

IN THE MATTER AND IN THE MATTER	of the Fast-track Approvals Act 2024 (FTAA) of an application for approvals under the FTAA for the Stella Passage Development FTAA-2512-1163
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**LEGAL SUBMISSIONS ON BEHALF OF NGĀTI KUKU HAPŪ AND
WHAREROA MARAE IN REPLY TO MINUTE 5**

08 June 2026

Tu Pono Legal Ltd
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INTRODUCTION

1 In Minute 5, the Panel has directed that tangata whenua participants (including Ngāti Kuku hapū / Trustees of Whareroa Marae), may address the following Requests for Information (**RFIs**):

- (a) Cumulative and positive effects;
- (b) Whether alternative relief sought by Ngāti Kuku / Whareroa Marae is a financial contribution condition under the constraints of ss108(9)(10) RMA;
- (c) References to s6(e) and 7(a) RMA as matters of discretion in Rules PZ5, PZ8, PZ10, PZ11 of the RCEP;
- (d) the SPDAG consent conditions, and whether amendments are required to address tangata whenua concerns;
- (e) response to Applicant position on request for oral hearing at Whareroa Marae;
- (f) whether there are remaining 'western science' issues in dispute.

2 These issues are addressed sequentially.

Cumulative effects

3 Paragraph [4] of Minute 4 relevantly states:

[4] Section 3 of the RMA defines effect to include "any cumulative effect which arises over time or in combination with other effects regardless of the scale...". The Panel understands from section 3(c) of the RMA that the "other effects" can be "past, present or future" effects. Paragraph 128 of the Applicant's Legal Submissions dated 7 May 2026 appears to be a commendable attempt to distil the adverse cumulative cultural effects as articulated by tangata whenua. The Panel seeks:

- (a) comment from the **tangata whenua participants** as to:
 - (i) the Applicant's distillation of the *adverse* cumulative cultural effects of allowing this project and/or an alternative list or explanation;
 - (ii) the existence of any positive effects of allowing this project (including effects arising in the foreseeable future) and, if applicable, actual or potential examples;" ¹

¹ Leave is sought to address paragraph [3](b), following any response from the Applicant; and paragraph 6 (as anticipated by the Minute).

- 4 The Port, in its legal submissions at paragraph [128] has identified some, but not all, of the relevant adverse cumulative effects.
- 5 The receiving environment, relied on by the Port as its starting point for identification of adverse cumulative cultural effects (and thus adverse impacts under s85(3) FTAA) cannot be viewed monoculturally.
- 6 The 'environment' as defined by s2 RMA includes historical context, leading to present-day context, as well as tikanga-based viewpoints.
- 7 This is reflected in the RMA's reference (in the definition of 'environment') to "social, economic, aesthetic and cultural conditions.."² It is telling that the Port's analysis of cumulative effects does not cross-reference or acknowledge the historical analysis provided by Dr Vincent O'Malley, which forms part of the relevant 'environment' into which the Project's effects are to be assessed. This includes Dr O'Malley's understated conclusion that:

"[191] Whareroa Marae today remains exposed to significant levels of pollution and environmental harm as a result of the cumulative impact of land loss, industrial development, and infrastructure projects such as Tauranga Harbour Bridge, the Mount Maunganui port, and Tauranga airport. Ngāti Kuku might have been better placed to benefit from some of these works had they retained an adequate land base. But raupatu, public works takings and other land alienation since 1864 have ensured that is not the case. Often these developments have come at the expense of Ngāti Kuku rather than benefitting them."

- 8 Ngāti Kuku and Whareroa Marae do not accept the assertion at paragraphs [157]-[158] that specific categories of cumulative cultural effect are not cumulative adverse impacts of the Project.

