Zealand's obligations under UNCLOS—that the criteria in (b)-(d) of clause 6 of Schedule 10 must “weigh heavily” in the Panel's

¹⁷ At [140].

¹⁸ At [187].

¹⁹ At [199]-[213] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]-[297] per Williams J and [332] per Winkelmann CJ.

²⁰ At [186], [197], [198]

decision-making.²¹ Putting UNCLOS to one side²² we submit the matters in (b)-(d) of clause 6 are required to be given genuine consideration, and should be assessed on an individual basis prior to standing back and conducting an overall weighting (as directed in relation to item (a) in the list).²³ That might be consistent with what Forest and Bird describes as weighing those matters 'heavily', so in our submission nothing turns on this language, provided the "greatest weight" is in the end given to the purpose of the FTAA, as directed.

Definition of "environment"

33. Forest and Bird refers to both the broad definition of "environment" in the RMA and the narrower definition in the EEZ Act.²⁴ They appear to accept that the narrower definition applies here.²⁵
34. A literal reading of s 4(2) of the FTAA would require the RMA definition to apply to TTR's application.
35. However, it is clear that a deliberate choice has been made in the EEZ Act to apply a narrower focus to activities in the EEZ—one that does not share the RMA's preoccupation with built elements of the environment ("physical" as opposed to "natural" resources) or social and cultural well-being. We note the EEZ Act is the only "specified Act" under the FTAA to contain its own definition of "environment" (excluding the RMA itself).

²¹ At [88].

²² For the reasons addressed in section 8.2.3 of TTR's application, we submit that reference to UNCLOS, or any of New Zealand's obligations under other international conventions relating to the marine environment is not required.

²³ Consistent with the approach taken with other legislatively-directed weighting provisions in *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 ("*Enterprise Miramar*"), as subsequently applied by another Fast-Track Panel re *Bledisloe North Wharf and Fergusson North Berth Extension* FTAA-2503-1028 ("*Bledisloe Wharf*") at [121].

²⁴ At [80]-[81].

²⁵ At [88].

36. Further, the clear intent of the FTAA is to make the consenting of certain projects faster and easier than under the alternative regime (in this case the EEZ Act).
37. For these reasons, we submit it cannot have been intended that applying for the Project under the EEZ Act would enable a narrow concept of “environment” to apply (and all the attendant efficiencies that flow from that), whereas the same application under the fast-track would be measured against the wider concept of environment from the RMA (which, with all its additional complexities is potentially more onerous, if not more constraining).
38. Is submitted that the only purposive interpretation available is that the definition of “environment” in the EEZ Act applies for the purposes of applications under the FTAA for marine consents that would otherwise be sought under the EEZ Act.

The meaning of “material harm”

39. Forest and Bird states²⁶ that the concept of “material harm” is similar to the RMA concept of a “more than minor effect”, but does not elaborate what the similarities are. Seemingly by way of explanation, Forest and Bird offers the example that “no more than minor” is one of two tests a non-complying activity must satisfy if it is to gain consent under the RMA (s 104D).
40. The similarity Forest and Bird seems to be focussing on is that “no material harm” is a gateway or threshold requirement for a discharge activity under the EEZ Act (but not the FTAA), just as effects “no more than minor” is one of two possible gateway requirements for non-complying activities under the RMA. That the provisions of both statutes establish gateway requirements for, respectively, non-complying activities and marine discharge activities, does not signify that the gateways themselves must be ‘similar’.

²⁶ At [75].

41. Further, there are clear differences between the two situations. The RMA provides an alternative gateway which relies on the application of objectives and policies in the relevant planning instrument. By comparison, while the EEZ Act enables policy to be developed, none has been. Further, the activities for which TTR requires marine consent are all explicitly provided for as “discretionary” activities, not “non-complying” activities.
42. It is submitted that likening the “material harm” concept to the RMA’s “more than minor effects” concept is an unnecessary and unhelpful gloss. As Forest and Bird’s discussion of some of the relevant RMA caselaw discloses, the test of whether an effect is “minor” is ultimately one of fact and degree, for which there can be no absolute yardstick or measure.
43. We submit there is no reason to look further than the Supreme Court’s guidance: what is required is a consideration of the ‘multiplicity of factors’ that might contribute to assessing whether harm is material, including its temporal, spatial, quantitative and qualitative aspects.²⁷

The role of NZCPS Policy 13 in assessing material harm

44. Forest and Bird submits²⁸ that material harm cannot be interpreted in a vacuum and must be determined in relation to the values and areas in question. We agree with that submission as it is a partial re-statement of the Supreme Court’s clear direction that there will be qualitative, quantitative, temporal and spatial dimensions²⁹ to the assessment of material harm.
45. However, we submit the Panel should be cautious about Forest and Bird’s suggestion that this means Policy 13(1)(a) or (b) of the NZCPS might somehow colour the assessment of

²⁷ At [310] per Winkelmann CJ, [255] per Glazebrook J and [292] per Williams J.

²⁸ At [72].

²⁹ At [255] per Glazebrook J, [292] per Williams J and [310] per Winkelmann CJ.

material harm. Those policy provisions do not operate as environmental bottom lines for the present application,³⁰ and interpreting whether harm is material by reference to those provisions elevates them to a level of significance they do not have under the FTAA framework.³¹

46. Relevant to this, the approach taken by the Supreme Court in applying the NZCPS policies as bottom lines drew heavily on the Court's approach to s 10(1)(b) of the EEZ Act:³²

[280]... I agree that the NZCPS was not directly applicable and that the DMC nevertheless needed to take into account the environmental bottom line in the NZCPS. I do not, however, consider this environmental bottom line can be outweighed by other s 59 factors. **This is because on the approach I take, s 10(1)(b) itself provides an environmental bottom line that cannot be overridden. There must be a synergy in the approach to the NZCPS bottom line and s 10(1)(b).**

....

[298] I largely agree with William Young and Ellen France JJ's approach to "other marine management regimes", particularly their approach to the New Zealand Coastal Policy Statement 2010 (NZCPS), which was the focus of argument. I disagree, however, with their conclusion that the bottom line contained in that document is defeasible by reference to other s 59 factors. Like Glazebrook J, **I consider that in this respect the NZCPS is in lockstep with s 10(1)(b).**

....

[331] like Glazebrook J, I disagree with the approach suggested by Ellen France J that the DMC needed to consider whether the environmental bottom lines in the NZCPS were outweighed by the other s 59(2) factors or sufficiently accommodated in other ways, if it is thereby suggested that **the s 10(1)(b) bottom line could be overridden or displaced. As stated above, the ultimate assessment for the DMC must take place against the s 10(1)(b) standard.**

47. These passages disclose that what led the Court to require relevant NZCPS policies to be applied as a "bottom line" was not merely the directiveness of the policies, but the commonality between those policies and the bottom line in

³⁰ This is addressed in TTR's application: see the text accompanying footnotes 215- 216 and 220-222.

³¹ See also the discussion below at [71]-[79].

³² At [280] per Glazebrook J, [298] per Williams J and [331] per Winkelmann CJ (emphasis added).

s 10(1)(b) of the EEZ Act. It was this “synergy” or “lockstep” between the two regimes that led to the weight the Supreme Court gave to the NZCPS policies.

