BEFORE THE FAST-TRACK EXPERT CONSENTING PANEL

IN THE MATTER	of n application for approvals under section 42 of the Fast-track Approvals Act 2024
AND	
IN THE MATTER	the substantive application by McCallum Bros Limited for the Te Akau Bream Bay Sand Extraction Project located at Te Ākau Bream Bay, Northland

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SUBMISSIONS OF COUNSEL FOR TE PATUHARAKEKE TE IWI TRUST BOARD AND NGĀTIWAI TRUST BOARD

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M +64 27 468 7778 —— MADELEINE.WRIGHT@MILLSLANE.CO.NZ
MILLS LANE CHAMBERS. LEVEL 27, 125 QUEEN ST, AUCKLAND 1010
PO.BOX 537 SHORTLAND ST, AUCKLAND 1140. MILLSLANE.CO.NZ

MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These submissions are filed on behalf of Patuharakeke Te Iwi Trust Board and Ngātiwai Trust Board ("**Patuharakeke**" and "**Ngātiwai**") as part of their s 53 comments on the substantive application by McCallum Bros Limited for its proposed Te Ākau Bream Bay Sand Extraction Project ("**McCallum Bros project**" or "**application**"). They are accompanied by 8 statements of evidence[1], a position statement from the Patuharakeke Mana Whenua Kaitiaki Roopu, an assessment of the McCallum Bros project against the objectives and policies relating to cultural matters in the applicably planning documents, and the updated, final cultural impact assessment ("**CIA**") prepared by Patuharakeke.

1.2 These submissions address the significant legal issues raised by this application under 9 headings in addition to this introduction:

a. Section 2: applicable version of the Fast-trac Approvals Act 2024 ("**FTAA**")

b. Section 3: strength of Patuharakeke and Ngātiwai's relationship with Te Ākau Bream Bay

c. Section 4: key aspects of the statutory framework for deciding applications for approvals under the FTAA

d. Section 5: application of Te Tiriti o Waitangi and Treaty principles to the Panel's decision

e. Section 6: inconsistency with the Treaty of Waitangi (Fisheries Settlement Act) 1992 ("**Fisheries Settlement**")

f. Section 7: regionally significant benefits

g. Section 8: significant adverse impacts

h. Section 9: assessment against the RMA

i. Section 10: section 85 assessment and why the application must be declined

1.3 The focus of these submissions are the resource consent approvals ordinary sought under the Resource Management Act 1991 ("**RMA**").

1.4 The essential points of argument for Patuharakeke and Ngātiwai are:

a. Patuharakeke and Ngātiwai's rohe includes Te Ākau Bream Bay. Both have relied on te moana o Te Ākau mai rā anō for kaimoana and as a place for cultural and spiritual practices for generations, and hold tino rangatiratanga over Te Ākau through ahi kā. In contemporary time, Ngātiwai has had a particular responsibility in Te Ākau Bream Bay as guardian of the assets

[1] For completeness it is noted that the 2 cultural statements by Mr Edwards and Mr Milner both append several documents

allocated to Ngātiwai and related hapū, including Patuharakeke, under the Fisheries Settlement. Patuharakeke has primary responsibility for kaitiaki obligations flowing from tino rangatiratanga. Looking after the Bay is part of their everyday mahi.

b. Patuharakeke and Ngātiwai acknowledge that members of Te Parawhau ki Tai have a relationship with Te Ākau Bream Bay. However, the information before the Panel demonstrates that Patuharakeke and Ngātiwai have the stronger relationship with Te Ākau Bream Bay, based on tikanga, meaning their views on the adverse cultural impacts and correct tikanga and kawa should be preferred by the Panel.

c. Te Tiriti o Waitangai and tikanga are relevant to the Panel's decision. Granting the application would breach Treaty principles, including active protection, and the RMA requirement to recognise and protect Māori cultural relationships with their traditional waters, through undermining the tino rangatiratanga of Patuharakeke and Ngātiwai and preventing exercise of kaitiakitanga. It would also breach the Treaty principle of good faith by rendering redundant Patuharakeke and Ngātiwai's applications for recognition of customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA Act") over Te Ākau Bream Bay, despite their being first in time and in progress for nearly 10 years. These adverse impacts are sufficiently significant to outweigh any benefits of the McCallum Bros project.

d. Granting approvals for the McCallum Bros project would be inconsistent with the Fisheries Settlement. It puts sustainable utilisation of fish stocks in Te Ākau Bream Bay at risk, it is directly contrary to the scallop fishery closure and risks rendering that closure redundant, it undermines the recognition of tino rangatiratanga and kaitiakitanga provided through the gazetted rohe moana that applies to the Bay.

e. McCallum Bros has grossly overstated the benefits of the project. Currently the Auckland market does not need more sand, so any economic benefit is limited to providing consumers with more choice. Emissions associated with the proposal are therefore costs, not benefits, because they are additional. Looking forward, McCallum Bros has overstated likely future demand and relied on the unsubstantiated and unrealistic proposition that the existing Kaipara Harbour sand source will disappear. The more realistic and reasonable scenario is that the McCallum Bros proposal would remain surplus to requirement and associated emissions would remain costs not benefits. The McCallum Bros project's benefits are therefore very small in both scope and degree.

f. The McCallum Bros project requires further approvals under the Fisheries Act 1996 ("Fisheries Act"). There is no guarantee all approvals would be granted or on what conditions. This uncertainty requires a significant reduction in "extent" of any benefits the Panel identifies commensurate with the significant risk that those benefits will not eventuate.

g. The McCallum Bros project will have significant adverse cultural, environmental, and economic impacts. In respect of some matters, the information provided by McCallum Bros' is insufficient to be able to identify and/or quantity the adverse impacts of the project which means the Panel does not have the information it needs to be able to decide the application. In respect of other matters, the information that is available demonstrates that adverse impacts will or are likely. Looming behind these topic-specific adverse impacts, is the fact that all adverse impacts are felt by Te Tai Tokerau but all benefits accrue to Tāmaki Makaurau. This is itself a significant adverse impact. Ngāti

h. The McCallum Bros project is contrary to sustainable management and fails to recognise and provide for the matters of national importance in s 6(a),(c) and (e) RMA. It is contrary to directive provisions in the New Zealand Coastal Policy Statement 2010 ("NZCPS") requiring protection of the coastal environment. It gains no support from the regional planning documents because it has no benefit for Te Tai Tokerau and is contrary to provisions relating to cultural and environmental values and outcomes. These inconsistencies constitute significant adverse impacts.

i. Because the McCallum Bros project is inconsistent with the Fisheries Settlement the Panel must decline the application under s 85(1). Even if granting the application was not prohibited, the adverse impacts are so significant that they vastly outweigh any benefits of the McCallum Bros project, making a decision to decline under s 85(3) FTAA inevitable.

2. APPLICABLE VERSION OF THE FAST-TRACK APPROVALS ACT 2025

2.1 The FTAA came into force on 24 December 2024.[2] It was subsequently amended by the Fast-track Approvals Amendment Act 2025 ("Amendment Act"). Some of the Amendment Act's changes came into force on 17 December 2025 and others came into force on 31 March 2026.[3] The extent to which the changes coming into force on each commencement date apply to a particular substantive application is specified in Part 2 Schedule 1 FTAA.

2.2 The application was lodged with the EPA on 26 January 2026, between the first and second commencement dates, with processing currently on-going. Consequently, the version of the FTAA that applies is that with:[4]

a. the amendments made on the first commencement date; and

b. new ss 68A, 68B, and amended s 88 included.[5]

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[2] FTAA, s 2

[3] Amendment Act, s 2

[4] FTAA, Schedule 1 Part 2 cl 7

[5] Which were introduced by ss 37 and 42 Amendment Act and which providing for the ability for the Minister to enable an applicate to reduce the scope of a substantive application that is before a panel (ss 68A and 68B) and issue, service and publication of the panel's decision (s 88)

2.3 This means that, for the purposes of making its decision, the Panel can refer to the FTAA as it looks today, because all changes made by the Amendment Act to provisions relating to deciding substantive applications apply to the Panel's decision.

