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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 28/2020
[2020] NZSC Trans 28

BETWEEN **TRANS-TASMAN RESOURCES LIMITED**
Appellant

AND **TARANAKI-WHANGANUI CONSERVATION BOARD**
CLOUDY BAY CLAMS LIMITED
FISHERIES INSHORE NEW ZEALAND LIMITED
NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN INCORPORATED
SOUTHERN INSHORE FISHERIES MANAGEMENT COMPANY LIMITED
TALLEY'S GROUP LIMITED
GREENPEACE OF NEW ZEALAND INCORPORATED
KIWIS AGAINST SEABED MINING INCORPORATED
TE OHU KAI MOANA TRUSTEE LIMITED
TE RŪNANGA O NGĀTI RUANUI TRUST
THE TRUSTEES OF THE TE KAAHUI O RAURU TRUST
ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
First Respondents

AND **ENVIRONMENT PROTECTION AUTHORITY**
Second Respondent

AND **THE ATTORNEY-GENERAL**

Intervener

Hearing: 17-19 November 2020

Coram: Winkelmann CJ
William Young J
Glazebrook J
Ellen France J
Williams J

Appearances:

J B M Smith QC and V N Morrison-Shaw and P F Majurey for the Appellant

J D K Gardner-Hopkins for the First Respondents Taranaki-Whanganui Conservation Board

R A Makgill and P D M Tancock for the First Respondents Cloudy Bay Clams, Fisheries Inshore, New Zealand Federation of Commercial Fishermen, Southern Inshore Fisheries Management Company and Talley's Group

D M Salmon, D A C Bullock and D E J Currie for the First Respondents Greenpeace of New Zealand and Kiwis Against Seabed Mining

R J B Fowler QC, J Inns, H J Irwin-Easthope and N R Coates for the First Respondents Te Ohu Kai Moana Trustee Limited, Te Rūnanga o Ngāti Ruanui Trust and The Trustees of the Te Kaahui o Rauru Trust

M C Smith, H E McQueen and P D Anderson for the First Respondent Royal Forest and Bird

V E Casey QC and C Haden for the Second Respondent

D A Ward and Y Moinfar-Yong for the Intervener

CIVIL APPEAL

KARAKIA TIMATANGA

MR SMITH QC:
May it please your Honours, with Mr Majurey on my right and Ms Morrison-Shaw I appear for the appellant.

WINKELMANN CJ:
Tēnā koutou.

MR GARDNER-HOPKINS:
May it please the Court, Gardner-Hopkins for the Taranaki-Whanganui Conservation Board.

WINKELMANN CJ:
Tēnā koe.

MR FOWLER QC:
May it please the Court, Fowler for the three iwi first respondents together with Ms Inns, Ms Irwin-Easthope and Ms Coates.

WINKELMANN CJ:
Tēnā koutou.

MR SALMON:
May it please the Court, Salmon with Mr Bullock on my right and Mr Currie on my left for Greenpeace and Kiwis Against Seabed Mining.

WINKELMANN CJ:
Tēnā koutou.

MR MAKGILL:
May it please the Court, Makgill and Ms Tancock for Fisheries Inshore New Zealand and the parties collectively referred to as “the Fishers”.

WINKELMANN CJ:

Tēnā kōrua.

MR SMITH:

Tēnā e te Kōti, ko Smith tōku ingoa. E tu ana mātou ko McQueen, ko Anderson mō the Royal Forest and Bird Protection Society Incorporated.

WINKELMANN CJ:

Tēnā koutou.

MS CASEY QC:

E te Kaiwhakawā tēnā koutou, Casey and Haden for the Environmental Protection Authority – Te Mana Rauhi Taiao.

WINKELMANN CJ:

Tēnā kōrua.

MR WARD:

E te Kaiwhakawā, tēnā koutou, ko Ward tōku ingoa māua ko Ms Moinfar-Yong mō te Karauna. May it please the Court, Ward and Ms Moinfar-Yong for the Attorney as Intervener.

WINKELMANN CJ:

Tēnā kōrua. As you sort your papers out, Mr Smith, I just thought I'd start off in a helpful way by saying that the Court won't be able to sit past lunchtime on Thursday, so my expectation is that counsel will work together to make sure that we are finished for hearing for that point in time.

MR SMITH QC:

Thank you, your Honour, and on that very point there was a minute which was produced by his Honour Justice Williams earlier in the piece in which he set out the expectations of the Court about how hearing time could be divided up and asked the respondents to indicate how they would divide up the issues in the time available to them.

Although we were not asked to, and haven't filed any response to that request ourselves, I can indicate that I expect that we would go to the end of the day and that the topics between myself and my friends would be divided up as follows. First of all, I would do some introductory matters, issues on the questions of law, what is in my submission one of the major issues, which is statutory purpose, the issue of favouring caution, the issue of bond and insurance, the issues concerning the conditions in relation to marine mammals and seabirds, then adaptive management, then the vires issue concerning the ability to make pre-commencement monitoring orders, then the issue of the casting vote, and finally, for me, the issue of economic benefit, one of that statutory considerations under section 59. Then Ms Morrison-Shaw would deal with issues of international law and best available information.

I should indicate that I anticipate that I would take till about quarter to three to do what I have to do. Then Ms Morrison-Shaw for her two issues anticipates she will take 15 minutes, and then Mr Majurey would deal with the issues of treaty matters, existing interests and tikanga issues together with the applicability of coastal marine management regimes, and I would have expected that he would take about an hour to do that. That would enable, as had been indicated, the respondents to have between them all of the day tomorrow outside of whatever it is which the Crown has to say as intervener, and that indication that I have given should get us to the point, I hope, that we would finish by 11.30 as Justice Williams' minute of some time ago indicated.

With that –

WILLIAMS J:
I think the indication is that the 11.30 that was expressed by all of us as a hope is now immutable.

MR SMITH QC:
Yes, you said at the latest, Sir, in your minute.

WILLIAMS J:
Good.

MR SMITH QC:
So I'm glad to say that you have been completely consistent.

WILLIAMS J:
How prescient was I.

MR SMITH QC:
Yes, Sir. Now I want to deal first of all with a number of introductory matters and these are really intended simply to provide some preliminary navigation around the DMC decision which you find under tab 8, starting at page 102.0226, and I'll be taking you to parts of that from time to time but the parts of it which are of use to you, first of all chapter 3. Chapter 3 begins on intrinsic page 34, 33/34, which is the bundle page 0275, and that gives an outline of the project and its context. I hadn't been intending to take you through that because I imagine that it will have been read, but nevertheless to assuage somewhat the otherwise abrupt start I am going to make by going into the issues, for a general outline of the project and its context, that page, page 33, and the 16 which follow, give you a great deal of what you would have to know in terms of context.

Usefully, when you come across a term requiring definition, there's a glossary at the beginning starting at page 0235. From time to time I, and I expect all parties, will wish to take you to the conditions and the conditions you find in appendix 2 starting at page 0517. I also will want to take you to what is called in the decision the record and summary of the decision and that starts at page 012.238.

Now the next issue that I was going to deal with is questions of law and my submissions, written submissions, begin with an outline of what we have to say on the questions of law but it's not a particularly good use of time to deal with that as a separate topic up front but rather I propose to come to questions

of law in a manner consistent with my submissions on that overall issue when I get to the individual issues which a question of law issue arises in.

That being the case, I intend to go straight to what I indicated earlier and submit is one of the central issues which is statutory purpose. The reason why it is a central issue is because it underpins much of the Court of Appeal's reasoning, both on the statutory purpose itself but also on the question of favouring caution and also to an extent on one of the other major issues in the appeal, that of adaptive management.

I want to begin by setting out, without going into the detail, what is TTR's basic argument in relation to statutory purpose, and I'll then go into the detail of why we say that argument is correct.

The basic argument is that the Court of Appeal has interpreted the statutory purpose of protection of the environment in section 10(1)(b) as an absolute requirement. If it has not done that, then we say that it's come close to it, that is to say the statutory purpose in section 10(1)(b) according to the Court of Appeal has operative effect on its own or it is paramount or, at the least, it leaves little or no room for the effective operation of the considerations which are outlined in section 59 of the Act. We say that is an incorrect interpretation of section 10, it has the effect of preventing the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 from working as it should. It also places the EPA, or in this case what was the DMC, the Decision Making Committee, and an applicant, including TTR in this case, in a difficult position, and that is because it creates a tension which is difficult to resolve between on the one hand the realities of seabed mining, which the EEZ Act expressly contemplates, but on the other hand the Act's statutory purpose as pronounced on by the Court of Appeal. Each of those under the Court of Appeal's approach in my submission are opposed or diametrically opposed. That is to say seabed mining, which the Act allows, must create some pollution from harmful substances because it's expressly envisaged by the EEZ Act that harmful substances include what is no more than sand or sediment from seabed mining. But on the other hand, protection

of the environment, according to the Court of Appeal's decision, could be described as a sine quoi non. For practical and legal reasons we say that means that any seabed mining applications for discharge consents face as a result of the Court of Appeal's decision obstacles which are steeper, more difficult to overcome, than Parliament actually intended. Practically, a seabed mining operation must produce some change to some part of the environment in which it takes place for some time. Legally, the provisions of Section 59 and the other provisions in the Act are prevented by dint of the Court of Appeal's decision from having operative effect. We say that the correct position should be that the words in section 10, being the purpose provision of the Act, are to be read as a whole, there is more than one aim in section 10, one of the them is the use of natural resources to provide for economic wellbeing, but another is environmental protection from pollution and, because there's a tension between those objectives, the Act provides flexibility and goes out of its way in effect to say that neither predominates. That is implicit in the requirement to take into account decision-making criteria that is specified which, in well-understood statutory language, is a direction well short of allowing any one consideration to govern the outcome. So we say that is the first error as per our submissions in relation to statutory purpose. The second error is an error on a question of law, and I'll come to that later.

To look at the first error in more detail, it's first necessary to be satisfied as to what precisely it is that the Court of Appeal did and which the appellant complains of, and the reason why I say that is because you will have seen in the arguments for a number of the respondents that the appellant has set about attacking the straw man in its arguments. We say that in point of fact there is no attack of a straw man. In fact the Court of Appeal decision, read properly, imposes barriers to the operation of the Act of the very type that I have indicated already.

So turning to the Court of Appeal's decision, the paragraphs or the parts of it on statutory purpose that we complain of are indicated best firstly in

paragraph 86 on 0156. About just over half of the way down, beginning with the words: “It is not consistent”.

GLAZEBROOK J:
I’m sorry, I didn’t catch the paragraph number.

MR SMITH QC:
It’s 86, your Honour. About two-thirds of the way down that longer paragraph. “It is not consistent with section 10(1)(b),” the Court of Appeal says, “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.” Then the second distinct phrase that concerns us is that following in paragraph 86: “The section 10(1)(b) goal can only be achieved,” the Court of Appeal says, “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.” So the purpose of regulation is to achieve complete avoidance. It’s not permitted, according to the Court of Appeal, to regulate for the purposes of remedying or mitigating the harm to the environment.

WILLIAMS J:
Why is your battle not with just what’s material?

MR SMITH QC:
We do have a battle with what’s material but what we are confronted with is a decision which in part relies on the qualifier “material harm” but it on the other hand in part indicates that there must be no damage whatsoever. The difficulty also is that the question of material is very broad and it is capable of being interpreted by the DMC or these days the Board of Inquiry which is appointed under the EEZ Act in a way which could be quite differently from what the Court of Appeal indicates or had intended to say. We are confronted, in my submission, with quite stentorian language in the Court of Appeal judgment as a whole from these paragraphs.

WILLIAMS J:

Why is materiality broadly conceived of any different to the balancing between economic interest and resource use against damage to the environment? Why is that not equally broad and stentorian? Doesn't it end up being the same question framed differently?

WILLIAM YOUNG J:

Could be you might say that if it's material it might be outweighed by terrific economic benefits whereas if it's not material, whereas if the bottom line material applies then economic benefits are irrelevant, no matter how wonderful they are.

MR SMITH QC:

That is the difficulty that we have. This is an Act which has been interpreted as if the cascade of avoiding, remedying, mitigating is really very much confined to that of avoiding, and we say that is simply wrong. It –

WINKELMANN CJ:

But what do you say it is? What is right? What is the standard? Is there no standard? Is, in a particular case, any amount of environmental damage possible to permit?

MR SMITH QC:

This is a discussion which some time was spent on in the Court of Appeal. In other words, the Court of Appeal wanted to know how one applies the section 59 decision-making criteria so to arrive at a standard for decision-making and what was the standard for decision-making, and in the Act we don't have anything between section 10 on the one hand and section 59 on the other hand. So that means that a holistic assessment has to be carried out with the statutory aims in mind, and it is –

WINKELMANN CJ:

But the problem with a holistic analysis is that you're undertaking an holistic analysis of two things that are naturally in conflict, or possibly naturally in conflict, as they are here. So is there no bottom line at all?

MR SMITH:

There certainly isn't a bottom line in the sense that there was for example in *Save our Sounds* or in *King Salmon* because we have different legislation and we have different standards which are to be operated to.

WINKELMANN CJ:

Well, actually, "bottom line" is a bad expression. But is there no – I'll just repeat my question – the difficulty with just the reading the provision as a whole is how do you read it as a whole when you you're reading together two things which are in conflict, where do you end up, in terms of the test you apply what level of environmental destruction or damage do you allow?

MR SMITH:

It is extremely difficult, if not impossible, to articulate a test because the statute in the end doesn't articulate a test which is a bottom line. But one would think that you would be entitled, as a decision-making tribunal in relation to this Act, to allow significant environmental harm if it were to be remedied, to the extent that it is going to be remedied or, alternatively, significant environmental harm if it were to be mitigated, to the extent that it's going to be mitigated. If those measures of remediation or mitigation are not available or, alternatively, not ones which the applicant which is prepared to take, then that in a general sense is an example of a situation in which one would expect refusal of the application. The point is, and our point, is whereas the Court of Appeal strongly indicates in its decision that there must be no harm, whether it's material or otherwise, the Act says that there can be harm and it can be allowed to continue over some space of time and over some geographical space, provided it is remediated or it is mitigated, and that is done by regulation under section 10(1)(b) as per the meaning of "regulation" under section 10(1)(b).

WILLIAMS J:

Well, “remediated” means fixed, “mitigated” doesn’t. It means “mollified”. Now then you get to the question of, well, how far does that have to go before it’s sufficient mitigation to deal with the harm, and it does seem to me that the Act is based around the idea that initial harm might be acceptable if it is – because it can’t be avoided – if it is remediated. But if it can only be mitigated then it becomes a balancing question about whether that's enough, and that takes you to material harm.

MR SMITH:

It is a balancing question, and that is what I meant a little earlier on the question of a holistic assessment. Yes, the position that you’ve outlined is, in my respectful submission, correct, “remediated” does mean “fixed”, but it does on the other hand allow the harm to happen in the first place. The appropriate synonym for “mitigated” in my submission is not so much “mollified” but “attenuated”, it is something short of remediation which may arise through partial remediation or, alternatively, through there being less harm than the application for instance, if allowed in full, would at first blush be inclined to impose. But at the end there is a requirement for there to be a balancing exercise and the balancing exercise must take into account all of the purposes in section 10(1)(a) and 10(1)(b) which include the purpose of development, making use of natural resources in a sustainable way for the wellbeing of people economically. So in other words in my submission the take-into-account requirement in section 10(1)(3) of the section 59 criteria requires exactly what Justice Williams has indicated, that is to say a balancing exercise. And there may well be circumstances in which harm is permitted at a level which is material, it is remediated or it is not, it is mitigated or it is not, and it may well be that the harm which is material is balanced against the other aims of section 10(1)(a) and 10(1)(b). That is what makes, in my submission, a first-instance decision of a tribunal such as the DMC somewhat difficult to interfere with because of the breadth of what is essentially the judgment exercise which it is asked to undertake by the statute.

WILLIAMS J:
So you would say that even mitigation that leaves material harm remaining can be consented if there is an economic payback that justifies it?

MR SMITH QC:
From the later parts of the Act which I'll come to, the answer to that is yes. The later parts of the Act, for example, in relation to discharge and dumping consents, section 87D, E and F, specifically envisage instances where there will be harm to the environment.

WILLIAMS J:
But I'm talking about in discharge. Let's not talk about dumping. That seems to be a special kind of regime.

MR SMITH QC:
Whether it's a discharge or dumping, more particularly so with dumping, of course. But my point about although this is a discharge application we're talking about the meaning of the Act in the round, in which case we take into account the full breadth of the provisions, including dumping, and certainly the Act, when it comes to dumping, does envisage harm which may well not be remediated. In fact, as we'll come to, there is a cost benefit ratio which looks, amongst other things, at the reasonableness of the costs of treating or recycling what is to be dumped or re-using it and if it is concluded on a cost benefit basis that the costs are unreasonable then the material may be dumped notwithstanding the harm that will be caused. One would think that where there is excessive harm, however that is judged, then that would plainly and clearly lead to a declinature of the application. I'm not suggesting for a split second that it is a carte blanche. That certainly isn't the case.

So the other paragraphs I wanted to come to apart from paragraph 86 is also 89, second sentence: "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," and there are two issues which we have with that part of the decision. The first is that the second sentence, beginning with the words "It is not consistent", is effectively an absolute requirement and you will note that it doesn't contain the word "material" or level of harm to any basis.

The second concern we have was with –

WILLIAM YOUNG J:
But it also implies that if you get to a level of harm that's relevant, material or otherwise, it cannot be balanced against economic benefit. So it's absolutist in that sense.

MR SMITH QC:
Well, on the – my concern is how the DMC, as however it may be reconstituted for the purposes of this hearing, will look at that sentence in the Court of Appeal's judgment, and it will not be an easy thing to do to explain to the DMC that notwithstanding what is contained in that paragraph there is in fact a level of harm which the Act contemplates. The Court of Appeal really said that there doesn't seem to be, and then it goes on to say, in the second sentence we complain of: "Nor is it consistent with the scheme of the Act to permit harm to the environment."

WILLIAM YOUNG J:
The point I was making is that if one reads in "material" as though it were said –

MR SMITH QC:
I'm sorry, Sir, I didn't quite hear you.

WILLIAM YOUNG J:
If one reads into 89 "material" in front of "harm" in the third line…

WINKELMANN CJ:

Which is reasonable since the word “material” is used in the last sentence in that paragraph.

WILLIAM YOUNG J:

Yes, so if you read that then it implies that once you get to a point where there is material harm you can never outbalance it with economic benefits. That’s effectively what that section, that passage, seems to be saying.

MR SMITH QC:

Yes, I’m sorry, that is what it says and the difficulty that I have – well, two points. The difficulty I have is that the word “material” weaves its way in and out of the judgment from time to time. It’s not as if we have a sentence at the beginning of the judgment which says: “Definition: wherever I use the word *harm* I mean *material harm*.”

WINKELMANN CJ:

Yes, well, that’s a matter of drafting the judgment. But it’s clear when you read the judgment as a whole it’s using the word “material”, even in the very paragraph we’ve just talked about.

MR SMITH QC:

Yes, it uses it to a significant extent. But even then we’re stuck with the question of what “material harm” means and the issue of trading off again economic…

GLAZEBROOK J:

If you're wanting to give guidance in the future you do have to give us what you say is the test, because it’s not very satisfactory to say they’ve got it wrong. So what exactly is it you say we should say in our judgment to give guidance in the future? Because not having anything is not going to give anybody any guidance, is it?

MR SMITH QC:

No, no, I hadn't intended for a moment to leave that issue untouched, and what we are saying is that there is a broad decision, a holistic decision, in the nature of overall judgment which the DMC or the EPA is required to make, so that –

GLAZEBROOK J:

Well, that's exceedingly helpful. I'm sorry, I don't find that a particularly helpful analysis. So it's a holistic decision doing what and taking into account what?

MR SMITH:

Well, the decision has to take into account each of the section 59 decision-making criteria to see whether or not the aims or purposes of the Act correctly interpreted are satisfied, and in doing so one arrives –

GLAZEBROOK J:

And so the aims of the Act are the section 10(1)(a) and (b)?

MR SMITH QC:

Section 10(1)(a) and (b), and second 10(3) specifically directs the decision-making tribunal to go straight to the section 59 considerations for the purposes of determining whether or not those purposes are met. But what is clear, that should be clear, is that all the purposes in section 10(1) and section 10(2) are required to be met, and they include not merely environmental protection but, in addition, economic use in a sustainable manner of natural resources for the purposes of people and their communities.

WINKELMANN CJ:

So it's an evaluative exercise which may balance off economic benefit with environmental harm and thus it's kind of a sliding balancing, well, sliding scale? So the more economic benefit perhaps the more environmental harm that might be permitted?

MR SMITH QC:

Yes, that is certainly the case, it's a sliding scale, and one precisely does trade off harm, environmental harm, against economic benefit of course, not overlooking for one split second the ability to avoid, mitigate or remedy on the way through. So it is essentially a trading exercise which the EPA is involved with. For example, this is why it becomes very difficult to talk about these things in the abstract, because when one is looking at an application, and you all know exactly what these applications look like, they're enormous documents with a huge impact assessment and swathes and swathes of expert evidence on what is the nature of the project, the extent of the environmental harm which is possible, the extent of the remedial measures and the mitigation measures which are intended to be taken, the extent of the economic benefit. So that it could be that in relation to *a* single aspect of one of these very complex and involved and detailed applications, there is an area of intended activity which is going to cause harm which can be sliced off, as it were, from the application so as to avoid that harm because the tribunal thinks in its application of the statutory criteria that in relation to that one area of proposed activity that is an appropriate trade-off. Harm ought not happen because, for instance, it has relatively little economic benefit, in which case it can be removed, it can be avoided, in the language of the section. On the other hand, there are areas where there is considerable economic benefit, albeit that there is harm associated with it, but the tribunal takes the view that the harm is in a limited area, or alternatively or additionally the harm is for a limited period of time, namely the duration of the consent following which there is a recovery period, in which case notwithstanding what might amount to considerable harm for the time being in limited places. The Court is content with measure which simply mitigate, at the other end of the scale, what that harm is, taking into account, for example, that the harm which for the time being is mitigated through the use of conditions is in the result remediated because of the cessation of the activities, given the limited duration of the mining permit and the limited duration of the consent which is sought. That is a very long answer but that is the reality of what the DMC is having to look at.

WILLIAMS J:

So what are the problems with very complex applications such as this one, to operate in dynamic, even chaotic, systems that we call the marine environment and to measure them against a complex set of considerations such as those in 59, is that the decider ends up forgetting the question? I mean, it's the great risk in this area because is it so complex, and that question becomes very important because it's so easy to lose sight of it, that seems to me fundamental and important. So you should read section 59 as saying: "In order to achieve the purpose of the Act the following considerations are to be taken into account," you wouldn't disagree with that, would you?

MR SMITH QC:

Well, no, section 10(3) tells me to do exactly that.

WILLIAMS J:

Right, exactly. But it doesn't say that in 59, you've got to read that in for it to make sense. Otherwise section 59 is a free for all, and it was never intended to be that.

MR SMITH QC:

Section 59 cannot possibly be a free for all.

WILLIAMS J:

Right.

MR SMITH QC:

And, as you say, section 10(3) says you look at section 59 for the purposes of carrying out your duties as a decision-maker under the Act in connection with the statutory purposes discussed in the preceding two subsections.

WILLIAMS J:
So the balancing is contained in paragraph (a) of 10(1) because it refers to sustainable management and sustainable management says looking after humans while doing as little damage as possible, right?

MR SMITH QC:
Yes.

WILLIAMS J:
(b) sharpens that up, doesn't it? Because it's not a straight balancing when you have a discharge, (b) says so, right?

MR SMITH QC:
Mmm.

WILLIAMS J:
What is it? Because when you apply 59 that's one of the purposes you've got to apply when you apply 59.

MR SMITH QC:
What that involved – no more correct thing can be said about the implementation of the provisions in this Act, except that they are difficult. And, yes, it is easy to forget what the question is. But we have a DMC which in this case went to the utmost effort to set out –

WILLIAMS J:
No, no, just tell me what (b) – because if (a) allows you the balancing that you've been describing, how does (b) change that? Because it's certainly intended to change it somehow.

MR SMITH QC:
Well, what it requires you to do as a decision-making tribunal is to say to the applicant that it's not carte blanche for the purposes of development, there is

a requirement to protect the environment from pollution and to do so by regulation: “So we are going to require you to –

WILLIAMS J:
So how do you make sense of that? If the balancing is in (a), economic benefit against environmental sustainability, but where you’ve got a discharge it’s that and protection of the environment, how does that change the game for you, what’s your question?

MR SMITH QC:
The question is how to let an activity which is applied for for the purpose of achieving economic benefit continue with no more than a level of harm to the environment so that the activity remains a worthwhile undertaking, and that is the balance.

WILLIAMS J:
But you see the problem with that is protect is not a passive idea. It’s an active idea. It’s not some, you know, non-agent harm. The harm is caused by the activity. This says you can do that balancing under (a) but you must protect the environment. Where’s the trade-off in that?

MR SMITH QC:
Well, the trade-off is that you – well, it’s not a passive requirement. It’s an active requirement and the actions which are required to be taken for the purposes of achieving it are set out in the conditions, and the conditions require you to undertake –

WILLIAMS J:
My point is there’s not trade-off in that. That’s what I’m trying to get you to bite into, because you say this is a trade-off and it’s okay to materially harm the environment if there’s economic benefit but doesn’t (b) specifically prohibit that?

MR SMITH QC:

No, the trade-off exists in the not merely implicit but express intention in the Act to allow harm to occur and be regulated and it is regulated so as to achieve mitigation at the bottom level.

WILLIAMS J:

Yes, you're not addressing (b).

WINKELMANN CJ:

Justice Young had a question.

WILLIAM YOUNG J:

Is it possible that (b) is primarily aimed at activities that don't have much to do with sustainable management like, for instance, ships emptying ballast water?

MR SMITH QC:

There is an argument afoot that that may well have been the case because of the intention of the Act to introduce (b) out of recognition of the MARPOL Convention.

WILLIAM YOUNG J:

It doesn't mean it doesn't apply to discharge but it may be a reason why it's in there when much of its ground on your argument is, in any event, covered by sustainable management.

MR SMITH QC:

Well, much of it would be and the – well, the answer to your question is yes but the trouble is it's there and…

WILLIAM YOUNG J:

I suppose it all comes down to what "protect" means. Does it mean, is a COVID virus that gives 80% protection really protection or is the word "protection" inappropriately used in relation to it?

MR SMITH QC:

The word, yes, it does. It does mean those things, and the question of this is a question of what "protect" means, is it an absolute or is it not, it can't be an absolute because it is used in conjunction with qualifying terms, namely when we look at the section as a whole, remediation and mitigation and also regulation, for example, regulation, so far as the Court of Appeal are concerned, comes very close to meaning "prohibition". One is allowed to regulate for the purposes of avoiding harm, that is protection, because it's viewed as an absolute, as I'll come to. The difficulty with that, I was going to say argument, it's not an argument, it's a conclusion that's in the Court of Appeal judgment, the difficulty with it is, is that it deprives in context the word "regulation" of any meaning.

WILLIAMS J:

Not really if you say that, if your actions are avoid, remedy or mitigate for the purpose of protection then obviously you can mitigate to protect. So there's obviously some room to move. The statute must interpret that.

MR SMITH QC:

Absolutely.

WILLIAMS J:

It must have intended that or it wouldn't have used that word.

MR SMITH QC:

Yes.

WILLIAMS J:

But that takes you to what does "protect" mean and what does "harm" mean, and that seems to me to be where this debate should be.

WINKELMANN CJ:

Mr Smith, perhaps I can just reformulate what was just being put forward by Justice Williams to you before because I don't think you have quite squarely

answered it. The point is that generally section 10(1)(a) applies to the general course of development of the exclusive economic zone, so general activity in that area. That's the test. But when you move into activities which carry this more harmful, potentially harmful aspect which is dumping or discharge harmful substances, there is a heightened threshold which is, when you look at the wording of the section, an available reading and might be thought to be consistent with the Court of Appeal's approach.

MR SMITH QC:

There can be no question that when one moves through to putting aside dumping, come to that in a second, but when one moves through to discharge there is a heightened threshold and that becomes evident from looking at section 87A, B, D through to G because they specifically relate to discharge and dumping consents as opposed to marine consents. All consents are marine consents but a marine consent can be a marine consent, a discharge consent, a dumping consent and if there is a discharge consent then there is unquestionably a high threshold, because there are certain considerations in section 59 which you take into account in relation to a marine consent which, when it comes to discharge consent, you are not to take into account and are to substitute instead with different considerations under section 87D, I think it is, and I'll come to those, and then the same again with dumping consent where there is a yet further higher threshold. But looked at in the round, even in the case of discharge consents, in my submission there can be no doubt that the Act envisages harm and, if there is to be any doubt about that, one can see that the Act envisages harm to the environment even in the case of dumping consents, because that's what the modified provisions of section 59, as modified by section 87F, actually say.

Now I do appreciate that a question which occurs over and over again to everybody in looking at those is that if it's not absolute then just how long is this piece of string? And the only answer which in my submission can be reasonably be given to it is that it is a broad evaluative overall judgment exercise, genuinely of the sort which was held not – with respect, obviously quite correctly – to be appropriate in *Save our Sounds* and also in

King Salmon, because in those cases there were requirements for the environment to be protected by an avoidance requirement which was to be recognised and given effect to as an absolute bottom line and that's what it was appropriately, with respect, called in those cases. We don't have that type of guidance in the EEZ Act. Instead, what is deliberately left in place is an extremely broad suite of measures in relation to regulation, avoidance where possible, remediation, mitigation, in relation to every single component of what might be and almost inevitably will be when it comes to seabed mining, an extremely complex and long-lasting operation. And so almost on a case-by-case basis during the course of its decision-making processes, the EPA or the DMC looks at the type of harm to be caused, if there is any, by each aspect of each component of the proposed activity and makes a decision in the round: can it be avoided, does that have the result of making the activity impossible, what is the intrinsic value in terms of economic value of the activity, are we prepared to go so far as to impose this barrier in relation to being able to pursue it or not? And that also means that it becomes an intensely factual enquiry, that's to say, as intensely factual as it is broad, and that in my submission leave an appellate tribunal in a position where there is less rather than more scope for interference with what is found unless there is a very, very clear and either, on the face of the record or alternatively –

WILLIAM YOUNG J:

It's a bit like a "are cats better than dogs?" sort of question, on which you may come to a different view but it's hard to say the other person's wrong, to put it slightly crudely.

MR SMITH QC:

Would could lend a little more definition to the problem if you were to ask yourself whether or not the dumping of heavy metals in terms of amount for a relatively small environment gain is better than not doing that. There would be a clear answer.

WILLIAM YOUNG J:

Yes.

MR SMITH QC:
In which case if, having purported to direct itself on all the relevant parts of the Act, your Honours came to the DMC – although it didn't according to the letter of the law do, it must have got it wrong somewhere – then you would find accordingly. But this is an enormous boundary – I'm not using word "discretion" because that indicates a range of other consideration – it is an enormous boundary of holistic balancing and evaluative exercise which in terms of an outer contour the DMC would have to go a long way to step over the boundaries of, and this is a case where it has come, in my submission, nowhere near to stepping over the boundaries of.

Now that has taken me not particularly far.

WINKELMANN CJ:
That's disappointing.

