IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 28/2020
[2021] NZSC 127

BETWEEN	TRANS-TASMAN RESOURCES LIMITED Appellant
AND	TARANAKI-WHANGANUI CONSERVATION BOARD, CLOUDY BAY CLAMS LIMITED, FISHERIES INSHORE NEW ZEALAND LIMITED, GREENPEACE OF NEW ZEALAND INCORPORATED, KIWIS AGAINST SEABED MINING INCORPORATED, NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN INCORPORATED, SOUTHERN INSHORE FISHERIES MANAGEMENT COMPANY LIMITED, TALLEY'S GROUP LIMITED, TE OHU KAI MOANA TRUSTEE LIMITED, TE RŪNANGA O NGĀTI RUANUI TRUST, ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED AND THE TRUSTEES OF TE KĀHUI O RAURU TRUST First Respondents
AND	ENVIRONMENTAL PROTECTION AUTHORITY Second Respondent

Hearing:	17–19 November 2020
Court:	Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ
Counsel:	J B M Smith QC, V N Morrison-Shaw and P F Majurey for Appellant J D K Gardner-Hopkins for Taranaki-Whanganui Conservation Board

R A Makgill and P D M Tancock for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd and Talley's Group Ltd
D M Salmon QC, D A C Bullock and D E J Currie for Greenpeace of New Zealand Inc and Kiwis Against Seabed Mining Inc
R J B Fowler QC, J Inns, H K Irwin-Easthope and N R Coates for Te Ohu Kai Moana Trustee Ltd, Te Rūnanga o Ngāti Ruanui Trust and the Trustees of Te Kāhui o Rauru Trust
M C Smith, H E McQueen and P D Anderson for Royal Forest and Bird Protection Society of New Zealand Inc
V E Casey QC and C J Haden for Second Respondent
D A Ward and Y Moinfar-Yong for Attorney-General as Intervener

Judgment: 30 September 2021

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **Leave is reserved to a party to apply to the High Court for directions if necessary.**

C **Costs are reserved.**

SUMMARY OF RESULT
(Given by the Court)

[1] The appellant sought marine consents and marine discharge consents in order to undertake seabed mining within New Zealand's exclusive economic zone. By a majority decision, the decision-making committee (DMC) of the Environmental Protection Authority granted the application for consents with conditions under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act). The first respondents successfully challenged the DMC decision in the High Court as wrong in law. The Court of Appeal dismissed the appellant's appeal, upholding the High Court's decision to quash the decision of the DMC and refer the matter back for reconsideration. The appellant was granted leave to appeal to this Court on the question of whether the Court of Appeal was correct to dismiss the appeal.

[2] The Supreme Court has unanimously dismissed the appeal. In doing so, the Court addressed the correct approach to a number of provisions of the EEZ Act.

[3] In particular, Glazebrook J (with whom Williams J agreed[1]) held that the purpose provision in s 10 provides an overarching framework for decision-making under the Act and, to this extent, has substantive or operative force.[2] This means that s 10(1)(b), which applies to marine discharges and dumping, creates an environmental bottom line in the sense that, if the environment cannot be protected from material harm through regulation, then the discharge or dumping activity must be prohibited.[3] The assessment of whether there is material harm requires qualitative, temporal, quantitative and spatial aspects to be weighed.[4] The s 10(1)(b) requirement is cumulative on the requirement in s 10(1)(a) (which applies to all consent applications) to achieve sustainable management.[5]

[4] The operative force of s 10(1) means the relevant decision-making criteria in s 59 must be weighed by the decision-maker in a way that achieves both the s 10(1)(a) and s 10(1)(b) purposes.[6] However, the bottom line in s 10(1)(b) does not mean applicants for discharge consents are limited to showing there is no material harm. Rather, they may also accept conditions that avoid material harm, mitigate the effects of pollution so that harm will not be material, or remedy it so that, taking into account the whole period of harm, overall the harm is not material.[7] To meet the bottom line, remediation will have to occur within a reasonable time in the circumstances of the case and, in particular, in light of the nature of the harm to the environment, the length of time that harm subsists (that is, the total duration of projected harm until remediation occurs), existing interests and human health.[8] All else being equal, economic benefit considerations to New Zealand may also have the potential to affect the decision-maker's approach to remediation timeframes, but only at the margins.[9]

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1 At [292]–[293].
2 At [240] per Glazebrook J.
3 At [245] per Glazebrook J.
4 At [255] per Glazebrook J.
5 At [245] and [250] per Glazebrook J.
6 At [249] and [253] per Glazebrook J.
7 At [260] per Glazebrook J.
8 At [256]–[259] per Glazebrook J.
9 At [259] per Glazebrook J.

[5] Accordingly, decision-makers must follow a three-step test when assessing applications for marine discharge and dumping consents under the EEZ Act:[10]

(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping? If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.

(b) Is the decision-maker satisfied that conditions can be imposed that mean:

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

If not, the consent must be declined. If yes, then step (c) must be undertaken.

(c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

[6] The Chief Justice took a similar view to Glazebrook and Williams JJ's approach to s 10, with one key difference.[11] She did not consider economic benefit considerations were relevant in any circumstances to the assessment of materiality and so could not be taken into account in terms of setting remediation timeframes.[12] Nevertheless, for pragmatic reasons, the Chief Justice was content to adopt the

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10 At [261] per Glazebrook J.
11 At [302] and [315].
12 At [316]–[317].

three-step approach set out above at [5], in order to reach a majority.[13] This therefore represents the majority approach to how discharge and dumping applications are to be determined.

[7] William Young and Ellen France JJ differed in that, on their approach, what is required is an overall assessment of the relevant factors in s 59, albeit those factors need to be addressed with both s 10(1)(a) and (b) purposes in mind.[14] Section 10(1)(b) does not set an environmental bottom line.[15] Material harm was not automatically decisive, but s 10(1)(b)'s sole focus on protection and other elements of the statutory scheme meant the balancing exercise may well be tilted in favour of environmental factors where discharge and dumping consents are concerned. That decision, however, would need to be made on a case-by-case basis.[16]

[8] In considering the effect of the Treaty of Waitangi clause in s 12 of the EEZ Act, all members of the Court agreed that a broad and generous construction of such Treaty clauses, which provide a greater degree of definition as to the way Treaty principles are to be given effect, was required. 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.[17] Here, s 12(c) provided a strong direction that the DMC was to take into account the effects of the proposed activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty.[18] It followed that tikanga-based customary rights and interests constitute "existing interests" for the purposes of the s 59(2)(a) criterion, including kaitiakitanga and rights claimed, but not yet granted, under the Marine and Coastal Area (Takutai Moana) Act 2011.[19]

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13 At [319]. The Chief Justice at [319] also makes explicit the point which she considers implicit in step (c) of the three-step test set out above, which is that because s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 is cumulative on s 10(1)(a), it may be that a decision-maker would want to impose conditions to mitigate, remedy or avoid adverse effects even though the threshold of material harm will not be met.

14 At [59].

15 At [102].

16 At [102].

17 At [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

18 At [149] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

19 At [154]–[155] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

[9] Further, drawing on the approach to tikanga in earlier cases such as *Takamore v Clarke*,[20] all members of the Court agreed that tikanga as law must be taken into account by the DMC as "other applicable law" under s 59(2)(l) of the EEZ Act where its recognition and application is appropriate to the particular circumstances of the consent application at hand.[21]

[10] The Court was also largely in agreement on the remaining issues relating to the approach to the requirement to consider economic benefit in s 59(2)(f),[22] whether the conditions imposed amounted to adaptive management,[23] whether the DMC erred in not requiring a bond,[24] the approach to the casting vote,[25] whether the appeal raised questions of law,[26] what is required to take into account the nature and effect of other marine management regimes under s 59(2)(h)[27] and the approach to the information principles in ss 61 and 87E.[28] On the latter two issues, the points of disagreement flowed inevitably from the different approaches to s 10(1)(b). Thus, the majority held that if the other marine management regime provided for a bottom line, this could not be outweighed by other s 59 factors,[29] and that discharge consents may be granted on incomplete information, as long as that is the best available information and that,

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20 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

21 At [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ. Williams J at [297] (with whom Glazebrook J agreed at n 371) wished to make explicit that these questions must be considered not only through a Pākehā lens.

22 At [188]–[197] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.

23 At [199]–[213] per William Young and Ellen France JJ, [281]–[284] per Glazebrook J (where she also observed the conditions may nevertheless fall within the spirit of the prohibition), [299] per Williams J and [332] per Winkelmann CJ.

24 At [214]–[221] per William Young and Ellen France JJ, [285]–[286] per Glazebrook J (where she also considered it irrational not to require a bond in this case), [299] per Williams J and [332] per Winkelmann CJ.

25 At [222]–[226] per William Young and Ellen France JJ, [287] per Glazebrook J (where she also expressed unease about the legislation which gives a casting vote), [299] per Williams J and [332] per Winkelmann CJ.

26 At [227] per William Young and Ellen France JJ, [237] per Glazebrook J, [299] per Williams J and [332] per Winkelmann CJ.

27 At [175]–[187] per William Young and Ellen France JJ, [280] per Glazebrook J, [298] per Williams J and [331] per Winkelmann CJ.

28 At [103]–[138] per William Young and Ellen France JJ, [238] and [272]–[279] per Glazebrook J, [294]–[295] per Williams J and [321]–[330] per Winkelmann CJ.

29 At [280] per Glazebrook J, [298] per Williams J and [331] per Winkelmann CJ. Compare at [186] per William Young and Ellen France JJ.

taking a cautious approach and favouring environmental protection, the decision-maker is satisfied that the bottom line in s 10(1)(b) is met.[30]

[11] Although differing on the correctness of the approach adopted to the purpose provision, all members of the Court were satisfied that the Court of Appeal was right to find there were errors of law in the DMC's decision. A fundamental error was that the DMC's decision did not comply with the requirement to favour caution and environmental protection in ss 61 and 87E, as was illustrated by the conditions imposed by the DMC relating to marine mammals and seabirds.[31] Winkelmann CJ, Glazebrook and Williams JJ also made the point that the attempt to rectify information deficits by imposing conditions requiring pre-commencement monitoring which would subsequently inform the creation of management plans inappropriately deprived the public of the right to be heard on a fundamental aspect of the application.[32]

[12] As a result, the Court is agreed that the Court of Appeal was correct to uphold the High Court's decision to quash the DMC's decision. A majority consider the matter should be referred back to the DMC for reconsideration.[33] Leave is reserved to a party to seek directions from the High Court should that prove necessary.[34]

[13] The reasons of the Court for this result are given in the separate opinions delivered by:

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30 At [273]–[274] per Glazebrook J, [294] per Williams J and [327] per Winkelmann CJ. Compare at [117] per William Young and Ellen France JJ.

31 At [118]–[131] per William Young and Ellen France JJ, [274]–[276] and [279] per Glazebrook J, [294] and [299] per Williams J and [328] per Winkelmann CJ.

32 At [277]–[278] per Glazebrook J, [295] per Williams J and [329] per Winkelmann CJ. Compare at [133] per William Young and Ellen France JJ.

33 At [229] per William Young and Ellen France JJ, [299] per Williams J and [333] per Winkelmann CJ. Compare at [288]–[289] per Glazebrook J.

34 At [231] per William Young and Ellen France JJ, [299] per Williams J and [333] per Winkelmann CJ.

REASONS

WILLIAM YOUNG AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[14] The appellant, Trans-Tasman Resources Ltd (TTR), wants to mine iron sands. It seeks to do so in an area in the South Taranaki Bight 22–36 km offshore and

comprising an area of approximately 66 km^2 within New Zealand's exclusive economic zone (EEZ). The EEZ comprises the areas of the sea, seabed and subsoil between the outer boundary of New Zealand's territorial sea (12 nautical miles from shore) and 200 nautical miles from shore.[35]

[15] TTR has a permit issued under the Crown Minerals Act 1991 in relation to its proposed seabed mining activities. However, to undertake those activities, TTR also requires marine consents and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act or the Act).[36] The Act is an environmental and resource management measure relating to New Zealand's EEZ.[37]

[16] TTR applied for the necessary consents in August 2016. After a hearing of 22 days over a period of just over three months, marine consents and marine discharge consents were subsequently granted by a decision-making committee (the DMC) appointed by the Board of the Environmental Protection Authority (the EPA).[38] The consents were subject to a range of conditions. The four-person DMC was equally divided on whether or not to grant the consents and the decision to grant the consents was made on the casting vote of the chairperson of the DMC.

[17] Under the consents, TTR can extract up to 12.5 million tonnes of seabed material during any three-month period and up to 50 million tonnes of seabed material per annum, and process that material on an integrated mining vessel. About 10 per cent of the seabed material extracted will be processed into iron ore concentrate, which is retained for later shipping. The de-ored material which remains after that

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35 The exclusive economic zone (EEZ) means the EEZ as defined in s 9 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977: Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [the EEZ Act], s 4(1) definition of "exclusive economic zone".

36 The Act in force as at the time of Trans-Tasman Resources Ltd's (TTR) application is the version as at August 2016. That is the version used in this judgment, unless otherwise stated.

37 The area in which the mining would take place abuts the coastal marine area (CMA). Activities in that area are governed by the Resource Management Act 1991 [the RMA].

38 Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight* (August 2017) [DMC decision]. An earlier application made by TTR in November 2013 was declined by a differently constituted decision-making committee (DMC) in June 2014: Environmental Protection Authority | Te Mana Rauhī Taiao *Trans-Tasman Resources Ltd – Marine Consent Decision* (June 2014).

process would be returned to the seabed via a controlled discharge. The discharge of de-ored sediment from the integrated mining vessel is a mining discharge of harmful substances under the EEZ Act for which TTR requires a marine discharge consent.[39] The other marine and marine discharge consents granted to TTR cover a range of matters, including extraction, the redisposition of de-ored sediments, anchor handling, and noise caused by the integrated mining vessel during extraction activities.[40] The marine consents and marine discharge consents would be valid for 35 years.[41]

[18] An important focus of the DMC's assessment of TTR's application was on the likely environmental effects of the sediment plume. In addition, the DMC was required to address the direct effect of mining on the seabed floor and benthos (that is, the flora and fauna on the bottom of the seabed in the 66 km^2 mining area) and the effect on marine mammals and other fauna of the noise generated by the mining activities, as well as the effects on iwi and on various existing interests.

[19] The first respondents all participated in the hearing before the DMC.[42] They made submissions opposing the grant of the consents. The first respondents appealed to the High Court challenging the DMC decision on the basis that it was wrong in law on a number of grounds. The High Court allowed the appeal on one ground.[43] The High Court found that the consents adopted an "adaptive management approach", which is not permitted under the EEZ Act in relation to marine discharge consents.[44] The High Court quashed the decision of the DMC and the matter was referred back to the DMC for reconsideration, applying the correct legal test on adaptive management.

[20] TTR appealed to the Court of Appeal, arguing that the consents should not have been quashed because they did not adopt an adaptive management approach. The first respondents sought to uphold the High Court decision and filed cross-appeals in the Court of Appeal contending that there were other errors of law in the DMC decision.

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39 EEZ Act, s 20C.

40 A full list of authorised restricted activities as set out in the DMC decision, above n 38, is reproduced below at Appendix 1.

41 See EEZ Act, ss 73 and 87H.

42 The second respondent, the Environmental Protection Authority (the EPA), also participated.

43 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 (Churchman J) [HC judgment].

44 EEZ Act, s 87F(4).

[21] The Court of Appeal dismissed the appeal.[45] The High Court's decision to allow the first respondents' appeal and quash the decision of the DMC was upheld but on other grounds. Leave to appeal to this Court was granted on the question of whether the Court of Appeal was correct to dismiss the appeal.[46]

[22] TTR's appeal to this Court raises a number of issues about the approach to the EEZ Act, in particular, to its purposes, how the Act gives effect to the Treaty of Waitangi and customary interests, the place of tikanga,[47] the approach to international instruments, the adequacy of the information before the DMC and its ability to address any uncertainty about that information and adverse effects by the conditions that were imposed on the consents, as well as the interrelationship between the regime in the EEZ Act and other marine management regimes. Finally, there is also a question about the use of the chairperson's casting vote.

[23] We address these issues in the discussion which follows but first provide an overview of the statutory scheme.

Overview of the statutory scheme

[24] It will be necessary in due course to refer to a number of provisions in the EEZ Act, but for the moment, it suffices to give a brief description of the outline of the Act[48] and to set out the key provisions relating to TTR's application for marine consents and marine discharge consents.

[25] The purpose of the Act is set out in s 10 and at this point it is sufficient to note the two purposes in s 10(1), that is:

> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and

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45 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment].

46 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZSC 67.

47 The Attorney-General was granted leave to intervene on the issues arising in relation to the Treaty of Waitangi, Māori customary interests and the applicability of tikanga to marine consent and marine discharge consent applications. Leave was also given to the EPA to make submissions on systemic issues raised in the appeal which may affect the Authority's further work.

48 See EEZ Act, s 3.

> (b) in relation to the exclusive economic zone, … to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

[26] The Act also provides that it continues or enables the implementation of New Zealand's international obligations relating to the marine environment,[49] and sets out how the Crown's responsibility to give effect to the principles of the Treaty of Waitangi is recognised and respected by provisions of the Act.[50]

[27] Subpart 3 of Part 1 then sets out the functions, duties and powers of the EPA and of the Māori Advisory Committee which assists the EPA under the EEZ Act.[51]

[28] Central to the Act's consenting regime is the classification of activities as permitted, discretionary or prohibited. An activity is a permitted activity if it is described in regulations made under the Act as a permitted activity.[52] Permitted activities can be undertaken without a marine consent, provided the activity complies with the specifications set out in the regulations.[53] An activity is a discretionary activity if, relevantly, the Act or regulations describe the activity as discretionary or allow the activity with a marine consent.[54] Discretionary activities can only be undertaken with a marine consent.[55] An activity is a prohibited activity if it is described in the Act or regulations as a prohibited activity.[56] Such activities cannot be undertaken, nor can consents be applied for or granted in relation to them.[57]

[29] Part 2 of the Act sets out the duties, restrictions and prohibitions relating to various activities in the EEZ. The effect of s 20 is that the activities listed in s 20(2), which do not include discharges and dumping, may not be carried out in the EEZ

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49 Section 11.
50 Section 12.
51 The EPA and its Māori Advisory Committee are both established under the Environmental Protection Authority Act 2011: ss 3 and 18. Section 8 provides that the EPA is a Crown entity for the purposes of s 7 of the Crown Entities Act 2004 (that section sets out the various categories of Crown entities).
52 EEZ Act, s 35(1).
53 Section 35(2).
54 Section 36(1).
55 Section 36(2).
56 Section 37(1).
57 Section 37(2)–(3).

unless the activity is a permitted activity or authorised by a marine consent,[58] or by ss 21, 22 or 23. (Sections 21–23 permit specific existing and planned petroleum activities to continue.) The listed activities are as follows:

> (a) the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed:
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> (b) the construction, placement, alteration, extension, removal, or demolition of a submarine pipeline on or under the seabed:
>
> (c) the placement, alteration, extension, or removal of a submarine cable on or from the seabed:
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> (d) the removal of non-living natural material from the seabed or subsoil:
>
> (e) the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil:
>
> (f) the deposit of any thing or organism in, on, or under the seabed:
>
> (g) the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine species or their habitat.

[30] TTR required various marine consents for the activities linked to the recovery of iron ore deposits and the related environmental monitoring activities as these were not permitted activities. To illustrate the nature of the consents in terms of the activities referred to, s 20(2)(d) relates to the removal of non-living natural material from the seabed or subsoil. That subsection was relevant to two of TTR's proposed activities: the removal of sediment from the seabed and subsoil using its crawler and by grade control drilling; and the taking of sediment and benthic grab samples from the seabed and subsoil associated with environmental monitoring.[59]

[31] There are also duties, restrictions and prohibitions relating to discharges of harmful substances or dumping into the EEZ.[60]

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58 A "marine consent" is defined to mean "(a) a marine consent granted under section 62; or (b) an emergency dumping consent, a marine discharge consent, or a marine dumping consent": s 4(1) definition of "marine consent" or "consent".

59 TTR's impact assessment report prepared as part of its application describes grade control drilling as involving "closely spaced seabed sampling to further define the extent of the extraction area as well as providing further information of the sediment characteristics within this area, prior to any extraction activity".

60 See Subpart 2 of Part 2.

[32] To put this part of the legislation in context, it is necessary first to explain what is meant by a "harmful substance". Harmful substances are defined in s 4(1) of the EEZ Act as "any substance specified as a harmful substance by regulations made under [the] Act". The Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015 (EEZ Regulations 2015) relevantly define harmful substance as including "sediments from mining activities other than petroleum extraction".[61]

[33] It is also important to note the interrelationship between the EEZ Act and the Maritime Transport Act 1994.[62] The Maritime Transport Act and the Maritime Rules and Marine Protection Rules made under that Act comprise the primary mechanisms for regulating maritime activity in New Zealand. The Maritime Transport Act and its associated delegated legislation, broadly speaking, address both maritime activity generally and the protection of the marine environment.[63] For present purposes, it is relevant that the Maritime Transport Act also regulates the discharge of harmful substances into the sea or seabed of the EEZ but not discharges associated with mining activity. TTR's activities with which the DMC's decision was directly concerned are accordingly governed by the EEZ Act rather than the Maritime Transport Act because the relevant discharges are mining discharges.[64] A "mining discharge", in relation to a harmful substance, is defined in s 4(1) of the EEZ Act to mean "a discharge made as an integral part of, or as a direct result of, a mining activity".[65]

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61 Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015 [EEZ Regulations 2015], reg 4(d). The applicable version of the regulations is the version as enacted on 28 September 2015. This is the version used in this judgment.

62 The RMA also deals with marine pollution, providing criminal liability for certain dumping and discharges within the CMA: RMA, ss 15A, 15B and 338(1A)–(1B).

63 The purposes of the Maritime Transport Act 1994 include "to protect the marine environment" and "to continue, or enable, the implementation of obligations on New Zealand under various international conventions relating to pollution of the marine environment" (long title).

64 EEZ Act, s 20A. See also s 224A of the Maritime Transport Act, which sets out how the discharge of harmful substances is regulated under that Act and under the EEZ Act. See further ss 226(1)–(2) and (4) and 226A of the Maritime Transport Act, the effect of which is that harmful substances other than mining discharges cannot be discharged from a ship into the sea within the EEZ or into or onto the seabed below that sea except where discharged in accordance with the Marine Protection Rules.

65 A "mining activity" means "an activity carried out for, or in connection with,—(a) the identification of areas of the seabed likely to contain mineral deposits; or (b) the identification of mineral deposits; or (c) the taking or extraction of minerals from the sea or seabed, and associated processing of those minerals": EEZ Act, s 4(1) definition of "mining activity".

[34] Section 20B of the EEZ Act prevents the discharge of a harmful substance from a structure into the sea or into or onto the seabed of the EEZ unless the discharge is a permitted activity or authorised by a marine consent or ss 21, 22 or 23.[66] Section 20C makes similar provision for mining discharges of harmful substances from a ship into the sea of the EEZ. To illustrate the application of those provisions here, s 20C applied to the discharge of de-ored sediments and any associated contaminants back to the water column from TTR's integrated mining vessel. We add that the term "marine consent" is used in these reasons to encompass consents required for s 20 activities, not consents relating to discharges and dumping.

[35] The next part of the Act, Part 3, provides for regulations to be made and the matters to be considered in making the various regulations.[67] This Part also contains the process for making and deciding on applications for marine consents (in respect of the activities described in s 20).[68] We will come back to some of the detail of the processes for applications and hearings later. We will also return shortly to the detail of s 59, which sets out the factors to be taken into account by the EPA in considering an application for a marine consent, as well as to s 60, which provides for the matters to be considered in considering the effect of an activity on existing interests, and to s 61, which describes the information principles applicable to applications for a marine consent.

[36] Section 62(1) states that after complying with ss 59–61, the EPA or (as here) the DMC may grant an application for a marine consent in whole or in part, or may refuse the application.[69] If the application is granted, it may be subject to conditions as provided for in s 63.[70] Section 64(1) provides that the EPA may incorporate an adaptive management approach into a marine consent, as defined in that section. Section 65 deals with bonds and s 66 with monitoring conditions.

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66 Under reg 10 of the EEZ Regulations 2015, the discharge of sediments other than a discharge permitted by regs 7, 8 or 9, or prohibited by reg 11, is classified as a discretionary activity under the EEZ Act.

67 Subpart 1 of Part 3.

68 Subpart 2 of Part 3.

69 Where referring to the decision-maker in the present case, reference will be to the DMC rather than to the EPA. Further, references to the DMC's approach are references to the DMC majority unless specified otherwise.

70 Section 62(3).

[37] Where the activity involves a mining discharge of a harmful substance which is not a permitted activity, as was the case here, the relevant processes are described in Subpart 2A of Part 3. The effect of this Subpart is, broadly, that the provisions governing applications for marine consents also apply to applications for marine discharge or dumping consents but with some important modifications. In terms of the modifications, for example, and as noted above, on a marine discharge or dumping consent it is not permissible to impose a condition that amounts to or contributes to an adaptive management approach.[71]

[38] Part 4 of the Act deals with objections, appeals and enforcement. The only aspect of this Part that needs to be recorded is that there is a right of appeal from a decision of the EPA to the High Court on a question of law.[72]

The correct approach to determine applications for a marine discharge consent

[39] This part of the appeal turns on whether the Court of Appeal was correct in its approach to the statutory purpose and, in particular, as to the interrelationship between s 10, the purpose provision, and s 59 (and s 87D),[73] which sets out various factors the DMC was required to take into account.

[40] It is helpful at this point to set out s 10 in full:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

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71 Section 87F(4).

72 Section 105. See s 113 for appeals to the Court of Appeal.

73 When considering an application for discharge and dumping consents, s 87D(2) provides that the DMC must take into account the matters described in s 59(2) apart from some specific exceptions depending on the type of application. Accordingly, and for convenience, throughout these reasons we refer to the "s 59 factors" even where they relate to the discharge aspects of the application.

> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

[41] When considering an application for a marine consent and submissions on the application, the specified decision-making criteria are those factors set out in s 59. For applications for a marine discharge consent and the submissions on the application, s 87D(2)(a) provides that the relevant criteria are also as set out in s 59(2), with one amendment relating to s 59(2)(c), as we will discuss.[74]

[42] The list of factors in s 59(2) begins with a number of environmental factors and the effects on existing interests. Section 59(2)(a) accordingly directs the EPA to consider "any effects on the environment or existing interests of allowing the activity" and s 59(2)(b) refers to "the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity". When considering an application for a marine consent, s 59(2)(c) provides that the EPA is to take into account "the effects on human health that may arise from effects on the environment". But when the application is for a marine discharge consent, this requirement is expressed as "the effects on human health of the discharge of harmful substances if consent is granted".[75] Section 59(2)(d) directs attention to "the importance of protecting the biological diversity and integrity of marine species,

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74 Section 87D(2)(a)(i).
75 Section 87D(2)(a)(ii).

ecosystems, and processes" and s 59(2)(e) to "the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species".

[43] The remaining factors in s 59(2) are as follows:

> (f) the economic benefit to New Zealand of allowing the application; and
>
> (g) the efficient use and development of natural resources; and
>
> (h) the nature and effect of other marine management regimes; and
>
> (i) best practice in relation to an industry or activity; and
>
> (j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and
>
> (k) relevant regulations; and
>
> (l) any other applicable law; and
>
> (m) any other matter the EPA considers relevant and reasonably necessary to determine the application.

[44] Section 59(3) makes it clear that the EPA must also have regard to submissions and evidence given in relation to the application, any advice the EPA has sought, and any advice from the Māori Advisory Committee. Under s 59(5), the EPA is directed not to have regard to the following factors:

> (a) trade competition or the effects of trade competition; or
>
> (b) the effects on climate change of discharging greenhouse gases into the air; or
>
> (c) any effects on a person's existing interest if the person has given written approval to the proposed activity.

[45] As the case has developed, two main issues arise about the correct approach to the purpose provision and its interrelationship with s 59. The first is whether, as the Court of Appeal found, s 10(1)(a) and (b) provide the operative criteria for the DMC's decision. The second issue is whether the Court was correct to conclude that the objective of s 10(1)(b) can only be achieved by regulating the proposed activity in a way that will avoid material pollution of the environment or, if that is not possible, by prohibiting the relevant discharge or dumping.

[46] On these two aspects of the appeal, TTR's position is that the Court of Appeal has erred in adopting an environmental bottom line or a position close to that. TTR says that what the Act requires is an overall assessment of the various relevant factors with no requirement to give ascendancy to the environmental effects of an application. The first respondents support the judgment of the Court of Appeal on this aspect.[76] As is apparent from TTR's case, the issues arising under this head are interrelated, but it is useful nonetheless to first address how ss 10(1) and 59 work together before turning to the meaning of s 10(1)(b).

Decision-making criteria?

[47] The Court of Appeal saw s 10(1) as the "principal criteria by reference to which powers must be exercised under the EEZ Act". Indeed, the Court considered that for marine consents and marine discharge consents s 10 provides "the only decision-making criteria in the EEZ Act and must be the touchstone of the EPA's analysis".[77] In developing this point, the Court said the DMC erred in not asking two questions, that is, whether granting the consents would give effect to sustainable management and whether granting the consents was consistent with the objective in s 10(1)(b) of protecting the environment from pollution caused by the discharge of harmful substances.[78] The DMC, and similarly the High Court, were accordingly wrong to have "undertaken a broad evaluation of the desirability of granting a marine discharge consent weighing all the relevant s 59 factors in the mix—an 'Integrated Assessment' in which all the factors are balanced together, and a conclusion reached by reference to an unarticulated overall test".[79]

[48] We do not agree with the view of the Court of Appeal that s 10(1)(a) and (b) provide the main operative decision-making provisions.[80] That is clear from s 10(3), which says that to achieve the purpose in s 10(1), decision-makers must "take into

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76 The first respondents generally adopted each other's submissions. Individual respondents led the argument on various topics. We accordingly largely focus on the primary submissions on any topic.

