TRANSCRIPT PREPARED BY:	**TASMAN TRANSCRIPTION**	
CLIENT:	**ENVIRONMENTAL PROTECTION AUTHORITY**	
SPEAKERS:	**EXPERT PANEL:**	**THE HON. KIT TOOGOOD, KC** **LORETTA LOVELL** **GAVIN KEMBLE**
	NGATI RUANUI:	**HAIMONA MARUERA** **JUSTINE INNS**
	FOREST & BIRD:	**PETER ANDERSON** **MAY DOWNING**
	TE OHU KAI MOANA TRUSTEE LIMITED:	**BETH MURFITT** **HORIANA IRWIN-EASTHOPE**
	SOUTH TARANAKI DISTRICT COUNCIL:	**MATT CONWAY** **KIERRA PARKER** **KYLAN LUKE-McKEEN**
	KASM and GREENPEACE AOTEAROA INC:	**RUBY HAAZEN** **DUNCAN CURRIE**
	TE KAAHUI O RAURU TRUST AND TE KOROWAI O NGĀRUAHINE:	**PARANIHIA WALKER** **RHIANNA MORAR**
	TE TOPUNI NGARAHU:	**JAMIE FERGUSON**
	ENVIRONMENTAL DEFENCE SOCIETY:	**JOHN COMMISSARIS** **ROB ENRIGHT**
	NGATI MANUHIAKAI and NGATI TU:	**JAMES GARDNER-HOPKINS**
	TRANS-TASMAN RESOURCES LTD:	**MORGAN SLYFIELD**
TOTAL LENGTH OF AUDIO:	**4.02 HOURS**	
TOTAL PAGES:	**71**	

[Background chat].

[Start of Recorded Material: 9:10].

K TOOGOOD: All right ladies and gentlemen and Mr Enright online. We'll begin with a karakia, and Haimona has come all the way from Taranaki to do that for us. Could you do that now, Haimona, please.

H MARUERA: Tēnā koe, otirā tēnā tātou. Aroha mai mō te tōmuri nei. Taku whakapāha nei ki te kaupapa — heoi anō, kia tau mauri ora ki Ngāti Whātua te hau kāinga. E mihi ana. Kia tau ki runga manaakitanga o te wāhi ngaro, ki runga ki tēnā, ki tēnā o tātou. Kia hui pai mai ki a tātou katoa te wānanga o tēnā, o tēnā o tātou. Tūturu o whiti, whakamaua, kia tina!

ALL: Tina

H MARUERA: Hui e

ALL: Taiki e

K TOOGOOD: Well, Mōrena koutou. Welcome to you all. Thank you for joining us.

I am Kit Toogood, Chair of the Panel. On my right is Loretta Lovell, on my left, Gavin Kembell and also members of the Panel. Behind us, although some are obscured by me, particularly I suspect on your right, Sally Jepp KC, who's our legal advisor, and on your left, Carolyn Wratt, who's been appointed by the EPA to assist us with the preparation of our decision. I also want to introduce Keely Paler and Tuf Ioane from the EPA, with whom I imagine you have dealt from time to time.

Would counsel and representative please be good enough to announce their appearances just so that we can get that on the record? We'll start with the front. Justine, would you like to start?

J INNS: Tēnā koe e te kaiwhakawā, me ngā mema, tātou i huihui mai nei. Counsel's name is Justine Inns for these purposes. Thank you all.

K TOOGOOD: Kia ora.

J INNS: For Ngāti Ruanui.

P ANDERSON: Thank you. Kia ora. [inaudible 11:10]. Good morning. My name is Peter Anderson. I represent Forest and Bird with my friend, Ms Downing.

K TOOGOOD: Thank you .

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

H IRWIN-EASTHOPE: E rau rangatira mā, tēnā koutou, otirā, tēnā tātou. Ms Irwin-Easthope and Ms Murfitt for Te Ohu Kai Moana Trustee Limited.

K TOOGOOD: Kia ora.

E RONGO: Tēnā koe e te kai whakawā. Ko Eve Kahuwaero Rongo ahau. He rōia mō Ngāti Manuhiakai. Ka mihi e Okahu hapū o Ngāruahine. Kia ora.

M CONWAY: Tēnā koutou. Counsel name is Conway. I appear with Ms Parker for Taranaki Regional Council and South Taranaki District Council.

K TOOGOOD: Thank you, Mr Conway.

M CONWAY: With me are Mr [inaudible 11:54] and Mr Kylan McKeen also representing those councils, and not as council.

K TOOGOOD: Can you speak up please because it's quite hard to hear from you? I think when you're addressing us, we might have microphones, but while you're introducing yourselves, if you can speak right up so we can hear you. Thank you.

M CONWAY: Apologies sir, would you like me to repeat that?

K TOOGOOD: No, no, we got the message. Thank you very much, Mr Conway.

M CONWAY: Thank you.

R HAAZEN: Tēnā koutou. Ms Haazen and Mr Currie for KASM and Greenpeace.

K TOOGOOD: Thank you, Ms Haazen.

P WALKER: Kei te kānara [? 12:35], tēnā koutou, hoki atu ki a koe e te rangatira nāu i whakarite tō tātou maunga, tēnā koe. Paranihia Walker and Rhianna Morar, appearing for Te Kaahui o Rauru. We also had instructions in the last couple of days to also appear for Te Korowai o Ngāruahine.

K TOOGOOD: Kia ora. Thank you.

J FERGUSON E te kaiwhakawā, me ngā mema o te kaipiri [? 12:59]. Tēnā koutou. Ko Jamie Ferguson taku ingoa. I appear for Te Tōpuni Ngārahu.

K TOOGOOD: Kia ora, Mr Ferguson.

J COMMISSARIS: Good morning, Mr Commissaris here for the Environmental Defence Society with Mr Enright. Thank You.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Thank you. Mr Gardner-Hopkins.

J GARDNER-HOPKINS: Mōrena koutou, Gardner-Hopkins here as representative for Ngāti Manuhiakai and Ngāti Tu.

K TOOGOOD: Kia ora.

M SLYFIELD: Kia ora koutou. My name is Slyfield. I'm here for TTR along with Ms Buxeda. We also have present Drs Mitchell and MacDiarmid and Mr Eggers.

K TOOGOOD: Good morning all. Thank you very much. Thank you. I'm grateful to you all.

I just want to tell you briefly something about the timetable. I think Keely may have told you basically what we had intended, although it's fairly flexible for reasons which will come apparent in just a moment. We thought we'd take morning tea around 10:45 for quarter of an hour, lunch for half an hour at one, afternoon tea at 3:15, and then we would finish the day at five. That was the plan, but we are very grateful to you all for your efforts in responding at short notice to our questions on legal issues. I have to say we've been impressed by the quality of your submissions, by the focus which we asked for so that they're succinct but they are very understandable. It's made our job so much easier.

We're also very grateful to those council's who gathered their thoughts and provided that helpful memorandum of the 24th of November and the attached schedule. Those both proved very useful tools for us, so thank you for that.

We, the members of the panel who are present, and our advisors have spent quite a bit of time considering the legal submissions and discussing. As I say, we were found the quality excellent, and that has meant that as we worked through them yesterday in particular, we found that we did not have as many follow up questions for you as we anticipated we might have, but we have identified some and we will direct specific questions to counsel or representatives for specific parties accordingly. It may not take (in fact it will not take) as long as we thought it might take us, but we value this opportunity to have you with us in person and Mr Enright online. We acknowledge that this is a good opportunity to hear from you on what are some quite tricky legal issues.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

We're conscious, among other things, that the submissions were filed simultaneously, and therefore there may have been aspects of submissions filed on behalf of other parties, some whose views you may support, some whose views you may disagree with. We thought we would give you an opportunity to speak to those if you want to do that.

The other point is that Ms Lovell has a question. What she describes I think is the second part to Question 10, which on our observation wasn't directly addressed by any of the submitters. We'd like to hear from you on that question, and I'll ask her to explain that now so that you can give it some thought, but then we'll give you some time when we've finished asking our questions to gather your thoughts. You can take an hour or whatever it is you need to think about what other submissions you want to make or simply to take us to the main points of your submissions. We don't want you to go back through your submissions in any detail, but we would have a couple of hours or so available to you to make any additional submissions that you want to make arising out of the questions and answers that have been given this morning or any other matters related to those submissions. We'll do that, Mr Slyfield and Ms Buxeda, first hearing from the commentators and then giving you an opportunity to respond. We will use the time usefully in that way, and I hope that's acceptable to you.

Ms Lovell, do you want to talk about the issue that you wanted to deal with?

L LOVELL: Kia ora. Kia ora tātou. So, yes, in Minute 11 for this hearing, the panel asked two aligned questions at Question 10. As you know, the first part was the relevance of the Treaty principles, cultural values in kaitiakitanga to the panel's considerations, and whether they fit within our assessment framework.

There was a second question which was of note, which is 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 under the Fast Track Act, Section 7(1)A.

I note that this really wasn't picked up in terms of detail with respect to the joint memorandum or with respect to the written submissions. It was alluded to, but I think for the Panel's purposes, we consider that it would be of assistance if we received oral submissions directed specifically to that second part of Question 10. Again, namely that the

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

correct legal test for distinguishing between an effect on an existing interest under the EEZ Act and an effect on an obligation arising under Treaty settlement under Section 7(1)A of the Fast Track Act.

Again, we suggest that parties take a moment after our questioning and consider how you can respond to that question from us. That would be appreciated. Kia ora koutou.

K TOOGOOD: All right, let's get straight onto it. My first question is Question 2A, which reads: Is the Panel required to determine whether TTR's proposal requires approval under the Resource Management Act? My question is directed to TTR, so Mr Slyfield and Ms Buxeda. I don't mind which of you responds, but the position you have taken in the Application is that you don't require any resource management consents, but we noted that in Part 1 of the SICAP report at Page 168 of the SICAP report.

You may not have it in front of you, so I'll read you the passage just to refresh your memories about that. The report reads: Even though … this relates to the mooring of buoys for monitoring purposes. Even though the specific details have not been confirmed as to the mooring configuration and surface buoy arrangement, TTR is aware that a coastal permit, likely to be a discretionary occupational consent, will be required from the Taranaki Regional Council prior to the BEMP commencing. A resource consent application and supporting assessment of environmental effects will be submitted to the TRC for processing as soon as the relevant mooring and buoy details are confirmed. TTR note that the application for the placement of the moorings and surface buoys will be submitted in accordance with the relevant rules of Regional Coastal Plan for Taranaki in adherence to the RMA 1991. No moorings will be placed within the CMA without prior resource consent approval.

My question really, and I know that that may appear to be, and it may be a relatively minor issue, but is that not a consent application that has not yet been made that is required to be made and is a discretionary consent and there may be others of that kind that will affect the Project?

M SLYFIELD: Thank you, and I don't have a light on but I'm assuming you can hear me okay through the microphone.

K TOOGOOD: We can, thank you.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

M SLYFIELD: Perhaps it's useful if I start by saying TTR's position is that the statement you refer to in the SICAP report is accurate, and to that extent, yes, there will be a requirement for resource consents as TTR understands it for those moorings, and that has not yet been sought.

K TOOGOOD: All right, well, there's a follow up question which I'm going to ask you about that, but I'll come back to it after I've heard from Mr Enright. Thank you, Mr Slyfield.

Mr Enright, just on this issue of the need to apply for other resource consents, you have said at Paragraph 8 that TTR will require one or more resource consents under Section 12(1)D of the RMA, and you're referring there to circumstances where discharged sand migrates from the point of release in the EEZ onto the seabed or the foreshore of the Coastal Marine Area and causes an adverse effect. As I understand it, you're referring there to the deposition of sand back onto the seabed in the permit area, but suggesting that sediment will carry into the Coastal Marine Area.

First, if I'm right about that, your submission is that that proposal therefore would require a consent under the RMA. You go on to say that, on balance, EDS submits that the Act does not require the Panel to determine whether the proposal requires approval under the RMA and nor is TTR required to seek all necessary approvals for the proposal, but your point is, on behalf of EDS, that the Applicant bears the risk that the proposal will not be able to legally proceed if resource consents under the RMA are required that have not been sought and granted. You say then that the Panel may as a matter of discretion have regard to the need for additional RMA consents as relevant to the question of immediacy of claimed net benefits.

This is the particular point I want you to focus on. You submit that given these are contingent on securing additional RMA consents, this means that the benefits are not capable of being secured and that may affect their net value. My question is, does the contingency issue, that is the security of additional consents, affect the benefits and the costs or disbenefits of the action equally? That is if the consents are not secured, neither the benefits nor the cost or disbenefits are experienced, and are there specific costs or disbenefits that could be experienced without realising the benefits? That relates of course to unconsented activity. Are you able to comment on that for us please?

R ENRIGHT: Just before I answer, the context of this is set out in a joint memorandum that's dated April 2014. I believe we've provided that to

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

you, but certainly Mr Commissaris will make sure that's the case. The example given as between both EDS at the time and counsel then acting for TTR was of de-ored sand migrating from the point of release in the EEZ to the seabed or foreshore of the CMA and resulting in an adverse effect. EDS' position, I should say, that would be captured by Section 12 as a discharge of the RMA. The example given related to the discharge of faecal matter from marine farms, which often migrates a significant distance before is deposited and is outside the control of the operator between point of release and point of deposit. That was the type of scenario in mind. Forest and Bird helpfully provided a plan in their submissions on the same topic which showed examples of proximity where this cross boundary issue may arise.

That's the context of the issue, and then turning specifically to your question, we have submitted that if a material resource consent is required and putting to one side the moorings/buoys example, which may not fit into a materiality threshold, but this would be certainly from EDS' perspective, a material issue, Section 12 consent needed. That would go to the question of crystallisation, the ability to actually exercise TTR's consents if the Panel were hypothetically to grant. Obviously, they couldn't proceed to do so pending the outcome of a separate consent process, which we haven't given you the anticipated activity status, but we could do that if that was of interest, but assuming for present purposes it requires a consent on a discretionary basis so it can't be relied on. There's no committed baseline argument for example under Section 12. That does mean the claimed benefits won't be realised for a period of time or may never be realised, so that may be relevant to an economist assessing net benefit.

The latter point would be a matter for the economist to assess and give you a view on in my submission and to question the evidence, but as a matter of law, it would be relevant to the question of net benefit in my submission.

G KEMBLE: Just on that, and I know this wasn't to your point, but we have also had some questions posed about the absence of a mining permit and there's potentially wildlife permits. So, how far does this extend, because if we look at every subsequent type of application that may need to be sought to enable this, I think Ngāti Ruanui has identified potential cables and pipes and various other things that may also require consent. The difficulty for us is how do we actually handle that? If that creates a level of uncertainty around the benefits, then how do

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

we actually factor that into consideration? Does that make sense? Is that clear?

R ENRIGHT: It's a reasonable inference that where there are other approvals not presently sought that are still required, these may affect the net benefit. Again, it's a question I would submit you put to the economist, but bear in mind the Act, the FTAA, is meant to be a so-called one-stop shop. If the Applicant hasn't lined all their ducks in a row, hasn't applied for all the relevant approvals at the time of the Application before you, then again they do take some risk on that. I understand they've acknowledged that risk, although of course they would say, 'You don't need an RMA consent,' for example, other than the [inaudible 31:32] point.

Anyway, to the extent that there is uncertainty, in my submission that's a potentially relevant factor for an economist to evaluate when looking at net benefit. Again, it's a relevant matter for their assessment.

K TOOGOOD: Very good.

[off microphone discussion among EPA members 32:00 – 34:30].

K TOOGOOD: Look, I'm sorry to turn our backs on you, but we want to make sure when we use this opportunity that we really do get the answers that we're looking for. Mr Enright, thank you for your help. I have no further question arising from your [overspeaking].

R ENRIGHT: Thank you sir. Sorry, just for the sake of completeness, I should point out that the joint memorandum does state that TTR denies that there would be any need for a Section 12 consent. I'm sure my friend will confirm that, but I just wanted to be complete on that.

K TOOGOOD: Thank you.

R ENRIGHT: Thank you.

K TOOGOOD: Yes, we understand that. Thank you.

