

BEFORE THE PANEL

FTAA-2512-1163

UNDER THE

FAST TRACK APPROVALS ACT 2024 ("FTAA")

IN THE MATTER OF

a substantive application by the Port of Tauranga Limited, for resource consent and a wildlife approval associated with the Stella Passage Development Project listed in Schedule 2 of the FTAA

**NGĀ TAI KI MAUAO
RESPONSE TO MINUTE 7**

14 July 2026

JGH BARRISTER

**James Gardner-Hopkins
Barrister**

M: [REDACTED]

E: [REDACTED]

MAY IT PLEASE THE PANEL:

INTRODUCTION

1. This memorandum provides a response by Counsel for the parties collectively referred to herein as Ngā Tai ki Mauao to the requests for information/ submissions in respect of the following matters (paraphrased, as most relevant for Ngā Tai ki Mauao):
 - a. legal submissions that considers any condition(s) identified by the Applicant in Appendix 2 of its response to Minute 5 as *Augier* conditions are within the scope of allowable conditions under s108AA(1)(b) of the RMA (**Augier issue**);
 - b. targeted legal submissions addressing sections 7, 82 and 85(1)(b) of the FTAA (**Treaty settlements issue**), identifying:
 - i. The existing Treaty settlements, as defined in the FTAA.
 - ii. The relevant obligation(s) arising under those settlements.
 - iii. How a decision to grant the approvals would arguably be inconsistent with the obligation(s).
 - iv. Whether the settlement provides for the consideration of any document (as defined in s82(4)) when decisions are made under s104 of the RMA or s53 of the Wildlife Act 1953.
2. Counsel for Ngā Tai ki Mauao has also been asked to raise some practical questions with the Panel in respect of this process.
3. In addition, while the Treaty settlements issue is raised by the Panel chronologically after the *Augier* issue, Ngā Tai ki Mauao wishes to address the Panel, at least in these submissions first on the Treaty settlements issue. Ngā Tai ki Mauao considers that the cultural issues, including the Treaty settlements issue, are critical (although the *Augier* issue does also relate to what cultural conditions can be imposed by the Panel (rather than just offered by POTL – ie on the basis that they can't be amended further or otherwise strengthened by the Panel).
4. It also needs to be confirmed that Ngā Tai ki Mauao, like most of the other tangata whenua and/ or mana whenua participants, are fundamentally opposed to POTL's Stella Passage proposal. They have seen little change in attitude or approach from that which POTL was chastised for in the 2011 Dredging decision,¹ and, to a large extent in the 2023 First Interim Direct Referral decision of the Environment Court on what is essentially the same Stella Passage project as now sought by POTL before this Panel.²
5. Ngā Tai ki Mauao (and others) consider subsequent changes from Direct Referred project before the Environment Court to this Panel as minor and cosmetic (including as to proposed mitigation), as well as consultation through this part of current (re-lodged) Panel process to have been "tick the box" and/ or "lip service" consultation. While it is for POTL to make its

¹ *Te Runanga O Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402.

² *Port of Tauranga* [2023] NZEnvC 270.

decisions on litigation strategy, it is hard to see how POTL can complain about delays in advancing its FTAA processes, when it would have been much quicker (and less of a process imposition on participants) to simply complete the Environment Court Direct Referral process.

6. Finally, by way of introduction, Ngā Tai ki Mauao intends to call/ co-ordinate the following witnesses to be heard at the hearing as follows (listed in intended order of presenting on day:
 - a. Charlie Tawhiao;
 - b. Nessie Kuka;
 - c. Jason Murray;
 - d. Brendon Taingahue;
 - e. Pia Bennett; and
 - f. Rahera Ohia or Areta Gray (depending on availability).
7. In terms of timing of appearances, Ngā Tai ki Mauao has been liaising with Whareroa Marae/ Ngāti Kuku, and have agreed, if possible, for Ngā Tai ki Mauao to follow Whareroa Marae/ Ngāti Kuku in terms of order.
8. As for timing, the Panel has indicated that it anticipates each participant having one hour to present. For clarification, it would assist if the Panel could indicate whether:
 - a. this is to include questions from the Panel, or if questions might be additional (as otherwise 3-days seems like it would not all be used up); and
 - b. the Panel has a preference for hearing mostly from the cultural witnesses, with Counsel having less time allocated, in part because they will have filed their submissions in advance, but also are it is most important (in Ngā Tai ki Mauao's opinion) to maximise the ability for the Panel to hear from the witnesses themselves.

SECTIONS 7, 82 AND 85(1)(B) OF THE FTAA

Statutory provisions

9. Section 7 provides (as is most relevant):

7 Obligation relating to Treaty settlements and recognised customary rights

- (1) All persons performing and exercising functions, powers, and duties under this Act must act in a manner that is consistent with—
 - (a) the obligations arising under existing Treaty settlements; and
 -
- (2) To avoid doubt, subsection (1) does not apply to a court or a person exercising a judicial power or performing a judicial function or duty.

- (3) In this section, existing Treaty settlements means Treaty settlements that exist at the time the relevant function, power, or duty is performed or exercised (rather than only those that exist at the commencement of this Act).

10. Section 82(2) and (3) also state:

82 Effect of Treaty settlements and other obligations on decision making

...