² **environment** includes—

- (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

- 9 These include cumulative effects on the mauri of the moana, loss of connection with Te Awanui, and impaired ability to exercise rangatiratanga and kaitiakitanga, as relevant to the Port proposal, seen in its historic and contemporary context. It is submitted these types of effects do form part of the Panel's assessment of cumulative adverse impact of the Project under the FTAA.³
- 10 A related point, is that the Port appears to contends that "adverse impacts" (which necessarily includes cumulative effects) are co-extensive or synonymous with adverse effects as defined by s3 RMA (subject to an unspecified 'magnitude' threshold referenced by the Port).⁴ This assertion underlies the Port's identification of the relevant cumulative effects in the list provided at paragraph [128] of the Port's submissions.
- 11 That assertion is incorrect. It is submitted that 'adverse impacts' (for the purposes of the proportionality test in s85(3) FTAA) include RMA 'effects' as a subset. Adverse impacts are a wider grouping than simply 'adverse effects'.
- 12 Adverse impacts in s85 FTAA include (for example) policy bottom-lines (which are not a species of environmental effect) – which can be considered as part of the balancing exercise anticipated by s85(3) FTAA – albeit within the constraints of s85(4).
- 13 Thus, s85(5) FTAA adopts the widest possible definition of 'adverse impact' as being any matter considered by the Panel in complying

³ Port Legal Submissions at [157]

[..]

(a) Cumulative effects on the mauri of the moana and consequently the relationship of mana whenua to Tauranga Moana and their ability to uphold manaakitanga;

(b) Progressive loss of connection with and access to Te Awanui through historic development of the Port and surrounding activities (including industrial activities and Tauranga Airport) and further loss of connection resulting directly from the development.[..]

(c) Loss of ability to meaningfully exercise rangatiratanga, kaitiakitanga and tikanga" [all footnotes omitted]

⁴ Albeit, the Port submits that not all effects of all magnitude are captured: Port legal submissions dated 07 May 2026 at [56]

with s81(2) that weighs against the granting the approval. This does not suggest inherent limits on cumulative effects. In any event, the magnitude of adverse cumulative cultural effects on Ngāti Kuku and Whareroa Marae is significant (as identified by their tangata whenua and independent expert evidence).

- 14 Cumulative impacts of the proposed cranes at Sulphur Point are a case in point. Dr Rā identifies these as a material and significant cumulative effect on Ngāti Kuku / Whareroa Marae, including the Proposal's effects on the cultural and ancestral landscape, and the interconnected whakapapa landscape.⁵
- 15 This a material omission from the Port's identification of cumulative effects (and adverse impacts) of the Proposal in its legal submissions.
- 16 Cumulative effects are more broadly identified by Ms Wilkinson in planning evidence; this evidence is adopted without being repeated.
- 17 As regards the cumulative impact of the proposed cranes, Counsel for the Port is wrong in submitting that:

⁵ Statement of Evidence of Dr Alayna Rā at [9]-[11]:

"9 A core consideration of this evidence is the recognition and safeguarding of the cultural landscape values held by Ngāti Kuku hapū, as expressed through the interrelationships between Whareroa Marae, Te Awanui, and the wider ancestral landscape. This includes sustaining the ihi inherent within whakapapa connections and maintaining the mana of places subject to ongoing kaitiakitanga.

10 It therefore extends beyond the immediate physical environs of Whareroa Marae into wider landscape connections to the surrounding lands and waters, including the retention of the significant ancestral viewshaft toward the Kaimai Ranges.

11 These visual, spatial, and experiential connections form an integral component of the hapū's wider cultural landscape, reinforcing orientation, identity, and continuity of place. The integrity of this viewshaft, which links the Marae, the harbour, and the Kaimai as an interconnected whakapapa landscape, cannot be understated."

- (a) “[Counsel] has cited the Sustainable Ōtākiri...Supreme Court decision in his submissions, without any reference to the text of that decision.”⁶

Response: the criticism is erroneous. Footnote [26] of Counsel for Ngāti Kuku / Whareroa Marae’s Initial Legal Submissions references paragraph [59] of the *Sustainable Ōtākiri* decision. Perhaps ironically, this is the same paragraph relied on by Counsel for the Port from that decision.