I come back to Mr Slyfield and Ms Buxeda. The question arising from this issue is on the evidence, and particularly related to this question of the discharge into the CMA, is it open to the panel to determine on the evidence that the Project does involve a discharge into the CMA? Would that finding be available to us on the evidence in your view?

M SLYFIELD: It's an interesting question.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: I'm happy to give you time to think about it and take some advice. I don't want anyone today to be caught out by questions that we haven't indicated we would be asking as follow up, so if you want some time?

M SLYFIELD: Well, I think I have an answer for you, and perhaps I can circle back to this and reply at the end if I need to.

K TOOGOOD: Yes.

M SLYFIELD: I think the answer is, no, it would not be open to the Panel to make a determination of that sort because it wouldn't be for the purpose of determining the Application that is in front of the Panel. That really removes from the Panel's jurisdiction the task of having to identify what other consents may or may not be needed or the factual debate that Mr Enright properly observes exists between TTR and EDS about the nature of the discharge and whether it gives rise to another consenting requirement.

K TOOGOOD: Yes, so you would say also that it's not open to us either to inquire into whether the Project involves a deposition to which Section 12 of the RMA applies.

M SLYFIELD: Correct, yes.

K TOOGOOD: That's your position?

M SLYFIELD: It is.

K TOOGOOD: All right. Can I ask you then this question: let's just look at this question of contingency of securing additional consents. I suppose if an additional consent is required, let's take that hypothetically, and isn't sought and therefore the activity is not undertaken, then no benefit arises, but equally no cost or disbenefit arises. Therefore, the position is I suppose neutral, but can you envisage from your knowledge of the Project whether there are any activities that might involve a specific cost or disbenefit from which no benefit might arise, such activity being one that requires a consent? I mean I know you've said you're not required to issue consents, but is there anything in the Project that might result in a disbenefit without any countervailing benefit?

M SLYFIELD: Nothing comes to mind.

K TOOGOOD: No.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

M SLYFIELD: No, and I endorse the way that you've expressed it, sir, that the two, the benefits and the costs, if I put it in my terms, go hand in hand. The only activity that could get underway that may have a consenting requirement in advance of the extraction activity would be activity related to pre-commencement monitoring.

K TOOGOOD: Yes.

M SLYFIELD: As I see it, none of that activity inherently gives rise to any of the adverse effect concerns that are on the table for the Panel to work your way through.

K TOOGOOD: All right. Thank you. Don't leave the room because my next question under 7A is for you also, and that 7A asked, are international climate conventions relevant under Section 11 of the EEZ Act, and if so, how? So, are international climate conventions relevant? At Paragraph 20 of your submissions, you say that 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. 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. My question is, while that may be so, are international climate conventions relevant as aids to interpreting the statutory requirements under the FTAA?

M SLYFIELD: I think on the principle enunciated in the Helu and Immigration decision, the answer has to be a clear yes.

K TOOGOOD: Yes.

M SLYFIELD: I think that's consistent with the findings that, sir, you've just referred to that are drawn from that Court of Appeal decision on TTR's former application. I think the answer there is, yes, they can be aids to interpretation.

K TOOGOOD: All right, thank you. Anything you wanted to ask? No? Thank you very much.

All right, now Mr Kemble has a question arising in relation to Question 8.

G KEMBLE: Also of TTR, so Question 8A for those who aren't in attendance reads: *Is the effect on the climate of releasing seabed stored carbon or*

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

reducing carbon flux to the sea bed a relevant consideration? The second limb to that question is, if so, to which aspects of the assessment? You have addressed in 21 the potential for such carbon to be released as a greenhouse gas. The question's not in relation to that; it's really in relation to those elements that could be considered an environmental effect, which is dealt with in your Paragraph 23. I won't read out the whole of the initial paragraph, but the question primarily arises out of your bullet point A to your Paragraph 23 where you say the science in this area is still developing and subject to much uncertainty and debate. In bullet point B, you cite an experimental location in the Baltic Sea, which you say is not comparable and otherwise via a theoretical global model. So, just wanting a wee bit more expansion on exactly what that science looks like and where the various experiments which you or models that you cite here, where they are and how we can review them on our own account to determine relevance or otherwise.

M SLYFIELD: I'm acutely conscious that the Panel's been very clear this is not to be an evidential hearing, and the paragraphs to which you refer, Mr Kemble, in some senses are referring to matters of advice that TTR has received. I can confirm that the source of that advice is Earth Sciences New Zealand, formerly NIWA, and from experts in assessments of greenhouse gas emissions. I think I need to be a little bit careful not to go over a line in terms of giving evidence from the bar as it were. There is certainly an opportunity, if it will assist the Panel to understand what's said in the submissions, for some evidence to be potentially compiled by the suitable experts at ESNZ and provided to the Panel, but this is a summary effectively of what that advice has been. Perhaps dealing with the first point, the point about the uncertainty of the science and please stop me if you feel I stray into the evidential.

K TOOGOOD: Well, I don't think you need to be overly concerned about that because we won't be taking, with respect, into account what you say the evidence is. I think Mr Kemble's question is if we wanted to explore this further, could evidence be made available that's not already available within the Application?

G KEMBLE: The second question, so you say that it's based upon advice that the Applicant has received. Is that advice before us?

M SLYFIELD: No, it is not. No, it's an issue that has come to the fore as a result of the comments on the Application, and in particular, for example, the

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

comments of the Parliamentary Commissioner for the Environment. You'll recall that the Parliamentary Commissioner referred to some work that he had commissioned in his role from NIWA (now ESNZ), dealing with carbon emissions from seabed trawling.

Effectively the advice that TTR has received is that the degree of understanding of the science that the Parliamentary Commissioner for the Environment has developed based on that report is somewhat ahead of where the actual science sits. It would be, in my terms, well-nigh impossible for TTR to provide you with some information that you could rely on to reliably quantify in any robust fashion what the emissions component associated with the activity would be. But I hasten to add, if that is information that is of interest to the Panel to receive, there would be no issue with TTR obtaining some expert evidence on that and putting it before the Panel.

G KEMBLE: I suppose the matter that's before us in Paragraph 22, you're saying it's an effect that we can take into consideration?

M SLYFIELD: Yes.

G KEMBLE: It's a live issue that's been raised, and then we're addressing the signs of it here and saying it's developing and we're saying … so there's two areas. There's the release of the seabed carbon and there's also the carbon flux. Now the Applicant has addressed the carbon flux reduction and its impact assessment by saying there'll be a 40% reduction, but the comment would appear to suggest that we shouldn't be relying upon … well, maybe 'Shouldn't be relying upon,' is too strong a statement, but that we should exercise some caution when it comes to assessing this issue which is useful and unuseful if that makes sense because it's basically saying the science is developing and it's something which is in its infancy for the want of another term.

M SLYFIELD: Yeah.

G KEMBLE: It is an effect that you have to get your head round and you have to effectively draw a conclusion about. We've gone so far as to say there'll be a 40% reduction in the impact assessment and now we're saying this statement appears to be suggesting that we should hesitate even to rely upon that statement.

M SLYFIELD: Well, if I can just pick up on the part of your statement, sir, about having to get your head around it, I think that will come back to a question for the Panel whether you have the best available information on this topic.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

From TTR's understanding of how nascent the science in this area is, it's not possible for TTR to point to available independent scientific material and say, 'Well, that's where you can go to find that'. We're talking about an area that is at the cutting edge, that would have to be the product of some additional supplementary statement that TTR commissioned and put before you. If that is what the Panel would need in order to then undertake the analysis of whether you have best available information on that, and that is absolutely part of your obligation to think through whether you have information of that standard, then TTR is very happy to get that information in front of you.

G KEMBLE: The last follow up question from me on that is in terms of the 40% reduction in the flux issue, that's in Page 168 of the impact assessment, what was that based on?

M SLYFIELD: We'll have to come back to you on that. I can come back later in the day and provide you with an answer.

G KEMBLE: Thank you.

K TOOGOOD: Thank you. If you could just mark that for a response later on in the day, Mr Slyfield, that'd be helpful.

All right, now Ms Lovell has some issues arising under Question 10.

L LOVELL: Kia ora koutou. My question's for the Applicant. In terms of Question 10, and it's the first part of the two limbs for those not attending, Question 10 says 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? Now my question of you, Mr Slyfield, is at Para 25 of your submission you say that Treaty principles should not be read into the Fast Track Act. My question is how do you reconcile that with the Supreme Court statement in TTR at Paragraph 151 and the Court of Appeal statement in Ngararoa [? 51:10] at Paragraph 46 that subject to the terms of legislation Treaty principles may still be used as an aid of interpretation even where they are not expressly referred to? Can you help me with that?

M SLYFIELD: Yes, dealing first with the Supreme Court's reference, in my submission we have to remember that the Supreme Court was operating under the EEZ legislation and the provision in the EEZ legislation is expressed in different terms than the relevant provision Section 7 in the fast track legislation. There is a difference in terms of legislative expression there, one referring to principles and the other referring to obligations

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

under Treaty settlements, which in my submission is a meaningful distinction. That is where a line needs to be drawn in terms of reading in principles which have been not explicitly carried over into the fast track legislation in the way that they are in the EEZ legislation.

L LOVELL: Yeah, I think I have difficulty with that particularly when I do look at 151 because the Court is not limiting its observations to the EEZ Act. I mean the Court is actually quite clear. The Court will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question, not just the EEZ Act.

M SLYFIELD: In my submission, whether the Supreme Court says in a given passage that it is applying the EEZ legislation or not, that is as a matter of law what it was doing. It did not need to say that it was applying the EEZ Act in that particular passage in order for that to be the case.

L LOVELL: You consider that would limit our symptoms [? 53:30 about assessment?

M SLYFIELD: Yes.

L LOVELL: Okay, did you [inaudible 53:38] question?

Moving onto the second limb, so this is around existing interests, and again noting at Paragraphs 26 and 27 of your submission, and in that you addressed the concept of existing interests. Again, do you accept that in light of the Supreme Court's decision, tikanga based interests fall within existing interests or do you say a different approach applies where the Application is made under the Fast Tract Act? This follows, in some ways, the answer you've just made? I can repeat the question if it helps.

M SLYFIELD: No, I think I understand it, but if I don't answer the question, by all means repeat it. I think the answer is, yes, that is where tikanga related interests fit in terms of the framework that you're operating under, which is both FTA and EEZ legislation.

I've been thinking about the question that you've posed about 10B and this relationship between existing interests and obligations under Treaty settlements, and I think part of the answer to that, and it is only part, is that the existing interests are defined in the EEZ Act in a way that on the face of the definition refers to interests in a settlement. Bearing that in mind, it may be the case, depending on the circumstances and the evidence before you, that looking at an effect

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

on an existing interest, which is an existing interest arising out of a settlement matter and looking at an obligation under the relevant settlement are really just two different sides of the same coin.

It may be that in terms of the way the question was put about what's the distinction legally between the test that must be applied, depending on the circumstances factually, there may not be a meaningful distinction to be drawn. Now that I submit won't be the position in every case because there will be some situations where there might well be an existing interest, but there is not a corresponding obligation under a Treaty settlement. In other situations, it may simply be different lenses of looking at the same subject matter, one from the perspective of the holder of the interest and the other from the perspective of the Crown as the holder of the obligation.

L LOVELL: Kia ora, Mr Slyfield.

Would you like for me to move on or shall I wait for—

K TOOGOOD: Let's wait.

All right, the next issue is that Mr Kemble has a question arising under Question 15.

G KEMBLE: Correct. It's for council for South Taranaki District Council. Again, for those who aren't in the room, Question 15A reads 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 Section 59(2)B or (b), the second limb under Section 959(2)G of the EEZ Act or otherwise in question. The second limb is if the potential for offshore wind energy generation is relevant, how should it be taken into account? In the legal submissions for South Taranaki, Paragraph 4.5 in particular, it basically says that even if we do not conclude that the wind generation projects are in existing interest that we could consider them under 59(2)G and we have to inquire as to whether it's an efficient use and development of the natural resources. That's the context, so my question is quite simply … the question is just to start in baby steps first, so fundamentally understand the submissions to be that we need to consider what is the most efficient use of the site? Is that a fair question, a fair summation of the advice before us or that we can assess what is the most efficient use of the site?

M CONWAY: I would probably state it slightly more focused on the provision which talks about whether the activity is an efficient use of the use and

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

development of natural resources rather than whether it's the most efficient use and development. To that end, there is a limit here perhaps with reference to Section 7 of the RMA where I don't think that provision in itself requires a comparative assessment of relative efficiency between a current proposal and some other proposal that's not before the decisionmaker.

G KEMBLE: If I understand you, we're basically following the same thought process that the High Court landed on Meridian's Project Hayes Wind Farm, that it doesn't require that comparative assessment, it doesn't provide a full cost benefit assessment of what is the efficient use. We literally stand back and look to determine what is before us as being whether it's sufficient or not. Is that—

M CONWAY: Yes, by analogy to that RMS situation, that Meridian case, that is the closest, I think we've got to a steer on what this provision would look like in practise.

G KEMBLE: Okay, thank you. That's all I have.

K TOOGOOD: Thank you. Ms Lovell, Question 21.

L LOVELL: Kia ora koutou. This is for counsel for Te Ohu Kai Moana. You won't be surprised. In relation to Question 21, and again I'll repeat it - in relation to Section 85(1)B of the Fast Track Act and the obligations under Section 7(2) of the Fast Track Act again to act in a manner consistent with the obligations arising under existing Treaty settlements and customary rights, and I'll jump to B: if adverse effects on fish stocks or aquaculture stocks are found to exist would granting the Application be inconsistent with obligations under the Fisheries Act or fishery settlement or the Māori Commercial Aquacultural Claims Settlement Act?

My question is, in your submissions, you say the Crown must uphold the integrity and permanence of Māori fisheries settlement, so the question is, does that include maintaining the fishery or resource itself?

H IRWIN-EASTHOPE: Sorry, Ms Lovell, I'm pausing because my mic doesn't seem to be working, but perhaps I'll just … oh now, it is. Thank you. Never did that. Tēnā koutou.

I think the short answer is, yes, to the extent that … I mean, just taking a step back and I want to make sure that I'm answering your question,

but the way in which we've approached our submissions on this question is to contextualise the integrity of the settlement itself. Of course, what we say is if there are negative effects on the fish stock, then of course the Panel can take that into account in the context of upholding the integrity of the settlement, but what we've also tried to emphasise is it's not simply about the fish. Again, I want to be clear that I'm answering your question, so please just let me know if I'm not, but that does impose an obligation on the Crown to ensure that when it is developing different legislative frameworks that were not in the mind of people at the time of the Māori fisheries settlement, it does so with the mind to ensure that the settlement can be upheld.

What we also say in our submissions is that it has done so in this Act. It has said that if the Panel is of the view that there are inconsistencies with the Māori fisheries settlement, the Panel must decline. Again, let me know if I haven't answered your question squarely, but that does provide an obligation on the Crown to ensure that when it's developing these legislative frameworks, that it has a mind to upholding the settlement.

L LOVELL: I guess the question is there is the Crown setting up frameworks and then there's the question of maintaining the fishery or resource. Are they one and the same?

H IRWIN-EASTHOPE: I don’t think they're one and the same. I think that when the Crown is, let's just say putting in place this new regime, it has to have a mind to the fisheries settlement, which means that it has to have a mind to what the effects are going to be on quota for instance or customary fishing rights. We would say it has done so in this case and it provides the Panel with a clear directive that if the panel is of the view there are inconsistencies, then it must decline. I don't think it's the same, but I think that they are interrelated.

L LOVELL: Okay, and just following that line of thought, what is it about the effects of this Application that in your view makes it inconsistent with the settlement when other changes that affect the fishery would not?

H IRWIN-EASTHOPE: Other changes that it would affect climate change for instance, or sorry, I'm just trying to think about—

[no dialogue 1:5:25 – 1:6:13]

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

L LOVELL: I haven't got it right in front of me in terms of your submission, but I think the question is, in your submission you note that in some instances, effects haven't gotten to the point of inconsistency—

H IRWIN-EASTHOPE: Yes.

L LOVELL: —and with other matters. But my question is what is that distinction? We have it here or what have you seen in terms of other instances where that threshold has not been met?