MR SMITH QC:
In terms of where I was going to get to in my argument. If I can just leave you with the other paragraph which concerns us in the judgment, which is 109, and it's the second sentence: "The goal of protecting the environment from pollution caused by marine discharges may be able to be met by either regulating or prohibiting the discharge of harmful substances, depending on the context. But the goal remains the same: protecting the environment, which as we explained means keeping the environment safe from pollution caused by such discharges." And then carrying on from there: "If regulation of discharges is not sufficient to achieve that goal, then prohibition is the appropriate response," and just pausing there. We have a difficulty with that because it homologates, if one likes, the words "prohibition" and "regulation" so that they really mean no different.

And then carrying on from the word "goal", "then prohibition is the appropriate response to ensure it is achieved. Section 10(1)(b) recognises that the 'protection of the environment' goal may be achieved in some cases by regulating discharges, rather than prohibiting them. But it is not possible to

reason from this to a…watered-down version of that goal," and again regulating discharges in that sense is used really in a prohibitory sense. That is a concern that we have, or I should say the solicitors who will next appear in front of the Board of Inquiry or DMC, if it goes that far, have, in terms of the debate which is likely to take place there. These paragraphs, 86, 89 and 109, depending on the type of discussion, have an appearance of an absolute target which must in terms be absolutely achieved, and that is not helped, I might add, by the use by the Court of Appeal of the *Environmental Defence Society Incorporated v Mangonui County Council* [1989] 3 NZLR 257 (CA) decision, and I'll come to that in due course.

So the next issue is was the Court of Appeal right to say what it said? It invokes the scheme of the Act. In fact, we say the Act's scheme supports a conclusion which is the opposite of that arrived at by the Court of Appeal. We say that the Act's scheme envisages that there may well be harm to the environment, ie, some pollution which is remedied, et cetera, in accordance with the discussions we've had, and I just want to go as quickly as I can through those contexts. That will require us to look at the Act which is under tab 3 and the wider context is first of all that there is a prohibition on discharges of any harmful substance where it's a mining discharge from ships and that's set out in section 20C(1) but that may be allowed if it is a permitted activity or pursuant to marine consent.

WINKELMANN CJ:
Sorry, what section was that, Mr Smith?

MR SMITH QC:
20C(1): "Restriction on mining discharges from ships." So, "No person may discharge a harmful substance (if the discharge is a mining discharge) from a ship into the sea," et cetera. However, a person may do it under subsection (2) if it's a permitted activity or authorised by a marine consent or under section 21, 22, 23. 21, 22 and 23 relate to existing consents and those provisions set out that, in respect of existing consents or existing established lawful activities, they may continue under certain conditions for a certain

period of time. We don't need to get into those but they certainly envisage that if there is harm being done by the environment by those activities which are already lawfully established then it may continue for some period of time. And so that is a minor nail in the coffin to any argument to the effect that there is an absolute protectionist approach which is correctly invoked by the Act.

WILLIAMS J:
Is "harmful" defined, "harmful substance" defined?

MR SMITH QC:
Yes, "harmful substance" is defined in section 2 –

WINKELMANN CJ:
Could I just ask…

MR SMITH QC:
– and section 2, I think, says "regulations"…

WILLIAMS J:
Ah, "regulations".

MR SMITH QC:
And the regulations are what I call the D and DR regulations, and they may be found in the bundle – I'll just find it – under tab 11, they're the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Discharge and Dumping) Regulations 2015, and regulation 2 says: "Harmful substance has the meaning given in regulation 4." Regulation 4 says: "Meaning of harmful substance," and there are some obvious ones and less obvious ones. But "a substance that is ecotoxic to aquatic organisms", et cetera, "(b) oil: (c) garbage: (d) sediments from mining activities other than petroleum" activities.

WINKELMANN CJ:
So, Mr Smith, is there a contrary point of view to the one you've just put forward –

MR SMITH QC:

No.

WINKELMANN CJ:

– which is it's not a nail in a coffin at all but actually suggests that only existing interests can be allowed to continue to harm, because that's typical that people don't, that legislation does not take away people's rights…

MR SMITH QC:

It's a transition – no.

WINKELMANN CJ:

And so it's actually simply a transitional provision allowing for existing interests?

MR SMITH QC:

That's all it is. I hadn't meant to suggest that it was anything else.

WINKELMANN CJ:

Right. Well, you said it was a minor nail in a coffin and a notion that no harm is to be allowed, did you say that?

MR SMITH QC:

Well, I do say that because if there was, if it was correctly to be said that the act absolutely prohibited harm to the environment then existing activities would be somewhat more curtailed than is envisaged by sections 21 to 23. Under those sections in some instances one could have a consent of considerable duration which would allow ongoing discharge into the waters above the exclusive economic zone and the continental shelf. But I'm simply saying that – let's not call it a nail, let's call it a panel pin. It's not that important.

WILLIAMS J:

Well, a permitted activity can be a new activity, can it not?

MR SMITH QC:

That would be an activity for which a consent is sought, if we look at section 20C(2).

WILLIAMS J:

Yes. "However, a person may discharge the harmful substance…

MR SMITH QC:

"Permitted activity or authorised by a marine consent", ie that's what you apply for, these are…

WILLIAMS J:

So that's loops you back to the purpose of the Act and section 59, doesn't it?

MR SMITH QC:

Yes…

WILLIAMS J:

So theoretically you could dump toxic waste provided you can avoid, remedy or mitigate harm to the environment and so protect the environment?

MR SMITH QC:

Well, theoretically that is right. I mean, one would imagine that there would be –

WILLIAMS J:

Well, it might be *how* you dump it, for example. The containers you would use, the protections that you would use around the containers…

WINKELMANN CJ:

The rate of dumping.

WILLIAMS J:

Yes.

MR SMITH QC:

Well…

WILLIAMS J:

But it doesn't exclude 10(1)(b) or 59.

MR SMITH QC:

Except that there has to be protection, and it's a question of what protection means. So it doesn't –

WILLIAMS J:

Quite, yes, that's my point really. It doesn't assume material, let alone extravagant, harm, because you've got to go through the section 59, 10(1)(a), (b) process.

MR SMITH QC:

Correct, yes.

WILLIAMS J:

Okay, all right, good.

WINKELMANN CJ:

Right. So we'd better move on through the rest of the statutory scheme, I think, Mr Smith, because we'll get behind again.

MR SMITH QC:

Right. So, going through the statutory scheme, that was 21 through to 23. So the Act envisages that – if we go to section 20C(2), which I've just been to – one applies for a marine consent and if the marine consent is one which requires a discharge then it's a marine discharge consent, according to the –

GLAZEBROOK J:

Sorry, what section are you on now?

MR SMITH QC:

I'm in section 20C(2), but I just want to make sure that your Honours are aware of what the marine consent incorporates. A marine consent in the definition section of the Act includes not just a marine consent – it's a slightly confusing part of the Act – but it also includes a marine discharge consent or a marine dumping consent. So when "marine consent" is used in section 20C(2), that incorporates, if appropriate, for instance, a discharge consent.

So if there is to be an application for a discharge consent then we go to, as I mentioned before, sections 87A through to J, and under section 87D if it is a discharge consent which is sought all of the factors in section 59(2), except (c), and the effects on human health of the discharge of harmful substances if consent is granted, all of those factors are to be taken into account. So it modifies what one would normally do for a straight-out marine consent with some exceptions, and there are the same considerations for dumping consents but with more exceptions and I'll come to those in a second. So for discharge consents, section 59(2)(a), which remains applicable, requires the EPA to take into account the effects on the environment of the discharge of harmful substances, including cumulative and effects outside the EEZ, and "effect" in section 6 is defined as including adverse effects. That's an express contemplation, we say, that there will be or could be some negative effects on the environment being caused by the discharge for which consent is sought.

The effects on the environment as they affect human health required to be taken into account for section 59(c) for marine consents but for discharge consents it's under section 87D(2) and under 87D(2) it's the effects on human health of the discharge of the harmful substances. So not the activity as a whole but on the discharge of the harmful substances.

Then 59(d) and (e) also require the importance of biological diversity of marine species to be taken into account, not as a governor but a factor. Implicitly some derogation must be envisaged as a possibility because it is a matter which is to be taken into account. It's not to be avoided.

In the case of dumping consents, the position is made clear in an additional way if we go to section 87D(2). That provides, in 87, (2)(b) in relation to dumping of waste or other matter, all of the matters in section 59(2) except this time paragraphs (c), (f), (g) and (i) as opposed to simply (c) are to apply, and in addition the EPA is to take into account alternative methods of disposal that could be used and whether there are practical opportunities to recycle, re-use or treat the waste that would otherwise be dumped. If that is the case then section 87F applies, F(2)(a). So F(2)(a) is "Decision on an application for marine discharge consent," subsection (2): "However, the EPA must refuse an application for a marine dumping consent if the EPA considers that the waste or other matter may be re-used or recycled without adverse effects or without imposing costs on the applicant that are unreasonable in the circumstances.

So it seems clear in my submission from the wider context that the scheme of the Act comes, in my submission, nowhere near to indicating that there is an absolutist approach to protection of the environment. The Act on a cost benefit basis, at least in relation to dumping consents, looks at the prospect of some environmental harm in the face and says that if it's environmental harm which is too costly to avoid by other means because of the imposition or likely imposition of costs which are unreasonable then the consent may be granted. One would think that the EPA would go to some considerable length to impose conditions of every sort imaginable in order to avoid that type of harm but if so remedy it and if not mitigate it. But without getting into the details of type of application you might be concerned with, the fact remains that the Act does specifically contemplate that there may be harm to the environment from at least dumping consents purely on a cost benefit basis. If you were to ask: "Well, how do they work this out?" the answer can only be is that the calculus is done as a matter of broad evaluation and judgment, holistic assessment, by the tribunal or the DMC at the time when it is done in accordance with the evidence which is provided to it. It's not possible, given the breadth of the matters they would take into account and the breadth of the statute, to be prescriptive about precisely what is the right answer on a one-size-fits-all basis. However, if one takes these cases on a case-by-case basis in my

submission it should be evident to an appellate tribunal if a tribunal has in the first instance correctly set out the law but, notwithstanding that it's correctly set out the law, allowed derogation of the environment, which on any basis seems unconscionable or unimaginable, in which case – and I'm taking a deliberately extreme example just to make the point – it may well be that an appellate court takes the view that the DMC has misdirected itself on what the Act means in terms of level of protection. But on an appellate basis arising but from one case, to give the answer across the board for all cases at all points in the future, particularly against what is obviously such generalised litigation and which almost on a generalised basis, quite a non-specific basis, expressly envisages the incurrence of harm to the environment from discharge or dumping consents, in my submission it is equally as hard to hold correctly that the tribunal has gone wrong in law as it is to tell the tribunal what is the correct answer for all purposes.

GLAZEBROOK J:
I'm not sure that I quite understood why it expressly allows harm in relation to dumping because it seems to be providing much greater protection than less.

MR SMITH QC:
Yes, it does, that's the intention, but…

GLAZEBROOK J:
So I don't understand the argument that you're making, I'm afraid.

MR SMITH QC:
Well, the argument that I'm making is that even in the case of dumping consents dumping is permitted in certain circumstances, and there are a number of restrictions.

GLAZEBROOK J:
Sorry, just to interrupt you because I think I now understand your point, you're just saying that it's not totally absolutist as you say the Court of Appeal said it to be?

MR SMITH QC:

Yes, I am saying that, but I'm also saying –

GLAZEBROOK J:

Which, given the issue of materiality, may not have been what the Court of Appeal was saying, despite the passages that you've taken us to.

MR SMITH QC:

Well…

GLAZEBROOK J:

And in fact can I say I would agree with you that it's not totally absolutist, just so that we, that the Act doesn't require it to be absolutist.

MR SMITH QC:

You have my point about dumping, but there is a slight additional gloss which is to say that that is even in the most – I was going to use a better word – but the area of consenting which would provide the EPA with the most concern one would think would be dumping consents, and even in the case of dumping consents the Act countenances harm to the environment. But not only that, it does so on the basis of a cost benefit trade-off, it expressly says so in sections 87F to A, and so any notion that the environment at all costs must be kept untrammelled is just not one which is at all supported by the wider scheme of the Act.

GLAZEBROOK J:

I don't really understand why you say that when it says it must refuse it, F(2)(a).

MR SMITH QC:

"Must refuse an application if the EPA considers that the waste or other matter may be used without imposing costs," so in other words you have to spend some money on it, but if the costs are unreasonable, 87F(2)(a)(ii), then it may well be that you get to dump anyway.

GLAZEBROOK J:

But don't you first say, well, you first have a look at whether you can grant it and then it says: "But you can't grant it in those circumstances." I don't see that it's saying you can under, when you're looking at D and E, do a cost benefit analysis. In fact, it actually excludes those paragraphs that talk about economic benefit under section 59.

MR SMITH QC:

Well, it does exclude it there but it doesn't in relation, in my submission, 87F(2) –

GLAZEBROOK J:

No, that's when you say you have to refuse it even when looking at D and E you've had granted it.

WILLIAM YOUNG J:

But the point you're making is 87F(2)(a)(ii)?

MR SMITH QC:

Yes.

WILLIAMS J:

That's right, and you must refuse it unless the cost of remediation was disproportionately large in which case you might still consider it.

MR SMITH QC:

You might be able to do it. That's my point.

GLAZEBROOK J:

But you first of all have to have decided under D and E that you would have granted it, don't you?

MR SMITH QC:

Well, that may be so –

GLAZEBROOK J:
This is just saying even though you would have granted it, looking at D and E, you must refuse it in these circumstances.

MR SMITH QC:
That's correct but the question is the reasonableness of the costs. We're talking about what the Act has to say –

GLAZEBROOK J:
We're probably not going to agree on this. It just doesn't seem to me to be saying you do a cost benefit analysis. It says you refuse it even if you would otherwise have agreed to it.

MR SMITH QC:
Perhaps we're needlessly at loggerheads. What I'm saying is that there is recognition in the Act that the question of dumping, which is the most serious type of, potentially the most serious type of effect on environment, is one which still involves the question of a trade off.

Then there's the narrower context of the Act and the issue that we have there is that the Court of Appeal says regulation can only be used, well, may be used, only to wholly avoid material harm, failing which there must be prohibition of the otherwise harmful activity and that's my complaint about section 109, and the difficulty with that is, as I've indicated, that it equates regulation with prohibition and I don't need to say more about that. What we say is that it avoids a normal reading of the word "regulation" for a start. It is a more normal reading of the word "regulation" where regulation is textually juxtaposed with the word "prohibition", that regulation means something else and indeed less than prohibition. It's also consistent that regulation would mean something less than prohibition with the cascade of measures which are not implicit but express in section 10(2)(c), namely avoid, remedy and mitigate, and the Court of Appeal's decision makes regulate, and I say prohibition, far too close to being the same thing for comfort.

WINKELMANN CJ:

Well, does it, because it does recognise that prohibition stops the activity whereas regulation stops the harm?

WILLIAM YOUNG J:

Or limits the harm.

WINKELMANN CJ:

Or limits the harm. Limits the harm so that it's not material.

MR SMITH QC:

Justice Goddard's view in the Court of Appeal was that one may regulate so as to avoid the harm and only so as to avoid the harm. If you can't avoid the harm by regulation then his, the dicta in the judgment clearly was that you prohibit the activity. There's nothing between.

WINKELMANN CJ:

Yes, but what I'm saying is he's not equating prohibition with regulation because he's re-using prohibition in relation to the activity, so you prohibit the activity, or you regulate the activity to minimise the harm which is no more than – less than material.

MR SMITH QC:

That is what the judgment should say.

WINKELMANN CJ:

Well, it's how I read the judgment, I must say.

MR SMITH QC:

Well, if we look at 109 of the judgment, what we have is, I think it's the last few sentences, say take the last one: "Section 10(1)(b) recognises that the 'protection of the environment' goal may be achieved in some cases by regulating discharges, rather than prohibiting them. But it is not possible to reason from this" different, watered-down view. I'm sorry, a bit further up:

"The goal of protecting the environment from pollution caused by marine discharges may be able to be met by either regulating or prohibiting the discharge of harmful substances, depending on the context. The goal remains the same: protecting the environment, which as we explained…means keeping the environment safe from pollution caused by such discharges." So that –

WINKELMANN CJ:
And I read into that "material", as I said to you, because it's used so consistently throughout the rest of the judgment, but do you read out of it "material", the word "material"?

MR SMITH QC:
I don't, in what I'm saying about the meaning of that section, I don't take into account the meaning of the word "material" either way. What the aim is, according to the Court of Appeal, is that you regulate for one purpose and one purpose only which is to prevent the harm, and if regulation isn't possible so as to achieve that then you simply straight out prohibit it. That's the difficulty which we face in relation to that.

ELLEN FRANCE J:
Mr Smith, just going back to your unconscionable or unimaginable, if the harm is material does that meet that test or does it have to be something else and, if so, what else?

MR SMITH QC:
The difficulty with the question is that the word – it involves a search for clarity on an across the board basis in relation to the way in which this Act works, as if there is a clear test.

In the scope of an application, the word "material" might be harm which is material because it's worth not having and worth avoiding and yet unable to be avoided but is nevertheless, albeit material, at such a low level by comparison with the economic benefits to be obtained that it is permitted to

occur subject to the full length and breadth of measures to remedy it, short of that mitigate it, and to give an example of why we cannot do better than that is to take an example arising from this application which is that the crawler tractors underneath the vessel, one of the vessels used, in the process of mining, suck up volumes of sand, extract by magnetic process minerals, mostly iron ore, from the sand and return by way of discharge 90% of the volume of the sand back to the sea bed.

Putting aside the sediment plume, the example I was going to give is what that process does to the sea bed immediately under the crawler tractor. It effectively removes most benthic life, which consists of benthic worms and shellfish for the most part, in the immediate vicinity of what the tractor sucks up, just as, for example, a motorway which is being constructed removes forever all life underneath the footprint of the motorway.

When the activity comes to an end, not the consent comes to an end because that runs or is intended to run for 35 years, but when the activity comes to an end in that particular part of the mining permit area, the sea bed, which is well-established in the decision as resilient, begins to recover, and there are a set of conditions to monitor how quickly that's doing it but it is envisaged to recover completely within five years, and so in considering the question of material harm the DMC has to focus not merely on the fact that the benthic life in the sea bed in the immediate area concerned is completely destroyed but take into account also the value of that sea bed life, whether kaimoana collection is significantly interfered with just because of the interference with the life or the sea bed life in that area, how long it will carry on for and what is the length of time over which it will recover, and all those factors, and no doubt more, are considerations which go towards materiality on that one issue, and that is why, because there are scores of issues such as this in the context of this application, that is why it is extremely difficult for the appellate tribunal to give a one-size-fits all decision on what is material or, with respect, out of extreme circumstances to contend that the DMC has misdirected itself.

The next thing I was going to go to is the question of "protect", which is used in verb and noun forms in section 10(1) and section 10(2) respectively. It's unlikely the word has different meaning in each. In section 10(2) "protection" is a relative concept, we say, which may be achieved either entirely, which is avoiding, or relatively, which is remedying, for a period of time, or to an extent, which is mitigating, and those descriptions of the meanings of those words are taken from *King Salmon* at paragraph 24(c). Section 10(1), on the other hand, we say it's extraordinarily unlikely that the word "protect" in contrast is absolute, especially when juxtaposed with the words "prohibit" and "regulate".

So against that background I wanted to focus on the Court of Appeal's reliance on *Mangonui*, which we see at paragraph 85 of the judgment. So at paragraph 85 of the Court of Appeal judgment: "Protecting the environment in this context means keeping the environment safe from harm caused by discharge of harmful substances," that's again an absolute. "In *Environmental Defence Society v Mangonui* –

WINKELMANN CJ:
Mangonui, Mangonui?

MR SMITH QC:
Mangonui. The Court said, referring to the phrase "protection of the coastal environment and margins of lakes and rivers from unnecessary subdivision and development" and the relevant part of the decision has the Court of Appeal saying: "In his careful argument in this Court Mr Salmon put it that "protection" in paragraph (c) is 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. Accepting this apart from the vagueness of "more or less", I am nevertheless unable to accept that the Tribunal have found that the natural environment would be kept safe from injury." So no question that that's what in *Mangonui* the word "protect" or "protection" was to mean. It's a question of whether or not the word "protect" or "protection" in this Act means the same thing.

The text of the provision in which the term appeared is quite different. Looking at *Mangonui,* which is for anybody looking at the hard copy volume, as I am, under tab 43, the relevant page is 259, and 259 at lines 34, 33, 34: "The arguments that we heard from Mr Curry and Ms Elias for the appellants ranged widely but were based on s 3(1) of the TCP which enacts that in the preparation of the district schemes certain matters are declared to be of national importance and shall in particular be recognised and provided for," and they include 3(c), as I've already said. In addition, the context different, and the distinguishing respects are, first of all, textually the words "by regulating or prohibiting" in section 3(c) or elsewhere do not appear as they do in section 10(1)(b) of the EEZ Act, and so that is a textual barrier to the applicability of the meaning of "protect" or "protection" in *Mangonui*.

Secondly, contextually the protection is from unnecessary subdivision and that must cover what work protection is supposed to do in that part of the Town and Country Planning Act. Again contextually in *Mangonui* section 3(1)(c) of the Town and Country Planning Act's protection aim or "matter of national importance" is something which is required to be recognised and provided for, and if that were an operative provision, and which we say it wasn't, that is a stronger requirement than "take into account", which is what the EEZ Act requires in section 59(2). So there's a clear set of understandings about the levels of enforcement, if one likes, between for instance taking into account on the one hand a lower level or less powerful direction as opposed to recognising and providing for at the other end of the extreme.

An example of that which is often cited is the High Court's decision in *Bleakley v The Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) – and I'll just go to that very quickly if I can – it's under tab 35 and it is at paragraph 72. This was a case involving the Environmental Risk Management Authority and genetic modification, and the phrase "take into account" or consider came up for interpretation in that case alongside and in juxtaposition to other statutory requirements to consider prescribed matters. So, paragraph 72: "The first question is what is required in law by the section

6(d)," that was of the Hazardous Substances and New Organisms Act 1996, "requirement to 'take into account'? I do not propose to dwell on other judicial interpretations related to other statutes –

WILLIAMS J:
Can you give me the point in the judgment again, please?

MR SMITH QC:
Paragraph 72. It's High Court, not the Court of Appeal or the Supreme Court, but it's stood the test of time. "The first question is what is required in law by the section 6(d) requirement to 'take into account'? I do not propose to dwell on other judicial interpretations related to other statues. Some do not easily reconcile. On occasions the phrase has been held to require some actual provision to be made for the factor concerned, but all depends on context. In this case context is clear and decisive. There is deliberate legislative contrast between section 5 'recognise and provide for' and section 6 'take into account'. When Parliament intended that actual provision be made for a factor, Parliament said so. One does not 'provide for' a factor by considering and then discarding it. In that light, the obligation to 'take into account' in section 6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision to weigh it up along with other factors with the ability to give it considerable, moderate, little or no weight at all as in the end in all circumstances seemed appropriate." So again this is…

WILLIAMS J:
There's a slight whip in the tail of this case too though, that isn't in *Bleakley* or in *Mangonui*, and that is the word that you're applying is the purpose of the Act, and that means that you have to read 59 and say: "In order to achieve the purpose of the Act, which is in part protection of the environment, you must take into account." So I don't know how these cases actually help us because it doesn't have that double whammy, or they don't have that double whammy that this one does.

MR SMITH QC:

Yes, that's right, but the – I completely accept that's it, but there is a sting in the tail, or the sting of your tail, with respect, which is that when we look at the purpose of the Act that in itself is a broad church, it isn't just protection of the environment, other things –

WILLIAMS J:

Sure, but so is preservation of the relationship between Māori and blah, blah, blah, they're all broad ideas, it's the nature of this area of law.

MR SMITH QC:

Yes, which in – this was the difficulty which, well, in the Court of Appeal judgment, that it has alighted on environmental protection in extreme terms in preference as a paramount consideration to all other considerations, and in my submission that can't be the position.

WINKELMANN CJ:

Right, okay, we'll take the morning adjournment.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.50 AM

MR SMITH QC:

I wanted to come next to the respondents' reliance, not *Mangonui*, but on *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] 1 NZLR 593 (SC) in particular. So the passage which is relied upon in *King Salmon*, appearing under tab 44, is at 24(d) on intrinsic page 617 of *King Salmon*. 24(d) reads: "…the use of the word 'protection' in the phrase 'use, development and protection of natural and physical resources' and the use of the word 'avoiding' in subparagraph (c) indicate that section 5(2)" of the Resource Management Act "contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable

management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management."

So that passage relates to the sustainable management purpose section of the RMA, being section 5, and in *King Salmon* section 5(2) is conveniently set out on the opposing page, 616, at paragraph 22, and it's drafted in similar terms to the sustainable management provision in section 10 of the EEZ Act, including the use of the terms protection, avoiding, remedying and mitigating.

In my submission, this Court's point at paragraph 24(d), the one that my friend, Mr Fowler, in particular, relies on, was that while section 5(2) referred to protection by avoiding, remedying or mitigating adverse effects, some areas require protection in the form of avoiding and avoiding alone, that that by dint of surrounding provisions in the statute was all you could do in relation to some areas, and that is clear from the latter part of 24(d), that is to say the last sentence appearing on page 617 of the judgment: "The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management," not remedying or mitigating, for examples.

We say that in no sense does this Court's decision in *King Salmon* say that protection can only mean avoiding, rather the decision says that that was what was required in that case for a particular area. The particular area which happened to be involved in that case was an area which by agreement amongst the experts who gave evidence at the first stage was ONL, or outstanding natural landscape, isn't the case here.

So in *King Salmon* there was also to be considered the Coastal Policy Statement and that contained policies 13 and 15 and they are set out at

paragraphs 59 and 60. For example, policy 15 at the bottom of intrinsic page 629 says: “Natural features and natural landscapes. To protect the natural,” this is the Coastal Policy Statement policy, “To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development: (a) avoid adverse effects of activities,” that doesn’t – the policy language, it’s a statutory instrument under the RMA, was deliberately to use the word “avoid” as opposed to “remedy” or “mitigate”, and this was not a matter which was to be taken into account but under section 6 of the Act was required to be recognised and provided for. So avoiding and recognising, providing for, wholly different statutory language, and recognised different statutory language than in this case, remedy or mitigating and taking account of.

So for these reasons alone, in my submission, the passage relied on in *King Salmon* simply does not assist your Honours in this exercise. They require the avoidance of adverse effects on ONL, the same for policy 15 as well as policy 16, and the way that the Supreme Court interpreted the word “avoiding” can be seen in paragraph 62, and elsewhere in the decision, but at the end of paragraph 62 on page 631. In this context “avoid” appears to mean “not allow or prevent the occurrence of” and that’s an issue they return to, but in the same terms, in a later paragraph which they mention. Again, we’re not restricted to avoiding in this case, and in addition, under section 67, the New Zealand Coastal Policy Statement, the NZCPS, was not to be taken into account. That’s not what the statute said. It was to be recognised and given effect to, and that’s section 67(3) of the Resource Management Act, and here there’s no requirement to give effect to, only to take account of certain matters under section 59, and I might add that there is no background evidence which sits there which says that the experts had agreed that the area concerned was outstanding natural landscape.

In contrast to *King Salmon*, the protection function of sustainable management, we say, can in this case be pursued through the full gamut of means which are prescribed, being avoiding, remedying and/or mitigating, not

just avoiding, and protect or protection, as already submitted, must mean the same in the two subsections, 10(1) and 10(2).

The next argument that I understand is proposed to be made on this issue is what I would respectfully submit is a rhetorical argument in paragraph 58 of my friend, Mr Fowler's submissions. The question is asked: how could the DMC properly directing itself have concluded that severe harm of the particular type which was isolated in the judgment and repeated at paragraph 58 of my friend's submissions in a particular area of the project area could have been permitted, and that, in my submission, involves looking at that finding in the context of the whole of the decision and the whole of the application. I'm obviously not going to even begin to take you through all of that but there are one or two sign posts which would be of assistance to you.

WILLIAMS J:
Mr Smith, can you just bring the microphone…

MR SMITH QC:
First of all, the first factor is that there was no finding of outstanding natural landscape here. Quite the opposite. If we go to the decision which is under tab 8, first of all the mining area is away from the coast. I understand the nearest point is something like 20 kilometres out at sea. We also see from 201, page 201 of the decision, other information. I'm sorry, it's 07…

WINKELMANN CJ:
It's page 201 of the decision itself?

MR SMITH QC:
It's 201.076…

WINKELMANN CJ:
What page of the –

MR SMITH QC:

Sorry, from the impact assessment is what I wanted to refer to, thank you. It's under tab 36, and if we go to page 201.076.

WINKELMANN CJ:

Tab 26 of what, Mr Smith?

MR SMITH QC:

Tab, it's…

GLAZEBROOK J:

Which volume?

MR SMITH QC:

It's volume 201.

WINKELMANN CJ:

Are we going to 201 at the top of the document?

MR SMITH QC:

No. It's volume 201 under tab 36.

WINKELMANN CJ:

Okay, so what page are we going to?

MR SMITH QC:

It's page 0076, 201.0076, and the relevant part is that relating to maritime navigation. So again, looking at the –

GLAZEBROOK J:

You've probably just lost two of the Bench, so just go back and tell us where we are.

MR SMITH QC:

Sorry, right. It is under tab 36, and it's at the top, it's at page 201.0076, this is the impact assessment, and the paragraph is 3.11.3, "Maritime and Navigation", and that simply tells you that it's a frequently used shipping route. For example, third paragraph under 3.11.3: "A total of 926 movements were detected over the 12-month period –

GLAZEBROOK J:

Sorry, what paragraph number?

MR SMITH:

That is the third paragraph under 3.11.3.

WILLIAMS J:

Page 62.

MR SMITH QC:

It's the intrinsic page 62.

WINKELMANN CJ:

What's the significance of the fact that it's a shipping route? Are ships going by not the same as something being moored there, et cetera?

MR SMITH QC:

It is a busy high-traffic area and so contextually…

WINKELMANN CJ:

Well, define "busy" and "high-traffic".

MR SMITH QC:

That's all I'm saying. And we see this, there are countless indications of this. For example, if we look over the page, 078, which is intrinsic page 64, down the bottom, it's bottom trawl by the fishing industry, and then several pages over, at 081, there are petroleum interests there as well.

The next point I wanted to make, which is again a contextual point, is that the sediment plume, which has been an area of concern, is not one which reaches the coast, and it's difficult to distinguish from background levels. What I want to refer you to there is again the DMC decision and it's at 102.0241, paragraph 34, 33 and 34: "There will be minor effects on fishing and diving within the relevant areas of the South Taranaki Bight as a whole. Other locations, including some that are valued by fishers, will be subject to greater impacts. These are identified and the intensity of the impacts assessed in chapter 5-19. The effect on kaimoana/shellfish are minimal. These filter feeders tolerate high turbidity. The sediment plume will dissipate before it reaches the coast and will be difficult to distinguish from background levels," and, as we will see a little later on, part of the reason for that is that there was such a significant of cliff erosion and sediment being flushed down in the form of silt down rivers as to essentially swamp the influence of additional sediment which may arise from this mining activity or proposed mining activity.