- (b) “[Cranes]..are also outside the relevant matters of discretion for cranes. This appears to be accepted by the planning witness for Ngāti Kuku and the Whareroa Marae.”⁷

Response: Ms Wilkinson identified the impacts of the cranes as a consequential effect of granting approval – precisely the type of cumulative effect that the Panel must consider under the *Sustainable Ōtākiri* decision.

Positive effects

- 18 As regards positive effects, Ms Wilkinson in her planning evidence has confirmed that there are acknowledged positive effects, mainly relating to the economic benefits identified by the Port’s evidence, but of a lesser extent than claimed by the Port, especially in net terms.⁸

⁶ Port legal submissions dated 07 May 2026 at [48]

⁷ Port legal submissions dated 07 May 2026 at [50]

⁸ For example, statement of evidence of Vanessa Wilkinson at [18]-[20] as follows:

“[18] The tangata whenua and independent expert evidence for Ngāti Kuku and Whareroa Marae identifies significant adverse effects that have not been sufficiently addressed within the Application or through the proposed consent conditions. As a result, it is my view that the proposal does not meet the requirements of s6(e) or 7(a) or the purpose of the RMA and the equivalent planning provisions in the national and regional instruments. There is a failure to recognise and provide for the customary relationships, beliefs, and values arising under sections 6(e) and 7(a) RMA, relating to site specific values affected by the proposal.

[19] The Applicant identifies national and regional benefits of the proposal but the nature and net extent of these are called into question by the

- 19 However, the true extent of net benefits of the Project are substantially overstated by the Port. It is, for example, hyperbole to submit that -

"the scale of the benefits from this Project are at the highest end of the spectrum when considering the projects approved under the FTAA.." ⁹

- 20 Moreover, it is not a numbers game. Counsel for the Port has cited that 74% of participants are "overwhelmingly supportive" of the application.¹⁰ Another example of overstatement, and the point is taken out of context. The RDA criteria under the RCEP relevantly focus on sections 6(e) and 7(a) RMA; and not (with respect) the number of supportive voices that endorse the proposal.
- 21 As identified by Dr Meade and Ms Wilkinson in evidence, the Panel is required to assess the net economic (and any other) benefits; and these benefits must be considered in light of the disbenefits (adverse impacts) to (*inter alia*) Ngāti Kuku and Whareroa Marae. To the extent there are positive effects, these do not address (for example) breach of existing Treaty Settlements under s7 FTAA.

Whether the proposed compensation conditions are financial contribution conditions or otherwise allowable conditions under the FTAA

- 21 Paragraph 5 of Minute 5 relevantly states:

Section 108(10) of the RMA limits the imposition of conditions requiring financial contributions. Mr Enright, on behalf of Ngāti Kuku Hapū and the Trustees of Whareroa Marae, submitted that the proposed compensation be imposed as a "financial contribution". Mr Enright has not addressed whether "financial contributions" under s108(9) can be payable to other than the consent authority. Nor has he addressed how the "financial

evidence of Dr Meade.

[20] I acknowledge that the Applicant identifies potential benefits from the proposal and these are set out in the Substantive Application Report. While there are acknowledged benefits, I have set out a position which differs on the net extent of these benefits, especially having regard to the adverse impacts to Ngāti Kuku and Whareroa Marae."

⁹ Port legal submissions dated 07 May 2026 at [25]

¹⁰ Port legal submissions dated 07 May 2026 at [2]

contribution" sought meets the clear statutory test in s108(10). The Panel requests clarification from **Ngāti Kuku Hapū and the Trustees of Whareroa Marae** as to whether Mr Enright is submitting that the proposed compensation is a financial contribution within the scope of s108(10) and, if so, how.

- 22 Counsel is grateful to the Panel to address this issue in more detail.
- 23 As a starting point, Ngāti Kuku and Whareroa Marae emphasise that their first (and preferred) outcome is that the proposal is declined, on the mandatory basis of s7 FTAA; and (if needed) the discretionary basis under the proportionality threshold in s85(3) FTAA.
- 24 Ngāti Kuku and Whareroa Marae have (in the alternative) proposed that the Panel impose a direct compensation conditions as recommended by Ms Wilkinson in planning evidence, in reliance on Dr Meade's evidence.¹¹
- 25 It is submitted that the Panel has jurisdiction to impose consent conditions requiring compensation or offsetting in favour of Ngāti Kuku and Whareroa Marae, to address an adverse effect of the activity on the environment directly connected to the Proposal.¹² It is therefore unnecessary to assess whether it constitutes a financial contribution under ss108(9)(10) RMA. The proposed conditions meet the relevant FTAA threshold under s83 FTAA (conditions must be no more onerous than necessary).