H IRWIN-EASTHOPE: Met, right. Yes, no, I understand the question now. Thank you. I think it is at … maybe where I was just looking at it.

[no dialogue 1:6:55 – 1:7:05]

H IRWIN-EASTHOPE: Is it the point that not every effect is going to lead to an inconsistency, right? Yes, so how I would think about that, and again just let me know if you … is that what we've done is focused on the effects of TTR's Application. There may be instances where there are effects that don't necessarily lead to consistencies. We haven't … I think that the point of making that submission was we just simply don't know, but it's not to say that things aren't going to affect fish stock. I mean we know that things affect fisheries, but why I think Justice Bolt's decision is really helpful is because in that case his Honour effectively said, well, that's the Crown in the context of the Section 2018 rights affecting the quota and therefore that's a breach of the fisheries settlement and the Crown needs to rectify that.

Here, I think the Crown's given the Panel direction to say, well, if there are inconsistencies (and we say that there are) that are focused on … I mean we've addressed where we say they are in terms of the fish stock, that is a ground to decline. Now I haven't thought about every instance where the Panel might think, well, that doesn't lead to a circumstance of decline from an inconsistency perspective, but I think that not everything in the sea may lead to a decline, may lead to an inconsistency with the Māori Fisheries Act, but this is a huge Application and so we say that it does.

There may be other things, like wharfs or I'm not sure, but things that are far more straightforward than what the Panel has to consider before it that don't lead to an inconsistency.

L LOVELL: Okay, thank you.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Right, thank you. Finally, I have a question directed to counsel for TTR under Question 21A, which reads in relation to Section 85(1)B FTAA and the obligation under Section 7(2) FTAA to act in a manner consistent with the obligations arising under existing Treaty settlements and customary rights, are the members of the Panel exercising a judicial power or performing a judicial function or duty in terms of Section 7(2) of the Act? Section 7(1) says all persons performing and exercising functions, powers and duties under this Act must act in a manner that is consistent with the obligations arising under existing Treaty settlements and customary rights recognised under the Marine and Coastal Area Takutai Moana Act, the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act, and to avoid doubt, Subsection 2 says Subsection 1 does not apply to a court or a person exercising a judicial power or performing a judicial function or duty. In TTR's Application (I beg your pardon, submissions) on Question 21, it has said 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, support this interpretation.

My question is, does mean that the obligation under Section 7(1) one applies to everyone performing and exercising functions, powers and duties under the Act except the Panel?

M SLYFIELD: I don't think it's as simple as that. I'm sorry. I think there is an ambiguity in the legislation because I think that the conclusion that you've expressed, sir, is one that you're inexorably led to if you look exclusively at Section 7, but of course, we know that Section 81 (sorry 85(1)) indicates quite a different intention. I think in terms of assisting the Panel to join the dots on that so to speak, I can't go further really than to say that you could not be giving effect to 85(1) if you were to apply 7(2) according to its face. There is a need to reconcile this apparent tension between those two provisions in my submission. One way that that can be done is the way that it was done in the Bledisloe Wharf fast track decision where that panel gave a decision whether it was or wasn't exercising a judicial power in both directions. I dare say that that may be the only way that that decision could be made so as to be immune from an appeal on a point of law.

K TOOGOOD: The tension you describe arises only if you are right that the Panel is exercising a judicial power.

M SLYFIELD: Yes.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: It's interesting that Subsection 2 is prefaced to avoid doubt, so Parliament was trying to make its intention clear, was it not?

M SLYFIELD: It was intending to.

K TOOGOOD: Yes, so wouldn't it have been easier for Parliament if it wanted the result you argue for that it could have said simply in Section 7(2) the obligation under Section 7(1) does not apply to the Panel? Wouldn't that have been a much clearer way of expressing the view that you have as to what Subsection 2 was on about?

M SLYFIELD: Yes, it would.

K TOOGOOD: It could have said in Subsection 1, I suppose all persons other than the members of the Panel appointed under the Act. If that is Parliament's intention, does that strike you as odd that it should place such prominence in the Act in Section 7 on compliance with obligations under the Treaty settlements, and yet the body which is charged with the responsibility for making the decision is not bound by that obligation? Does that not strike you as strange?

M SLYFIELD: Very strange.

K TOOGOOD: Yes, so you accept that your proposition is one that Parliament, if we look at it carefully, may not have in fact intended?

M SLYFIELD: Yes, that's exactly the view I've come to about the tension that arises if you adopt my interpretation of 7(2).

K TOOGOOD: Thank you. I appreciate that.

All right, well, that is the end of the list of specific questions we have, so we were right to let you know that we didn't think it would take very long, but that's partly because your answers this morning have been very helpful to us, and we're grateful to you.

I now want to ask you, and you may want to take some time to think about this before you do the answer, how we make best use of the remaining time available and to give you an opportunity to make further submissions to us either on matters which have arisen this morning on which you haven't commented or matters which arose from the submissions of other parties which may feel you haven't adequately addressed yourselves. And also to give the Applicant an opportunity to respond to some of the answers that have been given by commentator parties this morning.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

My question is, how long do you think you will need to decide what questions you want to ask? Would an hour be sufficient? Would you like a little bit longer than that to confer with each other and work out a way in which you will approach this? We're in your hands. We want to make the time available to you and to use it in the way you think might be the most useful. If you'd like to just talk amongst yourself briefly, would an hour be sufficient? We'll give you more time if you think an hour would be longer for you to prepare and then we can make whatever time you think we'll need after that to hear from you.

J INNS: So, you're suggesting an hour's break?

K TOOGOOD: Yes, so that you can prepare the submissions that you want to give us. If you want longer than that, just say so. We'll give you that time because we've got plenty of other things to do while we're waiting.

J INNS: I'm getting self-appointed shop steward here. I'm getting shaking heads, so I'll canvas the room and see is everyone ready to make submissions now? Would we like to take an early morning tea break or just box on?

K TOOGOOD: Some of you may want some time just to prepare your thoughts on this, but would an hour be too long or not enough? You'd let me know.

J INNS: I think the consensus is an hour would be too long. If we could take an early morning tea break, take half an hour now.

K TOOGOOD: Yes.

J INNS: That would then allow us to come back while Mr Enright's still got some time available.

K TOOGOOD: Yes.

J INNS: We might arrange ourselves so he could address you first.

K TOOGOOD: All right, let's reconvene at 10:50, so 10 to 11 and we'll hear from you and then we will take other breaks. We'll take lunch, break and so on as we go through. All right, thank you very much.

[End of Recorded Material: 1:18:38]

[Background chat].

[Start of Recorded Material: 4:20]

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Tihei Mauri Ora. Well I'm going to ask Ms Lovell to remind you of her Question 10 follow up issue, the second part. That question will be directed first to EDS so that Mr Enfield can deal with it, and then we can hear from you on any other matters that you might have that you want to raise with us before 11:30, and then we'll come round to the room. We have no particular method. Just put your hand up and say you want to speak about something and we'll hear you. All right.

L LOVELL: Kia ora koutou. I'm going to say that question one more time. So, the question is, and I'll say it as a whole so it's one and two limbs, you can choose which limb you want to pick of the body/arm/leg. What is the relevance of Treaty principals, cultural values and kaitiakitanga to the Panel's consideration and where do they fit within the assessment framework? The second limb is, 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 under the Fast Track Act Section 7(1)A?

Now I'm about to ask Mr Enright if he has a response he would like to provide, and then after that, it would be helpful if we can confirm any other party who wishes to speak on this matter. To help with the record, if you could just confirm your name when you speak. So, kia ora, Mr Enright, did you have any submission to make on that question? You're on mute.

R ENRIGHT: I'm sorry. Was there another question? Can you hear me?

L LOVELL: Yeah.

R ENRIGHT: Okay, great. Thank you. I just wanted to make sure. I do have one other topic to address, but I'm happy to wait.

L LOVELL: Okay, sorry.

K TOOGOOD: He can tell us what he wants.

L LOVELL: Okay, yeah, absolutely.

K TOOGOOD: Mr Enright, why don't you address the issues you want to address? We know that you're under a time constraint, so you just tell us and then we'll return to Ms Lovell's question later. Thank you.

R ENRIGHT: Thank you. I'm grateful for the indulgence. The only topic I'd like to address obviously, otherwise rely on the written submissions, was Question 24. This relates to the Section 85 test and the reference to

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

policy instruments and statute of provisions in Section 85(4). It's the solely issue, how do you manage policy instruments? Can they tip the balance? I just really wanted to respond to a point made by TTR in their written submissions at Paragraph 75, where they say that there's essentially a statutory bar on a policy instrument tipping the balance as a result of the language used in 85(4). I just wanted to clarify EDS takes the exact opposite position on that, that an inconsistency with a policy instrument can indeed tip the balance.

If it was in very simplistic terms a question of the only provision the Panel found that the proposal was inconsistent with was a policy instrument such as a policy in the NZCPS, then that obviously couldn't operate solely to justify decline, but where there are a number of factors, which invariably there will be, again picking on the NZCPS as an example where generally the policies are effects based, so you would have an evidential basis as well as a policy basis, but you are not precluded by the language used in Section 85(4) from declining in reliance on inconsistency with a policy in addition to other factors.

I just wanted to draw to your attention that is a fundamental point of disagreement, and just a related point is that you may recall we addressed you in Hawera around the question of environmental bottom lines and that they still have an ability to operate in our submission on Sections 81 and 85 of the Act. Again, although we recognise that inconsistency with a policy provision cannot be of itself determinative but may operate again in tandem with other considerations in terms of the proportionality test. Of course, environmental bottom lines often relate to biophysical matters and very strongly founded evidence rather than just a matter of what a policy provision might for itself say.

Those were the main points EDS just wanted to emphasise to you and also to express my gratitude that I was able to appear online. Mr Commissaris will be there if any other matters arise for the rest of the day.

K TOOGOOD: Well, that's very helpful, Mr Enright. Thank you very much and thank you for taking the trouble to join us in this way.

R ENRIGHT: Thank you.

K TOOGOOD: Thank you very much.

L LOVELL: Kia ora koutou. The floor is yours.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

J INNS: Oh, ngā mema. The approach that our counsel discussed over the break was that if it suits you that we might just essentially go front of the room to the back, address highlights from our submissions, things we'd like to respond to from the discussion this morning. Those who were addressing Question 10 anyway have noted the question. I think on my list that would be myself, Ms Walker, Ms Rongo and Mr Ferguson and perhaps Mr. Conway for the Taranaki Regional Council. We're prepared to just take those on the way through. If we don't, you'll pull us up, I fully expect, so if you're happy for us to just go, I think—

K TOOGOOD: Yes, we're very happy for you to approach it.

J INNS: I think that would be less disruptive than trying to go question by question.

K TOOGOOD: I think if you everybody else, when you're speaking, please just identify yourselves and the organisation you're representing. That will help us with the transcript.

J INNS: Thank you.

K TOOGOOD: Thank you.

J INNS: Thank you, so first of all, Ms Inns for Te Runanga o Ngāti Ruanui. Just couple of points on the early questions, things that were discussed this morning or not.

Question 1 which relates to the factual findings of the original, the 2017 DMC, nothing to add to the written submissions, but I would just point to the submissions for Talleys and Seafood New Zealand who aren't represented here are usefully also pointed to the efficiency principle, if I could put it that way, in the statute supporting the idea that you could certainly look to those previous findings as well as the requirement that an applicant who had a previous application provide that information. Clearly, that information was supposed to be before you. It seems efficient that you might look at it. We also made the point that panel wasn't time constrained in the way that you are and had hearings and full testing.

I should just say, sir, when we compared notes, assessment of counsel was that we might each take somewhere between four and 20 minutes. I'm not at the four end, but hopefully not at the 20 either. That was comments on Question 1.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Question 2A, that there was some discussion about this morning, just two points if I can. We, perhaps a little overly boldly, stated in submissions that we think that the Panel should determine whether RMA consents are required. I'd just modify that slightly. I agree with my friend, Mr Enright, that that's not a jurisdictional question. It's not that you must require this Applicant to apply for consents they don't wish to. It's not going so far as to say you cannot grant the consents they seek if you're of the view they also need RMA consents, but I would align myself with his submissions that if there is at least a reasonable prospect that further consents are required, whether it be under the Resource Management Act or otherwise, that must be relevant to your consideration as to whether grant of these consents would achieve the purpose of the Act. I see it a little like the feasibility question which I don't think I'm going to address now, but should you be discounting the potential benefits of the project, if any, for the risk that it either may be delayed or may not materialise because of those other processes which are outside your control? So, just to reconcile those two positions.

One other point, and perhaps I misheard. I thought the Chair asked Mr Slyfield the question as to whether the Panel could conclude on the evidence that there would be discharges in the Coastal Marine Area. To me, clearly the answer to that must be yes. The sediment modelling shows that this discharge visits itself in the Coastal Marine Area. Not unreasonably, Mr Slyfield went to the next question is should you then conclude that therefore RMA consent's required? That's a separate question which I've just spoken about, but I think on the factual question, clearly the evidence is that discharges will occur in the coastal marine environment, and from some of the expert caucusing last week, there's also the question of mounds (pits and mounds as it were) which will migrate downstream. So clearly, these effects are felt in the CMA.

K TOOGOOD: Just so that I understand this, it seemed to me that it is arguable both that where the discharge is taking place within the permit area, so within the EEZ and not in the Coastal Marine Area, it's arguable that that would be sufficient for TTR to say, 'We are discharging outside the Coastal Marine Area'. Your argument, as I understand it, the argument of others, is that the discharge might take place there initially, but because the sediment then moves into the Coastal Marine Area, then the legislative provision applies. Is that's really the contest?

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

J INNS: That's right, and at Paragraph 11, we talked about Section 15B of the RMA, which refers to discharges of a harmful substance or contaminant from a ship or offshore installation. Now, in this case, the discharge is to all intents and purposes in the CMA. That's where it will have its main effects. The source of the discharge is not, and that's the confusion here.

K TOOGOOD: [overspeaking]. Thank you. [overspeaking].

J INNS: No, nothing, sir, in Question 3 or Question 4. Sorry, just one point on Question 4. TTR says that feasibility is not a relevant consideration because this is conceptually the same as any other consenting process where the risk that the thing I want to … the moon landing plant that I want to build may not be feasible, that risk is on me as Applicant. With respect, I don't think that this is exactly conceptually the same as other consenting processes because the purpose of the Act is to facilitate projects that have particular benefits, and an infeasible project obviously cannot have benefits. Point made, it also can't have disbenefits, but that's not the test. That's not way that the purpose is framed. It's the type of projects that will have, I would say, net benefits. So, feasibility must be relevant to that, and I don't think that aligning of this framework with more normal consenting frameworks we're used to is entirely on point there.

Turning pages in terms of Question 5 and the categories of benefits, I get a little nervous here because it occurs to me that economists use terms a little differently from us lay people. So, I was a little nervous on that, but I would just point to … we've sought leave for such for Dr Nana's response to the joint witness statement on economics to be received. He makes the point in that response, as he does in his initial evidence, of the value of a total economic value approach, which does its best to bring in all of those intangibles and imponderables. It is ideally in the broadest sense of that, that goes beyond even the cost benefit analysis. As I said though in the submissions, that's because that is not the analysis that's before you, the obvious argument of double counting doesn't arise. You need to deal with the evidence that's in front of you. Again, Dr Nana makes the point that in his view there is some double counting of benefits in the analysis that is before you. So, we just take the opportunity to say that.

K TOOGOOD: I don't know whether it may not have reached you yet, but we've decided to accept that information.

J INNS: Thank you.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Formalities may not yet have been completed.

J INNS: Very good, thank you.

K TOOGOOD: We'll take that into account.

J INNS: I will skip over Questions 6, 7-9, which gets us to Question 10. Before I go to the second limb of that question, which as you say my entirely … our area that was omitted from the table of questions probably (well clearly also) our error that there was a bit once over lightly in the written sub, so let me take that. Before I do, just a response to the conversation this morning about the relevance of the principles of Te Tiriti. I'll just make the observation that the jurisprudence on the principles as they relate to statutory interpretation doesn't just sit on the Supreme Court decision in TTR, whether that was confined to its statutory framework or not. That's a decision that was based in actually quite a long line of jurisprudence now, and our footnotes to Paragraph 30 refer to decisions back to the '80s to Huakina Development, Barton Prescott and so on. I would say that this is actually just an orthodox position that really doesn't need to lean too heavily on what might just be the most recent decision.