Then staying with the DMC decision a few pages, quite a few pages over, paragraph 232, on intrinsic page 51: "The nearshore areas of the Patea Shoals experience high levels of suspended sediment concentration due to the wave climate resuspending the seabed sediment and from the land, including rivers and coastal erosion. Further offshore, suspended sediment levels are generally low except at seabed level during storm events. Dynamic and variable factors such as wind, waves and sediment runoff from the land and seabed characteristics strongly influence the SSC levels."

Over the page, several pages, to 437: "Areas affected by the sediment plume are likely to include important locations such as The Crack, within five to eight kilometers, and Graham Bank, which is about 20 kilometers downcurrent of the mine. Based on SSC avoidance thresholds for fish provided to us by Dr MacDiarmid, we consider the effect may include either temporary or permanent displacement of species. In the worst case modelled," by him, "an area of approximately 60 to 100 kilometres could be subject to avoidance behaviours by fish and/or a reduction in their prey. Dr MacDiarmid considered

these effects to be 'very small' in the context of the overall distribution of species, meaning that less than 1% of their distribution will be affected."

Next paragraph: "The experts agreed that there may be local effects of mining noise on fish, but acclimatisation by fish to mining noise is likely, and population level impacts are unlikely." Accept that opinion.

Then some pages over at paragraph 724.

WINKELMANN CJ:
Well, you're skipping out some paragraphs, Mr Smith, for instance –

MR SMITH QC:
Some pages over.

WINKELMANN CJ:
Well, 402 and 404, for instance, which talks about a catastrophe loss of benthic fauna, which will be during the course of the recovery and it may, of the excavation, may recover but be different afterwards.

MR SMITH QC:
It does recover. This is the effect that I mentioned earlier in answer to a question.

WINKELMANN CJ:
"Outside the actual mining site, we understand and accept that elevated sediment in the water column and deposition of sediment on the seafloor will have some adverse effects. There may be smothering of organisms, or effects on their respiration. Light may be reduced to the extent that it affects the production," et cetera. So there is – it's not all rosy, is it?

MR SMITH QC:
Not at all. In the – I hadn't meant to give the –

WINKELMANN CJ:

Well, it's just you're taking us to the bits that say it's not going to be significant whereas this is material that says it is going to be, in some areas, significant.

MR SMITH QC:

To be clear, during a question, the answer to a question from her Honour, Justice France, I made the analogy of the complete destruction, or of the reference to the complete destruction of the seabed underneath the area of the crawler tractor but went on, as, for example, one finds underneath the construction of the footprint of a motorway, for instance, and went on to mention that unlike the example just given on a land-based construction that there is in the fullness of time, and it's not just a general remark, that there are conditions relating to the likely and monitored recovery of that part of the seabed.

WINKELMANN CJ:

Yes, but you're taking us through passages which support what you say is the proposition. So sediment plume is not one which reaches the coast and in the sea it's going to be difficult to distinguish from background levels. But that's not entirely consistent with the passages, for instance, about elevated sediment in the water column settling on and smothering creatures, et cetera. So there is a suggestion there is an effect on the overall system which, as Justice Williams says, is a very complex system.

MR SMITH QC:

There certainly is but the point is that just as it's not all rosy nor is it all bad and many of the effects, all of the relevant effects, have been looked at and a great many of them have been found in the round to be negligible, minor, and this is what we see from the paragraphs that I am taking you to. For example, 724, which was the next paragraph I was going to go to and one that my friend, Mr Fowler relies on: "The highest levels of suspended sediment concentration will occur in the coastal marine area," et cetera, et cetera. "There will be severe effects on seabed life within 2 – 3 km of the project area and moderate effects up to 15 km from the mining activity." Most of them

occur in the CMA. "There will be adverse effects such as avoidance … Kaimoana gathering sites … are likely to be subject to minor impacts given background suspended sediment concentrations nearshore."

Then the next paragraph, certain particular areas within the South Taranaki Bight: "… are likely to be adverse effects such as avoidance by fish towards the outer edge … area will at times have significant reductions in light … Kaimoana gathering sites on nearshore reefs are likely to be subject to minor or negligible impacts given that background SSC is typically elevated in the nearshore area. Impacts may be moderate towards the western end of the rohe, but minor or negligible elsewhere."

The point is that the DMC have looked at all of these effects in the round and in context and there's no use just plucking out one area of severe impact. There certainly are areas of severe impact.

938, over some pages, under the heading "Tangata whenua", second paragraph, 938: "The nearest shoreline to the Ngāruahine rohe is north of and over 20 kilometers from the mining site. Even during unusual current and weather conditions, the predicted level of suspended sediment concentrations will be small increments on background levels inshore and will be less than the levels at which potential adverse effects on marine life might occur."

Then 939: "The highest levels of suspended sediment concentration will occur in the CMA offshore from Ngāti Ruanui's whenua. There will be severe effects on seabed life within two to three kilometers of the project area and moderate effects up to 15 kilometers away. Most of these effects will occur within the CMA, adverse effects such as avoidance by fish of those areas, kaimoana gathering, likely to be subject to minor impacts given background suspended sediment concentrations nearshore." And finally, same sort of consideration of other areas, namely The Traps, Graham Bank and The Project Reef: "Kaimoana gathering sites on nearshore reefs are likely to be subject to minor or negligible impacts given the background SSC is typically elevated in the nearshore area.

And then 955 and 956 over the page: “The main potential for cumulative effects arises in relation to suspended sediment. Regardless of the existing sources, mobilisation of sediment is an ongoing process. The oceanographic and climate regimes in the STB lead to an almost continuous suspension and re-suspension. Within this context we accept that the sediment plume will be a cumulative addition to the existing background level. At some times and in some locations this will cause adverse effects. Although the sediment plume will be the main contributor to cumulative impacts, we consider the potential for that type of effect to occur in relation to all other aspects of proposal.”

Then before we go to the summary at the beginning, 959: “Our principal findings are: activities on land contribute to elevated background levels of SSC and this is an environmental issue unlikely to be resolved in the near future; the commercial fishing industry, especially bottom trawling, may have some effect on benthic disturbance but the effect is not on the same scale as the mining operation or its associate plume; oil and gas exploration poses a widespread risk of disturbance to marine mammals through noise.”

So these things are all taken in context and then their overall effects summarised at the summary of the decision in a number of paragraphs. There is paragraph 15 at bundle page 239, intrinsic page xiii at the bottom: “The impact of most effects will be felt at a localised scale. For example, the mining operation is not assessed as having any significant effects on fish at a population level. Impacts on the number of fish at particular locations within the CMA and the EEZ however will range from no effect –

WINKELMANN CJ:
Sorry, can you just tell me where you are again, Mr Smith? I just lost that.

WILLIAMS J:
Right at the front of the DMC decision.

WINKELMANN CJ:
Right, I've got it.

GLAZEBROOK J:
Not that I can find. Where?

MR SMITH QC:
0239, your Honour, is the page in the bundle.

WILLIAMS J:
So it's the summary at 102.0240, 0239?

MR SMITH QC:
Yes. The numbering of the DMC's decision is –

WINKELMANN CJ:
Complex.

MR SMITH QC:
I'm glad I don't have to defend that. Then there's 33 and 34 over the page: "There will be minor effects on fishing and diving within the relevant areas of the STB as a whole. Other locations, including some that are valued by fishers, will be subject to greater impacts. These are identified and the intensity of the impacts assessed in 5-19. The effects on kaimoana/shellfish are minimal. These filter feeders tolerate high turbidity. The sediment plume will dissipate before it reaches the coast and will be difficult to distinguish from background levels."

So I can't pretend to have given you anything like a complete background to all of the exceptional detailed evidence in submissions and factual adumbrations in their decision which the DMC made. But at least on the basis that I have put before you, that is a somewhat more balanced approach than looking purely at a severe effect in one area which is drawn with all, in fairness to my friend, from the Court of Appeal's judgment as a severe effect

in one area and therefore there isn't avoidance of protection and that is required as an absolute.

So then as to temporal issues, I have already covered in that in part and in answer to her Honour, Justice France, describing that the process moves over the seabed and it recovers after a period of time. But the best paragraph to get a short and sharp summary of that is paragraph 25, which I won't take you to, of the summary that I've just taken you to which is at that bundle, 0239, paragraph 25.

So where we end up on statutory purpose in my submission is that we did have in New Zealand prior to *King Salmon* and *Save Our Sounds* a body of jurisprudence which said in relation to some statutory, environmental statutory contexts, what was required was the exercise of an overall judgment by the decision-making committee, and that indeed was exactly what was under discussion in *King Salmon*. It was all – an example in *King Salmon* of that type of approach to the weighing up of the statutory considerations, that is to say overall consideration or broad overall judgment, can be seen from the cases which are set out in *King Salmon*. They include, for example, Justice Greig's decision in the *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) decision concerning the construction of a coal facility at Westport.

In the context of the RMA and the New Zealand Coastal Policy Statement in that case it was held that there could not be, in that case, the exercise of broad overall judgment because the Act and the New Zealand Coastal Policy Statement specifically said that because there was outstanding natural landscape the effects which were under view had to be avoided and there was no use considering mitigating or remedying.

And so that was an end for the purposes of legislation of that sort of the overall judgment approach. But the EEZ Act came into effect prior to *King Salmon* and the approach which the DMC is required to follow, whether anybody likes it or not, in my submission, is the overall judgment approach

and that is why it is not nearly difficult or a struggle for an Appellate Court to come to a view as to what is a one-size –

GLAZEBROOK J:
Can I just check why you say that? So how do you distinguish the – what do you say distinguishes the context because *King Salmon* didn't just say "only because it's natural". It said that the overall judgment approach is not right. You have to take into account all of the purposes of the Act. That's the point about it.

MR SMITH QC:
Yes.

GLAZEBROOK J:
You can't just say one of those purposes can be overriding.

MR SMITH QC:
The reason why it wasn't right was because of the wording of the statute and the relevant instruments which were required to be looked at in *King Salmon*.

GLAZEBROOK J:
Well, that's true except that the – wasn't the bottom line that you look at the purposes of the Act and all of the instruments have to fit within the purposes of the Act?

MR SMITH QC:
Yes.

GLAZEBROOK J:
And you can't take an overall judgment approach which ignores those purposes, and isn't that all the Court of Appeal is saying here, that you have to – apart from the issue of what is actually required by 10(1)(b)?

MR SMITH QC:

No, I'm saying that *King Salmon* decides what it decides which is the use of the overall judgment approach in relation to statutory considerations which clearly conflict, and they did in that case, because –

GLAZEBROOK J:

Well, what's the difference, if you're looking at the purposes here?

MR SMITH QC:

Well, because in *King Salmon* there was no room to move. You were required under section 67 of the Act to give effect to the New Zealand Coastal Policy Statement. The New Zealand Coastal Policy Statement said in policies 15 and 16 if it is outstanding natural landscape then you will not remedy or mitigate out of the three tools that you have under section 5(2) to deal with adverse effects. The second two of them simply aren't available. All that you can do –

GLAZEBROOK J:

But don't you have to go the step back in *King Salmon* with that?

MR SMITH QC:

Well, I would –

GLAZEBROOK J:

So, yes, of course we looking at the Coastal Policy Statement but don't you go the step backwards from that, in terms of the decision generally saying that's been the wrong approach, is the wrong approach when you you've got conflicting values?

MR SMITH QC:

No, I'm not saying it's the wrong approach. There is no conflicting – a part of the ratio of *King Salmon* is to say because of what the Act says in section 5(2) and section 6 and because of what the New Zealand Coastal Policy Statement says and because, factually, this is an area of outstanding natural

landscape, “you will avoid” and “avoid” means protect, or “avoid” means not allowed to happen. And so that means that the overall judgment approach is simply not available in those circumstances. But in this case the full panoply of avoidance, remediation and mitigation, plus regulation alongside it, is thoroughgoingly available, nothing is prohibited, and that means, in my submission, that it will be an unrewarding struggle to find an answer to how the EEZ Act works, and after all its first iteration pre-dates *King Salmon…*

WINKELMANN CJ:

Can I just ask you a question, which is zooming back out from *King Salmon*? If one looks at the purposes of the legislation, how does your evaluative approach which allows a trading off of protection in favour of economic development, how does that serve the purpose in section 10(1)(b), is it actually likely to further the purpose of protecting the environment from pollution through dumping or discharge of harmful substances and dumping or incineration, or is it in fact likely to enable it, you can just purchase the right to purchase it effectively – and I’m not saying buy it, Mr Smith – I mean the economic benefit, purchases the right to pollute?

MR SMITH QC:

It serves its purposes when the purposes are understood in the context of the section as a whole and not plucked out and said “we must protect”. This is the problem –

WILLIAM YOUNG J:

But the crux of it is, isn’t it reasonably simple? If “protect” means protect against any material harm, then that’s what the purpose is and you can’t trade off. If, on the other hand, “protect” includes a range of protective measure from partial to almost complete to complete and materiality can be balanced against economic benefit, then there’s no conflict, it all comes down to what the subsection means, doesn’t it?

MR SMITH QC:

That is exactly the position, Sir, which highlights in a sentence the danger of alighting on the word “protect” in isolation to other considerations, and particularly highlights the danger of interpreting section 10 in a way which is somehow strictly consistent jigsaw-wise with resource management legislation. We are looking at a statutory purpose which is quite different from, in the way it’s expressed and in the circumstances, than what we find in *King Salmon.*

WILLIAMS J:

But it does mean that’s where you fight your battle.

MR SMITH QC:

On…

WILLIAMS J:

In the meaning of 10(b)

GLAZEBROOK J:

Yes.

WILLIAMS J:

We need to hear all your best shots about that issue, because that's where the battle is to be fought.

WINKELMANN CJ:

Unless you’ve already given us your best shots. Because we don’t want to hear them repeated.

MR SMITH QC:

I have submitted that the question of protection is a relative and the extent to which you have to do it is modified or qualified by the rest of the words in the entire section. Firstly, in section 10(1)(b) itself you regulate it, you don’t just prohibit it, and you can’t interpret “regulate” as only meaning prohibiting,

otherwise you are reading down the word “regulation” to mean only prohibiting.

WILLIAMS J:
But it all comes down to what “protect” means.

MR SMITH QC:
And it comes down to what “protect” means. But before we get to that we have to bear in mind that it is used also in the sustainable management definition at section 10(2), it uses the word in the second line, “protection”, but in my submission it should self-evidently have been within Parliament’s intention that the word “protect” in both subsections couldn't have been meant differently, and yet in relation to “protection” –

WILLIAMS J:
Well, I don’t think it does. You see, in (2) “protection” is a counterpoint to “economic wellbeing”. In 10(1)(b) it’s not. So the question then was if you do not have an express counterpoint in 10(1)(b) are you entitled to measure it against something other than protection?

MR SMITH QC:
We must be entitled to measure it against the wording of the provision – putting aside the Act – but the wording of the provision, as a whole.

WINKELMANN CJ:
Not measure it against but construe it in the context of…

MR SMITH QC:
Construe it, I’m sorry, I meant construing against the words in the provision as a whole.

WILLIAMS J:
Yes. But you see what the skilful working through of those words has you in fact inserting economic wellbeing into mitigation, avoidance and remediation,

a phrase that's not there. You see, if avoidance, mitigation and remediation can only be applied for the purpose of protecting then you don't have your balancing game.

MR SMITH QC:
Unless I've misunderstood you, Sir, the words in the first line of section 10(2), "use" and "development", must necessarily contemplate economic use and development.

WILLIAMS J:
10(2)?

MR SMITH QC:
10(2).

WILLIAMS J:
I'm talking about 10(1)(b).

WINKELMANN CJ:
Because 10(2) is not part of 10(1)(b).

WILLIAMS J:
10(2) is talking – "protection" is there, but it's talking about protection balanced against something else. 10(1)(b) does not have the balance in it.

MR SMITH QC:
But the point is we get closer to 10(1)(b) by going to 10(1)(a) and it specifically refers to "sustainable management of natural resources", "sustainable management of natural resources is defined at section 10(2)…

WILLIAMS J:
Sure. But you're stuck with 10(1)(b) which says but if you're discharging there is no express balancing game, you must protect the environment and do all you can to avoid, mitigate and remedy.

MR SMITH QC:
But that –

WILLIAMS J:
So the question then becomes how big is avoiding, mitigating and remedying such as to be consistent with protection? That's where this game has to be fought.

WINKELMANN CJ:
And I think we've heard you on that. But can I just ask you one question, which is something to do with the structure of your submissions? Because of course when you're construing this legislation, it's purpose, one has regard to the international instruments that it's implementing, but you're cutting that off in the way you've structured your submissions today from that.

MR SMITH QC:
I am very largely basing it on the, entirely basing on the Act as we see it. Although we do have to look at –

WINKELMANN CJ:
But can you do that?

MR SMITH QC:
– the international instruments in relation to, for instance, favouring caution to see if there's anything that we can learn from that.

Now I'm getting to the point where it's possibly a little short on time, but I wanted –

WINKELMANN CJ:
We'll stop interrupting you too much.

MR SMITH QC:
I want to deal with the second issue about error of law, and I just want to talk quickly about where the parties seem to be at odds about that.

In my submissions I have said that if we follow *Edwards (Inspector of Taxes) v Bairstow & Anor* [1956] AC 14, which is in turn already cited with approval and followed in *Bryson v Three Foot Six Limited* [2005] 3 NZLR 721 (SC) in this Court and also in *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2012] 3 NZLR 153 (SC) then you would find that there's an error of law if it is, to quote *Edwards v Bairstow*, ex facie on the face of the record or, alternatively, if it's not apparent on the face of the record, if the decision which the Tribunal has come to, including a decision on the facts not just on the question of law, is one which no tribunal could, properly directing itself, have arrived at, then it can be interpreted or implied that there was an error of law.

In my submission the Court of Appeal has gone into a factual evaluation of the material in front of the DMC and has called what in my submission could only be an error of fact – if it was an error of fact, and we certainly don't concede that for a moment – an error of law, and we say that the DMC plainly did direct itself on the Act's purposes fully and completely. The paragraphs that we see are in the DMC's decision –

WINKELMANN CJ:
Well, the whole thing sets out with reference to the purposes, doesn't it?

MR SMITH QC:
It sets out the entire relevant part of the Act in the summary, for example, at –

GLAZEBROOK J:
But you accept if they'd set out the purposes and then just ignored them, that would be an error of law and isn't that what the Court of Appeal said they didn't, that they didn't take into account the purpose at 10(1)(b)?

MR SMITH QC:

If you set out the purposes and just ignored them, that would be an error of law. You'd have to be satisfied that it –

GLAZEBROOK J:

Well, isn't that what the Court of Appeal said they did? Now you might be, they may or may not be right in that.

MR SMITH QC:

There's got to be a – if – well, it's a cascade.

WINKELMANN CJ:

That must be right, Mr Smith. You have to not only set out the test but then correctly apply it.

WILLIAM YOUNG J:

Isn't it clear…

WINKELMANN CJ:

Well, can I just let Mr Smith answer me?

MR SMITH QC:

First you have to, you should set out the law and of course we don't need to worry about that here because they do. Secondly, it is not enough to give lip service to the law and think that you can set it out and then set yourself free to do whatever you like. But it is a bad start for any appellant on the question of law if the law has been set out correctly. They are then thrown into the next in the cascade of two levels which is to say, all right, it's been set out properly but I can deduce from the decision which has been come to that they must have misdirected themselves, in which case there is an onus on an appellant to say how that misdirection came about and what it was, and in my submission we haven't arrived at that position here and that is simply what is set out in my written submissions on the subject.

WILLIAM YOUNG J:
But if section 10 means what the Court of Appeal thought it meant, the DMC almost certainly was wrong, wasn't it?

MR SMITH QC:
Yes, that's right, if –

WILLIAM YOUNG J:
Okay, so why are we arguing about this?

MR SMITH QC:
If the – the reason why we would be arguing about it is that if the purpose in section 10(1)(b) is not absolute or if somehow the Court of Appeal was in fact saying the protection purpose was not absolute, which is unlikely, then there is no error, but I accept that if we, if TTR were to come home on the question of interpretation then there is a reduced need to look at error of law.

WILLIAMS J:
Isn't Justice Young right that there's no need to look at it because you just conceded that if the Court of Appeal is right on the test then they're right on the result too?

MR SMITH QC:
You would have to be satisfied that the DMC did make the error complained of and…

WILLIAM YOUNG J:
It's clear –

GLAZEBROOK J:
Well, they've put all the –

WINKELMANN CJ:
Yes, it's hard to say otherwise.

GLAZEBROOK J:

If put everything in the pot and take a holistic approach is not right then they made an error of law. If it is right, they didn't. So it all depends on your first argument, doesn't it? I think that's what's been put to you.

MR SMITH QC:

I concede it largely depends on the first argument.

WINKELMANN CJ:

There's one point just before we –

WILLIAMS J:

Good. We've gained some time then, Mr Smith.

WINKELMANN CJ:

Yes. Just before we move off error of law, however, I did notice that the DMC refers quite often to the decision of Justice Chambers in *Ngāti Rangi Trust, Tamahaki Inc Society and Whanganui River Māori Trust Board v. Genesis Power Limited and Manawatu-Wanganui Regional Council* CA518/2007 [2009] NZCA 222 and that, of course, had a different statutory provision. It didn't have a 10(1)(b) condition in it at the time, so – and they don't seem to note that.

MR SMITH QC:

No. Well, they don't seem to note it but, I mean, again that's a – you can't tell from that that they have necessarily erred in the way that they applied the Act, and my focus is rather more on what the Court of Appeal did as opposed – there will be some infelicity of expression, of course, in the DMC decision even then.

WINKELMANN CJ:

Well, yes, okay. Well, I mean I see it as more than infelicity of expression but I'm just giving an opportunity to comment upon it.

MR SMITH QC:

The next subject is the question of favouring caution and again that's a topic which can lend to an enormous amount of discussion. There is always a way to contend that there was not enough favouring of caution or more should have been exercised and that is particularly if a broad or permissive approach to error of law is taken. But there are four points which in my submission lend shape to this part of the debate. The first is the relevant part of the Court of Appeal's decision. The second is what the legislature meant by caution. The third is what the DMC actually did and the fourth is that favouring caution does not automatically mean or entail that an application is declined.

So the first point is the relevant part of the Court of Appeal's decision which is at paragraphs 130 and 131. So, "We consider that the High Court," the Court of Appeal said, "erred in failing to find that the incompleteness of information and resulting level of uncertainty in relation to TTR's application required refusal … unless the DMC was satisfied notwithstanding that uncertainty that conditions could be imposed that would protect the environment from pollution caused by discharge," and then further down, 131, third line: "The DMC failed to make the connection between the requirement to favour caution and environmental protection in s 87E(2), and the objective or protecting the environment from pollution caused by discharges in s 10(1)(b). If there is a real prospect that a marine discharge will result in material harm to the environment, then whether or not that harm could subsequently be remedied or mitigated, the grant of a consent would not be consistent with the requirement to favour caution…"

So it's therefore clear that the Court of Appeal's decision on favouring caution is linked to and depends also on its view on statutory purpose and, in particular, it's view of what "protect from pollution" in section 10(1)(b) means. So if the Court of Appeal's view on the meaning of 10(1)(b) is right then its view about caution could be correct as well. That is, it is necessary to avoid adverse effects on the environment rather than merely remedying them or mitigating them and regulation may be undertaken but only to wholly prevent harm, failing which there must be prohibition, and the more strict the obligation

to protect from pollution the more significant is any lack of information or uncertainty and therefore the greater the need to apply caution.

But the problem is that the Court of Appeal's view of the DMC's failure to apply caution is dependent on it being right about the effect of the statutory purpose, 10(1)(b) being correct, and if it's not then in my submission the favouring caution issue falls away. It becomes necessary to show the DCM failed to favour caution against a much less demanding standard and that becomes difficult to do.

The second issue about favouring caution is that it is intrinsically flexible. The Act does not use the term "precautionary principle". This is referred to in paragraph 99 of my submissions and it deliberately uses the term which is employed in the Act and that's because of uncertainty and dispute surrounding the concept of "precautionary principle" as that phrase is used in the Rio Declaration and the London Convention and other literature.

If we look at volume 2 of the authorities there is a reference to the Hansard debate on this very part of the Act. It's under tab 15 and the debate is one that took place on the 21st of August 2012 and the relevant passages appear on page 4601, the first speaker being the Honourable Member Grant Robertson and then the Honourable Dr Nick Smith: "Let me explain. The great difficulty with this bill is rather than talking about the precautionary principle, it says that 'the Minister must favour caution and environmental protection.' So the great big contribution to environmental protection in New Zealand is an argument over whether the words 'must favour caution and environmental protection' –

GLAZEBROOK J:
We're having difficulty finding where you are, at least I am, so…

MR SMITH QC:
I'm sorry. It's under tab 15.

WILLIAMS J:
Whose legislation was this?

MR SMITH QC:
National's.

WILLIAMS J:
No, no, I don't mean which party. I mean which Minister.

MR SMITH QC:
I think it was Amy Adams, Minister.

WILLIAMS J:
Why are we worried about what Dr Smith thinks then?

MR SMITH QC:
Why are we worried about?

WILLIAMS J:
What Dr Smith thinks.

MR SMITH QC:
Well, Dr Smith had a relevant portfolio at the time and he was – sorry, I think that it was primarily Dr Smith's legislation, I think, it certainly wasn't just the Minister Adams who was involved. He held the environmental portfolio at the time.

WILLIAMS J:
Who did?

MR SMITH QC:
Dr Smith, as I recall.

WILLIAMS J:
No, Minister Adams was the Minister for the Environment, according to Hansard, and she's the one that seems to be leading the debate for the Executive.

MR SMITH QC:
Well, I know that Dr – I can't say from the Bar how much involvement Dr Smith had but, as I understand it, he did have involvement in the promulgation of the legislation, he wasn't a ring-in on the day during the parliamentary debates.

So, the passage that I wanted to refer to is at the top of that page, 4601, and then again under the second interjection from Mr Robertson, several lines down: "If you look through the Court decisions on those that have chosen to put that precautionary principle, it creates huge uncertainty. I commend the Minister. The language we have in this Bill could not be more plain, could not be more plain than simply saying that the Minister must favour caution and environmental protection where there is uncertainty. How could it be more clear than that?

So the third point is what the DMC –

GLAZEBROOK J:
How does that help you?

MR SMITH QC:
Well, what it says is that those promulgating this, the provision, thought that there was a reason why the word "precautionary principle" would not be used and in its place the word "favour caution" was used.

GLAZEBROOK J:
But doesn't that widen precautionary principle rather than narrow it?

MR SMITH QC:

What it means is –

GLAZEBROOK J:

It would be inclusive of a precautionary principle rather than – and in fact the precautionary principle is actually saying that you take measures to mitigate, even if you're not sure that they will have a mitigation or avoidance effect, so it's actually narrower than what they're saying here, isn't it?

WINKELMANN CJ:

Yes. But isn't Dr Smith simply saying this is better than the precautionary principle in terms of protecting the environment? That's what he seems to be saying at the end of paragraph 1.

GLAZEBROOK J:

But that was what I was suggesting, so that it's actually – I can't understand why that favours what you're saying rather than actually makes it worse.

MR SMITH QC:

The purpose of my mentioning the passage from Hansard is that by and large it is sufficient to in my submission interpret the Act on its own terms, according to the words that it has, as opposed to getting into interminable debate about what are the meets and bounds of the precautionary principle.

WILLIAMS J:

Well, he seems to say when in material doubt protect the environment.

MR SMITH QC:

Well, he's saying favour caution, is what he's saying there.

WILLIAMS J:

Well, favour caution and environmental protection.

MR SMITH QC:

Correct.

WILLIAMS J:
The caution is to protect the environment. So, I mean, it's not rocket science, is it?

MR SMITH QC:
Well, no, that is –

WILLIAMS J:
And does the precautionary principle get you any further?

MR SMITH QC:
It is not rocket science, and that is my point. There is a tendency to spend far too long on the issue of the precautionary principle and what's said about it in international literature. All that is required to be done is to follow the direct words of the statute, and the words of the statute, by departing from the use of the words "precautionary principle", if anything, tended to indicate that New Zealand's, there should be a straightforward application of care, that's all it means.

Then, third, what the DMC actually did. It went out of its way, we say, to consider the requirement to favour caution, and I there refer to all of the relevant passage in the DMC decision, starting at 102.0250, that is the part of the decision that you find what they said about precaution –

WILLIAMS J:
What's the intrinsic page? I haven't got a hard copy

MR SMITH QC:
It is 102.250, and the intrinsic page is 8. Yes, 8.

GLAZEBROOK J:
It's in the summary, isn't it, that you…

MR SMITH QC:
It's in the summary.

WINKELMANN CJ:
Page 8, isn't it?

GLAZEBROOK J:
In the summary at the beginning.

MR SMITH QC:
And it goes into some detail about the precautionary principle. So we say that if the Court of Appeal's decision on statutory purpose imposes too onerous a burden then it follows that the degree of caution which the Court of Appeal might have had in mind that the DMC should exercise is too high. On the other hand, if the appellant is right then the DMC made no error of principle and the respondents are stuck with a largely factual argument or disagreement over the adequacy of the conditions imposed to achieve environment protection, and that can't be a ground of appeal unless the likely resultant degradation is so extreme that no reasonable person properly directing themselves could countenance it or come to the same conclusion.

We can easily deal with favouring caution simply by looking at it in those terms. If the degree to which you have to favour caution is conditioned by the Court of Appeal's decision in respect of statutory purpose and if the Court of Appeal have got it wrong then in my submission the "favouring caution" argument falls away as well.

Finally, of course, the fourth point is that favouring caution does not entail declinature necessarily and as I apprehend it that's common ground.

The next point I wanted to go onto is bond or insurance and the question of whether there should be a bond or insurance. It comes towards the end of the DMC's decision at page 1071. Sorry, paragraph 1071. It's at page 102.463.

WINKELMANN CJ:

Can you just give us that again? I'm confused by the numbers. What page number?

MR SMITH QC:

It's in the bundle 102.0463.

GLAZEBROOK J:

Page 221 of the…

MR SMITH QC:

Page 221, yes. So the issue is whether the DMC misdirected itself by thinking that the two were interchangeable. We accept that the DMC's decision on the matter is relatively summary. That can't be denied. But then again so were the High Court's and, with the greatest respect, so too was the Court of Appeal's. We say that there is no direct evidence that the DMC misdirected itself or did so expressly. It says at paragraph 1074 at the bottom of page 221 that given the insurance TTR would have in place there was no need for a bond in addition but it said that it reached that view "having regard to the circumstances of the application, and taking into account the legal and technical advice that we received", and in addition it had received advice regarding a bond and the portion of the advice it recorded didn't seem on the face of it to conflate bond with insurance. That's why KASM and Greenpeace in its submissions appears to rely on an inferred misdirection, that is to say of the sort that we see in *Vodafone* at paragraph 52. In other words, "… an ultimate conclusion of a fact-finding body can sometimes be," to quote Vodafone, "so insupportable – so clearly untenable – as to amount to an error of law," and then as I understand it KASM and Greenpeace rely on *Edward v Bairstow* as they say the decision is said to be one in which the true and only reasonable conclusion contradicts the determination.