48. For the present application—where there is clear statutory direction that neither s 10(1)(b), nor any other provisions of other marine management regimes operate as bottom lines—this means the Panel should be cautious about relying on NZCPS policies to assess whether harm is material.
49. Despite this, TTR's position is that the Project is not in fact inconsistent with Policy 13, for the following reasons:
 - (a) The Policy concerns preservation of the natural character of the coastal environment. Where the coastal environment has outstanding natural character, Policy 13(1)(a) requires adverse effects on that character to be avoided; and in all other areas Policy 13(1)(b) requires significant adverse effects on natural character to be avoided. This relates back to the requirement in the opening words of the policy: “To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development.”
 - (b) There are two relevant areas within the coastal environment identified as having outstanding natural character: “Project Reef” and “North and South Traps”.
 - (a) These matters were re-considered by Dr MacDiarmid in 2023.³³ Dr MacDiarmid's evidence responds to the contention that effects on primary production at Project Reef and effects on macroalgae at The Traps are inconsistent with the bottom line in Policy 13(1)(a). Her evidence addresses in detail both the discharge

³³ Expert evidence of Dr Alison MacDiarmid on behalf of Trans-Tasman Resources Limited, 19 May 2023 at [21]-[25].

activity and the affected environment, and she concludes that the harm described in paragraph 111(a) of the Court of Appeal's decision is immaterial.³⁴

- (c) We submit Dr MacDiarmid's evidence supports a conclusion that the actual effects on primary production at Project Reef and macroalgae at the Traps are so minor or transitory when considered in context that there is no inconsistency with Policy 13(1)(a).
- (d) A broader assessment of potential effects on natural character — as required by Policy 13(1)(b) — is set out in the Seascape, Natural Character and Visual Effects Assessment by Boffa Miskell, referred to in TTR's application.³⁵ It relies on the technical and expert reports of other parties to assess effects on natural character by reference to all of the natural character attributes listed in Policy 13(2). The assessment concludes the only significant effects on natural character will be in the mining area itself, and specifically relates to the mine pits and mounds that will form at the end of each mining lane as a result of the extraction and deposition of seabed material.

50. On this basis, TTR submits the Project will give rise to no significant adverse effects on natural character within the coastal marine area/coastal environment, and accordingly the grant of marine consents is consistent with preserving the natural character of the coastal environment in the manner required by Policy 13(1)(b).

³⁴ Above n 33 at [25].

³⁵ Report 31 Boffa Miskell Visual Effects Report, December 2015 [here](#).

Favouring caution and environmental protection

51. Forest and Bird seems to suggest that the requirement in s 61(2) of the EEZ Act to “favour” caution and environmental protection calls for something different than “weighing” that matter in the Panel’s decision-making.³⁶
52. It is agreed that the directive to “favour” caution and environmental protection creates a different emphasis for this component of the assessment (which TTR considers is activated by uncertainty, but not inadequacy³⁷). However, this does not displace the over-arching requirement that s 61(2) is a matter to be “taken into account”,³⁸ which indicates that its place in the assessment is ultimately a matter for the Panel to determine after giving it genuine attention and thought,³⁹ but it is not open to the Panel to give it greater weight than the purpose of the FTAA.
53. It is also submitted that the approach adopted by the Supreme Court in relation to this requirement effectively treated favouring caution and environmental protection as a bottom line for the purposes of TTR’s 2016 application. As addressed elsewhere, the provision does not function in this way under the FTAA framework, and if the Panel were to conclude that granting approval would be inconsistent with favouring caution and environmental protection, there is a statutory bar on that inconsistency being a basis for declining approval under s 85(3).⁴⁰

³⁶ At [100].

³⁷ See section 8.3.14 of TTR’s application.

³⁸ FTAA, Sch 10, cl 6.

³⁹ See *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at [72].

⁴⁰ See also the discussion below at [71]–[79] concerning how s 85(4) operates if more than one inconsistency with a provision of specified Act or any other relevant document arises.

54. In any event, TTR maintains that granting approval subject to the conditions it has proposed will in fact favour caution and environmental protection.⁴¹

Conditions of consent

55. Forest and Bird submits that ss 63-67 of the EEZ Act are not matters to be "taken into account".⁴² On this basis, Forest and Bird seems to imply the Panel is not required to give greater weight to the purpose of the FTAA when applying ss 63-67.
56. We submit this misconstrues clause 7 of Schedule 10. Clause 7 does not exist in isolation. It follows immediately after the legislatively-directed weighting provision,⁴³ which makes explicit reference to ss 63-67 of the EEZ Act as matters:
- (a) to be taken into account, and
 - (b) to be given less weight than the purpose of the FTAA.⁴⁴

Further, clause 6 states that the weighting directive applies "when considering an application for a marine consent, including conditions in accordance with clause 7".

57. Based on this, we submit that clause 7's function is not to elevate the EEZ Act's provisions regarding conditions above the weighting requirement in clause 6. Clause 7 is a machinery provision, not a substantive provision, the role of which is simply to direct that the term "marine consent authority" in ss 63-67 is to be read as if it refers to the Panel.
58. Forest and Bird describes particular findings by the Supreme Court in respect of pre-commencement conditions as 'laying down key principles as to the formulation of conditions'.⁴⁵ We

⁴¹ See section 8.3.15 of TTR's application and the Statement of Evidence of Dr Mitchell and Mr Faithfull dated 13 October 2025.

⁴² At [112].

⁴³ Clause 6(1)(d).

⁴⁵ At [114].

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

59. 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.
60. 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.
61. 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.⁴⁶
62. 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

⁴⁶ 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).

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.⁴⁷

63. From TTR's perspective, this does not reflect the true function of the "population level" condition or the pre-commencement monitoring.
64. 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 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.⁴⁸
65. 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

⁴⁷ 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.

⁴⁸ 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].

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:⁴⁹

Aerial surveys will be designed in order to describe the **variability of relative abundance and distribution** of marine mammals in the STB during the two year period prior to iron sand extraction activities commencing. ...

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:⁵⁰

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.

⁴⁹ At 10.3.2.

⁵⁰ At 13.4.3.

- (d) The operational plan says in respect of interpreting findings:⁵¹

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.

66. 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—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.
67. 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.
68. 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

⁵¹ At 13.7.

- (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.

- 69. 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.
- 70. 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.

The proportionality test

- 71. Forest and Bird submits that s 85(4) does not prohibit inconsistency from being a factor in the exercise of the proportionality test in s 85(3)(b); it only prevents inconsistency from being the sole factor. Forest and Bird contends that inconsistency can and should be taken into account in the exercise of the test, if there are other adverse impacts also in play.⁵²
- 72. We submit this is only partially correct. We agree that s 85(4) does not at face value preclude inconsistency with a relevant

⁵² At [126].

provision from being a consideration under s 85(3)(b), alongside other considerations.

73. 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).⁵³
74. 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.
75. If these were the only inputs to the test, then there would be no grounds to decline consent under s 85(3)(b).
76. 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.

⁵³ See also the discussion at [24] above, and section 8.2.11 of TTR's application. NB. Forest and Bird also apply a different formulation at [215], treating “out of proportion” and “outweigh” as synonymous, which is not agreed. Proportionality imports greater flexibility than weighing (or balancing).