So, a question of existing interests and Treaty settlement obligations and how they interrelate and overlap and should be treated within the statutory framework, the first point quite obviously is that the interests for want of a more elegant term of iwi and hapu of Māori in this space are based in whakapapa. They derive from their mana. They are holistic. I think Justice Churchman in a Takutai Moana decision that I appeared on, which is now no longer a decision unfortunately, referred to the people of Ruapuke for argument's sake as having an integrated and holistic relationship with their seascape, which is a phrase that appeals to me, albeit that it's not as elegant as my friend would deliver it in te reo. These relationships, they're not easily amenable to being sliced and diced, notwithstanding that statutory frameworks require us to do that, but clearly an existing interest as that term's used in the EEZ Act is the broader concept than an obligation under a Treaty settlement as used in this statute.

Essentially though, what I would say is that one is the superset, the existing interest is the superset. Treaty obligations are a subset of that as the kaitiaki of iwi in their rohe is an existing interest. The Supreme Court recognised that, and so that's a matter to be considered via your Schedule 6 consideration to Section 59 of the EEZ Act, but that kaitiakitanga will also naturally be reflected in the Treaty settlement

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

obligations. It's only logical that there's that overlap between what I might call the substantive interests and the things that are expressed in Treaty settlements because those are the rights and interests that iwi go into Treaty settlements to seek protection and recognition of. The practical distinction, and I will come to the legal, but the practical distinction is that Treaty settlements are fundamentally about the relationship between iwi and the Crown and the mechanisms (which translate as settlement obligations) that settlements for all their imperfections deliver are mechanisms for that relationship to be expressed with the Crown or as I would say with its agents and local authorities. Mr Conway might just disagree with that characterisation, but they are mechanisms for that relationship to be expressed. The substantive interests, those tikanga based interests, are about the relationship between the people and the taiao and the things that live within it. That's fundamentally, if someone crudely in my terms, that's a whakapapa relationship.

I will pause, and you will want to ask me a question, I'm sure. So, Ngāti Ruanui's position is that granting this Application would be consistent with its Treaty settlement obligations because those obligations include mechanisms that tie into decision making through the RMA, decision making through the Fisheries Act, decision making through the Conservation Act and other mechanisms. This would be a decision that fundamentally impacts on their interests that is made outside those frameworks so that they don't have those rights of participation that the settlement guaranteed them through various mechanisms, and that those mechanisms again are underpinned by Crown apology, which elevates the status of a relationship between the Treaty partners. That is their position, that this would be inconsistent with those mechanisms because it would bypass them, and by bypassing them, it would create changes in that marine environment which would then devalue those instruments going forward because all decisions taken going forward would be effectively under the shadow, or the plume if you like, of this activity.

Coming then to the legal distinction in terms of framework, we would say that all existing interests of the iwi and hapu, including those Treaty settlement interests, must be considered as part of the Schedule 10 assessment (sorry, I think I said Schedule 6 before) through Section 59 of the EEZ Act, and adverse effects on all of those interests must also be considered in Section 85(3).

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

So, the conclusion is that if you agree with us that granting this Application would be inconsistent with the Treaty settlement obligations, then clearly you would decline it under Section 85(1). Even if you take the view that it doesn't rise to the threshold of being inconsistent with those settlement obligations, you can still take the view that it would have very severe adverse impacts on those Treaty settlement obligations as part of the full bundle of iwi/hapu interests and that those adverse impacts would weigh against benefits in the Section 85(3) assessment.

Did I get there? I'm not saying that you agree with me, but just in terms of addressing the question on its terms?

K TOOGOOD: We understand the submission.

J INNS: Thank you.

K TOOGOOD: Very clearly expressed, thank you.

J INNS: I don't think I need to add anything to Question 11 in terms of Justice Bolt's decision. A friend addressed that. I won't talk about iwi management plans. I'm going to flip forward to Question 14A in terms of habitats of particular significance to fisheries management. It's not one that you had questions on. Again, I would just point to the submissions from Seafood New Zealand and Talleys, especially at Paragraph 18 where they go into this in some detail. They make reference to Unison Network's case about the fact that by analogy whether such habitats exist is a factual matter. It's not a matter of being able to point to a thing on a plan. It's a consideration because the habitats are shown to exist on the facts. That was very briefly on that.

I think the last two points I'd like to address, Question 21A in terms of Section 7(2) and this next question of whether the Panel is exercising a judicial function, which it has to be acknowledged very much does feel like today.

K TOOGOOD: [inaudible 28:35][laughter].

J JINNS: The judiciary is always kind, sir. Look, I do take a different view from my friend, Mr Slyfield. I think reading Section 2A is applying to the Panel and then saying, but clearly it doesn't for Section 85(1) just seems unsatisfactory to me. I think a better answer is required. We said in the submissions that the better reading is that Section 7(2) should be confined to the courts. We referred to a submission the Chief

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Justice gave on the now repealed Natural and Built Environments Act. We actually did a little more work. It's been an evolving feast. The Chief Justice actually gave that same submission on this Bill, saying that it wouldn't be … I found it on the parliamentary website, happy to send it through … but raising queries as to the application of a Section 7 type provision to the judiciary.

She actually raised two points: that and that the regulation making power could impliedly allow regulations to be made which would impact on the administration of the courts.

K TOOGOOD: Thank you for that reference. We could probably find it but it would be easier if you sent it into the EPA.

J INNS: I can certainly send it. I'm very happy to do that. It wasn't easy to find because there were some tens of thousands of submissions of course.

K TOOGOOD: Well, you just send it to Keely.

J INNS: Will do.

K TOOGOOD: Thank you very much.

J INNS: I don't think it's a long bow to draw to say that is what motivated Section 7, Subsection 2. The select committee report says, 'We recommend replacing Clause 7(1)D with clause…' No, that's not the right one. One moment. 'We recommend inserting Clause 6(2), as it was then, to make clear that Clause 6(1) does not apply to the courts or to any procedural or administrative matters of the courts.' They made a similar addition to the regulation making power to make it clear that regulations could not be made that would impact on the administration of the courts. Notwithstanding that the phrase that was used was exercising a judicial power, and there is nothing in Hansard (we checked), the best evidence we have of Parliament's intent is that they thought they were excluding the courts and the courts only.

K TOOGOOD: You'd say that in conventional terms, we can look at parliamentary proceedings such as the select committee report to aid our interpretation of the statute?

J INNS: I do, sir. I mean I totally agree with Mr Slyfield. There's a clear ambiguity or inconsistency there because you really can't read Section 7(2) and 85(1) together unless one of them bends to the other, if I could put it that way. I think that that parliamentary material is a useful guide that says, well, we don't need one to bend to the other. If we simply

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

recognise that Parliament was talking about the courts, then that logic flows through appropriately to 85(1).

The last point I would like to make just picks up on a kōrero with my friend, Ms Irwin-Easthope, about the fisheries settlement. Two things I'd say on that is the one in terms of the Question … and I hope that I reflect it properly, is does the Crown have a settlement obligation to maintain the fisheries resource essentially? It goes a little bit outside the submissions that were made here. I would say that it does in fact. It does have an obligation to maintain the resource, and that obligation comes because, first of all, in the Fisheries Act … sorry, the fisheries settlement is intrinsically bound with the quota management regime and the fisheries management regime that it sits within.

We needed quota to deliver for the settlement that the two cannot be unpicked essentially. The current Fisheries Act 1996 recognises that and says that the Act is to be interpreted and all persons exercising powers and functions so and so in a manner consistent with the provisions of the Treaty of Waitangi Fisheries Claim Settlement Act. The Fisheries Act is to be interpreted consistent with the Settlement Act.

Section 9 of the Fisheries Act is its purpose. Sorry, my apologies, Section 8. Its purpose is to provide for the utilisation of fisheries resources while ensuring sustainability, so the driver of the fisheries management regime is to provide for utilisation while ensuring sustainability. If the Crown was acting in a way that was not ensuring the sustainability of fisheries, it would not be achieving the purpose of the Act. I would say it would also be in breach of the fisheries settlement because of the manner in which those things are so inextricably linked. That was my answer to that one.

In terms of the question of are there examples of impacts on fisheries which would not rise to the level of inconsistency with settlement obligations? Perhaps a little tangentially, but we provided a couple in the written submissions. The one at Paragraph 67, we make the point that, as I say, through our fisheries management regime, annual decisions can be taken on total catch allowances. The decision making machinery for that is provided in the Act as rights of participation. When a catch allowance is reduced, the value of settlement quota is reduced, but that is an impact on that settlement obligation, which is not inconsistent with the settlement because it is bound into the settlement. It's contemplated by the machinery of the settlement. That's the nature

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

of quota. That's one example of where an adverse impact on a fishery wouldn't be inconsistent with the settlement.

The other that I gave there, which is we all play to our strengths and like talking about the things we know about, but if we were applying here for resource consents for marine farming aquaculture activities either through the statute or the RMA, there is a statutory process for assessing how that aquaculture development would impact on fisheries resources and fishing (commercial, non-commercial, customary). That's a process that says if it's assessed that the negative impact of the marine farm would exceed a threshold of impact on fishing, then there is a statutory requirement to negotiate and compensate.

Again, I'd say that's an example of a situation where there is an adverse impact on my fishery settlement quota, but the protective mechanism for that is written into the framework, into the legislation that we're working with. That's all contrasted with this situation where we've got a decision-making framework which was not contemplated at the time of the fisheries settlement or any of the land-based Treaty settlements either. That's why this new decision-making impact that could permit an activity that has such significant adverse effects is inconsistent with those settlements.

I think I'll leave it there, barring any questions.

K TOOGOOD: Thank you. Any questions?

L LOVELL: No, I don't actually specifically have any questions. I will say thank you, that was quite robust in terms of answering our questions, so much appreciated, Justine.

I'll just double check. Yeah, so kia ora. Thank you.

K TOOGOOD: Right, next row.

P ANDERSON: I'm going to push the button and see if it works but it didn't seem to. Is the microphone on? No.

K TOOGOOD: We can hear you, Peter, so it must be working.

P ANDERSON: It's working, great. Okay, thank you. So, Peter Anderson for Forest and Bird, and with me is May Downing. We're going to address four issues. One is the question of relevance, one is the consent requirements, one is the east-west link asked question, and the other question is

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

feasibility. I'm going to deal with the relevance, the consent requirement and the feasibility, and Ms Downing is going to address east-west link.

G KEMBLE: Could we have the actual question numbers [inaudible 37:38]?

P ANDERSON: Sure. The first question is Question 1, which is what is the relevance, if any, of factual findings by the DMC on previous applications by the Applicant? This is really about responding to other parties that have reached different views to what we have. We're not restating the submissions, but in Paragraph 4 (sorry 5 and 6) of their written submissions, TTR explained that it's a new panel and it's obliged to make its own findings, but then in Paragraph 6 (and we agree with Paragraph 5), TTR say, 'For all the above reasons, no factual findings by either of the prior DMCs have any relevance to the present matter'. We depart from TTR on that point. The Supreme Court decision, which they referred to as quashing the earlier decision, that addressed matters of law and they actually referred to the factual findings of the DMC and included those in the appendix. So, the notion that the factual findings were quashed doesn't stack up.

The second point is that it would be undesirable if we had a DMC, considering effectively the same material, reaching a different view without any reference back. There's no requirement on this DMC to be bound by it, but if it reached different views, then it would be undesirable to have one DMC saying this is having significant effects and then this DMC to say different without actually some kind of explanation of why that different view was reached. There will be justifiable reasons for it, but to simply just say it's not relevant at all, I disagree with that submission.

K TOOGOOD: So, your dissatisfaction would arise if we disagreed with the earlier findings without explaining why?

P ANDERSON: Yeah, so if the previous DMC made findings that there was significant adverse effects and this DMC said, 'We conclude there are no significant adverse effects from this', then you'd have these two decisions which are contradictory, but then what I would expect or submit would be appropriate would be that the current DMC would look back and say, 'Well, the 2017 DMC reached these views and we differ for the following reasons, difference everyone's provided, etc', but simply having two starkly different decisions out there, that I think would be undesirable.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: I understand that.

P ANDERSON: The second issue I want to address is the consent requirement, which is this issue about whether resource consents are required under the RMA and the question of discharge and deposition. What our focus is on is on Section 12 of the RMA, particularly Section 12(1)D, which is no person may, in the Coastal Marine Area, deposit in, on or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed. So, whether or not the discharge occurs in or out of the CMA doesn't matter. The deposition occurs within the CMA, therefore it contravenes Section 12(1)D. That's the start point about that. Don't take a view on discharge whether a consent is required, but there's a firm view that consent is required for a deposition in the CMA.

K TOOGOOD: [inaudible/off microphone 41:20].

G KEMBLE: If we turn that around, are there any examples of whether there's an activity undertaken in the CMA which causes deposition in the EEZ and where a consent has had to be secured for that plume extending out into the EEZ under that piece of legislation?

P ANDERSON: I cannot think of any examples. There may be, but none come to mind.

G KEMBLE: Thank you.

P ANDERSON: I will now pass over to Ms Downing to address Question—

M DOWNING: 13.

K TOOGOOD: Thank you, Ms Downing.

M DOWNING: Thank you - Ms Downing for Forest and bird. I just wanted to take the time to briefly respond to a point by my friends for the Taranaki Regional Council. At 5.13A of their legal submissions, they note that the relevance of RMA policy and planning documents to the Application is limited by the location of the Project being within the EEZ. Our submission is that it is not that limited, particularly in light of the observations of the Supreme Court, particularly the majority spearheaded by Glazebrook, who acknowledged that the bottom lines in the NZCPS had to be taken into account. The correct references are set out in Paragraph 40 of our written submissions and the footnotes attached to that. We were just wanting to point that out.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Just while I've got the speaking stick, I thought I'd take the liberty to just briefly touch on a small point in relation to Ms Lovelle's query about kaitiakitanga considerations for the Panel. I have done some thinking about that in relation to the query on habitats for significance for fisheries management, and it was at Paragraph 62 of our written submissions where we make mention of the bottom line.

The Fisheries Act is also a marine management regime and at Paragraph 62 we make observations about the senior courts consistently finding that the purpose of the Fisheries Act sets a bottom line. The ultimate aim is to ensure sustainability and whilst that might seem diametrically opposed to the other, so there's a twin purpose of ensuring sustainability but also allowing utilisation.

An interesting facet of the definition of utilisation, and that's set out in Section 2 of the Fisheries Act, that refers to cultural wellbeing, and Footnote 29, I've referred to a decision by Justice Churchman, Environmental Law Initiative and the Ministry for Oceans and Fisheries. I just point the Panel to Paragraph 12 of that decision where Justice Churchman acknowledges the definition of utilisation includes the concept of cultural wellbeing, and in that, he notes that that includes obligations of kaitiakitanga by iwi, hapu and whānau Māori within their respective rohe. He also points to definition of kaitiakitanga in Section 2 of the Fisheries Act.

I'll pass you back to Mr Anderson.

P ANDRESON: Did you have a question?

G KEMBLE: Yeah, I do have one question just around the statutory planning instruments that apply within the CMA, so like the New Zealand Coastal Policy Statement. I'm wanting to confirm my understanding that your submissions apply within the CMA, but they do not extend into the EEZ. Is that correct?

M DOWNING: Yes, so they apply the CMA in so far as effects generated by the activity will be felt within the CMA.

[P Anderson and M Downing off-microphone whispering/discussion]

P ANDERSON: I think just to add to that, one of the points the Supreme Court made, I think it was Glazebrook, I'm not 100% sure was this notion—

K TOOGOOD: Justice Glazebrook?

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

P ANDERSON: Yeah, Justice Glazebrook. Justice Glazebrook, yes, sir. I think it was Justice Glazebrook made the point that there was synergy between the NZCPS and the EEZ Act. The idea is that even though the NZCPS applies within the CMA, then looking across to the way in which that interacts in the EEZ, that's something to do to make sure the EEZ Act and the Coastal Marine and NZCPS work together rather than contradictory.

I can see you're thinking [laughter].