The problem with that submission is that the DMC did not say that the two, bond and insurance, were the same, and in my submission there's no evidence that they thought they were. Rather, they said that because of the

circumstances of the application and because of the technical and legal advice they had received that a bond wasn't necessary in addition, that could have been, and on the face of it probably was, that they did not think that the risks associated with the performance of the works required a bond. Because for the DMC to be shown to be wrong it would have to have been shown to the High Court and the Court of Appeal that on a circumstantial and technical, ie a factual basis, the risks associated with carrying out the work had a such a prospect of uninsurable losses as to make it necessary for the EPA to have security in the form of a bond as well. So we say that the Court of Appeal's decision is incorrect. As it says, the DMC needed to turn its mind to whether a bond should be required in order to achieve those objectives, having regard to the risks such a bond would address and any countervailing reasons for not having a bond and that it didn't do so, we simply say the Court of Appeal had no basis for saying that it didn't do so. On the contrary, it said that it had received factual and technical and legal advice, which would have been relevant to its apprehension of the extent of the risks and its decision whether or not those risks required security in the form of a bond. There isn't, in my submission, an error of law on the face of the record nor one to be inferred.

The next is the –

WINKELMANN CJ:
Does the legal advice identify that some of the risks are uninsurable?

MR SMITH QC:
Not that I have seen. I don't think I need to go back and read it again, but –

WINKELMANN CJ:
Are you saying that therefore the Court of Appeal just provided that legal analysis on its own?

MR SMITH QC:

Well, it has, with respect – really what would have to be shown is that given that the DMC hasn't clearly misdirected itself it must have inferentially misdirected itself. To establish that one would have to look at the facts and say: "Here is a risk which could occur and here is the magnitude and here is the cost of fixing it up, and it's uninsurable, and therefore there should have been a bond."

GLAZEBROOK J:

Well, do we know what the insurance requirements were, do we know what the insurance covered?

MR SMITH QC:

Five hundred million – I know the level of the insurance and it was

WINKELMANN CJ:

Mr Smith, it does seem like you could draw an inference, as the Court of Appeal did, if there was information about what insurance could not cover, that it would be wrong to say that a bond is not necessary.

MR SMITH QC:

I don't recall that there was any evidence or any information about the terms of the insurance policy other than the amount of the cover, which is immaterial for now but I believe it was 500 million, but I may not be correct on that. My point is a different one. The point is that if you were saying that you might have needed a bond then there had to be evidence of some risks which could occur and were serious, would cost a great deal to fix and which couldn't be covered by insurance. Now it was open to the –

GLAZEBROOK J:

Well, wouldn't you know to know if you were saying: "We don't need a bond because it's covered by insurance," what was covered by insurance? I think you've got it the wrong way round.

MR SMITH QC:

No, they're not saying that it's, they're not saying –

GLAZEBROOK J:

But the DMC, wouldn't they have to know, they'd have to say: "Look, there is no way, given the insurance that we're requiring is kept in place, that there's going to be a need for a bond"?

MR SMITH QC:

All they have said is the words "in addition to the insurance" and that's not to be inferred from that that they think that the insurance covers absolutely and utterly everything. And DMC were entitled, if they thought that the types of risks which might occur, which might be uninsurable, were ones which were not particularly significant and therefore in its own terms it didn't require a bond. It then adds as an afterthought "in addition to the insurance which has already been provided". It's not –

WILLIAMS J:

Well, the question is really whether in pursuit of the purpose of the Act it was incumbent on the DMC to determine what was covered by insurance in order to determine whether further protection was necessary?

MR SMITH QC:

Only if you read the words "in addition to the insurance which have been obtained" as meaning that the DMC necessarily thought: "Oh, we've got insurance, we don't need a bond." I'm submitting that's not the case.

GLAZEBROOK J:

No, I think what's being put to you is shouldn't the DMC say: "What is the insurance that is in place and is that then sufficient?" and did it ask itself that question? Because if it didn't know what insurance was in place and just knew the level of it then it clearly didn't.

MR SMITH QC:

No. They could have decided that there was no need for a bond, irrespective of what insurance was in place, because they have taken into account the technical and legal information, ie evidence that they've been given. They have decided –

WILLIAMS J:

But you said none of that covered this issue.

MR SMITH QC:

No. Well, sorry, there is no reference in the decision as to how at that point they calibrated the risks which could come out of the project, what they would be, how serious they would be, what they might cost to…

WILLIAMS J:

Well, I think you'd be on strong ground if the advice they received or evidence about the matter addressed the issue and could be properly construed as indicating there was no issue but you're not pointing us to that.

MR SMITH QC:

No, the advice that they received is the advice that they refer to in the decision and it doesn't cover then, it doesn't cover the connection, or should I say the interface, between bond and insurance. It doesn't concern itself with that issue at all. I'm saying something which is quite different. What I'm saying is that it's not to be taken from the decision that the DMC thought: "We've got insurance, therefore we don't need a bond." All it has done is said: "We've taken into account technical and factual and legal evidence," which is the whole of the application they've been taking into account, "and we've decided we don't need a bond in addition to the insurance." That doesn't mean to say that they thought that the insurance covered everything. They could just as easily have come to the conclusion that the magnitude and type of risks were not ones that they needed to be concerned about such that a bond at any level was required.

WILLIAMS J:
But you see, in order to come to that conclusion they needed to know what was covered, otherwise you couldn't possibly reach that conclusion.

MR SMITH QC:
No, they didn't. No, with respect, they didn't need to know that. They could have been satisfied that TTR were putting in place an insurance policy, and no doubt with the Insurance Law Reform Act if anybody went broke then anybody could inherit the benefit of that in the fullness of time.

But a bond is for a different purpose. A bond just provides security. So irrespective of any insurance or the financial welfare of TTR, the Council or public body or other entity holding the bond can avail itself by calling the bank bond up, no questions asked.

WILLIAMS J:
Right, but you see there's a –

WINKELMANN CJ:
I've think we've probably exhausted –

WILLIAMS J:
Can I just – I haven't exhausted myself yet.

WINKELMANN CJ:
But we're going to exhaust the time is my concern.

MR SMITH QC:
Nearly exhausted me.

WILLIAMS J:
So let's go back to first principles. The job under 10(1)(b) is by avoiding, remedying and mitigating to protect the environment.

MR SMITH QC:

Yes.

WILLIAMS J:

A bond or insurance is about remedying in the event something goes bad, right? Having enough money to do that.

MR SMITH QC:

It would be.

WILLIAMS J:

So the DMC had to think whether the protections in place would effectively remedy if something went wrong.

MR SMITH QC:

Yes.

WILLIAMS J:

In order to know that, they had to know what remedies were going to be provided. It doesn't seem that they did.

MR SMITH QC:

That's exactly what they did know, with respect. They knew that there was a suite of something in the order of a hundred conditions, each of which was carefully calibrated to attenuate risk and that was –

WILLIAMS J:

I'm talking about the insurance bit. Insurance as a remediation issue.

MR SMITH QC:

Irrespective of insurance, and so it was open to them to decide, bearing in mind what are the intrinsic risks, on the one hand, and our view about how, what magnitude they have and what they are and whether they're really all that serious. It could be that they would have taken the view that a tractor crawling over the bottom of the seabed actually, in terms of environmental risk

which costs a great deal of money which you would have to avail yourself in the forms of millions of dollars worth of bond money from a bank, is simply unnecessary and it needs to be established if it's said that a bond is required for protection purpose of the environment that the risks that were being looked at were of a nature which (a) were significant and (b) could not be attenuated by the conditions, and that's what they're talking about when they say in the section of their decision about the bond that they have taken into account the technical and factual and legal aspects of the application, bearing in mind the technical and factual evidence we have received. The question is whether that was too short and cursory and are we concerned that they might have overlooked something when they put quite a lot and made that sentence do a lot of work. To consider that they were wrong when they used that sentence as a matter of law you have to make an inference that they have made a mistake of which there is in point of fact no evidence to believe it was made and quite the contrary, given all the conditions that we've seen and the lengthy, lengthy decision and all the evidence they had, they might well have come to the conclusion that there just wasn't a problem which required a bond.

WILLIAMS J:
You've exhausted me now.

WINKELMANN CJ:
I think…

ELLEN FRANCE J:
I was just going to say they did know that it was a hundred million…

WINKELMANN CJ:
500 million, wasn't it?

WILLIAMS J:
500 I think.

MR SMITH QC:

It is in the decision…

ELLEN FRANCE J:

100 million public liability insurance and they did have some legal advice about the scope of their power in relation to public liability insurance.

MR SMITH QC:

Yes, they did, but they didn't have any advice, at least not that I've seen, about the interface between a bond on the one hand and insurance on the other.

WINKELMANN CJ:

Or the scope of what the public liability covered.

MR SMITH QC:

No, they wouldn't, but as I say, well, it's common ground between myself and my friends that a bond and insurance are significantly different and one of the significant differences is that with a bond you just ring up the bank and say: "Give me the money," no questions asked, and the purpose of having that is because there is going to be an environmental mishap which requires money to fix because TTR has disappeared over the landscape. They are entitled to form a view about how likely that was given the conditions they imposed, and they did.

WINKELMANN CJ:

So I think we'll come back at 2 o'clock to recover some of your lost time, Mr Smith. We'll take the luncheon adjournment.

COURT ADJOURNS: 2.00 PM

COURT RESUMES: 2.01 PM

MR SMITH QC:
Thank you, your Honour. In the time remaining there are a number of things I need to get through, but I expect to get to the end of conditions on marine mammals and seabirds and adaptive management and if I have to leave the remaining points to the submissions I will.

On the question of conditions in relation to marine mammals and seabirds, the relevant passage of the judgment is at paragraph 259 and the Court of Appeal considered three issues which are in 259(a) through (c). First of all in (a), the issue of uncertainty in information available referred to as the information which is available and the Court referred to as: "this level of information" and that that uncertainty was reflected in the conditions and that triggered an obligation under section 61(2) and 87E to favour caution. The second issue, which is (b), was that the conditions weren't consistent with the statutory purpose under section 10(1)(b), then finally general conditions were not consistent with the Act's scheme and in particular with public participation and deferral of management plans removed submitters' ability to be heard. So the second concern, which is the influence of section 10(1)(b), your Honours may forgive me for suggesting has been talked about enough. If we have an answer on that then that takes away or endorses the second of the two concerns which Justice Goddard had.

In relation to the first concern a particular point emerges, which is that although the judgment sets out the conditions which were the subject of concern, it does not refer to the level of information that the DMC had and acted on and why that information, the information that was described, at this level was uncertain or why that level of information triggered the obligation to favour caution, let alone why there should be caution to the point of declinature, bearing in mind that caution may result in something less severe than refusal. The information in fact on seabirds in the DMC's decision starts

– if we go to tab 8 in the DMC decision at page 120, bottom right-hand corner, paragraph 536 – and if we go over to 578, we there have findings on seabirds, 578: "The differences in the evidence between Drs Thompson," that was for TTR, "and Dr Cockrem," for some of the submitters, "on the scale and consequences was exemplified by the summary in their joint witness statement which said: 'Overall it was Dr Cockrem's view that mining would have adverse effects on seabirds, including threatened and 'at risk' taxa. Dr Thompson's view was that there would be no adverse effects on seabirds'," and that continues over to 579, 80, 81, 82, and then at 83: "We accept that the inclusion of seabirds in the PCEMP (Condition 48) and the development of a seabird effects mitigation and management plan … We endorse the need for Condition 66.d which addresses the issue of vessel lighting and deck strike. Because the practice of kaitiakitanga extends to seabirds, we have added consultation" with the KRG, which is apparently yet to be formed. What the effects were on seabirds was set out in the preceding paragraphs.

If we also go over some pages to 983 and 984, at intrinsic page 204 of the decision, 983, "Seabirds and their habitats". This is where under 59(2)(e) the effects on species so far as seabirds and their habitats are looked at. "All the seabirds referred to by the experts are wide ranging and at the level of the STB there are likely to be few effects. We do not dismiss the potential for some effects at the local level. The birds are highly mobile and their location in time and space is driven by their habitats," et cetera.

WINKELMANN CJ:

Mr Smith, I'm sorry to be dim but I've lost the thread about why we're concentrating on seabirds.

MR SMITH QC:

Because there were two sets of conditions in relation to marine mammals and seabirds and the complaint about them at the High Court and Court of Appeal stage was that the conditions in relation to them required the development of a management plan and that the management plan was, amongst other things, too uncertain and unenforceable and in addition it was something from

which submitters were cut out of submission on and it was on those grounds at paragraph 259 of the judgment in the Court of Appeal that the Greenpeace point of appeal on seabirds and marine mammals conditions was upheld.

So 983. 984: "Effects on krill are unlikely," in which seabed, seabirds' food, "… the concentrations of krill are typically well removed from the mining site. We conclude there is little risk to foraging by fairy prion." Type of bird. "Suspended sediment will increase turbidity in locations near the mining site, and there will be some consequent effects on the behaviour of fish," as bird food. "There is potential for effects on those birds which rely on water clarity to forage. This will be localised and minor, and monitoring of these effects will be required."

So therefore so far as the seabirds were concerned the DMC preferred the evidence of Dr Thompson, TTR's expert, and concluded the risks were low. So we say that in point of fact although the Court of Appeal didn't look at it at all, let alone in detail, there was very little basis for the Court of Appeal's first point on this ground of uncertainty and therefore the need to favour caution in the face of uncertainty simply because the level of uncertainty was nothing like as high as hinted at in paragraph 259 of the judgment.

There is then –

GLAZEBROOK J:
4579 of – 579 of their decision? There is a lack of detailed knowledge about habitats and behaviour. It's difficult to assess the risks or effects.

MR SMITH QC:
There's no question that there are comments which go both way but the point is that the overall decision which we see at 983 and 9 –

GLAZEBROOK J:
Well, it's an overall decision taken on no evidence or lack of detailed knowledge of effects.

MR SMITH QC:

Well, we don't know that the lack of detailed knowledge was in an area which needed to have concerned the –

GLAZEBROOK J:

Well, but surely they should explain why, despite 579, it's fine rather than just saying: "It's fine even though we accept there was nothing upon which we could base that"?

MR SMITH QC:

They obviously did consider that. This is a decision which is hundreds of pages long, thousands of paragraphs long, and –

GLAZEBROOK J:

Well, do you want to show me where they did consider it and where they said despite these uncertainties it's fine?

MR SMITH QC:

No, that's not my point, Ma'am. That's not my point. My point is that all the conclusions that the DMC come to necessarily –

GLAZEBROOK J:

I'm sorry, you'll have to speak into the microphone.

MR SMITH QC:

My point is that all the decisions which the DMC come to require a level of summarisation and conclusion at some point and that if they go into every tiny detail in relation to all of these issues that the difficulty is that they will never finish. They have concluded, at 983 and 984, that the risks are low, and so the only way for an appeal to succeed on this is if it can be shown that the material before the DMC was insufficient for them to reach their final conclusion, notwithstanding what they had to say in the early paragraph that they came to, that that was wrong. There is no way to show that that was wrong, that was a view that they took of the evidence as a whole –

WINKELMANN CJ:

But wasn't this their actual finding about the evidence as a whole and what appears later is not a factual finding it's purportedly proceeding from that?

MR SMITH QC:

983 are factual findings, "effects on krill are unlikely", effects are "localised", "monitoring of the effects will be required", they are saying that there are relatively few worrisome effects in relation to seabirds, that is the conclusion that they have reached.

WILLIAMS J:

But it does seem that the reasoning is "we don't know as much as we could know about the STB but birds can fly away", that's the essence of it, and therefore the risks to, the local risks, are more than mitigated by the mobility of the birds, that's their reasoning, isn't it?

MR SMITH QC:

Yes, exactly, and the limited effect and seafood for a start, and the flying away point, and on top of that the conditions which we come to presently. But the point is that this was not a case where there was a complete absence of information and evidence on seabirds. Generally speaking, there was a level of comfort about the likelihood of species harm, certainly at a population level, and that is what the DMC was confronted with.

WILLIAMS J:

The problem, I guess, to the extent there's a problem, is that management plans are dynamic things and they used the word "management" in the plan and that probably piqued the interest of the Court of Appeal because adaptive management is also dynamic and evolutionary, and perhaps if they'd adopted name for what they were doing in the management plans for the birds and the mammals they might not have had the problem they had.

MR SMITH QC:

Quite possibly. As soon as one talks about managing a problem the first thing that people think about is how big is the problem.

WILLIAMS J:

Well, you wouldn't practically or as a matter of policy want to take away the ability of people with marine consents, marine discharge consents, to manage what they're doing in a dynamic and evolutionary way through the usual technique in resource management which is management plans.

MR SMITH QC:

That would depend on what the conditions, including the conditions in relation to the management plan, was, and I'll come to that in a second.

I had been intending to go through the same exercise in relation to marine mammals. What I will do, rather than go through the relevant parts of the DMC decision in detail I'll just tell you where they are. They are at 444 – these are the paragraph numbers – through to 446, 464, 476, 482, 508, 521 to 522, 529, 533 to 535, 543, then 550 to 555. And all that these do is set out what is the degree of knowledge about, the level of inflation in relation to marine mammals as opposed to seabirds.

So, bearing in mind that this part of the judgment is concerned with the issue of caution, and so we also have the early part of the summary from paragraph 13 through to 37, which deals with the formal directions which the Committee gave in relation to caution. And we say that the DMC was obviously favouring caution in conditions 9 and 10 to see that apart from the conditions already imposed that there were no effects at a population level. In other words, if we go for example to condition 9 at the end or near the end of the DMC decision, you see at page 102.0522 of the bundle or intrinsic page 280 "Benthic Recovery" and then, paragraph 9, "Seabirds", this is one of the conditions which were imposed: "At all times during the term of these consents the consent holder shall comply with the following: there shall be no adverse effects at a population level of seabird species," et cetera, et cetera, "adverse

effects on seabirds," but not limited to effects arising from certain specific issues are to be managed. And then there is a requirement which is the requirement which is a concern to the Court of Appeal in paragraph 259(c) which is imposing general conditions about avoiding adverse effects by means of a management plan, and this too was the concern of Forest and Bird, that the general condition were deferred to the formulation of management plans so that submitters were cut out of participation.

Before considering that, the real but related point Forest and Bird made was the open-endedness and what it described as the "vagueness" up to the extent of the enforceability of these conditions. We say that first of all, while only of persuasive value, RMA cases in the Employment Court do contain examples –

WILLIAMS J:
You mean the Environment Court?

MR SMITH QC:
I've very sorry, the Environment Court. I can't imagine why I leapt to the Employment Court – contain examples of deferring the means of achieving certain outcomes stipulated in conditions to the development of management plans. The condition according to the decision of *Ferguson v Far North District Council* [1999] NZRMA 238 (EC), it's in our bundle volume 5 at page 244, tab 46, is that the condition has to be clear and specific and also that management plans are appropriate for development of how certain parameters are to be met but they can't specify the parameters themselves, that's *Wellington Fish and Game,* which again is in our bundle at tab 72 and the paragraph is 174.

WINKELMANN CJ:
Mr Smith, can I just take you back, because I've been finding it difficult to follow your argument because the Court of Appeal's finding seems to be based on far more than the finding in relation to seabirds, it seems to be

based on a wide range of conditions, but you've taken us to the material about seabirds.

MR SMITH QC:
Seabirds and marine mammals are the specific issues which as – it's under the heading above paragraph 242 of the Court of Appeal's decision, "Effects on seabirds and marine mammals", and so this was –

WINKELMANN CJ:
249 refers to condition 11, which imposed limits on underwater noise generated by the operation of marine vessels and project equipment.

MR SMITH QC:
That's a whale, that's a marine mammal issue.

WINKELMANN CJ:
And condition 48, environmental monitoring, is that a marine mammal issue too?

MR SMITH QC:
In part, and I come to that.

WINKELMANN CJ:
But it's all of those things which suggest monitoring possibly were the focus of the Court of Appeal?

MR SMITH QC:
Monitoring?

WINKELMANN CJ:
Monitoring, the fact there's so much monitoring of the basic background environment.

MR SMITH QC:

But the monitoring is a different issue, the monitoring, that's a separate issue for the purposes of this appeal, which is the power or the vires, the lawfulness of pre-commencement monitoring, and I don't want to – I'll just deal with that quickly, it's under one of our next succeeding…

WINKELMANN CJ:

You don't need to deal with it at this point.

MR SMITH QC:

I can deal with it now. I won't be able to come back to it in the time available so we'll deal with it now, just to be quite clear about pre-commencement monitoring. There's nothing in the Act or in the Regulations which says it can't be done. The purpose here was not to establish baselines for the purposes of the consent. It was to establish what were the natural background levels of species in the South Taranaki Bight as at the time when mining activities were to commence as opposed to some preceding point in time possibly years in advance so that at the time when the mining activities commenced the monitoring on the effect on species could be carried out in respect of a level, an ascertained level, of the species which was relevant and timely, namely that it had only just been acquired, bearing in mind that this is a dynamic environment. That's all that was about. It's not a question of adequate baseline monitoring. It's purely a question of setting the levels which form the basis on which TTR has to manage its effects.

WINKELMANN CJ:

Because you haven't taken us to marine mammals and when I looked at the material I noticed the joint statement of experts which DMC had before it. It seemed to contain a lot of statements of uncertainty and absence of knowledge.

MR SMITH QC:

The question of – well, what I have done is, rather than take you through them all, I've taken you to the paragraphs which deal with those issues and from

those paragraphs you will see that there was some uncertainty but in addition there was a lot of very clear information about what levels of population were present. Some of it wasn't entirely clear and some of it, with respect to the DMC and later courts, would never be clear because the information is just too hard to tell for anybody in any circumstances ever. But to the extent that there is lack of certainty, that shapes the conditions, and the primary condition in relation to marine mammals, and for that matter for seabirds, was that there was to be no adverse effects at a population level, so –

WILLIAMS J:
So what does that mean?

MR SMITH QC:
Well, presumably it means something to people who know about seabirds and whales. In other words, if you have a threatened species, sufficiently categorised as threatened, such as a Māui dolphin, then it's accepted that the loss of one or two members of its species threatens the population level. On the other hand, a species which is not in that ilk can afford to lose higher numbers of population without threatening its existence at a population level.

WILLIAMS J:
So how do we – how many are you allowed to kill before you have to stop?

MR SMITH QC:
Well, it's not a question of –

WILLIAMS J:
Well, that is the question, isn't it?

MR SMITH QC:
– whether anybody, whether they would be killed, and on top of that it is a scientific question to be exercised at the time when these events occur as to whether there is a threat at a population level.

WILLIAMS J:

I don't understand the term. Can you help me?

MR SMITH QC:

No, no, well, the term is not defined in the DMC decision and I don't think that it's defined in the evidence but it is a term of art which those giving evidence understand what is a threat at a population level.

WILLIAMS J:

So only the experts will know whether this has been breached?

GLAZEBROOK J:

But they won't though, will they, and if they don't, as the minority decision says, although seeing it's two/two it's hard to call it "minority", but in any event they say there's not enough information at least with marine mammals on what the population is like anywhere.

WINKELMANN CJ:

Or with Māui dolphins, dolphins.

MR SMITH QC:

Well, certainly with Māui dolphins. But in order to –

WINKELMANN CJ:

Which is a tiny population.

MR SMITH QC:

In order to around New Zealand –

WINKELMANN CJ:

If you measured an adverse effect on a population level on Māui dolphins you'd be in very great trouble if there was any population effect, wouldn't you?

MR SMITH QC:

Well, as a matter of stepping back and looking perhaps a little at the concern with Māui dolphins, I did take you through the fact that this is a busy coastal marine area where we already have oil and gas drilling. We also have bottom trawling. We also have dry container cargo ships, anchor handlers and so on and so forth, right throughout the environment, and so there was a great deal of evidence about this and the DMC was in a position to say whether irrespective of the fact that it may not know whether or not what the precise numbers of a certain species were in the area and may not be able to tell exactly what the risk was. Nevertheless, it was in a position to address that concern with conditions and it doesn't merely impose a hard limit of no effect at population levels but it requires that there also be management plans. Management plans were not management plans which the submitters were cut out of input on. On the contrary, the management plans formed part of the impact assessment as drafts and they may be found, that's to say in the two areas concerned which are seabirds and mammals, nothing else, they may be found under tab 64 and 65 in the supplementary documents for the case on appeal. So they are at pages 301.01 and 301.17.

GLAZEBROOK J:

You'll have to say what tabs again, sorry.

MR SMITH QC:

The tab is 65, 64 and 65. It's in a very small volume.

WINKELMANN CJ:

I think it might only be electronically.

MR SMITH QC:

Looks as if you have it.

WILLIAMS J:

TTR's supplementary?

MR SMITH QC:

So 65 is the Draft Seabirds Effects Mitigation and Management Plan and this, as I say, was…

WILLIAMS J:

Yes, 65, thank you.

MR SMITH QC:

This, as I say, was, along with the marine mammals document, put in as a draft as an annexure to the impact statement and so in point of fact anybody who was a submitter and who had interest in this, for example, was entirely, absolutely entitled to look at it, read it, call evidence on it and say what they had to say about it. So at least in the first instance it cannot be said that the public were cut out of the formulation of these management plans.

The second point is that the management plan is not produced by TTR in a form which it finds satisfactory irrespective of consultation or the lack thereof with anybody else. On the contrary, it first of all has to be developed by an independent expert which is employed by TTR under the conditions. Secondly, it has to be submitted to the EPA for certification. Thirdly, it has to be prepared in consultation with the KRG as well. And, as I say, they are management plans which any person during the course of the hearing of the consent application was entitled to say what they had to say about them. So in point of fact the public participation was ensured to a reasonable degree.

WILLIAMS J:

You'd think if it was a term of art, population impact, because that's the bite in this condition. The rest is about how you manage injured birds or acoustic issues and so on. So you'd think that the management plan would say: "We take adverse effect on a population to be the following level."

MR SMITH QC:

No, it doesn't.

WILLIAMS J:

No one's mentioning that elephant in the room. Sorry about the metaphor. Perhaps I should have said the whale. But…

GLAZEBROOK J:

Well, as they don't know what the population is they couldn't, could they?

WILLIAMS J:

Exactly. You see, it's kind of like an acoustic level that says: "Don't be too loud and we'll leave the level to the management plan," which would be okay if the management plan said: "Well, too loud is 75dB," but it doesn't. It just says: "We won't be too loud."

MR SMITH QC:

The difficulty – I accept everything that you say but it looks with great detail at one gap in the picture which is an inevitable gap in the picture. What it doesn't take into account is all the other information which was relevant, all the evidence which I have referred to, admittedly only by reference to paragraph numbers when it comes to mammals but not so with seabirds, where some information is known about the population levels. Some information, in fact a good deal of information, is known about the risks. There's a wealth of evidence, all of which is summarised in the paragraphs that I gave you about the risks of noise to various types of whales. So when we look at the absence of information about a number of a particular type of marine mammal, we take into account what, in any event, are the risks and on –

WILLIAMS J:

Sure, but they just adopted the NOAA standards without explaining what they were and why they were the appropriate standards.

MR SMITH QC:

Well, they didn't explain what the NOAA standard was. They certainly did adopt it, but on the other hand the NOAA standard is an international standard which is in –

WILLIAMS J:

Well, it's an American standard.

MR SMITH QC:

It is in good standing and there is nothing on the face of the decision to show that it was wrong to adopt the NOAA standard or that the NOAA standard was outdated or inadequate, and on top of that, of course, if there was a concern about the adoption of the NOAA standard what is the counterfactual? Is the counterfactual that the DMC is required to thoroughgoingly investigate everything which went into and made up the NOAA standard or any replacement for the NOAA standard and form its own views about what a new standard might be?

WILLIAMS J:

For example, the NOAA is designed for the American circumstances which has marine traffic about 50 times the amount of hours and 120dB is louder than a Deep Purple concert. I've been to a few of those and they're really loud.

MR SMITH QC:

Nevertheless, which would intend to indicate that that perhaps might not be such a problem for New Zealand waters but…

WILLIAMS J:

Yes, but it may suggest that the ambient sound levels mean your level should be lower.

MR SMITH QC:

But they also had –

WILLIAMS J:

I don't know. I'm not the DMC but…

MR SMITH QC:

But they had evidence on ambient sound levels and they had evidence on what it would be at certain contours. So all these issues were looked at and the difficulty is that if we pass from one area of inevitable uncertainty, that means that there is something in the nature of a decision which says that if there is uncertainty in this one area then amount of development of conditions, no amount of assessment of other risks, is going to be able to satisfy the level of uncertainty in the particular area. The DMC was satisfied that notwithstanding that it did not have, and it was quite express about that, full information about all of the species of marine mammals in the entire South Taranaki Bight, and let's face it, how could they ever have that information, that nevertheless they did have information about the risks, they had information about the standards that were appropriate, they also had evidence about what was possible to be done in relation to that and they accepted that evidence. It would be, in my submission, going altogether too far to suggest that an international standard which the DMC thinks is suitably applicable is one which should be reinvented on the basis of evidence. One can only imagine how much evidence and how much effort and study went into the promulgation of the international standard, of the NOAA international standard. If that were to be –

WILLIAMS J:

Sorry, it's not an international standard. It's an American federal standard.

MR SMITH QC:

It's an American standard. It's adopted from America but my point remains.

WILLIAMS J:

But it's a domestic standard, not an international one.

MR SMITH QC:
I had intended to say that my point remained the same. There has to be a clear basis on which to say it was inappropriate to adopt it. In my submission, there wasn't one.

Now that almost takes me to adaptive – it does take me to adaptive management, and on that subject there are, in my submission, four relevant provisions in the Act. They are section 64 which defines adaptive management approach. When I use the word "adaptive" or term "adaptive management" I do mean adaptive management approach, and I'll come to these –

WILLIAM YOUNG J:
Sorry, what section number?

MR SMITH QC:
64, Sir. Then 61(3) which requires the adaptive management approach to be considered if favouring caution would likely result in refusal. Then section 63(2)(b) which is permissive, formally providing that the adaptive management approach may be used by incorporation in conditions, and then section 87F(4) in the section of the Act which deals with discharge consents and dumping consents which says that may be okay for marine consents but you can't use it all for discharge or dumping consents. It withholds the use of AMA.

So the issue is whether conditions in the DMC decision amount to an adaptive management approach and, in my submission, the history of decisions in the DMC and also in the High Court is not greatly helpful. There's no need to go into them in great detail except to say that TTR supports the Court of Appeal's decision.

The core of the Court of Appeal's decision is at paragraphs 225 and 226, and the exception, that is to say the part that TTR wouldn't wholly agree with, is the effect on the availability of the adaptive management approach of

section 10(1)(b) but, as I say, we have discussed section 10(1)(b) and I needn't go into that in any more detail.

The basic thrust of TTR's position is that the conditions involve ascertainment and imposition of what may be called "hard limits" and the applicant has to meet those and, failing that, it was in breach of its consent and that carries statutory consequences and those are referred to later. So deciding if the conditions amounted to adaptive management or an adaptive management approach involves examining the Act and then the conditions against the Act's relevant provisions once they are correctly understood.

The definition of AMA under 64(2)(a) is allowing an activity to start on a small scale or for a short time for effects to be monitored, or, more broadly, any other approach, under (b), to allow effects to be assessed following which it is discontinued or continued with or without amendment. So section 64(2)(a), we say, does not obviously apply in this case. It's not a trial project in terms of small scale or a short period. Section 64(3) might or meant adaptive management under section 64(2)(a) or (b) but there was no staging as was envisaged in section 64(3).