77 CA judgment, above n 45, at [35].

78 At [106].

79 At [107]. See also at [110].

80 See also, in the context of s 5 of the RMA, *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [130] and [151] as to the operative decision-making criteria applying in that case.

account decision-making criteria specified in relation to particular decisions".[81] The Court of Appeal accepted that s 10(3) "identifies key steps that the decision-maker must take in order to achieve the [statutory] purpose". But the Court stated that neither s 10(3), "nor the provisions to which it refers, provide any criteria to govern the overall assessment and determination of applications". As noted, the Court said the "relevant criteria are found in s 10(1)".[82] That approach, however, does not fit with the words of s 10(3)(a), which expressly describe the matters set out in s 59 as "decision-making criteria". That point is emphasised by the direction in s 62(1) (the provision on decisions for applications for consents) that, "[a]fter complying with" ss 59–61, the EPA may grant or refuse an application for a marine consent.

[49] Further, the s 10(1) purposes apply in the context of a definition of the environment which addresses the biophysical aspects.[83] Section 59, by contrast, also lists non-biophysical and environmental factors as needing to be taken into account, which suggests s 10(1) does not provide the full considerations.[84]

[50] Finally, it is clear from the overall statutory scheme, which sets out which factors apply to which type of proposed activity, that the approach is to provide, via those factors, for the way in which the purposes are to be achieved in respect of different activities.

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81 This appears also to have been the responsible Minister's view at the time of the passage of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-1) [EEZ Bill] through the House. The Minister said she saw the s 59 factors as mirroring s 6 of the RMA (which provides a range of matters decision-makers must recognise and provide for in order to achieve the purpose of the RMA): (16 August 2012) 682 NZPD 4492. The departmental report to the Select Committee also described the clauses which became s 59 as the "operative decision-making clauses": Ministry for the Environment *Departmental Report on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill* (March 2012) [Departmental Report on EEZ Bill] at 41.

82 CA judgment, above n 45, at [108].

83 The definition of "environment" in s 4(1) of the EEZ Act is narrower than that in s 2(1) of the RMA. In the EEZ Act, "environment" means "the natural environment, including ecosystems and their constituent parts and all natural resources" of New Zealand, the EEZ, the continental shelf and the waters beyond the EEZ and above and beyond the continental shelf. The RMA definition of "environment" also includes "amenity values" and "the social, economic, aesthetic, and cultural conditions" affecting ecosystems, natural and physical resources and amenity values: s 2(1) definition of "environment", paras (c)–(d).

84 R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) notes at 341 the need to keep "in mind that the statement of purpose, being only a précis, may sometimes not accurately cover the whole scope of the Act, and individual provisions may go beyond it".

[51] We therefore accept TTR's argument that what is required is an overall assessment of the s 59 factors albeit, as we will come to, the statutory purpose must always be kept to mind.

[52] An approach requiring an overall assessment or judgment is not inconsistent with this Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.[85] The Court in that case considered the Board of Inquiry had erred in making an "overall judgment" on the facts and in light of the purposes and principles set out in Part 2 of the Resource Management Act 1991 (the RMA) in deciding whether or not to make the changes sought by New Zealand King Salmon Co Ltd to the Marlborough Sounds Resource Management Plan. The changes sought would move salmon farming from a prohibited activity to a discretionary activity in eight locations.

[53] The Court found that, in the plan change context in issue, the "overall judgment" approach did not recognise environmental bottom lines, which in that case were those in the New Zealand Coastal Policy Statement (NZCPS).[86] The NZCPS was "an instrument at the top of the hierarchy [of planning instruments]" and contained "objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in Part 2 [of the RMA] in relation to the coastal environment".[87] Therefore, the Court held there was "no need to refer back to [Part 2] when determining a plan change".[88] There were also other factors supporting rejection of the "overall judgment" approach in relation to the implementation of the NZCPS.[89]

[54] Since *King Salmon*, there has been debate as to how that decision impacts the approach to applications other than for plan changes under the RMA, such as applications for resource consent which have different statutory directives.[90] Differing approaches have emerged in the lower courts.[91] This issue was recently considered by

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85 *King Salmon*, above n 80.
86 At [132]. See also at [136]–[137] and [152]–[153].
87 At [152].
88 At [85].
89 At [136]–[139].
90 Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 591.
91 At 591.

the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*.[92] This decision addressed the interrelationship between the purpose provision in s 5 of the RMA and s 104 of that Act, dealing with applications for resource consents. The case concerned the same resource management plan as was in issue in *King Salmon*.[93] The Court of Appeal accordingly addressed the effect of the rejection of the "overall judgment" approach in *King Salmon*. The Court did not consider that the ability to consider the purposes and principles in Part 2 of the RMA (including s 5) in the context of s 104 was subject to any limitations of the kind contemplated by *King Salmon*.[94] Various statutory provisions relied on by this Court in rejecting the "overall judgment" approach in *King Salmon* were not relevant in *RJ Davidson*. The Court concluded that s 5 was relevant to the decision as to whether or not to grant a resource consent under s 104.[95]

[55] In the present case, there is a clear link between the purposes in s 10(1) and s 59. The decision-maker has to consider the criteria in s 59 with a view to ensuring that the statutory purposes in s 10(1) are met.[96] Accordingly, the DMC, when taking into account the s 59(2) factors and having regard to the matters in s 59(3) and (4), will always have to consider those aspects in terms of the purpose. Treating both of the purposes as a cross-check is a way in which that consideration may be achieved. To this extent we accept the notion that s 10(1) is the ultimate touchstone.[97]

[56] However, the approach taken by the Court of Appeal unduly elevates the purpose provision by giving it an operational effect and by treating s 10(1)(b) as thereby giving priority to some effects in s 59 over others.[98] If that means a

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92 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

93 At [54].

94 At [66].

95 At [47], [51]–[52] and [70].

96 This is clear from the wording of s 10(3)(a), which states that "[i]n order to achieve the purpose", the decision-maker must take into account the decision-making criteria specified in relation to particular decisions. See similarly *RJ Davidson*, above n 92, at [52], where the Court held that the reference to Part 2 in s 104(1) of the RMA "enlivens ss 5–8 in the case of applications for resource consent".

97 Carter, above n 84, at 343 makes the point that "individual sections of an Act may be so clearly expressed that they are not susceptible to qualification in the light of [a] purpose statemen[t]", but, even then, the purpose statement is "an important part of the context in which every section of the Act must be read before a meaning is attributed to it".

98 The High Court similarly rejected a submission that the s 10(1)(b) purpose overrode the purpose in s 10(1)(a): HC judgment, above n 43, at [102].

hierarchical approach to s 59 is required, we do not agree. The obvious contrast is with ss 6, 7 and 8 of the RMA, which plainly establish a hierarchy of interests.[99] But, when dealing with marine discharge consents, both limbs of s 10(1) are relevant, so each must be addressed. The sustainable management purpose therefore remains part of the equation when considering the s 59 factors.

[57] Further, the legislative history suggests that the decision not to adopt a hierarchical approach in the EEZ Act was a deliberate one. During the parliamentary process, an amendment was proposed by a member of Parliament which would have amended the purpose clause in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (EEZ Bill)[100] by establishing the priority of environmental-focused matters over the broader matters, including economic benefit.[101] This amendment was not passed.[102]

[58] That said, in a particular case, some factors will be more relevant and more important as a matter of fact than others. To take an obvious example, some situations may involve impacts on human health where the proposed activity has only limited economic benefit. In those situations, the impact on public health will take primacy. As the Court in *RJ Davidson* said, this reflects "the possibility of different outcomes where an overall judgment is applied".[103]

[59] To summarise, an overall assessment of the s 59 factors (except for s 59(2)(c) and substituting s 87D(2)(ii)) was required to be taken in this case, but the DMC also needed to address those factors with both s 10(1) purposes in mind. The DMC's approach was to focus on the s 59 factors, albeit acknowledging the need to achieve

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99 Section 6 of the RMA lists matters of national importance that the decision-maker "shall recognise and provide for", s 7 lists other matters that decision-makers "shall have particular regard to" and s 8 provides that decision-makers "shall take into account" the principles of the Treaty of Waitangi. All three sections apply as part of achieving the statutory purpose set out in s 5, but Salmon and Grinlinton, above 90, at 595 state that the different phraseology "establish[es] a hierarchy of importance for decision-makers to follow".

100 EEZ Bill, above n 81.

101 Supplementary Order Paper 2012 (89) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (321-2) (explanatory note) at 2–3. See also (16 August 2012) 682 NZPD 4506–4507. The departmental report to the Select Committee explicitly rejected any hierarchical or tiered approach to the s 59 factors, contrasting this aspect of the Bill with the RMA. The report suggested the matters listed were "equally weighted and the weight will depend on the circumstances of a given case": Departmental Report on EEZ Bill, above n 81, at 12.

102 (16 August 2012) 682 NZPD 4518.

103 See *RJ Davidson*, above n 92, at [69]. See also at [74].

the statutory purpose. The DMC undertook what it described as an "Integrated Assessment" which worked through those factors in turn. However, it is fair to say, as the Court of Appeal did, that this assessment comes to a "somewhat abrupt end" with no clear indication of the test applied in coming to the conclusion to grant the consents.[104] Further, the DMC took the view that it was not possible to deal with the applications for marine consents separately from the applications for marine discharges because they were linked. That may well have been a practical approach to take but the risk in doing so was that the s 10(1)(b) purpose was overlooked. We consider that, at least in respect of the significant adverse effects identified by the DMC, for example, in relation to the Pātea Shoals and other environmentally sensitive areas, it appears that the s 10(1)(b) purpose was not considered. However, given our approach to s 10 is not one shared by the majority, we do not need to reach a concluded view on this.

The requirement to "protect the environment from pollution"

[60] We turn to consider what s 10(1)(b) means in the present context. On this aspect also we take a different view from the majority. The dispute between the parties turns on whether the Court of Appeal's approach is correct. While the first respondents generally adopt the Court of Appeal's approach, TTR says the Court incorrectly attributed "protection" with an absolute quality. TTR argues that what is required instead is a trade-off against a range of protective measures and the DMC can balance the materiality of harm against economic benefits. This exercise, it says, should be undertaken in the round. In supporting the approach taken by the Court of Appeal, Mr Fowler QC for the iwi parties submitted that the addition of s 10(1)(b) shifts the focus to the prevention of pollution. He says this does not allow an activity to proceed where essentially that would entail cleaning up the environmental damage left behind, albeit over time that damage may be mitigated.

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104 CA judgment, above n 45, at [99].

[61] To put the argument in context, it is helpful to begin with the key conclusion on this point in the judgment of the Court of Appeal, namely that:[105]

> It is not consistent with s 10(1)(b) to permit marine discharges or marine dumping that will cause harm to the environment, on the basis that the harm will subsequently be remedied or mitigated. The s 10(1)(b) goal can only be achieved by regulating the activity in question (for example, by imposing conditions) in a manner that will avoid material pollution of the environment, or if that is not possible, by prohibiting the relevant discharge or dumping in question. … [T]he reference to regulating discharges or dumping is a reference to regulating those activities in order to pursue the goal of protecting the environment from pollution: it does not indicate that there are circumstances in which that goal need not be pursued.

[62] The Court of Appeal in this passage and elsewhere discusses both "harm" (and "pollution") and "material harm" (and "material pollution"). There was some debate at the hearing in this Court about the test being applied, but it was generally accepted that the Court of Appeal meant "material" harm. That this is the position is confirmed by the Court's emphasis on the findings of the DMC as to the real prospect that the sediment plume resulting from TTR's proposed activities would have "material" adverse effects on the environment despite the conditions imposed.[106]

[63] The Court said that protecting means "keeping the environment safe from pollution".[107] If regulation will not achieve that, then prohibition is the appropriate response.[108] The Court stated that it followed that the criteria for marine discharge consents were "more demanding" than for marine consents generally, and, importantly, the Court explained:[109]

> It is not consistent with the scheme of the EEZ Act to trade off harm to the environment caused by a marine discharge against other benefits, such as economic benefits. Nor is it consistent with the scheme of the EEZ Act to permit harm to the environment caused by a marine discharge on the basis that this harm will subsequently be remedied or mitigated. It would be inconsistent with s 10(1) for the EPA to grant a marine discharge consent if granting the consent is not consistent with the goal of protecting the environment from pollution. Protecting the environment—keeping it safe from harm caused by marine discharges or marine dumping—is in this sense a bottom line. It is not open to the EPA to grant a consent for a marine discharge or marine dumping

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105 At [86].
106 At [111].
107 At [109]. See also at [85]. In this respect, the Court of Appeal cited (at [85], n 56) *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 262.
108 CA judgment, above n 45, at [109].
109 At [89] (footnote omitted).

> unless it is satisfied that the relevant activity is not likely to cause harm to the environment. If there is a real prospect of material pollution of the environment, a marine discharge or dumping consent should not be granted.

[64] It is clear from the legislative history that, at the time the EEZ Act was enacted, the intention was to enable the natural resources of the EEZ to be exploited but "in an environmentally responsible way".[110] What was envisaged was a balancing process between environmental and economic interests in the exploitation of those natural resources. As Hon Amy Adams, the responsible Minister, put it in the course of the second reading debate, the Bill was not about "pitting the economy against the environment. It is about balance, and responsible management of our oceans".[111]

[65] In the Bill as introduced, the purpose clause (cl 10) was framed in terms of that balance: the "balance between the protection of the environment and economic development".[112] Neither environmental nor economic interests prevailed. This balancing exercise was to be undertaken by requiring decision-makers to do various things, including taking into account the matters in cls 12 and 13. Clause 12 listed many of the factors which are now in s 59, including adverse effects on the environment and economic wellbeing. Clause 13 set out the information principles which are now in s 61. In the report back on the Bill from the Select Committee, the Committee recommended moving the requirements in cls 12 and 13 to the "substantive decision-making clauses" in the Bill (what is now s 59).[113] This, the Committee said, "would strengthen the connection between decision-making and the relevant considerations".[114]

[66] A number of supplementary order papers were introduced at the Committee stage of the Bill. In one supplementary order paper, the responsible Minister sought

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110 See the speech of the responsible Minister at the time in the first reading: (13 September 2011) 675 NZPD 21216.

111 (30 May 2012) 680 NZPD 2734. The departmental report to the Select Committee was clear that the EEZ Bill did not have "an absolute conservation or protection purpose", noting that there were "better tools available to address conservation needs in the EEZ [such as] the Marine Reserves Bill": Departmental Report on EEZ Bill, above n 81, at 10.

112 EEZ Bill, above n 81.

113 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) (select committee report) [EEZ Bill (select committee report)] at 3–4.

114 At 3.

an amendment to cl 10 which would insert a new purpose provision. The proposed amendment read:[115]

> **10 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

[67] The explanatory note to the supplementary order paper advanced by the Minister noted that the proposed amendment replaced the balancing purpose with a purpose of promoting sustainable management.[116] The Minister did not see this change as reflecting a shift away from a balance. Rather, the Minister described it as substituting a term, "sustainable management", that was "well defined in case law" and well understood.[117] This, the Minister later reiterated, would "provide for fundamentally the same process [as the original balancing exercise] but directed

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115 Supplementary Order Paper 2012 (100) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) at 2.

116 Supplementary Order Paper 2012 (100) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) (explanatory note) at 14.

117 (16 August 2012) 682 NZPD 4492. To the same effect, see the Minister's speech in the third reading: (28 August 2012) 683 NZPD 4780.

through better-understood legal mechanisms".[118] This proposed amendment was adopted by a majority of the House following the Committee debate.

[68] As we have noted, another member proposed an amendment to cl 10 and consequential changes, which would have provided for a prioritised list of factors for decision-makers to consider. This was rejected.[119] A proposed amendment to the purpose clause so that it provided that the Act's purpose was "to protect and preserve the environment while providing for sustainable economic development" was also rejected.[120]

[69] Section 10 was enacted in the same terms as the Minister's proposed amendment. This was then the position until the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 (the 2013 Amendment Act).[121] The 2013 Amendment Act inserted s 10(1)(b) into the EEZ Act, this provision coming into force in October 2015. What became the 2013 Amendment Act arose from an omnibus bill, the Marine Legislation Bill 2012, which was introduced to the House shortly after the EEZ Bill was given its third reading.[122]

[70] The explanatory note to the Marine Legislation Bill recorded that the Bill amended the EEZ Act in order to transfer the responsibility for the regulation of discharges and dumping in the EEZ and continental shelf from Maritime New Zealand to the EPA.[123] The transfer was to enable discharges and dumping "to be assessed

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118 (28 August 2012) 683 NZPD 4780.

119 See above at [57].

120 Supplementary Order Paper 2012 (97) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2).

121 The EEZ Bill did not address management of the effects of discharges and dumping because these were regulated under the Maritime Transport Act and Marine Protection Rules by Maritime New Zealand. That may have been because the Bill was seen as gap-filling, a point to which we return later: at n 297 below. An early regulatory impact statement produced shortly after the EEZ Bill had its first reading recommended transferring discharge and dumping regulatory functions to the EPA under the EEZ Bill: see Ministry for the Environment *Regulatory Impact Statement: Transfer of discharge and dumping regulatory functions from Maritime New Zealand to the Environmental Protection Authority* (14 September 2011) [Regulatory Impact Statement on Transfer of Discharge and Dumping Regulatory Functions] at 3 and 10. However, this did not occur in the EEZ Act as originally enacted.

122 Marine Legislation Bill 2012 (58-1).

123 Marine Legislation Bill 2012 (58-1) (explanatory note) at 7.

within the same consenting regime as other activities relating to the wider operation".[124]

[71] The explanatory note also recorded that some of the amendments made to the EEZ Act were required to ensure New Zealand acted consistently with the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL) and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention).[125] It was as part of this exercise that s 11 of the EEZ Act dealing with international instruments relevant to the Act was amended to add s 11(c) and (d), which refer respectively to MARPOL and to the London Convention.

[72] Of cl 92, which inserted s 10(1)(b), the explanatory note stated that the clause amended s 10 "so that it encompasses the new provisions relating to discharges and dumping".[126] The scope of the discharges that would come under the EEZ Act was to be determined by the definition of "harmful substance" which would be provided for in regulations.[127] The High Court said that because of the more limited focus of MARPOL and the London Convention, "it was not obvious that, at the time the Bill was introduced, the discharge of sediments from marine mining would be caught by this provision".[128] The Court said this was due to the fact that "the definition of 'harmful substance' had not yet been set by regulation, and sediments from seabed mining had not been included as 'harmful substances' under the prior regime under the [Maritime Transport Act]".[129]

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124 At 7.

125 At 7, citing Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 1340 UNTS 61 (signed 17 February 1973, entered into force 2 October 1983) [MARPOL]; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120 (opened for signature 29 December 1972, entered into force 30 August 1975) [London Convention]; and 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (adopted 7 November 1996, entered into force 24 March 2006) [1996 London Protocol]. The Ministry of Transport and Ministry for the Environment's joint report to the Select Committee did not support replacing the phrase "to protect the environment from pollution" with the words "to protect and preserve the marine environment" as the current wording complied with MARPOL and the London Convention: Ministry of Transport and Ministry for the Environment *Marine Legislation Bill 2012* (15 November 2012) at 123.

126 Marine Legislation Bill 2012 (58-1) (explanatory note) at 19.

127 At 20.

128 HC judgment, above n 43, at [81].

129 At [81].

[73] Against this background, we turn to how the addition of s 10(1)(b) altered the position from that when the EEZ Act was enacted. Does the word "protect" mean to protect from material harm, as the Court of Appeal found, with no ability to trade off against other benefits such as economic benefits? Or, as TTR would have it, does it envisage a range of protective measures which may have the effect of partially or fully addressing any harm?

[74] We agree with TTR that the construction of s 10(1)(b) has to leave some room for the effective operation of the considerations in s 59. The need to leave room for s 59 means factors other than the environmental effects are necessarily part of the equation. That must be so where s 87D(2)(a), which was introduced along with s 10(1)(b), makes it clear that s 59(2)(f) (referring to the economic benefit to New Zealand of allowing the application), s 59(2)(g) (referring to the efficient use and development of natural resources) and s 59(2)(j) (requiring consideration of the extent to which imposing conditions might "avoid, remedy, or mitigate" the adverse effects) remain relevant considerations to applications relating to the discharge of harmful substances. The ongoing relevance of those factors reflects the statutory intention, which was to allow for some exploitation of the natural resources in the EEZ.

[75] By contrast, the approach to dumping consents is more restrictive than that applicable to marine discharges. Under s 87D(2)(b)(i), for example, the factors in s 59(2)(c), (f), (g) and (i) are excluded, which means that economic benefit is irrelevant when the proposed activity comes within the definition of dumping.[130]

[76] Further, in their ordinary dictionary meanings, the three words "avoid, remedy, or mitigate" in s 59(2)(j) suggest varying levels of "protection".[131] The notion of something less than complete protection from material harm is also consistent with the use of the word "protect" in the definition of sustainable management in s 10(2),

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130 Section 59(2)(c) refers to the effects on human health arising from effects on the environment and s 59(2)(i) refers to best practice in relation to an industry or activity.

131 "Avoid" means to "[k]eep off; prevent; obviate", "remedy" means to "[p]ut right, reform, (a state of things); rectify, make good"; and "mitigate" means to "lessen the suffering or trouble caused by … [a] difficulty" and to "[m]oderate (the severity, rigour, etc, of something)": see William R Trumble and Angus Stevenson (eds) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 1 at 159 and 1800; and William R Trumble and Angus Stevenson (eds) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 2526.

referring to the "protection of natural resources in a way … that enables people to provide for their economic well-being". Its use in s 10(2) clearly envisages some balancing.[132]

[77] We do not consider that the idea that there may be some balancing of interests is inconsistent with the ordinary dictionary meaning of "protect", namely:[133]

> (1) Defend or guard against injury or danger; shield from attack or assault; support, assist, give [especially] legal immunity or exemption to; keep safe, take care of; extend patronage to.
>
> …
>
> (1C) Aim to preserve (a threatened plant or animal species) by legislating against collecting, hunting, etc; restrict by law access to or development of (land) in order to preserve its wildlife or its undisturbed state; prevent by law demolition of or unauthorized changes to (a historic building etc).

[78] A similar approach to the meaning of "protection" was taken by Cooke P in *Environmental Defence Society Inc v Mangonui County Council*, in a passage adopted by the Court of Appeal in the present case. The Town and Country Planning Act 1977 referred to the "protection of [the coastal environment and margins of lakes and rivers] from unnecessary subdivision and development".[134] The argument put to the Court in *Mangonui* was that "protection" was "not as strong a word as prevention or prohibition; that it means keeping safe from injury and that a development may be permitted if the natural environment is more or less protected".[135] Cooke P, apart from noting that "more or less" was vague, accepted this argument, but did not consider that the Planning Tribunal had found that the natural environment would be "kept safe from injury".[136]

[79] TTR is critical of the application of *Mangonui* to the present case, given the different statutory context. We do not see the passage cited from *Mangonui* as

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132 As discussed, the sustainable management purpose in s 10(1)(a) represented a way to balance environmental and economic factors: see above at [64]–[67].

133 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 2), above n 131, at 2376.

134 Town and Country Planning Act 1977, s 3(1)(c).

135 *Mangonui*, above n 107, at 262.

136 At 262.

adopting a different approach to the ordinary dictionary meaning. Obviously though, the phrase as used in s 10(1)(b) has to be read in light of the overall statutory scheme.

[80] Nor do we see the passage referred to by the Court of Appeal from this Court's decision in *King Salmon* as adding particularly to the issue in this case. The point made in the passage cited was that in some cases the sustainable management goal may be most appropriately pursued via preservation or protection of the environment.[137] But we consider the Court of Appeal draws too much from that passage in concluding that for marine discharges and dumping, "the way in which the broader goal of sustainable management is to be pursued is by protecting the environment from harm caused by those activities", such that discharges and dumping could not be permitted if they would cause material harm (pollution) to the environment.[138]

[81] Some weight must be given to the reference in s 10(1)(b) to achieving protection by "regulating or prohibiting" marine discharges. "Regulate" in its ordinary dictionary meaning encompasses controlling, governing or directing by rule or regulations and to "adapt to circumstances or surroundings".[139] We agree with the conclusion of the High Court that the ability to regulate or prohibit means that the EEZ Act envisages circumstances where the discharge of harmful substances need not be prohibited if it can be appropriately regulated.[140] By contrast, some discharges are separately and completely prohibited.[141] No consents can be applied for, or granted, for such discharges.[142] Discharges of the nature in issue in this case necessarily involve the ejection of "harmful" substances to the marine area where the substances previously were not present, thus disrupting the marine ecosystem, but they are not automatically prohibited. That supports the view that "protect" does not mean there can be no material harm.

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137 *King Salmon*, above n 80, at [149].
138 CA judgment, above n 45, at [86].
139 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 2), above n 131, at 2516.
140 HC judgment, above n 43, at [93].
141 For example, the discharge of sediments that are prohibited radioactive materials: EEZ Regulations 2015, reg 11.
142 EEZ Act, s 37(2).

[82] Thus, as TTR submits, the use of the word "regulate" suggests protection is a relative and not an absolute concept. The effect of the ability to regulate may mean that if harm, albeit material, can be avoided, remedied or mitigated over time, the goal of s 10(1)(b) may nonetheless be able to be met.[143] Of course, whether that is so in any given case is a factual question. This interpretation is further supported by the reference to "protection" in s 10(2)'s definition of sustainable management. As this Court said in *King Salmon* about the analogous definition in s 5(2) of the RMA, "the use of the word 'protection' links particularly to subpara (c)", namely, "avoiding, remedying, or mitigating any adverse effects of activities on the environment".[144] It seems likely that "protection" in s 10(2) has the same meaning as "protect" in s 10(1)(b).

[83] Despite the analogy with s 10(2)(c) (and s 5(2)(c) of the RMA), we accept, as the iwi parties submit, that the addition of s 10(1)(b) must add something to the equation. Indeed, TTR accepts there is a heightened threshold when it comes to authorising discharges and dumping. That must be so where, unlike s 10(1)(a) (and s 10(2)), the focus in s 10(1)(b) is solely on protection. And the activities covered by s 10(1)(b) are broader than those activities, such as emptying ballast water from ships, which do not have much to do with sustainable management.[145]

[84] The prohibition, in applications for discharge and dumping, on imposing conditions which involve adaptive management is also relevant.[146] That prohibition

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143 Compare CA judgment, above n 45, at [86]. While the DMC's decision suggests it considered the conditions imposed had the effect of avoiding, remedying or mitigating material harm over time, any such consideration was tainted by the DMC's fundamental error, discussed below, of acting on the basis of uncertain information. As we discuss at [129] in relation to seabirds and marine mammals, on the information before it, the DMC simply could not be satisfied that the harm would be remedied, mitigated or avoided.

144 *King Salmon*, above n 80, at [24(c)].

145 The discharge of ballast water from ships is dealt with under the Maritime Transport Act, not the EEZ Act: Maritime Transport Act, Part 19A. In the early regulatory impact statement recommending the transfer of discharge and dumping regulatory functions from Maritime New Zealand (under the Maritime Transport Act) to the EPA (under the EEZ Act), the Ministry for the Environment considered that such a transfer would produce better environmental results, noting that the Maritime Transport Act was "largely a transport Act" and "not suited to assessments of environmental effects": Regulatory Impact Statement on Transfer of Discharge and Dumping Regulatory Functions, above n 121, at 6. See also at 10.

146 EEZ Act, s 87F(4). The High Court Judge pointed out that although neither the London Convention nor the associated 1996 London Protocol prohibited adaptive management in relation to dumping, it appeared that adaptive management was prohibited to ensure consistency with both MARPOL and the 1996 London Protocol: HC judgment, above n 43, at 80, citing Ministry of Transport and Ministry for the Environment, above n 125, at 111.

too suggests a greater concern by the legislature with protection of the environment than is the case for general marine consents. We interpolate here that we consider the submission for the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) goes too far, however, in saying that the unavailability of adaptive management means that an activity causing material harm must be prohibited. We say that because s 59(2)(j) – "the extent to which imposing conditions … might avoid, remedy, or mitigate the adverse effects of the activity" – still applies to applications for marine discharges as a matter the DMC must take into account.[147]

[85] The fact that there is a heightened threshold is also emphasised by the need to favour caution and environmental protection if there is uncertainty as to the information available.[148] In practice, the uncertainty is likely to relate to environmental effects. This more cautious approach is reflected also in the requirements applicable to the Minister in recommending the making of regulations relating to discharges and dumping, and that, in turn, imposes limits on what could otherwise become a permitted activity in terms of s 20C.[149]

[86] Obviously the relevant international obligations also provide an overlay to the approach to be taken. Section 11 provides that the EEZ Act "continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment". Section 11 provides that those conventions include: the United Nations Convention on the Law of the Sea 1982 (LOSC);[150] the

147 EEZ Act, s 87D(2)(a)(i).

148 Section 87E(2).

149 For example, unlike the position for regulations relating to cases requiring general marine consents, when developing regulations relating to discharges and dumping the Minister cannot take into account the economic benefit of an activity, the efficient use and development of natural resources and best practice in relation to an industry or activity: s 34A(3)(a). The Minister can however consider adaptive management as an approach that would allow a dumping or discharge activity to be classified as discretionary in circumstances where it would otherwise be prohibited due to the need to favour caution and environmental protection: see s 34(3), which s 34(1) says applies to regulations made under s 29A.