K TOOGOOD: [inaudible/off microphone 46:47][laughter]. Thank you.

P ANDERSON: The last point that we wanted to address was this question of feasibility. That's Question 4, is the Project's feasibility a relevant consideration? We just want to respond to Paragraph 12 of the TTR submissions, which they say feasibility isn't a relevant consideration. My submission on their Paragraph 12 is that they've confused feasibility with viability and what they say is correct about viability, but feasibility is a different thing. When we talk about feasibility, if they had said, 'We are going to do this thing which is going to be this seabed mining and that is going to not have any impacts anywhere within the CMA', we'd be open to the Panel to say, well, that's not feasible. So, feasibility is an issue in so far it comes to meeting consent conditions. You couldn't impose a condition where you didn't think that the Applicant could actually meet it. That's different to the viability point that's been raised in Paragraph 12 of the TTR submissions.

I have nothing further to say unless there's any questions from the Panel.

K TOOGOOD: Loretta, did you have anything?

L LOVELL: [Shakes head to signal no].

K TOOGOOD: Thank you, Mr Anderson. Next row.

H IRWIN-EASTHOPE: Tēnā nō koutou. Thank you. I'm hoping to be at the four minute end of Ms Inns' spectrum. I have three points to make.

K TOOGOOD: Please identify yourself and your organisation.

H IRWIN-EASTHOPE: Horiana Irwin-Easthope, appearing with Beth Murfitt for Te Ohu Kai Moana Trustee Limited. Thank you, sir.

K TOOGOOD: Thank you.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

H IRWIN-EASTHOPE: So three points. The first is picking up on my friend Ms Inn's helpful examples in the context of Question 21B and coming back to Member Lovell's questions this morning. The only thing I would highlight in our submissions is we have addressed at least one of those examples, at just for your reference, Panel, Paragraph 30, which is the undue effects test, so in addition to the detail that I understand is included in Ms Inns' submissions for Ngāti Ruanui.

The next two points are in relation to Question 10 and these are points that our written submissions do not address, so content to rely on our written submissions in relation to Questions 11 and 21.

The first point in relation to Question 10 on Treaty principles is just another case for the Panel, which is Justice Palmer's decision in the line of Ngāti Whatua cases. That's the number four decision, so bringing us from Justice Chilwell in 1987 to Justice Palmer in 2022, who's very clear that the Treaty does not need to be directly incorporated to be relevant just under general principles of statutory incorporation or interpretation.

The second point on Question 10 is seeking to be helpful to the part that Member Lovell has emphasised firstly by endorsing the submissions of my friend, Ms Inns, and secondly to hopefully add to them in the context of … I'm at risk of labouring this point, but of course when the Panel is in the space of inconsistency, so if we're thinking about legal tests, the Crown has clearly identified that the Panel can decline the Application.

That's the only addition that I would make to my friend's submissions around existing interests and to the extent there's a different legal test for inconsistencies with obligations under Treaty settlements. Thank you, sir.

K TOOGOOD: Thank you.

M CONWAY: Thank you, sir. Matt Conway with Kierra Parker for Taranaki Regional Council and South Taranaki District Council. I too intend to be at the shorter end of the spectrum. I have comments to make on Questions 2, 5, 10B, and then the bottom line's in Questions 13 and 24.

In terms of Question 2, Mr Slyfield this morning indicated a view that it's not open to the Panel to find that an RMA consent will be needed. We've said in our written submissions on Question 2 that the Panel is not required to determine whether the Application requires approval

under the RMA, but I would submit it cannot be correct that it's not open to the Panel to find RMA consents will be needed. For a start, that's because under the EEZ Act, Section 59(2)H requires the Panel to take into account the nature and effect of other marine management regimes, and specifically in terms of Section 5 of the Fast Track Act, the Panel does need to satisfy itself that the activity is not an ineligible activity.

In that respect, to be clear, TRC and STDC do not say that this activity is prohibited in one of the ways referred to in Section five. We're not saying it is ineligible, but I would support my friend Mr Anderson's comment that Section 12(1)D of the RMA is a relevant thing that will need to be considered in relation to the Project in terms of whether sediment that is raised through the project in the EEZ is deposited within the CMA, and therefore within the area covered by the Resource Management Act.

If it is so triggered, then the activity status, in case it's useful under the Taranaki Regional Coastal Plan, would either be discretionary activity or a non-complying activity. The distinction being whether the sediment is deposited in one of the protected areas that are recorded under the regional plan or not. There would be matters that would need to be considered and provisions of the NZCPS, including Policy 11, that may well be triggered under that too.

Those are matters that will need to be determined and the Panel is in the perhaps tricky position of needing to work out to what extent they create doubt about the overall implementability of this Application, bearing in mind, as has been identified, you have not been asked to determine any such application, so it's not something you would need to directly make a finding on in my submission, but it may be relevant to that overall question, a bit like the feasibility one, of whether these consents can be fully implemented if approved.

On that point, and it was raised first thing this morning from the Panel and about the question of I suppose side winds and whether—

G KEMBLE: Excuse me, Mr Conway, can you give us the rule numbers that you're relying on for those activity classifications please?

M CONWAY: Yes, they are Rules 65 and 66 which cover deposition that's not provided for in earlier rules.

G KEMBLE: That's the Regional Coastal Plan?

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

M CONWAY: Yes.

G KEMBLE: Thank you.

M CONWAY: A question that I was asked first thing this morning was whether any doubt about whether the activity could proceed might essentially be neutralised in terms of the benefits not materialising and also the impacts not materialising. In general terms, that does seem a logical way to look at it, but I would respectfully caution against assuming that all such benefits and impacts might neutralise each other if there is a doubt about whether the activity could proceed.

I've been thinking about whether there's an example of that that would assist in the context of the matters raised by those making comments on this Application. One such example might well be that if TTR receives a marine consent for its activity in this area, it would become an existing interest in terms of having an activity that may be undertaken under the authority of an existing marine consent. That would qualify TTR as having an existing interest at that point, and this is a question of how far you go down this track, but it seems realistic that that might dissuade another potential applicant from making an application or it might well, if they do make an application, mean that effects on TTR's existing interest might be material to the consideration of their own application.

Now that's a matter for weighing for the Panel as to whether that would qualify as an adverse impact, but the definition of adverse impact under the Act in Section 85(5) is broad, and it says adverse impact means any matter considered by the Panel in complying with Section 81(2) that weighs against granting the approval. In turn, the matters in Section 81(2) include matters raised in comments which have covered all of the above types of things. Those are matters that may become relevant, so that's just a caution against going too far in terms of the neutralising component.

Turning now to Question 5 on that, comfortable that we've raised relevant matters in our legal submissions. What I would just want to draw the Panel's attention to is in terms of other recent comment on this yesterday, the Wahi North draft decision was issued by a differently constituted panel chaired by Sue William Young KC, and in that case, there are some comments in Part F of that draft decision that in short I would submit reinforce the position that generally seems to be taken in submissions here, but I will refer you to the relevant paragraphs in case

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

it's useful for ease of reference. I'm happy to have that part sent through if it assists.

K TOOGOOD: We have a copy of the draft, thank you.

M CONWAY: Yes, thank you.

K TOOGOOD: The paragraph reference is F?

M CONWAY: Part F.

K TOOGOOD: Sorry?

M CONWAY: Part F of the draft decision, and in that part, it's paragraphs 34 to 37.

K TOOGOOD: Yes.

M CONWAY: There is also a note at the end of Paragraph 91 in that same part about how significance is to be determined. I'll simply leave that in case it's of use or interest more generally in relation to this matter. Really, the key point is it's an indication of scale, and I think that's consistent with what we've otherwise said to the extent relevant in our submissions here.

K TOOGOOD: Can I just ask you a question which has really only just occurred to me, with respect to those who may have made [inaudible/off-microphone 59:35] who have already made submissions [? 59:35] under the Act. Obviously, I use the word judicial [inaudible 59:44] judicial commenting which suggests that panels should so far as is reasonably possible to try to reach a common view on some of these legal questions. It would be, I think, unhelpful to the scheme for the operation of the Act as a whole if the Panel simply went off and did their own thing and paid no heed at all to other decisions of other panels on similar questions. Do you agree with the approach that we should, where possible, take into account and agree as far as possible some of the other panels' decisions on these general questions? Is that the sort of approach you say we should take?

M CONWAY: Yes, sir, I think it would be beneficial. I don't think you're bound to in the way that you would be perhaps if there was a decision from a higher court that had made a clear finding on interpretation, but in the absence of such, it is a situation where as these questions the Panel's devised highlight a call is needing to be made on what some of the provisions in the Act mean. In some cases, certainly as with the reference to the Meridian case earlier, we've looked to find useful wording from other

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

regimes perhaps to describe what some of these obligations mean. Here, obviously it's the same framework, but naturally in this case, it's not under the EEZ Act in terms of the way Waihi North decision. It is helpful, and I think it may provide wording that if this Panel agreed with, it could adopt, and that would have the benefit you've just described.

K TOOGOOD: Yes, right, I understand that. Thank you.

M CONWAY: Turning to Question 10B, I'm generally comfortable with what's been raised by my friends. The Regional Council and District Council do see that the existing interest and obligations arising under a Treaty settlement in terms of the two different provisions referred to in this question relate to the same subject matter, but the role of each legal requirement is different and needs to be considered on its face. I don't think I need to say too much more on that other than just reinforce the reference to Section 85(1)B that has already been made today that indicates that if a panel decides that granting an approval would breach Section 7, then that is a ground on which the Panel must decline. I don't make a submission about whether you're in that position here, and I do leave submissions on the detail of that and of the nature of those existing interests to those who are asserting them. I respect those, so I will leave you to consider those, but just wanted to highlight that point.

Finally, in terms of bottom lines, Questions 13 and 24, I agree with what Mr Enright indicated just before he signed off about those. The answer is in Section 85(4) of the Fast Track Act, and it's really that word solely. That section does not say other enactments or documents like the NZCPS cannot be influential in a decision, and it would improperly apply them in my submission if you were to conclude that they couldn't tip the balance. In fact, the role that often those documents have and are recognised as having is identifying particular locations of environmental sensitivity and the degree to which public processes under the RMA have determined those warrant protection. They inherently reinforce judgment calls made about the level of protection that might be warranted, and as Mr Enright said, it would seem very rare and we're not in that situation here, where the only thing possibly that is being triggered as a bottom line under one of those regimes which would get you into the Section 85(4) territory. Here, it's really a matter of I think being able to weigh all of those things and being guided by those other statutory documents and their bottom lines, which may well be influential.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Just to confirm, appreciate the point my friend Ms Downing made in relation to our submissions, and I just confirm I agree with her that we were saying essentially in Paragraph 5.13 of our submissions, the fast track purpose and decision-making provisions inherently modify how those RMA provisions and documents apply, not that they can't be influential. To reinforce that, I think the Supreme Court's decision at Paragraphs 181 and 182 are very clear about the relevance of RMA documents to an EEZ activity and Paragraph 187 is also instructive in that respect because that confirmed that there was an error of law in not assessing whether the proposal would produce outcomes inconsistent with the objectives of the RMA and the NZCPS within the CMA.

Those are the only comments I was planning to make, sir.

K TOOGOOD: Back row?

R HAAZEN: Yes, can you hear me?

K TOOGOOD: Yes.

R HAAZEN: Thank you. Ruby Haazen and Duncan Currie for KASM and Greenpeace.

K TOOGOOD: Thank you, Ms Haazen.

R HAAZEN: We will be speaking on Questions 5, 10, 20 and 24, which is the economics, climate change and some of the statutory framework comments questions.

On Question 5, around economics, the joint witness statement for the economists, there seems to be general agreement that it is a net and not gross assessment but disagreement around non-economic versus … or non-market versus market costs and benefits. We would say that the Fast Track Act gives some guidance as to whether or not these non-market costs and benefits are also included within the definition of benefit. Section 22 of FastTrack Act requires both non-market and market environmental and social factors, and these must be responded to in the information requirements for both listed and referred applications under Section 13(4) of the Fast Track Act.

You can also gain some guidance from the RMA definition for benefit, which includes benefits and costs of any kind, whether monetary or non-monetary.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

I think the last point on this would be that the Trans-Tasman Supreme Court decision, which looked at just the Section 59(2)F consideration of a cost benefit analysis. Section 59(2)F refers to economic benefits, and we would say those are the only the market considerations. Here, we have benefit, not the use of economic, so that's the broader sense of both those non-market and market considerations.

Question 20, and that's the question relating to Section 62 of the EEZ Act and whether that's a standalone ground for declining a marine consent, and then the second question, or are the Panel's powers to decline confined to Section 85? Just on further consideration, I think in our written responses we initially said, no, it's not a standalone ground, but we now say yes. That's on looking specifically at the wording of Schedule 10, Clause 6(2). That wording refers to the Panel must take into account and it's referring to 62(1)A of the EEZ Act where it would normally require an application to be declined but must not treat that provision as requiring the Panel to decline the approval the panel is considering.

The submission is that here the Act is explicitly setting out where a mandatory obligation to decline under the EEZ Act doesn't bite on the Panel. The corollary of that must be that the other provisions, the one in Section 62(2) which sits right underneath can provide a discretionary basis for the Panel to decline. That Section 85, the pathways under Section 85 are not the only ones, and that is recognised in Schedule 10, Clause 6.

In terms of Section 81(2), that says that the Panel may decline the approval only in accordance with Section 85, we would say that that needs to be read in light of the purpose of the Act, but also that where you have a pathway to decline, as long as it is not inconsistent with Section 85, then you are not contrary to this bar in Section 81(2), that the Panel may only decline in accordance with. We say that has to be the case because otherwise you end up with a rather illogical outcome. The Fast Track Act doesn't allow for any provision for a discretionary power to decline where you have inadequate information, and if the only discretionary power sits on Section 85(3), then you have to make a finding that where you have inadequate information, that demonstrates sufficiently significant adverse impacts. That, to me, is if just in the Supreme Court finding where there was inadequate information on the exact same application to determine material harm, how can on this information you can also make a finding of sufficiently significant adverse impacts? That would be illogical in our submission.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

There must be a pathway for the Panel to decline based on inadequacy of information.

The other indicator would be where an applicant applies but does not demonstrate significant regional or national benefit, they have not met the burden under Section 3, and Section 85(3) doesn't necessarily require that the Panel decline in that case. Section 85(3) doesn't refer to significant national or regional benefits. It only refers to regional or national benefit, so your proportionality assessment may allow or arguably it shouldn't, but allow an application that doesn't meet that high threshold, but the adverse effects are not out of proportion to the benefits. You still don't have a basis to decline under Section 85(3), so there must be other pathways that are not inconsistent with Section 85, but where you have an application that fundamentally doesn't meet the purpose of demonstrating significant national regional benefit, so it should not be facilitated through this fast track procedure. That can be declined on that basis or on the basis of inadequate information.

Just to comment then I think that on bottom lines, and that would be I think Question 24, that for the other mandatory requirements under Clause 6, notably Section 10 of the EEZ Act and Section 61, we say that these should be given substantial weight and determinative weight, that it would be very a difficult finding to say that an application that fails to meet the very purpose of the management regime that it sits within, ie Section 10 of the EEZ Act, but is so beneficial it still should go ahead. That, to me, would be out of alignment with both the purpose of the Fast Track Act and the purpose of the EEZ Act, and a finding of breach of Section 10 of the EEZ Act should be given substantial weight in the proportionality assessment.

The final comment from me probably is just on feasibility. I generally agree with my learned friend's comments here for Forest and Bird, but also would say that if the Application, there's been some evidence given through the Sanofex report and for evidence produced by KASM and Greenpeace that there is some issues around the feasibility of the extraction of vanadium from the sand and the costs of washing the sand and producing the volumes of metal that TTR is relying on. That's a technical issue that does go to whether or not the benefits that TTR say will accrue will actually accrue.

If there's no questions from the Panel on those, I'll pass to Duncan Currie to speak to the climate change point.

K TOOGOOD: Thank you, Ms Haazen.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

D CURRIE: Thank you, Panel. We just have a very brief sub-four minute observation on climate change and Questions 7 to 9. Firstly, we fully agree with Mr Enright's comments, and we just want to point to our submissions on the question and in particular to draw a line between environmental protection and climate change. We note that Climate Justice Taranaki made similar points in their comments.