77. On Forest and Bird's approach both the adverse environmental effect and the inconsistency with Policy 13(1)(a) would be factors that could legitimately contribute to a decision to decline. Conversely, we submit it is only legitimate to take into account the inconsistency with Policy 13(1)(a) to the extent that this does not alter the outcome. If accounting for the inconsistency led 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.
78. 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).
79. 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, and that granting consent in those circumstances would not favour caution and environmental protection, then there would be one environmental effect, and two 'inconsistencies' (i.e. an inconsistency with NZCPS Policy 11, and with s 61(2) of the EEZ Act). 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.

ENVIRONMENTAL DEFENCE SOCIETY

EDS involvement

80. EDS states TTR's first application in 2013 was declined, including on appeal to the High Court.⁵⁴
81. It is correct that TTR's first application was declined by a DMC, but not correct that it was declined on appeal. TTR commenced an appeal, but elected to withdraw and lodge a new application with the EPA rather than proceed. The High Court decision referred to in EDS' submissions⁵⁵ did not relate to TTR's first application in 2013, but its second application in 2016. EDS was not a party to those proceedings, and did not participate in TTR's second application to the EPA.

Discretion to decline

82. EDS submits that a panel's discretion to decline under s 85(3) must be exercised in the context of a panel's compliance with s 81(2).⁵⁶ We agree. The words "in complying with section 81(2)", which appear in s 85(3) and are repeated in s 85(4) and (5) indicate that there are not two separate, or standalone, assessments to be made of the relevant matters.
83. In outline:
- (a) The Panel's evaluation must follow the prescription in s 81(2);
 - (b) This requires the Panel to take into account all the matters listed in clause 6 of Schedule 10, giving the greatest weight to the first of those matters (i.e. the purpose of the FTAA);
 - (c) If, in complying with those requirements—including the statutorily directed weighting—the Panel forms

⁵⁴ At [4].

⁵⁵ At footnote 4.

⁵⁶ At [19].

the view that the adverse impacts are out of proportion to the Project's benefits, then it may decline approval.⁵⁷

84. Thus, the adverse impacts are not assessed once for the purposes of clause 6, and then a second time for the purposes of s 85(3). The adverse impacts are assessed once, guided by the weighting directive in clause 6, and the outcomes of that assessment are scrutinised through the lens of the test set out in s 85(3).

Measuring benefits

85. EDS submits that a cost-benefit analysis (**CBA**) must be done in order to assess the Project's regional or national benefits.⁵⁸
86. The Court of Appeal and Supreme Court held that a CBA is not required under the EEZ Act.⁵⁹ As with the EEZ Act, a CBA is not mandated by the FTAA.
87. EDS submits that the word "significant" in the FTAA purpose, and the word "extent" in s 81(4) necessitate a quantitative and qualitative assessment of the benefits.⁶⁰ In our submission, this falls short of mandating a cost-benefit analysis, which would not have been difficult to prescribe if the intention was to make a CBA mandatory.
88. EDS also relies on the lack of the qualifier "economic" when reference is made in the FTAA to "benefits". It says this indicates that assessing benefits under the FTAA does not involve a purely economic assessment.⁶¹ In our submission,

⁵⁷ For the purposes of outlining the assessment structure we do not list all the matters to be considered under cl 6, or other relevant aspects of s 85 such as those in subsections (4) and (5).

⁵⁸ At [23]-[32].

⁵⁹ *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.

⁶⁰ At [24](b).

⁶¹ At [24](c) and [31](a).

EDS reads too much into these differences because of a flawed view that in the absence of a CBA one cannot properly account for both the upside and the downside of the Project.

89. In our submission, properly evaluating both sides of the matter does not inherently rely on reducing both sides to a numerical value (i.e. quantification). As is well-recognised in RMA jurisprudence, environmental assessments often require consideration of matters which are not capable of quantification.⁶² 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.
90. In our submission, any attempt to exhaustively quantify every impact is, in any event, unnecessary. As the Court of Appeal and Supreme Court's decisions on TTR's previous applications authoritatively confirm, there is a distinction between undertaking a net economic benefit assessment (as required under the EEZ Act⁶³), and undertaking a full-blown CBA. Contrary to EDS' submission,⁶⁴ a 'net' benefits approach does not necessitate a CBA.
91. The central flaw in EDS' approach is the idea that in the absence of a CBA, the Panel cannot consider the "negatives" (in addition to the "positives").⁶⁵ They say, only the Project's

⁶² 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].

⁶³ *TTR (CA)* above n 59 at [281].

⁶⁴ At [25].

⁶⁵ At [24].

“pros” will be considered, and the “cons” ignored;⁶⁶ the Panel will have “only one side of the story”.⁶⁷

92. This presumes that a proper consideration of negatives relies on quantification, which is counter to both RMA jurisprudence⁶⁸ and to the decisions of the Court of Appeal and Supreme Court on TTR's 2016 application. They had no concerns with economic benefits being quantified, and weighed against environmental, social and cultural impacts that were assessed in a qualitative way:⁶⁹

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.

93. EDS submits it would be perverse if a project that delivers significant positive outputs but imposes costs that “outweigh” those outputs could be “elevated under the FTAA's purpose”.⁷⁰ In response, we submit:

- (a) The relevant statutory test under s 85(3) does not refer to “outweighing”, but being “out of proportion”. There is a subtle but meaningful difference between the two.⁷¹
- (b) If the proper test is applied, a project that delivers significant positive outputs but imposes costs that are out of proportion to those outputs, is one that would ‘fail’ the proportionality test, and be declined. The perversity that EDS wishes to avoid is the very thing that s 85(3) prevents from arising; particularly given

⁶⁶ At [24](a)

⁶⁷ At [28].

⁶⁸ Above n 62.

⁶⁹ *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.

⁷⁰ At [24](a).

⁷¹ See TTR's application at 8.2.11.

the breadth of the definition of “adverse impacts” in s 85(5), which ensures the full suite of environmental and other impacts are accounted for.

- (c) This avoids what EDS calls a “disservice” to society.⁷² Adopting that terminology, the proportionality test ensures that any degree of *disservice* to society must be in proportion to the degree to which a project serves society.
- (d) EDS seems to read into the FTAA an ideology that the only projects that can be approved are those that deliver the “greatest benefit” to society.⁷³ This promotes a requirement to assess hypothetical ‘alternative’ uses of natural resources, which has no support, explicit or otherwise, in any of the relevant sections of the FTAA.

- 94. Further, we submit that comments made by the Parliamentary Commissioner for the Environment in support of a CBA,⁷⁴ and the draft decision of another FTAA Panel on a different project⁷⁵ are not authoritative. For the reasons we have traversed above, in particular the strong judicial support for relying on qualitative analysis to ensure non-economic components of an assessment are accounted for, we submit there is no basis to require a CBA here.
- 95. Other criticisms of NZIER’s adoption of a “gross” benefits approach are addressed in the evidence of Ms Leung and Ms Huang submitted as part of TTR’s responses to comments. We note, though, that Ms Leung’s and Ms Huang’s evidence, addresses what they consider are likely to be the main

⁷² At [24](a)(i).

⁷³ At [24](a)(ii).