150 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) [LOSC].

Convention on Biological Diversity 1992;[151] MARPOL;[152] and the London Convention.[153]

[87] Of those instruments listed in s 11, the LOSC and the Convention on Biological Diversity apply directly. While MARPOL and the London Convention are also relevant, neither applies directly to TTR's application.

[88] The LOSC applies to activities in the EEZ.[154] The relevant part of the LOSC (Part XII) deals with the "protection and preservation of the marine environment". The "[g]eneral obligation" is set out in art 192, under which states "have the obligation to protect and preserve the marine environment". Relevant also is art 193, which recognises the national economic interests of states along with the duty to protect and preserve the marine environment. Art 193 provides that:

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

[89] Reference should also be made to art 194, which sets out obligations in relation to measures to prevent, reduce and control pollution of the marine environment. Under art 194(1), states parties are required to take:

> … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance

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151 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).

152 Art 1(2) to the Protocol of 1978 relating to MARPOL states that the provisions of the MARPOL Convention and Protocol shall be read and interpreted together as one single instrument.

153 Art 23 of the 1996 London Protocol provides that it supersedes the London Convention for those contracting parties to the Protocol which are also parties to the Convention.

154 Article 55 defines the EEZ and subjects it to the "specific legal regime" in Part V. Part V's regime is "characterized by a combination of selected exclusive rights and jurisdiction of the coastal State and rights and freedoms of other States": Alexander Proelss "Exclusive Economic Zone" in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, Munich, 2017) 408 at 409. Article 56(1)(a) provides that a coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" in the EEZ. Article 56(1)(b)(iii) states that the coastal state has jurisdiction, as provided for in the relevant provisions of the LOSC, with regard to "the protection and preservation of the marine environment". Thus, the general obligation in art 192 to protect and preserve the marine environment is applicable to activities in the EEZ of coastal states: Detlef Czybulka "Protection and Preservation of the Marine Environment" in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, Munich, 2017) 1277 at 1280.

> with their capabilities, and they shall endeavour to harmonize their policies in this connection.

[90] "Pollution of the marine environment" is a defined term and means:[155]

> … the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities[.]

[91] Art 194(3) provides that the measures taken need to deal with all sources of pollution of the marine environment. The measures are to include, amongst other things, "those designed to minimize to the fullest possible extent" pollution from various sources, including pollution from seabed activities subject to national jurisdiction. One commentator writes that the objective of art 194(3) "is not to eliminate pollution as such but to reduce it, thus minimizing it to the greatest extent possible".[156] That is seen as a "realistic approach, as otherwise most kinds of ocean uses would have to be banned".[157]

[92] Finally, art 208(1) provides for coastal states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction". Under art 208(3), the national legislation and regulations in this respect are to be "no less effective" than international rules. Unlike the position for dumping, the information we have is that international rules on seabed pollution subject to national jurisdiction are not commonplace.

[93] The case law and commentary on arts 192–194 of the LOSC suggest that what is envisaged is a balance between environmental protection and preservation (art 192) and the economic development of resources (art 193), but that the balance is tilted towards environmental protection. That environmental protection has priority over economic development is apparent in the wording of art 193 which provides that states

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155 Art 1(1)(4) definition of "pollution of the marine environment".

156 Czybulka, above n 154, at 1307.

157 At 1307. See also Joanna Mossop *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (Oxford University Press, Oxford, 2016) at 103.

can exploit resources "*in accordance with*" their duty to protect and preserve the environment.[158]

[94] That something less than absolute protection is envisaged is also reflected in the characterisation of the art 194(1) obligation as one of "due diligence" rather than strict liability, given the leeway in art 194(1) for states to prevent, reduce and control pollution "using the best practicable means at their disposal and in accordance with their capabilities".[159] Further, the International Tribunal for the Law of the Sea's (ITLOS) Advisory Opinion on Seabed Activities, to which we were referred, has said that the obligation of due diligence is a variable standard that changes over time and in relation to the risks, with the standard of due diligence being more severe for riskier activities.[160]

[95] The Convention on Biological Diversity has as its objectives:[161]

> … the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources…

[96] The Convention, like art 193 of the LOSC, provides that states have "the sovereign right to exploit their own resources pursuant to their own environmental policies".[162] Under art 6(a), each party shall "in accordance with its particular

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158 Emphasis added. See, for example, Elizabeth A Kirk "Science and the International Regulation of Marine Pollution" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 516 at 521; Czybulka, above n 154, at 1288; and Robin Warner *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff Publishers, Leiden, 2009) at 48.

159 Warner, above n 158, at 48, quoting Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 352. See also Donald R Rothwell and Tim Stephens *The International Law of the Sea* (2nd ed, Hart Publishing, Oxford, 2016) at 370. Sands and others describe art 194(1) as "introduc[ing] the element of differentiated responsibility based upon economic and other resources available": Phillipe Sands and others *Principles of International Environmental Law* (4th ed, Cambridge University Press, Cambridge, 2018) at 463. In the context of interpreting a bilateral treaty with similarly worded obligations to protect and preserve the environment and prevent pollution, see the comments of the International Court of Justice in *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits)* [2010] ICJ Rep 14 at [197]. See also at [116].

160 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Reports 10 [Seabed Advisory Opinion] at [117]. See further Mossop, above n 157, at 103–104.

161 Convention on Biological Diversity, above n 151, art 1.

162 Article 3.

conditions and capabilities … [d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity".[163]

[97] We turn, then, to MARPOL and the London Convention and its associated 1996 Protocol (the 1996 London Protocol). MARPOL deals with marine pollution from ships.[164] The preamble to MARPOL states the parties' wish "to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances". Article 1(1), setting out the general obligations, accordingly requires parties "to prevent the pollution of the marine environment by the discharge of harmful substances … in contravention of the Convention". MARPOL does not apply to discharges of harmful substances from ships that arise directly from seabed mining activities and is therefore not directly applicable to TTR's application.[165]

[98] The London Convention deals with marine pollution from the dumping of waste and other matter.[166] As TTR's application does not involve dumping as defined, this Convention is not directly applicable.[167] Under art 2 of the 1996 London Protocol, parties must "protect and preserve the marine environment from all sources of pollution and take effective measures, according to their … capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping". But the

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163 There are other international instruments relevant to New Zealand's obligations in terms of the LOSC. None of these add substantively to the present issue. In this category are the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region [1990] NZTS 22 (signed 24 November 1986, entered into force 22 August 1990) [Noumea Convention] and various soft law instruments endorsed by New Zealand, namely, the Rio Declaration on Environment and Development UN Doc A/Conf 151/26 (vol 1) (12 August 1992) [Rio Declaration] and *Agenda 21: Programme of Action for Sustainable Development* UN GAOR 46th Sess, Agenda Item 21, A/Conf 151/26 (1992) [Agenda 21]. The Noumea Convention and the Rio Declaration have provisions equivalent to arts 192 and 193 of the LOSC; that is, while emphasising the need for environmental protection, a state's sovereign right to exploit resources is affirmed. Agenda 21 is an action plan "calling for the 'further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns'": James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 339.

164 MARPOL, above n 125, preamble and art 2(3)(a).

165 Article 2(3)(b)(ii).

166 London Convention, above n 125.

167 Dumping is defined in art 3(1)(a)–(c). Art 3(1)(c) provides the "disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of sea-bed mineral resources will not be covered by the provisions of this Convention".

Protocol, like the Convention, does not apply to the dumping of waste related to seabed mining activities.[168]

[99] We agree with the Court of Appeal that these instruments all inform the interpretation of the EEZ Act.[169] The effect of such instruments on interpretation is set out in this way by McGrath J in *Helu v Immigration and Protection Tribunal*:[170]

> [143] Parliament takes differing approaches to the implementation of international obligations. It sometimes gives them effect by incorporating their exact terms into New Zealand law. At other times, it enacts legislation, with the purpose of giving effect to such obligations, using language which differs from the terms or substance of the international text. In such cases, the legislative purpose is that decision-makers will apply the New Zealand statute rather than the international text. Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations. But the international text may not be used to contradict or avoid applying the terms of the domestic legislation.
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> [144] Accordingly, if the legislation confers a discretion in general terms, without overt links to pertinent international obligations, the application of this principle of consistency may, depending on the statute and, in some instances, the nature of international obligation, require that the power is exercised in a manner consistent with international law. Or it may require that a decision maker take into account particular considerations arising from international instruments to which New Zealand is a party. If, however, Parliament has provided that a decision-maker is to have regard to specific considerations drawn from international obligations, the legislation must be applied in its terms, although they may be clarified by reference to the international instrument.

[100] The EEZ Act has been enacted with the purpose of giving effect to New Zealand's international obligations, but has used language which differs from the international texts. In such cases, as McGrath J says, the legislative purpose was that decision-makers would apply the EEZ Act rather than the international text, but resort can be had to the relevant international instruments to clarify the meaning of the Act.

[101] Here, neither the LOSC nor the Convention on Biological Diversity imposes absolute requirements on states parties to these Conventions. They do nonetheless

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168 1996 London Protocol, above n 125, art 1(4.3).

169 See CA judgment, above n 45, at [269]–[270].

170 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 (footnotes omitted). See also at [207] per Glazebrook J in *Helu*; and *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96].

provide support for the proposition that s 10(1)(b) imposes a heightened threshold in favour of environmental protection. It is less clear in our view that the Court of Appeal is correct to say that the interpretation of the provisions in the Act dealing with marine discharges and dumping must take into account the objective of giving effect to MARPOL and the London Convention.[171] To put it another way, we do not see either instrument as adding to the effect of the LOSC or the Convention on Biological Diversity in the present case.

Conclusions on the correct approach to s 10(1)(b)

[102] When all of these features of the statutory scheme are considered, in disagreement with the majority, we do not consider it would be correct to describe s 10(1)(b) as creating an environmental bottom line.[172] Harm, even material harm, is not automatically decisive. The ongoing relevance of all but one of the considerations listed in s 59(2) to marine discharge applications is the strongest pointer against that. But the addition of s 10(1)(b) with its sole focus on protection must be given effect. As we see it, that will likely mean that the s 59 balancing exercise may well be tilted in favour of environmental factors, particularly when s 10(1) is read in light of the information principles, but that is a decision that will need to be made on a case-by-case basis having considered all of the relevant factors.

The information principles

[103] In accordance with s 10(3)(b) of the Act, the DMC was obliged to apply the relevant information principles. Those principles are, on our analysis, part of the decision-making criteria. Section 61 sets out the information principles applicable to the DMC's consideration of an application for a marine consent. Section 61(1) provides that the DMC must:

> (a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and
>
> (b) base decisions on the best available information; and
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> (c) take into account any uncertainty or inadequacy in the information available.

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171 CA judgment, above n 45, at [28]–[29] and [88].

172 See below at [245] per Glazebrook J, [292] per Williams J and [305] per Winkelmann CJ.

[104] Under s 61(2), if, in making a decision under the Act, "the information available is uncertain or inadequate, the EPA must favour caution and environmental protection". If the effect of favouring caution and environmental protection is that "an activity is likely to be refused, the EPA must first consider whether taking an adaptive management approach would allow the activity to be undertaken".[173] Section 87E provides that the same principles apply to applications for marine discharge and dumping consents,[174] except, as discussed, there is no ability to take an adaptive management approach.[175] The relevant provisions also make clear, for the avoidance of doubt, that the EPA may refuse a general marine consent application or discharge or dumping consent application if it considers it does not have adequate information to determine the application.[176]

[105] As TTR submits, the information principles recognise that considerably less is known about the marine environment as opposed to the terrestrial environment.[177]

[106] A number of issues arise in respect of the information principles. We begin with TTR's challenge to the finding by the Court of Appeal that the requirement to favour caution and environmental protection in the Act is a statutory implementation of the "precautionary principle" in international environmental law.[178]

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173 EEZ Act, s 61(3). Section 61(4) states that s 61(3) does not limit ss 63 or 64.

174 Accordingly, and for convenience, our discussion refers to the information principles in s 61 even in relation to the discharge aspects of the application, except where it is necessary to refer to s 87F(4)'s prohibition on adaptive management for discharge applications.

175 In addition, applications for consent must include an impact assessment. That assessment must contain, among other things, information about the effects of the activity on the environment and existing interests in "sufficient detail" to enable an understanding of the nature of the activity and its effects. If the impact assessment does not comply with these requirements, the EPA may return the application as incomplete: see ss 38(2)(c), 39 and 41 in relation to marine consents and s 87B(2)(c) for discharge and dumping consents.

176 Sections 62(2) and 87F(3).

177 The Fisheries Act 1996 contains a similar set of information principles, including the requirement for decision-makers to be "cautious when information is uncertain, unreliable, or inadequate": s 10(c). Further, s 10(d) states that any uncertainty in information "should not be used as a reason for postponing or failing to take any measure to achieve the purpose" of the Act. In her dissenting reasons in *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [9], Elias CJ said s 10 meant "imperfect information" was not a reason "for postponing or failing to take measures to achieve the purpose of the Act".

178 CA judgment, above n 45, at [127]. Some states prefer to refer to a "precautionary approach", but for our purposes we do not need to deal with the difference (if any) between the two.

Implementation of the precautionary principle?

[107] This point can be dealt with briefly. As has been said in the commentary, "At its most basic, environmental precaution involves the idea that it is better to be safe than sorry when the effects of activities are uncertain."[179] The concern underlying the reference to the need to favour caution in the EEZ Act obviously reflects that idea. Further, two of the international instruments referred to in s 11 of the EEZ Act, the Convention on Biological Diversity[180] and the London Convention as modified by art 3(1) of the 1996 London Protocol (in respect of dumping), incorporate the precautionary principle and so are relevant to the interpretation of the phrase "favour caution".[181] The Rio Declaration on Environment and Development 1992 (Rio Declaration) and the Programme of Action for Sustainable Development (Agenda 21), both of which New Zealand has endorsed, also incorporate the precautionary approach.[182] That said, for the reasons we discuss, it is important to focus on the actual words used. The observations of McGrath J in *Helu*, discussed above, are apposite here.[183] The following points can be made.

[108] First, Parliament could have used the term the "precautionary principle" but did not. Rather, as TTR submits, the choice of the wording "favour caution" was a deliberate one reflecting the uncertainty around the "precautionary principle" at international law.[184] Given that uncertainty, the international instruments do not assist substantially in clarifying the interpretation of the statutory wording.

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179 Catherine J Iorns Magallanes and Greg Severinsen "Diving in the Deep End: Precaution and Seabed Mining in New Zealand's Exclusive Economic Zone" (2015) 13 NZJPIL 201 at 201. Jacqueline Peel "Precaution — A Matter of Principle, Approach or Process?" (2004) 5 MJIL 483 at 484 says the heart of the principle "is a reminder of the limitations of scientific knowledge as a guide to decision-making, and a warning to heed the lessons of the past to prevent the occurrence of environmental damage in the future".

180 Convention on Biological Diversity, above n 151, preamble.

181 The precautionary approach is incorporated into the RMA regime via Policy 3 of the New Zealand Coastal Policy Statement (NZCPS): Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

182 Rio Declaration, above n 163, at Principle 15; and Agenda 21, above n 163, at [17.1].

183 See above at [99].

184 A supplementary order paper which would have replaced the word "caution" with the words the "precautionary approach" was rejected: Supplementary Order Paper 2012 (103) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2012 (321-2). See also (21 August 2012) 683 NZPD 4601 where the Hon Nick Smith, the responsible Minister at the time of the Bill's introduction, referred to the uncertainty of the principle at international law.

[109] Second, there are suggestions that the "precautionary principle" may have a narrower effect than the wording adopted in the EEZ Act. This Court noted in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* that there is material in the international law context to support the view that "rather than being concerned with taking precautionary measures in allowing development, the term is more often used for advocating precautionary measures to protect the environment".[185] There is also debate in the international law context about the scope of the principle.[186] Further, the references to the principle in international instruments are not uniform. Under Principle 15 of the Rio Declaration, for example, the threshold is "threats of serious or irreversible damage" and the approach is only to be applied by states "according to their capabilities". By contrast, art 3(1) of the 1996 London Protocol refers to the application of a precautionary approach where the dumping of waste is "likely to cause harm".[187] Further, under the Protocol, dumping is not permitted unless specifically allowed.[188]

[110] These contextual matters serve to emphasise the importance of considering the way in which the concept is expressed in a particular context. The DMC was cognisant of this context. The DMC obtained legal advice from counsel assisting as to the relevance of New Zealand's international obligations including those relating to the precautionary principle. The DMC adopted the advice from counsel on this aspect.[189] That advice in turn adopted the advice given to the DMC that considered Chatham Rock Phosphate Ltd's application, noting the absence of any universal approach to applying the precautionary principle and that the language of s 61 could "be taken to embody" that principle. The advice also noted that this interpretation was supported by the legislative history. The opinion concluded there was no need for the DMC to

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185 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [109], n 208. The Court referred in that context to the International Union for Conservation of Nature "Guidelines For Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management" (as approved by the 67th meeting of the IUCN Council 14–16 May 2007). For a discussion of the precautionary principle in international law, see Sands and others, above n 159, at 229–240; and World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) *The Precautionary Principle* (United Nations Educational, Scientific and Cultural Organization, March 2005).

186 See, for example, Peel, above n 179, at 500.

187 The preamble to the Convention on Biological Diversity, above n 151, adopts the precautionary principle, referring to "a threat of significant reduction or loss of biological diversity".

188 See 1996 London Protocol, above n 125, art 4(1).

189 DMC decision, above n 38, at [40]–[41].

apply a precautionary approach in addition to the requirement to favour caution and that it was not clear what practical distinction there was between the requirement in s 61(2) and the precautionary principle as it is "generally understood".[190]

[111] There is no apparent reason to read down the wording adopted in the EEZ Act. Against the background outlined above, we see no reason to depart from the ordinary meaning of those terms. The dictionary definition of "favour" includes "[t]reat with partiality" and "have a liking or preference for", and "caution" means "a taking of heed", "[p]rudence", "taking care" and "attention to safety, avoidance of rashness".[191]

[112] Finally, we do not consider that Kiwis Against Seabed Mining Inc (KASM) and Greenpeace of New Zealand Inc's reliance on the ITLOS Advisory Opinion or on the International Seabed Authority Regulations assists. These regulate seabed activities in areas beyond national jurisdiction (the Area) to which a different international regime applies.[192]

[113] In conclusion, for these reasons, we do not consider the DMC misdirected itself when it summarised the test as imposing "no requirement … to apply a precautionary approach". When faced with uncertainty, as the DMC said, it was "required to favour caution".[193] As the DMC was advised, this, in any event, accords with the precautionary principle as it is generally understood.

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190 See also Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consent Application – Chatham Rock Phosphate Ltd – To mine phosphorite nodules on the Chatham Rise* (February 2015) at [838].

191 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 1), above n 131, at 363 and 932.

192 LOSC, above n 150, Part XI. For an explanation of the international regime for seabed activities in the Area, see Joanna Dingwall "Commercial Mining Activities in the Deep Seabed beyond National Jurisdiction: the International Legal Framework" in Catherine Banet (ed) *The Law of the Seabed: Access, Uses, and Protection of Seabed Resources* (Koninklijke Brill NV, Leiden, 2020) 139.

193 DMC decision, above n 38, at [40]. Nor is it necessary for us to resolve whether the precautionary principle is a mandatory consideration as "other applicable law" under s 59(2)(l) of the EEZ Act for the reasons discussed below at n 290.

The link between s 87E and s 10(1)(b)

[114] After addressing the relevance of the precautionary approach, the DMC considered it was sufficient to impose conditions managing the potential effects on the environment.[194]

[115] The Court of Appeal considered that while the DMC understood the requirement that it favour caution, it was apparent that the DMC "did not put the same emphasis on the requirement to favour environmental protection, despite the reference to that requirement in s 87E(2)".[195] It was important to recognise that the information principles operate differently in the context of discharge consents compared to marine consents generally. That was because, on the Court's analysis, the environmental bottom line in s 10(1)(b) applied to discharge consents.[196]

[116] Reflecting the respective views on s 10(1)(b), TTR submits the Court of Appeal has in this way erroneously imposed a gloss on the requirement in s 87E, whereas the first respondents support the Court of Appeal's approach.

[117] It follows from our approach to s 10(1)(b) that we disagree with the Court of Appeal that the DMC erred because it did not consider the effect of that section as the Court of Appeal interpreted s 10(1)(b), that is, as providing absolute protection from material harm.[197] We take the view that it is possible that even material harm may be able to be mitigated, avoided or remedied by conditions. Accordingly, we also accept TTR's proposition that consents may be granted subject to conditions even when the full information may not be available in a particular case so long as taking a cautious approach means that harm can be avoided, remedied or mitigated. As we have accepted, however, the effect of the information principles in the context of applications for a marine discharge may nonetheless tilt the balance in favour of environmental protection.

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194 At [40]. The DMC also added that s 61(2) required it to "favour environmental protection in addition to caution, if the information we receive is uncertain or inadequate": at [42]. The DMC said that some of the information it received did have uncertainties, noting that it was "in that context, for the purpose of environmental protection, that we have imposed a suite of conditions to avoid, remedy or mitigate environmental effects": at [44].

195 CA judgment, above n 45, at [118].

196 At [129].

197 Compare at [274] per Glazebrook J, [294] per Williams J and [327] per Winkelmann CJ.

Did the DMC comply with the requirement to favour caution and environmental protection?

[118] As the High Court noted, the fact the DMC did not err in law in the way it formulated the test is a "different question to whether or not they actually applied an approach which 'favoured caution and environmental protection'".[198] It is helpful to address this question by considering the approach taken by the DMC in relation to the effects of TTR's application on seabirds and marine mammals. The Court of Appeal took the view that the uncertainty identified by the DMC in relation to seabirds and marine mammals, which was reflected in the conditions imposed, activated the requirement to favour caution and environmental protection. The Court concluded that granting consent based on this level of information and on these conditions was inconsistent with the requirement to favour caution and environmental protection.

[119] There was information showing the presence of a diverse range of seabirds and marine mammals in the general region of which the South Taranaki Bight forms a part. There was also a lack of information available about these species and, as a result, difficulty in assessing the risks or effects on these species in particular areas and in assessing the effects on them of particular aspects of the mining operation.

[120] In terms of seabirds, the DMC noted the "diverse range" of seabirds either passing through or foraging in the South Taranaki Bight but said that there had been "no systematic and quantitative studies of the at-sea distributions and abundances of seabirds within the area".[199] Regarding potential effects on seabirds, the experts agreed that they included the sediment increasing turbidity and reducing light intensity within the water column, and mortality from vessel strike for seabirds attracted to artificial nocturnal light from the mining vessel. But the experts disagreed on the potential for other effects on foraging efficiency and food availability, and also as to the scale and consequences of any effects.[200] Ultimately, the DMC concluded there was a "lack of detailed knowledge about habitats and behaviour of seabirds" in the

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198 HC judgment, above n 43, at [337].

199 DMC decision, above n 38, at [563]. The experts for TTR and Kiwis Against Seabed Mining Inc (KASM)/Greenpeace of New Zealand Inc agreed a number of "threatened" and "at risk" taxa occur within the South Taranaki Bight year-round or seasonally (conservatively, 10 and 24 taxa respectively).

200 The expert for KASM/Greenpeace was of the view that mining would have adverse effects on seabirds, while the expert for TTR was of the view there would be no adverse effects.

area and said it was therefore "difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself".[201]

[121] The marine mammals in the general region of which the South Taranaki Bight forms a part include the Māui dolphin, killer whale and Bryde's whale, all of which are nationally critical species, as well as the Hector's dolphin, bottlenose dolphin and the southern right whale, which are nationally endangered or vulnerable species. There was also evidence of blue whale, a migratory species that is internationally critically endangered. But, as the Court of Appeal noted, there was incomplete evidence about habitats and population numbers in the area and that evidence was subject to various uncertainties.[202] There were also uncertainties about effects, particularly of noise, on marine mammals. The DMC, the Court of Appeal said, accepted "the absence of comprehensive well-researched species-specific and habitat-specific information about noise effects on marine mammals".[203]

[122] The DMC responded to these uncertainties by including various conditions concerning seabirds and marine mammals in the consents. Condition 9 in relation to seabirds required TTR to comply with various matters including that there be "no adverse effects at a population level" of seabirds that fell within various categories of the New Zealand Threat Classification System, including those that are "Nationally Endangered" or "Nationally Critical". The condition then set out a non-exhaustive list of what comprised adverse effects, for example, effects arising from lighting or from the effect of sediment in the water column on diving birds that forage. These adverse effects were to be mitigated and, where practicable, avoided. A similar approach, that is directing that there be no adverse effects at a population level, was found in condition 10, which applied to the various marine mammal species listed. Condition 10 further provided that adverse effects on marine mammals, including those arising from noise, were to be "avoided to the greatest extent practicable". There was also a condition, condition 11, imposing limits on underwater noise generated by the operation of marine vessels and project equipment.

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201 At [579].
202 CA judgment, above n 45, at [244].
203 At [244], citing DMC decision, above n 38, at [544].

[123] The second aspect of the conditions imposed affecting seabirds and marine mammals was the provision for pre-commencement environmental modelling, that is, two years of environmental monitoring to be undertaken before mining operations begin. The list of matters to be monitored in condition 48 included seabirds, marine mammals and sediment concentrations and quality. The Court of Appeal described the pre-commencement monitoring in this way:[204]

> The purpose of the pre-commencement monitoring would include establishing a set of environmental data that identifies natural background levels while taking into account spatial and temporal variation of the various matters to be included in the plan. The pre-commencement monitoring would, among other matters, inform preparation of an Environmental Management and Monitoring Plan (EMMP) in accordance with condition 55. The EMMP would be submitted to the EPA for certification that it meets the requirements of the relevant conditions (with certification deemed to have occurred if the EPA has not given a decision within 30 working days). Condition 54 then requires ongoing environmental monitoring of a range of matters including marine mammals, to be undertaken in accordance with the EMMP.

[124] Finally, conditions 66 and 67 required TTR to prepare a Seabird Effects Mitigation and Management Plan and Marine Mammal Management Plan setting out how compliance with conditions 9 and 10 about adverse effects at the population level for seabirds and marine mammals were to be met. For seabirds, the plan had to include indicators of adverse effects at a population level of seabird species that utilise the area, and this plan was to be submitted to the EPA for certification that the requirements of the condition have been met. The plan for marine mammals was along similar lines.

[125] It is plain that the information available about the environmental effects on seabirds and on marine mammals was uncertain. It is sufficient to quote the DMC's conclusion in relation to seabirds that, because of the lack of detailed knowledge about habitats and behaviour of seabirds in the South Taranaki Bight, it was "difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself".[205] The obligation to favour caution and environmental protection was accordingly triggered.

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[204] At [250].

[205] DMC decision, above n 38, at [579]. The Pātea Shoals was an area of particular focus in the DMC's decision.

[126] Forest and Bird says the DMC could not remedy the uncertainty in information by granting consent subject to the conditions that TTR gather information post-approval and prepare management plans. Forest and Bird also says the imposition of very general conditions, leaving specific controls to management plans, was too uncertain, unlawfully delegated decision-making power and deprived submitters of participation rights.

[127] TTR, however, says the DMC's approach was sufficient for a number of reasons. First, the pre-commencement monitoring conditions will provide any further necessary information. Second, the conditions imposed were sufficiently specific and set clear limits, noting for example that the phrase "population level" is a term of art, and experts called upon to consider compliance will be able to determine whether or not that is met. TTR also notes that the DMC's conditions relating to noise levels and marine mammals adopted recognised noise standards. The matters left to the management plans were, TTR says, technical details. Third, TTR says that conditions 66 and 67, in indicating a list of adverse effects, provide sufficient protection. In other words, TTR says that the requirement to favour caution and environmental protection was met by this combination of conditions. Finally, because the appeal is limited to questions of law, TTR maintains that the respondents have to show that the DMC's approach was so wrong that it has effectively misdirected itself.

[128] As discussed, on our approach to s 10(1)(b) and the information principles, we accept TTR's proposition that consents may be granted subject to conditions even when the full information may not be available in a particular case, so long as taking the cautious approach means that harm can be avoided, remedied or mitigated. That is not to say that, as TTR submits, the purpose of the information principles is to facilitate the granting of consents. Accordingly, on our analysis, the key question in terms of the requirement to favour caution and environmental protection is whether the Court of Appeal was right in its conclusion that by granting the consents on the broad terms it did, the DMC did not meet that requirement.

[129] The difficulty with the conditions imposed in terms of the requirement to favour caution and environmental protection in this case is twofold. First, given the uncertainty of the information, it was not possible to be confident that the conditions

would remedy, mitigate or avoid the effects. Second, the physical environment in the South Taranaki Bight is, as the DMC said, "challenging, dynamic and complex".[206] The margins involved in relation to seabirds and marine mammals in the area may be extremely fine, with the outcomes turning on those margins extreme. To take just one example, for those dolphin species which are critically endangered, a very small change in population could have a disastrous effect. But conditions 9 and 10 do not respond to or reflect this because the population level that is problematic is not defined. The end result is that the DMC simply could not be satisfied that the harm could be remedied, mitigated or avoided.