It seems to be well accepted we're not in the territory of Section 59(5)B of the EEZ Act and the effects on climate change of discharging greenhouse gases into the air. We're talking about different impacts there. What we do want to add is that since the Supreme Court decision, a landmark advisory opinion on climate change was delivered by the International Tribunal for the Law of the Sea, which is an international court in Hamburg. That opinion strongly linked environmental protection, in particular Article 192 of the '92 Convention with Climate change. In our comments, we quoted that the obligation under Article 192 of the Convention to Protect and Preserve the Marine Environment has a broad scope, encompassing any type of harm or threat to the marine environment. Under this provision, stated parties have a specific obligation to protect and preserve the marine environment from climate change impacts and ocean certification.

Our point here is simply that as a matter of weighing the climate change effects, their relevance to environmental protection, which was recognised also by the Supreme Court, is a relevant consideration.

Finally, we wanted to just point to the Supreme Court citation of Article 192, which is its obligation to protect and preserve the marine environment. The Supreme Court linked that to Section 10(1)B of the EEZ Act. That's in Paragraph 101 of the Supreme Court decision. The Supreme Court said that the law of the Sea [? 1:17:40] Convention provides support for the proposition that Section 10(1)B imposes a heightened threshold in favour of environmental protection. That was Justices Young and France.

In close, we say that the Panel should likewise strive to reach an interpretation of the Fast Track Approvals Act which is consistent with New Zealand's obligations, and to pay particular attention to Section 59 of the EEZ Act in Paragraph D, the importance of protecting the biological diversity and integrity of marine species, ecosystems and processes, and Paragraph E, the importance of protecting rare and vulnerable ecosystems and habitats for threatened species.

Thank you, Panel.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Thank you. Mr Gardner-Hopkins.

J GARDNER-HOPKINS: Thank you. If it's acceptable to the panel, my preference is to stand when I address the panel.

K TOOGOOD: Of course.

J GARDNER-HOPKINS: Thank you. Look, I'm grateful for the submissions made by other counsel. I don't intend to cover ground that's been covered already. The one question I wish to address the Panel on … well, the two related questions (2A and 2B) in terms of the relevance of Resource Management Act approvals.

I think just for the record, I just want to confirm, I'm here giving representations for Ngāti Manuhiakai and Ngāti Tu. I'm speaking to aspects of the submission that was filed by Ms Rongo and Ms Black, just so that is clear.

Look, an aspect of that submission addressed whether or not this Application included an ineligible activity, and I am grateful to council for the regional council for clarifying their position at least that this Application doesn't include an ineligible activity. I think perhaps with some reluctance I tend to agree with that position, and I just wish to clarify why that is for the assistance of the Panel. Of course, this is a key question because under Section 85 of the FTAA, the Panel must decline if an application includes an ineligible activity, and that is defined in Section 5. The relevant part of that Section 5 definition is an activity that is described in Section 15(B) of the RMA and is a prohibited activity under that Act or regulations. It's not just enough to be an activity described in 15B of the RMA; it has to be prohibited.

I have done my best to double check the provisions of the Regional Coastal Plan, and as I understand it, discharges in terms of activities that would be captured by Section 15B are either discretionary or non-compliant under Rule 13 and 14 of the regional plan. In that case, the discharge is something that is controlled under the relevant Regional Coastal Plan through a discretionary or non-compliant consent status.

I think that gets to the point where the activity doesn't include an ineligible activity, but I would I guess urge the Panel to satisfy itself that logic and chain of reasoning upholds, and make a specific finding that it does not include an ineligible activity.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

The only other, I guess, comment that I would have is subject to that finding, the Panel, as I understand it, does not need to make specific findings as to what RMA consents may or may not be required, but it would be entitled to as part of its consideration of the relevance of the RMA as another marine management regime. It may be relevant to the exercise of understanding that regime to understand what consents may be required.

There is obviously the somewhat vexed issue as to whether if the discharge is occurring within the EEZ, whether consents under the RMA are required for deposition. Certainly, my clients say so. There is also potentially a question of if the discharge is occurring in sufficient proximity to the Coastal Marine Area, and as I understand it, the application site effectively abuts the Coastal Marine Area, so there will be some discharges very, very close to the CMA. There is a question as to if the discharge is occurring centimetres or metres away from the CMA and it is continuing in the plume into the CMA, is there actually a discharge as well into the CMA, not just a deposition?

Unless there's any questions from the Panel on those issues, that was just what I wished to assist the Panel with.

K TOOGOOD: Thank you. One moment.

[no dialogue / off-microphone Panel discussion 1:24:35 – 1:25:20].

K TOOGOOD: There’s a question that is above my pay grade, Mr Gardner-Hopkins, so I’m taking advice.

[no dialogue / off-microphone Panel discussion 1:24:25 – 1:25:40].

K TOOGOOD: So, Mr Gardner-Hopkins, Section 5(1)L(2) of the FTAA refers to the actual regulations in relation to an eligible activity. You mentioned I think something about the plan.

J GARDNER-HOPKINS: Yes.

K TOOGOOD: Is there a point there that you need to address?

J GARDNER-HOPKINS: In terms of the regulations, I understand there are relevant regulations but they are permissive, as I understand it, in terms of addressing standard or common discharges from ships and offshore installations, stormwater, grey water, matters like that. Those regulations, as I understand it, are enabling. I don't understand those regulations to prohibit the relevant discharges.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Thank you.

G KEMBLE: Can you just give me the rule citations again that you rely on?

J GARDNER-HOPKINS: Yes, Rule 13 and 14 of the Regional Coastal Plan, but they're the catch-all other discharges not otherwise provided for in the earlier rules.

K TOOGOOD: Thank you. I think it's sufficient. Thank you, Mr Gardner.

J GARDNER-HOPKINS: Thank you.

L LOVELL: Kia ora, Mr Conway. I just had a question following the submissions you have just heard. Sorry, I'm very quiet. That's why I need these. Just on the point around the discharge from source and the effect effectively going into the CMA and therefore triggering the question we have in terms of 2 around requiring approval under the RMA, you've heard the submissions thus far. Do you have a view as on behalf of the councils as to your perspective?

M CONWAY: Is that specifically in relation to whether the activity would constitute a discharge within the CMA as opposed to a deposition? Have I understood that correctly?

L LOVELL: Yeah, it's that source question. The source might be in the EEZ but is there a corollary which says that effectively we then need a consent, if the impact affects the CMA that we need to consent in the CMA?

M CONWAY: The approach that has traditionally been taken under the RMA is that the point of discharge is where the contaminant leaves the effective control of the discharger. If that is purely within the EEZ, then my starting point for that analysis would be to say that the point of discharge is within the EEZ, and therefore anything over the line in the CMA, you'd be looking at deposition rather than discharge rules. The challenge can be that it's very difficult to draw strict lines, but that is the traditional starting point for that consideration if that assists. I can probably find a case. I think it's McKnight and Biogas, I think that says that if my memory serves me correctly.

K TOOGOOD: Can you check that authority for us please and send us a note?

M CONWAY: Yes, I will do, sir.

G KEMBLE: Just further to that, do you agree with the contention that the activity is not something that cuts across 15B?

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

M CONWAY: In short, yes, because 15B of the RMA prohibits certain discharges within the CMA, and on the basis of that reasoning, I don't think it's correct to say that this would be a discharge in the CMA if it's occurring within the EEZ.

K TOOGOOD: All right, and the next row from the back

J FERGUSON: Thank you. I think is this … we've got a microphone issue. Oh no, we're working out. Thank you, sir. Ferguson for Te Tōpuni Ngārahu.

As you'll appreciate, given the limited scope we were given in terms of legal submissions as they came after the others to the large part, we've indicated in our written submission that we support relevant submissions of other parties, but there were a couple of supplementary areas where we did add some comment. They are matters within particular scope today, so I wanted to touch briefly on the point you've just finished on, which is Question 2A, then also Questions 10 (both limbs), and finally just Question 21A relating to the quasi-judicial question that was traversed earlier.

Just in relation to the first question, this issue about the interplay with consent required under the Resource Management Act, and it was a matter where in Paragraph 11 of the Te Tōpuni Ngārahu submission, we did note those two rules that Mr Conway's referred to being Rule 65 and 66, which clearly do apply to deposition of material on or under the foreshore or seabed within the CMA. I can agree that those would apply regardless of where the source of that deposition was, so anything arising within the EEZ, if it is being deposited within the CMA, in my submission, triggers those rules and those requirements. In that regard, they're either discretionary that applies generally to any deposition of material within the open sea, but it becomes non-compliant when it's in an outstanding value area.

In that latter respect, in terms of the outstanding value areas they include in Schedule 2 (I think or Schedule 1, it might be) of the Taranaki Coastal Plan, Project Reef and the North and South Traps. Those are both areas that were expressly referred to in the course of both the DMC decision, but also by the Supreme Court, referring to the traps (as that was called in Paragraph 185 of the Supreme Court's judgment) and Project Reef in Paragraph 288 of the Supreme Court's decision, noting that there were findings of adverse effects in relation to the traps and potentially effects of a more minor nature in relation to Project Reef.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Usefully, I think my friend for Fish and Game referred to this earlier, right at the final page of the Supreme Court judgment is an appendix. There's a helpful Appendix 3, a diagram. It was prepared by iwi parties, but it does list the DMC findings on effects and shows a map of the proposed mining area, and then those two and a number of other areas of the traps in the Project Reef and their distances and then refers helpfully to the paragraphs of the DMC decision in relation to Project Reef, significant effect by the DMC at Paragraphs 350 and 970 of its decision, major effect on Project Reef at Paragraph 952. Sorry, I had them the wrong way, the traps minor effect identified at Paragraph 9(7)O of the DMC decision. This is a very real impact that's been identified here.

I think putting to one side the issue of the resource consent itself, that we would also submit needs to be applied for by the Applicant and whether the fact that that resource consent still needs to be sought in our argument at least is a relevant matter for the Panel. I think I'd just make two comments. First, at the very least, it's a contingency, and in my submission based on the material that's before the Panel, that contingency should be expressly recognised and referred to for the avoidance of doubt.

Secondly, even though it's not for this Panel to determine in some kind of de facto way the outcome of any such resource consent application, it's quite clear that effects of this activity must also be reasonably considered where they occur within the CMA as part of the overall assessment of whether this activity and Application should be approved. It's a bit like saying, well, if one says that one doesn't look at effects in the CMA, one only looks at effects within the EEZ, then they must apply that equally to benefits. Of course, many of the benefits being looked at economically and otherwise are not benefits within the EEZ; they're benefits to people and other economic benefits that apply within the nation as a whole.

So, drawing these lines between the EEZ and the CMA in some kind of artificial way and saying, 'Don't worry, we can deal with all that if required in a resource consent application,' in my view is not the end of the point for the Panel, and the Panel must grapple with the evidence and issues that arise naturally in that space. Those are effects of an environmental nature, effects in relation to fisheries and the fisheries settlement, which those fisheries and that quota under the settlement needless to say exists both within the CMA and within the EEZ, and of

course, the implications for both existing rights and Treaty settlements for iwi. I just wanted to make those points in that regard.

K TOOGOOD: Before you move on from there, were those findings of the DMC you referred to founded on evidence which is also before this Panel?

J FERGUSON: I'm happy reflect on that and advise the Panel. Given my very late instruction, I haven't had the opportunity to delve to that level of detail.

K TOOGOOD: Because if you want us to have regard to it, it would be difficult for us to do that if the DMC was considering materials not before us, wouldn't it? I mean I suppose I should ask that question. How could we have regard to findings of another body, another panel, founded on evidence that we're not considering?

R HAAZEN: If I may, the evidence with regards to the plume modelling, our understanding is that has not changed. Therefore, the flow on assessment of effects to biodiversity effects which relies on the plume modelling also has not changed. That has not been updated by the Applicant.

K TOOGOOD: Yes, so you're confirming that the evidence considered by the DMC is evidence that we're required to consider?

R HAAZEN: It's the same, yes.

J FERGUSON: Thank you. I'm grateful to my friend in that respect for that clarification.

I then wanted to turn to Question 10, and apologies to the panel; I fear that the second limb of that question may have been dropped from a number of responses because I think it was added between the original minute and the notice of hearing. I suspect it wasn't always picked up on. Certainly, I was guilty of that oversight. I looked at the question numbers and saw it hadn't changed without noticing there was a second limb to it, but I think the matters can be fairly addressed. I think they were interrelated to some degree, the two limbs.

Perhaps if I just briefly touch on the first limb of that question, and I note this is a matter that was addressed in the written submission for Te Tōpuni Ngārahu, Paragraphs 17 and 18, but in terms of the relevance of Treaty principles, cultural values and kaitiakitanga, they're all in my view, matters that appropriately are imported in and may be implied in as relevant considerations. They are interrelated in that respect. There is no preclusion. The absence of an express obligation, for example, to give effect to, to give consideration to Treaty principles

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

does not preclude the consideration where those are relevant. That's quite clear from cases that others have mentioned, such as Barton Prescott, but it is closely linked always to the subject matter of the legislation in question as that case determined in relation to those matters. Obviously, as we have seen in other cases where matters relate particularly to the rights and interests of iwi and where we're dealing with this legislative scheme and the consideration of activities with effects on the environment, and I think more tellingly where we have clearly identified intersection of both Treaty settlements and existing interests of iwi and hapu in a range of capacities where those things are expressed mandatory considerations, then the importation of Treaty principles as a relevant consideration is both reasonable and appropriate. That gives you the focal point through those mandatory relevant considerations of the Panel that in my submission Treaty principles are naturally able to be considered as a relevant consideration by the Panel alongside those matters given the subject.

In that regard, I just wanted to touch on the fact that Treaty settlements by their very nature aren't simply the specific mechanisms or the specific requirements that might be to give consideration to a particular matter, for example, in a particular area that would be viewed if one stepped through elements of settlement redress, but necessarily Treaty settlements are founded on the Crown's express intention to fulfil and where previously breached, correct its obligations under Te Tiriti must necessarily be considered and upheld with reference to the principles of Te Tiriti, and thirdly, acknowledge and recognise the intrinsic and holistic relationship between iwi and the natural environment, including coast and sea, and both innately and in many cases expressly incorporate the cultural values and tikanga rights, interests and responsibilities of iwi, including kaitiakitanga.

When one's looking at those matters, the relevant principles of Te Tiriti and tikanga notions such as kaitiakitanga are also within the frame of Treaty settlements and acting consistently with Treaty settlements, as those Treaty settlements commonly contain significant acknowledgements even where they don't necessarily have legal weighting into statutory schemes where the Crown has acknowledged those relationships. They do so particularly in the case of my client and also Ngā Iwi o Taranaki in terms of the relationship of Te Kāhui Tupua extending out into the CMA in that respect and obviously the source of the ironsand material in this particular case.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

There are a range of provisions, for example, and that legislation acknowledging that close relationship as a matter of tikanga and the reciprocal obligations that iwi and others in the Taranaki community have to those value sets in terms of Ngā Pou Whakatupua. That's in Section 19 of the Act. Those matters are all part of the fabric and intrinsic elements of the Treaty settlement, and consistency with those naturally arises and brings with it the issue of implication of consideration of kaitiakitanga, Treaty principles and cultural values.

Those things are all intricately interwoven, and I think this is very much legislation where in order to read those things in their fullest and natural way, one necessarily has to touch on and draw from reference to cultural values, kaitiakitanga and Treaty principles. They come in implicitly, and even if they're not mandatory considerations, they're at the very least discretionary relevant considerations. In my view, it would be reasonable and appropriate in the circumstances for the Panel to treat them accordingly.

In terms of the second aspect which wasn't addressed in the written submission in terms of existing interests as grappled with the Supreme Court and Treaty obligations in terms of the specific provision in this legislation, in my view, they're not discrete matters in that respect. I think they are co-existent layers, and there are fundamental interrelationships between Treaty settlements and Treaty settlement obligations in the nature of what Treaty settlements represent for the reasons as I've just indicated, and the existing interests of iwi and hapu of Taranaki which exist as a matter of tikanga and kawa, and are manifested not limited by the statutory frameworks in which they might operate.