3. STRENGTH OF PATUHARAKEKE AND NGĀTIWAI'S RELATIONSHIP WITH TE ĀKAU BREAM BAY

3.1 Since their ancestors first came to Te Ākau Bream Bay, Patuharakeke and Ngātiwai have been relying on and actively guarding and protecting te moana and its resident taonga. The unrelenting mahi required by Patuharakeke to do this and to meet their kaitiaki obligations continues today and is detailed at length by Mr Milner.[6] In his statement for Te Whangārei Te Rerenga Parāoa Rohe Moana, Mr Solomon has also explained the worked being done to protect the mauri of the moana and uphold kaitiaki obligations. Ngātiwai is an active guardian of Te Ākau Bream Bay's fish and fishing potential and also continues to rely on the Bay for cultural practices.[7]

3.2 Te Parawhau ki Tai's support of the McCallum Bros project, and its claim it holds mana moana interest over Te Ākau Bream Bay[8], mean the Panel has to determine which group has the stronger interest in Te Ākau Bream Bay in order to determine which views on cultural effects and applicable tikanga it should prefer.[9]

3.3 This is a factual assessment which requires the Panel to examine:[10]

- whether the values correlate with physical features of the world (places and people);
- people's explanations of their value and their traditions;
- whether there is external evidence (e.g. Māori Land Court Minutes) or corroborating information (e.g. waiata or whakatauki) about values. By 'external' we mean before they become important for a particular issue and (potentially) change by the value-holders;
- the internal consistency of people's explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

3.4 The information presented in the Patuharakeke and Ngātiwai cultural statements is directly related to Te Ākau Bream Bay and its physical environment. It demonstrates shared and consistently held values and associations across generations and up until current times. It is "external" in the sense that much of the information is from well before the application was lodged, prepared for the purposes of Patuharakeke and Ngātiwai MACA Act applications. Much of the new information in the cultural statements is about expression of kaitiakitanga over the years that have passed since

[6] Appendix 3, comments covering letter. See also Appendix 10, comments covering letter
[7] Appendix 2 and Appendix 4, comments covering letter.
[8] Memorandum of counsel of behalf of Te Pouwhenua o Tiakiriri Kukupa Trust (Te Parawhau Ki Tai) dated 13 May 2026 including Annexure 1 affidavit of Riripeti Mira Norris.
[9] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768.
[10] *Ngāti Maru* at [117] relying on *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111, with Whata J also noting that these considerations had been favourably referred to by Justice Williams in various writings as providing the appropriate way to assess conflicting evidence from Māori groups to determine strength of interest and thus which evidence to prefer.

the MACA Act information was prepared and so is also "external". Examples of kaitiakitanga at work include exercise of customary practice in respect of stranded whales; fisheries and wider taonga protection, rejuvenation, and monitoring; mapping of cultural sites around Te Ākau Bream Bay; and involvement in numerous proposals seeking approvals for activities that would impact the rohe and rohe moana.[11]

3.5 The strength of this evidence led the Attorney-General to concluded in closing submissions in relation to Patuharakeke MACA Act application relating to Te Ākau Bream Bay that there was "fairly good evidence" that Patuharakeke holds Te Ākau Bream Bay in accordance with tikanga, with Ngātiwai holding the outer area of the Bay.[12] [13] In contrast, the Attorney-General's conclusion in relation to Te Parawhau ki Tai's interest was that "the evidence provided by Te Parawhau ki Tai to suggest that the hapu has authority (as a matter of tikanga) to control access to and use of the hearing area vis-à-vis other Māori groups is limited."[14]

3.6 In short, Patuharakeke and Ngātiwai do not dispute that Te Parawhau ki Tai has an interest in Te Ākau Bream Bay, but it is a much weaker interest than the interest held by them. The evidence before the Panel clearly demonstrates that Patuharakeke and Ngātiwai hold the stronger interest, based on correct application of the tikanga of ahi kā, and reflected in the practical exercise of rangatiratanga and kaitiakitanga by both. Their views on inconsistency with the Fisheries Settlement and adverse impacts on cultural values, associations, and rights should therefore be preferred by the Panel.

4. KEY ASPECTS OF THE STATUTORY FRAMEWORK FOR DECIDING APPLICATIONS FOR APPROVALS UNDER THE FTAA PURPOSE

4.1 The starting point for the Panel's decision is s 81(1) FTAA:

> (1) A panel must, for each approval sought in a substantive application, decide whether to:
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> a. grant the approval and set any conditions to be imposed on the approval; or
> b. decline the approval.

4.2 Section 81(2) then sets out what the Panel is required to do for the purpose of making that decision. It provides an index directing the Panel to the various statutory provisions that contain the information it must consider, the framework for making its decision, and the limits applying to its decision.

> (2) For the purpose of making the decision, the panel—

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[11] Appendix 3 and Appendix 4, comments covering letter including all MACA Act evidence attached to those appendices.

[12] Attorney-General closing submissions for Whangārei Coast (stage 1(b)) hearing, 3 October 2024 at [64]: "On balance, the Attorney-General considers there is fairly good evidence to suggest limb one of the s 58 test is met in respect of some parts of Patuharakeke's application area. These areas appear to be concentrated around Poupouwhenua and stretching down to Waipū, and along the mainland coast (rather than further out to sea)." Provided in **Attachment A**.

[13] The Attorney-General made similar submissions in relation to Ngātiwai but in respect of the offshore area surround Taranga and Marotere (at [71]). However, in this case Ngātiwai and Patuharakeke speak with one voice, so it is the comments relating to Patuharakeke that are of most relevance to the Panel.

[14] Ibid at [35]

(aaa) must, if the substantive application relates to an unlisted project, consider the Minister's reasons for accepting the referral application that are stated in the notice given by the responsible agency under section 28(1):
(aab) must consider a relevant Government policy statement:
(a) must consider the substantive application and any advice, report, comment, or other information received by the panel under section 51, 52, 53, 55, 58, 67, 68, 69, 70, 72, or 90:
(b) must apply the applicable clauses set out in subsection (3) (see those clauses in relation to the weight to be given to the purpose of this Act when making the decision):
(c) must comply with section 82, if applicable:
(d) must comply with section 83 in setting conditions:
(e) may impose conditions under section 84:
(ea) may impose conditions under section 84A:
(f) may decline the approval only in accordance with section 85.

4.3 Section 81(2)(b) and the clauses to which it relates comprise the first component of the framework for the Panel's decision, stating matters the Panel must take into account and how. For resource consent approvals ordinarily sought under the RMA the "applicable clauses" are clauses 17-22 of Schedule 5, with clause 17 being the clause central to the panel's decision. It states:

> the panel must take into account, giving the greatest weight to paragraph (a),-
> (a) the purpose of this Act; and
> (b) the provisions of Parts 2, 3, 6, 8 to 10 of the Resource Management Act that direct decision making on an application for resource consent, (but excluding s 104D of that Act); and
> (c) the relevant provisions of any other legislation that directs decision making under the Resource Management Act 1991.