- (2) If the settlement or Act provides for the consideration of any document, the panel must give the document the same or equivalent effect through the panel's decision making as it would have under any relevant specified Act.
- (3) The panel must also consider whether granting the approval would comply with section 7.

11. Noting also that "Treaty settlement" means:

- (a) a Treaty settlement Act; or
- (b) a Treaty settlement deed

12. It should also be noted that the term "Treaty settlement" does not give greater weight or preference to an Act over a Deed, in the scheme of s7 of the FTAA.

13. Section 85(1B) further reinforces the importance of s7, stating:

85(1B) When panel must or may decline approvals

When approval must be declined

- (1) The panel must decline an approval if 1 or more of the following apply:
...
- (b) the panel considers that granting the approval would breach section 7:

Taranaki VTR decision

14. The importance of the above sections are recorded in the draft decision of the Taranaki VTR decision at [1826]-[1827] (emphasis added):

The Panel treats s 82 as important for two related reasons. **First, it prevents settlement instruments (and the obligations therein) from being treated as background context only where, under the relevant specified Act [or deed], they are intended to have real and practical effect.** Second, it informs what kinds of measures could realistically avoid or remedy any inconsistency. **Where a settlement instrument is intended to operate in a durable and practical way, the Panel must be satisfied that approval, including any conditions, would preserve that practical operation. Where the Panel is not so satisfied, the FTAA requires that approval be declined.**

In applying s 7, the Panel has considered whether approval would materially undermine the intended practical operation and integrity of Treaty settlement obligations. The Panel also recognises that Treaty settlement instruments frequently implement tikanga through relationship and participation structures (including protocols, agreed engagement pathways, recognition of kaitiakitanga

responsibilities, and provisions directed to taonga species and customary practice). ...

15. I note that Ngā Tai ki Mauao's tikanga and post-settlement expectations would also include "enjoyment" of Treaty settlement obligations, ie it must be asked whether "approval would materially undermine the intended practical operation and integrity **and enjoyment** of Treaty settlement obligations". This is in the sense of being able to enjoy the fruits of settlement of past grievances and enjoy the re-recognition of kaitiakitanga responsibilities and of Te Awanui as a taonga.
16. And at [1831]-[1833] (emphasis added, which also picks up on the "enjoyment of the settlement outcomes" issue identified above):

The settlement frameworks below reflect the intention to restore, in a modern statutory form, aspects of rangatiratanga, kaitiakitanga, and economic participation that were lost or constrained. That intention informs how settlement obligations are to be understood and applied in this decision, including whether approval would preserve the practical operation of settlement recognised instruments.

In assessing consistency with Treaty settlements, the Panel has looked at both the language of the legislation and settlement instrument and how those settlement instruments are intended to work in practice. Where a settlement instrument is designed to enable iwi to access, use, or care for marine areas and resources over time, the Panel has considered whether approval of the project would materially interfere with that ability. **Interference may arise where the project's effects would limit access, displace customary activity, or introduce ongoing uncertainty of a kind or scale that materially undermines the ability of settlement beneficiaries to exercise their settlement-recognised roles and responsibilities in practice and over time.**

Applying that approach, the Panel identifies several settlement instruments that are engaged by the project and that, on the findings discussed below, raise a real question as to whether they could continue to operate with practical integrity if approval were granted. In summary:

...

- (b) Settlement instruments that provide for active stewardship, management, or use of affected marine areas: **where** the project's effects materially constrain the practical exercise of those instruments, even in the absence of permanent physical exclusion, such that **the instruments cannot operate in the manner contemplated by the settlement, the Panel considers approval would be inconsistent.**

17. In terms of a test as to what amounts to being "inconsistent" the Taranaki VTR Panel appeared to equate that with preserving "the practical operation and integrity of the affected settlement instruments", stating at [1899]:

... It is open to the Panel to set conditions to recognise or protect a relevant Treaty settlement. However, **the proposed conditions framework and post-consent processes presented by the applicant would not preserve the practical operation and integrity of the affected settlement instruments and the Panel has not identified alternative conditions that would achieve Treaty settlement consistency.**

Application to the Stella Passage project

18. In very simple terms, POTL has not done enough to ensure that its Stella Passage project will preserve the practical operation and integrity of the

relevant settlement instruments – including through conditions (*Augier* or otherwise; see below section). Consent must therefore be declined.

19. As Charlie Tawhiao records at his [6], there are two relevant Treaty settlements for Ngāi te Rangi:
 - (a) the Ngāi Te Rangi & Nga Potiki Deed of Settlement; and
 - (b) the Tauranga Moana Iwi Collective Deed of Settlement.
20. Both include apologies to Ngāi Te Rangi that are an integral part of the Treaty settlement.
21. As Mr Tawhiao states, the Treaty settlements “provide relevant context for understanding the obligations engaged by section 7, particularly where a proposal concerns the harbour, cumulative effects, and the practical exercise of rangatiratanga and kaitiakitanga”.³