So the provision which is most relevant, in my submission, is section 64(2). 64 – sorry, 64(2)(b), not (a). It's broader in nature than (a). The assessment of effects followed by discontinuance or change so that if there were to be AMA in this case to (b), the definition taken overall, in my submission, possesses two key elements and those are, first of all, the assessment of effects and then secondly subsequent decision-making on whether the activity continues and if so to what extent. I'd submit that the correct way to go about deciding if the conditions are adaptive management conditions is simply to examine them. We see, for example, starting with some conditions at the back of the DMC decision, in particular conditions 5 and following, starting at page 102.0521, intrinsic page 279, sediments in 5, benthic ecology in 7, benthic recovery in 8, seabirds and marine mammals in 9 and 10, underwater noise in 11 and unanticipated effects in 19, and rather than go through them all I'm going to go look at 7 in particular. All of them, however, impose hard

limits which have to be met, failing which there are statutory consequences, more of which later. For example, benthic recovery –

GLAZEBROOK J:
Can you just slow down slightly because we do have to find these so as we really missed your points.

MR SMITH QC:
I'm very sorry. I am at page 102.0522, near the beginning of the conditions section. The conditions which I mentioned were 5, 7, 9, 10, 11 and 19.

With benthic ecology, it's both conditions 7 and 8. The activities authorised by the consent shall not result in "more than a 5% reduction in overall abundance of macro fauna and flora;" et cetera, et cetera, "at the monitoring sites listed in schedule 4 when compared with the pre-commencement monitoring data as determined in accordance with Condition 48, but taking into account natural variation." So how that works is that under condition 48 you carry out pre-commencement monitoring to find out not what the level of fauna on the seabed and the area concerned is years before the application is granted and mining commences but immediately or as close to immediately as possible prior to the commencement of mining. And then you have hard limits as to what is the level of reduction which is permissible.

That brings into play condition 8, which is benthic recovery, so fauna on the seabed. No later than five years following the completion of all seabed material extraction from two kilometres of the location where the extraction has occurred, consent holder required to demonstrate that recovery of the macroinfauna benthic community has occurred, provided that the annual monitoring results for that area indicate that such recovery is on track to be achieved, and it continues on.

So these – and this is just one example of the types of conditions said to be adaptive management conditions which were imposed and said to be adaptive management.

WILLIAMS J:

So presumably if you had a greater than 5% reduction in macro fauna and flora, benthic macro flora and fauna abundance, you'd have to stop?

MR SMITH QC:

You have to – ultimately, yes, you do. There is a step or two on the way. In the event, for example, half way down condition 8, in the event that annual monitoring shows it's not on track to be achieved, so you can't wait to the end of the five years and say: "Oh, sorry, I'm out of here." You've got to show on an annual basis that it's happening, and you have to, in the next quarterly report, provide information to the EPA that highlights and does certain things. But none of that helps you if you're not getting there, if you can't demonstrate that you have only lack of recovery to the limits which are specified in the condition. In that event, yes, you have to stop, and when I say "stop", well, what that means is that the full equivalent set of statutory consequences in the EEZ Act, as similar to the RMA, come into play. There's, I think, the section 20 which requires the activity to be authorised in the first place and it may not be if you're outside, well, it's not if you're outside the terms of your consent. You can be prosecuted under section 132. It's a strict liability regime, of course, under section 133. You're separately subject to enforcement action under section 115.

WILLIAMS J:

Sure, so that's in respect – this is all after the event, of course. These animals are dead and so are the plants so –

MR SMITH QC:

They will be dead.

WILLIAMS J:

Right, so it's for 35 years, so the big threat is that –

MR SMITH QC:

No, it's not 35 years. I'm sorry to interrupt, Sir. It's not 35 years at all. This is five years.

WILLIAMS J:

Yes, I get that. I'm talking about the length of the consent. It's 35 years. So the big threat is that you do the first five years, you breach these standards and have to stop.

MR SMITH QC:

Yes, and in fact it may well be that you have to come to a shuddering halt before that because of your annual monitoring.

WILLIAMS J:

Because you're not recovering at the right rate?

MR SMITH QC:

That's right.

WINKELMANN CJ:

So, Mr Smith, isn't there a –

WILLIAMS J:

So that is adaptive management, isn't it?

MR SMITH QC:

No, you're failing to meet a hard limit. There's no question of assessment depending on the effects and there's no ability to adjust what you're – there's ability to adjust what you're doing so as to avoid damage.

WILLIAMS J:

Exactly.

MR SMITH QC:

But there's no ability to adjust the limit.

WILLIAMS J:

Well, TTR isn't going to stop. It's going to try and fix it because it's been doing it in a way that hasn't met the standard.

MR SMITH QC:

If it can operationally do that then it will.

WILLIAMS J:

In short, TTR will adapt?

MR SMITH QC:

That's not to say that it's adaptive management. For example, this exact dispute arose in relation to the sediment plume and resulted in a discussion with Justice Goddard about the question of adaption of operational procedures as opposed to adaptive management. For instance, there are engineering solutions and there are mining solutions to deal with the sediment plume, for example. A mining solution is that you simply mine in different areas which are less sediment rich. An engineering solution is that whether or not you implement a mining solution you have them lower the nozzle of the discharge a little closer to the seabed so it's carried a lesser distance in the current which you can do when the wave heights are below a certain level.

WILLIAMS J:

And you have to slow the discharge rate?

MR SMITH QC:

That's another way of doing it.

WILLIAMS J:

Or jam the machine?

MR SMITH QC:

That's an engineering solution. And so all of those, however they are described, are operational issues. They don't change the metes and bounds

of the consent. They don't change the hard limits that you are required to meet.

WINKELMANN CJ:

So if I might just ask a question at this point. When you look – so the conditions are a little unusual in that conditions will often say you may not exceed X decibels, you must keep your lights at a certain level, you may not exceed a certain level of particulate discharge, but here the conditions are wrapped around monitoring for adverse effects and if one looks at the words of the definition of adaptive management process approach, the second limb of it is: "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." Could you not say that that is exactly what these conditions are?

MR SMITH QC:

I say that it's not because the activity continues. How you carry it out is another issue altogether. There is a stark difference between the metes and bounds of the activity as defined in the consent and the operational measures by which you comply. For example –

WINKELMANN CJ:

It either continues because you can come within it by adapting –

MR SMITH QC:

If you have to.

WINKELMANN CJ:

– or it discontinues. So those are two of the scenarios set out in 64(2)(b).

MR SMITH QC:

Yes, but they are also set out in section 20, section 132, 133, 115 and 125 and 126, all of which are provisions of the Act which say irrespective of

whether it's adaptive management, if you're doing something not authorised by your consent you have to stop.

WINKELMANN CJ:
Yes.

MR SMITH QC:
The concern that you may have, your Honour, about there being adaptive management in this sense, is merely a similarity between an aspect of section 64, stopping if you're outside your consent, with other provisions in the Act which say in any event you have to stop, and that doesn't make it adaptive management.

WINKELMANN CJ:
Well, no, perhaps I haven't put what I was saying to you very clearly. What I'm saying is that the difference between these conditions and many other is that they are structured around monitoring the adverse effects.

MR SMITH QC:
Right, yes, but the purpose of –

WILLIAM YOUNG J:
Can I just ask you a question, just to show my ignorance, but say there's a consent that relates to noise levels and it says that the maximum noise level at the boundary, and I now forget what it might be but say 60 decibels, now obviously that's something that's monitorable and if you breach it there's a problem, would that be adaptive management?

MR SMITH QC:
No, you're in breach, and liable to –

WILLIAM YOUNG J:
So you could be expected to adapt the conduct of your consent to ensure you don't emit noise at the boundary above a certain level?

MR SMITH QC:

That's merely bringing yourself back inside the terms of the hard limit –

WILLIAM YOUNG J:

Sorry?

MR SMITH QC:

That's merely bringing oneself back inside the terms of the hard limits of the consent.

WINKELMANN CJ:

Yes, and what I was putting to you is that I think what, if we read the definition, is what differentiates adaptive management from other conditions is that adaptive management conditions tend to be structured around monitoring adverse effects.

MR SMITH QC:

There are two forms of monitoring. The first is the pre-commencement monitoring. In simple terms, and that's carried out under condition 48, that is to determine roughly, colloquially, what is there. For example, what is the background level of suspended sediment.

WINKELMANN CJ:

And you've covered that.

MR SMITH QC:

After that, you monitor for the purpose of deciding whether, or seeing, whether or not your activities are within the pre-set levels specifically spelled out in the conditions that you're allowed to go to. Your entitlement to conduct the activities consented does not change. All that changes is the requirement to adapt, if necessary, to stay within the conditions or stop. But –

WILLIAMS J:

I'm not sure I agree with that. Adaptive management is there because of information poverty. It isn't there with noise controls. You have to have adaptive management because no one is quite sure what the effects will be and how to mitigate them because they don't even know what they're affecting yet. So adaptive management is a way of limited suck it and see. So in this case, where you are information poor and you have to adjust what you're doing to stay inside your parameters, that probably is adaptive management.

MR SMITH QC:

No, in my submission it's not adaptive management because the consented activity never changes and that's what adaptive management approach –

WILLIAMS J:

But it wouldn't under any adaptive management regime other than the one under (a). Under (b), because you're information poor, you don't know whether you can comply because you don't know enough about your environment. You're not going to change the compliance levels because they are environmentally protecting. What you're going to change is how you go about it, if you still can, based on the information you have now gleaned, how you go about meeting them.

MR SMITH QC:

In my submission, no. That part of the adaptive management approach section says that the activity is monitored for effects, firstly. Secondly, it is monitored with effects with a view to the activity ceasing or, alternatively, amended in some respect. The amendment is an amendment not to the operational means of achieving it but to the nature of the consent itself.

WILLIAMS J:

Well, it says "with or without amendment".

MR SMITH QC:

With or without amendment. So there may be an amendment which –

WILLIAMS J:

And the definition is inclusive, so it's obviously intended to be a big idea.

MR SMITH QC:

Well, it could be that, for example, in relation to a spatially or temporally limited project you engage in the consented activity for a period of time. The effects are assessed. It is then decided, and I'm not talking about this application, I'm talking about one generally, it is then decided, by dint of the power to amend the consent, that you can scale it up because you've assessed what the effects are going to be. Here, there is no question of scaling up or down or any form of amendment. You can go or stop and the only thing in between is how you set about meeting your limits but there is no provision in the consent which says that you can go back to the EPA and say: "Well, we've tried this for a bit and now we want to scale up." You've got all of your consents, all of your limits, all of which have to be complied with, set in conditions right from the start. They don't change and that's why, in my submission, it's not adaptive management. That's why the Court of Appeal thought that it wasn't adaptive management.

I see that I am – that means that I will need to rely on the submissions that I've made in writing in relation to pre-commencement monitoring, which I've covered a little anyway, also the casting vote and also on economic benefit. I might seek some indulgence by way of reply since these are the appeals of the appellants, or the cross-appeals effectively of the appellants, in any event, but given that I'm well over my time I'll, unless I can assist further, I'll hand over to Ms Morrison-Shaw who will address you on her two issues and then Mr Majurey.

WINKELMANN CJ:

So those are all reply points? Those are all points that you could respond to on a cross-appeal, is your point about the other parts you are not addressing now? Are they all…

MR SMITH QC:
I'm just relying on my submissions.

WINKELMANN CJ:
Okay.

MS MORRISON-SHAW:
Tēnā koutou e ngā Kaiwhakawā. I will be brief. The two issues I address are notices of – they were raised in notices to support the appeal on other grounds. The first is whether or not the DMC erred in not considering international obligations as other applicable laws under section 59(2)(l) and the second is in relation to whether the DMC complied with the best available information requirement which is set out in sections 61 and 87E. The High Court and Court of Appeal found no error in the DMC's approach to these matters.

Turning first to the international obligations, the approach to consideration of international obligations is governed by section 11. Section 11 states that it continues or enables the implementation of New Zealand's international obligations but it does not incorporate the exact terms of those obligations. Instead, specific considerations drawn from those obligations have been included within the Act and examples are section 59 where there's referral to effects on the environment under (a) or 61 which is talking about favouring caution. The Act must therefore be applied in its terms although those terms may be clarified by reference to the international obligations.

The wording of section 11 was a deliberate policy choice by Parliament. The Bill as originally introduced required the Act to be interpreted and powers and duties to be exercised consistently with the United Nations Convention on the Law of the Sea. After considering submissions and advice received from various agencies, including the Ministry of Foreign Affairs and Trade who negotiated UNCLOS, the Legislation Advisory Committee and its own legal advisers, Parliament amended the wording to refer to international obligations more generally rather than just UNCLOS as it was at that stage, and to

remove wording that would constitute section 11 as an interpretation clause, and this was for two reasons. Firstly, so that the Act did not become subject to international obligations not considered by Parliament, and I have just noted a footnote reference there in seven where I've referred to a comment made by Nicky Wagner in Hansard and just picking up on Justice Williams' comment before about referencing that. I just I'd note that Nicky Wagner was the chair of the select committee which is why I've referred to him there. And the second reason was that so that a decision-maker did not need to look beyond the Act to ensure that they were complying with those international obligations.

The EEZ Amendment Act in 2013 which brought discharges and dumping into the EEZ regime didn't change this approach. Had Parliament intended a different approach to apply, it could have amended the Act to require this, and in my footnote 10 I've given an example there of where the Amendment Act did make some changes and for emergency dumping and brought in requirements for notification and compliance requirements as a result of those international obligations but it didn't in terms of these discharges.

The other thing Parliament could have done is that it could've introduced additional restrictions by regulations and again in my footnote I've provided an example of where it did that. Again, it didn't do this for discharges.

So absent any express statutory direction to the contrary, international obligations are not laws which are directly enforceable within New Zealand and do not require consideration under section 59(2)(l) which refers to any other applicable laws.

The decision-making committee was, however, able to, and did, consider such obligations to the extent they formed part of other mandatory considerations, and I've given an example there of the other marine management regimes which the DMC noted in its decision included the Maritime Transport Act 1994 which was intended to give effect to MARPOL, and the DMC also considered some of their international obligations under section 59(2)(m) and in that I've

referenced under it where the Court considered to what extent that was relevant.

Over the page on 7, while the DMC omits reference, and I just have picked this up here on my review through the decision I noticed that the DMC had omitted reference to 11(c) and (d) when it was quoting section 11 at paragraph 1040 of its decision. In my submission, this appears to be a typographical error, given the references to MARPOL and the London Convention elsewhere. In any event, the omission is not material, given international obligations are implicit in the Act.

Turning to the best available information requirement, the DMC was required to base its decision on the best available information and this is not all information, rather it's the best information that in the particular circumstances is available without unreasonable cost, effort or time. The DMC did not misstate the law, nor did it misunderstand or misapply it. As the High Court recognised, what constitutes unreasonable cost, effort or time are issues of fact, not law. The DMC detailed the steps it took and the evidence and information it both requested and received in order to satisfy itself it had the best available information. So this is not a situation such as that arising in *Edwards v Bairstow* which was cited in *Bryson v Three Foot Six* about there being no evidence or evidence inconsistent or contradictory to the DMC's determination.

As the High Court noted, the DMC clearly exercised its power to request further information from the applicant to the point where those requests were being criticised by submitters, and I've footnoted there some references to the DMC decision where it's evident that the submitters have indeed criticised that exercise of power.

Turning to the three KASM and Greenpeace grounds, first, the DMC's conclusion that it had sufficient information to make a decision is not evidence that the DMC misunderstood its obligation to obtain the best available information. The DMC was required to be satisfied under section 62(2) that it

had adequate, ie, sufficient or enough, information to make a decision. Second, that the DMC imposed pre-commencement monitoring conditions does not mean that the DMC failed to obtain the best available information. While pre-commencement monitoring, like other forms of monitoring, does provide information about the environment, its purpose to provide up-to-date information on environmental indices for compliance purposes, its scope to require monitoring of indices at locations, both of which, the indices and the locations, need to be determined by the DMC, and its duration, here a minimum of two years, mean it cannot be undertaken prior to consent being granted and accordingly cannot form part of the best available information on which decisions must be based.

Just before I leave that topic, I would just note that in some questions that came up just before for my friend, there was questions around the degree of being information poor or there was insufficient information to make an assessment, and I would just note, as we noted in our reply submissions, that the DMC had evidence from expert witnesses that the information was sufficient to assess effects, and we've noted that at paragraph 57 of our reply submissions and given an example in the footnote there of evidence that stated that.

Finally, in relation to the third ground, the DMC gave reasons sufficient to enable the intellectual route it took to be understood. The DMC was not required to articulate the information it considered unreasonable to obtain, and in 29 there I've given a reference there to some examples that the DMC did give in relation to some studies that had been suggested by a submitter. In my submission, there was no error of law on either of those grounds.

WINKELMANN CJ:

Thank you. Thank you, counsel. Mr Majurey.

MR MAJUREY:

Tēnā koe e te Pāpā i tūwhera tō tātou hui i te rā nei, **(Māori 15:04:18)** atu ki te Runga Rawa, nō reira tēnā koe. May it please the Court, apologies for the

contribution of paperwork and conscious of time, I'll cover the Treaty tikanga and the NZCPS in 55 minutes.

Beginning at paragraph 5 of my oral, just to note there, and it seems clear that the Court has an opportunity to read the DMC decision, I set out in the footnotes a number of the references. I'm happy to take you to those to illustrate some of the points but also again conscious of time recognise that they're there for your record.

So section 5, the decision provides a window into the DMC's method and part 17.5, especially in the context of what I'm addressing you on, is representative.

Turning then to the Treaty, the constitutional place or relevance of the Treaty is not an issue, rather the extent of the parliamentary mandate, and I set out there paragraph 162 from the Court of Appeal's decision.

Section 12 is in the nature of the Treaty clauses legislated by Parliament for nearly two decades prior to the manifestations earlier this year and they're in the nature of the RMA model. While section 12 ultimately received some strengthening during its passage, and those changes are set out in footnote 8, this fell well short of the Green Party's unsuccessful attempts to secure the section 4 model, section 4 of the Conservation Act, give effect to.

Section 12 defines how the Treaty principles are incorporated into the Act. There is no direct requirement to take them into account, nor does the counterfactual assist. The question is not where the Courts might land with the Treaty required as an extrinsic aid to cure deficient statutory guidelines absent a Treaty reference, à la *Huakina*, rather what did Parliament actually mandate, and arguments of reductionism or ouster likewise do not advance matters.

Parliament enacted a familiar style of a Treaty clause that specifies a provision purposely inserted to, and just to add there, recognise and respect

the Crown's obligation to give effect to the Treaty principles. There is no ambiguity. However tempting, the Treaty principles cannot be invoked to override a deliberate statutory scheme, especially one that does include a Treaty clause. It was not open to the Court of Appeal to determine that the section 12 considerations were themselves required to be interpreted and applied in a manner that gives effect to the principles of the Treaty.

Section 12 is nowhere near section 4 of the Conservation Act which gap the Green Party attempted to close, yet the Court's reasoning would have them on an equal footing.

WILLIAMS J:
What does it mean then?

MR MAJUREY:
Parliament has, in the indirect way that section 12 says, ie, in order to give respect to the Crown's obligation in respect of the Treaty principles, required certain provisions in section 12 to meet those obligations. Two are relevant here, the establishment of Ngā Kaihautū to provide the Māori perspective and also the "take into account" considerations in the Act. That's what Parliament provided for.

WILLIAMS J:
So section 59 was intended to be read to give effect, what's the phrase, is it give effect, recognising the effect, something like that, to Treaty principles.

MR MAJUREY:
So in 12(c), as part of those provisions that I've referred to in that list of four, section 59 requires the EPA to take into account the effects of activities on existing interests, and those are provided for, as you've touched on, Sir, at section 59, and you've had a good ventilation of those matters with my learned senior.

WILLIAMS J:

Right, so we read that taking into account in section 59 and the preceding sections as requiring us to approach it in a manner that recognises and respects the Crown's responsibility to give effect to the principles of the Treaty of Waitangi?

MR MAJUREY:

So the statutory scheme, as I touched on in the first part of my oral that I didn't speak to, is quite careful. The statutory purpose is to regulate the natural world and there's been full discussion on that. There's no purpose reference to the Treaty tikanga or existing interests in the purpose. The Authority's decision-making is directed to achieve the statutory purpose and that's been discussed.

WILLIAMS J:

Yes, but…

MR MAJUREY:

And just to complete that point, Sir, in order to achieve the purpose decision-makers must take into account, so it's very similar to part 2 of the RMA. Section 8, for example, take into account the Treaty principles, is there to serve the purpose of the RMA. Similarly here.

WILLIAMS J:

But there's a purpose – you see, this is rather, it seems to me, quite carefully worded, whatever one might attribute in terms of motives to that careful wording, the wording is careful, one Parliament says: "We are doing this to give effect to the Crown's obligations. This is how we're doing it."

MR MAJUREY:

That's right, Sir.

WILLIAMS J:

So that fills up the space a bit, and when discretions are exercised under section 59 they must be read in a way so as to recognise and respect those obligations.

MR MAJUREY:

That takes it too far, Sir, if I understand the question and that's essentially where the Court of –

WILLIAMS J:

I'm just reading from the statute.

MR MAJUREY:

Well, and that's where the Court of Appeal landed, if I apprehend the section, because if we go to section 59(2), the EPA must take into account in those discretionary matters, and if we come back to section 12(c), and the reference to section 59 there, Parliament indicated it requires the EPA to take into account the effects of activities on existing interests. That's the mechanism by which that obligation is perfected.

WILLIAMS J:

Yes, right, but we know that the reason that that taking into account is to occur, is because it is a discharge of Treaty obligations which must be respected and recognised.

MR MAJUREY:

Yes, and that obligation is discharged by the "take into account" provisions of section 59.

WILLIAMS J:

Yes, but, you see, that's a two-way street otherwise you're reading this as if Parliament intended the Treaty to have minimal effect, as if Parliament's intention was to read down Treaty obligation. There's no particular reason to

read it that way here. It could be equally read as if Parliament intended a full recognition of the Treaty, couldn't it?

MR MAJUREY:

Another way to approach it, Sir, is rather in qualitatively saying how real is the recognition of the Treaty because we have the different models over the years, as the table in our submission sets out, going back to the Conservation Act, and following the 2001 Law Commission recommendation the different style was adopted by Parliament, and so Parliament had a clear intent in how to approach that and it's carefully laid that in section 12 and section 59.

WINKELMANN CJ:

Another way of formulating what Justice Williams is putting to you, I think, is that when you read the obligations under section 59 you must read them in the light of the statement at paragraph 12, section 12, that they are intended to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi. So they're not to be read down beneath that. They are to be read in that context.

MR MAJUREY:

Yes, Ma'am. They're to be read in that context but it's quite important to recognise that Parliament has used a specific formula here and that is an indirect one in terms of in order to recognise and respect the Crown's obligation it doesn't say, for example, as the submission, the parent submissions say, thou shalt take into account the principles of the Treaty.

WILLIAMS J:

Well, it does, you see. That's the point. It explicitly does. It says it carefully and thoughtfully because this is a difficult area, both politically and legally, but it most certainly does say the Treaty is to be recognised and, whatever the other phrase is, respected, and this is how we're doing it.

MR MAJUREY:

Yes, Sir. I'm at risk of repeating myself. I just emphasise section 12 is worded in a very careful way.

WINKELMANN CJ:

Yes, I think we're saying the same thing, but the point that Justice Williams, I'm making is when you look at the obligations under, the factors under section 59 and you interpret them, you have to interpret them in the light of section 12.

MR MAJUREY:

Yes, Ma'am, and –

GLAZEBROOK J:

But you'd say it says no more, don't you?

WINKELMANN CJ:

Yes, so in relation to existing interests, for instance, when you interpret existing interests, that's coloured to some extent by section 12. What extent you're going to submit but…

MR MAJUREY:

And there's a good example because there again Parliament has been quite explicit about what some of those Treaty interests are. They're settled historical claims, they're settled contemporary claims, and they are MACA orders.

What I wanted to complete the section with, in paragraph 16, and these parts of the DMC decision might be familiar to you, is that sometimes the apparent debate in terms of what different parts mean may not involve too much difference insofar what I mean by that is the DMC in those references in footnotes 12 to 14 clearly references the Treaty principles. They took legal advice. They had the Ngā Kaihautū report and at different parts, especially in section 17.5 of the DMC's decision, they are quite explicit about Treaty

principles. Active protection, for example, is mentioned. They refer to kaitiakitanga, they refer to mauri, et cetera, and that then brings us back to so how do we wrap all that up into how the DMC fulfilled its task and did it do it in accordance with the statute and we say yes.

WILLIAMS J:
So do you agree that the Treaty guarantees are of particular significance, or is it just another document like the Coastal Policy Statement?

MR MAJUREY:
That's not the appropriate way to frame the matter here, Sir, because –

WILLIAMS J:
Well, that's how I'm framing it. I want you to tell me whether you agree with it or disagree and if you disagree, why.

MR MAJUREY:
I'm wanting to give a careful answer because as I prefaced this part of my discussion there's no debate about the constitutional place of the Treaty or its importance or its significance. But what does this Act say? And this Act has got some very deliberate language and it follows a mode of parliamentary style or Treaty clauses for some time.

WILLIAMS J:
Can we just flip this because I think, I agree with that proposition. Let's say it was a different circumstance and the chapeau said in order to properly provide for the rights contained in section 15 of the Bill of Rights the following processes are contained in this Act. How would that affect your interpretation of those processes?

MR MAJUREY:
Two points, Sir. One, and you'll hear this tomorrow and you've seen in the Attorney's submissions they refer to the chapeau and the current wording of the chapeau and its effect. The way you've put that hypothetical gets you a

bit closer. Perhaps for me the stronger counterfactual to remake the point is if this was worded in the way of section 4 of the Conservation Act there'd be no debate.

WILLIAMS J:
Yes, just answer the question.

MR MAJUREY:
That's my answer, Sir.

WILLIAMS J:
Well, would it make any difference? It's an important question.

MR MAJUREY:
If the chapeau were worded that way it would make a difference, yes.

WILLIAMS J:
What sort of difference would it make?

MR MAJUREY:
Well, you are then, because currently the wording is quite indirect in terms of how you get there, it says you follow a process and that's section 59 considerations. The way I've understood how you've character –

WILLIAMS J:
So I'm reconstructing the same dynamic using BORA as the base document instead of the Treaty. Exactly the same dynamic except for that.

MR MAJUREY:
Sorry, I'd misapprehended your question there, Sir. In a Treaty context I don't see anything different to the way I've answered your question.

WILLIAMS J:
Okay.

MR MAJUREY:

Turning to existing interests –

ELLEN FRANCE J:

Just before you do that, in terms of what the DMC did, they, as you note, talk about Treaty principles colouring the interpretation of the Act. Do you agree with that, that that's the correct approach?

MR MAJUREY:

So that reflects the legal advice that the DMC received. That's set out in the report and that followed some analysis along the lines that I've made submissions on in terms of how one characterises the Treaty principles, and so notwithstanding that, where the advice got to was that the principles can still colour the assessment. The DMC went further than that. If I take you to, for example, para 716 of the DMC report: "In considering these matters –

WINKELMANN CJ:

What paragraph?

MR MAJUREY:

716 of the DMC report, tab 8. That's page 155 in the bottom right. "In considering those matters, we have borne in mind the principles of Te Tiriti, including the duty for the Crown to act reasonably the duty to make decisions informed by Māori perspectives, and the duty of active protection of Māori interests," and then goes on to customary activities. So there are in this very long report a number of references to Treaty principles.

Turning to existing interests, and I'm at page 3 of my oral, I won't take you through the first several paragraphs. They just set out the scheme there in terms of subpart 2 decision, section 59(1) and section 59, leading to the Court of Appeal's conclusion where the Court at 163 stated: "The references to existing interests in section 59 must be read as including the interests of Māori in relation to all the taonga referred to in the Treaty."

The exhaust, and I've touched on this in my previous answer, that was the exhaustive section 4, definition of "existing interest" lists three forms of Treaty interests and I have referred you to those.

There is no issue with the Authority's consideration of settled Treaty claims, those of Ngāti Ruanui, Ngā Rauru Kītahi, Ngāruahine.

However, the Court of Appeal also looked for a home to locate non-specified Treaty interests and found it at paragraph (a) of the definition, any lawfully established existing activity, and in the following paragraphs I set out the extracts from 167 and 168, and you see there the reference to taonga and also MACA claims.

At para 24 of my oral. The Waitangi Tribunal has warned against conceiving of the environment as a whole as a taonga in the Treaty sense. Such an all encompassing interpretation devalues the status of taonga and the rights and obligations that flow from them. If the legislature wanted any effects on non-determined, non-recognised MACA claims to be taken into account, it would have so provided at paragraph (f) of the definition. The example of the national MACA claim struck out by the High Court shows why that is not so. The making of claims is not a guarantee of success. And again, referring to what the DMC actually addressed and discussed, it recognised customary activities and taonga and also took account of the fact of contingent or potential MACA rights and title and customary interests, what it called the broad, inclusive approach.

WILLIAMS J:
Are you familiar with the way the Canadians deal with this sort of situation?

MR MAJUREY:
In terms of taonga, Sir?

WILLIAMS J:

No, no, in terms of claims to customary right as yet uncrystallised when there's development on claimed lands. You've seen cases that deal with that? It's a similar sort of situation.

MR MAJUREY:

Yes, there is, Sir. I've seen some of the cases. I'm not aware of a statutory regime that's like this one though in terms of its explicit recognition and reference to recognised claims through that statutory regime.

WILLIAMS J:

Yes, so the federal environmental legislation has similar sorts of provisions. I think the case is *Chippewas* and *Clyde River* where the Supreme Court had to deal with the question of what do you do with rights that have been claimed but not yet declared by a Court.

MR MAJUREY:

Thank you, Sir. So in this instance, as I say, there's a specific legislative reference to those claims. Orders and title references are mentioned and so where the Court of Appeal –

WILLIAMS J:

So you think that implicitly excludes those existing but not yet subject to judgment rights, if they are rights?

MR MAJUREY:

Not exclude, Sir, but in terms of the language that Parliaments use in terms of what those interests are that are actually recognised explicitly, the reference is to rights and orders that have been recognised under the legislation.

WILLIAMS J:

So it does exclude?

MR MAJUREY:

And what I'm saying is there's a reason that, at least I'm inferring in terms of why Parliament got there, and that is the making of the claim itself is not evidence of its success in terms of achieving those. The underlying points that go with that, as the Court of Appeal talked to, take you back to the Treaty rights and Treaty interests and those are dealt with in other ways.

WILLIAMS J:

So yes, it excludes them?

MR MAJUREY:

In this specific reference, yes, Sir.

WILLIAM YOUNG J:

Just can I ask a question? I suppose, I mean it's a slightly silly sort of counterfactual, but those claiming the customary interests could have set out to prove them in front of the DMC although that seems sort of a rather odd process, but until they're proved you say that they are simply claims?

MR MAJUREY:

Yes, and, for example, if the national MACA claims had been before the DMC, the ones that I'm referring to, completely different context, different legislation, but they were claims, those were rejected by the High Court, so if they are to be taken into account that puts the decision-maker in a pretty difficult decision in terms of what sort of weight it's going to attribute to them.

WILLIAM YOUNG J:

At the end of the quote in para 23 of your note, how does the Court of Appeal know that the claimed community interests and customary interests exist?

MR MAJUREY:

Just checking I've got the reference. This is the last sentence in 168?

WILLIAM YOUNG J:

Yes. I think it's 168. You've got 167, emphasis added, and then the next part of the quote is "a similar point can be made". The quote finishes at the bottom of page 3. "In the meantime, pending such recognition, tangata whenua with customary interests continue to have and enjoy those customary interests, and those customary interests qualify as existing interests under paragraph (a) of the definition." So that assumes that there are customary interests.