4.4 When considering the matters in clause 17 in relation to the approvals sought by the Panel is required to first consider each of the relevant considerations in the applicable clauses, uninfluenced by the purpose of the FTAA, before secondly weighing those factors in accordance with the prescribed hierarchy. That approach is supported by the Court of Appeal's decision in *Enterprise Miramar Peninsula Incorporated v Wellington City Council*.[15] That approach has been applied in most other FTAA panel decisions to date.[16]

4.11 When taking the purpose of the FTAA into account under clause 17, the Panel "must consider the extent of the project's regional or national benefits".[17] This is a factual

[15] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 [52]-[53], [59]. In *Enterprise Miramar* the Court of Appeal considered the correct interpretation and application of the decision-making criteria in the Housing Accords and Special Housing Area Act 2013. Although the weighting hierarchy was different in that statute, the decision-making provision was the same in that it required decision-makers to take into account a list of matters and then weigh them in accordance with statutory direction about how the weighting exercise should be undertaken.
[16] See for example Bledisloe Wharf decision, Waihi Gold decision, Taranaki VTM draft decision
[17] FTAA, s 81(4)

question based on evidence and informed by judgement.[18] The extent of regional benefits is context-dependent: what constitutes a significant benefit may differ from one region to the next.

4.12 When taking the RMA provisions that direct decision-making, the Panel must undertake an assessment of the application against those as it would under the RMA, but with the modifications made by the FTAA in place (e.g. no s 104D assessment; provisions that would require decline under the RMA do not have that effect under the FTAA). This requires "a fair appraisal of the objectives and policies [of applicable planning instruments] read as a whole".[19]

4.13 The Panel must decline an approval sought by McCallum Bros if any of the mandatory decline factors in s 85(1) or (2) apply, which includes where granting the approval would be inconsistent with the obligations arising under existing Treaty settlements or with customary rights recognised under the MACA Act.[20] With respect to determining if an approval would have that effect, Treaty settlements are intended to operate in a practical and enduring way. They are not limited to compliance with individual clauses but include an obligation on the Crown to ensure that settlement redress is not undermined in practice.[21]

4.14 The Panel may decline an approval if, in complying with s 81(2), it forms the view that there are 1 or more adverse impacts in relation to the approval sought; and those adverse impacts are "sufficiently significant to be out of proportion to the project's regional or national benefits" that the Panel has considered under section 81(4), even after taking into account any modifications made by the applicant or conditions that the panel may set to address to those adverse impacts.[22]

4.15 Adverse impact means "any matter considered by the panel in complying with section 81(2) that weighs against granting the approval."[23] The Panel may not form the view that an adverse impact meets that threshold "solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2)".[24] The word "solely" (common meaning "only; completely"[25]) and the reference to "a provision" are important. The Panel may form the view that adverse impacts are sufficiently significant to be out of proportion due to a

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[18] The FTAA does not define what constitutes a significant regional or national benefit, nor does it define the terms "significant" or "benefit(s)".
[19] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC [2024] NZSC 26 at [79]-[80].
[20] FTAA, ss 7 and 85(1)(b). There has been some discussion in context of other fast-track applications about whether this applies to panels give s 7(2) which says that this obligation "does not apply to a court or a person exercising a judicial power or performing a judicial function or duty". The applicant considers it does apply to panel to the reasons set out in the Taranaki VTM draft decision at [219]-[224].
[21] *Te Ohu Kaimoana Trustee Ltd v Attorney-General* [2025] NZHC 657 at [194].
[22] FTAA, s 85(3).
[23] FTAA, s 85(5).
[24] FTAA, s 85(4).
[25] Collins New Zealand Dictionary, First Ed 2017.

combination of inconsistencies with provisions or documents, or due to a combination of those inconsistencies with other adverse impacts.

4.16 Ultimately s 85 requires the Panel to look at benefits and adverse impacts it has identified on the information before it, and make a judgement about whether adverse impacts are sufficiently significant (which can also be understood to mean "noteworthy"[26]) that they are much bigger than the benefits[27], even when benefits are given more inherent weight[28].

5. TE TIRITI O WAITANGI AND TIKANGA

Tikanga

5.1 Tikanga is the first law of Aotearoa.[29] It "was not displaced or extinguished by the arrival of the English common law…"[30] It "is a part of the common law of Aotearoa/New Zealand."[31]

5.2 With particular reference to this application, s 6(e) RMA (which is a matter the Panel must take into account as part of its RMA assessment) requires decision-makers to recognise and providing for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga" as a matter of national importance. As the cultural statements for Patuharakeke and Ngātiwai explain, for Māori their relationship with the ancestral waters (including te moana) is underpinned by whakapapa and ahi kā, which according to tikanga leads to the holding of rangatiratanga and exercise of the related obligation of kaitiakatanga. Tikanga[32] then also determines what actions and behaviours are required of those exercising their rangatiratanga and acting as kaitiaki. It is the tikanga of those holding rangatiratanga that applies to an area or place.

5.3 Properly understanding impacts on cultural relationships and traditions therefore requires consideration of cultural and spiritual effect not just physical and biological effect. It requires understanding about the harm done to Patuharakeke and Ngātiwai as a consequence of usurping their rangatiratanga and undermining their exercise of kaitiakitanga and their ability to continue to meet their kaitiaki obligations in the future.[33]

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[26] Definition applied to the term significant in context of benefits by several panels. See for example Maitahi decision, Waihi Gold decision.
[27] Reflecting the common meaning of the concept "out of proportion", which is defined in the Cambridge online dictionary as: "If something is out of proportion, it is much bigger or smaller than it should be when compared to other things".
[28] As required by FTAA, clause 17 of Schedule 5.
[29] *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [110] per Glazebrook J, at [172] per Winkelmann CJ.
[30] Ibid.
[31] *Ellis* at [116] per Glazebrook J.
[32] Tikanga Māori is defined in the RMA as "Māori customary values and practices"/ Translated literally it means correct, or the correct way. Its meaning is also addressed by Mr Milner in Appendix 3, comments covering letter.
[33] This harm is outlined in Appendices 2, 3, 4, 10, 12, comments covering letter.

5.4 Tikanga therefore must sit squarely at the forefront of the Panel's decision. In this case, the information before the Panel demonstrates that the McCallum Bros project is contrary to tikanga at multiple levels.[34]

5.5 More generally, tikanga must colour the interpretation and application of the FTAA. As part of the fabric of New Zealand law, it is relevant context for the interpretation of legislation under s 10(1) of the Legislation Act 2019.

5.6 The information before the Panel demonstrates that the McCallum Bros project will significantly adversely impact on the mauri of Te Akau Bream Bay and the taonga (including dolphins, whales, fish species, scallops) that live there, and thus on the mauri and mana moana of Patuharakeke and Ngātiwai. [35]

Te Tiriti o Waitangi

5.7 The FTAA does not contain a general Treaty clause or refer to Te Tiriti o Waitangi or its principles, beyond references to Treaty settlements. However, it is well-established that Te Tiriti and its principles are relevant to the interpretation and application of statutory provisions even when not referred to in legislation or only in a Treaty clause that is limited in scope. This is because "the Treaty is part of the fabric of New Zealand society"[36] and "has an elevated status owing to its constitutionally-foundational significance".[37] As a Full Court of the High Court said in *Barton-Prescott v Director-General of Social Welfare*[38]:

> We are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute.

5.8 The presumption of consistency with Te Tiriti is a powerful one. In *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* the Supreme Court said:[39]

> The courts will not easily read statutory language as excluding consideration of Treaty principles is a statute is silent on the questions … An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[40]

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[34] Ibid.

[35] Ibid. See Appendices 5-8, comments covering letter which shows that the cultural concerns align with western science assessment. See also Mr Solonmon's statement for Te Whangārei Te Rerenga Parāoa Rohe Moana.

[36] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

[37] *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [35].