[130] A very basic way of putting the problem is that as a result of the uncertainty of the information, it could not be known whether the death of one or 10 Hector's dolphins would be treated as an adverse effect at a population level or not. We consider in those circumstances the DMC had to say something more than "at a population level" in terms of how the adverse effect would be measured and that not doing so was an error of law. We accept that in other contexts, it may be sufficient to require an absence of adverse effects, for example, where the effects of noise can be measured against a standard. And in other cases, it may be sufficient to impose a condition effectively requiring that no damage be done. But the particular factual situation here is quite different, and the DMC has misdirected itself in concluding that such conditions are adequate to avoid, remedy or mitigate adverse effects. Accordingly, although the DMC cited the correct test, it did not apply that test, which is an error of law.[207]

[131] We have focused on the conditions relating to seabirds and marine mammals as the most obvious illustration of the problems. But we agree with the Court of Appeal that there are similar problems in terms of the uncertainty as to the effects caused by the sediment plume and the associated conditions dealing with suspended sediment levels, although we base that on the need to favour caution and environmental protection rather than s 10(1)(b) per se.[208]

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206 At [931].

207 We do not accept TTR's submission that it is necessary to show that the likely resultant degradation is so extreme that no reasonable person properly directing themselves could countenance it or come to the same conclusion.

208 CA judgment, above n 45, at [259(b)].

[132] Before leaving this topic, we very briefly address the argument for Forest and Bird that the pre-commencement monitoring conditions are ultra vires on the basis that they were not imposed to deal with adverse effects, but rather were conditions imposed for the purpose of baseline investigation and identifying effects. This is a reference to s 63(1) of the EEZ Act, which allows conditions to be imposed "to deal with adverse effects of the activity authorised by the consent on the environment or existing interests". On this topic, we agree with the Court of Appeal that the relevant conditions came within the statute because they ensure that adverse effects can be identified and a response provided.[209] Section 63(2)(a)(iii) anticipates conditions which "monitor, and report on, the exercise of the consent and the effects of the activity" authorised. Section 66(1) also makes it clear that a condition imposed under s 63(2)(a)(iii) may require the consent holder to undertake a range of activities directed towards monitoring, for example, making measurements, taking samples, and undertaking analyses or other specified tests.

[133] We do not agree, however, with the Court of Appeal that dealing with aspects of the conditions via management plans was inconsistent with the public participation rights in the EEZ Act.[210] Rather, we consider that TTR is right that in this case that was not an issue because drafts of the plans were included with the application for consent as lodged. That was sufficient in this case to enable public participation.

"Best available information"?

[134] The last of the issues relating to the information principles requires consideration of the joint submission for KASM/Greenpeace that the Court of Appeal erred in concluding that the DMC had not applied the wrong legal test for whether it had the "best available information" as required by the information principles. "Best available information" is defined to mean "the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".[211]

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209 At [272].

210 At [259(c)]. Compare at [277]–[278] per Glazebrook J, [295] per Williams J and [329] per Winkelmann CJ.

211 EEZ Act, ss 61(5) and 87E(3).

[135] The Court of Appeal agreed with the High Court[212] that this challenge to the DMC's decision did not raise a question of law.[213] The Court said that the DMC was required to decide "in the exercise of its judgment, whether it had obtained the best available information and then proceed to make its substantive determination".[214] We agree. We accept the submissions for TTR that the DMC correctly set out its understanding of the requirement to use the best information and carefully explained the steps it took to satisfy itself that this requirement was met. In terms of s 61(1)(a), the DMC made use of its powers to request further information and to obtain advice.[215] The view that sufficient information had been received to enable a decision to be made was the unanimous decision of the DMC.[216]

[136] KASM/Greenpeace submit that the imposition by the DMC of the pre-commencement monitoring conditions demonstrated that the best available information had not been obtained before granting the consent. The argument is that the information that could be obtained from the pre-commencement monitoring was obtainable without unreasonable cost, effort or time and hence represented the best available information. Accordingly, KASM/Greenpeace argue the DMC should have required this information before granting the consent, rather than granting the consent in the absence of this information with the condition that TTR gather this information at a later time.[217]

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212 HC judgment, above n 43, at [294].

213 CA judgment, above n 45, at [267].

214 At [266].

215 In the DMC decision, above n 38, at [21], the DMC set out the further requests for information which it made to TTR encompassing a number of issues, including effects on plankton, fish and marine mammals, worst-case sediment plume modelling, noise modelling not based on a simple spherical approach, and questions for TTR's noise expert. The DMC also set out at [18] and [26] the various sources of information on which it relied, which included requiring experts to confer, considering submissions, expert and non-expert evidence, and taking expert and legal advice in relation to a range of issues.

216 Environmental Protection Authority | Te Mana Rauhī Taiao *Trans-Tasman Resources Limited (TTRL) iron sand extraction and processing application: M46 – Minute of the Decision-making Committee – 31 May 2017* at [2]. Contrary to the notice to support on other grounds filed by KASM/Greenpeace, nothing turns on the use of the word "sufficient" information in this minute given the other explanations within the DMC decision which show an appreciation of the standard required. This point was not developed in the written submissions or oral argument for KASM/Greenpeace.

217 The Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) made submissions of a similar tenor.

[137] That submission conflates satisfying the requirement to have the best available information with the need to favour caution and environmental protection if information is uncertain. As the Court of Appeal noted, if the information was not adequate to support a consent, then the consent would be refused. Inadequacies "in the information available to the DMC would disadvantage the applicant", not others.[218] Mr Makgill, on behalf of the various fisheries organisations, also made the point that if the presumption is that the best available information meant there was enough information on which to grant consent, that would obviate the need for the other requirements such as the need to favour caution and environmental protection.

[138] We add that the DMC recorded that its approach was to reduce uncertainty whilst recognising that the cost of supplementing some of the information about the marine environment by requiring further surveys would not meet the definition of "best available information" in the Act.[219] That was an orthodox approach to the statutory definition of "best available information", given the qualifier that the information be available "without unreasonable cost … or time". The DMC was required to make a factual assessment of what constituted unreasonable cost and delay in the circumstances of this case.

The place of the Treaty of Waitangi and customary interests

[139] In addressing this aspect of the appeal, two questions arise. The first relates to the effect of s 12 of the EEZ Act, which sets out the way in which the Crown's responsibilities in terms of the principles of the Treaty of Waitangi are to be given effect. The second question concerns the effect of the requirement that the DMC must take into account any effect on existing interests of allowing the activity that is the subject of the application for a marine consent. The two questions are interrelated.

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218 CA judgment, above n 45, at [266].
219 DMC decision, above n 38, at [13].

The relevant provisions

[140] Section 12 is in the following terms:

> **12 Treaty of Waitangi**
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> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
>
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise the Environmental Protection Authority so that decisions made under this Act may be informed by a Māori perspective; and
>
> (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
>
> (c) sections 33 and 59, respectively, require the Minister and the EPA to take into account the effects of activities on existing interests; and
>
> (d) section 45 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

[141] In relation to existing interests, there are two key provisions. First, as noted above, the relevant part of s 59 provides that the DMC must take into account "any effects on the environment or existing interests of allowing the activity".[220] The DMC must also take into account "the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity".[221]

[142] "Existing interest" is defined in s 4(1) as follows:

> **existing interest** means, in relation to New Zealand, the exclusive economic zone, or the continental shelf (as applicable), the interest a person has in—
>
> (a) any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing:

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220 EEZ Act, s 59(2)(a). "Effect" is broadly defined in s 6(1) and in s 59(2)(a) "effects" include both cumulative effects and effects occurring in the waters above or beyond the continental shelf beyond the outer limits of the EEZ.

221 Section 59(2)(b).

(b) any activity that may be undertaken under the authority of an existing marine consent granted under section 62:

(c) any activity that may be undertaken under the authority of an existing resource consent granted under the Resource Management Act 1991:

(d) the settlement of a historical claim under the Treaty of Waitangi Act 1975:

(e) the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992:

(f) a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011

[143] In relation to para (f) of the definition of existing interests, s 4(1) defines "protected customary rights group" as having the same meaning as that in s 9(1) of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act).[222] That definition in turn refers to a group to which a "protected customary rights order" applies, where both "protected customary rights order" and "protected customary rights" are also defined in s 9(1).

[144] Second, reference should be made to s 60 of the EEZ Act, which sets out the matters to be considered in deciding the extent of adverse effects on existing interests. Those matters are as follows:

(a) the area that the activity would have in common with the existing interest; and

(b) the degree to which both the activity and the existing interest must be carried out to the exclusion of other activities; and

(c) whether the existing interest can be exercised only in the area to which the application relates; and

(d) any other relevant matter.

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222 Section 4(1) definition of "protected customary rights group". In the Marine and Coastal Area (Takutai Moana) Act 2011, a "protected customary right" is defined in s 9(1) as "an activity, use, or practice— (a) established by an applicant group in accordance with subpart 2 of Part 3 [which addresses establishment of protected rights]; and (b) recognised by— (i) a protected customary rights order; or (ii) an agreement".

The approach in the Court of Appeal

[145] The approach of the Court of Appeal to these questions can be summarised briefly. The first point to note is that the Court decided that it was not necessary to resolve the question of whether s 12 is exhaustive or, as the iwi parties submitted in this Court, a "non-exhaustive way of directing attention to those sections in the EEZ Act that are of particular significance" in relation to the Treaty. That was because the correct focus was on making sure that the provisions referred to in s 12, especially s 59 in relation to existing interests, were interpreted correctly.[223] As the Court saw it, that required existing interests in s 59(2)(a) to include the interests of Māori in respect of all of the taonga referred to in the Treaty.[224] Further, the Court said that all customary rights and interests relating to the natural environment (whether or not they are referred to or recognised in a Treaty settlement) and relating to claims under the MACA Act were existing interests.[225] The Court found that the DMC had not approached its task in this way and, at the least, should have given reasons to justify determining that these interests were appropriately overridden.[226]

The effect of s 12

[146] The challenge to the findings of the Court of Appeal by TTR and, at least to some extent, the Attorney-General requires consideration of the effect of the deliberate absence in the EEZ Act of any direction requiring the decision-maker, the DMC, to give effect to the principles of the Treaty of Waitangi. To illustrate the point, TTR highlights the difference between s 12 of the EEZ Act and s 4 of the Conservation Act 1987. The latter provides that the Conservation Act is to be "interpreted and administered [so] as to give effect to the principles of the Treaty of Waitangi".

[147] The submission that the difference between the method adopted to address Treaty obligations in the EEZ Act and that in other statutes such as the Conservation Act reflected a deliberate choice draws some support from the legislative history of s 12. Relevantly, in the EEZ Bill as introduced, the clause that became s 12 referred

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223 CA judgment, above n 45, at [162].
224 At [163].
225 At [167]–[168].
226 At [175] and [178]–[179].

to the Crown's responsibility to "take appropriate account" of the Treaty.[227] The Select Committee considering the Bill recommended that the clause be amended "to give effect to the principles of the Treaty of Waitangi" through the specified provisions.[228] That change was made, but a supplementary order paper which would have added in a new subsection like that in s 4 of the Conservation Act stating that the Act "must be interpreted and administered so as to give effect to the principles of the Treaty" was rejected.[229]

[148] The legislative history, however, only takes the matter so far. While the amendments proposed in the supplementary order paper were not accepted, the clause was strengthened in accordance with the Select Committee's recommendation.[230]

[149] In any event, s 12 does not limit or constrain the DMC in the way that TTR and the Attorney-General suggest. When read with s 59, as s 12(c) itself directs, s 12 requires the DMC to take into account the effects of the activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty.[231] That is a strong direction. And that direction can only be given effect through the way in which the DMC interprets and applies the relevant factors in s 59(2).

[150] Ultimately, it was not contended that s 12 has the effect of ousting Treaty principles. That is not surprising, given the Treaty's constitutional significance. The broader, constitutional context in which Treaty clauses like s 12 are to be interpreted has been the subject of attention in the authorities. Chilwell J in *Huakina Development Trust v Waikato Valley Authority* made the point that the cases "show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute" of the Crown's Treaty obligations.[232] Of that statutory recognition, s 12 illustrates the trend in more recent

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227 EEZ Bill, above n 81, cl 14.

228 EEZ Bill (select committee report), above n 113, at 4.

229 Supplementary Order Paper 2012 (96) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2). See (16 August 2012) 682 NZPD 4518–4519.

230 See the responsible Minister's speech in (30 May 2012) 680 NZPD 2733–2734.

231 An analogy can be drawn with the interrelationship between ss 9 and 27 of the State-Owned Enterprises Act 1986 considered by the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands case*] at 658 per Cooke P.

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

statutes to give a greater degree of definition as to the way in which the Treaty principles are to be given effect and a departure from the more general, free standing Treaty clauses like that in s 4 of the Conservation Act.[233] The author of *Burrows and Carter Statute Law in New Zealand*, for example, notes that in recent years there has been a move towards precise consideration of how Parliament "wants particular legislative schemes to provide for and protect Māori interests in the light of the Crown's responsibility under the Treaty".[234]

[151] But the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question.[235] It ought to follow therefore that Treaty clauses should not be narrowly construed.[236] Rather, they must be given a broad and generous construction.[237] 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.[238]

The scope of "existing interests" in s 59(2)(a) and the application of those interests

[152] Whether or not there are existing interests has considerable impact in terms of the procedure applicable to an application for a marine consent as well as on the substantive decision-making process. There are various provisions in the EEZ Act which require the identification of existing interests[239] and action subsequent on such

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233 Carter, above n 84, at 697–699.

234 At 697. See also Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 96–101 and 183–184; and Legislation Design and Advisory Committee *Legislation Guidelines* (2018) at ch 5.

235 *Huakina*, above n 232, at 210 and 233; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]–[37]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46].

236 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whales case*] at 558.

237 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [*Coals case*] at 518; and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]–[54].

238 See similarly *Lands case*, above n 231, at 655–656 per Cooke P.

239 See EEZ Act, ss 38(2)(c) and 39(1)(c)–(d). The same approach applies to applications for marine discharge or dumping consents: s 87B(2)(c).

identification, for example, the giving of notice.[240] Further, on a review of the durations or conditions of a marine consent, the EPA can cancel the consent if the activity has significant adverse effects on the environment or existing interests.[241]

[153] Against this background, TTR says the terms of s 12 mean that the Court of Appeal was wrong in its approach to the meaning of "existing interests" in s 59(2)(a). TTR also says that the Court erred in concluding that the DMC was required to, and did not, "engage meaningfully" with the impact of TTR's application on the "whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment".[242] Similarly, the Attorney-General submits that the Court of Appeal's approach is inconsistent with the statutory history, scheme and purpose.

[154] The iwi parties submit that giving appropriate recognition to Treaty principles in terms of s 12 means that the Court of Appeal was right to conclude that tikanga-based customary rights and interests are existing interests under s 59(2)(a). The submission is that, accordingly, the existing interests that the DMC needed to consider here are kaitiakitanga of iwi of their relevant rohe; rights recognised by the MACA Act; and interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[243] We agree. That follows from the guarantee in art 2 of the Treaty of tino rangatiratanga in the context of the marine environment.[244] The answer to the submission that the Court of Appeal goes too far in treating all customary interests in this context as existing interests is found in that guarantee. Further, as the Court of

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240 Section 45(1)(d). The same procedure applies to applications for marine discharge and dumping consents: s 87C(1). The probability of significant adverse effects on the environment or existing interests must be considered when determining whether a discretionary activity can be treated as non-notified in regulations: s 29D(2)(a).

241 Section 81(3).

242 CA judgment, above n 45, at [174]. See also at [175].

243 The iwi parties adopt the following definition of kaitiakitanga: "the obligation to care for one's own", citing Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 3. The author also emphasises the importance of whanaungatanga to kaitiakitanga (and other core values), as "the glue that … holds the system together" and "the fundamental law of the maintenance of properly tended relationships": at 4. See also Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 13, where the Tribunal describes how Kupe's people brought with them Hawaikian culture which "enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) it also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga)".

244 To the extent the Court of Appeal's approach may suggest the environment as a whole to be a taonga in the way that term is used in the Treaty, we disagree. See the discussion in Waitangi Tribunal, above n 243, at 269.

Appeal notes, the processes such as that provided for by the MACA Act are not the source of such customary interests but rather provide a mechanism for their recognition.[245] Thus, we agree with the Court of Appeal that rights claimed under the MACA Act but not yet granted may qualify as "existing interests" under para (a) of the definition.[246] It may be that there are questions to be resolved to clarify the nature and extent of existing interests in a particular case, but that is an evidential issue and not an obstacle to the interpretation adopted by the Court of Appeal.

[155] In challenging the Court of Appeal's approach, TTR emphasises that existing interests in the EEZ Act reflect the interests a person has in any lawfully established activity rather than the relationship a person has with a particular resource.[247] However, as the iwi parties submit, practice and principle in this respect are intertwined. Kaitiakitanga manifests itself in an activity. Nor do we find persuasive TTR's submission that New Zealand's limited "sovereign rights" in the EEZ,[248] where the proposed seabed mining will take place, means that case law on how the principles of the Treaty are to be recognised by decision-makers under other environmental legislation has little relevance. The nature of New Zealand's rights does not dictate the scope of existing interests in the EEZ Act.[249]

[156] As noted, the Court of Appeal also found that the DMC was required to "[give reasons] to justify a decision to override existing interests of this kind".[250] The

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245 CA judgment, above n 45, at [168].

246 At [168]. There is support for this approach in decisions of the Supreme Court of Canada which recognise the Crown's duty to consult (and where necessary, accommodate) indigenous peoples in relation to aboriginal title and rights extended to situations where the aboriginal rights and title had not yet been proved: see, for example, *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511. More recent Supreme Court of Canada decisions have confirmed that the Crown can rely on steps taken by an administrative body or regulatory agency to partially or completely fulfil its duty to consult and accommodate: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* 2017 SCC 41, [2017] 1 SCR 1099; and *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40, [2017] 1 SCR 1069.

247 The EPA makes a similar submission.

248 LOSC, above n 150, arts 55–56. See Scott Davidson and Joanna Mossop "Law of the Sea" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 687 at 701; and Proelss "Exclusive Economic Zone", above n 154, at 409 and 416.

249 The distinction between waters and seabed within New Zealand's territorial sea and EEZ has legal implications, but as noted by commentators, from the perspective of te ao Māori, this division is immaterial: see Andrew Erueti and Joshua Pietras "Extractive Industry, Human Rights and Indigenous Rights in New Zealand's Exclusive Economic Zone" (2013) 11 New Zealand Yearbook of International Law 37 at 66; and Benjamin Ralston and Jacinta Ruru "Landmark EPA Decision" [2014] NZLJ 284 at 285.

250 CA judgment, above n 45, at [171].

Attorney-General submits that this imposes an unduly high standard where the requirement in s 59 is to take account of the listed factors.

[157] Plainly, the DMC must give reasons: s 69 of the EEZ Act says as much. However, that requirement must be tempered by the fact that this is an area where it may not be possible to do much more than explain the balance struck, having set out the evidence for the findings of fact on which that balance depends.[251] It also needs to be kept in mind that the DMC is not a judicial body, but is comprised of lay members.[252] Further, the DMC has to work within the statutory time limits, and the subject matter which the DMC has to deal with in a case like the present is complex and will often involve measuring incommensurable values.[253] In context then, and as we understand the Attorney-General accepts, where there are a number of factors to be taken into account and interests relevantly reflecting Treaty obligations, the decision-maker will need to explain, albeit briefly, the way in which the balance has been struck.

[158] The next question is whether the DMC approached these matters correctly. In supporting the analysis adopted by the Court of Appeal, the iwi parties used the following statement from Ngā Rauru to the DMC to illustrate the significance and effects of TTR's application on the environment and the relevant iwi:

> [W]e submit that seabed mining is an experimental operation and that it will have destructive effects on our marine environment, marine species and people. As kaitiaki we cannot support this activity. It is the absolute antithesis of what we stand for. … Seabed mining effects are a violation of kaitiakitanga. … [A]s kaitiaki, we, as Ngā Rauru Kītahi, are defenders of the ecosystems and its constituent parts. We believe that everything has a mauri or a life force and that mauri must be protected.

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251 See *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [81]; and Harry Woolf and others *De Smith's Judicial Review* (8th ed, Thomson Reuters, London, 2018) at [7-105]–[7-106]. See also *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345.

252 Accordingly, reasons of the detail and scope of legal reasoning normally expected in High Court judgments are not required: GDS Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 318, 322 and 327; and Woolf and others, above n 251, at [7-105].

253 In the context of the values set out in s 5(2) of the RMA, Royden Somerville notes the difficulties that may arise in balancing incommensurable values where there is no common measure to undertake that balancing: *Resource Management* (online ed, Thomson Reuters) at [IN4.06]. See also *Helu*, above n 170, at [221] per William Young and Arnold JJ (dissenting).

[159] In this case, as we shall explain, we see the DMC's error as the failure to properly engage with the nature of the interests affected rather than the absence of reasons. The DMC did consider a range of interests including kaitiakitanga, noting that the legal advice it received stated that the lawful exercise of kaitiaki responsibilities might fall within the scope for consideration of effects under s 59(2)(a).[254] The DMC also said it took into account the duty of active protection of Māori interests,[255] although it concluded that the relevant interests of iwi could be met through the conditions imposed. Of particular relevance were the conditions relating to the direction to TTR to offer to establish and maintain a "Kaitiakitanga Reference Group" with the purpose of, amongst other things, recognising the kaitiakitanga of tangata whenua and the establishment of the kaimoana monitoring programme, which would be required to operate even in the absence of iwi engagement in the Reference Group.[256]

[160] However, despite the references to the effect of the proposal on kaitiakitanga and the mauri of the marine environment, the DMC did not effectively grapple with the true effect of this proposal for the iwi parties or with how ongoing monitoring could meet the iwi parties' concern that they will be unable to exercise their kaitiakitanga to protect the mauri of the marine environment, particularly given the length of the consent and the long-term nature of the effects of the proposal on that environment.

[161] What was required was for the DMC to indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply. Here, while there was some reference to spiritual aspects, the primary focus does appear to have been on physical and biological effects, for example, of the sediment plume.[257] Further, while the DMC acknowledged there would be "some impact" on kaitiakitanga, mauri and other cultural values, that significantly underrated the effects.[258] The DMC then needed to explain, albeit briefly, why these existing interests were outweighed by other s 59

254 DMC decision, above n 38, at [647].
255 At [716].
256 See at [726] and [728]–[729].
257 At [721]–[725].
258 At [727]. See also at [728].

factors, or sufficiently accommodated in other ways. Further, also reflecting the advice it had received, the DMC did not consider that the as yet unrecognised claims made by iwi under the MACA Act were existing interests, and nor was this a situation where these "future possibilities" could be considered under s 59(2)(m) as any other relevant matter.[259] Finally, the DMC's starting point was that the principles of the Treaty were not directly relevant but, rather, could "colour" the approach taken.[260] On our approach, these two aspects were also errors of law.

The scope of "any other applicable law" in s 59(2)(l)

[162] Section 59(2)(l) directs the DMC to take into account "any other applicable law". Two issues require consideration under this heading. The first of these is whether tikanga Māori comprises "applicable law". The second issue is whether the relevant international law instruments should have been treated as applicable law.

Tikanga Māori

[163] In the Act as it was at the relevant time, there were two situations in which tikanga appeared. In the first of these, s 53(3)(b) provides that in deciding on an "appropriate and fair" procedure for a hearing, the EPA must "recognise tikanga Māori where appropriate".[261] Second, under s 158(1)(a), the EPA has the power to provide for a hearing or parts of a hearing to be held in private and to prohibit or restrict the publication of information relating to a proceeding if such an order is necessary "to avoid causing serious offence to tikanga Māori". In addition, since 1 June 2017, the responsible Minister may appoint a board of inquiry to decide an application for a marine consent in specified situations.[262] In appointing members to such a board, the responsible Minister must consider the need for the board to have "from its members, knowledge, skill, and experience relating to … tikanga Māori".[263]

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259 At [696]. See also at [710] and [719].
260 At [628]–[629] and [720].
261 See also cl 2(3)(b) of sch 2, cl 3(3)(b) of sch 3 and cl 7(3)(b) of sch 4 of the current version of the EEZ Act.
262 See the changes made to the EEZ Act providing for boards of inquiry by the Resource Legislation Amendment Act 2017.
263 See ss 52(5)(c) and 99A(5)(a)(iii) of the current version of the EEZ Act.

[164] The Court of Appeal said that tikanga Māori must be treated as an "applicable law" under s 59(2)(l) where it is relevant to an application before the EPA.[264] That approach followed from the fact that the tikanga that "defines the nature and extent of all customary rights and interests in taonga protected by the Treaty" is part of the common law of New Zealand.[265] The iwi parties support that approach.

[165] TTR supports the conclusion of the High Court that tikanga Māori was not a matter to be considered under s 59(2)(l).[266] TTR says that although tikanga is acknowledged as forming "part of the values of the New Zealand common law", citing the reasons of Elias CJ in *Takamore v Clarke*,[267] it is not an "independent source of law" requiring separate consideration under s 59(2)(l).[268] The submission for the Attorney-General is to similar effect. In addition, TTR argues that to the extent tikanga is a relevant factor in the exercise of existing interests, it is to be considered under s 59(2)(a). To consider it under the "applicable law" limb in s 59(2)(l) would be double counting.

[166] In the context of considering what the position was in New Zealand at common law in relation to the duties and rights of executors, the majority of this Court in *Takamore* relevantly made two points in relation to the relevance of tikanga to the common law. First, it was noted that the English common law has applied in New Zealand "only insofar as it is applicable to the circumstances of New Zealand".[269] It followed that, subject to conflicting statute law, "our common law has always been seen as amenable to development to take account of custom".[270] In *Paki v Attorney-General*, the majority said that accordingly, common law presumptions of

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264 CA judgment, above n 45, at [178].

265 At [177].

266 The High Court accepted it was a matter for the DMC to consider under s 59(2)(m) (other relevant matters): HC judgment, above n 43, at [177].

267 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore* (SC)] at [94].

268 Citing Williams, above n 243, at 16.

269 *Takamore* (SC), above n 267, at [150] per Tipping, McGrath and Blanchard JJ, citing *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ and [105] per McGrath J. See English Laws Act 1858, s 1; and English Laws Act 1908, s 2, the effect of which is preserved by the Imperial Laws Application Act 1988, s 5. See also *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [13] and [17] per Elias CJ, [134]–[135] per Keith and Anderson JJ and [183]–[185] per Tipping J.

270 *Takamore* (SC), above n 267, at [150] per Tipping, McGrath and Blanchard JJ, citing *Baldick v Jackson* (1910) 30 NZLR 343 (SC); and *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

Crown ownership "could not arise in relation to land held by Maori under their customs and usages, which were guaranteed by the terms of the Treaty of Waitangi".[271]

[167] The second of the points made by the majority in *Takamore* was that the common law of New Zealand required reference to tikanga (as well as other important values and relevant circumstances) in that case.[272] As foreshadowed above, in a separate judgment, Elias CJ said that "Maori custom according to tikanga is … part of the values of the New Zealand common law."[273] More recently, and in a similar vein, this Court in *Ngāti Whātua Ōrākei Trust v Attorney-General* recognised that the Ngāti Whātua Ōrākei Trust should be able to pursue claims based on tikanga.[274] Elias CJ in a partial dissent put the point directly, stating: "Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation."[275] The issue in that case arose in the context of a strike-out application, but the approach indicates the way in which the common law in New Zealand has been developing.

[168] One commentator suggests that the decision in *Takamore* has resulted in some confusion in that although the Court recognised "that customary law is clearly relevant in the common law, [the Court] did not explicitly address the possibility of customary law being recognised as law based on the doctrine of continuity and the additional tests set out in [*The Public Trustee v Loasby*[276]] and by the Court of Appeal's *Takamore* decision[277]".[278] That is correct because it was not necessary to determine whether the tests for the recognition of custom at common law in cases such as *Loasby* were met or whether tikanga was a source of law on the approaches taken. But undoubtedly, the

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271 *Paki*, above n 269, at [18].
272 *Takamore* (SC), above n 267, at [164].
273 At [94]. See also *Ngati Apa*, above n 269, at [205] per Tipping J.
274 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
275 At [77] (footnote omitted).
276 *Loasby*, above n 270.
277 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore* (CA)].
278 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1 at 12. See also Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 120–123.

aspects of tikanga relevant in *Takamore* were treated as norms influencing the development of the common law.[279]

[169] For the purposes of the EEZ Act, tikanga Māori has the same meaning as in s 2(1) of the RMA,[280] that is, "Maori customary values and practices".[281] That definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices referred to in the Act. It follows that any aspects of this subset of tikanga will be "applicable law" in s 59(2)(l) where its recognition and application is appropriate to the particular circumstances of the consent application at hand.[282]

[170] It is not entirely clear what it was intended would be encompassed by the reference to other applicable law, given s 59(2) already requires the DMC to take into account the other marine management legislative regimes obviously relevant by virtue of s 59(2)(h) and relevant regulations under s 59(2)(k).[283] Counsel for the Attorney-General suggests that, because caution is required in referring in general terms to tikanga as a single body of law, a general reference to tikanga Māori in number 12 of a list of 13 factors does not appear a likely portal for the approach adopted by the Court of Appeal.

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279 In Te Aka Matua o Te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [77], the Law Commission observed that "The debate about whether 'law' exists in societies which do not have written laws, law courts and judges is an old one. Anthropologists now generally accept that all human societies have 'law', in the sense of principles and processes, whether or not it can be classified as 'institutional law generated from the organisation of a superordinate authority'." The Law Commission also refers to the conclusion of ET Durie that "Māori norms were sufficiently regular to constitute law": at [79], citing ET Durie *Custom Law* (draft paper for the Law Commission, January 1994) at 4.

280 EEZ Act, s 4(2)(d).

281 RMA, s 2(1) definition of "tikanga Maori".

282 We leave open for determination the questions of whether or not tikanga is a separate or third source of law and whether or not there should be any change to the tests for the recognition of customary law as law set out in *Loasby*, above n 270; see *Takamore* (CA), above n 277, at [109]–[134], [197] and [254]–[258] per Glazebrook and Wild JJ; and see also *Takamore* (SC), above n 267, at [164] per Tipping, McGrath and Blanchard JJ and [94] per Elias CJ.