Ngāi Te Rangi & Nga Potiki Deed of Settlement

22. As most relevant:
 - a. the Ngāi Te Rangi settlement expressly identifies Port development as part of the historical environmental harm, with cl 3.18 recording the Crown's acknowledgement:
 - 3.18.1 the significance of the ... harbours, and waterways of Tauranga Moana to Ngai Te Rangi and Nga Potiki as a physical and spiritual resource; and
 - 3.18.2 that the development of the Port of Tauranga, ... have resulted in the environmental degradation of Tauranga Moana and reduction of biodiversity and food resources which remain a source of great distress to Ngai Te Rangi and Nga Potiki.
 - b. The apology recognises rangatiratanga and practical participation:
 - 3.20 The Crown unreservedly apologises for not having fulfilled its obligations to Ngai Te Rangi and Nga Potiki under te Tiriti o Waitangi/the Treaty of Waitangi and for having shown disrespect for the mana and rangatiratanga of Ngai Te Rangi and Nga Potiki.
 - c. The apology then says that the settlement is intended to:
 - 3.25 ... address the wrongs of the past and to create a new platform from which to establish a relationship with Ngai Te Rangi and Nga Potiki, a relationship based on mutual respect and cooperation as was originally envisaged by the Treaty of Waitangi.
 - d. The Ngāi Te Rangi settlement purpose is relational and forward-looking, not merely compensatory:
 - 4.1.3: the settlement is intended to enhance the ongoing relationship between Ngai Te Rangi and Nga Potiki and the Crown (in terms of the Treaty of Waitangi, its principles, and otherwise).

³ Tawhiao at [17].

23. The April 2016 Deed of Amendment also emphasised the importance of the Tauranga Moana Framework (**Framework**) in the Tauranga Moana Iwi Collective Deed (**TIMIC Deed**). I turn to the TIMIC Deed next.

Tauranga Moana Iwi Collective Deed of Settlement

24. As most relevant:

- a. Clause 2.2 states (emphasis added):

Tauranga Moana iwi belong to the landscapes in which their whakapapa embeds them. Their ancestral landscapes are those places made sacred by the lives and deaths of their ancestors. These landscapes include natural features such as ... harbours and estuaries; and cultural features such as pa, kainga, mahinga kai and wahi tapu. The ancestral landscape defines the relationship between Tauranga Moana iwi and the natural environment; it is, quite literally, the embodiment of their cultural heritage. The state of their ancestral landscapes is inextricably linked to the spiritual, emotional, physical and social wellbeing of the people of the Tauranga Moana iwi and is expressed through the ethic and practise of kaitiakitanga. **The health and wellbeing of the Moana has a direct correlation to the iwi of Tauranga. If the Moana is unwell then its people are unwell. As kaitiaki, there is an obligation upon Tauranga Moana iwi to protect, enhance and restore the Moana to full health and wellbeing for all current and future generations.**

- b. Clause 2.11 and cl 2.11.1(a) in particular were intended to establish a statutory committee called the Tauranga Moana Governance Group, with cl 2.11.1(b) to provide for the preparation, review, amendment and adoption of a Tauranga Moana framework document - Ngā Tai ki Mauao [note this is a framework document, rather than the hapū collective of a similar name, who are an “umbrella” participant in this Panel process].
- c. Part 3 of the Legislative Matters Schedule to the Collective Deed provides that the collective legislation would require the Bay of Plenty Regional Council, when preparing, reviewing, varying, or changing the Bay of Plenty regional policy statement, to recognise and provide for Ngā Tai ki Mauao,⁴ including that the relevant contents relate to resource management issues within the scope of the regional policy statement and that compliance is the most appropriate way of achieving the purpose of the RMA.⁵ Compliance must also be necessary for achieving Treaty settlement consistency.
- d. The Framework was also intended to have a direct interim consent function. Until the RPS obligation had been complied with, a consent authority processing or deciding a resource consent within the relevant Framework areas would be required to have regard to Ngā Tai ki Mauao, subject again to the stipulated statutory qualifications.⁶

⁴ Subject to the qualifications in para 3.16.2

⁵ Tauranga Moana Iwi Collective Deed (21 January 2015), cl 2.11.1(b); Tauranga Moana Iwi Collective Deed: Legislative Matters Schedule (21 January 2015), pt 3, paras 3.16.1–3.16.2.

⁶ Tauranga Moana Iwi Collective Deed: Legislative Matters Schedule (21 January 2015), pt 3, para 3.16.3.

- e. The agreed architecture shows that it was specifically designed to influence:
 - i. the strategic policy framework against which RPS/planning framework, consent decisions, local government decisions, specified enactments, and activities affecting Tauranga Moana - ie major projects such as Stella Passage - are assessed;
 - ii. resource consent decision-making before the strategic policy framework had caught up;⁷
 - iii. other statutory decisions affecting the Moana;⁸ and
 - iv. the broader integrated management of activities within the catchment affecting the Moana.⁹
- f. The settlement promised Ngāi Te Rangi and the other Tauranga Moana iwi an institutional role in establishing, before or as part of the ongoing management system, the strategic direction for restoration, protection and sustainable management of the Moana. Approval of Stella Passage now risks making one of the most consequential long-term decisions affecting the Moana outside that promised architecture and before it can operate.¹⁰
- g. The prejudice is therefore not merely procedural. It has substantive dimensions.
- h. Should the Stella Passage consent be granted:
 - i. the physical and operational baseline against which future management occurs changes;¹¹
 - ii. the authorised envelope of dredging, reclamation and Port activity becomes an entrenched part of the future environment;
 - iii. the Framework's future restoration objectives will have to accommodate those authorised activities;
 - iv. future plan and policy choices may be constrained by an existing consented activity and major infrastructure investment;
 - v. monitoring and adaptive management may become focused on managing the Project's effects rather than deciding whether the relevant environmental risk should have been accepted in the first place; and

⁷ Ibid, paras 3.16.1–3.16.3 and 3.17.