[38] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

[39] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

[40] In respect of the FTAA, although s 8 RMA is excluded there is no provision saying that the Treaty of Waitangi is not relevant to the Panel's assessment, or excluding tikanga-based rights and interests

5.9 In respect of the FTAA, although s 8 RMA is excluded, there is no provision saying that the Treaty of Waitangi is not relevant to the Panel's assessment or excluding tikanga-based rights and interests from the purview of Māori cultural relationships or adverse impacts. None of the Supplementary Analysis Report: Fast-track Approvals Bill 29/2/202, the Legislative Statement for Fast-Track Approvals Bill 7/3/2024, the Select Committee Report, and the First and Third Readings on the Bill, express a policy intent to exclude the ability of decision-making panels to respect the Treaty of Waitangi. Thus, it can be assumed to be applicable to panel decisions depending on context, and in this case the context makes Te Tiriti directly relevant to the Panel's decision.

5.10 The present case is one where breach of Te Tiriti and Treaty principles is directly at issue, with the principes of active protection and the duty to act in good faith being particularly relevant.

5.11 Article 2 of Te Tiriti o Waitangi guarantees Māori "rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa" ("unqualified exercise of their chieftainship over their lands, villages and all their treasures").[41] In the English text the guarantee is of "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties".

5.12 The principle of active protection means that "the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable."[42] The Privy Council has explained that where:[43]

> ...a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations. This may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches of the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action.

5.13 The principle of good faith stems from the overarching partnership principle and requires both Treaty partners to act reasonably and honourably towards each other.[44]

5.14 In this case, by granting the approvals sought by McCallum Bros, the Crown would be failing in its obligation to take steps to enable Patuharakeke and Ngātiwai to use and

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from the purview of Māori cultural relationships or adverse impacts. None of the Supplementary Analysis Report: Fast-track Approvals Bill 29/2/202, the Legislative Statement for Fast-Track Approvals Bill 7/3/2024, the Select Committee Report, and the First and Third Readings on the Bill, express a policy intent to exclude the ability of decision-making panels to respect the Treaty of Waitangi. Thus it can be assumed to be applicable to the Panel's decision.

[41] As translated by Professor Sir Hugh Kawharu in a translation widely used by the Waitangi Tribunal and first published in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, (Oxford University Press, South Melbourne, 1989).

[42] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) *(Lands case)* at 664 per Cooke P.

[43] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) *(Broadcasting Assets case)* at 517.

[44] Ko Aotearoa Tenei, Waitangi Tribunal, Volume 2 pg 94.

exercise their tino rangatiratanga, meet their kaitiaki responsibilities in their rohe moana, and benefit from the outcomes of the Fisheries Settlement. This would compound the Crown's history of failing to recognise and protect their tino rangatiratanga and kaitiaki responsibilities through land confiscation, delay in recognising grievances and rangatiratanga through the settlement process, and delay and refusal to recognise the rangatiratanga each hold over the sea where it has mana moana resulting from amendment to the MACA Act.[45]

5.15 The principles of Te Tiriti also include the express terms of Te Tiriti, as the Privy Council stated in the Broadcasting Assets case,[46] so a breach of the Article 2 rights of iwi to tino rangatiratanga over their taonga will also breach the principles of Te Tiriti.

5.16 Further, granting the approvals sought by McCallum Bros would be a breach of the good faith with which Patuharakeke and Ngātiwai have engaged with the MACA Act process. As Mr Milner and Mr Edwards have explained in their statements neither Patuharakeke nor Ngātiwai see a finding of customary marine title under the MACA Act as necessary to confirm or provide mana moana; this is held based on tikanga and through whakapapa. However, the MACA Act is a modern legislative tool that supports exercise of tino rangatirtanga hence both have applied in order to have access to that tool.

5.17 As Mr Milner and Mr Edewards have also explained, both Patuharakeke and Ngātiwai applied for MACA Act recognition nearly 10 years ago, with their applications heard by the High Court in 2024. As the cultural statements lodged in this case demonstrate that evidence demonstrating unbroken connection with Te Ākau Bream Bay was extensive, particularly in the inner area for Patuharakeke and outer area for Ngātiwai. But for the changes made to the MACA Act in 2025[47] which mean these applications have to be reheard, both Patuharakeke and Ngātiwai would likely have customary marine title, applying directly over Te Ākau Bream Bay. This would have meant the McCallum Bros project would have be ineligible to apply for approvals under the FTAA.[48]

5.18 The MACA Act was born out of central government recognition that fisheries policy before its enactment had "severely discriminatory" effects.[49] A decision by the Panel to grant the application would continue this discrimination and undermine the objective of the MACA Act to address historical grievance. Enabling an activity that would significantly undermine the MACA Act applications of Patuharakeke and Ngātiwai, after waiting (thus far) around 10 years for them to be decided would be an act of the utmost bad faith by the Crown and in direct breach of the good faith

[45] Refer to Appendices 2-4, comments covering letter for comment on historical grievance.
[46] At 517.
[47] Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Act 2025. The Amendment Act came into force on 25 October 2025.
[48] FTAA, s 5(b).
[49] *Whakatōhea kotahitanga waka (Edwards) v Attorney-General* [2024] NZSC 164 at [102].

expectation that underpinned the guarantee of tino rangatiratanga and in exchange for exercise of kawantanga in Te Tiriti.

5.19 These breaches of Te Tiriti are significant adverse impacts of the McCallum Bros proposal and are, on their own, sufficiently significant to outweigh any benefits of the proposal. The constitutional significance of Te Tiriti means that effects that would be inconsistent with Te Tiriti or its principles must have significant weight in assessing an application under the FTAA. A decision to grant the McCallum Bros' proposal would put private commercial benefit above the integrity of Aotearoa's founding document. As the Supreme Court found in the *Trans-Tasman* decision, Māori currently hold rights and interests in the takutai moana whether or not those have been recognised legally under the MACA Act. Consequently, upholding Te Tiriti and Treaty principles requires decision-makers to recognise rights and interests that exist, whether or not they have been confirmed through statutory process.

6. INCONSISTENCY WITH THE FISHERIES SETTLEMENT

6.1 As with s 7 FTAA itself, Treaty settlements should be interpreted broadly and generously. The presumption favouring an interpretation that is consistent with Te Tiriti and its principles is relevant here.

6.2 Treaty settlements have a two-fold function:

a. first, resolving and remedying historical breaches of Te Tiriti and its principles through the acknowledgement of those breaches and provision of redress;

b. secondly, providing for an ongoing relationship between the iwi and the Crown that will uphold Te Tiriti and its principles.

6.3 As such, Treaty settlements should be interpreted in a way that gives effect to the Crown's ongoing obligations under Article 2 of Te Tiriti and the principles of Te Tiriti. While any Treaty settlement leaves the Crown free to exercise its responsibilities of Kawanatanga, it is not to be supposed that the parties to such settlements intended that the Crown should be free to continue to breach its Treaty obligations to iwi. That would be inconsistent with the Treaty principle of good faith that settlements are based on.

6.4 Each Treaty settlement is therefore more than a 'shopping list' of mechanisms to be implemented. It is a contract between Treaty partners, in which the spirit and intent – the nature of the new relationship the parties say they wish to forge – is just as important as the mechanics, if not more so.

6.5 As Boldt J found in the context of proceedings relating to the Fisheries Settlement, Treaty settlements are intended to operate in a practical and enduring way. They are not limited to compliance with individual clauses but include an obligation on the Crown to ensure that settlement redress is not undermined in practice.[50]

[50] See fn 21 above.

6.6 The information before the Panel demonstrates that the McCallum Bros project would be inconsistent with the Fisheries Settlement for three reasons.

6.7 First, it poses significant risks to customary fish stocks, access to fish stocks, iwi settlement quota, and Moana New Zealand (the largest Māori-owned fisheries company in Aotearoa).[51] It was never an expectation of signatories that there would be no change to the extent of commercial fishing able to be undertaken at any one time, given the Fisheries Act 1996 provides for the total allowable commercial catch for any stock to change year-on-year, and even to be set at zero. But enabling other activities that fall directly within important fishing locations, which will or are like to impact fish stock habitat and numbers, and thus commercial fishing, directly undermines the redress the Settlement Act was intended to provide.