MR MAJUREY:

Yes, and what I understood the Court of Appeal to be saying was the making of claims doesn't create the interest. Those are recognised. The point I'm addressing is a very different one and that is what has Parliament set out as the things that are meant to be taken into account.

GLAZEBROOK J:

So you're saying Parliament said claims are excluded from a lawfully established existing activity. So if you have a customary taking right, actually, because the claim and the recognition of the claim doesn't create the interest, the interest comes beforehand, and so isn't that what the Court of Appeal is saying, that the claim isn't the interest, it's the customary interest that is the subject of the claim and that comes within (a)?

WILLIAM YOUNG J:

That's the point I was making is how does the DMC know that it's –

GLAZEBROOK J:

Well, that's true. That's not a – that's the difficulty but I think that's all that's being said though by the Court of Appeal, isn't it?

WILLIAM YOUNG J:

I think the Court of Appeal is saying that it is but you assume that it's made out. It's not saying it's subject to it being made out in front of the DMC, but I

don't know what the answer to that is because it's unrealistic to expect that to happen.

MR MAJUREY:
And potentially there's a point in terms of what's the home that one is looking for to locate those particular interests and the Act provides different homes for different things. The point I was making before was that it's correct to say, with respect, that the claims don't create the interest but insofar as the claim references in the Act are there, those are quite clearly too where those claims have been perfected into rights of title.

WILLIAMS J:
But it says whether or not authorised by any Act or Regulations or under any Act or Regulations and that must include MACA.

MR MAJUREY:
That's right, and again it's which –

WILLIAMS J:
So how can it be excluded?

MR MAJUREY:
Yes, so we might be at odds, Sir, or at cross-purposes, Sir, in the sense of that part of the definition that I'm referring to. A protected customary right or customary marine title recognised under MACA.

WILLIAMS J:
Yes, well, that's one of them but at (a) is a right that doesn't need to have been recognised under any enactment.

MR MAJUREY:
That's right, so I'm agreeing with that proposition, Sir, that in the absence of there being a recognised title or right, that then draws in where's the

fundamental provenance for that interest, and that can be the Treaty, Treaty principles, customary interest, and those are provided for elsewhere.

GLAZEBROOK J:
It's not the Treaty because those customary interests arise without the Treaty. They arise at common law.

MR MAJUREY:
Correct, that's –

GLAZEBROOK J:
They're effective. That's what it is. It's actually a common law right. Nothing whatsoever to do with the Treaty. Although the Treaty protects those interests, it doesn't create them.

WILLIAMS J:
The Treaty reflects them.

MR MAJUREY:
Yes, what I should have said was the Treaty settlement references earlier in that definition, historical claims and contemporary claims.

GLAZEBROOK J:
Well, certainly there because in fact you might be given access to assets that aren't anything to do with…

MR MAJUREY:
The settlement can reflect those interests in terms of the redress that's provided.

GLAZEBROOK J:
Reflect in a different manner, yes.

MR MAJUREY:
Yes, Ma'am.

WINKELMANN CJ:
Are putting emphasis on "lawfully established", so you're running those two words together as opposed – so a notion of somehow legally established as opposed to an existing activity that is established lawfully such as to encompass customary rights?

MR MAJUREY:
Yes.

WINKELMANN CJ:
So it could therefore encompass a claim which hasn't been to Court and substantiated?

WILLIAM YOUNG J:
Might it not have to be substantiated in the minds of the decision-maker?

WINKELMANN CJ:
It would have to but that's another question.

WILLIAM YOUNG J:
Yes.

MR MAJUREY:
Yes –

WILLIAMS J:
Well, it just depends on – sorry, but this is –

WINKELMANN CJ:
Well, can I just ask Mr Majurey to answer my question?

WILLIAMS J:
This is not a new problem. It's been around for a generation and other Courts have dealt with it relatively effectively I would think.

WINKELMANN CJ:

Yes, so can I just ask, because when you look at it "lawfully established" doesn't mean established by going to the Land Transfer Act or by going to a Court of law. It means an activity that was established lawfully. So that's all that's required there, so it could be a customary right.

MR MAJUREY:

That's right.

WINKELMANN CJ:

And so it's for DMC to decide whether or not it's a right that appears to be a bona fide right. So I don't know what criteria to apply but if it had indication that it was just a fanciful vexatious thing it might exclude it but…

MR MAJUREY:

So I agree with that. It's the point that I'm trying to make, probably poorly, is depending on which part of the Act you're looking for to find the home for the interest gives you the answer and so a consequence or corollary of my submission is that while MACA claims that have not been perfected are not recognised in that particular paragraph, customary activities that go behind the Treaty rights, for example, are recognised, and so, for example –

WINKELMANN CJ:

But if you agree with me, Mr Majurey, you're agreeing with the Court of Appeal because that's what I was saying to you, so I think you may misunderstand me.

WILLIAMS J:

In (a)? Unless he doesn't mean (a). Do you mean (a), within (a), or are you saying it doesn't belong in existing interest at all?

MR MAJUREY:

I'll just complete what I was going to say because that might bring me back to the question that's been asked. So, for example, at 716 of the DMC report:

"Customary activities have the status of existing interests under the Act." The DMC found that. So sometimes the answer –

GLAZEBROOK J:
716, sorry.

MR MAJUREY:
Sorry, yes. So page 155. It's third line from the bottom: "Customary activities have the status of existing interests under the Act." So while sometimes it appears there may be a legal debate in terms of –

WILLIAMS J:
Okay, I must have misunderstood how you were answering me. I thought you were saying that these unsubstantiated rights were excluded from the definition of "existing interest" but you're not saying that?

MR MAJUREY:
I was saying that in respect of para (f), Sir.

WILLIAMS J:
MACA? Of course, yes, there's no doubt about that.

MR MAJUREY:
That's what I was saying, Sir.

WILLIAMS J:
Right, okay.

MR MAJUREY:
Takes us to kaitiakitanga and whanaungatanga. The Court of Appeal concluded the "lawfully established existing activity" definition of "existing interest" allowed it to import kaitiakitanga and whanaungatanga as a mandatory consideration. Kaitiakitanga is a long-established and familiar feature in statutory recognition of the Māori worldview, the RMA, Fisheries

and Te Ture Whenua being examples, or, as more eloquently put, the direct infusion of indigenous values into mainstream environmental regulation.

Parliament could have expressly included kaitiakitanga along with whanaungatanga in the statutory purpose Treaty clause, subpart 2, or even as specific existing interests. It is telling that Parliament did not. And perhaps just reflective of our previous theme, as I note in 30, the DMC actually did recognise kaitiakitanga as an existing interest and it did engage and it also took into account the relationship of Māori with the natural environment and particular area through whakapapa.

GLAZEBROOK J:
Can I just – so just to absolutely clearly get the argument, the argument seemed to be that it's limited to section 12 and very carefully limited and yet you accept that they did take into account Treaty principles on a wider basis and they did take into – and especially in particular areas. But on your argument with section 12 that would have been wrong, or have I misunderstood you?

MR MAJUREY:
Perhaps a different way to say it is that there's the legal frame that I've talked to and that's the advice they've had. The DMC went further and took into account the matters that I have been referring you to. Now whether that was because – and I wasn't involved – whether that was because clearly there was a debate at the hearing, they had taken independent legal advice, they had fulsome submissions from iwi parties and their counsel, and I'm speculating here, but, as I say, the DMC went further than where the legal line left it.

GLAZEBROOK J:
So is the submission then that even if the respondents are right, these factors were taken into account and therefore there was no error or law?

MR MAJUREY:

Yes.

WINKELMANN CJ:

But you're saying, can we just take you back, Mr Majurey, to what you do say the test is for an existing interest?

MR MAJUREY:

Sorry, I couldn't hear that, Ma'am.

WINKELMANN CJ:

What is the test for an existing interest on your account then? You're saying the DMC went further than it had to? It only had to go as far as?

MR MAJUREY:

So in terms of the section I'm addressing you on on kaitiakitanga and whanaungatanga, the Court of Appeal said it was a mandatory requirement to take those into account in its considerations. I am addressing you on what the scheme provides for. There are some specific references to different matters such as Treaty principles. There's a difference of approach in terms of where the Courts got to on those direct incorporations, the direct incorporation of, for example, kaitiakitanga and whanaungatanga, and I'll come to tikanga shortly, and so where the DMC got to was to, on the result of the advice it received from both its independent counsel and Ngā Kaihautū, which was quite fulsome on those matters, kaitiakitanga and whanaungatanga and other aspects of tikanga, was to recognise those and take those into account.

WINKELMANN CJ:

I suppose just if I read your written submissions I'm finding it hard to see what you're saying because at, for instance, paragraph 29, you say Parliament could have expressly included kaitiakitanga along with whanaungatanga and the statutory purpose Treaty clause, it is telling that it did not.

MR MAJUREY:

So the point there is that there's no express reference to it and so what this reflects is part of the struggle that the DMC had in terms of what was the parameters of what it was required to take into account and those were quite widespread in terms of matters tikanga and on Treaty principles and what those incorporate. All I'm saying there is Parliament didn't include those specifically so for them to be taken into account another home needs to be found for them. The Court of Appeal talked to that point and I conclude that section by saying in any event wherever the appropriate legal test lies the DMC did take them into account.

WINKELMANN CJ:

Okay, I'm just trying to understand, are you saying the Court of Appeal was wrong?

MR MAJUREY:

Where I began the discussion in terms of answering your point, Ma'am, is at 23 in terms of going back to customary rights and interest in relation to taonga.

WINKELMANN CJ:

Well, I just want to know, is your submissions that the Court of Appeal was wrong to say they should take into account customary rights but that doesn't really matter because the DMC did take it into account, is that your argument?

GLAZEBROOK J:

That's what he answered in respect to my question.

MR MAJUREY:

If I can take you to paragraph 170 of the Court of Appeal decision.

WINKELMANN CJ:

I'm not trying to trick you, Mr Majurey. I'm just trying to get clear what you're saying.

MR MAJUREY:

Yes, I understand that. I understand. At 170 the Court of Appeal: "It was therefore necessary for the DMC to squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests. In particular, in the context of this application, it was necessary for the DMC to address the impact of the TTR proposal on the kaitiakitanga relationship between the relevant iwi and the marine environment. Kaitiakitanga is an integral component of the customary rights and interests of Māori in relation to the taonga referred to in the Treaty." So they say that. I took you back earlier in terms of all taonga must be recognised and provided for, and in terms of trying to unpack that –

WINKELMANN CJ:

Yes, so what do you say? That's what the Court of Appeal said. Do you say they were wrong there?

MR MAJUREY:

The threshold that they arrived at in terms of that being expressed in the way that they have is where they erred.

WINKELMANN CJ:

Okay, so you're saying they're wrong to say that the DMC had to take into account the full range of customary rights, interests and activities and they were wrong to say they had to take into account kaitiakitanga and whanaungatanga?

MR MAJUREY:

Yes. More –

GLAZEBROOK J:

But in any event they did.

MR MAJUREY:

And let me just add, more than in terms of the "take into account" formula that Parliament inserted quite clearly into the Act, and I'll come to an example of that in terms of the override section to the Court of Appeal's decision which is next.

WILLIAMS J:

Are you saying 170 has a standard higher than "take into account", is that what you're saying?

MR MAJUREY:

At 170 combined with several other sections of the Court of Appeal decision, such as…

GLAZEBROOK J:

You've got 171 and 176 there?

MR MAJUREY:

That's right.

GLAZEBROOK J:

Can I – I'm interested in that, actually, "take into account" in terms of existing interests. Now let's move totally away from this and imagine we're talking about fishing quota and imagine that in effect this kills off half of the fish. Now obviously there's going to be – and this is not a situation. You wouldn't say: "Well, I've taken into account this kills off half of the fish and you won't be able to catch your existing quota and existing property right. I've taken that into account and decided I'll grant the thing anyway." Now obviously if it kills off half of the fish there's probably going to be other problems there. But I'm not sure that looking at this reasons were given to justify to override existing interests. It would actually be quite odd if "taken into account" actually allows expropriation in some way of an existing property right, wouldn't it?

MR MAJUREY:

Yes, and that's –

GLAZEBROOK J:

It's just that what I'm saying is what's wrong with what – looking at what I'm saying in terms of taking away an existing property right in a quota to take fish, why wouldn't what the Court of Appeal says there, but at least reasons, I would have thought it might even go further than that, doesn't it?

MR MAJUREY:

Yes, so this –

GLAZEBROOK J:

Ie, if you're taking away an existing property right it's actually an odd piece of legislation that does that because there are all sorts of very fundamental issues about expropriation of property.

MR MAJUREY:

So this takes us, for me, dangerously back to some of the earlier discussion that was being had in terms of the nature of the regime, whether it's an overall broad judgment or something different. And so these paragraphs that are coming next in my oral at my para 31, the point I'm making there is the way the Courts expressed it, ie, that somehow there's an override, and that's the assessment that they've formed, and so therefore there's a justification required to justify that override, mischaracterises that statutory scheme which again takes us back to take into account, and so to use that hypothetical if half the fish were going to be lost and so therefore you have issues of expropriation, that brings into question the appropriate weight that's been put on the decision if there was one made to grant it, and so questions of reasonableness and probative value of the evidence –

GLAZEBROOK J:

But why would you assume that the scheme is to justify expropriation? Wouldn't you say the scheme is the opposite?

MR MAJUREY:

The scheme is to, I'll say the phrase and take the response, but the scheme is to undertake that overall broad judgment based on all the evidence and submissions before the Court and as long as that judgment provides for the purpose of the Act then it's safe. That begs all sorts of questions in terms of the quality of the evidence, its probative value and whether it was a reasonable outcome, sorry, a reasonable decision.

WILLIAMS J:

This is really –

WINKELMANN CJ:

Section 21 of the Bill of Rights Act might apply, mightn't it, which is be free from unreasonable…

WILLIAMS J:

Search and seizure?

WINKELMANN CJ:

Yes, seizure. Seizure, so –

GLAZEBROOK J:

Seizure?

WILLIAMS J:

I don't think it's designed for this situation.

WINKELMANN CJ:

It is, it is –

GLAZEBROOK J:

But more fundamentally, expropriation –

WINKELMANN CJ:

Yes, well, it is actually designed for that. That's the statutory representation of the right against expropriation of property.

MR MAJUREY:

Yes, well, safely we don't have that hypothetical before us and if I then come back again to try and answer the question, the points I make in relation to those extracts of the Court of Appeal in 31 is to say the Act did not enshrine Article 2 or require Treaty interests to be recognised and provided for or even given effect to à la the RMA. There was nothing to override, which takes me back to my point about the evaluative process or task that the DMC had.

WILLIAMS J:

See, it's quite easy to contemplate a difficulty if property rights are being expropriated because we're used to that scenario and it's a bad thing because we're all used to it, that is the culture of the English common law. So the weighting that would be attributed to the loss of half your fishing quota would be very significant.

MR MAJUREY:

Yes, Sir, agreed.

WILLIAMS J:

But you see, the question is what is the value to be attributed to the constitutional document called the Treaty of Waitangi and the pre-existing customary rights of the indigenous people who were its signatories? Are they as significant as the property right that everybody else, being used to this, attributes to them or more are they constitutional rights, and, if so, what sort of balance – how should they weigh in the balance?

MR MAJUREY:

So in part answering your question, I'm going to bore you, Sir, by going back to the same answer in terms of what the scheme is here, but in terms of the

direct point of weight, that's the very difficult task that this DMC had in terms of what was before it.

WILLIAMS J:
We both know the DMC would really struggle with a large scale expropriation of property rights because it is dyed in the DNA of our legal system. The question is do these Treaty clauses and these references to customary rights represent a similar dying into the DNA of our common law that used to be applied to property rights or still is applied to property rights?

GLAZEBROOK J:
Or you'd say even more so given the constitutional nature of those rights?

WILLIAMS J:
Exactly.

MR MAJUREY:
Yes, and so –

GLAZEBROOK J:
Sorry, not putting words in your mouth.

WILLIAMS J:
No, no, you can put all those – they're lovely words. You can put those in my mouth.

MR MAJUREY:
So acknowledging, of course, the erosion of Treaty rights and reductions in quota on an annual basis in terms of the quota management system is one that's very perplexing to our people. Different regime, different decision-making, but that's part of life. Again, in terms of the tasks that Parliament has given to the DMC with its statutory scheme and to weigh the evidence on the best advice it can receive, which here was its independent legal advice and the report of Ngā Kaihautū, it also received extensive

submissions from iwi, from Te Ohu and the like. So those matters were all before the DMC. It's recognised in the report. They were given the task to weigh that evidence and make its findings in accordance with the scheme and provided they didn't err in law then that's a safe outcome.

Turning now to tikanga. The DMC was required to take into account any other applicable law. The Court of Appeal found this included tikanga Māori. The place of tikanga in our law is significant and evolving. However, there is no reference in the EEZ Act to tikanga Māori as there is in the RMA or Te Ture Whenua. Here to Parliament could have included a specific reference to tikanga but did not. The "any other applicable law" consideration is twelfth in a list of 13 and follows a reference to relevant regulations.

Tikanga is a product of the cultural context in which it arises and cannot be divorced or separated from that context. While tikanga is acknowledged as forming part of the value of the New Zealand common law, it is not an independent source of law – and acknowledging all the caveats with citing the judiciary extrajudicially – requiring separate consideration under section 59(2)(l), a flavour in the common law where context is everything.

It is also relevant that disputes as to the nature of tikanga are becoming prominent in the senior Courts, and that's a reference to "amongst iwi" in terms of exactly what does "tikanga" mean.

So the point here is a bit similar to the previous themes that I've mentioned. I make reference to the fact that there's no reference in the Act to tikanga, not to say that tikanga is not to be taken into account. In effect the DMC did. Again, it's to recognise those elements of tikanga were before the DMC, kaitiakitanga, whanaungatanga, whakapapa, mauri, et cetera. It had received advice on this from Ngā Kaihautū and it made the finding that it did in terms of the recognition that tikanga forms part of the Māori customary and kaitiakitanga interests, and it also noted the recommendations of the Māori Advisory Committee on tikanga.

Finally, other marine management regimes, and this touches on some of the discussion that we had previously with the NZPCS but this finds a different home in terms of the statutory criteria. The RMA and EEZ are neighbour statutes. The TTR application activities are located in EEZ with some of its effects occurring the CMA which is governed by the RMA. The DMC was required to 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, including the nature and effect of other marine management regimes. This includes regulations, rules and policies made and the functions, duties and powers conferred under the RMA.

The sole issue here is the treatment of the NZCPS in the "take into account" assessment.

It is common ground that the DMC did discuss the NZCPS but the Court of Appeal characterised its treatment as brief and very general and gave the conclusion set out there at para 46 of my submission.

This logic misconstrues both the nature and effect and "take into account" components of the DMC's duty. The TTR proposal is not governed by the RMA and the EEZ Act does not extend the NZCPS into the EEZ. The DMC was required to take into account the RMA, including the NZCPS, but not to apply it or give effect to the policy. The nature and effect assessment involves a much higher order consideration than the detailed assessment of individual NZCPS policies favoured by the Court of Appeal. That was the level of consideration that the DMC applied and we say the High Court's analysis was correct.

GLAZEBROOK J:
Did you want to take us to those paragraphs you mentioned?

MR MAJUREY:
Yes, Ma'am.

GLAZEBROOK J:
1022, is it?

WILLIAMS J:
1022 of?

MR MAJUREY:
1022 to 1023, and that begins on page 211. Just before I go there, it might –

GLAZEBROOK J:
Hang on.

WINKELMANN CJ:
That's not right.

GLAZEBROOK J:
"We're clear that our duty and powers lie only under the Act," and there's no relevant topic covered.

MR MAJUREY:
Sorry, Ma'am, where are you?

GLAZEBROOK J:
Well, I'm just wondering what they did with the NZCPS that you say was sufficient.

MR MAJUREY:
I was just going to say that perhaps a better starting point would be 1004 starting at page 206, and I start here because, as has been reflected in some of the discussion to the NZCPS, the DMC was mindful of the task that it had and starting at the second sentence of 1004 –

WILLIAMS J:
Sorry, can you give me the number again? I was looking at the wrong one.

MR MAJUREY:

Yes, 1004 starting at page 206 of the DMC report. The second sentence begins: "However, the Act gives us little guidance about considering the nature and effect of the other MMRs. The relevance of those regimes and the weight we have given to them has therefore been based on the circumstances of this case, rather than any specific statutory direction. As with any other requirement under section 59(2) we have evaluated the relevance of the regimes and determined what weight to give them in reaching our decision." So just to note then there a recognition by the DMC of the task not being that straightforward.

If we then go to 1019: "We have had regard to the NZCPS, but provisions (or parts of provisions) of potential relevance include the following," and it sets out the objectives.

So it's quite right to say, as the minority view said, there was not an explicit statement that here are the bottom lines of the NZCPS and going through in chapter and verse. The way the High Court conceived of that was to say that clearly regard was had to the NZCPS, the nature of its implications and what it involves. There is a summary set out there in terms of what it contains, including matters of the Treaty, biodiversity, natural character, contaminants. So the essence of what I understand the Court of Appeal to be saying is that the discussion and reasons weren't fulsome enough, and therein lies the essential difference between the High Court and the Court of Appeal. The High Court took a different approach and said clearly it had been taken into account and in doing so the DMC discharged its duty. And I set out those paragraphs from the High Court at footnote 38.

WINKELMANN CJ:

So the High Court's analysis was correct?

MR MAJUREY:

Yes, Ma'am.

Those are my submissions, Ma'am.

WINKELMANN CJ:

Thank you, Mr Majurey. You've finished early. We'll retire I think and…

WILLIAMS J:

Well, maybe you've got some other things you want to fill the time up with, Mr Smith.

WINKELMANN CJ:

Is there anything you could usefully do in eight minutes?

MR SMITH QC:

Well, if I can get my friends' materials –

WINKELMANN CJ:

There's no compulsion to do so though.

MR SMITH QC:

I will just give my friend his materials back and perhaps I can look at the question of a casting vote.

WINKELMANN CJ:

Yes, I think it would be useful to have that.

MR SMITH QC:

So if your Honours please, the question of the casting vote is referred to in part 5 of the DMC decision and complained of in KASM and Greenpeace's submissions that the casting vote procedure was published for the first time in the DMC decision-making process, and we say first of all I don't anticipate that that is their real gripe about it being published for the first time in the decision, but in case it is I simply say that in point of fact the DMC at the time was a subcommittee of the EPA Board and the EPA is a Crown entity under the Crown Entities Act 2004 by virtues of section 7 and 8 of the EPA Act and to which the Crown Entities Act applies. Section 78 of the Crown Entities Act

provides procedures in schedule 5 of that Act that apply to the board of any statutory entity and the EPA is a statutory entity within the definitions of the Crown Entities Act. Those procedures include that, and are also repeated in section 73 of the Crown Entities Act, that a board of a statutory entity can delegate to members and others under section 73 of the Act and that was done in this case. The board procedures, and therefore the procedure of any subcommittee of the board, are found under section 78 and schedule 5, and schedule 5 of the, sorry, clause 14 of schedule 5 allows the board to form a committee just as does section 73 of the same Act, and clause 12 of those procedures in schedule 5 gives the Board share a casting vote. So what that means in the end is that when the DMC determined its voting procedures it did so in a manner which was consistently with its constituting legislation and its constituting legislation was always, it's a matter of obviousness, available for the public to look at. So there was nothing new about the potential use of a casting vote. It's –

WILLIAMS J:
So just to clarify, the casting vote, well, the procedure is in the Crown Entities Act or the EPA Act?

MR SMITH QC:
It's in the Crown Entities Act.

WILLIAMS J:
Crown Entities Act, okay, good. Just wanted to get that clear.

MR SMITH QC:
And so in other words there cannot be a complaint. The law's the law, is what I'm saying, and…

WILLIAMS J:
Always a winning submission.

MR SMITH QC:
This is one of the easier.

Now, so down to the cases, we then come to the question of the cases relied on by KASM and Greenpeace as authority for the view that the Chair in this case was required to exercise the casting vote to separately consider the exercise of the vote. That's the first point. The second point that is made is that you have to give separate reasons for the exercise of that casting vote, that is aside from and/or in addition to the reasons you've given for the exercise of your primary vote or your deliberative vote, and then if there is a need to favour caution then you must cast the casting vote negatively. We say that that is simply a notion which KASM and Greenpeace put forward which, with the greatest respect, doesn't find a foundation in law. They rely on *Turner v Pickering* [1976] 1 NZLR 129 and their decisions and the relevant paragraph is 134. It says: "There is no right to a casting vote at common law," but that's of no significance because we have a right to a casting vote under the legislation which forms the statutory procedures to be adopted by the DMC and its board. There is *R v Bradford City Metropolitan Council, ex parte Corris* [1989] 3 All ER 156 at tab 44 of the respondents' cases and page 160. It's only authority to the effect that the casting vote, if there is one, is to be exercised honestly and in the best interests of those who may be affected and that adds nothing to the manner in which the primary or deliberative vote would be exercised.

There is then the New Zealand case which is TNZ, or one of them, *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at the passage cited, and it positively goes against KASM and Greenpeace's submissions. In my submission, it generally confirms there is no set practice in relation to the manner in which a casting vote is used.

WINKELMANN CJ:
What case was that, sorry?

MR SMITH QC:

Television New Zealand. I think I said TNZ, I'm sorry. I meant to say *TVNZ v Viewers for Television Excellence*, and that is in the bundle of authorities relied on by KASM and Greenpeace, and at paragraphs 59 and 60 it says there's no practice, no set practice. It refers to one or two articles. There is an article by Mr Ockleston which merely suggests that the status quo approach with appeals be followed. So in other words that author suggests that as, for example, I suppose with the Supreme Court where if there is by dint of circumstances only a four-Judge panel and there is an even split then that favours the status quo. Two points about that. The first is that that is embedded in a complete abstract set of rules and there is no casting vote, of course. The second point is what is the status quo. The status quo is that you had not one but two and possibly more preceding decisions where there have been judicial determinations of the rights of the individuals and they have been adjusted. The status quo is non-existent here so far as the DMC accept the legislation. The counsel for *Viewers for Television Excellence* in *TVNZ* said, well, okay, the status quo then is the legislation, the governing legislation, and that didn't find favour for obvious reasons. There had been no determination or preceding determination, therefore there was no status quo.

GLAZEBROOK J:

Isn't the status quo no…

MR SMITH QC:

Well, the status quo –

GLAZEBROOK J:

No, isn't the status quo that there isn't a permission? The status quo can't be that there is a marine consent, or discharge consent.

MR SMITH QC:

The status quo – the writer of the article, Mr Ockleston, when referring to a status quo, was referring to the status quo being the preceding judicial decision or determination, and that's what gave a basis to say that the status

quo was acceptable. But where you have no preceding determination, the argument put forward by Mr Ockleston falls away. There has been no pronouncement on rights at all. There is then *Blue Ring Pty Ltd v Landshore Pty Ltd (Subject To A Deed of Company Arrangement) & Anor* [2006] WASC 245 which is footnoted. It doesn't help. Australian case. There is the decision in the EPA's cases which is *Love v Porirua City Council* [1984] 2 NZLR 308 and it's not cited or relied on by the respondents. It clearly goes against restraints on a casting vote of the sort urged, ie, giving separate reasons. So running through the decisions, there is no basis in fact for any of KASM/Greenpeace's submissions, in my submission.

Finally, the question of favouring caution. Is it a means of favouring caution to exercise a casting vote negatively in the case of doubt? The difficulty with that submission is that in casting one's deliberate vote you have already exercised caution. You have already exercised caution because you are obliged to because that is what the Act tells you to do if circumstances arise which tell you to do it. If you do it again separately in your casting vote as opposed to your deliberative vote, you are exercising what you genuinely believe to have been the requirement for caution on your deliberative vote differently for the purposes of your casting vote, and in *Love*, for example, that was thought to be an outcome which would not be countenanced in the exercise of a casting vote that you would exercise it differently from the manner in which you'd exercised your deliberative vote, taking into account all the relevant circumstances.

So that takes me to 401 and I am content to reply on economic, benefit because that's a shorter subject, after my friends have given their submissions on it. It is, after all, a cross-appeal in effect.

WINKELMANN CJ:
Thank you, Mr Smith. All right, we will retire now.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON TUESDAY 17 NOVEMBER 2020 AT 10.18 AM

WINKELMANN CJ:
Morena, and our apologies for our late arrival. Mr Fowler, are you up first?

MR FOWLER QC:
No, your Honour. I think it's the Crown is next and the EPA if called on.

WILLIAMS J:
And at the risk of being seen to fall on my sword, and of sounding like Reggie Perrin, it was a dead logging truck at the top of Ngauranga Gorge.

MR WARD:
E ngā Kaiwhakawā, tēnā koutou. May it please the Court. Your Honours, the Crown has been granted leave to intervene on the issues that are raised in this appeal relating to that Treaty, Māori customary interests and the applicability of tikanga to marine and marine discharge consent applications under the Act.

Your Honours, the Attorney's focus is primarily on the general principles and approach adopted by the Court of Appeal. The Attorney is neutral as to the correction of the specific EPA decisions in this particular case. The Crown's focus is on section 12 and the approach that the Court of Appeal has taken and this Court might take in relation to Treaty provisions of the elaborated kind that one finds in section 12.

There are three main areas that I propose to address this morning, your Honours: section 12 which specifies how Treaty principles apply here, the interpretation of existing interests in section 4, and some comments on the nature of the decision-maker's task under section 59.

I'm conscious that your Honours have traversed a number of these issues with my learned friend, Mr Majurey, yesterday.

The Crown says that Parliament has made a deliberate choice in the way in which it has drafted section 12 of the Act, and the legislative history illustrates that choice. The select committee on the Bill rejected a proposal to include a Treaty provision that was similar to section 4 of the Conservation Act. That is, Parliament chose not to adopt a general provision that applied broadly to every decision-maker and every exercise of power under the Act, and further at the committee of the whole House stage a supplementary order paper was proposed to introduce a provision which read that the Act must be interpreted and administered so as to give effect to the principles of the Treaty. That's the supplementary order paper at tab 10 of the Trans-Tasman consolidated authorities and it's referred to in footnote 9 of the Crown's synopsis.

We say that that part of the legislative history shows that the Parliament made a conscious and careful choice. It chose to elaborate the framework for the decision-making process of the EPA on the basis of a "take account" standard and "take account" process, and that's consistent with the broader statutory scheme, the absence of any general Treaty principles, clause or reference in the purposes of the Act, and it reflects the nature of the decision-maker's task, the broad evaluative task of having to weigh up a large number of factors which are relevant to applications of this complexity and of this kind.

The shift to what's often called an elaborated clause of this kind in section 12 is a conscious choice for Parliament that's reflected in other parts of the statute book. Indeed, that's part of the Crown's particular interest in this intervention. Parliament has chosen to move away from, in a number of places, the unelaborated Treaty principles such as section 9 in the SOE Act or section 4 of the Conservation Act, and that's consistent with –

GLAZEBROOK J:
Can I just say that to the extent one would still, and it's the same with international principles, still interpret legislation on the basis that Treaty breaches or breaches of international treaties are not intended by Parliament, so obviously what's there in section 12 is less than section 4 of the Conservation Act and section 4 of the Conservation Act, as we know, is a very

strong provision, but just because you've got specific matters that are identified doesn't mean that you would be therefore getting away from just that normal interpretation provision that one would have in respect of international obligations and I would suggest the Treaty, and I would suggest in particular the Treaty.