⁸ Ibid, paras 3.18–3.20.

⁹ Ibid, paras 3.3–3.4.

¹⁰ Stella Passage s 18 report at [6] and [48]–[53]; Legislative Matters Schedule, pt 3, paras 3.3–3.4.

¹¹ Ibid.

- vi. the Governance Group cannot retrospectively exercise the strategic influence over the approval decision that the settlement architecture contemplated;¹² and
 - vii. rangatiratanga and/or kaitiakitanga cannot be freely exercised or expressed, but rather would be 'subject to' activities that underscore the original grievances to which the tribes settlements' were intended to repair or remedy.
- i. This is the practical impairment equated with "inconsistent" in the Taranaki VTN draft decision.

SECTION 108AA(1)(B) v *AUGIER* CONDITIONS

25. It has always been the case that conditions to avoid, remedy, mitigate, and, more recently offset, can be required by a consent authority as a condition of consent, and that there is significant flexibility as to whether those measures may comprise:

- g. the undertaking of specific works or mitigation projects; or
- h. the facilitation of such works by the establishment of a fund.

26. This is despite the fact that (b) above might look superficially like a financial contribution. Even if such a fund were to be a financial contribution, that does not necessarily mean it cannot be imposed (ie it does not have to be volunteered as an *Augier* condition).

27. The bounds of RMA conditions were previously governed by the *Newbury* principles.

28. They are now constrained, at least in part, by section 108AA(1)(b)(i) which requires conditions to be "directly connected" to an adverse effect of the activity on the environment. This reflects, and as one authority suggests might "arguably strengthen", the requirement to be "logically connected" under the Supreme Court in *Estate Homes*:

... We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not for example relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

29. As is most relevant section 108AA provides:

108AA Requirements for conditions of resource consents

- (1) A consent authority must not include a condition in a resource consent for an activity unless—

¹² Stella Passage s 18 report at [11], [48]–[53].

- (a) the applicant for the resource consent agrees to the condition; or
 - (b) the condition is directly connected to 1 or more of the following:
 - (i) an adverse effect of the activity on the environment;
 - (ii) an applicable district or regional rule, or a national environmental standard;
 - ...
 - (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
- (2) Subsection (1) does not limit this Act or regulations made under it.
- ...
- (4) For the purpose of this section, a district or regional rule or a national environmental standard is applicable if the application of that rule or standard to the activity is the reason, or one of the reasons, that a resource consent is required for the activity.
- (5) Nothing in this section affects section 108(2)(a) (which enables a resource consent to include a condition requiring a financial contribution).

30. A few initial points can be immediately made:

- a. the requirement for a condition to be directly connected to an adverse effect of the activity on the environment is a wide requirement;
- b. so too is the requirement for a condition to be directly connected to an applicable rule, which is widely cast in this case when it comes to cultural matters (despite being restricted discretionary), as follows:
 - i. Maintenance Dredging Activities: PZ 5(g) Site specific historical or cultural values under ss 6(e) or 7(a) of the RMA;
 - ii. Buildings and Structures in the Port Zone: PZ 8(o) Site specific historical or cultural values under ss 6(e) or 7(a) of the RMA;
 - iii. Specified Dredging Activities: PZ 10(g) Site specific historical or cultural values under ss 6(e) or 7(a) of the RMA;
 - iv. Specified Reclamations: PZ 11(f) Site specific historical or cultural values under ss 6(e) or 7(a) of the RMA;
- c. the impact or effect of subsection (2) is somewhat difficult to understand – how is s108AA(1) not intended to be a constraint, for example?;

- d. financial contribution conditions – if that is what any of the proposed (or imposed) conditions amount to – are not affected by s108AA(1)-(4).
- 31. In respect of a condition being directly connected to an adverse effect of the activity on the environment:
 - a. “Environment” is widely defined to include (emphasis added):
 - (a) **ecosystems** and their constituent parts, including **people and communities**; and
 - (b) **all natural** and physical **resources**; and
 - (c) **amenity values**; and
 - (d) **the** social, economic, aesthetic, and **cultural conditions which affect the matters stated** in paragraphs (a) to (c) **or which are affected by those matters**.
- 32. Accordingly:
 - a. people and communities associated with and connected to Te Awanui, such as the members of Ngā Tai ki Mauao, are part of the environment – effects on them are effects on the environment; and
 - b. the cultural conditions (ie cultural values, tikanga) which affect those people, or are affected by other aspects of the environment (such as the proposed Stella Passage works and activities) are also part of the environment, and effects on them are therefore effects on the environment. In respect of the latter, for example, an effect of the Stella Passage works and activities on an important cultural condition (or value) is an effect on the environment as defined in the Act.
 - c. The cultural conditions or values, tikanga, which affect members of Ngā Tai ki Mauao include:
 - i. Whakapapa, their interconnectedness with their ancestors, and their ancestral lands, which is their identity and sense of belonging.
 - ii. Kaitiakitanga and being kaitiaki of the land, water, and all living things, again emphasising the interconnectedness between humans and the natural world.
 - iii. Wairua, and mauri, the spiritual essence or soul that exists within all things. These spiritual matters exist independently of any biophysical effect.
 - iv. Utu, in the sense of balance and reciprocity in relationships and interactions, and the environment. It is about restoring equilibrium when harm has been done.
 - v. Taonga species, associated with ancestral connections and having spiritual meaning.