6.8 Second, the McCallum Bros project would entirely undermine the scallop fishery closure put in place under the Fisheries Act to enable that fishery to rejuvenate. It is not consistent with the intent behind the Fisheries Settlement, or the expectations of Māori signatories, that tangata whenua could seek a closure to enable sustainable utilisation of a fishery, and quota holders could support that, simply to have the area decimated by another activity for private gain.[52] [53]

6.9 Third, Te Ākau Bream Bay is subject to 2 gazetted rohe moana established under the Fisheries (Kaimoana Customary Fishing) Regulations 1998, promulgated under the Fisheries Act [54] and as a direct consequence of the Fisheries Deed of Settlement.[55] The Patuharaheke Mana Moana Roopu (a subcommittee of the Trust Board) are appointed kaitiaki for the purposes of the rohe moana which gives them the authority to authorise the taking of fish and aquatic life for customary food gathering purposes.[56]

6.10 The intent behind this aspect of the settlement redress was offered by the Crown was to recognise "that traditional fisheries are of importance to Māori and that the Crown's Treaty duty is to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries".[57] Granting approvals for the McCallum Bros project would enable an activity that would undermine exercise of rangatiratanga and customary fishing due to harm to fish and aquatic life, and at times, actual exclusion. That outcome directly undermines the redress offered by the Crown.

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[51] Appendix 5, comments covering letter addresses physical impacts on fish and also commercial fishing activity in the Bay. Appendix 2, comments covering letter addresses expectations relating to the Fisheries Settlement. Appendices 3 and 4, comments covering letter address customary fishing and kaitiaki obligations relating to customary fishing. Mr Solomon's statement also addresses customary fishing practices and related obligations.

[52] Noting that approximately 22% of Te Akau Bream Bay would be subject to dredging annually, likely increasing after 3 years. See Appendix 6, comments covering letter.

[53] This is also inconsistent with NZCPS Policy 11 which is addressed below.

[54] Appendix 12, comments covering letter.

[55] Regulation preamble.

[56] Regulation 11.

[57] Regulation preamble A(b).

6.11 The Fisheries Settlement is a rare national settlement, that binds and benefits all Māori, through the 57 iwi recognised in statute.[58] Approval of an activity that is inconsistent with the Fisheries Settlement would directly impact the interests of Ngātiwai (and Patuharakeke and other Ngātiwai-related hapū) and other iwi in the region, but would also indirectly impact on all iwi, as all have an equal interest in upholding the integrity of the Settlement.

7. SIGNIFICANT REGIONAL BENEFITS

McCallum Bros has grossly overstated the benefits of its proposal

7.1 As Dr Meade points out it is common ground between himself and the applicant's economic consultants that there is no need for sand from Te Ākau Bream Bay in Tāmaki Makaurau right now.[59] Consequently, there is logically no benefit from the sand beyond consumer choice. This also means that any purported transport emissions-related benefits are, in fact, costs because they represent increased emissions from the status quo for a product that is surplus to requirement.

7.2 All of McCallum Bros' claimed benefits are therefore based on meeting purported demand and increasing security of supply using a lower-emissions method.

7.3 However, as Dr Meade explains, based on current evidence the applicant is also likely overstating both future demand and future lack of supply. It is more likely demand will decrease and it is also more likely that existing sources, particularly the Kaipara Harbour source McCallum Bros places emphasis on replacing, will remain available. Indeed, as a high quality, established, renewable source, that is currently being successfully extracted, it is entirely unclear why McCallum Bros consider the Kaipara Harbour operation is unlikely to secure the approvals it needs to continue operating when the time comes. There are also numerous other potential sources if demand does unexpectedly increase, some currently operating, and others available to be utilised if needed.[60]

7.4 McCallum Bros also claims that the project is a better future option than the Kaipara or other land-based sources because of its reduced transport-emissions profile compared with other sources. However, no technical evidence has been put forward to support this claim. It is simply asserted in the applicant's economics assessment despite this being a matter of technical assessment. In addition, the claimed emissions reductions are based on comparison with travelling to the Auckland market from a 50km distance which is the equivalent of the Kaipara Harbour[61] but as noted above, there is no reason to expect that operation will discontinue. Therefore, the more reasonable assumption is that emissions from the McCallum Bros proposal will actually be additional to existing emissions and therefore be a cost not a benefit.

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[58] Māori Fisheries Act 2004, s 5 and Schedule 3.
[59] Appendix 9, comments covering letter.
[60] Ibid.
[61] Ibid.

7.5 The short point is that based on the information before the Panel there is no need now, and no need in the future, for the McCallum Bros project, so there is little benefit to the application.

Extent of benefits reduced because of uncertainty associated with actual extent of resource

7.6 Sitting behind all this is the fact that McCallum Bros has not presented any evidence to support the quantum of sand it says would be extracted over the 35 year lifetime of the approvals.[62]

7.7 This means that the extent of any benefits the Panel may find to result from the proposal must be reduced to account for the risk that the sand resource those benefits rely on is not actually there.

Extent of benefits reduced because of uncertainty associated with need for further approval

7.8 The McCallum Bros project will, or at least can, be reasonably expected to result in the taking[63] of scallops within the Bay which is in Fisheries Act quota management area SCA 1.

7.9 According to s 89(1) Fisheries Act:

> No person shall take any fish, aquatic life, or seaweed by any method unless the person does so under the authority of and in accordance with a current fishing permit.

7.10 Anyone who contravenes s 89(1) comments an offence under the Fisheries Act.[64]

7.11 In addition, every person also commits an offence who contravenes or fails to comply with a sustainability measure implemented by notice in a *Gazette* under s 11(4)(b)(i).[65] The scallop closure currently applying in Te Ākau Bream Bay is one such sustainability measure. It was gazetted in 2022[66] and says "A person must not take scallops from SCA 1" with 2 exceptions. The first exception is taking in accordance with regulations 50-52 of the Fisheries (Amateur Fishing) Regulations 2013 or Fisheries (Kaimoana Customary Fishing) Regulations 1998 and second is for scallops proven to be washed ashore.

7.12 Consequently, as well as the approvals it has sought under the FTAA, McCallum Bros also needs approvals under the Fisheries Act if it wants to undertake its project.

7.13 In particular, McCallum Bros would need a fishing permit under s 91 Fisheries Act to enable it to take scallops at all, and also a special permit under s 97 Fisheries Act

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[62] Appendix 8, comments covering letter.
[63] FTAA, s 2 definition of "taking" and "fishing".
[64] s 89(12)
[65] s 228
[66] https://gazette.govt.nz/notice/id/2022-go1122

enabling it to take scallops in an area subject to a gazetted closure preventing taking being approved by ordinary fishing permit.[67]

7.14 It is uncertain whether a special permit would be granted. This situation would not fall within any of the specific purposes for which a special permit can be granted under s 97(1)(a) or (b). It would be necessary to rely on the catch-all provision in s 97(c) of "any other purpose approved by the Minister". But the Minister can only approve such a purpose "after consultation with such persons and organisations as he or she considers are representative of those classes of persons having an interest in the granting of a special permit for such a purpose, including Māori, environmental, commercial, and recreational interests." If the issuing of the special permit "would have a significant effect on fisheries resources of any fishing interest in the stocks affected", the chief executive would be required under s 97(2) to "consult with such persons and organisations as the chief executive considers are representative of those classes of persons having interests that would be affected if the special permit were issued". This leaves multiple uncertainties:

a. Whether the Minister would consider this a suitable case for a special permit in light of the Fisheries Act's purpose and environmental principles;

b. Whether the Minister would consider it a worthwhile use of resources and effort to go through the consultation process necessary to approve a new purpose for granting special permits under s 97(1)(c);

c. How the Minister would respond to feedback from those consulted, particularly given the likely controversy about why McCallum Bros should be allowed to take scallops when commercial fishers who rely on fishing for their livelihood cannot;

d. Whether the Chief Executive would consider that consultation was required under s 97(2);

e. How the Chief Executive would respond to the feedback from any such consultation;

f. Whether the Chief Executive would decide to issue a special permit; and

g. What conditions would be imposed on the special permit (if granted) and fisheries permit.