⁷⁴ As referred to in EDS’ submissions at [25], and we acknowledge that the Parliamentary Commissioner for the Environment has made similar comments on TTR’s project.

⁷⁵ As referred to in EDS submissions at [26].

economic costs, and have accounted for those in order to quantify the 'net economic benefits' of the Project.

Environmental bottom lines

96. We agree with EDS' submissions at [33] and [34] regarding how the weighting direction in clause 6 of Schedule 10 should be applied. We disagree with EDS that sections 81 and 85 of the FTAA create three environmental bottom lines.⁷⁶
97. It is useful to begin by considering what an environmental bottom line is.
98. The term "bottom line" as used in the *TTR (SC)* decision⁷⁷ derives from the *King Salmon* decision where the Court held that NZCPS Policies 13(1)(a) and 15(a) provide "something in the nature of a bottom line".⁷⁸
99. The *King Salmon* case arose in the context of proposed changes to the Marlborough District Plan to better facilitate salmon farming at a number of sites in the Marlborough Sounds. The first instance decision on the proposed plan changes was made by a Board of Inquiry. The Board accepted that in relation to two of the potential salmon farm sites the proposed changes would give rise to significant adverse effects on an area of outstanding natural character and landscape. Policies 13(1)(a) and 15(a) of the NZCPS require such adverse effects to be avoided, but the Board granted the proposed changes.
100. The Supreme Court held this was in error, because it breached the environmental bottom lines in Policies 13(1)(a) and 15(a). It said careful attention must be paid to the way in which relevant policies are expressed:⁷⁹

⁷⁶ EDS submissions at [5](e) and [35](c).

⁷⁷ Above n 2 at [185], [187], [280], [298], [331].

⁷⁸ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [132].

⁷⁹ At [129].

Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it.

101. The Court had in mind that policies expressed in the most directive terms (such as the unvarnished requirement to “avoid” certain effects described in policies 13(1)(a) and 15(a)) could contemplate the prohibition of particular activities in certain localities:⁸⁰

The RMA contemplates that district plans may prohibit particular activities, either absolutely or in particular localities. If that is so, there is no obvious reason why a planning document which is higher in the hierarchy of planning documents should not contain policies which contemplate the prohibition of particular activities in certain localities.

102. Drawing on the *King Salmon* and subsequent *Port Otago*⁸¹ decisions, the constituent features of “environmental bottom lines” seem to be that they are:

- (a) Explicit: the policies held to be in the nature of “environmental bottom lines” are all explicit — no inference is required, and there is no suggestion that one could ever infer an environmental bottom line;
- (b) Outcome-oriented: the policies all state outcomes, rather than processes by which outcomes might be achieved;
- (c) Environmental: the outcomes explicitly stated in the policies concern some characteristic or attribute of the environment;
- (d) Absolute: the outcomes are of a sort that can only be achieved absolutely, not by degrees (e.g. “avoiding” a stated consequence, rather than “avoiding, remedying or mitigating” the same consequence,

⁸⁰ At [132].

⁸¹ *Port Otago Ltd v Environmental Defence Society* [2023] NZSC 112.

which admits an allowance for a range of degrees of achievement).

103. The position now advanced by EDS develops from a submission that the direction to give the 'greatest weight' to the purpose of the FTAA "does not preclude environmental bottom lines being applied".⁸² We agree with that statement, but submit that it misses the point, because the feature that EDS is directing attention to (the statutory direction on 'weighting' in clause 6 in Schedule 10) is not the mechanism by which environmental bottom lines are precluded under the FTAA. That statutory mechanism comprises:

- (a) The "take into account" standard in clause 6 of Schedule 10, which is insufficiently directive to make a bottom line of any of the components listed in clause 6: they must be given genuine thought, but (with the exception of having to give the greatest weight to the purpose of the FTAA), the Panel can then decide to give them as much or as little weight as the evidence supports;⁸³
- (b) The provision of few and explicit grounds for potentially declining consent under s 85, which do not incorporate any direct references to any of the environmental bottom lines held by the Supreme Court to apply to TTR's prior application (i.e. "no material harm" from the discharge, the requirement to favour caution and environmental protection, and the avoidance of effects (of any magnitude) on outstanding natural character under NZCPS Policy 13); and
- (c) The bar in s 85(4) that stops an inconsistency with any of the aforementioned provisions from being

⁸² At [35](c).

⁸³ *Bleakley v Environmental Risk Management Authority* [2001] NZLR 213 at [72].

imported into the proportionality test in a way that tips the balance.⁸⁴

104. In our submission none of the three “environmental bottom lines” that EDS asserts are created by section 81 and 85⁸⁵ are in fact environmental bottom lines.
105. The first, namely the proportionality threshold in s 85(3), does not manifest at least two characteristics of an environmental bottom line. It is as concerned with non-environmental and ‘enabling’ considerations (“national or regional benefits”) as it is with environmental and ‘constraining’ considerations (a sub-set of “adverse impacts”). Further, it does not prescribe a mandatory outcome, but rather provides a discretion: if the threshold is crossed, the Panel “may”, not “must”, decline consent.
106. As the Supreme Court has observed, in situations involving alleged bottom lines, careful attention must be paid to the way in which the relevant provisions are expressed, as differences in the language matter.⁸⁶ Properly construed, we submit s 85(3) simply expresses a legal test. On EDS’ approach any statutory expression of a legal test which might allow for the possibility of an approval being declined would amount to “an environmental bottom line”.
107. The second of EDS’ alleged environmental bottom lines is somewhat obscure. It seems to be either:
 - (a) A restatement of the first bottom line, in the guise of an “evidence-based” difference; in which case we observe that the application of all environmental bottom lines is inevitably evidence-based, but this

⁸⁴ See submissions above at [71]-[79].

⁸⁵ At [35](c)(i)-(iii).

⁸⁶ *King Salmon* above n 78 at [127] and *Port Otago* above n 81 at [61].

does not signify that all evidence-based assessments are bottom lines; or

- (b) An attempt to introduce to the s 85(3) tests the type of consideration of inconsistencies that s 85(4) forbids.⁸⁷

108. The third of EDS' alleged bottom lines is another attempt not only to incorporate "inconsistencies" with other provisions into the s 85(3) proportionality test, but to suggest they apply in that context as bottom lines. We reiterate that this is contrary to s 85(4), for the reasons previously expressed.

Proportionality

109. The approach taken by EDS in relation to benefits leads to a problem of double-counting impacts in the application of the proportionality test.

110. The potential for this problem was recognised by both the Court of Appeal and the Supreme Court, where, having confirmed that it was open to the DMC to have regard to environmental, social and cultural "costs" on a qualitative basis, the Court went on to say:⁸⁸

Indeed, we see force in TTR's argument that taking those costs into account in the assessment of economic benefit, and then weighing them separately under other limbs of s 59, could give rise to double-counting.

111. The problem is well-represented in EDS' description of proportionality [emphasis added]:⁸⁹

Principally, EDS's position is that where any benefits are rendered not significant after discounting the impacts, the impacts can fairly be treated as being so significant that they are out of proportion to the benefits.

⁸⁷ See submissions above at [71]-[79].

⁸⁸ *TTR (CA)* above n 69 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.

⁸⁹ At [37].