- vi. Their history, including the extent to which they have been dislocated from the wider whenua and moana, and past reclamations of Te Awanui, which intensifies the cultural values that attach to what still remains of Te Awanui.
 - vii. The taiao, the environment, encompassing both the natural world (land, water, air, flora, and fauna) and its spiritual essence, which sadly presents as a degraded and fragile state – now sick rather than healthy as remembered and passed on in recent history.
 - viii. Maemae and whakamā, arising from being unable to fulfil kaitiakitanga duties and protect the wairua and mauri of te taiao. It is deeply hurtful and shameful to be unable to prevent the continued abuse of Te Awanui, with which there are such strong whakapapa relationships.
 - ix. The cultural environment includes both tangible and intangible, both physical and metaphysical or spiritual concepts with both being highly relevant and valid. Tangata whenua also consider cultural effects on a continuum from past generations to future generations. A proposed activity's effects cannot be considered in isolation from the history of disconnection and harm suffered as a result of colonisation, confiscation, reclamation, development and pollution.
 - x. All of the above reinforces Ngā Tai ki Mauao's position that there can be no "hard bar", particularly in the context of impacts on cultural values, against consideration of whether, and, if so, to what extent, the Panel can require POTL to improve the cultural environment as part of allowing POTL to create further adverse cultural effects through the granting of consent.
33. As Counsel understands it, anything other than compensation (putting aside financial contributions, at this point), would fall within the categories of "avoid, remedy, mitigate" or "offset", the latter being considered a type of remediation or mitigation.
34. However, in the ecological context (eg the replacement of wetlands in a slightly different location onsite), the ecologists often appear to take the view that remediation can only occur "at the point of impact", in reliance on *Royal Forest and Bird Protection Society of New Zealand v Buller District Council and West Coast Regional Council and others* [2013] NZHC 1346. Given the difference between cultural and ecological impacts (while noting that the latter may inform the former), it may not be necessary to fully resolve "what" "type of a condition" a condition should be cast as (ie remediation, mitigation or offset). However, it is noted:
- e. In the [2013] RF&B case, that the "offset mitigation" (as it was termed then) in question was all outside the site to be mined.
 - f. In a more recent case, *Royal Forest and Bird Protection Society of New Zealand Incorporated v West Coast Regional Council and Buller District Council* [2023] NZEnvC 68, the Environment Court has said at [144] (emphasis added):

New Zealand guidance on offsetting is derived from the Business and Biodiversity Offsets Programme (BBOP) which explains that **mitigation addresses effects at the point of impact**, whereas **biodiversity offsetting seeks to** address the residual effects on biodiversity at one site by **improving the state of biodiversity at another site**.

- g. So, while the term “point of impact” used in the [2013] *RF&B* case, it appears to be used interchangeably with “site” in the circumstances of that case. This approach is appropriate, particularly given the guidance in the authorities that effects should be assessed “as a whole”, taking into account remediation, and in a “realistic and holistic way. For example:
 - i. It is a longstanding principle that effects are to be considered “as a whole, in light of the mitigating influence of the proposed conditions”, eg refer *Calveley v Kaipara District Council* [2014] NZEnvC 182 at [139], citing *Bethwaite and Church Property Trustees v Christchurch City Council* C085/93; and *Stokes v Christchurch City Council* [1999] NZRMA 409;
 - ii. Of particular relevance here, the Environment Court in *Stokes* said at p434 (emphasis added): “The test is whether the adverse effects as proposed to be remedied and/or mitigated, and **taken as a whole**, are more than minor”. (While noting that “more than minor” is not the test under the FTAA).

The thrust of the proposed cultural conditions and POTL’s view on them

- 35. The broad issue is whether the Environment Court can require the consent holder to remedy, mitigate, or offset past and current (or continuing) effects on cultural matters, as part of the grant of consent for Stella Passage. In a nutshell:
 - h. Ngā Tai ki Mauao says that there is no jurisdictional barrier that prevents the Environment Court from requiring the Respondent to improve the cultural environment as part of allowing the Respondent to create further adverse cultural effects through granting consent.
 - i. Ngā Tai ki Mauao uses the analogy of an overallocated water catchment. In that instance, while a consent applicant might consider their additional take to have limited effects that can be managed or mitigated in some way so as to address their effects (and solely their effects), they are still not entitled to consent. They must wait until the catchment is no longer allocated, or otherwise ensure that the catchment is no longer overallocated (for example by acquiring water rights and retiring their use), before they can then take the water they want for their activity.
 - j. There is no reason to treat cultural effects any differently. Tangata whenua have endured an enormity of effects on their cultural values, their relationships with their ancestral lands and waters, their ability to exercise of kaitiakitanga, as well as breaches of the principles of Te Tiriti. Tangata whenua should not be forced to endure yet further effects on these cultural matters (ie cultural impacts are significantly “overallocated”). The only way forward for

POTL is if they contribute meaningfully to restoring and repairing at least some of the past and current effects on these cultural matters (which the Respondent undoubtedly contributed to), before they can be allowed to create further adverse effects. At the very least, to put it colloquially, the Panel should not be precluded from considering to what extent an applicant might need to do some good, before it can do more bad.