283 For completeness, we note that s 26(a) of the EEZ Act provides that, for the avoidance of doubt, compliance with the Act "does not remove the need to comply with all other applicable Acts, regulations, and rules of law".

[171] The only other indication of the scope of s 59(2)(l) is provided by the amendment in June 2017, which made it clear that EEZ policy statements are excluded from consideration as other applicable law.[284] These policy statements appear to have been introduced to provide a broad equivalence to the various policy instruments in the RMA context.[285] Although not legislative instruments, these policy statements are disallowable instruments in terms of the Legislation Act 2012 and must be presented to the House of Representatives under s 41 of that Act.[286] The fact the Act expressly excludes these policy statements from "other applicable law", suggests that "law" in s 59(2)(l) should otherwise be understood in a wide sense. Thus, the better view is that s 59(2)(l) is intended as something of a catch-all provision and there is no apparent reason to interpret it more restrictively.

[172] As we have discussed, we see tikanga as also covered by the effect of s 12 as it relates to s 59.[287] It seems more likely that because the primary issues in an application for a marine consent will be directed to the effects on existing interests, the focus will, for practical purposes, be on s 59(2)(a) and (b). But we accept that tikanga could also be covered by s 59(2)(l) in those cases where the issues facing the decision-maker require its consideration.[288] Section 59(2)(a) and (b) and s 59(2)(l) do serve different purposes. The emphasis in the former two subsections, as we have said, is on the effects. Under s 59(2)(l), the decision-maker would look at the tikanga itself and consider what it might say about the rights or interests of customary "owners" or of the resources itself. To give just one illustration, the iwi parties in this case emphasise the mauri of the area. Considering the proposed activity in terms of tikanga may indicate that material harm extends beyond the physical effects of a discharge, or that pollution can be spiritual as well as physical. In any event, the relevant issues need to be considered under one or the other heading.

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284 The amendment was made by s 229(5) of the Resource Legislation Amendment Act.

285 (5 April 2017) 721 NZPD 17164. See also Ministry for the Environment *Regulatory Impact Statement: Resource Legislation Amendment Bill 2015 – EEZ Amendments* (28 October 2015) at 19–21.

286 See s 37G of the current version of the EEZ Act.

287 As discussed above at [154], the art 2 guarantee in the Treaty of Waitangi of tino rangatiratanga over taonga katoa (which includes taonga within the marine environment) means tikanga-based customary interests are existing interests under s 59(2)(a). This gives appropriate recognition to the Treaty principles in s 59, as required by s 12.

288 It is not necessary in the present case to consider the evidential issues that may arise. See also above at n 282.

International law instruments

[173] The Court of Appeal concluded that the relevant international law instruments (LOSC, the Convention on Biological Diversity, MARPOL, and the London Convention and associated 1996 London Protocol) do not need to be taken into account separately as "other applicable law" under s 59(2)(l), given they are considered under s 11. The Court said that a separate reference to these instruments as "applicable law" under s 59(2)(l) "would not add anything of substance and would result in duplication of analysis and unnecessary complexity".[289]

[174] KASM/Greenpeace submit that this was an error. The submission is advanced "for completeness" and can be dismissed shortly. Essentially, the Court of Appeal's analysis of this point is consistent with the statutory scheme and with the approach taken by this Court in *Helu*. There is no need, as TTR submits, to "strain" the statutory language to require international instruments to be considered again under s 59(2)(l).[290]

What is required by the direction in s 59(2)(h) to take into account the nature and effect of other marine management regimes?

[175] The principal point at issue in this part of the appeal is whether the DMC was required to consider inconsistencies between TTR's proposal and the NZCPS, which is a part of the marine management regime governing the coastal marine area

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289 CA judgment, above n 45, at [270].

290 Customary international law, however, is part of the law of New Zealand and so could comprise other applicable law: see *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [24]; Alberto Costi *Laws of New Zealand* International Law (online ed) at [128]; and Kenneth Keith "The Impact of International Law on New Zealand Law" (1998) 7 Waikato L Rev 1 at 22. KASM/Greenpeace and the fisheries organisations referred to the Seabed Advisory Opinion, above n 160, at [135], where the International Tribunal for the Law of the Sea's Seabed Disputes Chamber observed there was "a trend towards making [the precautionary] approach part of customary international law". Mr Makgill accepted, however, that the Chamber was not saying the precautionary principle had reached the status of being customary international law. Whether the precautionary principle has crystallised into a norm of customary international law is much debated: Sands and others, above n 159, at 234–240; and Warwick Gullett "The Contribution of the Precautionary Principle to Marine Environmental Protection: From Making Waves to Smooth Sailing?" in Richard Barnes and Ronán Long (eds) *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Koninklijke Brill NV, Leiden, 2021) 368 at 370. Accordingly, we do not need to consider whether the DMC erred in not taking it into account as "other applicable law" under s 59(2)(l) of the EEZ Act. Nor was the argument put to us on this basis. See also *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [124]–[125].

(CMA).[291] As we have noted, the CMA abuts the area of proposed seabed mining.[292] The other question is whether, if so, the DMC's consideration of this issue met the statutory test.

[176] Marine management regimes are defined as including the:[293]

> … regulations, rules, and policies made and the functions, duties, and powers conferred under an Act that applies to any 1 or more of the following:
>
> (a) territorial sea:
>
> (b) exclusive economic zone:
>
> (c) continental shelf.

[177] Section 7(2) of the EEZ Act then sets out a non-exhaustive list of 15 marine management regimes encompassed by the section. Some of these regimes have general application, such as the Crown Minerals Act, the Fisheries Act 1996, the RMA, the MACA Act and the Wildlife Act 1953. Other regimes are specific to a particular area, such as the Hauraki Gulf Marine Park Act 2000 and the Kaikōura (Te Tai o Marokura) Marine Management Act 2014.

[178] The context for the consideration of the approach to s 59(2)(h) of the EEZ Act is the practical reality that the effects of a proposed activity in a particular part of the marine environment may well spill over into other areas.[294] Here for example, as the Court of Appeal said, the effects of the sediment plume will in fact be felt mostly within the CMA.[295] There are good policy reasons for not ignoring the fact that if the proposed activity took place on the other side of an arbitrary line[296] between two regimes, its proposed effects would be assessed differently.

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291 The NZCPS, above n 181, is made under the RMA on the recommendation of the Minister of Conservation: RMA, s 57.

292 See above at n 37. A map of the project area as reproduced in the DMC decision, above n 38, is set out below at Appendix 2 to this judgment.

293 EEZ Act, s 7(1).

294 In the third reading debate, the responsible Minister said that alignment between the approach to matters within the 12 nautical mile limit (governed by the RMA) and those outside that limit between 12 to 200 nautical miles (governed by the EEZ Act) was desirable because it was not hard to envisage applications "that cross or could have impact on both sides of the 12 nautical mile limit": (28 August 2012) 683 NZPD 4780. It has to be said, however, that it is not clear from the legislative history that facilitating integrated consideration of effects and decision-making across the jurisdictional boundaries was a priority.

295 CA judgment, above n 45, at [199].

296 It is a jurisdictional line, rather than a line drawn on the basis of environmental or scientific factors.

[179] What then is the DMC required to consider? TTR and the EPA resist the suggestion that the DMC has to apply the other regimes or undertake a detailed evaluation of consistency with the policies, plans or environmental bottom lines of the other regimes. We agree that the DMC was not required to apply those regimes or to consider the minutiae of each particular regime, but nor did the Court of Appeal suggest that.

[180] Indeed, that would be an impossible task inconsistent with the intention to create a specific regime for the regulation of mining and other activities in the EEZ.[297] The EPA members will not necessarily have the expertise to undertake such an inquiry, and in any event, work under timeframes would not permit such an inquiry.[298] And, as has been noted, the definition of the environment in the EEZ Act is different from that in the RMA, and the relevant considerations for consent applications are also different. Further, as Ms Casey QC for the EPA submits, the EEZ Act provides the procedure applicable for activities requiring both consent under the RMA for activities in the CMA and consent under the EEZ Act for activities in the EEZ.[299] That procedure envisages the possibility of separate or joint application processes.[300] But even if a joint process is followed, the applications are dealt with separately, with the EPA having responsibility for deciding the marine consent application under the EEZ Act and the consent authority having responsibility for deciding the resource consent application under the RMA.[301] Finally, the DMC is required to take into account the nature and effect of the other regimes, but there is no prescription as to how that is to be achieved.[302]

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297 As we have noted above at n 121, the regime in the EEZ Act was seen as a gap-filler. Further, it was plain that the intention was not to create the "[RMA] of the seas": (18 July 2012) 681 NZPD 3680. See also (13 September 2011) 675 NZPD 21215; (30 May 2012) 680 NZPD 2734–2735; and (28 August 2012) 683 NZPD 4802.

298 A desire to avoid the lengthy, more complicated approach under the RMA was to the forefront in considering the scope of the EEZ Act. The more complex RMA framework was seen as "overkill" in the relatively uncrowded EEZ. Further, it was seen as important that consent decisions were made in a timely manner, which in turn was investment-friendly: see (30 May 2012) 680 NZPD 2734; (18 July 2012) 681 NZPD 3684; and (28 August 2012) 683 NZPD 4785.

299 EEZ Act, Subpart 3 of Part 3.

300 Section 90(a) and (b).

301 Section 98.

302 In response to a question from the Select Committee about how regional coastal plans were to be considered under the Act, the officials said it "will be up to the EPA how to give effect to the consideration of other marine management regimes in marine consent decision-making": Departmental Report on EEZ Bill, above n 81, at 145.

[181] That said, approaching the matter by using the ordinary dictionary meaning of the words "nature and effect", it is apparent that the DMC does have to consider the key features of the other management regimes and how they would apply if the activity "were" being pursued under those regimes. The word "nature" means the "inherent or essential quality … of a thing".[303] The word "effect" means "a consequence", "a contemplated result", or "a purpose".[304] Accordingly, consideration of the nature and effect of the other marine management regimes must, as the Court of Appeal said, involve considering:[305]

> (a) the objectives of the RMA and NZCPS, and the outcomes sought to be achieved by those instruments, in the area affected by the TTR proposal; and
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> (b) whether TTR's proposal would produce effects within the CMA that are inconsistent with the outcomes sought to be achieved by those regimes.

[182] We agree also with the Court of Appeal that, importantly, the DMC had to consider:[306]

> … whether TTR's proposal would be inconsistent with any environmental bottom lines established by the NZCPS. If a proposed activity within the EEZ would have effects within the CMA that are inconsistent with environmental bottom lines under the marine management regime governing the CMA, that would be a highly relevant factor for the DMC to take into account. The DMC would need to squarely address the inconsistency between the proposal before it and the objectives of the NZCPS. If the DMC was minded to grant a consent notwithstanding such an inconsistency, it would need to clearly articulate its reasons for doing so.

[183] The question then is whether the Court of Appeal is right that the DMC did not consider the matter in this way and that its failure to do so was an error of law,[307] or whether the High Court was correct that the issues raised by the parties were matters merely going to the weight to be given to this factor, which would not comprise an error of law.[308]

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303 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 2), above n 131, at 1891.
304 Trumble and Stevenson *Shorter Oxford English Dictionary* (vol 1), above n 131, at 793.
305 CA judgment, above n 45, at [199].
306 At [200].
307 At [201].
308 HC judgment, above n 43, at [161]–[162].

[184] The approach of the DMC was that it had taken into account the other marine management regimes.[309] The DMC took advice on this point and agreed with that advice that the NZCPS was not directly applicable within the EEZ, but said that it had regard to the fact that many of the effects were going to be felt in the CMA, which was covered by the NZCPS,[310] and identified the provisions of the NZCPS that were of potential relevance.[311] The DMC also made specific reference to the submission from Ngā Motu Marine Reserve Society that the NZCPS requires avoidance of adverse effects on areas with outstanding natural character and threatened species.[312] Ultimately, the DMC said of the NZPCS that:[313]

> … many of its potentially relevant provisions have parallels in the EEZ. For instance, the NZCPS has provisions related to indigenous ecosystems / biodiversity; and Section 59(2)(d) of the EEZ requires us to take into account the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes. Similarly, taking into account Te Tiriti is required under both documents. Importantly, we note that the NZCPS establishes discretionary activities as the highest consent status under regional coastal plans.

[185] The correctness of this approach can be viewed in the light of policy 13(1)(a) of the NZCPS, which provides that to "preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development", local authorities are directed to "avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character". This part of the NZCPS has been described as providing "something in the nature of a bottom line" by this Court in *King Salmon*.[314] But the majority of the DMC has not squared up to that in the context of s 59(2)(h), simply treating the NZCPS as equating to s 59(2)(d) (take into account the importance of protecting biodiversity). In other words, the DMC did not recognise the impact of the fact that the proposed activities would have adverse effects in some locations, such as "The Traps" (an area within the Pātea Shoals and some 26–28 km east of the mining site). It is, as the Court of Appeal found,[315]

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309 DMC decision, above n 38, at [1003].

310 At [1011]–[1012].

311 At [1019]. See also at [1023]. The DMC took particular account of Horizon Regional Council's "One Plan" and the Taranaki Regional Council's regional policy framework under the RMA (at [1014]–[1016]) but, as we shall discuss, did not consider the effect of the environmental bottom lines relevant to those instruments via the NZCPS.

312 At [1018].

313 At [1022].

314 *King Salmon*, above n 80, at [132].

315 CA judgment, above n 45, at [203].

seriously arguable that if the same activities had occurred in the CMA, this would have resulted in those activities being prohibited.[316]

[186] By contrast, the minority of the DMC, in considering the nature and effect of the marine management regimes, noted there were some environmental bottom lines which would have been relevant if the proposed activities were taking place in the CMA. The minority considered "significant weight" had to be given to such bottom lines "where discharge activities occur in close proximity to the CMA and the effects predominantly occur in the CMA".[317] The DMC similarly needed to directly confront the effect of the environmental bottom lines in the NZCPS in relation to areas where TTR's mining activities would be felt and explain, albeit briefly, why it considered that factor was outweighed by other s 59 factors or sufficiently accommodated in other ways.[318]

[187] Accordingly, we agree with the Court of Appeal that the difference in approach between the DMC majority and the minority on this aspect was not solely one of weight. Rather, there was an error of law in "not assessing whether the proposal would produce outcomes inconsistent with the objectives of the RMA and NZCPS within the CMA". In particular, the DMC majority "did not identify relevant environmental bottom lines under the NZCPS and did not consider whether the effects of the TTR proposal would be inconsistent with those bottom lines".[319]

The approach to the requirement in s 59(2)(f) to consider economic benefit

[188] Three issues arise from KASM/Greenpeace's submissions on this topic. The first is whether the Court of Appeal erred in finding that the DMC took into account the economic costs of the proposals as well as the benefits. The second issue is whether the Court was correct to find that the DMC was not required to quantify environmental, social and cultural costs and benefits. The final issue is whether the

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316 See, for example, policy 4.1 of the Taranaki Regional Council *Regional Coastal Plan for Taranaki* (1997), which identifies The Traps as being of "outstanding coastal value". (The Plan is currently under review.) In terms of the hierarchy of planning instruments in the RMA, that Plan must give effect to the NZCPS: RMA, s 67(3)(b); and see *King Salmon*, above n 80, at [31], [125] and [152].

317 DMC decision, above n 38, at [45].

318 The DMC minority's reasons focused on the effect of the NZCPS in relation to the effects on the Pātea Shoals: DMC decision, above n 38, at [46]–[47], [49]–[50] and [56] of the minority reasons.

319 CA judgment, above n 45, at [201].

Court was right that there was no error of law in the DMC's approach to "potential economic benefits in the counterfactual".[320]

[189] On the first issue, the Court of Appeal considered that addressing economic benefit under s 59(2)(f) must address net economic benefit, but said there was nothing to suggest that the DMC only considered gross benefits.[321] We agree that the DMC would need to satisfy itself that there was an economic benefit so that, if there were material economic costs, the DMC would be obliged to take those into account. The issue then is whether the DMC approached this matter correctly.

[190] In addressing s 59(2)(f), the DMC said it was not necessary to consider "a benefit cost analysis". Rather, it said that: "Understanding that there is an economic benefit is all that is necessary and is consistent with the purpose of the Act."[322] On its face, if net economic benefit must be shown, this observation is perhaps not a promising start. However, it is not entirely clear from the decision whether the DMC in this passage was rejecting the need to consider net economic benefit at all or whether the DMC was rejecting a broader cost/benefit analysis in the sense of the second issue raised by KASM/Greenpeace. We say that because, first, the DMC immediately went on to say that consideration had been given to "the potential environmental, social or cultural 'costs' (or benefits) that might arise", but the DMC did not consider that it was necessary "to ascribe a monetary value to those things".[323] Further, it appears that the primary difference between the experts who gave evidence before the DMC was whether there was any need to weigh up environmental costs against economic benefits. The DMC also had evidence suggesting any economic costs were negligible. Finally, the DMC did in fact note that, "[i]n considering benefits, … any economic dis-benefits must also be taken into account", citing, for example, impacts on existing interests.[324]

[191] To put the matter in context, the DMC's observation followed a review, in some detail, of the expert evidence on this topic. Mr Leung-Wai, who gave expert evidence

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320 At [284].
321 At [281].
322 DMC decision, above n 38, at [805].
323 At [806].
324 At [995].

on behalf of TTR based on a report he prepared for Martin, Jenkins & Associates Ltd (MartinJenkins), applied an input-output multiplier analysis which assumed recovery over time of the seabed environment and no ongoing irreversible effects.[325] His evidence covered the district, regional, national and offshore figures, for example, as to potential benefits in terms of direct spend and employment. While Mr Leung-Wai's analysis did not reflect a net benefit, he did address the likelihood of achieving the reported benefits, concluding that negative impacts were likely to be insignificant, temporary or trivial. He did not favour a benefit-cost analysis encompassing costs such as environmental costs, which was the preferred approach of Mr Binney, the expert who gave evidence on behalf of KASM/Greenpeace.

[192] Further, the conclusions of the MartinJenkins report were set out in TTR's impact assessment report. The impact assessment report first addressed potential costs, noting arguments there could be some adverse effects on other industries in the local and regional areas such as tourism. The report considered that there was, for example, likely to be limited impact on tourism, given the project was offshore and not visible from the shore. The report then noted MartinJenkins' conclusion that "[o]verall … when considering the balance of economic effects of the project, the positive economic effects are significantly greater than any other effects". The report said that this overall outcome had been accepted by the DMC in their earlier decision on TTR's previous marine consent application, "where they concluded that, while the value of the potential adverse effects is difficult to quantify, the project is likely to have a positive net economic benefit".

[193] Our attention has not been drawn to evidence of material economic costs which should have been taken into account.

[194] Against this background, we do not consider the DMC has erred in law in its approach to this issue.

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325 The expert conferencing on this topic noted that the input-output multiplier analysis identified the economic benefits of the iron sands project in terms of employment and gross domestic product (GDP).

[195] Similarly, we agree with the Court of Appeal in the approach to the second question. As the Court said:

> [283] We do not consider that there was any error of law in the DMC's decision not to seek to quantify, and include in a cost-benefit analysis, environmental, social and cultural costs. It was consistent with the scheme of the EEZ Act, and open to the DMC, to have regard to these matters on a qualitative basis. Indeed, we see force in TTR's argument that taking those costs into account in the assessment of economic benefit, and then weighing them separately under other limbs of s 59, could give rise to double-counting.

[196] As we have indicated, the DMC had expert evidence about the perceived pros and cons of the two approaches. We see no error of law in the DMC's preference for a qualitative analysis of environmental, social and cultural benefits and costs.[326]

[197] We also adopt the Court of Appeal's reasoning on the final issue, the approach to potential economic benefits in the counterfactual. The DMC had received submissions on the potential for adverse impacts on businesses not yet established. KASM/Greenpeace argue the DMC erred in failing to take into account these potential economic benefits that would be precluded or harmed by the activity, relying in this respect on the fact "effects" in s 6 of the EEZ Act are defined to include "future effect[s]". But the DMC did not ignore that. Rather, the DMC determined that in the absence of evidence "that such a venture or ventures were imminent", it could place no weight on the possibility of such a business being established in the future.[327] As the Court of Appeal said, that was a factual determination for the DMC.[328]

The correct approach to the imposition of conditions

[198] Two issues arise under this head. The first of these is whether the DMC's approach to conditions amounted to an adaptive management approach, which is not permitted in the context of an application for a marine discharge consent. The second issue is whether the DMC erred in its approach to the imposition of a bond. We deal with each issue in turn.

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326 DMC decision, above n 38, at [806].
327 At [809].
328 CA judgment, above n 45, at [284].

An adaptive management approach?

[199] "Adaptive management" for these purposes has the meaning set out in s 64(2),[329] and includes:

> (a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:
>
> (b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

[200] The question here is whether, in imposing conditions seeking to avoid particular effects and requiring ongoing monitoring to achieve that outcome, the DMC has in fact applied an adaptive management approach as the High Court found.[330]

[201] It is clear that the DMC adopted too narrow an approach to what constitutes an adaptive management approach. The DMC proceeded on the basis that conditions only comprised adaptive management where, as a result of the assessment of effects, the activity would be wholly discontinued.[331] The High Court and Court of Appeal were in agreement the DMC erred in this respect.[332] There were, however, differing views as to whether the conditions imposed comprised an adaptive management approach.

[202] In determining that the High Court was wrong to treat the approach adopted as one of adaptive management, the Court of Appeal saw the prohibition on adaptive management as linked to the objective in s 10(1)(b). "In other words", the Court said, the EPA could not "grant a marine discharge or dumping consent if it is unsure whether the consented activity will cause [the harms to the environment that must be avoided], on terms that provide that if such harms do occur then the consent envelope will be adjusted prospectively".[333]

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329 Section 4(1) definition of "adaptive management approach".
330 HC judgment, above n 43, at [404].
331 See DMC decision, above n 38, at [54]. See also at [55].
332 HC judgment, above n 43, at [392], [399(d)] and [420]; and CA judgment, above n 45, at [217].
333 CA judgment, above n 45, at [221].

[203] The Court of Appeal noted that in this case, the consents provided for pre-commencement monitoring "to establish relevant baselines, development of management plans, and ongoing monitoring by reference to the relevant conditions and the monitoring plans". The Court observed that the monitoring plans were necessary to "provide for operational responses" if the requirements of the consent and the monitoring plans were not met.[334] However, the Court of Appeal did not consider that the conditions imposed by the DMC comprised adaptive management. That was because they did not envisage any "adjustment of the consent envelope in response to monitoring and assessment of the effects of the consented activities".[335] The Court continued:[336]

> The conditions do not contemplate the scaling back of the authorised mining activities, or any adjustment of the effects permitted under the consent, over and above the adjustments contemplated by the EEZ Act in relation to consents generally. The conditions do contemplate TTR adjusting the way it carries out its operations to ensure it remains within the consent envelope—but that does not amount to adaptive management.

[204] It is helpful to address the correctness of this conclusion by considering the two broad categories of conditions imposed, that is, those involving pre-commencement monitoring and those involving ongoing monitoring.

[205] Conditions 9(a) and 66(b)–(c) relating to seabirds, discussed above, are illustrative of the approach to pre-commencement monitoring conditions. Condition 9(a) states that "There shall be no adverse effects at a population level of [various threatened] seabird species that utilise the South Taranaki Bight" at all times during the terms of the consent. Under condition 66(b) and (c), the Seabirds Effects Mitigation and Management Plan, which must be prepared and certified before any seabed extraction can begin, must set out indicators of adverse effects at a population level of those seabirds and identify responses or actions to be undertaken by TTR if the indicators are reached.[337] In this way, the broad consenting terms in condition 9(a)

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334 At [225].
335 At [226].
336 At [226].
337 Although condition 66 is not strictly speaking a pre-commencement monitoring condition, it has a pre-commencement aspect. While the Seabirds Effects Mitigation and Management Plan can be amended on an ongoing basis, an initial plan must be prepared and certified before any seabed extraction can begin. That initial plan will be informed by the data obtained from pre-commencement monitoring: DMC decision, above n 38, at [36].

("no adverse effects") are left to be "flesh[ed] out" in management plans prepared following extensive post-decision information gathering.[338] There is much force in the argument for the first respondents that these conditions and other pre-commencement monitoring conditions are a mechanism for providing baseline information as to effects, which was lacking in TTR's application. There is some support for that in the descriptions used in the decision of the DMC.[339] And we agree, as the Court of Appeal also found, that these conditions suffer the more fundamental problem we have identified above in that they do not meet the requirement to favour caution and environmental protection.[340]

[206] We turn, then, to the ongoing monitoring conditions. There is plainly a tension here between the provisions in the Act which allow for, respectively, monitoring conditions[341] to be imposed and, as well, envisage the EPA initiating the review process under s 76,[342] and the bar on the use of an adaptive management approach for marine discharge consents. How else, apart from requiring some form of ongoing monitoring, would the EPA be able to exercise its obligations in relation to the review process? We agree with the submission for TTR that there must accordingly be some distinction to be drawn between orthodox review conditions, which the EPA is expressly empowered to impose, and those which constitute adaptive management conditions, which are prohibited.

[207] Given this tension, we do not agree with the submissions for KASM/Greenpeace and Forest and Bird that the Court of Appeal's test for adaptive management is incorrect. In its written submissions, Forest and Bird notes that an adaptive management approach involves "courting a material risk of harm" so that "further information may be gathered and the management of the activity adapted accordingly to address that harm appropriately prospectively".[343] Both KASM/Greenpeace and Forest and Bird emphasise the words "so that" in s 64(2)(b), but we do not consider the wording can be read literally because of the need to manage

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338 CA judgment, above n 45, at [227(c)].
339 For example, see the DMC decision, above n 38, at [155] and [1065].
340 CA judgment, above n 45, at [227].
341 Sections 63(2)(a)(iii) and 87F(4).
342 Section 87I(1)(b) provides that s 76 also applies to marine discharge and dumping consents.
343 Both KASM/Greenpeace and Forest and Bird draw on the discussion in *Sustain Our Sounds*, above n 185, of when an adaptive management approach is an available response.

the tension identified. In our view, the "consent envelope" test advanced by the Court of Appeal provides a rule of thumb which can assist in resolving this tension in a manner consistent with the overall scheme of the Act.

[208] The Taranaki-Whanganui Conservation Board accepts that the "consent envelope" test is a possible test for determining whether conditions comprise adaptive management. But the Board says that the conditions imposed met that test. The Board also emphasises that s 87F(4) precludes the imposition of conditions on a marine discharge consent that amount or "contribute to" adaptive management. In other words, it is sufficient for conditions to contribute to an adaptive management approach, but the Court of Appeal has not factored that into its analysis. The Board argues that some of the conditions do not leave compliance and "operational responses" solely to TTR's discretion and that in this way they contribute to adaptive management.

[209] We consider the Court of Appeal was right, for the reasons given, in concluding that the conditions did not comprise adaptive management.[344]

[210] The conditions imposed in relation to the suspended sediment limits illustrate the point that the conditions do not contemplate scaling back the authorised activities or an adjustment of permitted effects beyond those contemplated by the Act. As TTR submits in response to the challenge to these conditions, conditions 5 and 51 and sch 3 provide a means by which the numerical values for each of the specified percentiles of background suspended sediment limits (25th, 50th, 80th, and 95th) in sch 2 can be reviewed and updated after the pre-commencement monitoring, but before the seabed extraction activities commence. The effect of this is that the number of grams of sediment per litre already occurring in the environment at, say, 75 per cent, 50 per cent, 20 per cent and 5 per cent of the time can be updated before the mining commences. But neither that mechanism nor the requirement to comply with it in condition 5(b) changes. There are no new thresholds. Nor do they allow for the numerical values of suspended sediment limits to change once mining has commenced.

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344 See above at [203].

[211] Further, condition 5(b) does not provide for the assessment of effects or any further decision-making based on the outcome of the monitoring and assessment. Rather, the requirement in condition 5(b) is that TTR ceases extraction activities if it cannot achieve compliance with the suspended sediment limits. As TTR says, this is a standard compliance requirement. Non-compliance does not result in any consequential amendment to the consented activity or any change to its scale or intensity but rather would mean that the enforcement provisions in the Act would come into play.[345] If TTR cannot meet that condition, then it cannot continue to operate.

[212] It does not seem to us that the addition of the requirements of the environmental management and monitoring plans, here condition 55, alters the position. For example, the requirement to identify operational responses to be undertaken if unanticipated effects are identified (condition 55(g)) does not amount to adaptive management as it does not contemplate any adjustment of the consent envelope as a result of the monitoring. Rather, it simply contemplates TTR adjusting the way it carries out its operations to ensure it remains within the envelope, which, as we have said, does not amount to adaptive management. Similarly, the ability to amend the environmental and management plans in condition 56 does not allow changes to any limits or thresholds.

[213] For these reasons, we agree with the Court of Appeal that the conditions imposed do not constitute adaptive management.

Did the DMC err in its approach to the imposition of a bond?

[214] Under s 63(2)(a)(i) of the Act, the DMC has the power to impose a condition requiring the consent holder to "provide a bond for the performance of any 1 or more conditions of the consent", and under s 63(2)(a)(ii), the DMC may also make it a condition, as it did in this case, that the consent holder "obtain and maintain public liability insurance of a specified value".

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345 The effect of ss 20B and 20C of the EEZ Act is that if a limit is exceeded, continuing the activity would not be permitted. TTR would be liable to prosecution under s 134 and enforcement action is available under s 115. Under ss 125 and 126, abatement notices can be served and TTR would have to comply with them.