¹¹ Statement of evidence of Vanessa Wilkinson:

"[23] In the event that the Panel decides that approval is merited, then I have provided planning recommendations in respect of the proposed consent conditions. My planning evaluation is that the effects of the proposal on Ngāti Kuku and Whareroa Marae are not avoided, remedied, mitigated, offset or compensated to the extent anticipated or required by the regional and national planning framework. I consider that this is an appropriate case where direct compensation is merited, in the absence of an avoidance response.

[..]

[31] Based on my review of Ngāti Kuku and Whareroa's evidence, I consider that it is necessary to manage (by way of compensation) the adverse effects (and 'impacts') on Ngāti Kuku and Whareroa Marae; and (based on Dr Meade's evidence) that it is not unduly onerous to such an this approach.

¹² Ms Wilkinson has addressed the relevant consent condition wording.

- 26 In the alternative, it is submitted that s108(9)(10) RMA do not *per se* prevent a financial contribution condition being imposed in favour of a party other than the consent authority, unless this is precluded by the relevant RCEP provisions (as identified by s108(10) RMA).
- 27 It is agreed that Schedule 11 of the RCEP contains Table 1, which sets out in tabular format the circumstance and purpose for which financial contributions can be applied.
- 28 The purview of Schedule 11, Table 1, is limited in scope (in terms of the circumstances identified) and includes a generic statement of the level of contribution that can be imposed. It is therefore legally available to impose a financial contribution in favour of Ngāti Kuku / Whareroa Marae, but the purposes are constrained to those set out in Table 1.
- 29 It is impermissible to interpret the RCEP provisions by reference to the Council's Development Contributions or Financial Contributions Policy 2024. This is an extrinsic document not referenced by the RCEP.¹³
- 30 In summary, Ngāti Kuku and Whareroa Marae rely on the Panel's power to impose a direct compensation consent condition under Schedule 5 and s83 FTAA, to remedy/ compensate adverse effects/impacts to Ngāti Kuku and Whareroa Marae arising from the Proposal, on the basis that there is a sufficient legal nexus (as required by s108AA RMA), and that the conditions otherwise meet the additional threshold set by s83 FTAA.
- 31 If the Panel does not accept that it has jurisdiction to impose a direct compensation condition as recommended by Dr Meade, and Ms Wilkinson in reliance on Dr Meade's evidence, then:
- (a) it is submitted that the Panel does have scope to impose a financial contribution under s108(9)(10) RMA in favour of Ngāti

¹³ But appears to be relied on by Counsel for the Port at [59](b) of Legal Submissions dated 07 May 2026.

Kuku / Whareroa Marae but for the purposes identified in Schedule 11 to the RCEP;

(b) As noted by Ms Wilkinson:

[32] If for any reason, the Panel considers that it does not have jurisdiction to impose a compensatory condition of the type recommended by Dr Meade, then (as noted), I recommend that approval is declined."

References to s6(e) and 7(a) RMA as matters of discretion in Rules PZ5, PZ8, PZ10, PZ11 of the RCEP

- 32 It is submitted that the references to ss6(e) and 7(a) RMA are material considerations, for reasons already addressed in the legal submissions and planning evidence filed with the Panel.
- 33 A key consequence is that the RDA criteria enable the Panel to have regard to a wide range of cultural effects, as relevant to the relationships, values and tikanga inherent in s6(e) and 7(a) RMA.
- 34 A further consequence is that the Panel **must** assess the question of strength of relationship of individual hapū and iwi with the Proposal – as part of the statutory duty identified by Whata J in *Ngāti Maru* (and other Senior Court authority).¹⁴
- 35 This is relevant to the proposed SPDAG consent condition framework, which is generic and unlawful because it does not respond to strength of relationship under s6(e) RMA. Moreover, the Panel has jurisdiction to impose a direct compensation condition in favour of Ngāti Kuku / Whareroa Marae that exceeds the so-called Augier-based offers made by the Applicant to date in the conditions framework.
- 36 The above (and related matters) are addressed in detail by Counsel's Initial Legal Submissions (dated 30 April 2026) which are adopted without repetition.