- k. This is reinforced by the cultural dimension within the definition of environment, which is what the Panel was required to consider when assessing the effects of the Stella Passage project in respect of section 104(1)(a) of the RMA, which forms part of the decision-making framework under cl 17 of sch 5 of the FTAA. More specific to the FTAA, is that cultural effects are “adverse impacts” that need to be considered against the regional and national benefits.
36. POTL says its strategic relationship meeting and relationship agreements are not connected to the effects of the development and so are *Augier* conditions. Liaison Groups and Relationship Agreements including with tangata whenua are common, and provided they have at least some connection with the effects of the proposal, they do not have to be *Augier* conditions. In particular, the strategic relationship purpose includes addressing both dredging and structures consents, and while the Relationship Agreements can include “matters which are outside the scope of, or are not covered by, this resource consent” they will clearly also include matters within scope, ie are directly related to the effects of the proposal.
 37. While relationship matters unrelated to the current proposal could be separated out into stand-alone *Augier* conditions, that would seem somewhat artificial and unnecessary. This is particularly the case when significant adverse cultural effects relating to the proposal are about process and cumulative effects.
 38. In many other cases, POTL seeks to separate out the funding commitment in a particular condition (eg Mātauranga Māori State of the Environment report, Mātauranga Monitoring Plan, the Restoration Fund, the Pou or other structures, Whareroa Marae infrastructure, Avifauna habitat enhancement fund), from the condition being a response to a cultural effect or potential cumulative cultural effect. This makes little or no sense – as if there was no funding commitment, then the response to a cultural effect or potential cumulative cultural effect would have no “teeth” or ability to get traction, or otherwise provide any mitigation, restoration, or offset, as there would be no funding for it. How can (say) a Restoration Fund condition operate at all if there is no funding?
 39. In a limited number of other cases, POTL says conditions are *Augier* and do not respond directly to any project effect (eg Whareroa health and wellbeing assessment, Independent discharges audit, Land-use policy adjacent to Whareroa Marae, Education and Research scholarship fund) or are outside the scope of section 108, Biosecurity programme contribution). In respect of the latter, it would seem odd if no biosecurity funding conditions could ever be imposed, given the increased risk of biosecurity effects that arise from new structures and increased vessel movements. In respect of the other matters, they each could be categorised as responding to a cultural effect or potential cumulative cultural effect – including restoration of a past cultural effect.

40. If the financial component had to be categorised as a financial contribution, the next section addresses that categorisation in greater detail.

Financial contributions

41. It was noted above that section 108AA(1)(4) does not impact on financial contributions under section 108(2)(a), which provides:

- (2) A resource consent may include any 1 or more of the following conditions:
- (a) subject to subsection (10), a condition requiring that a financial contribution be made:

42. Subsection 10 states:

- (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—
- (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
- (b) the level of contribution is determined in the manner described in the plan or proposed plan.

43. The provisions of the RCEP relating to financial contributions are contained in Schedule 11. Para [3] of Schedule 11 records:

... Financial contributions will not automatically be applied to any activity where a resource consent is required. Financial contributions are available to remedy, mitigate or offset the adverse effects on natural and physical resources that cannot otherwise be avoided, remedied or mitigated. Section 108(10)(a) of the RMA states that a financial contribution may be for the purposes specified in the plan, including the purpose of ensuring positive effects on the environment to offset any adverse effect.

44. Para [3A] further records:

If adverse effects can be appropriately avoided, remedied, mitigated, or, offset, and this is identified in a resource consent application, then financial contributions will not be required. However, the Regional Council may require financial contributions or a contractual agreement if mitigation or offsetting is dependent on a third party.

45. Table 1 then sets out the circumstances and purposes of financial contributions. The following are most relevant:

	Circumstances	Purpose
1.	Protecting Aquatic Habitats of Indigenous Species Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on any ecosystem values (aquatic habitats of indigenous fish species and spawning areas).	To restore or enhance aquatic habitats at the site, or to provide an offset or environmental compensation by restoring or enhancing aquatic habitat characteristics at another suitable location where avoiding, remedying or mitigating adverse effects at the site is not practicable or effective.

	Circumstances	Purpose
		To provide for research and/or protection to enhance marine habitats.
3A.	Protection of water quality for public use and kaimoana gathering Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on public use of the CMA or on kaimoana and related ecosystems.	To provide on-site mitigation or remediation measures, or works in other areas to mitigate or offset the effects of the discharges.
4.	Protection, Restoration or Enhancement of beds or margins of harbours and estuaries Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on the bed or margins of a harbour or estuary.	To mitigate or offset the adverse effects of the activity by protecting, restoring or enhancing harbour or estuary beds and margins, including, but not limited to, maintenance and planting of vegetation, sediment replenishment, erosion protection works, fencing, and including contribution to such measures elsewhere in the same general locality.
5A.	Exclusive occupation of space	To enhance public access or facilities in another similar location.
6.	General Works Where the activity for which a resource consent is granted will cause or contribute to adverse effects on the environment which will not be adequately mitigated by any of the types of contribution described elsewhere in this section.	To provide works for the purpose of offsetting the adverse effects of the activity, including protecting, restoring or enhancing natural and physical resources elsewhere in the same general locality.