7.15 Whether McCallum Bros should or should not be granted the permits it needs under the Fisheries Act is not an issue for the Panel. However, what is a matter for the Panel is the need for them and the uncertainty this need brings to whether the McCallum Bros project will in fact be realised. This uncertainty goes directly to the Panel's assessment of the "extent" of the proposal's benefits, and it requires a significant

[67] *NZ Waterways Restoration Ltd v Director-General of Conservation* HC Wellington CIV-2005-485-1824, 21 March 2006 at [26]-[28].

reduction in "extent" of any benefits the Panel identifies commensurate with the significant risk that those benefits will not eventuate.[68]

8. SIGNIFICANT ADVERSE IMPACTS

8.1 The information provided to the Panel by Patuharakeke and Ngātiwai demonstrate as a matter of fact that:

a. McCallum Bros' proposal will have significant adverse cultural, environmental, and economic impacts; or

b. in relation to some matters, that the information provided by McCallum Bros is so uncertain or so incomplete that it is not possible to tell what the actual impact will be, but there is a real risk it will be adverse based on the information that is available.

8.2 For a description of the adverse effects on Patuharakeke and Ngatiwai 's rangatiratanga, ability to exercise kaitiakitanga, and their cultural values and practices refer to:

a. Appendix 2, statement of Mr Nehua.

b. Appendix 3, statement of Mr Milner.

c. Appendix 4, statement of Mr Edwards.

8.3 For a description of the adverse impacts on:

d. Fish species, including commercial fish species see Patuharakeke and Ngātiwai comments Appendix 5.

e. Benthic ecosystems see Patuharakeke and Ngātiwai comments Appendix 6.

f. Marine mammals, including threatened taonga the bottlenose dolphin and Brydes whale, see Patuharakeke and Ngātiwai comments Appendix7.

g. Coastal processes and the natural character of the coast and the continental shelf, see Patuharakeke and Ngātiwai comments Appendix 8.

8.4 Last, but most certainly not least, all of the claimed benefits of the McCallum Bros proposal accrue in Tāmaki Makaurau. But all of the harm is felt in Te Tai Tokerau. And it is felt most acutely within a Bay whose coastline is already eroding[69] resident marine species[70] are already suffering harm from cumulative pressures, and whose people

[68] This proposition aligns with the approach taken by the panel to assessing benefits in the Homestead Bay decision. In that case the application proposed to fully deliver part of the overall number of homes in the project description in Schedule 2 FTAA. For the balance it proposed to deliver these through super lots with capacity to deliver the number of lots required. The panel said this was an allowable approach but the risk that the super lots would not be developed for some time, or ever, impacted the extent of the project's benefits.

[69] Appendix 8, comments covering letter.

[70] Appendices 5-7, comments covering letter

have also already suffered harm from historical erosion of rangatiratanga as outlined above.

8.5 This itself a significant adverse impact because there are no benefits the Panel can say truly counterbalance adverse impacts. Te Tai Tokerau gains nothing from the McCallum Bros project.

9. ASSESSMENT AGAINST PROVISIONS OF RMA THAT DIRECT DECISION-MAKING

9.1 As outlined above, the critical "provisions of the RMA that direct decision-making" for resource consent applications are s 104 and Part 2 (ss 5, 6, 7).

Section 104 considerations

9.2 Section 104 requires a consent authority to have regard to: (a) any actual and potential effects on the environment of allowing the activity, (ab) positive effects to offset or compensate for adverse effects, (b) any relevant provision of a national, regional or district planning instrument, and (c) any other matter that the consent authority considers relevant and reasonably necessary to determine the application. Under s 104(2EA), a consent authority may have regard to any previous or current abatement notices, enforcement orders, infringement notices, or convictions under the RMA received by the applicant. Under s 104(6), a consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

Effects

9.3 The information identifying actual and potential adverse effects on the environment is described in section 8 above. In many instances the application's assessment of effects in incomplete, wrong, uncertain, or effects are understated as explained in the expert statements provided in Appendices 5-8 provided with comments from Patuharekeke and Ngātiwai. Under the RMA, inadequacy of information is a ground for declining an application. While not a standalone ground for declining under the FTAA, inadequacy of information is a matter that weighs against approval and so should be treated as an adverse impact in the s 85(3) proportionality assessment.

Project is contrary to relevant planning instruments

9.4 Interpretation and consideration of planning provisions under s 104 RMA has been addressed by the Supreme Court in the *King Salmon, Port Otago*, and *East West Link* decisions.[71] Together, those decisions are authority for the following propositions:

a. Directive plan provisions have greater potency and leave decision-makers with less flexibility for choice as to the outcome of a particular decision than less directive plan provisions.[72]

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[71] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38; *Port Otago Limited v Environmental Defence Society Inc* [2023] ELHNZ 245; *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.
[72] *East-West Link* at [72]; *King Salmon* at [129] and [152].

b. The term "avoid" means "not allow" or "prevent the occurrence of".[73] It is a strong directive. The standard of protection is material harm; an effect is adverse if it will materially harm the thing sought to be protected.[74]

c. When having regard to relevant provisions of applicable planning instruments the decision-maker must undertake a fair appraisal of the objectives and policies read as a whole. Isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent for the drafters must be avoided. Attention must be paid to the words used in the relevant provisions. The words used matter.[75]

New Zealand Coastal Policy Statement 2010

9.5 The NZCPS includes 6 objectives. In relation to the natural environment these are, in summary, to "safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems"; to preserve natural character; to recognise that protecting habitats of living marine resources contributes to social, economic, and cultural well-being.[76] In relation to use and development these are, in summary, to recognise that protection of the values of the coastal environment does not preclude development in appropriate places, forms and limits, and that functionally some uses need to be in the coastal environment.[77] In relation to Māori rights, responsibilities and values objective 3 is (emphasis added):

> To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:
> - recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
> - promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
> - incorporating mātauranga Māori into sustainable management practices; and
> - recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

9.6 The NZCPS includes 29 policies, or courses of action, for achieving its objectives. Those most relevant to this application are policies 2, 3, 6, 11, and 13.

9.7 Policy 2 is titled "The Treaty of Waitangi, tangata whenua and Māori". It directs decision-makers to do certain things "In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment". These include:

a. Recongising that "tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations".

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[73] *King Salmon* at [93].
[74] *Port Otago* at [65]-[66].
[75] *East-West Link* at [72], [79], [80], [167], [169].
[76] NZCPS objectives 1 and 2.
[77] NZCPS objective 6.

b. Taking into account relevant iwi or hapū resource management plans.

c. Provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment.

9.8 The CIA provided with the comments from Patuharakeke and Ngātiwai[78] explains why the application is inconsistent with the hapū resource management plan prepared by Patuahareke. As already outlined in these submissions, the statements of Mr Kerepeti-Edwards, Mr Milner, and Mr Nepua make it clear that granting the approvals for the McCallum Bros project would undermine and adversely impact the relationship of Patuharakeke and Ngātiwai with Te Ākau Bream Bay which they have fished for generations and continue to fish. Granting the approvals would also adversely impact their ability to meet their kaitiaki obligations within the Bay.