In the first underlined phrase EDS describes a situation in which the impacts of the Project are taken into account in quantifying the benefits. In the second underlined phrase EDS describes an application of the test that compares the proportions of the impacts and the benefits, ignoring that benefits have already been adjusted by discounting the impacts. In other words, the impacts are applied twice: first to translate 'gross' benefits into 'net' benefits; and then by comparing the impacts with the net benefits (which has already accounted for those impacts) to assess their relative proportions.

RMA consents

112. EDS suggests TTR may require consents for a discharge aspect of the Project under the RMA, a position which it has argued before.⁹⁰ That is not a matter the Panel is required to consider or resolve in relation to TTR's present application; and it appears EDS may share that view, as they do not advance any substantive submissions on that point, and seem to raise it only to preserve a position they may pursue in a different forum.

Process

113. EDS submits expert caucusing is required, followed by a focussed hearing including targeted cross-examination.⁹¹
114. Since EDS filed those comments, the Panel has decided to hold a conference to hear overviews from most of the commenters.
115. In our submission the next procedural steps beyond that are matters for the Panel, guided by the principles of timeliness, efficiency, consistency and cost-effectiveness required by

⁹⁰ At [9].

⁹¹ At [7] and [40](b)

s 10. However, the FTAA does not permit cross-examination;⁹² and the breadth of topics EDS mentions in relation to cross-examination ("ecosystem, indigenous biodiversity, natural character and economic impacts") suggests that EDS' notion of a 'focused' hearing would be one that involves hearing evidence across almost every topic. TTR is doubtful that will be necessary, or of much assistance to the Panel, and if there is to be any hearing (or hearings) a much more forensic approach seems likely to better serve the Panel's decision-making functions, while ensuring the Panel can obtain all the information and understanding its members require.

KASM / GREENPEACE

116. The submissions of KASM/Greenpeace advance many similar issues to the submissions of Forest and Bird and the Environmental Defence Society.

Environmental bottom lines

117. KASM/Greenpeace describe an application of environmental bottom lines⁹³ that is entirely devoid of reference to, or recognition of, the FTAA framework and its implications for how the bottom lines identified by the Supreme Court should be applied in the present context. It is simply not open to the Panel to apply an identical legal approach to the Supreme Court, disregarding the FTAA framework and its implications for, among other things, how bottom lines do (or more accurately do not) apply here.
118. Among the issues arising from KASM/Greenpeace's approach on bottom lines:
- (a) They treat s 85(3) as a threshold test (in the 'gateway' sense), after which the Panel must apply the bottom

⁹² FTAA, s 58(1)(d).

⁹³ At [115]-[119].

lines.⁹⁴ This is contrary to the explicit direction in s 81(2)(f) that any basis to decline must be found somewhere within the mandatory and discretionary components of s 85 (respectively, in subsections (1) and (3)).⁹⁵

- (b) They state the bottom lines in s 10 of the EEZ Act are “not defeasible” by the other clause 6 criteria.⁹⁶ This in fact is what clause 6 (together with ss 81(2)(f) and 85(3)) achieves: it precludes any provision that would be a bottom line under the EEZ Act from being applied as a bottom line under the FTAA.
- (c) They appear to repeat this misdescription in different terminology when they state:
 - i. That the weighting assessment cannot be used to “neutralise or diminish other statutory imperatives”, such as the ‘material harm’ bottom line.⁹⁷ As a partial reflection of the approach derived from *Enterprise Miramar Peninsula*, and consistent with the FTAA decision for *Bledisloe Wharf*,⁹⁸ this is correct. Yet, while the weighting exercise cannot be used to avoid properly taking every listed criteria “into account”, it does have the effect of ‘diminishing’ the way in which some of those criteria would otherwise apply: it precludes ‘bottom line’ provisions from operating as bottom lines.

⁹⁴ At [18].

⁹⁵ It appears from KASM/Greenpeace’s statement at [56] (“Section 85(3) does not require that consent *only* be declined on this basis”) that they are unaware of s 81(2)(f).

⁹⁶ At [49].

⁹⁷ At [54].

⁹⁸ Above n 23 and accompanying text.

- ii. That environmental risks cannot be simply “weighed away” by other s 59 factors.⁹⁹ This reflects only that all s 59 factors must be individually evaluated, without any weighting being applied as between them, during the initial assessment. It fails to reflect that upon completion of that exercise, cl 6 of Sch 10 explicitly requires that a weighting be applied, and the proportionality test in s 85(3) allows for effects to be significant if that is in proportion to a project's benefits.
- (d) They call s 62 an “identified bottom line”.¹⁰⁰ This has no support from any part of the Supreme Court's decision.

Setting aside environmental, cultural and social impacts

- 119. KASM/Greenpeace assert that TTR's position is that the economic benefits of the project justify setting aside the environmental, cultural and social impacts.¹⁰¹
- 120. It is not clear what material they base this on (no reference is given), but this is not, in fact, TTR's position; and there are some differences that should be understood as between the environmental, cultural and social aspects.
- 121. In terms of the environment, under the FTAA the focus is on the natural environment, not social or cultural matters that would arise under the broader definition in the RMA.¹⁰² TTR's position is that the environmental impacts of the Project do not amount to material harm (applying all the temporal, spatial, qualitative and quantitative dimensions that assessing material harm requires).

⁹⁹ At [32].

¹⁰⁰ At [110].

¹⁰¹ At [20].

¹⁰² See above at [33]-[38].

122. Thus, it is not a matter of setting environmental impacts aside. Those impacts are not sufficiently significant that the grant of consent is in any way dependent on setting them aside.
123. This addresses some (but certainly not all) of the impacts of concern under a 'cultural' heading also, because the matters that can be addressed by marine science (and which TTR will submit have been addressed by marine science) occupy some common ground with the interests expressed by relevant iwi as guardians of the environment. For example, the evident interests of iwi parties in the protection of taonga species of marine mammal can, in part (but not in full), be evaluated using a marine science lens. We stress and accept that there is a cultural dimension to such matters that cannot be evaluated with the same lens.
124. TTR's position as regards cultural concerns is not that they should be set aside; but that it is appropriate to be clear-sighted about those aspects of the concerns that can be (and have been) addressed by marine science, and those aspects of a more metaphysical nature which are incapable of being addressed by marine science.
125. As for social considerations, it is submitted that these have relatively little role in the assessment. The EEZ Act's definition of sustainable management¹⁰³ does not place social (or cultural) well-being alongside economic well-being (unlike the RMA definition¹⁰⁴).
126. Notably, the same issue as addressed above in relation to the definition of "environment" arises in respect of the definition of "sustainable management": whether the literal meaning of s 4(2) of the FTAA must yield to a purposive interpretation. In our submission, it must. The intention of those parts of the FTAA that relate to marine consents is plainly to apply relevant parts

¹⁰³ EEZ Act, s 10(2).

¹⁰⁴ RMA, s 5.

of the EEZ Act, overlain with an FTAA framework. It would be contrary to that fundamental intent to revert to applying a definition of “sustainable management” that is different from the definition under the EEZ Act.