46. It is submitted that there is ample scope to require financial contributions in respect of the proposal for all the above purposes.

47. In respect of the amount of contribution, the RCEP states:¹³

- a. The amount of financial contribution must be an amount determined on a case-by-case basis by the Bay of Plenty Regional Council to be fair and reasonable. The amount must not exceed the reasonable cost of funding positive environmental effects required to offset the net adverse effects caused directly by the activity.
- b. The RCEP further states various matters to be considered for financial contributions. These include:¹⁴
 - i. Financial contributions must be used to avoid, remedy, or mitigate or offset adverse effects of the same type as those caused or potentially caused by the activity for which consent is sought.

¹³ Page 407, para [1].

¹⁴ Page 408, para [1].

- ii. Preference shall be given to the use of financial contributions at, or close to, the site of the activity for which consent is sought. This shall not prevent the use of financial contributions at other locations when appropriate or agreed between parties to the application.
 - iii. Preference will generally be for a financial contribution of money, except where land may be more appropriate.
48. While the financial contribution provisions of the RCEP are flexible, and, perhaps unusually, do not provide a set formula, they provide a qualitative basis for the assessment of contributions and are not on their face unlawful. The Panel would not be “going out on a limb” if it relied on the financial contribution provisions to require financial contributions, by way of money or land (or a combination of both) – outside any *Augier* requirement under POTL’s sole control.
49. In addition, the financial contribution provisions do not themselves limit any contribution to being made only to the Regional Council (other than perhaps, in relation to land¹⁵). In terms of jurisdiction, it does seem to be open under the Act for financial contributions to be paid to third parties, for example refer: *Transit New Zealand v Southland District Council* [2008] NZRMA 379 at [51]:

Mr Chapman submitted that the wording of the section was so wide that it must include a payment of money or land, howsoever arising. In other words, it must include any financial contribution relating to a third party such as Transit. We agree that the only sensible interpretation of this provision must be that it relates to any financial condition, no matter who the beneficiary is. ...

50. The context of this was, however a discussion about including such provisions in a district plan, which had not occurred, with the Court stating:

... financial contributions in relation to Transit assets are not included in the plan. This is probably based upon an expectation by all participants that funding for matters of national importance (that is, State Highways) would be provided from specific government sources

51. In any event – given the past experiences with bespoke “vehicles” for the management of funds intended to mitigate or offset effects – it may actually be more appropriate for the Regional Council to hold and administer any financial contributions (including land) on trust for their intended purpose.
52. Alternatively, section 111 appears to allow some latitude for a council to apply financial contributions to third party funds, stating:

111 Use of financial contributions

Where a consent authority has received a cash contribution under section 108(2)(a), the authority shall deal with that money in reasonable accordance with the purposes for which the money was received.

Summary of position

53. It is submitted that the effects of the proposal on cultural values are such that:

¹⁵

Page 409, para (d).

- a. POTL's proposed cultural mitigation package does not sufficiently avoid, remedy, or mitigate or offset those cultural effects;
- b. The Court can impose any conditions of consent to expand or otherwise modify that cultural mitigation package – to the extent necessary to ensure that the cultural effects are sufficiently avoid, remedy, or mitigate or offset those cultural effects.
- c. This could include the establishment of separate cultural mitigation funds for the various groupings, or the requirement to undertake the specific projects identified by any of those groupings. It could also impose a financial contribution condition to achieve these same outcomes.
- d. Significantly, the financial contribution provisions provide significant flexibility to require POTL to transfer land, if needed to address adverse effects of the proposal.

Final fallback – *Augier* conditions/ conditions agreed by POTL

- 54. Section 108AA(1)(a) allows a consent authority to impose any condition if the applicant (ie POTL) agrees to the condition of the consent. This could be seen as a codification of the *Augier* principle, by which parties to environmental proceedings may be held to their undertakings given in the course of those proceedings. The *Augier* principle has been described as being concerned with “specific undertakings” or “specific representations” made as a foundation for orders of the Environment Court., and that “great care is required ... in the application of the principle lest it be extended beyond its proper role”.
- 55. In fact, section 108AA(1)(a) may be a simplification of the *Augier* principle. In terms of an applicant “agreeing” to conditions, section 104(1)(ab) also states, in terms of matters for a consent authority to take into account:

any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;
- 56. Recent examples of the importance of *Augier* and compensation conditions include *Meridian Energy Ltd v Canterbury Regional Council* [2026] NZEnvC 140, whereby the Environment Court granted replacement consents for the Waitaki Power Scheme. The unavoidable adverse effects were addressed through an Indigenous Biodiversity Enhancement Programme (IBEP) involving substantial financial payments and works with the Department of Conservation and mana whenua.
- 57. The Environment Court held that the IBEP “can only be proffered on an *Augier* basis”, and characterised the package as:

... effectively a funding package more properly classified as compensation for the ongoing adverse effects of the WPS.
- 58. The proffered financial condition was:

The consent holder's contribution to the IBEP must have a minimum annual value of \$2.01M, CPI (all groups) adjusted from 1 July 2025.