9.9 Policies 11 and 13 both relate to protection of the coastal environment. Policy 11 says that adverse effects on specific biodiversity-related values or areas must be avoided and on other values and areas significant adverse effects must be avoided. The first category includes a direction to "avoid adverse effects of activities on":[79]

a. "indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists"; and

b. "areas set aside for full or partial protection of indigenous biological diversity under other legislation".

9.10 The McCallum Bros project is contrary to both of these policies. As Dr Brough explains, the project is likely to result in loss of core habitat for both Bryde's whale and bottle nose dolphin which constitutes material harm to those species. Both are classified as Threatened in the New Zealand Threat Classification System[80] Te Ākau Bream Bay is set aside under the Fisheries Act for protection of tipa. Approving the application would enable an activity with identical effects to the fishing activities that the Fisheries Act protection was put in place to prevent.

9.11 The second category includes direction to "avoid significant adverse effects" on:[81]

a. "Indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification"; and

b. "habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes".

9.12 Again, the McCallum Bros project is contrary to both these policies. The benthic habitat underneath the proposed mining area is only found in the coastal environment, it includes habitat forming species like horse mussels, tipa, and corals, and the specific benthic conditions required for tipa to establish. These features

[78] Appendix 11.1, comments covering letter.
[79] NZCPS, Policy 11.1.1 and 11.1.6.
[80] Bottlenose dolphin is Threatened, Nationally Vulnerable. Bryde's whale is Threatened, Nationally Critical.
[81] NZCPS, Policy 11.2.3 and 11.2.4.

particularly vulnerable to modification and the McCallum Bros project would result in this habitat being modified and removed.[82] The information before the Panel demonstrates that Te Ākau Bream Bay is home to species (fish and marine mammals) that are important for customary fishing and also important taonga to be protected. The application would have a significant adverse effect on those habitats and thus on related cultural values, associations, and uses.

9.13 Policy 13 NZCPS says that to preserve the natural character of the coastal environment, significant adverse effects on natural character in areas not identified as outstanding must be avoided. The McCallum Bros project results in the extraction of a non-renewable sand resource and so will materially change the biophysical and geomorphological nature of the seabed within Te Ākau Bream Bay. In doing so, it changes the ecology, removing species and changing habitat. It also risks further degrading the natural character of the beach itself which is already accepted to be eroding.[83] The exact extent and nature of effects cannot be identified on the information provided with the application, but on their face, the effects that can be identified do not preserve the natural charter of the coastal environment of Te Ākau Bream Bay.

9.14 Policy 6 NZCPS which relates to activities in the coastal environment does not provide McCallum Bros with a way around the clear, specific directives in Polices 11 and 13 NZCPS. It provides no equally directive policy providing for seabed mining.

9.15 On the other hand, Policy 3 requires the Panel to take a cautious approach to the potential adverse effects of the McCallum Bros project and supports the protective approach required by Policies 11 and 13. The effects of the project on the coastline and on the seabed is uncertain but they are potentially significantly adverse in terms of erosion and irreversible long term change to coastal processes and benthic habitat.[84] Similarly, the precise effects on fish like snapper and tipa is uncertain. However, given the accumulative stressors on both these species, which have resulted in significant illness for snapper and significantly depleted stocks for tipa, adverse effects from the application have the potential to be significantly adverse.[85]

9.16 The McCallum Bros project is contrary to the objectives and policies of the NZCPS when read as a whole.

<u>Regional plan</u>

9.17 The regional plan has only recently been introduced and is the most up to date expression of how the NZCPS and Part 2 RMA are to be implemented in Te Tai Tokerau. It is therefore the focus of these submissions in terms of the regional planning documents.

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[82] See Appendix 6, comments covering letter regarding benthic environment and Appendix 5, comments covering letter regarding specific requirements needed for scallop establishment.
[83] See Appendix 8, comments covering letter.
[84] See Appendix 8, comments covering letter.
[85] See Appendix 5, comments covering letter.

9.18 Objectives are set out in Part F of the regional plan. In many respects these mirror the NZCPS and Part 2 RMA. For example, they include:

a. Safeguarding ecological integrity including protecting significant habitat (F.1.3).

b. "Tāngata whenua's kaitiaki role is recognised and provided for in decision making over natural and physical resources" (F.1.9)

9.19 In contrast to these strongly worded objectives, development in the coastal marine area is only "provided for in appropriate places and forms, and within appropriate limits." (F.1.8)

9.20 These objectives are implemented through polices:

a. Requiring consent applications to include an assessment of effects on Māori and taonga, specifically considering matters like impacts on taonga which Māori have a special relationship, adverse effects on indigenous biodiversity that will impact carrying out of cultural activities, and effects on customary fishing (D.1.1 and D.1.2). Where areas or values of importance are not mapped the regional plan does not provide guidance on effects management, so it is necessary to look to the NZCPS and Part 2 RMA.

b. Requiring avoidance of adverse effects in accordance with Policy 11 NZCPS (D.2.18) and a precautionary approach in relation to adverse effects on indigenous biodiversity, and more broadly in the coastal environment in accordance with Policy 3 NZCPS (D2.20).

c. Building on the Policy 11 by stating that activities causing underwater noise must "avoid adverse effects on marine mammals listed as threatened or at risk in the New Zealand Threat Classification System" (D5.27).

d. Stating that dredging and disturbance of the coastal marine area should not cause long-term erosion within the coastal marine area or on adjacent land (D.5.24).

9.21 The McCallum Bros project is contrary to these regional coastal plan objectives and policies for the same reasons it is contrary to the applicable NZCPS objectives and policies. The analysis above at paragraphs 9.5-9.16 is therefore applicable here.

9.22 The regional plan also includes provisions supporting use and development. However, the specific circumstances at play in this case mean those provisions speak against granting the application, not in favour of doing so.

9.23 In terms economic well-being and the benefits of activities the regional plan's goal is to manage the use and development of Northland's natural and physical resources "in a way that will improve the economic, social, and cultural well-being of Northland and its communities" (F.1.5). The McCallum Bros project will see no economic or social improvement for Northland, because all its benefits accrue in a different region; Northland only receives adverse impacts. Similarly, the project will not improve

cultural well-being, rather it will cause material harm to the well-being of Patuharakeke and Ngātiwai.

9.24 In a similar vein, the regional plan recognises that some specific dredging and disturbance activities may be necessary and may have benefits (D.5.25). However, those activities do not include commercial seabed mining.

9.25 The McCallum Bros project is also contrary to the relevant enabling provisions in the regional plan.

Project is contrary to Part 2 RMA

9.26 The Part 2 RMA provisions relevant under the FTAA are ss 5, 6, 7. Section 5(1) states the RMA's purpose "is to provide the sustainable management of natural and physical resources".

9.27 Sustainable Management is then defined as:

> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

9.28 The term "environment is broadly defined and includes not only "natural and physical resources"[86] but also "ecosystems and their constituent parts, including people and communities", "amenity values" [87] which include "cultural attributes", and "the social, economic, aesthetic, and cultural conditions which affect" the preceding 2 matters or which are affected by them.[88]

9.29 Sustainable management is therefore about much more than protecting the natural world - its ecosystems, flora, and fauna – although that is of course a critical component. It is also protecting cultural well-being, people and their culture, and cultural value and attributes, both now and also for future generations.