¹⁴ [2020] NZHC 2768

The SPDAG consent conditions, and whether amendments are required to address tangata whenua concerns

- 37 As noted by Minute 5, Ngāti Kuku has already addressed the material shortcomings of the proposed SPDAG consent conditions, both in terms of vires and merits.
- 38 As to *vires*, the SPDAG fails to respond to the duty on the Panel as decision-maker to respond to strength of relationship, and the need for a differential treatment of different relationships of Iwi and Hapū under the ratio in *Ngāti Maru*.
- 39 As to merits, this is addressed in detail by Ngāti Kuku / Whareroa Marae in their evidence, noting that a 'universal' or one size-fits-all approach is unlawful and inappropriate in terms of the historical context and cumulative adverse impacts arising from the Proposal.

Response to Applicant position on request for oral hearing at Whareroa Marae

- 40 Minute 5 relevantly states:
- [9] Some tangata whenua participants have requested an oral hearing. Paragraph 244 of the Applicant's Legal Submissions dated 7 May 2026 suggests a potential process for the Panel to adopt in the first instance. The Panel requests feedback from the tangata whenua participants as to that suggested process and/or an alternate process that may assist the Panel to better understand the scale of the cumulative cultural effects and the "appropriate mitigation, remediation and offsetting".
- 41 Ngāti Kuku / Whareroa Marae have already requested in legal submissions (and the evidence of Awhina Ngātūere) that a Cultural Issues hearing should be convened, with at least part of the hearing taking place at Whareroa Marae. A similar approach was adopted by the Environment Court, during its hearings process.
- 42 By contrast, the Port has suggested a facilitated process, with a report-back to the Panel on outcomes agreed or not agreed, to inform the Panel's consideration of conditions.
- 43 Such an approach is strongly opposed. The Panel is the decision-maker, and the preponderance of evidence already identifies that

attempts at conciliation / agreement / facilitated outcomes have failed to achieve any tangible outcome.

- 44 Counsel submits that it is essential that the Panel convenes a Cultural Issues hearing to allow some contextual appraisal of the tikanga-based evidence of all tangata whenua participants. A facilitated session (as proposed by the Port) will not enable the Panel to assess this first-hand.
- 45 Counsel respectfully reiterates the request for directions set out at [83]-[84] of Initial Legal Submissions as follows:

[83] As with the Taranaki VTM proposal, the cultural impacts of this proposal are both complex and merit a bespoke process. The following directions are sought for two mini-hearings:

- Legal issues / overview hearing, with scope for Counsel to file submissions in advance;
- Cultural effects / tangata whenua hearing, to be held kanoahi ki te kanoahi in Tauranga. The Trustees extend an invitation to the Panel for this hearing to take place at Whareroa Marae.

[84] Additional directions sought are:

- Ngāti Kuku / Whareroa request that at least part of any cultural issues hearing is held at Whareroa Marae.
- Direction that Port file formal evidence in relation to benchmarking, with opportunity for reply evidence.
- Leave is sought for cross examination of Port witnesses on several confined topics: Port's benchmarking exercise for compensation; proposed consent conditions relating to cultural effects / tangata whenua.

Whether there are remaining western science issues in dispute

- 46 Minute 5 relevantly states:

[11] The Applicant has provided extensive information in response to the comments received, including multiple statements of evidence addressing the "western science" effects. The Panel seeks clarification from the **commenters that raised "western science" matters (other than economics and planning)** as to whether their comments have been satisfactorily addressed by the response or whether matters remain in contention. If the latter, the Panel would be assisted by a list of matters in dispute and the expert's indication of whether it is material (such that it may benefit from inclusion on an agenda for direct conferencing) or not.