MR WARD:
We are not suggesting that section 12 is somehow an ouster.

GLAZEBROOK J:
Right.

MR WARD:
What we say is that the, and the Court has established, that the Treaty can be an extrinsic aid to the interpretation of statutes where there is an ambiguity.

GLAZEBROOK J:
No, that's not what the Court has said and neither is that what the Court has said in respect of international treaties either. There's no need for ambiguity. It's an interpretive principle that applies more generally.

MR WARD:
Well, your Honour, we say that the –

GLAZEBROOK J:
So you say we're wrong in that?

MR WARD:
No, your Honour. I say that the starting point is the statutory scheme and that section 12 indicates that Parliament intended for the decision-makers to have a "take account" standard. Section 12 indicates that Parliament, considering the Treaty, has decided that this is the particular standard and form of the decision-making process. In my submission, that is consistent with the broader statutory scheme. It does not –

WILLIAMS J:

Is the subtle suggestion there that that somehow reduces the constitutional significance of the Treaty to something less because of the "take account"?

MR WARD:

No, your Honour. It's the suggestion that the "take account" standard is the standard that applies to the EPA. The regulatory regime that Parliament puts in place for consenting processes for the EPA is not intended to alter the constitutional significance of the Treaty, and I –

WILLIAMS J:

So you would read that then to say take account of something intrinsically important, wouldn't you? You'd have to read it that way.

MR WARD:

Yes, your Honour.

WILLIAMS J:

It's not just any old thing to take account of?

MR WARD:

No, the factors that are enumerated in section 59 have to be taken account of and a decision-maker who is acting reasonably in the context of the statutory scheme should be considering the sorts of things they are asked to take into account.

GLAZEBROOK J:

Isn't "take account" just related to existing interests, not Treaty generally, which was the debate we had yesterday in respect of how that provision is set out because it sets out, its chapeau, if you like, says it's giving effect to the Treaty and then it says in 59 in existing interests it's taking into account.

WILLIAMS J:

Take account.

MR WARD:

Yes, your Honour, but we say that by taking into account the – Parliament intended that if the decision-maker takes into account the things that are listed in section 59 and which come through section 59 that is how Parliament intended Treaty principles to impact on the statutory scheme, and we say that that choice is a choice that the – it's a policy choice that the legislature has made and it's reflected in the legislative history and in the wording when seen in the statutory scheme and so –

WINKELMANN CJ:

But you accept it doesn't oust the usual approach to statutory interpretation in relation to the Treaty?

MR WARD:

It isn't intended to be some sort of privative clause in relation to Treaty principles, I'd accept that. But we say that section 12 is Parliament's indication of how it considered a decision-maker should go about its task and having chosen not to insert a section 4 Conservation Act like clause and having chosen, having set out what it says the Crown's duty is, to set a "take account" standard and framework, that that is the starting point for the consideration that the decision-maker has to do and it's the starting point for a court's consideration, decision-making under the Act.

WINKELMANN CJ:

It's another way of reading taking account. Well, section 12 says: "In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty."

MR WARD:

So we say that that's Parliament signalling clearly that it has turned its mind to Treaty matters and that's clear from the legislative history as well. Having turned its mind to those matters it has put in place these sections.

GLAZEBROOK J:

It has put, sorry?

MR WARD:

It has put, having turned its mind to those factors, it has put in place these sections which are elaborated in section 12.

WILLIAMS J:

So the statute says the Crown is bound to recognise and give effect to the Treaty, right?

MR WARD:

Yes, your Honour.

WILLIAMS J:

It's an acknowledgement of that, hardly surprising these days, and as a result decision-makers to which through its legislative arm it delegates authorities must take account of the Treaty. But it must take account of the Treaty, I know that this is somewhat circular, but it must take account of the Treaty in the context of an accepted obligation to recognise and respect, and that must get us to the point where a decider wouldn't likely breach the Treaty. It's not just: "I've considered it, now I'm parking it." You have to get yourself to a point, given the background there, of saying: "No easy breach."

MR WARD:

The decision-maker has to take account of the relevant factors the statute points them to, the interests in section 59, and has –

WILLIAMS J:

But can the decision-maker say: "We've taken account of Article 2 of the Treaty's guarantee of tino rangatiratanga. We don't like it. We set it to one side"?

MR WARD:

Your Honour, I think a decision, dealing with all the caveats that go with hypotheticals, there would be the ordinary application of administrative law notions to a decision-maker showing what they have properly taken into account and that the decision reached is reasonable on all the factors taken into account. If a decision-maker is taking that approach to considerations that apply, presuming that considerations get in under section 59 which is what the decision-maker is directed to, we say that assessing a decision like that is a matter of deciding whether the decision-maker has taken into account a relevant consideration, and I take your Honour's point that it would be – one would expect to see reasoning to justify, well, not to justify, reasoning to explain particular approaches or particular conclusions.

WILLIAMS J:

Yes, at the very least because the problem with this approach of an apparently unvariegated list of considerations is that there are considerations and there are considerations.

MR WARD:

Yes, and so on review –

WILLIAMS J:

And the Treaty, of course, is, as we know, a constitutional document which at least politically, if not legally, constituted the country, and that ought to mean something other than just a vanilla take it into account, don't you think?

MR WARD:

Well, the standard that the statute sets is for the decision-maker to take into account the interests that are enumerated and so on review the question for the Court would be whether those matters have been properly taken into account. The –

WILLIAMS J:

My question is really what does "properly" mean. That's the point. Is your argument that they're unvariegated on purpose and they are undifferentiable if they – there's no considerations that have any particular context or importance as opposed to others? They're all equal?

MR WARD:

No, your Honour, that's not the contention.

WILLIAMS J:

Okay, what is it then?

MR WARD:

Well, the decision-maker would have to, in relation to the specific decision, show that they have considered and weighed the relevant considerations and interests and on it accept that if a decision-maker is engaging with interests that are customary interests or that engage Treaty interests, those things would require particular attention and one would expect to see that in the decision that's produced. But where we differ from the Court of Appeal, Sir, is that the "take account" standard structures the way in which a lawful decision should operate.

WILLIAMS J:

Sure. It's not a "give effect to"?

MR WARD:

Yes, and –

WILLIAMS J:

Yes, you're dead right about that.

MR WARD:

And so that also shapes some of the comments the Court of Appeal makes about justificatory standards. If the Court of Appeal is suggesting that there is

some particular justificatory standard that's not present in the statute, we think that goes too far. We think the framework is the "take account" framework and that the principles of public law that would apply to that decision-making are sufficient for the Court to engage, for a court on review to engage with the issues that arise through the lens of section 59.

GLAZEBROOK J:

Can I just put what I put to your friend yesterday, that where you're looking at existing property rights or constitutional issues the "take account" standard, well, what the Court of Appeal said about justification does not seem to me to be odd in the context of those sort of fundamental rights because one wouldn't normally expect that you could likely, for instance, and let's go to the property right, take away somebody's fishing quota without having major justification for doing so, and, what I put to your friend yesterday, or the words I put in Justice Williams' mouth, I think, especially if there's a constitutional aspect to it, and you seemed to be agreeing with that when you said that it would require particular consideration and you'd find that in the decision. I think that's all the Court of Appeal was saying, at least in the passages that were pointed out to us yesterday.

MR WARD:

Your Honour, I had read the Court of Appeal as going further to the extent that they may have suggested that there was a requirement to justify by reference to Treaty principles or Treaty texts as the standard that the decision-maker must meet. That departs from the "take account" framework.

GLAZEBROOK J:

Right, so you say it was actually a "give effect to" standard wrongly under the –

MR WARD:

Well, that is closer to a "give effect" standard, yes.

WILLIAMS J:
Where is that?

MR WARD:
Partly at 171, your Honour. 171 of the judgment, and there's a reference there to Treaty principles requiring justification of a decision.

WILLIAMS J:
Isn't that what you just said?

MR WARD:
Well, I think if the – the decision-maker's reasons should be related to the statutory scheme and to the interests that are set out in 59.

WILLIAMS J:
I think you accepted that these things wouldn't, given their intrinsic importance, wouldn't be lightly set aside so you'd expect some reasons that would match that. Isn't that what the Court of Appeal is saying?

MR WARD:
Yes, Sir, and to the extent that there is a suggestion that there is some additional justificatory standard we say that's not the case and that the "take account" standard would be sufficient.

WILLIAMS J:
Yes, I have to say I tend to agree with you. I just can't see that that's what the Court was saying in 171.

WINKELMANN CJ:
Yes, it's capable of being read two ways and I think that's –

WILLIAMS J:
Is it? Okay.

WINKELMANN CJ:

Well, for myself I don't think they are saying you can justify it by reference to the Treaty. They're just saying that then it can be, if you give full reasons then it can be debated then assessed against those matters which is I don't think they're saying what you're suggesting, Mr Ward, but I appreciate it's perhaps not as pinned down as neatly as it might be.

MR WARD:

Thank you, your Honours, yes.

ELLEN FRANCE J:

Mr Ward, could I just ask, one of the arguments made in response to the Attorney's approach is that you can read section 12 as a non-exhaustive way of directing attention to particular, or to sections of particular significance in terms of the Treaty. Is your response to that a reliance on the legislative history or are there particular things in the statutory scheme that you would point to?

MR WARD:

Your Honour, I would point to the, well, to the statutory scheme, to the broader history of the movement towards more precise specification of Treaty provisions and there's commentary in the Crown bundle from Professor Palmer, as he then was, and others about the benefit of elaborative provisions providing certainty and clarity for Courts and for decision-makers. In my submission the broader scheme of the Act supports the approach that we take to section 12. These are the same or similar reasons to the ones that Mr Majurey discussed yesterday. So there isn't a specific Treaty clause. There isn't a purpose provision that would support a "give effect" standard and the structure of section 12 itself, we would say…

WINKELMANN CJ:

Can you speak up a little bit, Mr Ward? I'm not quite sure why but your voice is fading away a bit. You are directly…

GLAZEBROOK J:

That was happening yesterday. Is there some way that we can turn it up because it seemed to be happening yesterday and people seemed to be speaking into the microphone but somehow it…

MR WARD:

I do beg your pardon, your Honours.

WINKELMANN CJ:

No, it's not your fault. It's the sound system. Just bear in mind because it's important for everyone in the courtroom to hear you.

MR WARD:

Yes, Ma'am.

WILLIAM YOUNG J:

And remember that it's being piped out to the back and it's much more difficult for them to hear.

MR WARD:

Yes, Sir, thank you. So we say yes, the statutory scheme is relevant to the interpretation that we propose and it supports the interpretation. The structure of section 12 in the chapeau states what Parliament considered the duty is and then the language that's used in the following elaborative subsections is quite clear, in my submission, and it points to a statutory scheme that connects section 12 to the sections regarding section 59 and the Māori Advisory Committee sections, section 18, and those provisions then provide particular machinery and specific obligations, and that reflects, is consistent with, the fact that this is a regulatory regime where the decision-makers have to engage with particularity and specificity, with the detail of a particular application.

WILLIAMS J:

But the Court of Appeal said, well, actually, looking at the significance of those sections, particularly section 59, there's no need to look beyond them anyway for the purposes of assessing the application of the – the Act does all it needs to do. In the context of applications, it might as well be a general one insofar as these issues are concerned.

MR WARD:

My submission is that goes too far in the way that it construes and describes Parliament's intent and the statutory scheme.

WILLIAMS J:

I think there's no doubt that Parliament's response to a generation and a half of experience of Treaty clauses is to be more specific where possible but it's also general. The 2020 COVID legislation had a general clause in it and I presume that was enacted relatively quickly. So it is horses for courses. I just wonder whether given the overall variety that we have now that it's appropriate to read elaborated clauses as somehow less than general ones.

MR WARD:

In my submission, it's not a matter of less than or more than anything. It is horses for courses. So the selection of the particular regime in this case and more generally is a particular policy calibration that Parliament has reached, and so the decision-maker, and a Court of review, has a clear signal about the framing of the decisions and the way in which both the decision-maker goes about their task and the way in which the Court considers it on review because there's a policy choice to be made about what a Treaty provision says.

WILLIAMS J:

So if you look at the regulation provisions are captured in that 33 to 59 list, aren't they? Regulation-making powers. Am I right in remembering that? They're listed in section 12.

MR WARD:

Yes, your Honour.

WILLIAMS J:

Right, so you see, under the Resource Management Act there's a general Treaty clause that applies to everybody because there's a whole complex cascade of documents generated by various levels of regulator until you get to the consent. So you've got National Policy Statements, Regional Policy Statements, District Plans, and then consents, and there's probably a whole pile of other things as well. That complexity is not here. There are two levels apart from the Act, the regulations and the consent, and the Treaty applies to both. So I wonder whether in substance there's actually any difference between the RMA clause and this clause.

MR WARD:

At a level of generality, your Honour, yes, because if the suggestion is that the differences in the statutory schemes between this statute and the RMA have no impact on the particular obligations or the particular, the legal parameters within which a decision-maker has to make, then respectfully we say that's not the case. The task for the Court here, in my submission, is the construction of the EEZ Act and it is relevant that the EEZ Act does not have the same hierarchy and structure as the RMA.

WILLIAMS J:

So my challenge to that proposition is in fact when you read it closely, yes, it does because the Resource Management Act is designed to have a general Treaty application to the various levels of decision-making. Here there are two levels. The regulations are the equivalent of District Plans, from Regional Plans, Policy Statements and so on, and the consent process itself. Under RMA the Treaty under section 8 applies to both. Under this provision the Treaty applies to both. In fact, the same wording is used except this wording might be said to be more powerful because prior to the "take account of" which you see in section 8 is "in order to give effect" to the Crown's accepted obligation to recognise and respect we have to take account of

requirement. So you could read this as more sophisticated and thoughtful than section 8 of RMA but having the same comprehensive effect if the Act is properly read.

MR WARD:

The Crown's submission is that that's not the appropriate construction of the statute, your Honour, because we say that the chapeau of section 12 is the statement that Parliament is making about its view of the Crown's duty and obligation and then it gives, it elaborates and makes choices about what the decision-maker must do in the rest of section 12, so it's not –

WINKELMANN CJ:

Okay, so I think we're going around in – we've now reached the point where we're going back into repetition, aren't we, and I'm just conscious of time.

MR WARD:

If I could just sum – yes, your Honour, I'll move on. The Crown's concern is that this statute should not be construed in a way as if to treat it as having a general Treaty clause because that's not what Parliament has chosen to do when it structured section 12, and we say that that's consistent with the statutory scheme, with the legislative history, but it's not an ouster or a watering down of a Treaty provision. It's the tailoring of a Treaty provision to the particular sorts of decision at issue.

WINKELMANN CJ:

I suppose what you were being challenged about by my friends to my left is –

WILLIAMS J:

I feel like a lawyer. We're her learned friends.

WINKELMANN CJ:

– is really how much, and given the status of the Treaty in common law and in common law now, in terms of common law approach to statutory

interpretation, how significant the small differences in wording really can be to the approach that is taken to the statute.

MR WARD:
Across a series of decisions, depending on the –

WINKELMANN CJ:
I mean I suppose the submission you're making is quite fundamental, that the Crown can change the nature of its obligations under statute by signalling different things out the front in relation to Treaty, and that's really the challenges coming to you.

MR WARD:
This is a decision, the decision under challenge is the decision of the EPA, not a Crown decision, and the Crown's Treaty obligations do not alter broadly but they may manifest in a particular statutory scheme in a particular way. This is not the only statute that regulates consenting activity and conduct in the EEZ or in activities related to EEZ activities. This particular statute adopts a particular regime, and there are other –

WINKELMANN CJ:
So if it's like the Bill of Rights Act, you know, for instance, we have the Sentencing Act which itself gives effect to, has a scheme which gives effect to the Bill of Rights Act, so when the Courts look at decisions under the Sentencing Act they don't have to do an Oakes kind of an exercise, you're saying that this is like that, that the scheme gives effect to the Treaty in itself and therefore there's no need to apply a greater level of gloss or scrutiny?

MR WARD:
Yes, the purpose of elaboration is to make the intention clear to the Courts and to the decision-maker.

WINKELMANN CJ:
Right, thank you.

MR WARD:

Your Honours, if I could turn to the question relating to section 59 and existing interests. The Crown's core point here is summarised at paragraph 18 in the synopsis. My submission that the Court of Appeal found that or appeared to suggest that all customary interests can fall within subsection (a) of the definition of existing interests in section 4, and the Crown says that an approach that treats all customary interests as falling within (a) without some further consideration wouldn't be consistent with the statutory scheme, and in many respects this overlaps with the point about the particular process that a "take account" process would require or might involve.

The statute contemplates and the legislative scheme indicates that Parliament contemplated a focus on lawfully established existing activities, so section 60 of the Act points the decision-maker to particular spatial considerations and considering particular impacts and areas of impact on activity. We say that the statutory scheme again focuses on a level of particularity and specificity so that the language in section 4 and the definition of existing interests, the Act is at tab 3 of the Trans-Tasman bundle, your Honours, definition in section 4 points to explicit and identifiable interests, is the language used in the select committee, in the departmental report in relation to the Act, and so the Court of Appeal goes too far, we say, in suggesting that subparagraph (a) provides a general portal through which all customary interests become existing, or are treated as existing interests under the Act.

WILLIAM YOUNG J:

You mean all customary interests or all claimed customary interests?

MR WARD:

All claimed customary interests, your Honour, except that it might be that, or it will be in relation to those –

WILLIAM YOUNG J:

What I mean is includes claims that are as yet unestablished customary interests.

MR WARD:

Yes, and I'll come in a moment to the particular relevance to the Marine and Coastal Area Act.

WINKELMANN CJ:

And what means "unestablished".

MR WARD:

Yes, your Honour. Well, it –

WILLIAM YOUNG J:

Well, I suppose what I mean by "unestablished" is not recognised either by some legal discussion for accepted by the parties to the issue at hand.

MR WARD:

Yes, your Honour. So the subparagraphs (b) through (f) are situations where particular interests will have been specified or will have been identified and acknowledged, and in relation to MACA claims that haven't yet been heard through the High Court, my submission, the statutory regime for MACA places those unresolved claims, undetermined claims, within the jurisdiction of that Act and the EPA shouldn't be required to cut across the MACA regime and the process that the High Court has under that Act and the statute.

So it's the Crown's supplementary bundle, tab 1, which includes excerpts from the Marine and Coastal Area (Takutai Moana) Act 2011. If your Honours come through to paragraph 94 provides –

GLAZEBROOK J:

Sorry, I've no idea where this is.

WINKELMANN CJ:

So which bundle is it?

MR WARD:

It's the Attorney-General's bundle, supplementary authorities. It's footnote 26 if your Honours are using the electronic version for note 26 in the Crown's synopsis.

GLAZEBROOK J:

Is it only electronic?

MR WARD:

It was filed in hard copy as well but…

WINKELMANN CJ:

We do have it electronically, "Authorities of the Attorney-General" at the top.

ELLEN FRANCE J:

What was the footnote number, Mr Ward.

MR WARD:

It's footnote 26, your Honour.

WINKELMANN CJ:

So what provision in Marine and Coastal (Takutai Moana) Act are we talking about?

MR WARD:

So it's section 94(2) of the Act. So this relates to the definition of existing interests in section 4. Paragraph (f) in section 4 includes protected customary rights or customary marine title recognised under the MACA as an existing interest under the EEZ Act. Protected customary right or customary marine title can only be recognised through the MACA process. So including, we say, including undetermined MACA applications in subsection (a) the definition of "existing interests" cuts across Parliament's wording in subsection (f). It leaves the decision-maker in a very difficult position of having to assess

what in some cases may be highly contested overlapping MACA applications, and I'd accept that a decision-maker, that there may be cases –

WINKELMANN CJ:

Well, it's not a very complex – we can just read it out, can't we? It says: "A protected customary right or customary marine title relating to a specified part of the common marine and coastal area may be recognised by an agreement made in accordance with section 95 and brought into effect under section 96; or an order of the Court made on an application under section 100. A protected customary right or customary marine title may not be recognised in any other way."

MR WARD:

And we say that there's a statutory scheme that MACA creates that applies here and in subsection (a) of the definition of "existing interests", shouldn't be interpreted in the way that cuts across that particular jurisdiction.

WINKELMANN CJ:

Well, are you saying, are you going so far as to say it would be to recognise a customary marine title outside of the scheme, is that your point, when you're saying "cutting across"? What do you mean, "cut across"?

MR WARD:

The EPA can't be expected to simply presume that an undetermined application is correct and it places considerable burdens on a decision-maker to be faced with a series of contested claims which may overlap which it is not its job to determine the validity of. The EPA can't simply presume that the application is accurate and correct.

WILLIAMS J:

Is the MACA definition of "customary right" or "customary marine title" in the documents anywhere?

MR WARD:

No, your Honour.

WILLIAMS J:

Can you tell me what it is because Google is not helping me.

MR WARD:

The definition for "customary marine title" involves –

WILLIAMS J:

The exclusive title?

MR WARD:

Yes.

WILLIAMS J:

Okay, what about "right"?

MR WARD:

"Rights" are – I'm grateful to my learned friends – a "protected customary right" means an activity, use or practice established by an applicant group in accordance with the tests later in the Act, which refer to activities since 1840, your Honour, and recognised by a protected customary rights order or an agreement, and, sorry, just to complete –

WILLIAMS J:

So if you applied that on those terms, no Māori interest of any kind below mean high water mark could ever be recognised in any other statute, including the Resource Management Act.

MR WARD:

That's not the outcome that we're contending for, your Honour, and I don't think it flows from the point. To the extent that the Court of Appeal says that the unresolved MACA claims fall within existing interests, we say that cuts across the MACA statutory scheme. Now it may be that a group that engages

with the EPA process will bring evidence about its interests and the EPA will engage with that material as it's required to, either –

WILLIAMS J:
Isn't your argument that they can't?

MR WARD:
Well, they can't simply by virtue of a MACA application. It might be that a group would show, regardless of MACA, particular interests and rights in the EEZ because the MACA application will only relate to the territorial sea.

WILLIAMS J:
But you pointed me to section 94, wasn't it?

MR WARD:
Yes, your Honour.

WILLIAMS J:
Which said that it's not open to the EPA to take account of any customary rights not recognised under MACA or – what was the other phrase? I don't have the section in front of me any more – or not the subject of an agreement or a court order.

WINKELMANN CJ:
A protected – yes.

WILLIAMS J:
That would, given the relevance in the various statutes of these very things, be an extraordinary result, wouldn't it?

WINKELMANN CJ:
I think you weren't prepared to go that high in your submission, were you, Mr Ward, because I put that to you and said –

MR WARD:

No, Ma'am, I wasn't.

WINKELMANN CJ:

No, you said, what you're saying is the EPA can't be expected – perhaps it is a good idea –

WILLIAMS J:

Well, they're different propositions. This is the point.

WINKELMANN CJ:

Yes, it is a good idea just to be very clear about what you are saying.

WILLIAM YOUNG J:

I take it to be your proposition that an interest which has been claimed but not established and which is maybe an issue in the proceedings at hand is not an established legal interest, shouldn't be treated as if the claim has already been made out.

MR WARD:

Yes, your Honour.

WILLIAM YOUNG J:

Does it go any further than that?

WILLIAMS J:

You can't be heard.

WILLIAM YOUNG J:

I take it the submission is that a claim to an interest where that claim has not been established or is not universally acknowledged or acknowledged by the parties is not to be treated as if the claim were already made out.

MR WARD:

Yes, your Honour.

WILLIAM YOUNG J:

And is your submission, does it go beyond that?

WINKELMANN CJ:

For instance, do you say that's the effect of section 94(2), do you say that?

MR WARD:

Yes. Well, 94(2) supports that approach to MACA interests.

GLAZEBROOK J:

Well, then you're saying that there is no customary interest until there's the MACA process, aren't you, and therefore that it can't be taken into account I would have thought more generally if there's no interest until it's established?

WILLIAM YOUNG J:

Well, it might have to be established. The logic of the argument is that it might have to be established at the hearing before the DMC.

WILLIAMS J:

But that's not what 94 says.

GLAZEBROOK J:

Well, I think the argument is it can't be because it can only be done under –

WILLIAM YOUNG J:

Well, that's a softer version of, that I put –

GLAZEBROOK J:

Yes, I agree.

WILLIAMS J:

That would be more helpful.

WILLIAM YOUNG J:

– is that if it's in dispute or not accepted it has to be established on the facts before the DMC. Now that's not a terrifically palatable procedural process.

MR WARD:

We accept that that may be the case. It's a challenging process for the EPA to then be drawn into and we say that the focus on existing interests is for identifiable particular activities that – and those are the sorts of things that the remaining parts of the definition look to.

WILLIAMS J:

So this refrain that it's not for the Courts dealing with, shall we say, collateral issues to address, well, dealing with their own issues to deal with collateral customary right claims, that's, the Environment Court has consistently taken that position for a long time, for the convenience reasons that you've discussed, but I wonder if that, given the comprehensive recognition now of the relevance of customary rights both in common law and statute, whether that's really a tenable stance any more and that there has to be some level of engagement, albeit not to the level of finding the rights crystallised but at least being able to address the credibility of the claim, you see, because in this case there's just no doubt that Ngā Rauru, Ngāti Ruanui, other ones who have a claim if it's anybody, there's no doubt about that. No one's arguing otherwise.

MR WARD:

Yes, Sir.

WILLIAMS J:

So why are we having this debate?

MR WARD:

And those – well, because the Crown's concern here is with the broader implications of the decision that your Honours will be making about how the EEZ Act works.

WILLIAMS J:

Well, we can deal with that when we get to a punch-up of Whakatōhea proportions. Perhaps that does get hard but that's not hard here.

MR WARD:

Nonetheless the Court of Appeal's approach in defining (a) as they have leaves open quite a much wider field for requiring the EPA to deal with those sorts of issues and while I accept your Honour's point that a decision-maker will need to have regard to the matters that are put in front of them and will need to take account of existing interests that qualify through section 59, that's the discussion we had earlier on, a –

WILLIAMS J:

Of course, the Crown has also argued when it's settling claims it oughtn't to be required to resolve cross-claims and that's been largely rejected, hasn't it, as an appropriate policy response?

MR WARD:

I'd be inclined to – there are some nuances and various qualifications to that, your Honour, in my submission.

WILLIAMS J:

Probably some nuances in there? It's a while since I've been – fair enough.

WINKELMANN CJ:

So Mr Ward, can I just get you then to recap for me exactly what the Crown's position is on existing interests?

GLAZEBROOK J:

Can I also, can I just point out that under that Act all customary interests under section 6 were restored? So anything that had been extinguished by the Foreshore and Seabed Act 2004 were restored. Now it does say: "And given legal expression in accordance with" this Act, but it certainly restores the

customary interest, so you cannot argue that they don't exist until recognised, it seems to me.

MR WARD:

Yes, your Honour, but they're recognised in the – the Attorney agrees that the recognition of the interests in the MACA process doesn't bring those customary interests into being, and we set that out at 21 in the synopsis.

WINKELMANN CJ:

Okay, so can you just recap where we've got to with your argument then as to what an existing interest is?

MR WARD:

We say that to the extent the Court of Appeal says that all customary interests fall within subparagraph (a) of the definition of "existing interests" in 4, that goes too far. Section 4 is aimed, the definition of "existing interests" is aimed at specific interests or rights which are established either through particular processes and mechanisms listed there but we accept that a decision-maker, if there was sufficient probative evidence, might reach a conclusion about customary interest in the course of considering the section 59 material, but we have caution about the approach that the Court of Appeal takes because it opens the EPA up to being used or being asked to or required to address collateral findings of rights at tikanga that is not what the Act intends and it places great burden on a regulatory body that is already grappling with issues of real complexity.

WILLIAMS J:

This is difficult territory at all sorts of levels.

MR WARD:

And in my submission that serves to reiterate the "take account" points made previously that decision-makers dealing with applications of this complexity, in landscapes of this complexity, landscapes very broadly defined, needs to have the ability to, where appropriate, look at the picture in the round and

evaluate the whole range of material that has been put before it and it's for that decision-maker to explain to the applicant, to the parties, to the relevant groups, how it has reached its final conclusions.

WILLIAMS J:
If you look at section 94 and the reliance to some extent anyway that you've placed on it, although I sent you a step back a little bit from the initial statement, it's inconsistent with the terms of (a), isn't it, because it says these interests can exist whether or not they are authorised by another Act, presumably that includes the MACA Act, so that even if they're not authorised they are still existing interests. So perhaps there's just a straight conflict between these two things. That would get you out of the pickle of having to say that customary rights are irrelevant under RMA in the foreshore and seabed area to…

MR WARD:
Yes, your Honour, that's not a submission that I'm making.

WILLIAMS J:
I'm helping you.

MR WARD:
Yes, your Honour. Yes, it may be that there is a tension there, your Honour, and that the way in which MACA recognises customary rights and so changes the way in which, changes the particular presence of those rights in the broader law, that that, in my submission, the EEZ is intending to contemplate that but there may be at a practical level some difficulty there. The key point that we make in the synopsis is that the Court of Appeal risks, by simply saying that there's a wholesale introduction, puts on the EPA the task of dealing with some of the detail and the complexity of those issues and that's not in the contemplation, well, it risks not being not being in the –

WINKELMANN CJ:
Although you're actually accepting that the EPA might do so?

MR WARD:

I think a consequence of the scheme is that they may have to do so.

GLAZEBROOK J:

And I suppose you'd say that if it is really difficult to work out what the case is then that might be a case of saying: "Well, we have sufficient information and we can only go forward on that information that we have and which we can be sure is," because I think you say if it's effectively uncontested and there's sufficient evidence then they can take it into account?

MR WARD:

Yes, your Honour.

WILLIAMS J:

Just finally, I did mention to your friend, Mr Majurey, where the Canadians deal with precisely this issue, albeit terrestrially, in mining and logging consents over land claimed by First Nations, and they do not take the approach you're suggesting, they say there needs to be at least some preliminary inquiry to work out what the standard is, if you look at – you'll probably know them – *Taku River, Haida*, and a couple of resource consent cases for mining, the *Chippewas* and the other case where the Supreme Court imposed that obligation on the consenting agency.

MR WARD:

Yes, your Honour, and the approach here we say is provided by this Act. The approach in Canada, in my submission, reflects the particular jurisdictional and constitutional framework for dealing with Aboriginal title and Aboriginal rights, and in my submission those doctrines flow out of a long engagement with Aboriginal title litigation and a focus on property rights. In my submission the EEZ and a number of New Zealand measures don't necessarily start from the same framework of – the courts in Canada have elaborated on a particular approach, it's rooted in litigation about Aboriginal title, and here the process is a different one, the process is Parliament choosing to elaborate the considerations that a decision-maker has to use,

and that's done against the background of, well, it's done in a context where there isn't something like section 35.

GLAZEBROOK J:

Well, doesn't Ngāti Apa say that customary title has nothing to do with legislation, it's actually a fundamental part of the common law? So it's effectively accepting all of the Aboriginal title-type considerations that have long been in other jurisdictions like Australia, Canada – sorry, a point I made yesterday as well, I think.

MR WARD:

I wasn't meaning to – well, the point that I was endeavouring to make to his Honour Justice Williams was that New Zealand had adopted a particular statutory regime and a particular public law approach to these issues and that that is the framework that the Court in my submission should apply. It's not a suggestion that seeks to depart from *Ngāti Apa*, because in my submission that's not at issue here.