Reliance on reconsideration matters

127. KASM/Greenpeace submit that:

- (a) the joint witness conferencing that occurred in 2024 as part of the reconsideration process, and
- (b) matters on which the reconsideration DMC were seeking further evidence,

should be used as a ‘starting point’ for the present Panel’s identification of key issues.¹⁰⁵

128. TTR acknowledges that the volume of information before the Panel is very large, and understands the temptation to look for ways to make it easier to work out what the issues are. However, the 2024 conferencing and the partial reconsideration hearings were all taking place under a different legislative framework, and under the limitations of a “reconsideration” exercise.¹⁰⁶ TTR submits this makes both the joint witness statements, and the early musings of the DMC of no reliable use to the present Panel in coming to grips with TTR’s current application. A fresh assessment, guided by the FTAA framework, and the evidence now before the Panel, must be conducted.

Speculation under the RMA

129. KASM/Greenpeace advance a rather generic submission about the weight to be given to speculative arguments under

¹⁰⁵ At [37].

¹⁰⁶ Where matters unaffected by the errors of law found by the Supreme Court were not to be revisited in the absence of new evidence or other exceptional circumstances: *R (Perrett) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1365, [2010] 2 All ER 578.

the RMA when a consent authority is deciding a consent application.¹⁰⁷ They cite *Hawthorn*¹⁰⁸ as authority for this proposition. This fails to place the *Hawthorn* decision in its proper context, which bears no resemblance to any aspect of the present matters factually, or in terms of the applicable legal framework.

Benefits

130. KASM/Greenpeace state that the *Delmore* (in draft) and *Bledisloe Wharf* decisions, both under the FTAA, have taken similar approaches to the definition of benefit.¹⁰⁹ This is inaccurate, as the Panel in *Delmore* decided that a detailed cost-benefit analysis was required, and that is not the approach taken by the Bledisloe Wharf Panel.
131. Further, it is submitted, that the approach towards assessing benefits ought to be context-specific. Some applications may require a greater level of assessment than others, depending on the role of economic analysis to the assessment, and the scale and significance of the project itself.
132. KASM/Greenpeace also misrepresents that the Supreme Court in TTR's case did not conclude whether a cost benefit analysis should be undertaken.¹¹⁰ In fact, the Supreme Court endorsed the Court of Appeal's finding that a cost benefit analysis was not required, and it was consistent with the scheme of the EEZ Act for a range of considerations to be assessed on a qualitative rather than quantitative basis.¹¹¹

International law

133. KASM/Greenpeace seem to rely on the operation of s 11 of the EEZ Act, and thereby various international law principles,

¹⁰⁷ At [73]

¹⁰⁸ *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424.

¹⁰⁹ At [86].

¹¹⁰ At [92].

¹¹¹ Above n 69.

to bolster its position regarding bottom lines, and in particular the need for precaution.¹¹²

134. In our submission, the correct approach remains that set out in *Helu v Immigration and Protection Tribunal*¹¹³ as applied by the Supreme Court in TTR's case. Under clause 6 of Schedule 10 of the FTAA, s 11 is a matter to be taken into account; but neither s 11 nor any of the international conventions it refers to can be used to alter the specific weighting that clause 6 requires the Panel to apply, or alter the way in which s 85(3) operates.

Conditions

135. KASM/Greenpeace's submissions regarding conditions¹¹⁴ are all substantially addressed in preceding sections.¹¹⁵ In brief, it is submitted that most of the relevant subject matter raises matters of fact which must be re-assessed. Findings of fact by the 2017 DMC, and findings of mixed law and fact by the Supreme Court that rely on the record of the DMC's decision-making, do not pre-determine those matters for present purposes.

SEAFOOD NEW ZEALAND AND TALLEY'S GROUP LTD

136. We have grouped the comments by Seafood New Zealand (**SNZ**) and Talley's Group Ltd (**Talley's**) together, as they tend to raise the same or similar legal matters.

Uncertainty or inadequacy

137. SNZ and Talley's submit that the information provided by TTR is uncertain or inadequate, and Talley's says the inadequacy is such that consent should be declined. These matters are

¹¹² At [104]-[114].

¹¹³ *Helu v Immigration and Protection Tribunal* [2015] NZSC 28.

¹¹⁴ At [124]-[130].

¹¹⁵ At [58]-[70].

responded to in TTR's evidence — in particular the evidence of Dr MacDiarmid.

Reliance on former decisions

138. SNZ and Talley's place some reliance on factual findings of the 2017 DMC.¹¹⁶ For reasons covered above we submit no reliance can be placed on such findings.¹¹⁷ Talley's states that the 2017 DMC found that the sediment plume would result in material harm, which is also incorrect.¹¹⁸ As addressed above, neither the 2017 DMC nor the Supreme Court found that the plume would result in material harm.¹¹⁹ That is a factual matter yet to be assessed.
139. The same is true for whether or not there remain "information deficits" in the application:¹²⁰ that is a factual matter for the present Panel to assess based on the evidence now before it (and properly informed by the new statutory context).

Material harm

140. Talley's submits that the (alleged) findings of material harm "also mean that the Project has adverse impacts that are sufficiently significant to engage the 'decline' ground in s 85(3)".¹²¹ This does not reflect the matters that s 85(3) actually requires to be considered, omitting both the "benefits" consideration, and the 'proportionality' comparison that is required; which in effect treats material harm as if it is a bottom line. For reasons already covered, it is not.¹²²

¹¹⁶ For example SNZ at [76] and Talley's at [6](a).

¹¹⁷ See above at [14]-[15].

¹¹⁸ At [6](a).

¹¹⁹ See above at [18]-[19].

¹²⁰ As referred to by Talley's at [7].

¹²¹ At [6](a).

¹²² See above at [103].

Significant habitats

141. SNZ and Talley's submit that there are "habitats of particular significance to fisheries management" (**HPSFM**) within the area that will be affected by the Project, being areas that require protection under the Fisheries Act 1996:
- (a) SNZ states that Fisheries New Zealand has identified the Pātea Shoals as HPSFM;¹²³
 - (b) Talley's refers more or less to the same area, and relies on statements of evidence it filed for the 2023-2024 reconsideration of TTRs 2016 application.¹²⁴
142. It is agreed that the Fisheries Act 1996 is a marine management regime, the nature and effect of which is required to be taken into account in accordance with s 59(2)(h) of the EEZ Act.
143. However, the submissions by SNZ and Talley's do not accurately reflect the status of the Pātea Shoals under the Fisheries Act. Fisheries New Zealand has not identified the Shoals as HPSFM, but as *potential* HPSFM, and this is accurately reflected in the statement of Dr Helson on which Talley's relies.¹²⁵ He acknowledges that no HPSFM have been formally identified.
144. The potential for future recognition and/or protection of a marine area is well beyond the matters that are required to be taken into account in the consideration of the nature and effect of other marine management regimes.¹²⁶
145. Both SNZ¹²⁷ and Dr Helson¹²⁸ also refer to the consideration given to a benthic protection area in the Chatham Rock

¹²³ At [128].

¹²⁴ At [11](e).

¹²⁵ Evidence of Dr Jeremy Helson, 6 October 2023 at [52].

¹²⁶ *TTR (SC)* above n 2 at [181]-[182] per William Young and Ellen France JJ.

¹²⁷ At [130].

¹²⁸ Evidence of Dr Jeremy Helson, 6 October 2023 at [53].