[215] The Court of Appeal found that the DMC had wrongly treated "a bond and public liability insurance as alternative ways of achieving similar outcomes".[346] As such, the Court said the DMC failed to identify the different purposes served by a bond and failed to turn its mind to whether a bond was required in this case. Some forms of harm caused by the planned activities were not insubstantial but would not be covered by insurance. It would, however, be covered by a bond. Thus, the Court said the DMC needed to have turned its mind to whether a bond should be required.[347]

[216] TTR supports the approach to this issue taken by the High Court. That is, that the DMC was entitled to treat a bond and public liability insurance as alternative ways of achieving similar outcomes, although accepting they operated differently.[348] Further, the Act does not require either, and whether the DMC adopted either, both or neither was a matter within the DMC's discretion.[349]

[217] Section 65 sets out the relevant provisions relating to bonds as follows:

> **65 Bonds**
>
> (1) A bond required under section 63(2)(a)(i) may be given for the performance of any 1 or more conditions of a marine consent that the Environmental Protection Authority considers appropriate and may continue after the expiry of the consent to secure the ongoing performance of conditions relating to long-term effects, including—
>
> (a) a condition relating to the alteration, demolition, or removal of structures:
>
> (b) a condition relating to remedial, restoration, or maintenance work:
>
> (c) a condition providing for ongoing monitoring of long-term effects.
>
> (2) A condition of a consent that describes the terms of the bond may—
>
> (a) require that the bond be given before the consent is exercised or at any other time:
>
> (b) provide that the liability of the holder of the consent be not limited to the amount of the bond:

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346 CA judgment, above n 45, at [239].
347 At [240].
348 HC judgment, above n 43, at [305] and [308].
349 At [303].

> (c) require the bond to be given to secure performance of conditions of the consent, including conditions relating to any adverse effects on the environment or existing interests that become apparent during or after the expiry of the consent:
>
> (d) require the holder of the consent to provide such security as the EPA thinks fit for the performance of any condition of the bond:
>
> (e) require the holder of the consent to provide a guarantor (acceptable to the EPA) to bind itself to pay for the carrying out of a condition in the event of a default by the holder or the occurrence of an adverse environmental effect requiring remedy:
>
> (f) provide that the bond may be varied, cancelled, or renewed at any time by agreement between the holder and the EPA.
>
> (3) If the EPA considers that an adverse effect may continue or arise at any time after the expiration of a marine consent, the EPA may require that a bond continue for a specified period that the EPA thinks fit.

[218] The relevant condition required TTR to take out public liability insurance to cover the costs of environmental restoration and damage resulting from an unplanned event. The condition, condition 107, as ultimately imposed provided as follows:

> The Consent Holder shall, while giving effect to these consents, maintain public liability insurance for a sum not less than NZ$500,000,000 (2016 dollar value) for any one claim or series of claims arising from giving effect to these consents to cover costs of environmental restoration and damage to the assets of existing interests (including any environmental restoration as a result of damage to those assets), required as a result of an unplanned event occurring during the exercise of these consents.

[219] In addition, condition 108 imposed a requirement for a certificate of insurance to be submitted prior to giving effect to the consents and that the certificate be updated annually. There was no requirement that TTR pay a bond.

[220] The need for a bond was raised by submitters. On this topic, the DMC had before it the joint statement of issues by the experts and legal advice on both a bond and on a condition TTR obtain insurance. The statement of issues said there was no agreement as to whether or not a bond was required. The legal advice treated a bond and insurance as separate and, in a passage set out by the DMC, stated that the "key requirement" for the imposition of a bond "is that it must relate to – and in effect

secure – the performance of one or more other conditions of consent".[350] Finally, the DMC noted the advice of Dr Lieffering as to the purpose of a bond, namely, "to ensure that an event such as restoration occurs, not to solve compliance issues".[351] Given the advice before the DMC that treated the bond and insurance as different, it is not necessarily the case that the DMC did not understand the two served different purposes. Nor is there the need to make an adverse inference that the DMC did not understand the advice.

[221] The more significant issue relates to the DMC's reasons. The reason given by the DMC for declining to require a bond was to note that given "the circumstances of the application, and taking into account the legal and technical advice" obtained, a bond was "not necessary in addition to the $500 million insurance offered by TTR".[352] However, that reasoning did not explain, even briefly, how the risks a bond would address were met by insurance, or could somehow be put to one side. To illustrate the point, in their submissions in this Court, KASM/Greenpeace expressed particular concern about two risks – what would happen if TTR went into liquidation and what would happen if it failed to fulfil its post-extraction conditions. KASM/Greenpeace say those risks would not be covered by the condition as to insurance, which provides only for unplanned events. As noted, the need for a bond to ensure environmental restoration work would take place had been raised by submitters.[353] The DMC did therefore need to explain (briefly) why it considered it was not necessary to impose a bond in addition to the insurance offered by TTR. It was an error of law not to have done so.

The exercise of a casting vote

[222] KASM/Greenpeace submit that the Court of Appeal was wrong to reject their argument that in exercising the casting vote, the chairperson was required to separately

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350 As quoted in the DMC decision, above n 38, at [1072].

351 At [1073].

352 At [1074].

353 Although consideration of whether to impose a bond and/or insurance condition is not a mandatory factor which the DMC must consider, it is mandatory for the DMC to have regard to any submissions made, evidence given and advice received in relation to the application, including advice from the Māori Advisory Committee: s 59(3).

consider the exercise of the vote, give reasons for the exercise of the casting vote, and favour caution in the exercise of the vote.

[223] The Court of Appeal dealt with this argument shortly on the basis that there was no "additional overlay of caution" necessary in relation to the exercise of the casting vote, "or that any factors were relevant to the exercise of the casting vote that were not also relevant to the Chairperson's deliberative vote".[354]

[224] We agree. The procedure adopted in Appendix 5 to the DMC's decision was to make decisions "[a]s far as possible" on a consensus basis. All members had a vote. When there was no clear majority, the procedure was that the chairperson has a casting vote.[355] The approach adopted by the DMC reflected in this respect the procedure applicable to the EPA as a Crown entity.[356]

[225] It is clear on the face of the report that the chairperson was aware of the minority's views.[357] Further, the chairperson considered that the approach adopted by the majority favoured caution and environmental protection. We do not see how the fact that the chairperson was now exercising a casting vote changed that or required reconsideration. As the EPA submits, if the chairperson properly applying the law is satisfied that granting the consent is appropriate in the exercise of the general vote, the chairperson is then also properly satisfied of those matters for the purposes of exercising a casting vote.[358]

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354 CA judgment, above n 45, at [276].

355 Matthew Ockleston "'… in the event of an equality of votes …': The Chairperson's Casting Vote" (2000) 11 PLR 228 at 229 notes that the term "casting vote" is at least 300 years old and derives from an archaic use of the word "cast" to mean to tilt the balance.

356 The EPA is a Crown entity: Crown Entities Act 2004, s 7(1)(a) and sch 1 pt 1. Clause 12(2) of sch 5 gives the chairperson "in the case of an equality of votes" a casting vote. Clause 14 empowers a board of a Crown entity to appoint committees to perform or exercise any of the entity's functions. The common law did not recognise casting votes: see Ockleston, above n 355, at 229; Madeleine Cordes, John Pugh-Smith and Tom Tabori (eds) *Shackleton on the Law and Practice of Meetings* (15th ed, Sweet & Maxwell, London, 2020) at 75; and Roger Pitchforth *Meetings: Practice and Procedure in New Zealand* (4th ed, CCH, Auckland, 2010) at 70.

357 See DMC decision, above n 38, at [5].

358 See *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [59]–[64].

[226] Nor were further reasons for the view required to be given. The chairperson had explained the position adopted in the context of reaching the views set out in respect of his deliberative vote.[359]

A question of law

[227] In relation to various aspects of the appeal, TTR, in its written submissions, said that the Court of Appeal had strayed into the merits of the application and did not identify any error in a question of law.[360] This was not a central focus of the oral argument. The point can be dealt with briefly. There was no real dispute between the parties as to the test for what constitutes a question of law for these purposes.[361] Apart from the two questions discussed earlier – whether the DMC was correct to decide that it had the best information and as to the DMC's approach to potential economic benefits in the counterfactual – it is clear that the other issues arising on the appeal raise questions of law.

Relief

[228] Having quashed the decision of the DMC, the Court of Appeal referred TTR's application back to the EPA for reconsideration in light of the Court's judgment.[362] The iwi parties along with Forest and Bird argue that if the Court upholds the decision of the Court of Appeal, this is one of those cases in which TTR's application should be dismissed outright.[363] The essential submission is that there are specific DMC findings that would compel the view that if s 10(1)(b), the information principles and powers as to conditions are correctly applied, TTR's application would not succeed. Mr Fowler illustrated the point by reference to some of the findings of the DMC, for example, the finding that the modelling "indicates that there will be significant adverse effects within [ecologically sensitive areas] to the east-southeast of the mining site

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359 See *Love v Porirua City Council* [1984] 2 NZLR 308 (CA) at 313.

360 Section 105(4) of the EEZ Act provides that appeals to the High Court from decisions of the EPA can only be on a question of law.

361 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]–[58]; and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[28]. Both discuss the older case of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).

362 CA judgment, above n 45, at [290] and [292].

363 The Taranaki-Whanganui Conservation Board submits that the decision should be remitted back but raises the possibility that the decision simply be quashed.

extending to at least Graham Bank".[364] In that context, the DMC also considered the effect on primary production would be significant at ecologically sensitive areas such as the Crack and the Project Reef.[365]

[229] We see no reason not to refer the matter back to the EPA for reconsideration as is the usual course on an appeal of this nature. Given the complex and evolving nature of the issues involved, it would not be appropriate to deny TTR the opportunity to have the application reconsidered. TTR may, for example, be able to remedy some of the information deficits identified. If a reconsideration is ordered, the Conservation Board sought directions that TTR should not be able to further amend its proposal to avoid the need for adaptive management or to reduce its effects. Obviously there are costs implications for submitters, like the Conservation Board, if the proposal is amended, but TTR should be able to remedy matters if it can.

[230] Finally, it is necessary to address the EPA's submission that if the Court of Appeal decision is upheld and the order to remit to the EPA confirmed, we should reserve jurisdiction for the High Court to make practical directions relating to the determination of the application. The EPA says this is necessary because of the passage of time since the DMC heard and determined the application in 2016–2017. For example, under s 16 of the EEZ Act, the EPA's delegation to the DMC requires that one member of the DMC be a member of the EPA board.[366] The DMC member who had that role in 2016–2017 no longer serves on the EPA board. The EPA also submits it would be necessary to consider a range of evidential issues.

[231] We consider the EPA/DMC may well be able to deal with these sorts of things which are not unusual in the situation where a decision has to be reconsidered following an appeal. That said, we see no issue with this Court reserving leave to a party to seek directions from the High Court should that prove necessary.[367]

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364 DMC decision, above n 38, at [350].

365 Mr Fowler submits that while it is not explicit, it is nevertheless clear from the DMC decision that the conditions imposed do not create the reduction in adverse effects that would be required.

366 A reference to cl 14 (1)(b) of sch 5 to the Crown Entities Act.

367 In reliance on r 20.19 of the High Court Rules 2016, which provides that a court, after hearing an appeal, may "make any order the court thinks just".

Result

[232] Although differing on aspects of the reasoning, the Court upholds the decision of the Court of Appeal. Accordingly, the appeal is dismissed. Leave is reserved to a party to seek directions from the High Court should that prove necessary.

Costs

[233] We reserve costs.

[234] Unless the parties are able to agree on costs, we seek submissions on that issue. We note in this respect that a full set of costs for each of the five groupings making up the first respondents would comprise over-recovery. That is so in light of the fact that the first respondents were asked to divide up the hearing time available to them and as a result, as we have noted, each took responsibility for the primary argument on particular topics.

[235] Submissions for the first respondents are to be filed and served by 1 November 2021. Submissions for TTR are to be filed and served by 15 November 2021 and any submissions from the first respondents in reply by 22 November 2021.

GLAZEBROOK J

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Summary

[236] I write separately because I take a different view from William Young and Ellen France JJ on some aspects of the appeal, although I agree with much of what is in their reasons.[368]

[237] I adopt Ellen France J's description of the background and the statutory scheme.[369] I agree with her discussion of the place of the Treaty of Waitangi and customary interests,[370] the scope of any other applicable law,[371] and the approach to the requirement to consider economic benefit.[372] I agree with her discussion of whether there is a question of law.[373] I agree the appeal should be dismissed and also agree with costs being reserved.[374]

[238] I take a different view on the approach to determining an application for a marine discharge consent and in particular the effect of the purpose provision, s 10 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act),[375] on the relevant s 59 factors.[376] I add some comments on the information principles, although agreeing with much of what Ellen France J says on that topic.[377] I also add some comments on her discussion of what is required to take

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368 In these reasons from now on I refer to Ellen France J alone as she is the author of their joint reasons.

369 Above at [14]–[38].

370 Above at [139]–[161].

371 Above at [162]–[174]. I also agree with Williams J's further comments below at [297] that the question of what is meant by existing interests and other applicable law must not only be viewed through a Pākehā lens.

372 Above at [188]–[197], although see below at [253] and [259] for discussion of when economic benefit can legitimately be taken into account for discharge consents.

373 Above at [227].

374 Above at [232]–[235].

375 All references are to the version of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [EEZ Act] in force as at August 2016, as that was the version in force when Trans-Tasman Resources Ltd (TTR) made its application.

376 I thus do not agree with Ellen France J's reasons above at [39]–[102], except as expressly indicated. Williams J agrees with my approach to s 10 of the EEZ Act and its effect on the s 59 factors below at [292]–[293].

377 Above at [103]–[138]. In particular, I agree with her discussion of the implementation of the precautionary principle (above at [107]–[113]). I agree that the decision-making committee (DMC) majority did not comply with the requirement to favour caution and environmental protection (above at [118]–[131]), although I do not agree that the DMC majority applied the correct test and so do not agree with the reasons above at [114]–[117], at [128] to the extent it does not apply the bottom line approach to s 10(1)(b) and the reference to the DMC majority citing the correct test in [130]. I also agree with the discussion on best available information (at [134]–[138]). Williams J agrees with my approach to the information principles below at [294]–[295].

into account the nature and effect of other marine management regimes,[378] the correct approach to the imposition of conditions[379] and the exercise of a casting vote.[380] I differ from the other members of the Court on the issue of relief.[381]

Role of s 10(1)(b)

[239] It is helpful to set out s 10 of the EEZ Act again:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

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378 Above at [175]–[187].
379 Above at [199]–[213] (adaptive management) and [214]–[221] (bond).
380 At [222]–[226].
381 Above at [228]–[231] per Ellen France J and below at [299] per Williams J and [333] per Winkelmann CJ.

[240] As a purpose provision, s 10 provides the basis for the purposive interpretation of the other sections of the EEZ Act.[382] It also, however, provides an overarching guiding framework for decision-making under the Act and, to this extent, has substantive or operative force.[383] This Court took a similar view of the purpose provision in s 5 of the Resource Management Act 1991 (RMA) in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.[384] It held that the definition of sustainable management in s 5(2) of the RMA "states a guiding principle which is intended to be applied by those performing functions under the RMA".[385]

[241] The central concept of the definition of sustainable management in s 5(2) of the RMA is the same as that in s 10(2) of the EEZ Act, the differences merely reflecting the different contexts in which the two Acts operate.[386] Section 10(1)(a), coupled with s 10(2), uses language of compromise between economic and environmental needs. As is clear from the legislative history,[387] s 10(1)(a) is also aimed at achieving a balance between protecting the environment and exploiting it for economic reasons.

[242] *King Salmon* is authority for the proposition that even sustainable management can, however, at times require absolute protection from environmental harm, depending on the circumstances or the terms of other planning documents.[388] If that is the case for sustainable management, then it must be even more the case when account is taken of s 10(1)(b).

[243] Section 10(1)(b) was inserted in 2013 as part of transferring responsibility for the regulation of discharges and dumping to the Environmental Protection Authority (EPA).[389] Unlike s 10(1)(a), the language in 10(1)(b) is not premised on compromise. There is no mention of economic well-being or sustainable management. It simply provides that the purpose of the EEZ Act with regard to the designated areas and waters

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382 See Interpretation Act 1999, s 5(1).

383 Winkelmann CJ agrees with this below at [303].

384 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

385 At [24(a)]. See also at [30] and [151].

386 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment] at [34].

387 See Ellen France J's reasons above at [64]–[68].

388 *King Salmon*, above n 384, at [149]–[154] and in particular [150] and [153].

389 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013. The provision came into force on 31 October 2015.

is "to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter".

[244] I do not agree that "protect" means the same thing in s 10(1)(b) as "protection" does in the context of the definition of sustainable management in s 10(2).[390] If it did, then there would have been no need for its separate identification in s 10(1)(b). Further, in s 10(2), the word "protection" is used with the words "use, development, and protection" not of the environment but of natural resources, and in a context that provides for the balancing of the need to enable people to provide for their economic well-being with the three factors in s 10(2)(a)–(c). By contrast, s 10(1)(b) just talks about the purpose being to protect the environment from pollution. Under s 10(1)(a), environmental protection can be subordinated to economic needs, but under s 10(1)(b), it cannot.[391]

[245] Section 10(1)(b) is cumulative on s 10(1)(a).[392] It must therefore provide for something more than sustainable management. In my view, s 10(1)(b) is an operative restriction for discharges and dumping and thus an environmental bottom line in the sense that, if the environment cannot be protected from pollution through regulation, then discharges of harmful substances or dumping must be prohibited.[393] I therefore agree with the Court of Appeal that s 10(1)(b) is a separate consideration from sustainable management and should have been separately addressed by the decision-making committee (DMC) of the EPA as a bottom line.[394]

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390 Contrary to Ellen France J's view at [76] and [82]. It means more than merely a heightened threshold, contrary to the view expressed above at [83] of Ellen France J's reasons. Winkelmann CJ agrees with my reasoning below at [308] and n 509.

391 Winkelmann CJ agrees with this below at [309].

392 I note that Ellen France J also accepts that the decision-maker has to consider the criteria in s 59 of the EEZ Act with both purposes in s 10(1) in mind: see above at [55], [59], [83] and [102].

393 Winkelmann CJ agrees with this below at [305].

394 CA judgment, above n 386, at [84], [89], [106] and [107]. Winkelmann CJ agrees with this below at [303] and [305].

[246] Other features of the EEZ Act such as the need for the best available information,[395] the prohibition on adaptive management[396] and the need for caution[397] support this view of s 10(1)(b), as do New Zealand's international obligations.[398]

[247] Section 10(3) does not affect the conclusion that s 10(1) has substantive or operative force.[399] Section 10(3) merely makes it clear that the information principles and the specific decision-making criteria in the EEZ Act must be considered and applied in "order to achieve the purpose" of the Act, meaning that any assessment must be done in light of both of the purposes in s 10(1) in cases where s 10(1)(b) applies.[400] This is consistent with the approach in *King Salmon*, which rejected an "overall judgment" approach that did not take account of the other provisions of the RMA or of any relevant instruments.[401]

[248] I do not, however, agree with the Court of Appeal that s 10(1) provides the main operative criteria for the determination of applications.[402] As Ellen France J points out, the Court of Appeal's approach does not fit with the words of s 10(3), which

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395 EEZ Act, ss 61(1)(b) and 87E(1)(b).

396 Section 87F(4).

397 Sections 61(2) and 87E(2).

398 In accordance with s 11 of the EEZ Act. Article 192 of the United Nations Convention on the Law of the Sea 1982 (LOSC) provides that "States have the obligation to protect and preserve the marine environment". Article 194 imposes an obligation on States to use the "best practicable means" to "prevent, reduce and control pollution of the marine environment". It is true that art 193 allows the exploitation of natural resources, but it also provides that this must accord with the duty to protect and preserve the marine environment. I thus see LOSC as being consistent with the bottom line approach of protection from material harm in s 10(1)(b). The same applies to the Convention on Biological Diversity, the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL) and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention). It follows that I do not adopt Ellen France J's commentary on these instruments: see above at [86]–[101] of her reasons. See United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994); Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993); Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973 1340 UNTS 61 (signed 17 February 1973, entered into force 2 October 1983); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120 (opened for signature 29 December 1972, entered into force 30 August 1975); and 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (adopted 17 November, entered into force 24 March 2006).

399 Contrast Ellen France J's reasons above at [48].

400 See similarly Winkelmann CJ's reasons below at [304].

401 *King Salmon*, above n 384, at [130] and [151], where this Court said that s 5 of the Resource Management Act 1991 [the RMA] was not intended to be an operative provision under which particular planning decisions are made, although Part 2 (of which s 5 is part) remains relevant. As indicated above at [240], this Court described s 5 of the RMA as a guiding principle.

402 See CA judgment, above n 386, at [35] and [108].

expressly describe the matters set out in s 59 as "decision-making criteria".[403] Section 10(1) sets out guiding principles but is not the section under which particular consent decisions are made.[404] Nevertheless, the s 10(1) purposes are not merely context for decision-makers. Nor are they factors to be given special weight. Ensuring those purposes are met is the very point of the s 59 assessment.

[249] In respect of discharges and dumping, therefore, this means that the relevant s 59 factors must be weighed in a way that achieves both the sustainable management purpose in s 10(1)(a) and the bottom line purpose in s 10(1)(b) of protecting the environment from pollution. Contrary to Ellen France J's view, I do not see this as imposing a hierarchical approach to s 59.[405] It just means applying the s 59 factors consistently with s 10(1)(b). It follows that I disagree with Ellen France J that there is a balancing exercise under s 59 but that s 10(1)(b) means this may be more tilted in favour of environmental protection.[406] To perform an "overall assessment" of the s 59 factors[407] in effect would mean that the protective aspect of s 10(1)(b) is not given effect (even assuming a heightened threshold).[408]

[250] Section 10(1)(b) is a cumulative and substantive provision requiring separate consideration when applying s 59 to ensure the bottom line of protection of the environment from pollution is achieved.

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403 Above at [48]. I also agree with her comments above at [49]–[50], but not the conclusion she draws at [51].

404 See above at n 401 for the similar position under the RMA. In the EEZ Act, the link between the decision-making criteria and statutory purpose is in s 10, the purpose section itself, whereas in the RMA the decision section for resource consent applications, s 104, is expressly "subject to Part 2", in which s 5, the statutory purpose section, is located. I note, as Ellen France J does at [171], that s 227 of the Resource Legislation Amendment Act 2017 amended the EEZ Act and made provision for EEZ policy statements (see Subpart 2 of Part 3A of the current EEZ Act), aligning the EEZ Act with the RMA in this regard (see (5 April 2017) 721 NZPD 17164).

405 See above at [56].

406 Above at [102] and [117]. Winkelmann CJ agrees with this below at [306].

407 As suggested by Ellen France J above at [59].

408 See above at [83], [85] and [101] of Ellen France J's reasons for the use of the term "heightened threshold". At [102] and [117] above she speaks of the possible tilting of the balance in favour of environmental protection factors.

What does protection require?

[251] There remains the issue of how the term "protect" is to be interpreted, whether the Court of Appeal's threshold of material harm is correct and, if so, how this is measured and over what period.

[252] The standard used by the Court of Appeal, "material harm", seems sensible as a bottom line.[409] If the environment is materially harmed, then it cannot be said to have been protected from pollution. On the other hand, it seems most unlikely that the purpose of s 10(1)(b) was to protect the environment against immaterial harm.[410] What amounts to "material harm" and the period over which this is measured will be for the decision-maker to determine on the facts of each case. Of course, harm does not have to be permanent to be material. Temporary harm can be material.[411]

[253] How then do the relevant s 59 factors fit with this bottom line? On my approach, s 10(1)(b) is not only relevant to the interpretation of s 59 but has substantive or operative force in its own right and is thus a qualification on s 59.[412] In light of this, I do not accept that protection is balanced against economic benefit. That is the province of s 10(1)(a).[413] Section 10(1)(b) is only concerned with protection. The fact that the list of factors in s 59 includes economic benefit and the efficient use and development of natural resources[414] with regard to discharges does not change this analysis and in particular does not mean that s 10(1)(b) allows varying levels of protection from material harm, depending on the amount of economic benefit. There is room between protection from all harm and protection from material harm for factors such as economic benefit and the efficient use of resources to operate.[415]

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409 I agree with Ellen France J above at [62] that the criterion used by the Court of Appeal was material harm.

410 Winkelmann CJ agrees with this below at [308].

411 Section 6(1)(b) of the EEZ Act defines "effect" as including "any temporary or permanent effect".

412 See similarly Winkelmann CJ's reasons below at [304] where she describes the s 59(2) factors as serving the s 10(1) purposes and hence subservient to those purposes.

413 I do not rely on the reasoning of the Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283: see Ellen France J's reasons above at [54], [58] and n 96. I do not comment on *RJ Davidson*, except to refer to the discussion of the approach in *King Salmon* above at [240], [242], [247] and n 401.

414 Sections 59(2)(f)–(g) and 87D(2)(a)(i) of the EEZ Act.

415 Winkelmann CJ agrees with this below at [312].

[254] I do not, however, agree with the Court of Appeal's view that consent cannot be granted where material harm to the environment may be caused in circumstances where that harm can be remedied or mitigated.[416] The Court of Appeal's approach does not give sufficient weight to the word "regulating" in s 10(1)(b) or indeed to practice both nationally and internationally. Section 59(2)(j) also supports this conclusion in the sense that it requires consideration of the extent to which imposing conditions under s 63[417] might avoid, mitigate or remedy adverse effects.

[255] The consequence of the link between ss 59 and 10(1) is that the s 59 factors are to be weighed in order to achieve the s 10(1)(b) purpose where that paragraph applies. This means that the terms in s 59(2)(j) in relation to conditions (avoid, remedy and mitigate) are aimed at achieving the bottom line. This approach also gives effect to the phrase "the extent to which" imposing conditions might avoid, remedy or mitigate adverse effects, which is defined in s 6(1)(b) as including temporary effects. There will be an acceptable extent of harm and an unacceptable extent. I accept, as the Chief Justice notes, that the assessment of whether there is material harm has qualitative, temporal, quantitative and spatial aspects that have to be weighed.[418]

[256] The meaning of the term "avoid" is obvious (avoid material harm).[419] The bottom line in s 10(1)(b) (protection from material harm) determines what is an acceptable extent of mitigation: mitigation must bring any harm below the threshold of material harm. As to the term remedy, this must mean that it may be permissible for discharges to cause harm, so long as the decision-maker is satisfied that any effects can be remedied and so rendered immaterial.[420] That by definition creates a margin of appreciation around timing, but in order to meet the bottom line (no material harm), remediation will have to occur within a reasonable time in the circumstances of the

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416 CA judgment, above n 386, at [86].

417 Section 63 of the EEZ Act sets out the types of conditions the decision-maker may impose.

418 See Winkelmann CJ's reasons below at [310].

419 As this Court said in *King Salmon*, above n 384, at [96], the term "avoid" in s 5(2)(c) of the RMA has its ordinary meaning of "not allow" or "prevent the occurrence of".

420 I see this as including any natural remediation that is projected to occur, except where there are no related conditions (which would be rare). In terms of the three-stage test set out below at [261], absent conditions, the matter will not be dealt with at the [261](b) step but at the [261](a) step. The issue at the [261](a) step will be only whether the duration and severity of any harm means it is material and with no consideration of economic benefit. It is only if the harm is not material, that economic benefit may come into play at the [261](c) step.

case and particularly in light of the nature of the harm to the environment, the length of time that harm subsists, existing interests and human health.

[257] The assessment of what is a reasonable time must take into account not only the duration of any recovery once the activity has ceased but also the total duration of the projected harm before remediation will occur. The longer the period before remediation occurs, the longer there will have been harm to the environment. That in itself may mean that the bottom line of protection is not achieved. In other words, what is a reasonable time for remediation must be assessed in a manner that is consistent with the s 10(1)(b) bottom line of protection of the environment from material harm.

[258] It follows that the length of time there is projected to be (unremedied) harm must also be factored into decisions on the duration of consents in order to ensure the bottom line in s 10(1)(b) is met.[421] Logically, too, the longer the timeframe before remediation and the longer the duration of any remediation measures, the less likely it is that a decision-maker could be satisfied, taking a cautious approach and favouring environmental protection,[422] that remediation will in fact occur as projected.

[259] Generally, therefore, what constitutes a reasonable time is for the decision-maker to decide, applying all the factors in s 59 but also meeting the standard of protection in s 10(1)(b). All else being equal, economic benefit considerations to New Zealand may have the potential to affect the decision-maker's approach to remediation timeframes in respect of discharges, but only at the margins.[423]

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421 See ss 73(2)(a) and 87H(4) of the EEZ Act, which provide that when determining the duration of the consent the decision-maker must, among other things, comply with ss 59 and 61.

422 See below at [270].

423 It follows that I disagree with the Chief Justice's view below at [316] about the complete irrelevance of economic benefit in the assessment of whether there will be material harm. The survival of s 59(2)(f) (economic benefit), following the 2013 reform inserting s 10(1)(b) into the EEZ Act, as a factor the decision-maker must consider, means economic benefit must play some role in dumping and discharge applications. But ultimately, as I have said above at [249], all the s 59 factors must be weighed with a view to achieving the s 10(1)(b) bottom line, and as such economic benefit will likely only be relevant at the margins to the assessment of a reasonable time for remediation. Thus, I do not consider that there is any practical difference between my approach and that of the Chief Justice.