59. While the actual amount over time will depend on the CPI adjustment, this essentially equates to some \$70.35 million in 2025 dollars.
60. Clearly, this is no small amount.
61. The Haldon Panel under the FTAA expressly adopted that analysis in the Haldon Solar Farm draft decision, released on 26 June 2026.
62. The Haldon Solar Farm application originally lacked an adequate offset or compensation response. The Panel records that the applicant offered a number of compensation conditions, following Requests for Information from the Panel, as including:
- ... a million dollar payment to the Department of Conservation to assist the black stilt/kakī breeding programme, a covenanted 180 ha Compensation Area, and four additional enhancement areas, as well as long term ecological management.
63. This followed concerns expressed by that Panel in an earlier minute that:
- ... the adverse effects on the ecology of the site might be unacceptably high and at risk of outweighing the benefits of the project, even taking into account the proposed effects management measures.
64. Most importantly, the Panel expressly states at [53] of its draft decision:
- The Panel has considered and taken into account the draft conditions proposed by the Applicant, and other conditions that the Panel may have considered imposing, in determining that the regional or national benefits outweigh the Project's residual adverse impacts.
65. In short, if this Panel were to decide it could not impose appropriate conditions itself, it must evaluate any *Augier* or s108AA(1)(a) conditions proffered by POTL. If they do not outweigh the Projects residual impacts then consent cannot be granted for the project.

DATED at Auckland, 14 July 2026



James Gardner-Hopkins
Counsel for Ngā Tai Ki Mauao

Group / subject	Dredging #	Structures #	Amount / commitment — joint or separate	Claimed <i>Augier</i> basis
Strategic relationship meeting	1.3	1.3	Non-monetary. Substantially the same obligation under both consents: annual meeting with POTL CEO and Board Chair concerning both consents and future stages	POTL says the meeting is not connected to the effects of the development and is voluntarily offered under the <i>Augier</i> principle
Relationship agreements	2.1–2.3	2.1–2.3	Non-monetary. Substantially the same organisation-wide relationship agreement process under both consents	POTL says the agreements are not linked to project effects and are voluntarily included under the <i>Augier</i> principle
Mātauranga Māori State of the Environment report	12.1	—	\$100,000 separate commitment under the Dredging consent only	POTL characterises the funding commitment to SPDAG as <i>Augier</i> , while maintaining that the report itself responds directly to potential cumulative cultural effects
Mātauranga Monitoring Plan	15.5	14.5	\$25,000 p.a. joint total across both consents, CPI adjusted. One Mātauranga Monitoring Plan addresses both consents	POTL characterises the third-party funding commitment as <i>Augier</i> , while maintaining that the monitoring mechanism itself responds directly to potential cumulative cultural effects
Restoration fund	18.1	15.1	\$2,000,000 one-off joint total across both consents	POTL characterises the funding commitment to SPDAG as <i>Augier</i> ; the stated purpose is to support SPDAG administration and restoration, abundance and other projects
Pou or other structures	18.2	15.2	\$500,000 one-off joint total across both consents	POTL characterises the third-party funding commitment as <i>Augier</i> ; the stated purpose is recognition of mana and the significance of the land on which the Port is located
Whareroa health and wellbeing assessment	18.3	15.3	\$250,000 one-off joint total across both consents	POTL characterises the funding commitment as <i>Augier</i> and says it does not respond directly to a project effect
Independent discharges audit	18.4	15.4	\$100,000 one-off joint total across both consents	POTL characterises the third-party funding commitment as <i>Augier</i> and says the audit is not necessary or directly related to the effects of the project
Whareroa Marae infrastructure	18.5	15.5	\$1,000,000 one-off + \$25,000 p.a. joint total across both consents, with the annual amount CPI adjusted	POTL characterises the third-party funding commitment as <i>Augier</i> ; the stated purpose is to respond to identified cumulative cultural effects and support Marae infrastructure projects
Land-use policy adjacent to Whareroa Marae	18.6	15.6	Unquantified funding and preparation obligation. Substantially the same obligation under both consents	POTL treats the obligation to fund and prepare a policy addressing incompatible activities on POTL-owned land adjacent to Whareroa Marae as <i>Augier</i>
Education and research scholarship fund	19.1	—	\$250,000 separate fund under the Dredging consent only	POTL characterises the funding commitment as <i>Augier</i> ; the fund supports research and education concerning Te Awanui and capacity enhancement within iwi and hapū

Group / subject	Dredging #	Structures #	Amount / commitment — joint or separate	Claimed <i>Augier</i> basis
Tangihanga cessation of pile driving	—	7.9	Non-monetary. Separate Structures consent obligation only	POTL says cessation is not necessary on the basis of its noise assessment but is voluntarily offered to respect tikanga regarding tangihanga
Avifauna habitat enhancement fund	—	13.4	\$150,000 one-off separate commitment under the Structures consent only	POTL characterises the third-party funding commitment as <i>Augier</i> , while maintaining that the Avifauna Management Plan requirements themselves are not <i>Augier</i> .
Biosecurity programme contribution	—	16.1	\$30,000 separate commitment under the Structures consent only	POTL characterises the funding contribution to the BOPRC-led biosecurity programme as <i>Augier</i> because it considers the funding commitment is not authorised by s 108 RMA