Phosphate decision as if it is comparable to the current status of Pātea Shoals, which is not the case. A benthic protection area is the product of Regulations.¹²⁹

Legal framework

146. Talley's asserts that TTRs approach to the legal framework suggests "that adverse effects can remain unmitigated and simply be ignored".¹³⁰
147. It is unclear what aspects of TTR's application Talley's is relying on to support this assertion, but in our submission no part of TTR's application promotes this. TTR considers that all relevant adverse effects have been identified in a sufficiently robust and reliable manner to enable them to be assessed, and it relies on the evidence of its technical advisors to support a conclusion that all effects are either avoided or else mitigated or remedied through a comprehensive suite of proposed conditions and management plans.
148. We disagree with Talley's submission that there is "nothing in the FTAA that says the grounds for a decline decision in s 85 are exhaustive".¹³¹ In our submission, that is what s 81(2)(f) does, when it states that the panel "may decline the approval **only** in accordance with section 85" (emphasis added).

Exclusion/Exercise

149. Section 60 of the EEZ Act requires the Panel, when considering the effects of the Project on existing interests, to have regard to:
 - (a) The area that the Project would have in common with the existing interest;
 - (b) The degree to which both the Project and the existing interest must be carried out to the exclusion of other activities; and

¹²⁹ The Fisheries (Benthic Protection Area) Regulations 2007.

¹³⁰ At [17]

¹³¹ At [22].

(c) Whether the existing interest can be exercised only in the area to which the application relates.

150. Talley's provides an approximate capital value of the quota it holds in the "the affected areas", but does not state how it has defined the area it considers to be affected.¹³² Given its other submissions regarding uncertainty and inadequacy of information, it seems likely to be adopting a very different view than TTR's experts about the spatial extent of effects.
151. In comparison, SNZ says it has analysed the level of displacement, "from an 'affected area', which more or less aligns with TTR's Sediment Modelled Domain".¹³³ It justifies this approach by asserting¹³⁴ that TTR described the SMD as "the area where any potentially significant impacts from sediment discharged by the project could occur". That is incorrect. The actual description is that the SMD "covers the area where any potentially significant impacts from sediment discharged by the project could occur".¹³⁵ In other words, the area potentially affected is a subset of the SMD, not the SMD itself.
152. In reliance on the evidence of its experts, TTR submits that proper consideration of the matters set out in s 60 requires the Panel to focus on:
 - (a) The relative size of TTR's proposed mining area, which occupies only a fraction of the relevant FMA;
 - (b) The relative size of the actual area of physical displacement, which is much smaller still (being the exclusion zone of approximately 10km² around the IMV);
 - (c) The fundamental difference between the mineral resource, which is static, and therefore (along with the

¹³² At [2].

¹³³ At [93].

¹³⁴ At [93].

¹³⁵ TTR's application, p 134.

geographical limitations of the Minerals Permit) dictates the location of the Project, compared to the fish stock resource, which is mobile and can therefore be caught elsewhere within the FMA.

TE OHU KAIMOANA TRUSTEE LTD

153. Te Ohu Kaimoana Trustee Ltd (**TOK**) submit against the granting of consent, claiming that the activity is inconsistent with the Māori Fisheries Settlement.
154. For decline to occur on this basis, the Panel must be satisfied that granting the consent would breach s 7,¹³⁶ which requires that all persons performing and exercising functions, powers, and duties under the FTAA must act in a manner consistent with obligations arising under existing Treaty settlements.
155. TOK raises concerns regarding:
 - (a) customary non-commercial fishing including uncertainty, potential adverse effects on the Pātaka system and associated risk of disruption;¹³⁷
 - (b) commercial fishing impacts on Māori fisheries include the potential for the settlement quota to be impacted, and the overlap of TTR's proposed activity potentially leading to displacement, reduced catch rates, and altered fish distribution;¹³⁸ and
 - (c) TTR's proposal to use Admiralty Bay for anchoring.¹³⁹
156. In our submission none of these concerns constitute inconsistency with obligations arising under Treaty settlements such that the Application must be declined under s 85. The concerns raised are not supported by evidence establishing

¹³⁶ FTAA, s 85(1)(b).

¹³⁷ At [32] – [47].

¹³⁸ At [50] – [65].

¹³⁹ At [66] – [72].

harm or effects arising from TTR's proposed activities, nor does the submission establish that these actions would be inconsistent with obligations arising under the Treaty settlements relating to fishing.

TARANAKI OFFSHORE PARTNERSHIP

157. Taranaki Offshore Partnership (**TOP**) raises concerns about what it says will be significant adverse impacts of the Project on the natural environment. However it does not pursue those matters for any reason other than the concern that it will prevent or constrain its own intended use of areas within the STB for offshore wind energy generation. For the various reasons that follow, it is submitted that the issues raised by TOP can all be disregarded.
158. First, TOP's only existing interest within the statutory definition in the EEZ Act is the interest it has in investigating feasibility.¹⁴⁰ It has no lawful ability to establish an offshore windfarm (as legislation is yet to be passed that would even enable an application to be made) so it has no lawfully established interest in *that* activity. An interest in something that may become lawful at some future time, and if so may (eventually¹⁴¹) be established, does not suffice.
159. Second, TOP seems to suggest that its nascent interest in wind-farm development must be accounted for in the consideration of the efficient use and development of natural resources.¹⁴² The contention is not developed in TOP's submissions other than to assert that s 59(2)(g) requires the Panel to consider whether enabling the Project would preclude more efficient development in the future.

¹⁴⁰ TOP's Legal Submissions at [77].

¹⁴¹ Noting that TOP does not anticipate even applying for a commercial permit until ~2032, assuming the current Bill eventuates.

¹⁴² At [79] and [164.4].

160. 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. Notably, s 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 TOPs broad approach.
161. Third, TOP seeks to rely on the Offshore Renewable Energy Bill as a marine management regime, whose nature and effect must be considered¹⁴³ in line with the Supreme Court's decision. This is contrary to s 7 of the EEZ Act. A Bill has no legal effect. Until it passes into law it cannot be considered a marine management regime.
162. For those reasons we do not address the substance of TOPs submissions any further at this time.

IWI COMMENTERS

163. In this section we set out some general responses to the comments received from iwi parties, addressing the legal dimensions relevant to the matters raised. For the sake of efficiency we have grouped iwi commenters together, and with a few exceptions we do not make reference to comments received from specific parties, but have rather responded to common themes. We also refer to parts of the submissions above that have already described some relevant considerations in relation to cultural matters.¹⁴⁴
164. A useful starting point in addressing the themes raised by Iwi submitters is the guidance of the Court of Appeal in

¹⁴³ Under EEZ Act, s 59(2)(h).

¹⁴⁴ Above at [121]-[124].