- 47 Ngāti Kuku and Whareroa Marae submit that there are remaining 'western science' issues in dispute.¹⁵ These relate to:
- Landscape (evidence of Dr Alayna Rā);
 - Public health (evidence of Professor Simon Hales);
 - Coastal erosion (but noting that Ngāti Kuku / Whareroa Marae do not have a technical science expert on this issue);
 - Planning and economics (but noting the Panel has not asked for comment on these matters).
 - History - Dr Vincent O'Malley's evidence does not appear to be contested (discussed below).
- 48 Putting to one side economics and planning, expert caucusing of landscape and public health issues is supported by Ngāti Kuku and Whareroa Marae. Both relate to core ss5 and 6 RMA matters of national importance.

Landscape

- 49 Matters in dispute (and that could be the subject of expert caucusing between Stephen Brown and Dr Rā) include the following:
- Was the Brown assessment undertaken in accordance with Te Tangi a te Manu. If not, then:
 - What are the aspects that are not in accordance;
 - How could these gaps be filled;
 - What further information is required for a full landscape evaluation.
 - To what extent is there agreement (or dispute) on the relevant landscape scale and landscape, visual and natural character effects of the Stella Passage proposal on Ngāti Kuku and Whareroa Marae.

Public health

- 50 There appears to be little common ground between Professor Simon Hales and his counterpart experts (Dr Lyn Denison and Jennifer Simpson). Matters in dispute (and that could be the subject of

¹⁵ Counsel has sought preliminary feedback from Dr Rā and Professor Hales on the identified issues. It is anticipated that the relevant experts could refine these issues prior to (or during) caucusing.

expert caucusing) are broadly identified by Dr Denison and Ms Simpson in their reply evidence dated 7 May 2026 as follows:

- **WHO guidelines:** Whether concentrations of NO₂ and PM_{2.5} at Whareroa Marae are unacceptably high with reference to WHO guidelines;
- **Source attribution:** whether the Port is a dominant contributor to elevated levels of NO₂ and PM_{2.5} at the Marae and associated health effects and whether no further development at the Port should be permitted until compliance with WHO guidelines;
- **Proposed consent conditions to address public health issues** (including the competing recommendations on epidemiological studies (as recommended by Professor Hales, as distinct from proposed consent conditions));
- **Relevance of National Air Quality criteria;**
- **Other matters:** Matters of detail identified in Ms Simpson's evidence at paragraphs [36]-[68]

Coastal erosion & ecology

51 For clarity, there remain points of difference between Ngāti Kuku and Whareroa Marae, and the western science evidence produced by the Port's coastal process experts.

52 This relevantly includes (but is not limited to) paragraphs [64]-[67] of Dr de Lange's evidence (which relates to erosion effects on Whareroa Marae). Ngāti Kuku and Whareroa Marae do not have a counterpart technical expert available for expert caucusing on this topic, and therefore rely on the parallel emphasis placed on mātauranga Māori, by (for example) Policy 2 of the NZCPS.

Evidence of Dr Vincent O'Malley (historian)

53 It appears that Dr O'Malley's evidence is uncontested, meaning that there is no direct need for historian expert caucusing (unless the Panel directs otherwise).

54 This is reflected in the Port's statement in the FTAA Response Table that relevantly states:

"..POTL acknowledges the historical evidence. It aligns with the wider Tauranga Moana record..The application does not seek to relitigate that history but to respond to contemporary Project effects within that context..

- 55 A historical lens is essential to understanding the extent of adverse impacts of the proposal, in its proper tribal history and public works context. At its' core, it is submitted that Dr O'Malley's evidence is material to the Panel's assessment of the cumulative adverse impacts of the Stella Passage proposal, as well as the s7 FTAA argument that the proposal must be declined.

Dated this 08th June 2026

Rob Enright / Jason Pou
Counsel for Ngāti Kuku / Trustees of Whareroa Marae