Even where there are artificially created lines drawn within any legislation including the line between the CMA and the EEZ, those lines do not constrain the nature of the existing interests of iwi. If, for example, some settlement acknowledgements might end at the CMA, that does not mean that the iwi values and interests stop at the end of the CMA. It just means that's where the Crown has grappled with them in the context of the Treaty settlement, but they still manifest as existing interests beyond and out into the EEZ. It’s a holistic and integrated hole in that respect from a perspective of iwi and hapu, and therefore while there are things that perhaps fall in one camp and not the other, to the large extent in my view, there's a significant material overlap between those. It’s probably not useful to kind of decompartmentalise them in

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

that respect. I think the analysis is a seamless one in a sense. Those are the comments I wanted to make in relation to that.

The final point is just an observation, not wanting to repeat matters that my friends have helpfully addressed in relation to Question 21A, which is the odd second limb and seeming inconsistency of the Treaty obligations provision in that it doesn't apply to a court or persons exercising a judicial decision or a decision of a judicial nature. I'd just observe that having been closely involved, I'm pleased that my friend, Ms Inwood, identified the fact that this arose originally out of submissions made by the Solicitor General in relation to the foreshore (or Chief Justice, I think it might've been actually, my apologies) in relation to the Natural and Built Environments Act in the first instance. Ultimately, that didn't manifest in any changes to that legislation, those submissions, but the point clearly was concern about those types of references in that case due to the Treaty of Waitangi and all the principles of it rather than Treaty settlement obligations. Those affecting or applying to the court when making its procedural and other administrative decisions of running the court, and that was a matter that was particularly identified in that submission, that somehow in that case, giving effect to the principles of the Treaty was the concern, that the court, in calling a judicial conference or the way in which it conducts itself, would somehow have to give effect to the principles of Te Tiriti at every limb. I understand that was the rationale behind that.

I think what we've seen come through into this, with respect and it's not commented on in great detail apart from the reference in Hansard that my friend's already made to this provision dropping into this Act and also one other Act, there is exactly the same qualification I have identified in Section 11 of the Hauraki Gulf Tīkapa Moana Marine Protection Act 2025. That also has this general obligation and a notion to Treaty settlements and then has a qualifying Section 11(2) which says it doesn't apply to a court or person exercising a judicial decision-making power.

In that regard, the Director General Conservation has a power to make permitting decisions under Part 3 of that Act, but then the court also has a whole lot of punitive compliance and other penalty powers in the back of that Act as well. It's quite clear again, a bit like the inconsistency that's been identified on the face here or the tension that the Director General, among the factors he has to expressly consider the rights and interests of iwi and hapu, including kaitiakitanga, etc. Again, a complete tension between that and the fact of having to … if it was suggested

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

that somehow that ruled out and giving effect to Treaty settlements when they address those very issues and are in part reflective of the rights and interests of iwi and of matters such as kaitiakitanga.

I think again the clear intent is that it's not intended to apply to the Director General in that case. There doesn't appear to be any commentary on that. That clause was introduced at committee of the whole house stage, so there's no select committee and no material debate that I can see on that issue, but in the case there of the Director General and the case here of the Panel, in my submission, clearly it's not intended to apply. If it was intended to apply, then the Panel wouldn't be able to discharge the express obligations it's got under other provisions relating specifically to Treaty settlements.

Those are the submissions I wish to make today, sir. Thank you for the opportunity.

K TOOGOOD: Thank you, we appreciate your help. Next.

L LOVELL: I have a question.

K TOOGOOD: Oh, a question.

L LOVELL: Kia ora, Mr Ferguson. If you can just help me, I just wanted to unpick, and you're the one blessed with the question, after hearing a number of submissions on this point. I understand the discussion around Treaty principles and kaitiaki, etc, in terms of the wider subset, the wider context of where a Treaty settlement has come from with obligations sitting as a subset of that. I understand what's been articulated, but I guess perhaps turning it on its head, recognising that we are dealing with Section 7(1) and that does speak to obligations, do you perceive in this amorphous of intertwining, are there any constraints I guess is what I'm asking in terms of that distinction between Treaty principles and Treaty settlement obligations given we're dealing with Section 7.1 with obligations?

J FERGUSON: Yeah, I mean it is an interesting question, and it doesn't say uphold either. It doesn't say uphold Treaty settlement obligations; it says consistency with, and that's a much (I'm not saying) fuzzier, but it's a broader church in a sense in that regard. I think the one judgment we've got of utility in that is the one that my friends have already referred to, which is the decision of His Honour Justice Bolt and the Te Ohu Kai Moana case, which clearly what was found to be an implicit obligation in relation to that settlement was not expressed on its terms at all, but

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

it was about the steps which undermine the integrity of that settlement, in that case found to be in breach of not simply inconsistent with.

I think that is my view in relation to Treaty settlement obligations, that while one could go through a tick box exercise in relation to particular mechanisms, there's a fundamental issue of the relationship and the integrity of that settlement and how that is impacted upon by activities and applications of this nature as they impact upon those iwi.

That's why there's a bit of a challenge there because there are some limits in terms of potentially where the extent of that Treaty settlement might operate physically because of the way areas of interest and other boundaries are put in place. Some of those mechanisms, for example a statutory acknowledgement, applies into the RMA. Therefore, it's within the Coastal Marine Area rather than the EEZ, but necessarily the rights and interests of those iwi and hapu which manifest the very same things that those statutory acknowledgements are recording carry on and beyond in that respect.

I think there are stronger arguments to be made in my submission in terms of this interplay with effects in the CMA in particular for iwi and hapu, but on that point of consistency, in terms of existing interests, they manifest and extend right throughout. That's why I say that there's not a clean demarcation in that regard, and even if there is some form of demarcation within a Treaty settlement, I think the existing interests pre-exist, pervade through and extend beyond that settlement.

Again, the relevant considerations that I say can be imported in and implied into this legislation touch on both of those matters. It's probably not a clean black and white answer, I'm afraid, but it's probably the best I can do. It's a challenging area due to what can only be described as the odd legislative gymnastics that Parliament has seen fit to charge or impose on us all, I think, where everyone is faced with the same challenge, whether one is the applicant, a submitter or the Panel. It comes back to that point, if this was intended to be a one-stop shop as someone pointed out it, it's a very awkward and clumsy way of doing that. It’s not effective for the very many reasons that have been identified. Kia ora.

L LOVELL: I will speak up. This may be for Te Ohu Kai Moana. We assume the Tongan [? 1:56:31] case hasn't been appealed?

H IRWIN-EASTHOPE: That's my understanding.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

L LOVELL: Anything else?

H IRWIN-EASTHOPE: I can just confirm that, but that's my understanding.

L LOVELL: Please.

K TOOGOOD: Thank you. Ms Davis [? 1:56:52].

P WALKER: I'm very short so I will stand. Tena koutou. Ms Walker for Te Kaahui o Rauru and Te Korowai o Ngāruahine.

My friends, and I'm very grateful to them, have addressed most of the matters that we would have otherwise addressed, and that is because we generally take a common position, particularly for the iwi and hapu of Taranaki, in consult with Te Ohu Kai Moana obviously who represent the fishery interest, and my friend Mr Ferguson, with Te Tōpuni Ngārahu. My points will be brief, possibly briefer than Ms Irwin-Easthope, and Questions 1, 10, 12 and 19 are really the focus, and very briefly.

In relation to Question 1, and this has been well covered and I don't really want to take the Panel any further in terms of the argument, but just to note that the findings that the DMC did make, and we say have not been impacted or changed by any other material that's been brought before you, were very clear about impacts on each of the coastal domains of Ngaa Rauru and Ngāruahinerangi, and that's both within the EEZ and the CMA.

As you've heard from Mr Ferguson, and you would've heard it a number of times from the representatives themselves from the iwi, that distinction is not something that exists in te ao Māori. It is artificial and it is for the purposes of these regulatory frameworks that govern those spaces created by the Crown. That point is well made, and this ties into Question 12 in the kaitiaki plan of Ngāruahinerangi which is available to you, they cover in some detail in that plan the iwi's views on the EEZ framework, but also that sets out from their perspective the holistic and interconnected nature of the entire domain of Tangaroa without any disruption between the EEZ and the CMA at least in their worldview.

You've got evidence before you of those impacts. The DMC found significant adverse effects in a number of spaces and the evidence that you have before you in these proceedings from the iwi themselves endorses that and sets out clearly that this Application will disrupt the

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

balance within Tangaroa. That evidence is from the number of parties, including Mr Turama Hawira and others.

You've got the base evidence, but you've also got additional and updating comment that's been brought before you by the iwi in these proceedings, which leads us into Question 10, which I think may have been Question 9, but we'll stick with 10. I'll call it the Member Lovell question. What is the relevance of the Treaty principles, cultural values and kaitiakitanga, and then of course, the second limb? We were one of the parties that did not address the second limb, but we fully endorse what Ms Inns has said this morning in relation to that second limb.

What I will say in relation to all of those things, and this relates both to Treaty principles but Treaty settlements as well, and my friends have touched on it. Treaty settlements are carefully crafted. They are enduring. They take years of hard work, of mandate, of bringing the people together, of being voted on by the people a number of times through hui and also a voting and ratification process. What is in those settlements is something that this Panel should carefully consider because they are not fast tracked processes. They represent not only the 170 years of grievance, but they represent the years of negotiation between iwi and the Crown and the toing and froing that occurs in that situation.

The thing that occurs to me, and it goes to your point, Your Honour, about your desire to see some sort of … well, not the desire, but the desirability within this framework of the Fast Track Act of having consistency across decisions so that we're not dealing with panels going off in all different directions on these points of law. On the issue of Treaty settlements and the other issues that are raised particularly by the EEZ provisions, what you have before you is effectively a novel proceeding in terms of the fast track decisions that have been heard to date. I would say, for example, the Wahi North decision that was issued. The draft decision issued yesterday was not one that engaged heavily with Treaty settlement matters because there aren't a lot of Treaty settlements in that area. What you have before you is a very different scenario. You have an application that is a decade in the making in terms of the background to it. You have a number of iwi and hapu who have given extensive comment and representation around Treaty settlement, around kaitiakitanga, certainly for Ngaa Rauru and Ngāruahine around specifically Ngaa Raurutanga, which is recognised in the Ngaa Rauru Deed of Settlement and in their Settlement Act around Ngāruahinetanga and their connection to the domains of

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Tangaroa and Atua, again recognised explicitly in the Ngāruahine Deed of Settlement and in their Settlement Act.

So, you have before you a significant body of information and submissions that other panels have not had to grapple with, so without putting too much burden on you, but we are, the iwi in these proceedings are saying to you, this is significant, this is a big application, this is complex, but actually we have given you everything we are able to give you in terms of Ngaa Raurutanga, in terms of Ngāruahinetanga to assist you in reaching a decision and weighing up the things that you need to weigh up under both the Fast Track Act and the considerations under the EEZ. We say obviously a significant part of all of that is your consideration of the Ngaa Rauru Claims Settlement Act, the Ngāruahine Claims Settlement Act, and of course, all of our interests in the Māori Fisheries Act. We fully endorse what Ms Irwin-Easthope has brought to your attention in that regard.

That's probably all I have to say on that point, but that does lead me, and I'll just conclude on this point. Question 12 tied into Question 10 obviously, iwi environmental management plans and their relevance. I endorse the comments that were provided by Mr Gardner-Hopkins in this regard, and obviously we provided our own submissions on this. They stand in their own right. You have them before you. All of the plans that have been provided to you contribute, alongside the other evidence that you have, to explaining all of those elements that I've just covered that you need to consider. The Treaty of Waitangi settlements, they're set out, they're addressed. Explanations of those are provided by the iwi themselves in those plans. They constitute evidence of the existing interests, both in tikanga terms but also evidence of tikanga as other applicable law. They set out how iwi themselves apply tikanga across their rohe. The examples of that include rahui that are currently in place that prevent the taking of particular kaimoana and the circumstances in which future rahui might be appropriate. Those plans are evidence and material that will be of use to you in assessing each of those elements under the two frameworks that you're considering within the overall fast track scheme.

I guess just to end on this, and it would be remiss of me not to given I've just mentioned tikanga as other applicable law, but for the iwi of Nga Rauru and Ngāruahine and may I say all iwi of Taranaki, given the fact that they collectively attached Te Iho Tangaingā to the cultural witness statement that you received last week, which is a powerful and enduring statement of Kotahitanga amongst the iwi, circling back to my

original point really, which is the division of these domains for the purposes of these various frameworks. You'll see it I think in Ngāruahine's response to the request for information about benthic habitats (Minute 14), they conclude there with a statement about the importance of Tangaroa, the mauri of the moana and the interconnectedness of these spaces. They say foundational understanding of te ao Māori, and in this context, Taranaki, is that our taiao was intimately interlinked ki uta, ki tai. The journey of wai as it falls from the sky flows over land and out to sea. Part of this journey in Taranaki is the flow of wai from our tūpuna maunga which transports iron-rich materials throughout our awa to the moana. The iron in our whenua and sand goes back to when Turi, Captain of the Aotea Waka, was told by Kupe of the whenua that was termed as Onekakara ,the soil that was sweet smelling and therefore fertile for growing kumara. The volcanic properties of our whenua have been long recognised as important from our cultural identity and the iron rich sands and benthic material in our moana are vital to our taonga species as well as our coastal and oceanic environments.

I just urge you to return to some of that material that's been provided to you as you're assessing what exactly kaitiakitanga is in this context and in particular to the iwi of Taranaki. They have gone to some effort to provide that to you. It's expressed through Ngaa Raurutanga. It's expressed through Ngāruahinetanga, and they have done their best to collate that for you in this short period of time.

The final matter I'll end on is just that you did receive some comments from Minister Tama Potaka in relation to the Application, and I would put it to the Panel that it is significant that while being neutral on the Application, he did draw your attention to a number of the Treaty settlement mechanisms that have been raised by the iwi and Te Ohu Kai Moana, including the fisheries settlement, the Ngāruahine settlement, the Ngaa Rauru settlement and Ngāti Ruanui settlement as well as Taranaki iwi. That is important because I think it goes to the intent of Section 7 and the considerations that you have under the EEZ Act. It is important to the Crown, and this letter in my submission is an indication of it, that Treaty settlement commitments are upheld, that the integrity of those settlements are upheld, and that is why they have provided for this process in the act of ministerial comment, and in particular Minister Potaka, recommending that the Panel have regard to those matters in terms of your decision making.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

That's probably the point I would conclude on, other than to thank you for your time and effort in this very fast moving process.

K TOOGOOD: That's a good point to finish on, Ms Walker. Anyone else other than the Applicant wish to [inaudible 2:10:20].

J COMMISSARIS: Yes, just briefly on a couple of matters, John Commissaris for Environmental Defence Society. I'd just like to address briefly Question 2 and Question 4, noting that they've been well addressed by other counsel.

Just on Question 2, which is about the discharge and deposit in the CMA, just to refer the Panel to Footnote 6 of EDS' original comments, that's where EDS' submissions and previous submissions and joint Memorandum of Counsel that Mr Enright referred to, that's where that can be found. That explores the issue in more detail.

Just on that point about the distinction between discharge and deposition in Section 15B and Section 12, it's just to note the slight hiccup that the definition of discharge in Section 2 of the RMA includes deposit. Sorry, enjoy [laughter]. On Question 4, which is around the relevance of feasibility support, what Mr Anderson has said in relation to that and just refer to Paragraph 12 of the written submissions, and there's a little bit of discussion about the ways in which feasibility is relevant. It's relevant not just in terms of whether the benefits will materialise or whether the conditions are appropriate, but it's also about whether the Applicant can feasibly manage its impacts. That goes to what sort of conditions need to be set and whether a bond or performance conditions need to be set.

I'll leave that there. Thank you.

K TOOGOOD: Ms Irwin-Easthope's [? 2:12:25] hand in the air.

H IRWIN-EASTHOPE: Thank you. Just following up on that point that you asked about an appeal, and I may have spoken too soon, I thought given Justice Bolt's watertight (excuse the pun) decision that the attorney may not have appealed. The attorney has appealed, and that appeal will be heard in June next year, but of course if the Panel would afford me the opportunity to make the trite submission that of course it is currently the law, so that appeal won't be determined before the Panel has to determine this Application.