Greenpeace Aotearoa Incorporated v Hiringa Energy Limited.¹⁴⁵

165. The Court there considered a challenge to a project involving four wind turbines under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**COVID Fast Track Act**). The appellants, Te Korowai o Ngāruahine Trust and four hapū, unsuccessfully argued that in granting the consent the Panel had failed to act in a manner consistent with the Treaty of Waitangi, as required by the COVID Fast Track Act.
166. Acknowledging the specific factual matrix of that case, it is relevant here as the Court of Appeal found that while the project was not fully consistent with Māori cultural and spiritual values, this is not the same as finding the a project is not consistent with the principles of the Treaty.¹⁴⁶ This supported the finding that the project, with conditions, was consistent with the principles of the Treaty:

[207] We acknowledge that the Panel found that the Project was not fully consistent with Māori cultural and spiritual values. But that is not the same as finding that the Project was not consistent with the principles of the Treaty. The Panel concluded that the Project with conditions was consistent with the principles of the Treaty. We consider that the Panel made no error in finding that the mitigation measures, including identifying an alternative site at the end of the useful life of the turbines, ensured that the Project was consistent with the Treaty. The Project was important to the Government's commitment to renewable energy and provided employment opportunities. It met the purposes of the FTCA. With the mitigation measures and conditions of consent, we consider it was a project that reflected a balancing of interests reflective of the partnership that the Treaty represents. It met the duty of active protection in the circumstances, taking into account the Crown's acknowledgment to Ngāruahine of past treaty breaches.

[208] Returning to the considerations in cl 31 of sch 6, we consider that the Panel properly had regard to the actual and potential effects on the environment of allowing the activity, and to measures proposed or agreed to ensure that positive effects offset or compensated for any adverse effects in allowing the activity, as viewed through the lens of what consistency with the

¹⁴⁵ *Greenpeace Aotearoa Incorporated v Hiringa Energy Limited* [2023] NZCA 672.

¹⁴⁶ The Court of Appeal helpfully set out commentary identifying the relevant principles of the Treaty, at [186] – [203].

principles of the Treaty required. For these reasons, we consider that the Panel made no error of law in how it approached the Treaty consistency of the Project.

167. Iwi commenters argue various elements are to be given “particular weight”, including environmental bottom lines imported from the EEZ Act¹⁴⁷, and the Treaty of Waitangi and its principles.¹⁴⁸ This is not correct. The FTAA is clear and any deviation under the guise of “reading into the statute” would be improper.
168. The High Court recently confirmed this on judicial review of a decision under the FTAA, where it said:¹⁴⁹

In enacting the FTA, Parliament made a deliberate decision to de-emphasise factors which might militate against approval... The premium the FTA places on speed and the reduced emphasis on cultural and environmental considerations means fast-tracking may be inappropriate where complex countervailing factors are present.

The intention of parliament was clear. It is inappropriate to read into the statute any “gloss” that a party may wish existed.

169. The ‘Treaty clause’ in the FTAA relates to Treaty settlements, and not the Treaty itself or its principles. This is to be contrasted with s 12 of the EEZ Act. The Supreme Court’s directions that the principles of the Treaty were “directly relevant” in regards to TTR’s previous application under the EEZ Act are therefore not to be imported to a separate and intentionally different legislative regime.
170. This has been reinforced by the High Court decision quoted above, which also found in relation to the FTAA that decision-makers “are not required to consider the principles of the Treaty”.¹⁵⁰

¹⁴⁷ Submissions on behalf of Te Rūnanga o Ngāti Ruanui at [84].

¹⁴⁸ Submissions on behalf of Te Rūnanga o Ngāti Ruanui at [21]; Submissions on behalf of Te Kaahui o Rauru Trust at [72].

¹⁴⁹ *Ngāti Kuku Hapu Trust v Environmental Protection Authority* [2025] NZHC 2453

¹⁵⁰ Above n 149 at [65].

171. In our submission it is debatable how s 85(1)(b) of the FTAA applies, given the Panel is exercising a power under section 7(2), which states section 7(1) does not apply. This may be a moot point given there is no evidence of a breach of s 7 here, and we note the panel in the *Bledisloe Wharf* decision identified this same issue, and worked around it by proceeding on the basis that s 7 applied, but also stating what their decision would be if it did not.¹⁵¹
172. As addressed in previous sections, the weighting to be given to the EEZ Act is clear—it must be given lesser weight than the purpose of the FTAA when applying an overall assessment. As also covered in previous sections, this does not diminish the requirement to assess the individual criteria listed in clause 6 of Schedule 10 of the FTAA individually in the first instance (i.e. without applying a weighting as between criteria), though it should be noted that none of those criteria make any specific reference to cultural values; and, as noted previously in these submissions, the definitions of environment and sustainable management that apply here do not share the RMA's specific references to cultural dimensions of those two concepts.
173. Any consideration of tikanga as “any other applicable law” is expressly constrained in the FTAA's hierarchy of considerations, and express direction that greatest weight must be given to the purpose of the Fast-track Act.¹⁵²
174. No evidence has been provided to demonstrate that the Project would prevent the effective operation of settlement mechanisms (including the Māori Commercial Aquaculture Claims Settlement Act 2004).
175. Provision for potential Marine and Coastal Area Act applications in the FTAA is limited to recognition of a

¹⁵¹ *Bledisloe Wharf* decision at [110].

¹⁵² FTAA schedule 10 cl 6(1)(a).

potentially affected party;¹⁵³ preliminary consultation;¹⁵⁴ information to be included in the s18 report;¹⁵⁵ and for invitation to comment.¹⁵⁶

176. Finally, matters relating to consultation are addressed in the evidence of Mr Eggers.

PROCESS

177. The Panel will need to determine how to proceed to further consider, and ultimately make decisions on, the application. In doing so, the Panel must regulate its procedure as it thinks appropriate, without procedural formality, and in a manner that best promotes the just and timely determination of the approvals sought.
178. We offer the following observations in the hope they may be of some assistance:
- (a) As you work through the comments and responses, there may be matters that are unclear and would benefit from further information or explanation. Section 67 authorises you to request further information if required.
 - (b) This may be an efficient way to enable the Panel to progress and resolve issues within the tight time constraints it is working under, given the requirement in s 67(3) for information to be provided within 10 working days (or such shorter period as you may determine).
 - (c) If there are material issues where the Panel considers a section 67 request is not appropriate, and the Panel determines that it needs to better understand the

¹⁵³ FTAA, s13(4)(j)(vii).

¹⁵⁴ FTAA, s11(1)(c).

¹⁵⁵ FTAA, s18(20(f)).

¹⁵⁶ FTAA, s53(2)(e).

views of the technical experts then there are a number of possible options to consider.

- (b) An efficient option may be to require the relevant experts to come before the panel in a workshop form, to answer questions to explore differences of view, and provide assistance to the Panel to determine the best and most pragmatic way to take matters forward.
- (c) An alternative is to direct the experts to conference between themselves to produce joint statements — though this may not be as useful, as it can leave questions unanswered, or answered in ways that are not as helpful to the Panel as it would wish. This can result in inefficiency that is more easily avoided by holding the sort of workshop described above.
- (d) The Panel retains the discretion to hold a formal hearing, and could employ this power to hold targeted hearings on identified issues of law, or specific and focussed evidential matters. By comparison, a full-scale hearing is less likely to be of much assistance to the Panel, given the time-consuming nature of hearings and the tight timeframes for the Panel to make its decisions.

179. Finally, TTR wishes to record its appreciation for the opportunity to provide its response to comments, and confirms that it will continue to assist the Panel in whatever ways the Panel considers will be most useful as the application progresses.

DATE: 13 October 2025

 

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