9.30 Section 5 "states a guiding principle which is intended to be applied by those performing functions under the RMA". The word "avoid" in (c) has its ordinary meaning of "not allowing" or "preventing the occurrence of". The word "while" means the definition should be read as an integrated whole: sub-paras (a), (b) and (c) means must be observed in the course of the management referred to in the opening

[86] Defined in RMA, s 2 as "includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".
[87] Defined in RMA, s 2 as "means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".
[88] RMA, s 2.

part of the definition (so "while" means "at the same time as"). The use of the words "protection" and "avoiding" contemplate that particular environments (places) may need to be protected from adverse effects in order to implement the policy of sustainable management. Sustainable management involves protection of the environment as well as its use and development.[89]

9.31 As Mr Milner and Mr Kerepeti-Edwards describe the well-being of Patuharakeke and Ngātiwai is intrinsically intertwined with the well-being of Te Ākau Bream Bay through whakapapa. The information demonstrates that the McCallum Bros project will or is likely to harm the Bay and its taonga inhabitants. Harm to the mauri and wairua of the Bay and its taonga also harms Patuharakeke and Ngātiwai. That harm is intensified because it reflects a breach of their kaitiaki obligation to protect Te Ākau Bream Bay both now and for the foreseeable future, and an erosion of tino rangatiratanga. Collectively these outcomes will have a significant adverse impact on the cultural well-being of Patuharakeke and Ngātiwai. In contrast, any economic or social benefits of the project are minimal, and they all accrue in a region that is different to where the harm is felt. The McCallum Bros project is not consistent with sustainable management.

9.32 Section 5 is elaborated on by ss 6 and 7 RMA.[90] Section 6 requires decision-makers to recognise and provide for identified matters of national importance. Where s 6 refers to protection from inappropriate development, "inappropriateness" is assessed by reference to what it is that is sought to be protected.[91] Of particular relevance in this case:

a. *Section 6(a): the preservation of the natural character of the coastal environment…and the protection of them from inappropriate subdivision, use, and development*

   The reasons why the McCallum Bros project does not preserve the natural character of the coastal environment are set out at paragraph 9.13 above.

b. *Section 6(c): the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*

   Te Ākau Bream Bay provides significant habitat for bottle nose dolphins and Bryde's whale.[92] It also provides significant habitat for tipa which are constrained in terms of the habitat in which they can establish.[93] The information before the Panel demonstrates that the McCallum Bros project will not keep those habitats safe from harm, injury, or damage.[94] It risks displacing

[89] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [158].
[90] *King Salmon* at [25].
[91] *King Salmon* at [101].
[92] See Appendix 7, comments covering letter. See also, Appendix 3 for mātauranga around use of the Bay by these species.
[93] See Appendix 5, comments covering letter.
[94] Being the meaning of protect as set out in *Royal Forest and Bird Protection Soc of NZ Inc v New Plymouth DC* [2015] NZEnvC 219.

marine mammals from the Bay and it results in the seabed being either removed or subject to immense physical impact.

c. *Section 6(e): the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga*

Only tangata whenua can identify and explain the nature of their relationship with their ancestral waters, including te moana.[95] The statements for Patuharakeke and Ngātiwai have outlined their relationship in detail; it is based on whakapapa and consists of intertwined rights and obligations of tino rangatiratanga and kaitiakitanga. Their reliance on the Bay for cultural uses and practices has been long established and continues to this day. Their commonly held view is that this application would significant adversely impact on those rights, obligations, uses, and values.

9.33 Section 7 identifies matters that the Panel must have particular regard to. Relevantly:

a. *Section 7(a): kaitiakitanga*

The statements for Patuharakeke and Ngātiwai show that they have, and continue to, undertake extensive activities to fulfil their kaitiaki obligations, and that this application would severely undermine their ability to do so on the future.

b. *Section 7(d): intrinsic values of ecosystems*

Intrinsic values, in relation to ecosystem, means:[96]

> those aspects of ecosystems and their constituent parts which have value in their own right, including—
> (a) their biological and genetic diversity; and
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience

An ecosystem is generally understood to be an inter-related group of living things in an area. The ecosystem within Te Ākau Bream Bay comprises numerous species, many of which are taonga. Some of those species appear to rely particularly on the Te Ākau Bream Bay ecosystem. For examples, aihe (bottlenose dolphins) are frequently present and appear to be resident. The scallop beds were once, before being over-fished, a critical source of tipa, and the Bay continues to have the substrate needed for them to re-establish. For Patuharakeke and Ngātiwai, all of the creatures residing in the Bay have intrinsic value, and a right to being able to continue to thrive. It is this view that underpins kaitiakitanga.

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[95] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.
[96] RMA, s 2,

c. *Section 7(f): the maintenance and enhancement of amenity values*

Amenity values include the cultural attributes of an area.[97] The cultural attributes of Te Ākau Bream Bay will not be maintained if the application is granted for the reasons already outlined, they will be degraded or lost.

d. *Section 7(g): any finite characteristics of natural and physical resources*

The sand resource in Te Ākau Bream Bay is a non-replenishing resource. The application does not address the extent and nature of this resource, and how much of it would be taken. It has also failed to consider the impact of its take alongside already consented takes. These are fundamental gaps in the application that mean the Panel cannot properly assess what the impacts of the application are on the seabed and thus on related habitats, species, and coastal processes.[98]

9.34 The McCallum Bros project is contrary to ss 5, 6, and 7 RMA, and to the applicable national and regional planning instruments. The approvals sought would inevitably be declined if sought under the standard RMA process. These adverse impacts must be weighed heavily in the Panel's proportionality assessment.

10. SECTION 85 ASSESSMENT AND WHY THE APPLICATION MUST BE DECLINED

10.1 Section 85 sets out when the Panel may or must decline an approval. There is no presumption the Panel should grant an approval.

Section 85(1) – approval must be decline

10.2 The Panel must decline an approval if it considers that if granted the approval would breach s 7 FTAA (regarding Treaty settlements and recognised customary rights).

10.3 Section 6 of these submissions explain why approval of the McCallum Bros proposal would be inconsistent with the Fisheries Settlement. Accordingly, s 85(1) requires the Panel to decline the application.

Section 85(3) – approval may, and in this case should, be declined

10.4 Paragraphs 4.14-4.16 explained that the Panel may decline an approval if 1 or more "adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits".

10.5 The proportionality assessment by Patuharakeke and Ngātiwai of the McCallum Bros project's benefits and adverse impacts, based on the information provided to the Panel, is set out below.

Benefits	
Economic benefit	No benefits at national scale.

[97] RMA, s 2
[98] See Appendix 8, comments covering letter.

	No benefit at regional scale for Te Tai Tokerau. Minimal benefit at regional scale for Tāmaki Makaurau.
Transport emissions benefit	No benefits at national scale at current time. No benefits at regional scale for Te Tai Tokerau or Tāmaki Makaurau at current time (rather a cost). Minimal potential benefit in future at national or regional scale (but could actually be a cost).
Factors reducing extent of benefits	
Other approvals needed	Significant uncertainty introduced regarding realisation of benefits.
Failure to confirm extent of resource	Significant uncertainty introduced regarding realisation of benefits.
Adverse impacts	
Te Tiriti	Very significant
Rangatiratanga and kaitiakitanga	Very significant
Cultural values, associations, practices	Very significant
Marine mammals	Significant
Fish and fisheries	Significant
Coastal processes and natural character	Potentially significant, major uncertainty in application
Benthic ecosystems	Significant
Te Tai Tokerau economy	Moderate
Inconsistency with directive RMA policy	Very significant
Inconsistency with Part 2 RMA including recognising and providing for matters of national importance under s 6 and promoting sustainable management under s 5	Very significant
All adverse impacts accrue to region where no benefits realised	Very significant

10.6 Based on this assessment, Patuharakeke and Ngātiwai say that, even if declining the application was not mandatory under s 85(1), the adverse impacts of the McCallum Bros proposal are sufficiently significant to be out of proportion to its benefits and require a decision by the Panel to decline the application.

Madeleine C Wright | Justine Inns

For Patuharakeke Te Iwi Trust Board and Ngātiwai Trust Board

Attachment A – Attorney-General submissions