[260] One possible objection to adopting a bottom line approach is that it may leave no realistic room for activities that require discharges, as most discharges could cause material harm through pollution of the environment.[424] The answer is that applicants for discharge consents are not limited to showing there is no material harm. They may also accept conditions that avoid material harm, mitigate the effects of pollution so that harm will not be material or remedy it so that, taking into account the whole period of harm, overall the harm is not material. It is only where there would be material harm and conditions cannot be imposed such that this material harm will be avoided, mitigated (so that it is no longer material) or remedied (within a reasonable timeframe taking into account the whole period harm subsists) that a discharge consent cannot be granted.

How applications should be determined

[261] In practice, the exercise of determining applications for discharge and dumping consents comprises up to three steps:

(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping?[425] If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.

(b) Is the decision-maker satisfied that conditions can be imposed that mean:

(i) material harm will be avoided;

(ii) any harm will be mitigated so that the harm is no longer material; or

(iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

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424 See Ellen France J's reasons above at [81].

425 Unlike the definition of environment in s 2(1) of the RMA, the definition of the environment in s 4(1) of the EEZ Act is limited to the biophysical aspects of the environment: see Ellen France J's reasons above at [49].

If not, the consent must be declined. If yes, then step (c) must be undertaken.

(c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

[262] This provides a coherent and clear framework for thinking about the different standards required for the different types of consents. It means the standard for dumping is the strictest because at step (c), the decision-maker cannot consider economic benefit, efficiency or best practice.[426] By contrast, those factors can be considered for discharges, so such consents will be more likely to be granted at step (c), but only provided the bottom line is cleared at steps (a) or (b).

[263] This sets discharges and dumping apart from other activities, where s 10(1)(b) does not apply and so there is no bottom line. In those cases, it is purely a balancing of the s 59 factors in light of the purpose of sustainable management in accordance with s 10(1)(a), but even in those cases, absolute protection from material harm may be required in some circumstances.[427]

The DMC's approach in this case

[264] I agree with Ellen France J that the DMC majority's approach was to focus on the s 59 factors to undertake what it described as an "Integrated Assessment" which worked through those factors in turn.[428] Like Ellen France J, I also agree with the Court of Appeal that this assessment comes to a "somewhat abrupt end" with no clear indication of the test applied in coming to the conclusion to grant the consents.[429]

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426 Instead, as well as the remaining factors in s 59(2), the factors in s 87D(2)(b) must be considered, along with the absolute prohibition in the circumstances described in s 87F(2). Section 87D(2)(b)(ii) is effectively substituted for s 59(2)(c).

427 See above at [242].

428 Above at [59].

429 CA judgment, above n 386, at [99].

[265] While it might be implicit in the DMC majority's ultimate conclusion that it found the economic benefits of the project outweighed its adverse environmental effects, the integrated assessment does not explicitly weigh the relevant s 59 factors against an overall test of sustainable management.[430] Further, there does not seem to be any suggestion that the DMC understood that even sustainable management can, at times, require absolute protection from environmental harm.[431] In this sense, it is likely the DMC erred in not giving even s 10(1)(a) its requisite substantive or operative force as a guiding principle.

[266] Whether or not the DMC majority in this exercise took into account s 10(1)(b) at all is, as Ellen France J notes, open to doubt.[432] However, what is clear from the fact the DMC majority undertook an integrated assessment of all relevant s 59 factors is that it did not follow the three-step approach set out at [261] above and that it did not treat s 10(1)(b) as a cumulative and operative provision providing a bottom line of protection of the environment from material harm. This was an error of law.

[267] The problem may have stemmed from the DMC majority's decision not to separate out the marine consent and marine discharge aspects of the application as it considered the two to be "so interrelated that they must be regarded as an integrated whole".[433] I agree with Ellen France J that this may have been a practical approach,[434] but even on an integrated approach, what is required is that the decision-maker understands and applies the different standard relevant to the discharge aspects of the application. The DMC majority did this in some respects: for example, it understood that it could not impose conditions that contributed to adaptive management because the application involved discharges.[435] But there is no indication that it understood the significance of the bottom line imposed by s 10(1)(b) in addition to s 10(1)(a).

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430 The Court of Appeal made a similar observation at [107].
431 See above at [242].
432 Above at [59].
433 Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight* (August 2017) [DMC decision] at [126].
434 Above at [59].
435 See, for example, DMC decision, above n 433, at [46] and [1055].

Indeed, in some parts of its decision, the DMC majority only identifies sustainable management as a purpose.[436]

[268] There is also much force in the iwi parties' submission that the DMC majority could not, had it properly directed itself in terms of the requirements of s 10(1)(b), have rationally come to the conclusion it did in light of a sediment plume that, for a distance of 2–3 km of the mining site, would have "severe effects on seabed life"[437] and significant effects on ecologically sensitive areas (ESAs) substantially further from the site.[438]

[269] It does appear that the DMC majority considered the effects on the environment would either not be material or that any adverse effects could be avoided, mitigated or remedied through the conditions imposed. It said that the effects will be in some sense "temporary" with "no constant level of effect in most locations".[439] It also saw various effects on the environment as minor or negligible,[440] although some others, such as effects on benthic fauna and oceanic productivity, were identified as more significant.[441]

[270] Ultimately, the DMC majority seems to have concluded that the conditions it imposed "will avoid, remedy or mitigate effects to the extent required to achieve the

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436 For example, in setting out the purpose at [4] of its decision, the DMC majority simply says that the purpose of the EEZ Act is to "promote the sustainable management of natural resources" in the EEZ.

437 At [939].

438 At [350] and sch 2 of Appendix 2. See also Appendix 3 of this judgment.

439 At [933].

440 See, for example, at [938], [941], [943], [953] and [954]. Note that the DMC majority uses the scale of harm set out in Table 5 of the decision: see [135]. Similar tables are used by the Ministry of Environment and in Australia. That scale sets a consequence level from negligible to catastrophic, taking into account the proportion of habitat affected; the population, community, and habitat impact; and the recovery period. The first two are appropriate for assessing whether there will be material harm. The third column, however, concentrates on recovery time once the activity ceases. This is not the correct measure for assessing material harm. The third consideration should be the total duration of material harm including recovery time: see above at [257]–[258] and below at [270]. The level of harm (and in particular whether there would be material harm) would then be considered taking all three factors into account. I note that in any event, Table 5 assumes a linear approach of effects across all three columns. It does not seem to take account of situations where, for example, effects are "measurable but localized" (minor) but with population, habitat or community components "substantially altered" (major) and a recovery period of one to two decades (severe). This means that a more nuanced analysis may be required – see, for example, the analysis from TTR's ecology expert, Dr MacDiarmid, regarding eagle rays, which was accepted by the DMC majority: at [431] and [433] of the majority decision.

441 See, for example, at [939], [968], [970], [972] and [974].

Act's purpose".[442] But this conclusion suffers from the same flaw as its assessment of the relevant s 59 factors: the failure to recognise s 10(1)(b) as providing a bottom line. In particular, the DMC majority does not follow the approach to economic benefit outlined at [253] and [259] above. Nor does it address the length of time before remediation and whether it will occur within a reasonable period, taking into account the bottom line of environmental protection in s 10(1)(b).[443] In this respect, the DMC majority seems to rely on its view that the effects will not be permanent, rather than assessing whether recovery will occur within a reasonable period taking into account the fact that the longer the total period of unremedied harm before remediation, the more likely the bottom line in s 10(1)(b) will be breached.[444] This was an error of law. The gist of this approach is evident in the following two paragraphs of the DMC majority's decision:[445]

> [25] Most of the effects on the environment will be temporary, albeit of considerable duration. When the extraction of material from the seabed finally comes to an end so will the generation of the plume and most of associated deposition and build up of sediment particles. We acknowledge recovery of the project site and areas in close proximity to it will recover over varying and longer periods than the rest of the [sediment model domain]. Noise from the extraction and processing of seabed material will cease and the existing ecology will be largely restored.
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> …
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> [43] Our record of decision acknowledges that there will be effects related to the mining. The effects will stop when the mining stops, or within a reasonable time period after that point.[446] We acknowledge that the 35-year duration of the consent means that the effects will be long term, but they will

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442 At [1028]. Although, as noted above, the DMC majority does not treat s 10(1)(b) as creating an environmental protection bottom line and so it was not assessing the conditions it imposed to the correct standard.

443 See above at [256]–[259] for the correct approach to this question. And see, for example, in light of the comments in that paragraph, the long timeframes (and uncertainties) associated with the recovery of some benthic fauna in the DMC decision, above n 433, at [402]–[408] and [972]. The DMC minority's assessment was that the recovery of certain ecological and cultural values was "extremely uncertain", and that more complex reef habitat and hard rocky outcrops "would take significantly longer to recover": at [97]–[99] of the minority's reasons. See also conditions 7–8 and 57–59 set out in Appendix 2. It must be remembered too that the consents (and therefore the effects) are for a very long period (35 years), as the DMC majority acknowledged at [43] of its summary set out in this paragraph.

444 See above at [257]–[258] and n 440. As noted above at [252], s 6(1)(b) of the EEZ Act means the DMC must consider temporary as well as permanent adverse effects.

445 See also, for example, DMC decision, above n 433, at [402] and [933]. I note too that Mr Leung-Wai's economic benefit analysis (expert for TTR) "assumed recovery over time of the seabed environment, and no ongoing irreversible effects": at [789].

446 I acknowledge that the DMC majority did mention remediation within a reasonable time in this passage. However, it is not just the period after mining ceases that should have been considered but the whole period of projected unremedied harm: see above at [256]–[259] and n 440.

> not be permanent. Our consideration of this point also acknowledges recovery, and that recovery may not be an exact replication of the environment that existed before the commencement of mining.

[271] There is another major issue with the majority's approach. Even if in some respects some of the conditions imposed may have had the effect of avoiding, remedying or mitigating material harm (at least over time), any such consideration was tainted by the DMC majority's fundamental error of acting on the basis of uncertain and incomplete information.[447] As discussed below in relation to seabirds and marine mammals and some other factors, the DMC majority simply could not be satisfied, on the basis of the information before it and taking the required cautious approach favouring the environment, that the conditions imposed would ensure all of the material harm would be remedied, mitigated or avoided.

Information principles

[272] Under s 61(1)(b) of the EEZ Act, the decision-maker must base the decision on the best available information. Section 61(1)(a) requires a decision-maker to make full use of its powers "to request information from the applicant, obtain advice, and commission a review or a report". Under s 61(1)(c), the decision-maker must "take into account any uncertainty or inadequacy in the information available" and, where this is the case, under s 61(2) must "favour caution and environmental protection".[448]

[273] This means that discharge consents may be granted even on incomplete information, as long as that is the best available information and that, taking a cautious approach and favouring environmental protection, the decision-maker is satisfied that the bottom line in s 10(1)(b) is met: that there is no material harm from pollution or that material environmental harm can be avoided, remedied (within a reasonable timeframe) or mitigated (so that it is not material) through the use of conditions.[449] Where this is not the case, the application must be refused.[450]

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447 See also Ellen France J's reasons above at n 143 and [129].

448 See also s 87E of the EEZ Act, which applies in respect of marine discharge and dumping applications.

449 See also Ellen France J's reasons above at [117] and [128].

450 See also the comment in the CA judgment, above n 386, at [266], referred to in Ellen France J's reasons above at [137].

[274] I agree with Ellen France J that the DMC did not favour caution or environmental protection in this case.[451] Given my view of the effect of s 10(1)(b), I do not, however, agree with Ellen France J's discussion of the link between the information principles and s 10(1)(b). Rather, I agree with the approach of the Court of Appeal.[452] It follows from my view of s 10(1)(b) that the DMC could not have met either step [261](a) or [261](b) above, given the almost total lack of information in this case on seabirds and marine mammals and the similar issues with the sediment plume and suspended sediment levels discussed by Ellen France J.[453]

[275] This information deficit could not legitimately be compensated for by conditions designed to collect the very information that would have been required before any conclusion at all could be drawn as to the possible effects, any possible material harm and any effect of any possible conditions. No conclusion was therefore possible on whether the bottom line could be met and a consent could not legitimately be granted.[454]

[276] While it is not necessary to decide this point, I think it is strongly arguable that in this case the pre-commencement monitoring conditions (conditions 48 to 51) were ultra vires as they went well beyond monitoring or identifying adverse effects and were for the purpose of gathering totally absent baseline information.[455]

[277] In my view, there is also force in the Royal Forest and Bird Protection Society of New Zealand Inc's submissions about conditions in this case meaning there was a deprivation of participation rights, as the Court of Appeal found.[456] Participation is

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451 Above at [118]–[131] (but see above at n 377 for specific aspects of the reasoning I disagree with). See also at [205].

452 Ellen France J's discussion is above at [114]–[117]. For the Court of Appeal's view, see CA judgment, above n 386, at [129].

453 See Ellen France J's reasons above at [131].

454 I agree with Ellen France J's analysis above at [129]–[130] as to the effect of the conditions but do not agree the DMC majority cited the correct test.

455 As the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) submits. Contrast Ellen France J's reasons above at [132]; and CA judgment, above n 386, at [272]. I do agree with Ellen France J's comments at [205] where she says there is much force in the argument that the seabird and other pre-commencement conditions are a mechanism for providing baseline information as to effects which had been lacking in TTR's application. As Ellen France J points out at n 337, even though condition 66(b)–(c) (relating to seabirds) is not strictly a pre-commencement condition, it has a pre-commencement aspect.

456 CA judgment, above n 386, at [259(c)]. See similarly Williams J's reasons below at [295] and Winkelmann CJ's reasons below at [329]. Contrast Ellen France J's reasons above at [133].

only meaningful on the basis of sufficient information, including as to the possible effects of the conditions. That information was in important respects entirely lacking and would only become available once the pre-commencement monitoring had occurred and the opportunity for public input had passed.[457]

[278] In particular, there would have been no opportunity for public input into vital conditions that would only be set after the informational gaps had been remedied. For example, as the Taranaki-Whanganui Conservation Board submits, some of the suspended sediment concentration limits required to be complied with under condition 5 are only to be set following the pre-commencement monitoring.[458] The same comment applies to the management plans related to seabirds and marine mammals.[459]

[279] I agree with Ellen France J that the conclusion of the DMC that it had the best available information that could have been delivered without unreasonable cost and time is a question of fact and therefore not subject to review by this Court.[460] The information before the DMC was, however, not sufficient to satisfy a decision-maker that there would be no material harm or that it would, through the conditions, be avoided or mitigated so that it was no longer material or remedied so that, taking into account the whole period harm subsists, overall the harm was not material. Consequently, the application should have been refused because the DMC could not rationally be satisfied that the bottom line in s 10(1)(b) would be met.

Other marine management regimes

[280] I agree with Ellen France J's general approach to s 59(2)(h) and other marine management regimes.[461] I agree that the way the New Zealand Coastal Policy

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457 The existence of the Technical Review Group and the Kaitiakitanga Reference Group does not change that conclusion.

458 See conditions 48 and 51 and sch 2 set out in Appendix 2 of the DMC decision, above n 433. I do not agree with Ellen France J at [210] that condition 51 only allows for the updating of numerical values pre-commencement, but that the "thresholds" do not change following pre-commencement monitoring.

459 See conditions 66 and 67 set out in Appendix 2 of the DMC decision. As Ellen France J notes above at [205], these are designed to set indicators of adverse effects at a population level before mining commences.

460 Above at [134]–[138].

461 Discussed above at [175]–[187].

Statement 2010 (NZCPS)[462] was dealt with by the DMC majority was an error of law.[463] My reasons for this differ from those of Ellen France J. She says that, although the NZCPS was not directly applicable to Trans-Tasman Resources Ltd's (TTR) proposed activities, the DMC majority needed to confront the effect of the environmental bottom line in the NZCPS and explain briefly why that factor was outweighed by other s 59 factors.[464] I agree that the NZCPS was not directly applicable and that the DMC nevertheless needed to take into account the environmental bottom line in the NZCPS. I do not, however, consider this environmental bottom line can be outweighed by other s 59 factors. This is because, on the approach I take, s 10(1)(b) itself provides an environmental bottom line that cannot be overridden. There must be synergy in the approach to the NZCPS bottom line and s 10(1)(b).[465]

Adaptive management

[281] I agree with Ellen France J that the DMC adopted too narrow an approach to adaptive management.[466] I also agree with the Court of Appeal that an adaptive management approach is one where there is uncertainty as to harm and a discharge or dumping consent is granted "on terms that provide that if such harms do occur then the consent envelope will be adjusted prospectively".[467] I agree too that there is a distinction between an adaptive management approach and one where monitoring and management plans are designed to "provide for operational responses" if the requirements of a consent are not met.[468] I thus agree with the Court of Appeal's "consent envelope" approach, endorsed by Ellen France J.[469]

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462 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010) [NZCPS].

463 Above at [187].

464 Above at [178]–[179] and [186].

465 That is, the bottom line in the NZCPS must be interpreted and applied in light of s 10(1)(b). It follows that I also disagree with the Court of Appeal's conclusion where it seems to contemplate that it would have been possible for the DMC to grant consent even if the proposed activity would have effects within the coastal marine area that were inconsistent with the NZCPS bottom line: CA judgment, above n 386, at [200].

466 Above at [201].

467 CA judgment, above n 386, at [221].

468 At [225].

469 Above at [207].

[282] In this case the real issue was that there was totally inadequate baseline information provided by TTR in a number of respects and therefore, as indicated above, the application should have been declined.[470] The pre-commencement monitoring and the management plans for seabirds and marine mammals were designed to gather baseline information that should have been provided by TTR in its application and were to be used, in effect, to set the consent envelope before mining began.[471] It was not, however, a case of starting mining and then adjusting the consent envelope prospectively and, thus, does not amount to adaptive management.

[283] It is true that, under the conditions, monitoring continues once the mining begins. This ongoing monitoring will inform further management plans,[472] but the ability to amend operational responses in the plans in light of the ongoing monitoring is not adaptive management as it does not allow for changes to the consent envelope. It only allows for changes in how TTR carries out its operations in order to stay within the consent envelope. I agree therefore with Ellen France J that this was not a case of adaptive management.[473]

[284] Having said that, even if not strictly adaptive management, what occurred here seems to me to fall within the spirit of the prohibition against adaptive management. It also reinforces the conclusion that the baseline information gathering conditions were not appropriate and that, on the basis of the information before the DMC, the discharge consent should have been refused.[474]

Bond vs insurance

[285] There is a clear difference between bonds and insurance in terms of when each operates and, while sometimes they will coincide in what they cover and therefore

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470 See above at [275].

471 As noted above at n 455. See similarly Ellen France J's reasons above at [205].

472 DMC decision, above n 433, at [36].

473 I thus agree with the discussion in Ellen France J's reasons above at [206]–[213], with the exception noted above at n 458. As discussed at n 458, I consider condition 51 does allow for the changing of thresholds following the pre-commencement monitoring. But this still does not amount to adaptive management as any change to the thresholds (and hence the consent envelope) occurs before mining begins.

474 See similarly CA judgment, above n 386, at [227], where the Court of Appeal said that the DMC's decision suffered from a much "more fundamental" problem than adaptive management of not meeting the requirement to favour caution and environmental protection. Ellen France J agrees with this finding of the Court of Appeal above at [205].

have similar outcomes, this will not always be the case. Consideration should be given to each where there is not congruence between the two and brief reasons should be given for not requiring both.[475] I do not consider this requirement was fulfilled here and thus there was an error of law.[476]

[286] In this case, given the uncertainties involved, the fact that there was no evidence that insurance would cover all of the risks, the length of time the conditions were to continue after mining ceases[477] and the real possibility of insolvency should the worst happen, it was in any event in my view irrational not to have required a bond.[478]

Casting vote

[287] I am uneasy about the use of a casting vote in favour of a consent where the legislation requires the exercise of caution. But this is a criticism of the provision of the legislation which gives a casting vote. I agree with Ellen France J that there was no error of law in its exercise in this case.[479]

Relief

[288] As indicated above, on the basis of the information before the DMC (which was found to be the best available information), the consent application should have been declined. In these circumstances, there is no point in referring the matter back for reconsideration.[480] It would also put an unwarranted burden on the first respondents if TTR is now allowed to try to fill the information gaps.[481]

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475 This is so whether or not the issue is raised by the submitters.

476 In agreement with Ellen France J's reasons above at [214]–[221].

477 See, for example, the conditions relating to benthic recovery. Once mining ceases, there are no direct economic incentives to comply with the conditions and operational capacity would also no doubt be much reduced.

478 I do not consider the possibility of enforcement proceedings meets this point, contrary to TTR's submissions. This is self-evidently not sufficient in the case of insolvency and in any event would mean time, trouble and expense.

479 Above at [222]–[226].

480 As Forest and Bird and the iwi parties submit.

481 There is nothing to indicate that the information gaps have been or will be filled to the degree that would be necessary to come to a positive conclusion on the environmental bottom line. Contrary to Ellen France J's reasons above at [229], I would in any event accept the submission of the Taranaki-Whanganui Conservation Board that the parties should not be put to the cost of responding to yet more evidence or a modified proposal even if the matter were referred back.

[289] I also consider there to be great force in the submissions of the iwi parties that there are specific DMC findings related to ESAs[482] that would in any event have compelled the refusal of the application. In addition, and more generally, it is difficult to see how a more than 35-year duration of significant effects could rationally meet the test of the environment being remediated within a reasonable period.[483]

WILLIAMS J

[290] I have had an opportunity to read my colleagues' drafts as they have evolved and to discuss various aspects with them. I record my appreciation for the collaborative approach they have taken.

[291] It remains for me to set out where (and occasionally why) I agree with the reasons of William Young and Ellen France JJ, and where I support Glazebrook J's reasons, having, on those aspects only, parted company with William Young and Ellen France JJ.

Section 10(1)(b) and the material harm bottom line

[292] For the reasons she adopts, I agree with Glazebrook J's assessment of the role of s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).[484] In particular, I agree that s 10 performs the same structural function as s 5 of the Resource Management Act 1991 and that, as s 10(3) makes clear, the criteria in s 59 must be applied to achieve the s 10(1) purposes.[485] Similarly, I agree with Glazebrook J that s 10(1)(b) imposes an environmental bottom line to protect the marine environment against material harm from marine dumping

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482 Summarised in Ellen France J's reasons above at [228]. See also Appendix 3 of this judgment.

483 See above at [270] and the conclusion at [43] of the DMC majority's decision, above n 433, that the effects will be throughout the 35-year period and cease only when mining stops or within a reasonable time thereafter. I make the comment about the lack of rationality despite economic benefit being able to be taken into account at the margins in assessing what is a reasonable period for remediation, given that what is a reasonable period must take into account the whole period harm will endure: see above at [256]–[259]. I comment that such a long period of significant effects may well not meet the s 10(1)(a) threshold either, given s 10(2)(a)–(c).

484 See above at [239]–[263].

485 I note that the same drafting formula as that in s 10(3) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 [EEZ Act] is used in ss 6–8 of the Resource Management Act 1991.

and discharges.[486] The decision-making committee's (DMC's) failure to apply s 10(1)(b) in that way was an error of law.

[293] I agree with Glazebrook J that the reference in s 59(2)(j) to consent conditions that "avoid, remedy or mitigate" adverse effects contemplates the possibility that discharges may cause temporary harm of a material kind. But that will be so only if it can (with a reasonable degree of confidence) be remediated within a reasonable time, so that it is nonetheless appropriate to treat the harm as immaterial in all of the circumstances. In addition to that temporal aspect, those circumstances will include the scale of the receiving environment, the magnitude of any (temporary) effect, the sensitivity of the receiving environment and so forth. I also agree (subject to the careful caveats set out by Glazebrook J) that economic factors may be considered in making that judgment.[487]

Information principles

[294] Like Glazebrook J, I am in general agreement with William Young and Ellen France JJ's conclusions in respect of the effect of the EEZ Act's information principles. But in light of my view of the effect of s 10(1)(b), I do not agree with the latter's conclusions about the relationship between the information principles and s 10(1)(b).[488] Rather, I prefer Glazebrook J's analysis.[489]

[295] I also disagree with William Young and Ellen France JJ's conclusion at [133] in relation to management plans, even though, as they rightly note, Trans-Tasman Resources Ltd (TTR) provided drafts of those plans in the application documents and their content would have been no surprise to submitters. It would be usual in complex consent applications such as TTR's to deal with some effects through management plans. But such plans would generally contain clear operational and effects parameters because their purpose would be to demonstrate how the applicant will keep the activity within those parameters and what will happen if it does not. TTR's management plans

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486 See above at [251]–[260].

487 EEZ Act, s 59(2)(f). See above at [259]. Compare Winkelmann CJ's reasons below at [315]–[317].

488 See above at [117] and [128]. Nor do I agree that the decision-making committee (DMC) majority cited the correct test in relation to s 10(1)(b): compare above at [130].

489 See above at [273]–[274].

did not contain clear parameters at all; rather, their first purpose would be to *set* the parameters. This allowed the applicant to postpone this task to a post-consent administrative phase. The Court of Appeal was right that this deprived submitters of the ability to engage at the hearing with what was plainly a fundamental aspect of the application.[490]

The Treaty of Waitangi, existing interests and tikanga

[296] I am in broad agreement with William Young and Ellen France JJ's reasoning and conclusions with respect to the Treaty of Waitangi and existing interests, and whether tikanga Māori (and international law instruments) are "other applicable law" in terms of s 59(2)(l).[491] In particular, I agree that s 12 contains a strong Treaty direction and that, in any event, the constitutional significance of the Treaty means that Treaty clauses will be generously construed. If Parliament intends to limit or remove the Treaty's effect in or on an Act, this will need to be made quite clear.[492]

[297] As to what is meant by "existing interests"[493] and "other applicable law",[494] I would merely add that this question must not only be viewed through a Pākehā lens. To be clear, I do not say the reasons of William Young and Ellen France JJ reflect that shortcoming. On the contrary, they make the same point implicitly at [155] and [161]. I simply wish to make it explicitly. As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place.[495] As with all interests, they reflect the relevant values of the interest-holder. Those values—mana, whanaungatanga and kaitiakitanga—are relational. They are also principles of law that predate the arrival of the common law in 1840. And they manifest in practical ways, as William Young and Ellen France JJ note.[496] There would have to be a very good reason to read them out of the plain words of s 59(2)(a), (b) and (l). I see no such reason.

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490 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment] at [259(c)]. See similarly Glazebrook J's reasons above at [277]–[278].

491 See above at [139]–[174].

492 See the reasons of William Young and Ellen France JJ above at [149]–[151].

493 EEZ Act, s 4(1) definition of "existing interest".

494 Section 59(2)(l).

495 CA judgment, above n 490, at [166].

496 See above at [155].

Other matters including relief

[298] I largely agree with William Young and Ellen France JJ's approach to "other marine management regimes", particularly their approach to the New Zealand Coastal Policy Statement 2010 (NZCPS)[497], which was the focus of argument.[498] I disagree, however, with their conclusion that the bottom line contained in that document is defeasible by reference to other s 59 factors. Like Glazebrook J, I consider that in this respect the NZCPS is in lockstep with s 10(1)(b).[499]

[299] On all other matters I adopt in full William Young and Ellen France JJ's reasons and conclusions. I also agree with William Young and Ellen France JJ that the appropriate remedy is to refer the matter back to the Environmental Protection Authority (EPA) for reconsideration, subject to the reservation of leave to a party to seek directions from the High Court should that prove necessary.[500] TTR may wish to apply to provide further material in relation to the information deficits identified in those aspects of the reasons given by Ellen France and Glazebrook JJ that represent the majority view of this Court. I agree the scale and complexity of this application is such that TTR should not be denied an opportunity to convince the EPA that, despite our findings, this would be an available and worthwhile course to take. Further, as a matter of principle, I would be most reluctant to take away from an expert statutory decision-maker the final reassessment of the substantive merits of the application.

[300] Finally, I also agree with the costs order.[501]

WINKELMANN CJ

[301] I write separately to record the areas of my agreement with the reasons of Glazebrook J and with the reasons of William Young and Ellen France JJ.[502]

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497 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).
498 See above at [175]–[187].
499 See above at [280].
500 See above at [228]–[231].
501 See above at [233]–[235].
502 As given by Ellen France J.

Relationship between s 10(1) and s 59(2) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

[302] I agree in large part with the reasons of Glazebrook J in relation to the role s 10(1)(b) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act) plays in the decision whether to grant a marine consent for the discharge of harmful substances in the exclusive economic zone. The scope of my disagreement with her reasons is set out below at [315]–[317].

[303] I agree with Glazebrook J that it is clear from the statutory scheme that s 10(1)(b) is an operative restriction for the grant of consents for discharges of harmful substances and the dumping or incineration of waste or other matter.[503] It is operative in the sense that this section, along with s 10(1)(a), provides the standard against which an application for consent for such activities is to be assessed.

[304] As s 10(3) makes clear, the decision-making criteria and information principles are to be applied in order to achieve the statutory purposes set out in s 10(1)(a) and (b). In that sense, the s 59(2) factors serve the s 10(1) purposes, and therefore are subservient to them.[504] I see s 10(1)(a) and (b) as providing the critical standard to be applied by the decision-maker, with the s 59(2) factors relevant only to the extent that they assist the decision-maker in making decisions that achieve those purposes. This approach is consistent with the language of s 59(2). Although it provides that the Environmental Protection Authority (EPA) must take the factors listed there into account, it gives no indication as to how they are to be taken into account – that can only be determined by reference back to the s 10(1)(a) and (b) standard.

