



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

30 SEPTEMBER 2021

## **MEDIA RELEASE**

TRANS-TASMAN RESOURCES LTD v TARANAKI-WHANGANUI CONSERVATION BOARD

(SC 28/2020) [2021] NZSC 127

## **PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

### **Background**

The appellant, Trans-Tasman Resources Ltd (TTR), wants to mine iron sands in the South Taranaki Bight; an area within New Zealand's exclusive economic zone (EEZ). To do so, it requires marine consents and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act).

By a majority decision, the decision-making committee (DMC) of the Environmental Protection Authority granted the consents with conditions. The consents granted were valid for a period of 35 years. They authorised TTR to extract up to 12.5 million tonnes of seabed material during any three-month period and up to 50 million tonnes per annum and to process that material on an integrated mining vessel. About 10 per cent of the seabed material would be processed into iron ore concentrate. The de-ored material which remained after that process would be returned to the seabed via a controlled discharge. The discharge would create a plume as the suspended material settled onto the seabed. The first respondents opposed the consents because of the effects of the proposed activity on the environment and other existing interests including those of iwi holding mana moana and kaitiaki responsibilities in the areas affected by the proposed mining.

In the High Court, the first respondents successfully challenged the DMC's decision as wrong in law. The Court of Appeal dismissed TTR's appeal against the High Court judgment. The DMC's decision was quashed and the matter referred back for reconsideration. The Supreme Court granted TTR leave to appeal on the question of whether the Court of Appeal was correct to dismiss the appeal.

## **Decision**

The Supreme Court has unanimously dismissed the appeal.

The judgment deals with a number of issues concerning the proper interpretation and application of the EEZ Act. Members of the Court took different approaches to the purpose provision in s 10, but were largely unanimous in their approach to the other provisions. All members of the Court agreed that the DMC erred in law in granting the consents.

In particular, a majority of the Court (comprising Winkelmann CJ, Glazebrook and Williams JJ), held that the DMC erred in law by not applying the decision-making criteria relevant to TTR's application in order to achieve the environmental bottom line imposed by s 10(1)(b). The majority held that the effect of s 10(1)(b) was to provide an operative restriction on marine discharges and dumping such that if the environment could not be protected from pollution through regulation, then the discharges or dumping had to be prohibited. William Young and Ellen France JJ differed in that they did not consider s 10(1)(b) imposed an environmental bottom line, but they held that, nevertheless, the statutory scheme meant the overall assessment of the decision-making criteria may well be tilted in favour of environmental factors.

The Court was unanimous that the DMC had also made a fundamental error by not complying with the requirement to favour caution and environmental protection in ss 61 and 87E. This was illustrated by the conditions imposed by the DMC relating to marine mammals and seabirds. Given the uncertainty of information relating to the effect of TTR's activities on these species, the DMC simply could not be satisfied that the conditions it imposed were adequate to protect the environment from pollution.

The Court also clarified the approach to the Treaty of Waitangi clause in s 12 of the Act, holding that a broad and generous construction 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. In particular, s 12(c) provides a strong direction that the DMC was to take into account the effects of TTR's proposed activity on existing interests in a way that recognises the Crown's obligation to give effect to the Treaty principles. These existing interests include tikanga-based customary rights and interests, including kaitiakitanga. Drawing on the approach to tikanga in earlier cases such as *Takamore v Clarke*, the Court was also agreed that tikanga as law had to be taken into account by the DMC as "other applicable law" under the decision-making criteria where its recognition and application is appropriate to the particular circumstances of the application at hand. The Court found the DMC had made various errors in relation to these issues.

The appeal was accordingly dismissed. The Court upheld the lower Courts' decision to quash the DMC decision. By a majority decision, the matter is referred back to the DMC for reconsideration in light of this Court's decision. Glazebrook J did not consider the matter should be referred back because, 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.

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