K TOOGOOD: Well we have enough to decide on without deciding [inaudible 2:13:05].

H IRWIN-EASTHOPE: Indeed, sir.

L LOVELL: I've got one question again for TOKM. Just to complete, given you're obviously part of that process, to what extent do you think Justice Bolt limited his remarks to the Fisheries Act? In your mind, what if any weight is there for the wider framework of Treaty settlements given you were a part of that process?

H IRWIN-EASTHOPE: I actually wasn't. Sorry, that's why I wasn't clear on whether they had been appealed, but I'm happy to answer the question because I have obviously read the decision now a number of times.

L LOVELL: I think I'm not the only one who needs to speak up. Can you just—

H IRWIN-EASTHOPE: Sure. Is that now better?

L LOVELL: Yeah.

H IRWIN-EASTHOPE: I would say two things in relation to that. One is that clearly this was in the context of the fisheries settlement and His Honour does go into a lot of detail about the importance of that settlement for broader settlements, it being one of the first ones, etc, but a second point I would make is that he doesn't limit his consideration of settlements or his comments in my view about the importance of Treaty settlements and the integrity of those and the obligations of the Crown solely to the fisheries settlement. In our submissions, we highlight a number of comments that His Honour makes dicta from the judgment that in my view, extend beyond the fisheries settlement because he's talking about the Crown's obligations in the context of settlements more generally. To pick up on my friend Ms Walker's submissions, the somewhat arduous process of getting to the finality of those obligations for the Crown. Those are the submissions that I would make in relation to the breadth of His Honour's judgment.

L LOVELL: Thank you.

K TOOGOOD: All right, thank you. Ms Buxeda and Mr Slyfield, this is not to limit you at all, but how long do you think you would need to reply to these matters and anything else you want to add?

M SLYFIELD: I think we will be relatively brief. I'm inclined to go with Ms Inns' 4-20 minute range and indicate most likely towards the 20 minute end of that range.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: All right, well, I think we'll take lunch and adjourn, but we will resume. We'll make it a full 30 minutes, so we'll resume at 1:35 to hear from you. Thank you all very much.

M SLYFIELD: Thank you.

[Break in Hearing].

[End of Recorded Material: 2:15:57]

[Background chat]

[Start of Recorded Material: 3:20].

K TOOGOOD: I think we can make a start, Ms Buxeda and Mr Slyfield.

M SLYFIELD: Thank you. I think I only have four topics that I wish to cover and reply, and I will be relatively brief. I should say that I'm really just not going to restate things that I think have already been well thrashed out in the written documents. It's addressing things that have come to the fore over the course of today, and I think I'll move from the easier side of things to the more complex side of things.

The first point I want to start with is the argument that's made about habitats of particular significance for fisheries. Some of the other parties, as you've heard, are asserting that the lack of formal identification of such habitats is not determinative, and all I wish to do on that space is alert you to the case law that Talleys and Seafood New Zealand referred to, in particular the Unison Networks case. It has been referred to in their submissions, and some of my friends relied on that in making their comments. It's been referred to on the basis that it supports a proposition that lack of formal identification doesn't preclude ad hoc identification, if I can call it that, on an individual application.

The point of difference there is that that was an RMA case dealing with a type of RMA identification, namely outstanding natural landscapes, and in my submission, that's a rather different proposition than the present circumstances, where the root by which the Panel arrives at consideration of habitats of particular significance to fisheries is via the requirement in 59(2)H to take into account the nature and effect of other marine management regimes, which in my submission is sufficiently further removed that the type of approach exercised in Unison Networks does not necessarily translate to this setting.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

I think it begs the question whether requiring you to make an assessment, whether there is or isn't a habitat of particular significance, is getting into what the Supreme Court described as the minutia of other marine management regimes rather than looking at them at the level of nature and effect, which is what you're required to take into account. That's all I was going to say on that topic.

The next topic is coming right back to Question 1 and the status of DMC findings. I think it's self-evident. No one is pointing at the 2014 DMC decision, but there are a number of parties pointing at the 2017 DMC decision and saying you can and should have regard to findings of fact, and in fact asserting in some cases that in making your decision, if you depart from findings made by that DMC, it's necessary for you to explain why you've departed. In my submission, that's not legally supportable as a starting point, and I won't go into a great deal of detail because it's already stated in the written submissions, but the 2017 DMC decision was quashed. The Application was subsequently withdrawn, and I think the reason that this has been proffered by other parties is essentially one of efficiency, where they quite rightly observe that DMC held hearings over many months, had a luxury of time that is not available to this expert panel, and that elevates in some fashion the significance of its findings.

The problem I ascertain with that whole proposition is in my submission you cannot look exclusively at the record of decision. If it were possible to simply look at the record of decision of the 2017 DMC and say, 'Well, we've reached a different view on this', then that might be one order of reference, but in order to actually compare and describe a departure from what that 2017 DMC did, you would have to go far deeper in my submission. You would have to understand what the evidence was, and that included over the course of hearings, which as you know were the subject of … where cross-examination was permitted to occur.

So, the carrot of efficiency that has been dangled in front of you in my submission is illusory because in reality if you were to undertake the task that has been put upon you by other parties and say, 'We're departing from a finding of the DMC and here's why,' you would actually have to get into a level of detailed analysis that I don't think is available to you in any reasonable sense.

I submit that's not the correct starting point. There are no findings of fact from the 2017 DMC that remain. I think the only point that I need to add to—

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: Can I just pause there?

M SLYFIELD: Yes.

K TOOGOOD: When you say the findings of fact don't remain, do you mean because the decision was quashed, they no longer have any legal significance? Is that what you meant?

M SLYFIELD: It is, yes.

K TOOGOOD: There was no challenge, was there, between material findings in the appellate proceedings, so no Appellate Court addressed findings of facts and said they were unfounded or unjustified?

M SLYFIELD: That's not a simple question to answer, sir. The reason I say that's not simple is because certainly the Supreme Court went so far as to say some findings of fact were these, and we in our minds, the combined Justices of the Supreme Court, cannot reconcile other findings that were reached on the basis of those facts.

In the Appellate Courts, there was quite a detailed examination, certainly in the Court of Appeal and the Supreme Court, of what I would describe as matters of mixed fact and law, but I caution this Panel against treating any record that forms part of the Court of Appeal or Supreme Court decisions as what has been described by some of my friends as an endorsement of the findings that were made by the 2017 DMC. Again, that comes out of the Talleys and Seafood New Zealand submissions. They say the Supreme Court endorsed these findings about the degree of adverse effects on certain sensitive environments, and in relation to that, I say the 2017 DMC was the last body actually charged with making factual findings. Every other body since then, the High Court, the Court of Appeal, the Supreme Court, were tasked with determining points of law on appeal.

So, none of the references made by the higher courts, the senior courts, to findings can be taken as endorsements per se because none of those higher courts heard the evidence or tested it.

K TOOGOOD: They weren’t asked to consider it?

M SLYFIELD: No, and dare I say, by the time matters arrived at the Supreme Court, it was sufficiently far removed from what had actually played out at the 2017 DMC that the task before the court was a very difficult one. I think that's evident from the variety of opinions that their Justices expressed.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

K TOOGOOD: That's a fair point I think. I thought you were going to say far removed from the [inaudible 12:40].

M SLYFIELD: No, no [laughter].

K TOOGOOD: [overspeaking].

M SLYFIELD: I would not be so bold.

K TOOGOOD: I understand your point.

M SLYFIELD: Yes.

K TOOGOOD: Just because the court didn't say, 'We don't agree with that finding,' they were never asked the question.

M SLYFIELD: No.

K TOOGOOD: The findings of fact was merely background [inaudible 13:10].

M SLYFIELD: Yes, and predominantly they were relying on the record of decision.

K TOOGOOD: Yes.

M SLYFIELD: I think it's fair to say it's self-evident that the record of decision had deficiencies as the senior courts found.

K TOOGOOD: Yes, no, I appreciate that.

M SLYFIELD: I think then the second to last point is the vexing question about discharges. I can't pinpoint which of the other participants here it was who referred to it, but in one of their legal submissions, they referred to the environmental law initiative and Attorney General decision. I commend that to you because the environmental law initiative and … sorry, not Attorney General, Canterbury Regional Council, which is 2024 NZHC612, at Paragraph 95 summarises exactly the point that my friend Mr Conway for the regional council made, which is that in an RMA setting, the traditional view, and I would say more than traditional but well-established jurisprudence, is that the point at which a discharge occurs is wherever the discharger loses effective control of the substance that is being discharged.

Now I think here it's become a little bit more of a distraction than it needs to be, this focus on deposition, because there is absolutely no suggestion by TTR that deposition is beyond the frame of your consideration. In other words, as a consequent effect of the discharge,

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

deposition is plainly within the matters that you must assess as an effect of the activity. That is regardless of the CMA boundary.

We're not dealing with a situation where the requirement or lack of requirement for resource consent is precluding a relevant impact or effect of the activity from being contemplated. Quite the opposite, the sediment plume for a substantial part of it will be within the CMA, and it's been very clear that it has been assessed in terms of its effects in the CMA, and the parties disagree about what those assessments conclude or what conclusion should be drawn from those assessments, but it's not the case that deposition is being swept under the rug. Deposition is before you and is able to be considered, and my submission is simply there is no purpose then served by this Panel stepping into the realms of making a determination about what further resource consents may or may not be required.

I would go one step further and say it's doubtful in my submission what status a finding by this Panel on that matter would have, and I was surprised that my friend for the regional council, he didn't invite you to go there, but he said it wasn't precluded effectively. That's my rephrasing of what he put. I suggest to you that that puts the regional council in a spot of bother because it is its statutory function to be the regulator in the CMA and apply its Regional Coastal Plan. If it forms a view that is different from the view that the Panel forms and there is a record in the Panel's decision, it begs a question, what is the status of that finding by this Panel?

K TOOGOOD: I must say for my part, it never occurred to me, and perhaps it should have, and I might have to think about it, the Panel's finding on that sort of question had any binding effect or influential in respect of other panels' decision-making, but I can't for a minute think that the Environment Court would pay deference (with great respect to my colleagues on the Panel) to our findings of this matter. I mean if we make findings of questions of law, then others will consider whether we've got that right [inaudible 18:20], but does it really come down to this? That this question of discharges for our purposes is essentially a factual matter. What is the effect?

M SLYFIELD: Yes.

K TOOGOOD: Where will the sediment go? What state would it be in when it reaches certain points? It really doesn't matter whether it crosses some artificial line on the map or in a regulation or a plan. Our concern is what is happening to the environment as a whole, and we shouldn't worry.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

M SLYFIELD: Yes.

K TOOGOOD: This is I think your point. We shouldn't worry about the legal implications of that because we don't need to consider it.

M SLYFIELD: Exactly.

K TOOGOOD: Is that really your submission, it's a factual question?

M SLYFIELD: It is. It's entirely a factual question, and it's slightly further afield, but there are a raft of other regulations with which TTR will have to comply in due course if it gets its marine consent. They include maritime transport regulations and craft management documents under the Biosecurity Act and so on. It's not really for this Panel to be thinking ahead to all of those and saying, 'Well, without that, you can't undertake the activity,' which comes back to the feasibility debate that's been playing out. I don't think I need to say anything more on that front.

I agree with you, sir; it is fundamentally a factual assessment for this Panel and where the law passes between one state and another is not really your concern.

K TOOGOOD: Well, thank you for agreeing with me, but I was trying to understand your submission.

M SLYFIELD: Right.

K TOOGOOD: We haven't [overspeaking].

M SLYFIELD: Well, I agree with myself in that case.

K TOOGOOD: I'm pleased to hear that, Mr Slyfield [laughter]. We haven't come to any view on this. We just wanted to clarify that that is your submission.

M SLYFIELD: It is.

I think the only other matter that was on my list of matters to cover was I did say that we could come back to Mr Kemble's question about the source of the 40% figure that you pointed us to in the SICAP document. The answer is a little more complex than one I should be giving you as a legal submission, so depending on the Panel's view about the offer that I made earlier about receiving a piece of supplementary evidence that picks up on the submissions I made to you about climate change matters and carbon flux and so on, my respectful proposal would be that that's a matter that we could trace through where did that come

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

from and what does it mean better for the Panel in the supplementary statement that is being proffered.

K TOOGOOD: Could we do that under Section 67 [several inaudible words 21:40]? What vehicle should we use, Mr Slyfield?

M SLYFIELD: I confess I hadn't even turned my mind to that aspect, sir. Bear with me, and I'll just remind myself of 67.

K TOOGOOD: We can ask the EPA to request further information rather than issuing a request for information [inaudible 22:10][overspeaking].

M SLYFIELD: Yes, I think that's the appropriate vehicle for that. That might be my opinion.

K TOOGOOD: Keely's confirmed that. She's by far the authority [inaudible 22:20][laughter].

M SLYFIELD: Than all of us [laughter].

K TOOGOOD: So, thank you.

M SLYFIELD: Thank you.

K TOOGOOD: We will adopt that suggestion. Thank you.

M SLYFIELD: Thank you, sir. I'll just check my notes, but I think that covers everything I wished to say.

[no dialogue 22:40 – 23:08]

M SLYFIELD: Yes, that is everything that I wished to say. Thank you and thank you for your time.

K TOOGOOD: Thank you. I want say on behalf of these two rows of participants in this process, how much we have appreciated the work that people have done. It's been interesting to me, but no surprise to those of my colleagues who spend a lot of time in the environmental law environment that the quality of the written and oral submissions has been excellent. We've had so many lawyers in the room addressing us on these topics and there has been universal performing at the highest level. It's been really inspiring and helpful, so I thank you and congratulate you all on the standard of your work, on your diligence and particularly given the time constraints, to have it turned around, so we really appreciate it. It's been a very worthwhile day for us.

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com

Also, important to us in our procedural aspect is to recognise tikanga, and I want to acknowledge Haimoana who has come all the way from Taranaki to open and close the proceedings for us and endure a bunch of lawyers talking for hours about arcane subjects, which I'm sure he is interested in, but not that interested [laughter]. Haimoana, we appreciate you making the effort to come all this way. Would you please close the proceedings for us?

H MARUERA: Ōtira, tēnā tātou Mr Toogood thank you. Ki a tātou katoa, e mihi ki a tātou, koutou, e hāpai ngā āhuatanga. He tika ana, ka mihi, ka mihi ki a tātou. Probably the only not lawyer in the room, but the pā/marae man that holds a tea towel really well and pretty good at digging holes for the hangis too. Kia kaua ake i ngā kōrero tā tāku marae ake, Ngāti Ruanui kua haere mai nei, Ngā Rauru, Ngā Ruahine-rangi, Te Matongatongaote [? 25:43]. Tēnā tātou.

It'd be wrong of me not acknowledging the haukāinga Ngāti Whātua Ōrākei. E mihi ana ki rātou, me kī ngā tōpuni o te wheheki [? 25:53], te manawhenua o te moana nei e tika ana. Te haukāinga, e mihi ake tēnei parāoa [? 26:00] kua haere mai kia mihi ana ki a koutou, kei te poari ki a koutou kei ngā mana, kei te ihi, e mihi ake nei, kei tau piro nei ngā manaakitanga o te wāhi ngaro ki mua i a tātou. Kia paeheretia te rangimarie, kia tukuki ai ngā wawata o kui ma, o koro mā. Ōtira o te iti o te rahi e noho tahi nei. Puritia mai tauira o te rangi, kia tina, kia tina, kia takoto te mana ora, tina, takoto te mana ora ki a Rangi e tū nei, tina, takoto te mana ora ki a Pāpā e takoto nei, tina, takoto te mana ora ki a Tangaroa e mahu nei te huinga tangata e noho tahi nei. Tūrutu [? 26:36] o whiti whakamaua kia tina.

ALL: Tina.

H MARUERA: Hui e.

ALL: Tāiki e!

H MARUERA: Tēnā tātou

K TOOGOOD: Kia ora.

[background chat].

[End of Recorded Material: 27:02]

c/- High Street Offices, 117 High Street, Motueka 7120
Phone: +64 (0) 3 526 7808
Web : www.tasmantranscription.com | E-mail: ml@tasmantranscription.com