Environmental bottom line

[305] The next issue that arises is the nature of the operative restriction imposed by the s 10(1)(b) requirement to "protect" the environment from pollution. I agree with Glazebrook J, and for the reasons she gives, that s 10(1)(b) imposes a requirement cumulative on the s 10(1)(a) requirement of sustainable management. I also agree that it provides an environmental bottom line in the sense that where the discharge of a

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503 Above at [245].
504 See similarly Glazebrook J's reasons above at [247].

harmful substance will cause pollution that the environment cannot be protected from through regulation, then a consent should not be granted.[505]

[306] I therefore disagree with the reasons given by Ellen France J that the EEZ Act requires an overall assessment, balancing the factors set out in s 59(2), and that the s 10(1)(a) and (b) purposes operate as a cross-check on that balancing exercise,[506] or that they operate to tilt the s 59 balancing exercise in favour of environmental factors in some but not necessarily all cases.[507] Either approach elevates the s 59(2) factors to operate independently of the s 10(1) purposes – an approach that is inconsistent with the requirements of s 10(3). Ellen France J sets out the legislative history of s 10, which suggests an intention that decision-making in respect of proposed activities within the exclusive economic zone and the continental shelf proceed by way of a balancing exercise – balancing environmental and economic interests.[508] But, in my view, that history is not of any assistance in interpreting the requirements of s 10(1)(b) because it pre-dates the enactment of s 10(1)(b) – and really does no more than describe the concepts that lie at the heart of sustainable management, as captured in s 10(1)(a) and s 10(2).

[307] What does it mean to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances? There is nothing in the language of s 10 or in the wider statutory context to suggest that the word "protect" in s 10(1)(b) has anything other than its ordinary meaning, namely;[509]

> (1) Defend or guard against injury or danger; shield from attack or assault; support, assist, give [especially] legal immunity or exemption to; keep safe, take care of; extend patronage to.
>
> …
>
> (1C) Aim to preserve (a threatened plant or animal species) by legislating against collecting, hunting, etc; restrict by law access to or development of (land) in order to preserve its wildlife or its

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505 Above at [245].
506 Above at [51], [55] and [102].
507 Above at [102].
508 Above at [64]–[68].
509 William R Trumble and Angus Stevenson (eds) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 2376. I agree with Glazebrook J above at [244] that "protect" in s 10(1)(b) does not mean the same thing as "protection" in the definition of sustainable management in s 10(2) – the context makes plain that the words are used in a different sense.

> undisturbed state; prevent by law demolition of or unauthorized changes to (a historic building etc).

[308] As to the standard of protection, I agree with Glazebrook J that s 10(1)(b) is not intended to protect the environment from all harm – there seems no environmental utility in protecting the environment from immaterial or insignificant harm.[510] The Court of Appeal and Glazebrook J adopt a standard of material harm. I am content with that. It is consistent with the use of the descriptor "pollution" in s 10(1)(b) as the effect to be avoided. I note that the definition of "pollution of the marine environment" in the United Nations Convention on the Law of the Sea 1982 is also set at the level of what can be described as material harm:[511]

> … the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities[.]

[309] Trans-Tasman Resources Ltd (TTR) says that the s 10(1)(b) purpose of protection does not preclude consent being granted where the discharge will cause material harm, if other s 59(2) interests (economic benefit and efficient use and development of natural resources) are assessed as justifying that harm. TTR argues that interpretation is consistent with the ordinary meaning of "protect" and how the word is used in the EEZ Act. In my view, the requirement to protect is inconsistent with permitting material harm to the environment through the consented discharge of a harmful substance. Whilst the approach suggested by TTR may be open where the decision is to be judged against the s 10(1)(a) purpose alone, it is not available in the case of marine discharge and dumping consents to which s 10(1)(b) also applies. If the environment is materially harmed by the consented discharge, it has not been protected from pollution, even if economic benefits flow from the activity – the environment cannot be said to have been defended or guarded against injury.

[310] The qualification added by the descriptor "material" is important in making sense of the statutory scheme and in terms of how it operates. Whilst s 10(1)(b) applies

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510 Above at [252].

511 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 1(4).

to every consent application for discharge of a harmful substance, not every discharge of a harmful substance will cause harm to the environment – material or otherwise. The continental shelf and exclusive economic zone cover a large and varied expanse of seabed. The exclusive economic zone contains a vast volume of ocean water and supports a wide variety of life. Whether harm is material in any one case will require assessment of a multiplicity of factors, such as the volume of the harmful substance discharged into the expanse of the sea, the flora, fauna and natural characteristics of the area of seabed affected, the size of seabed or volume of water affected, and the time for which the damage will last. There are therefore qualitative, temporal, quantitative and spatial aspects to materiality that have to be weighed.[512]

[311] The assessment of whether the projected harm crosses the threshold of materiality therefore requires a factual inquiry. Consideration must be given to the impact of the discharge upon the marine ecosystem when assessing what is to be adjudged a material level of harm. Consideration must also be given to the impact upon those who depend upon that ecosystem – s 59(2)(a) and (b) require any effects on existing interests of allowing the activity to be taken into account.

[312] TTR argues that the construction of s 10(1)(b) has to leave room for the effective operation of the factors in s 59(2), and that there is significance in the fact that, when s 10(1)(b) was engrafted onto the legislative scheme, the s 59(2)(f) and (g) factors of economic benefit and efficient use of resources were not removed from consideration for discharge consents. This suggests, says TTR, that the protection s 10(1)(b) describes is not intended to be absolute. The answer to this argument is the point made by Glazebrook J – there is room between protection from all harm and protection from material harm for factors such as economic benefit and the efficient use of resources to operate.[513] In other words, if the decision-maker is satisfied that the discharge will not, if regulated and subject to such conditions as the decision-maker imposes, cause material harm to the environment, the decision-maker must nevertheless still take into account whether there is any economic benefit (or detriment) to allowing the activity, and whether the activity allows for the efficient use and development of resources.

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512 See similarly Glazebrook J's reasons above at [255] and Williams J's reasons above at [293].
513 Above at [253].

[313] TTR argues that its interpretation is strengthened by the express contemplation within s 10(1)(b) that the discharge of harmful substances can be allowed where the environment can be protected from pollution through regulation, which must be a different standard to outright prohibition. It further argues that its approach is supported by the application of s 59(2)(j) to discharge consents: "the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity". In my view, neither point assists TTR's argument. The EEZ Act clearly contemplates the discharge of harmful substances, and so must provide for regulation or mitigation to be used to reduce the impact caused by the consequent pollution of the exclusive economic zone and continental shelf below the threshold of material harm. The EEZ Act provides for the imposition of conditions requiring remediation of adverse effects for the same reason it provides for the imposition of conditions requiring mitigation – conditions may be imposed requiring remediation of the adverse effects, so that the pollution caused by the discharge does not cause material harm to the environment.

[314] I therefore agree with the Court of Appeal, and with Glazebrook J, that s 10(1)(b) provides an environmental bottom line and the s 59 factors are to be taken into account by the decision-maker in achieving that purpose.[514]

Relevance of economic benefit considerations to the assessment of material harm

[315] I differ from Glazebrook J in one respect.

[316] Glazebrook J,[515] with whom Williams J agrees,[516] says that all else being equal, economic benefit considerations to New Zealand may have the potential to affect the decision-maker's approach to remediation timeframes in respect of discharges, albeit noting only at the margins. As noted above, I agree that economic benefit will be relevant in the decision to grant a consent, where the harm the discharge causes the

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514 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 (Kós P, Courtney and Goddard JJ) [CA judgment] at [82]–[83] and [89]; and Glazebrook J's reasons above at [249]–[250].

515 Above at [259].

516 Above at [293].

environment is assessed as falling beneath the threshold of material harm.[517] However, I disagree if it is suggested that economic benefits associated with the activity necessitating the harmful discharge affects the assessment of materiality. In my view, the decision-maker's assessment of whether the discharge of a harmful substance will cause material harm cannot be affected by considerations of economic benefit. If the harm cannot be avoided through regulating the discharge or through imposing conditions requiring mitigation or remediation, then consent must be refused, regardless of economic considerations.

[317] I see this conclusion as flowing inevitably from my earlier conclusions: that the s 10(1) purposes provide the standard against which consent decisions are to be made, and that s 10(1)(b), while cumulative upon s 10(1)(a), is an environmental bottom line which requires that decisions about the discharge of harmful substances be made so as to protect the environment from pollution which causes material harm. On my view of the legislative scheme, considerations of sustainable management play a part in relation to consents for discharge of harmful substances only where the proposed discharge (with all regulatory, remedial and mitigatory steps) does not cross the threshold of material harm.

How applications should be determined

[318] This, however, leaves the situation that there is no clear majority within the Court on this critical issue of how applications should be determined. The pragmatic solution is that I should join with Glazebrook and Williams JJ on this point, viewing that as the preferable of two approaches, each of which I disagree with, at least in part.

[319] I am therefore content with the three-step approach suggested by Glazebrook J at [261] of her reasons, but make explicit the following point which I see as implicit in the third step set out at [261](c). Since s 10(1)(b) is cumulative on s 10(1)(a), I do not exclude the possibility that a decision-maker would want to impose conditions to mitigate, remedy or avoid adverse effects even though the threshold of material harm will not be met.

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[517] See above at [312]. To be clear, whether it meets that threshold is to be assessed taking into account any conditions regulating the discharge, or requiring remediation or mitigation of adverse effects.

The DMC's approach in this case

[320] That takes me to the issue of whether the EPA decision-making committee (DMC) erred in its application of s 10(1). I agree with Glazebrook J that the integrated assessment undertaken by the DMC did not explicitly weigh the relevant s 59 factors against the s 10(1) purposes.[518] There is no indication in the DMC majority's reasons that the majority asked themselves the critical question, at the end of that assessment, whether the granting of the consents would give effect to the s 10(1) purposes, and in particular, to the s 10(1)(b) environmental bottom line.[519] I consider that the Court of Appeal was therefore correct in its conclusion that the DMC did not ask itself the right question when undertaking the decision-making process for the grant of the consents.

Information principles

[321] Section 10(3) requires the decision-maker to apply the information principles in order to achieve the s 10(1) purposes. The information principles that apply to applications for the discharge (or dumping) of harmful substances are those set out in s 87E of the EEZ Act. Section 87E is largely duplicative of s 61, which sets out the information principles that apply to marine consents other than for discharge or dumping activities,[520] save in one important respect relating to the prohibition on adaptive management for discharge and dumping consents.[521] These information principles require a decision-maker to make full use of its powers to obtain information,[522] to base its decisions on the best available information,[523] and to take into account any uncertainty or inadequacy in the information available.[524] Most relevantly, s 87E(2) provides that if, in relation to a decision on the application, "the

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518 Above at [265] (in relation to s 10(1)(a)) and [266]–[267] (in relation to s 10(1)(b)).

519 See similarly the discussion in CA judgment, above n 514, at [106]–[107]; the reasons given by Ellen France J above at [59]; Glazebrook J's reasons above at [264]–[271]; and Williams J's reasons above at [292].

520 For activities described in s 20 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

521 Section 87F(4). Compare s 61(3).

522 Section 87E(1)(a).

523 Section 87E(1)(b). This obligation is qualified by s 87E(3), which provides that "best available information" means the "best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".

524 Section 87E(1)(c).

information available is uncertain or inadequate, the EPA must favour caution and environmental protection".

[322] TTR challenges the Court of Appeal finding that s 87E(2) is a statutory implementation of the "precautionary principle", sometimes called the "precautionary approach",[525] at international environmental law.[526] That principle is expressed in Principle 15 of the Rio Declaration on Environment and Development 1992, which provides:[527]

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[323] TTR says that neither the Rio Declaration nor the precautionary principle are expressly mentioned in s 11, and are not mentioned elsewhere in the EEZ Act.

[324] I see no error in the Court of Appeal's characterisation of ss 61 and 87E as a statutory implementation of the precautionary principle. It is true that s 11, which contains a list of international conventions which the EEZ Act implements, does not expressly refer to the Rio Declaration. However, the list of conventions is expressed to be non-exclusive – the introductory part of s 11 states:

> This Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment …

It is also true that the EEZ Act does not use the expression "precautionary principle"; nevertheless, it is apparent from the content of ss 61 and 87E that they implement aspects of the precautionary principle as found in international environmental law.

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525 The language of "principle" and "approach" is a matter of preference between some states. In this context, it is unnecessary to deal with the difference (if any) between the two, and thus I will refer to "principle" as a matter of efficiency for the remainder of my reasons.

526 For a discussion of the principle and its source, see *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [109] and [111]. See also the reasons given by Ellen France J above at [107].

527 Rio Declaration on Environment and Development UN Doc A/Conf 151/26 (vol 1) (12 August 1992).

[325] Nevertheless, it is also important to bear in mind that these provisions in the EEZ Act are a particular and detailed statutory expression of that principle. As Ellen France J notes, the exact scope and application of the precautionary principle remains unsettled in international law.[528] It is arguable that the obligations imposed by s 87E, when applied in the context of a proposed marine discharge of harmful substances, are more protective of the environment than the precautionary principle.[529] Certainly nothing of substance was presented to us to suggest that interpreting this provision in light of that principle of international environmental law would enlarge the scope of obligations upon a decision-maker. I agree with the reasons given by Ellen France J that the DMC was therefore correct that there was "no requirement" for it "to apply a precautionary approach" in addition to applying the s 87E information principles.[530]

[326] TTR also contends that the Court of Appeal was wrong to say that the information principles operate differently between marine consents under s 61(2) and s 87E(2), an error, it says, that flowed from the Court of Appeal's finding that s 10(1)(b) operated as an environmental bottom line. It says that the provisions of ss 61 and 87E are in all material respects identical and had Parliament intended that a different or more restrictive meaning of "favour caution" should apply to discharge/dumping consents under s 87E(2), it could have used a different expression. It did not.

[327] It follows, as a matter of logic, from the conclusions I make above that there is an environmental bottom line and, as to the status of s 10(1) in the statutory scheme, that I am satisfied that the Court of Appeal was correct to find error in the DMC's approach, which failed to make the connection between the requirement to favour

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528 Above at [108]–[109].

529 In that they are to be applied to achieve the s 10(1)(b) purpose, and in that adaptive management is not permitted as a means of gathering information.

530 Above at [113]. See Environmental Protection Authority | Te Mana Rauhī Taiao *Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight* (August 2017) [DMC decision] at [40].

caution and environmental protection in s 87E(2) and the objective of protecting the environment from pollution caused by marine discharges.[531]

[328] I otherwise agree with the reasons given by Ellen France J that the DMC did not apply the s 87E(2) requirement to favour caution and environmental protection, given the paucity of information available to the DMC to allow it to assess the level of harm the proposed discharges would cause to seabirds and marine mammals, or as to the effects caused by the sediment plume and suspended sediment levels.[532]

[329] I also agree with the Court of Appeal that the information deficits in this case were such that there was a deprivation of participation rights. The DMC attempted to deal with the uncertainty arising from the lack of information not by favouring caution and refusing the consent, but by imposing conditions, including a condition requiring two years of pre-commencement environmental modelling to be undertaken before mining began. That monitoring would then inform the creation of management plans.[533] As the Court of Appeal said, the result of deferring these issues to management plans was to remove submitters' rights to be heard by the DMC.[534] This approach deprived submitters of the right to be heard on whether the conditions contained in those management plans would meet the risk of material harm caused by the discharges.

[330] I agree with Ellen France J that the DMC did not err by applying the wrong legal test in determining whether it had the best available information.[535]

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531 CA judgment, above n 514, at [131]. I therefore disagree with the reasons given by Ellen France J on this point above at [117], and agree with Glazebrook J's reasons above at [274] and Williams J's reasons above at [294].

532 Above at [118]–[131]. See also above at [205]. Glazebrook J also agrees with this above at [274]–[275], as does Williams J above at [294].

533 See DMC decision, above n 530, at [36] and condition 48.

534 CA judgment, above n 514, at [259(c)]. I therefore disagree with the reasons given by Ellen France J on this point above at [133] and agree with Glazebrook J's reasons above at [277] and Williams J's reasons above at [295]. I agree with Glazebrook J that participation is only meaningful on the basis of sufficient information: above at [277].

535 Above at [134]–[138], agreeing with the Court of Appeal finding that the challenge to the DMC's decision did not raise a question of law: CA judgment, above n 514, at [266]–[267].

Other marine management regimes

[331] I agree with Ellen France J[536] and Glazebrook J[537] that the New Zealand Coastal Policy Statement (NZCPS)[538] and other marine management regimes do not apply directly to TTR's marine consents application. The DMC was therefore not required to apply the entirety of every marine management regime governing the coastal marine area. Rather, as Ellen France J says[539] the nature and effect of those other policies are to be taken into account under s 59(2). But, like Glazebrook J,[540] I disagree with the approach suggested by Ellen France J[541] that the DMC needed to consider whether the environmental bottom lines in the NZCPS were outweighed by the other s 59(2) factors or sufficiently accommodated in other ways, if it is thereby suggested that the s 10(1)(b) bottom line could be overridden or displaced. As stated above, the ultimate assessment for the DMC must take place against the s 10(1)(b) standard.

Remaining issues

[332] I agree with the reasons given by Ellen France J in relation to all remaining issues.

Relief

[333] I agree with the reasons given by Ellen France J that, having quashed the decision of the DMC, it is appropriate to refer the matter back to the EPA for reconsideration in light of this Court's judgment, rather than, as the iwi parties along with the Royal Forest and Bird Protection Society of New Zealand Inc argue, dismiss TTR's application outright.[542] I also agree that leave should be reserved to a party to

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536 Above at [179].
537 Above at [280].
538 Department of Conservation *New Zealand Coastal Policy Statement 2010* (issued by notice in the New Zealand Gazette on 4 November 2010 and taking effect on 3 December 2010).
539 Above at [181].
540 At [280]. See similarly Williams J's reasons above at [298].
541 Above at [182]–[186].
542 At [228]–[229]. See also Williams J's reasons above at [299].

seek directions from the High Court relating to the determination of the application should that prove necessary[543] and with the costs order.[544]

Solicitors:
Atkins Holm Majurey Ltd, Auckland for Applicant
Holland Beckett Law, Tauranga for Taranaki-Whanganui Conservation Board
Dawson & Associates Ltd, Nelson for Cloudy Bay Clams Ltd, Fisheries Inshore New Zealand Ltd, New Zealand Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Ltd and Talley's Group Ltd
Lee Salmon Long, Auckland for Greenpeace of New Zealand Inc and Kiwis Against Seabed Mining Inc
Whāia Legal, Wellington for Te Ohu Kai Moana Trustee Ltd
Oceanlaw New Zealand, Nelson for Te Rūnanga o Ngāti Ruanui Trust
P D Anderson, Royal Forest and Bird Protection Society of New Zealand Inc, Christchurch for Royal Forest and Bird Protection Society of New Zealand Inc
Kāhui Legal, Wellington for the Trustees of Te Kāhui o Rauru Trust
C J Haden, Environmental Protection Authority, Wellington for Second Respondent
Crown Law Office, Wellington for Attorney-General as Intervener

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543 Above at [231]. I agree that r 20.19 of the High Court Rules 2016 provides sufficient jurisdiction for this procedure.
544 Above at [233]–[235].

Appendices

Appendix 1: Authorised restricted activities

The marine consents and marine discharge consents [granted to TTR] authorise the following restricted activities, subject to conditions listed in Appendix 2 [of the DMC decision].

Section 20(2)(a) – the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed.

1. The placement, movement and removal of the Integrated Mining Vessel ("IMV") anchor and the geotechnical support vessel anchor, including the anchor spread, on or under the seabed.
2. The placement, movement and removal of the crawler on or under the seabed.
3. The placement, movement and removal of the grade control drilling equipment on or under the seabed.
4. The placement, movement and retrieval of moored environmental monitoring equipment on or under the seabed.

Section 20(2)(d) – the removal of non-living natural material from the seabed or subsoil

1. The removal of sediment from the seabed and subsoil using the crawler and by grade control drilling.
2. The taking of sediment and benthic grab samples from the seabed and subsoil associated with environmental monitoring.

Section 20(2)(e) – the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil

1. The disturbance of the seabed and subsoil associated with the placement, movement and removal of the IMV anchor and the geotechnical support vessel anchor, including the anchor spread.
2. The disturbance of the seabed and subsoil associated with seabed material extraction via the crawler, through re-deposition of de-ored sediments, and from grade control drilling.

3. The disturbance of the seabed and subsoil associated with the placement, deployment, retrieval and mooring of environmental monitoring equipment.

4. The disturbance of the seabed and subsoil associated with the taking of sediment and benthic samples associated with environmental monitoring.

Section 20(2)(f) – the deposit of any thing or organism in, on, or under the seabed

1. The re-deposition of de-ored sediments in, on or under the seabed.

2. The deposition of small amounts of marine organisms and solids in, on or under the seabed as a result of vessel maintenance, hull cleaning (biofouling).

Section 20(2)(g) – the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine species or their habitat

1. The disturbance and damage of the seabed and subsoil as a result of the placement, movement and removal of the IMV anchor, and the geotechnical support vessel anchor on the seabed.

2. The disturbance and damage of the seabed and subsoil as a result of seabed material extraction via the crawler, the redeposition of de-ored sediments, and the grade control drilling.

3. The disturbance and damage of the seabed and subsoil as a result of the placement, deployment, retrieval and mooring of environmental monitoring equipment.

4. The disturbance and damage of the seabed and subsoil as a result of the taking of sediment and benthic samples associated with environmental monitoring.

Section 20(4)(a) – the construction, mooring or anchoring long-term, placement, alteration, extension, removal, or demolition of a structure or part of a structure

1. The anchoring of the IMV and the geotechnical support vessel, and the associated placement, movement and removal of the IMV anchor and the geotechnical support vessel anchor in the water column above the seabed.

2. The placement, movement and removal of the crawler in the water column above the seabed.

3. The placement, movement and removal of the grade control drilling equipment in the water column above the seabed.

4. The placement, deployment, retrieval and mooring of environmental monitoring equipment in the water column above the seabed.

Section 20(4)(b) – the causing of vibrations (other than vibrations caused by the normal operation of a ship) in a manner that is likely to have an adverse effect on marine life

1. Vibration (noise) caused by the IMV and crawler during iron sand extraction activities.

Section 20B – No person may discharge a harmful substance from a structure or from a submarine pipeline into the sea or into or onto the seabed of the exclusive economic zone

1. The release of seabed material (sediments) arising from the seabed disturbance during grade control drilling activities;

2. The release of disturbed seabed material (sediments) arising from the seabed disturbance during the crawler extraction operations; and

3. The release of disturbed seabed material (sediments) arising from taking of sediment and benthic samples associated with environmental monitoring.

Section 20C – No person may discharge a harmful substance (if the discharge is a mining discharge) from a ship into the sea or into or onto the seabed of the exclusive economic zone or above the continental shelf beyond the outer limits of the exclusive economic zone

1. De-ored sediments and any associated contaminants discharged back to the water column from the IMV.

Appendix 2: Map of project area

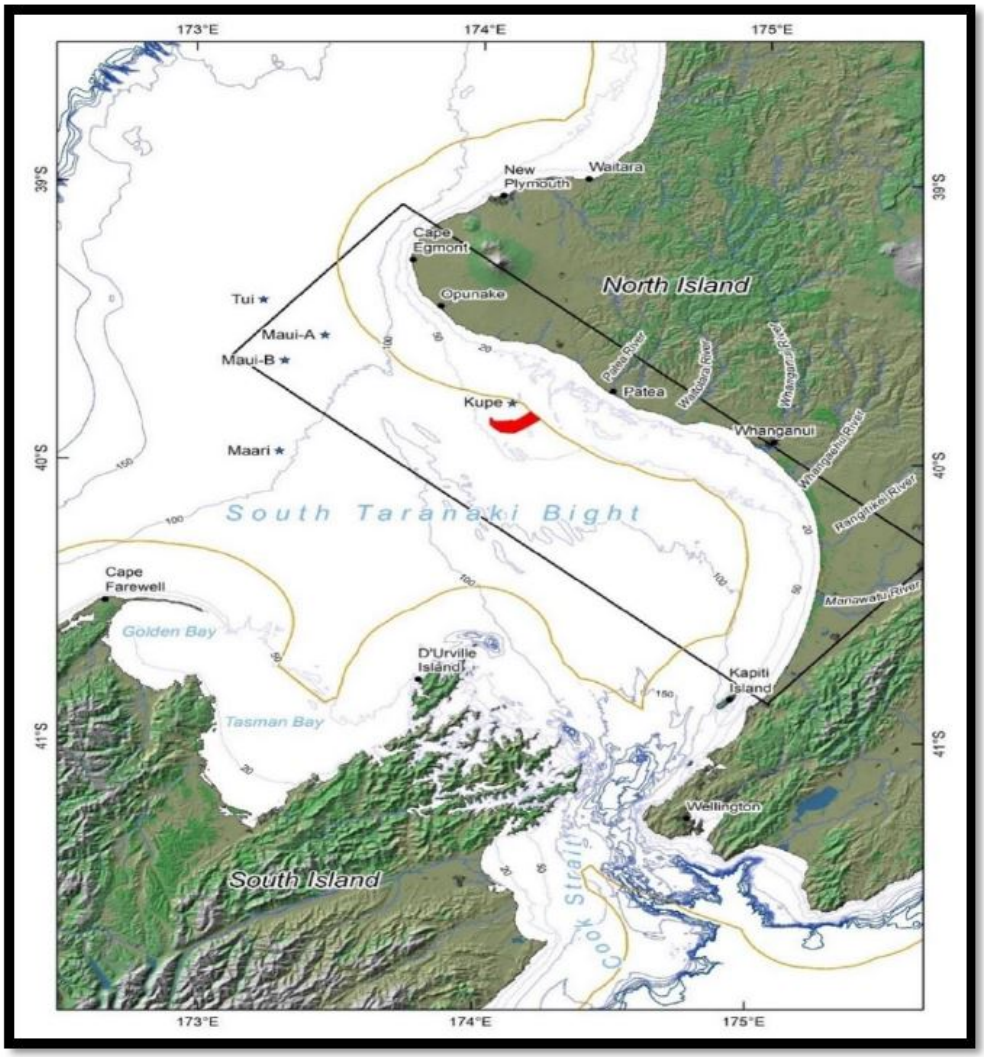
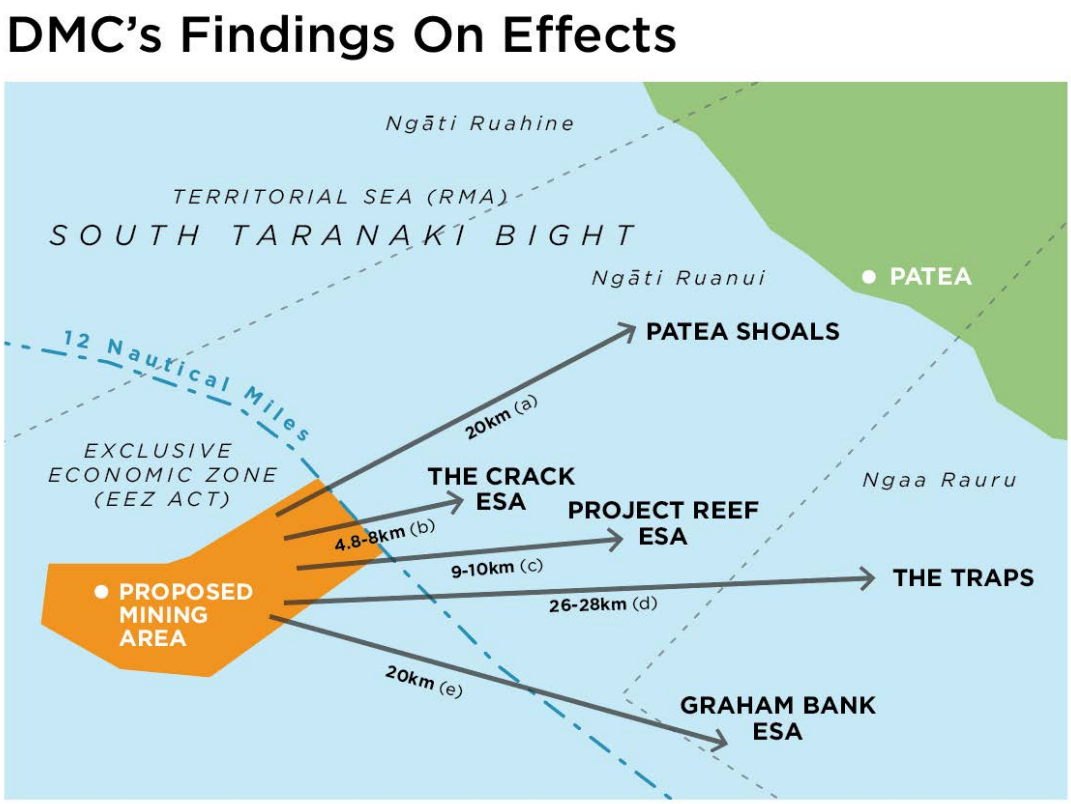


Figure 3.1: The South Taranaki Bight (STB) showing the Sediment Model Domain (SMD) (oblique black rectangle). The approximate project area is shown in red and the 12 NM boundary of the Territorial Sea is shown in yellow.

Appendix 3: Diagram prepared by iwi parties

Below is a diagram prepared by the iwi parties. The diagram is not to scale and should not be read as a map.



ESA	DMC Finding on Effect	Ref to DMC Decision
PATEA SHOALS	Moderate effect	At [350] At [970]
	Significant effect	At [968]
THE CRACK	Significant effect	At [350] At [970]
	Effects of concern	At [406]
	Effects including temporary or permanent displacement of species	At [437] At [980]
	Major effect	At [952]
THE PROJECT REEF	Significant effect	At [350] At [970]
	Major effect	At [952]

ESA	DMC Finding on Effect	Ref to DMC Decision
THE TRAPS	Minor effect	At [970]
GRAHAM BANK	Significant adverse effect	At [350] At [940] At [970]
	Effects including temporary or permanent displacement of species	At [437] At [980]