WINKELMANN CJ:

So, Mr Ward, does that complete your submissions? Because I think you were going to talk to us about what this means for the decision-making task under section 59, there might be additional material you want to cover under that?

MR WARD:

I think we've covered that point in the various exchanges I've had with your Honours. The other point that's covered in the synopsis relates to tikanga as applicable law and the propositions are as we set out from 22 in the synopsis, a similar point to the point made about existing interests, your Honour, that the Court of Appeal, to the extent that they are saying all customary interests fall within subsection (l) as other applicable law that conflates the various questions that courts need to consider where there's a question about how tikanga may operate in relation to the common law. My friends for the iwi party seem to suggest that somehow the Crown is

departing from previous positions but I don't accept that that's the case. The Crown said in *Ellis* that there were different ways in which tikanga might engage with manifest in the common law as a source of underlying values and principles as a source of private rights, the Aboriginal title point that Justice Glazebrook was raising, and in a public law sense, including through statutory references and in particular cases where tikanga becomes relevant through a decision-maker, through a statutory scheme or through context. We simply say that the reference to other applicable law at the second-to-last list of a long list of subsections is not a likely source location for general incorporation of tikanga in the way that the Court of Appeal appears to suggest and that the approach that's required here is a particular engagement with tikanga that's asserted and that becomes relevant through the statutory scheme. In some cases that may be broader than simply, well, broader than a reference to law, and so the sort of approach in *Takamore v Clarke* [2013] 2 NZLR 733 (SC) where principles identified in a former common law may be the appropriate approach in particular cases, those issues arise in an incremental case-by-case basis, and the Court of Appeal goes too far in drawing a general direct line from tikanga through to subsection (l).

WILLIAMS J:

I guess the response might be once you accept that tikanga is in the common law then at some point you've got to confront what tikanga is and that point it becomes obvious that it's not a two-dimensional thing, it's a system, and you have to confront all of it, at which point you are talking about a body or a system of law which is a source of rights in this unique form of common law we have in Aotearoa. But it's kind of unavoidable really, isn't it?

MR WARD:

Well, the way to, in my submission the way that a decision-maker has to engage with those sources of law and with tikanga is through a particular engagement with the issues at hand –

WILLIAMS J:

Of course, there's no point in looking at tikanga if it has nothing to do with fish, water and kaitiakitanga, and we're not talking about the removal of bodies.

MR WARD:

And the simple point that we make in relation to what the Court of Appeal says about subsection (l) is that it goes too far in – it conflates in effect the choices and consideration that might be required in a particular case, and so we say that particular subsection is not intended to provide that particular portal that the Court of Appeal seems to ascribe to it that we're –

WILLIAMS J:

My point is I get your conclusion, just explain to me why because isn't it now orthodox that tikanga is applicable law in appropriate circumstances and in the particular circumstances where the decision-maker has to address those issues?

MR WARD:

And then there's a secondary question about what that actually means in the particular decision.

WILLIAMS J:

Absolutely.

MR WARD:

So the particular sorts of manifestations.

WILLIAMS J:

Yes.

MR WARD:

And in my submission the appropriate place for the decision-maker here to grapple with those issues is the extent to which they are engaged by those other parts of section 59 or other parts of the statute that the eleventh, I think

it is, matter in a list of those subsections, in my submission, there's nothing in the statutory scheme to suggest, and the statutory scheme points the other way, in my submission, to that subsection being a general applicability of tikanga point. It's not an argument –

WINKELMANN CJ:
Mr Ward, can you tell me what is the substantive difference between what you're saying and what the Court of Appeal said, because you only engage with any applicable law in any circumstance in circumstances where it's applicable to the situation you're dealing with, and if tikanga can be a source of law and it can be a source of private rights then you'd be engaging with it when it would bear upon the issue. So I'm just trying to understand if the point you're making really, what it's implications are and whether it's a point of substance or just a fine technical argument?

MR WARD:
It may be a fine point, your Honour. We say it's a matter of the construction of that particular subsection and its statutory context doesn't go as far as the Court of Appeal says on that particular point. There are other ways in which particular interests may be engaged in the statute.

WINKELMANN CJ:
So you're saying the Court of Appeal put it too high because they said what?

MR WARD:
Because they said that all customary interests are that fall within the subsection for other applicable law.

WILLIAMS J:
I don't understand why not just these issues but any issues can be relevant at multiple points in section 59, not even Māori issues, all sorts of things will be multiply relevant, I would have thought. You could have existing established lawful rights as a fisher and then you could be worried about sustainability under another provision. Why, just because you're a fisher, are you stuck with

(a) and you can't use one of the others? It seems to me the sort of unholistic approach which this Act was designed to avoid.

MR WARD:

Well, your Honour, in our submission each subsection may bear on a particular thing and in our submission, and it may be that I can't take your Honours any further on this particular point, we think the Court of Appeal goes too far by opening (l) to such an extent that the entire corpus of tikanga flows into that subsection.

WINKELMANN CJ:

Is your point, is what you're having difficulty with the Court of Appeal's requirement that there be a specific identification and addressing of the relevant aspects of tikanga above and beyond acknowledging those interests?

MR WARD:

We say that would be necessary, yes, your Honour.

GLAZEBROOK J:

It's just an alternative though, isn't it, because they've already said those other interests are recognised anyway as existing interests?

MR WARD:

The Court of Appeal treats it as an alternative, yes, your Honour. Your Honour, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Ward.

MR WARD:

Thank you. May it please the Court.

WINKELMANN CJ:

So Mr Fowler.

MR FOWLER QC:

Yes, thank you, your Honour. Did the Court intend to hear from the EPA? Subject to the Court's direction, counsel had –

WINKELMANN CJ:

I was just following the sheet I've got but…

MR FOWLER QC:

Certainly once we start to run in terms of our cluster of first respondents that's the sequence, but counsel, subject to the Court's direction, counsel have discussed the EPA position and given the nature of the EPA submissions the suggestion was that perhaps they should follow the Crown if called on, given that there might be matters in terms of their position that the respondents would want to address.

WINKELMANN CJ:

All right. Ms Casey. So Ms Casey, we appreciate the EPA attending. We're just keen to avoid duplication so if you could make sure you don't cover ground that's been covered or – yes.

MS CASEY QC:

Thank you, your Honours. Your Honour, you will have brief written submissions from the EPA and as recorded in those submissions in accordance with convention the EPA proposes only to address the Court on matters of systemic or operational concern and won't be making any comment on the merits of the DMC decision under appeal. Similarly, your Honours, I don't intend to cover the ground already covered by my learned friends, so of the six topics covered in the EPA's written submissions I wouldn't propose to address any oral submissions on the casting vote and I make only one brief observation in relation to existing interests to touch on an aspect that's an operational concern to the EPA and hasn't already been canvassed.

So, your Honour, with that starting position, the first topic I'd like to address is taking into account the nature and effect of other marine management regimes.

WINKELMANN CJ:
So can I just ask you, Ms Casey, because there's time management for the Court as much as for you, what your time estimate is?

MS CASEY QC:
About 15 minutes, your Honour.

WINKELMANN CJ:
So your first topic is, sorry? Taking into account the nature…

MS CASEY QC:
Of, the nature and effect of other marine management regimes under section 59, and your Honours will recall that the Court of Appeal has taken an approach which could be interpreted as requiring the DMC to itself undertake an analysis and an assessment of whether the proposal meets with the objectives and in the context of the RMA the environmental bottom lines and to accordingly decline a consent or give strong reasons why a consent should be granted if it does conflict with another regime.

The operational concern for the EPA is that for a start the RMA is only one of 15 marine management regimes listed in section 7 of the EEZ Act and operationally the approach of the Court of Appeal, if it's understood to require that, would mean that the EPA decision-maker needs to engage in a definitive conclusion of whether a proposal meets the objectives and complies with each of these marine management regimes, and as I've set out in my written submissions at paragraph 9 that would require the DMC to engage in a full assessment of the proposal as against each marine management regime that was relevant and with regard to the Act, RMA, as your Honour, Justice Williams, noted, it's a complex regime with cascading planning instruments. The decision-maker under the EEZ is not authorised to make a

decision under the RMA, would have to do so under very constrained timeframes set out in the EEZ Act in circumstances where the procedural provisions, including the procedural protections for an applicant in the appeal rights, are absent and it would require the EPA to assess the consent application against different statutory criteria, fundamentally different concepts including the definition of environment and different statutory purposes.

Now, your Honours, when you set it out in that way it's apparent that this must not have been the intention of Parliament, and I'll come to that in a minute, but if we're getting to a situation where, and I think the necessary thought experiment is what say a consent was to be declined on this basis, of course the EPA would need to be reaching a definitive conclusion whereas in fact the regime is more that the "take into account" regime is a much softer requirement than seems to have been set out by the Court of Appeal and, with respect, that's the more appropriate approach. I set out at –

WINKELMANN CJ:
Yes, well, the issue – okay, carry on. You're not going to deal with the substance of what "take into account" means for that purpose?

MS CASEY QC:
No, your Honour, other than it's not "give effect to". So the position is it's not give effect to the NZ Coastal Policy Statement. It's not give effect to the RMA. It's not give effect to the Crown Minerals Act 1991 or indeed the health and safety legislation. That's not the task that the EPA has mandated to achieve.

I set out very briefly in paragraph 10 of my written submissions the core references to the legislative history which make it clear that it was a deliberate decision that the RMA does not apply and the EEZ, and I note at footnote 13 the Minister for the Environment referring to the application of the RMA being "overkill" in this context.

At paragraph 11 of the submission –

WINKELMANN CJ:

So I think we should take the morning adjournment, Ms Casey.

MS CASEY QC:

I'm sorry, your Honour, of course.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

WINKELMANN CJ:

So just addressing timing before you begin again, Ms Casey. An indication to counsel that we will sit, we will come back early from lunch at 2 o'clock and to make up some time we will sit until 4.30 today. Hopefully it gives no difficulty to counsel.

MS CASEY QC:

Thank you, your Honour. Your Honours, I was just about to address my synopsis of submissions at paragraph 11 which refers to the aspect of the legislative regime where Parliament has turned its mind to the particular issues with overlap between the RMA and the EEZ and, as I say there, they are primarily procedural and allow for but don't require joint processing of applications. The main provision that I would draw your Honours' attention to is section 98 of the Act which makes it clear that even if there is a joint application, the RMA decision-maker must make the decision under the RMA, applying the RMA, and the EEZ decision-maker must make the decision under the EEZ, applying the EEZ Act. So Parliament has drawn a clear line between the two.

WINKELMANN CJ:

That wasn't addressed by the Court of Appeal?

MS CASEY QC:

Not that I recall, your Honour. I didn't see reference to that, no.

So your Honours, the conclusion that I reach on this point is at 12 I note that the indications, and I cannot put it higher than indications, from the statutory context and legislative history are that the direction to take into account other marine management regimes is primarily aimed at ensuring that the DMC is aware of and respects the overlapping jurisdictions, reflecting the "gap filling" nature of the regime, and I've set out at footnote 15 the Hon Amy Adams, Minister for the Environment, at Second Reading, introducing or stating: "The Bill responds to a regulatory gap that has meant New Zealand does not currently have a comprehensive regime in place to manage and mitigate the environmental effects of development activities in our oceans," and she says: "I wish to stress from the outset that this Bill will not duplicate or extend existing legislation," and my respectful submission is that that is the intention of that reference in section 59(h), that it is a "have regard to", not "give effect to", and that the Court of Appeal perhaps with its narrow focus on the RMA didn't consider that its approach to the RMA would necessarily apply across all the marine management regimes. So, for example, if it was applied it would require the EPA to consider whether its consent decision would give effect to the objectives of the Crown Minerals Act which are, of course, to promote mining and exploitation of resources, and that is just an indication that the Act is supposed to stand alone and that it isn't a "give effect to" regime.

So those were my submissions on existing interests, existing interests in – the nature and effect of other marine management regimes.

WINKELMANN CJ:

In terms of your submissions on existing interests, that's largely a duplication, isn't it, of the submissions made by Mr Ward and I wonder if it's necessary, and also to the extent it's not it seems to go a little bit beyond what might be properly expected from the EPA.

MS CASEY QC:

Your Honour, in terms of your first comment, absolutely. I wasn't planning to touch on the matters covered by my learned friends. These submissions were filed just a few days before the Attorney's submissions were filed so they perhaps cover more ground than they needed to. The only point in terms of operational practical aspect that we'd wish to highlight that my learned friend didn't is in paragraph 20 of my written submissions. And your Honour, it's not a big point but that the Court of Appeal appears to have lost sight of the use of the word "activities" in the definition of "existing interest" and that's apparent most clearly at paragraph 170 of the Court of Appeal decision. It's not a big point but the Act is clear in its use of that term.

WILLIAM YOUNG J:

Can I just ask you one question, sorry? Just going back to something you said, just how is it the Crown Minerals Act applies to the EEZ? Is that in the EEZ legislation?

MS CASEY QC:

Yes, it's one of the marine management regimes listed in section 7.

WILLIAM YOUNG J:

Okay, thank you. No, that's all right.

MS CASEY QC:

And of course TTR hold a permit under the Crown Minerals Act.

WILLIAM YOUNG J:

Yes, I know that. I just wondered how they got there, but thank you.

MS CASEY QC:

So unless there were any questions on the existing interests and aspect of the EPA submissions, I was planning to move right on to page 8 of my written submissions which is to deal with the interaction between section 59 criteria and the decision-making criteria that the Court of Appeal has framed

section 10(1) as being, and again these are just operational systemic issues for the EPA that are raising questions for the Court that may be helpful to have some guidance on in light of the Court of Appeal's approach.

So essentially, your Honours, I've got three points to make covering both the headings on page 8. The first is the question about the focus and the very strong focus that the Court of Appeal placed on section 10(1) as the decision-making criteria and at paragraph 24 of my submissions I recall that the EPA is concerned that this risks placing too much weight on what are quite narrowly framed statutory purposes rather than the holistic balancing which section 59 contemplates, and just to explain that a bit better, the section 10 purposes in the EEZ Act refer only to biophysical impacts on the environment. The definition of "environment" in the EEZ Act is much narrower than it is in the RMA. So under section 10, if that were the only decision-making criteria, or if that were the full decision-making criteria, biophysical impacts and provision for economic wellbeing would be the dominant considerations whereas section 59 makes it clear that its impact on environment or existing interests and section 59 is somewhat broader than section 10, so that's the EPA's first question in terms of if the Court of Appeal is to be read as saying that section 10 is the operative provision rather than that holistic balancing. The EPA says it needs to be both.

The second point is in relation –

WINKELMANN CJ:
Again, I think that's a point on the substance of the appeal so, yes – well, anyway, that's an issue about the role the EPA plays at this hearing, but you carry on because you've said it now.

MS CASEY QC:
Your Honour, I apologise. When I said that the EPA was not going to be addressing matters of substance it was in relation to the DMC decision and I had intended to be addressing issues in relation to this appeal that raise

systemic or operational issues for the DMC, but of course in the Court's hands whether that's useful or not.

Because the second aspect in terms of the statutory framework that the EPA would wish to address is, as I say, at the heading at paragraph 26, is the threshold under section 10(1)(b), and I've just raised there the statutory interpretation issue of the Court of Appeal suggesting that material harm is, avoidance of material harm, is required by 10(1)(b) but in circumstances where the EPA can't take into account avoiding of remedying – sorry, mitigating or remedying – that harm. And the submission there, your Honours, is that section 10(1)(b) as it came in brought with it sections 87D and G and that suite, and under section 87D for discharges some aspects of section 59 are disapplied and for dumping other aspects of section 59 are disapplied in the decision-maker's assessment. But both for discharges and dumping 59(j) still stands, which is the extent to which imposing conditions under section 63 might avoid, remedy or mitigate the adverse effects of the activity. So in terms of statutory interpretation the EPA suggest that the Act needs to be read in a way that the potential for remedying or mitigating harm to the environment from pollution is still available, that your Honour Justice Williams' question yesterday that the bite in 10(1)(b) occurs in part in the exclusion of certain factors in section 59 from the assessment, and the other exclusion of course is the exclusion of adaptive management in the event of uncertainty, so fitting with the statutory regime that both section 10 and 59 are operative. 1158.

And, your Honours, the final issue that I wish to address is relief, and this is not a matter that was addressed in the Court of Appeal but is addressed on the last page of the EPA's submissions, and it's a practical request that if the Court is minded to uphold the reference back to the DMC where they would consider it appropriate to also reserve jurisdiction for the High Court to make practical directions – and I've just set out in the written submissions some of the practical issues that may arise if this goes back for reconsideration.

So, your Honours, unless there's any questions where the EPA can provide further assistance, those are my submissions.

WINKELMANN CJ:
Thank you, Ms Casey.

MR FOWLER QC:
Tēnā koutou, Ngāti Ruanui, Ngā Rauru, Te Ohu Kai Moana. If your Honours please, I'm very conscious of the time restraints that we've now got. I'm hopeful that indeed I will get through what I need to do in less than the half hour allocated. I do intend to obviously address the statutory purpose issue, but listening carefully to the exchanges yesterday I've pretty much jettisoned a good deal of what I was going to cover and I'll focus on, under the statutory purpose issue, two matters that appear to be fresh angles that have arisen in respect of the current arguments. I will not deal with the question of law. That would appear to be largely redundant now in terms of oral argument. I will briefly address the Court in terms of relief on behalf of all the respondents. So that's where I intend to travel.

That does mean that in terms of the major planks of the statutory purpose argument I do not intend to address the fact that 10(1)(b) is, we say, narrower and specific to discharges or, secondly, that it cannot have the same meaning as the first limb, 10(1)(a), it must add something, or that unlike the first limb the sole focus of 10(1)(b) is protection or the significance of adaptive managements being removed as an option for 10(1)(b) and then – or the 2013 augmentation of section 11 to add the London Convention which, in any event, is something that my learned friend, Mr Makgill, will say something about. I'm not intending to go into any of those nooks and crannies unless the Court wishes me to. Instead I want to address two matters that arose yesterday. The first is the suggestion on behalf of the appellant that –

WINKELMANN CJ:
Actually, Mr Fowler, could I just ask you to run through that list again because I thought it was quite…

MR FOWLER QC:

Yes, certainly. There are five significant planks that we say point to the outcome that there is a distinct statutory limb to the section 10 purpose that must be considered and applied by the DMC. The first was that it is a distinct second limb, and I think this was actually recognised by one of your Honours yesterday in terms of a question. It's narrower and specific to discharges. That's the first point. The second is perhaps a pretty self-evident statutory interpretation corollary. It cannot have the same meaning as the first limb. It must add something. The third is that unlike section 10(1)(a), 10(1)(b)'s sole focus is protection. The fourth is that the adaptive management conditions option has been removed. If you want the statutory references to those, it's section 61, 87E and 87F(4), and the fifth is the 2013 augmentation of section 11 to add the London Convention which included the 1996 protocol which shifts the focus of those international treaties to prevention of pollution rather than just clean up your mess in the first place. So those are the things I'm not going to deal with unless the Court wants me to.

WINKELMANN CJ:

Very effective form of rhetoric to list the things you're not going to deal with.

WILLIAMS J:

I should try that.

WINKELMANN CJ:

It's got a name in rhetoric, hasn't it? I just can't recall what it is, the things you're not going to say.

MR FOWLER QC:

It's just that I have that terrible feeling of being whipped along, your Honour. So the two that I do wish to address are this issue of there being an overall judgment or holistic approach that should be taken that my learned friend argued out of the interface of section 10(3) and, in particular, section 59, 59(2) of course. That's the first one that I'm going to cover, and the second is the suggestion that subsequent provisions in the Act, and my learned friend,

Mr Smith, pointed directly to section 20C, support the suggestion that the Act countenances discharge of harmful substances causing material pollution because there is scope there for permitted activity. So those are the two points that I want to address there.

WILLIAM YOUNG J:
Can I ask you about one point that I don't know is covered in the two lists of those that you aren't addressing and those you are? It's para 34 of your submissions.

MR FOWLER QC:
I have that, your Honour.

WILLIAM YOUNG J:
My reading of the Court of Appeal judgment is that it proceeds on the basis that protection means protection against all material harm and, secondly, in assessing materiality economic benefits are irrelevant, so there's no trade-off.

MR FOWLER QC:
Yes.

WILLIAM YOUNG J:
Now are you walking away from that? Because there are suggestions in para 34 that you are a bit.

MR FOWLER QC:
No, not walking away from that, your Honour. In fact the answers to that I think probably lie in paragraphs 86 and 89 of the Court of Appeal decision.

WILLIAM YOUNG J:
Well, sorry, do you – well, let's get it clear then. Do you accept that the Court of Appeal decision can be categorised in the way I have, that protection means protection against all material harm and in that sense it's the bottom line and consequently economic benefits are irrelevant?

MR FOWLER QC:

Yes.

WILLIAM YOUNG J:

No, that's all right, I just wanted to know that.

GLAZEBROOK J:

And you say that's correct, or not?

MR FOWLER QC:

Well, correct in the way that the Court of Appeal expressed it at paragraphs…

WILLIAM YOUNG J:

It's only 86 and 89 I think.

MR FOWLER QC:

Yes, 86 and 89 are the two that – in particular 89. "It is not consistent with the scheme of the EEZ Act to trade off harm," and your Honours inserted the qualification "material harm" there, from looking at the end of that paragraph, "It is not consistent with the scheme of the EEZ Act to trade off material harm to the environment caused by a marine discharge against other benefits, such as economic benefits."

WILLIAM YOUNG J:

Well, let's just go right to this so there's no ambiguity. I take it from that, from the drift of the judgment, that in assessing materiality economic benefits are irrelevant. You've got a base line or a bottom line of no material harm. Once that bottom line is infringed or reached then economic benefits are irrelevant.

MR FOWLER QC:

Yes.

WILLIAM YOUNG J:

And you say that's correct?

MR FOWLER QC:

And that's in terms of the correct interpretation of 10(1)(b), yes, the priority given to protection.

WILLIAMS J:

You must be able to though undertake an activity which has co-lateral advantages to the environment, despite its harm. I was thinking, having read through the *King Salmon* decision, that that might be an example where you could say that introducing fish farming, while it has harmful effects, could have such significant advantages for the survival of wild fish fisheries that we should put up with it and that farming is mitigation for the catastrophic possibilities for the wild fish fishery, for example.

MR FOWLER QC:

If you can slide it with the envelope of materiality, in the end if –

WILLIAMS J:

Yes. That's not an economic proposition, that's an environmental proposition.

MR FOWLER QC:

No – yes, it is, that's right, it's an environmental factor. But if you can slide it in the end into that envelope of materiality then I would answer your question yes, you could.

WILLIAMS J:

Well, in that sort of situation the environmental harm of fish farming might be material but the advantage to the wider environment, say, of greater protection for the wild fish fishery, because you're meeting demands for fish in a different way, might be said to counteract that. Do you think that's available as an analysis?

MR FOWLER QC:

Only if by what the Court of Appeal terms regulation, that is conditions, you still arrive at a point where the purpose of 10(1)(b) is met.

WINKELMANN CJ:

Right, carry on, Mr Fowler.

ELLEN FRANCE J:

Sorry, just in relation to that, so in that sense you would see section 10(1)(b) as having some sort of operative effect.

MR FOWLER QC:

Yes, and I will –

ELLEN FRANCE J:

So if you're the decision-maker.

MR FOWLER QC:

Yes.

ELLEN FRANCE J:

So you'd reject the notion that the scheme provides for an overall purpose and then specific ways in which those purposes are to be met or channelled, if you like, because I was thinking about, say, Part 2, dealing with regulation, well, in relation – I know you get into issues about what 10(1)(b) is dealing with, but I'm just interested in your view of the sort of overall statutory scheme and how a general purposes clause is then to be approached as a matter of statutory interpretation.

MR FOWLER QC:

Well, just to be clear, I'm not saying that the first limb, that's 10(1)(a), has no application whatever. You've then got an overlay in 10(1)(b) that applies specifically to discharges. So that's the approach that I am urging, suggesting, and is consistent with what the Court of Appeal is saying.

WINKELMANN CJ:

And you say it guides the application of the section 59 analysis?

MR FOWLER QC:

Yes, and I'm going to come to that next actually.

WILLIAM YOUNG J:

Guides or controls?

WINKELMANN CJ:

Well, controls, I think.

MR FOWLER QC:

Yes.

WINKELMANN CJ:

So it's not just some sort of whirligig that anything can be fed into and any outcome can come to?

MR FOWLER QC:

No, and that's the first point that I wanted to address in terms of how this works. And in terms of that, in my submission, what you have to do is to consider the overall legislative framework in terms of how you analyse this. The elder sister of this legislation is the RMA and I think his Honour, Justice Williams, has already pointed out there are obvious parallels and the regimes share the way you make an application, the impact assessment you have to put in if you're an applicant, notifications, submissions, hearing, even enforcement orders and abatement notices and there are a number of other similarities. There's even, in terms of the cross-fertilisation, if you look at section 4(2) on matters like tikanga Māori, there it's just a straight reference to whatever the RMA, to the RMA definitions of those things. Both also include reference to sustainable management under the purposes sections. In the case of the EEZA, this Act, it's shortened. You can see that if you compare section 10(2) with the RMA section 5. It's a little truncated but the consanguinity, if I can put it that way, is obvious. Both use the "achieve the purpose of the Act" language and you can – the obvious comparison there is between section 10(3) and Part 2 of the RMA where you have your provisions

in sections 6, 7 and 8 of the Resource Management Act which, as we all know, refer to achieving the purposes of the Act.

Now, and this is the significant part of this, with the RMA, as his Honour, Justice Williams, emphasised this morning, you have a whole layer of planning instrumentation created in that intermediate tier, planning instruments, and they contain policies, classification of activities, criteria for decision-making, all brought together in section 104 of the RMA which, as that classic phrase at the beginning, that it was the focus of both *King Salmon* and *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 subject to Part 2, and Part 2 has got these provisions we've been talking about, sections 5 to 8.

The EEZA does not have that layer of planning instruments. It does have regulations, and the ones that were in force at the time in relation to this application concerning harmful substances can be found in the TTR authorities, volume 2, tab 11. I'm not proposing to take the Court laboriously through those, but if you look at those you'll see that they do not have anything that deals with policy and they don't have anything to do with setting criteria for decision-making. They do have classifications, this or that is a permitted activity, "this is the standard you've got to meet if you want it to be a permitted activity". They do have a raft of provisions regarding information that's required and record-keeping and that kind of thing, but they do not have anything on policy or criteria for decision-making. So it says nothing about how to assess the relevant factors or principles to draw those together in terms of making a decision.

So where you get to in terms of your statutory analysis here is that you have a virtual straight line from section 10(3) to section 59, minus section 59(2), minus (c), which is taken out, in relation to marine discharges. And if you go to 59(2) – it's not a lot of help – it is by and large just a list of topics that needs to be taken into account, 59(2). The nearest you come to something that is faintly redolent of a policy content will be (d) and (e). Perhaps I should let the Court absorb that.

WINKELMANN CJ:
I think it's all right.

MR FOWLER QC:
So where that lands in my submission is you've got a direct link in terms of achieving the purpose with the decision-making criteria, and that must mean that your section 10(1)(b) limb is a lodestar principle to be distinctly addressed and you can't therefore just step away from it and say: "Oh, well, all this can be determined on a holistic basis or an overall judgment," if you look at the statutory framework that's what it requires, and in my submission this Court of all courts will be particularly interested in the coherence of the law. So in my submission the younger sister patently shares the DNA of the older sister on that point.

There is one other aspect of this that is material and that is that the decision of the Court of Appeal in the *RJ Davidson* case, which you'll find at tab 42 of the TTR submissions, that decision holds that even with the assistance of the sophistication of RMA planning instruments, in applications for consent – and that's the distinguishing feature from *King Salmon* – in applications for consent it is mandatory to take into account and apply the Part 2 purposes, part 2 of the Act, which is the purposes. So even with that added sophistication and added assistance you still have, in terms of the elder sister, the jurisprudence and statutory provisions that point very firmly to needing to distinctly apply the statutory purpose.

WILLIAMS J:
Well, section 104 says so.

MR FOWLER QC:
Yes.

GLAZEBROOK J:
And *King Salmon* says so as well.

MR FOWLER QC:
Yes.

So the second broader submission that I wanted to make was to just deal with this suggestion that subsequent EEZA provisions support the suggestion that the Act countenances discharge of some harmful substances causing material pollution because there is provision for permitted activities in that regard, and my learned friend relied on section 20C in that regard. The starting point for this analysis, your Honours, is section 35(1)of the Act which provides that an activity is a permitted activity if it is described in regulations as a permitted activity. So this self-evidently has to be driven out of regulation.

WINKELMANN CJ:
Sorry, what section were you at? What section were you at, please?

MR FOWLER QC:
It was 35(1), your Honour. So you derive your classification of permitted activity from regulation. Now the submission is that in terms of the statutory pathway, so a little bit of a labyrinth that I'll take you to in a moment, but if I perhaps start by indicating what the landing point is, the landing point is this.

GLAZEBROOK J:
Can you just tell me where it is in these materials, the Act? I've got it up on screen but…

MR FOWLER QC:
Where the?

GLAZEBROOK J:
Where the Act is in the volumes. I have got it up on screen but I'd quite like to – because I was using the paper copy yesterday so…

MR FOWLER QC:
It's of the TTR submissions volume 1, tab 3, your Honour.

So what we say the landing ground here is this that not only must the regulations be consistent with the purpose of the Act but the Minister has got to record his or her reasons for considering that to be so and to notify the parties, and I'll take you to the track to that now.

WILLIAMS J:
Sorry, let me get that sentence. The regs must be consistent.

MR FOWLER QC:
Yes. Not only must regulations be consistent with the purpose of the Act but the Minister must record his or her reasons for considering that to be so and to notify them to parties, and if I can – perhaps the best way to do it is to take you to that landing ground first and then I'll track back and demonstrate why it's a case of all roads lead to Rome. So the landing ground is section 32(2)(a)(ii).

Now in terms of the route there, I'll refer the Court first of all to section 27 which is the regulating making power for prescribing standards, methods or requirements, and draw the Court's attention to subsection (3) where you'll see the reference to section 32.

The next one is section 29 which is your regulations classifying activities. It's probably the one that's the most directly relevant but I want to scoop up all of them that could possibly apply to discharges from ships, which is what 20C addresses.

GLAZEBROOK J:
Section what, sorry?

MR FOWLER QC:
I am at 29. That is the next one, your Honour. Classifying activities. And the route there, because there isn't a direct reference to section 32 in 29, what happens is you go to 30 which is your provision that provides generally for

regulations, and then you go to section 30(2) and you will see there the route to Rome.

The next one is 29A, regulations for discharges and dumping, and if you look at subsection (3) you will see the route to Rome.

WINKELMANN CJ:
Sorry, what section was that?

MR FOWLER QC:
29A, dealing with regulations for discharges and dumping, subsection (3). So in my submission it's very clear from the statutory paths there that one couldn't possibly conclude that section 20C creates some sort of extra latitude of the nature that my learned friend was urging on you, and perhaps put most succinctly by her Honour Justice Glazebrook yesterday, the fact when you look at these things what you've got is an extra level of prescription, if anything.

WINKELMANN CJ:
What about the point that Ms Casey just made to us regarding the imposition of conditions?

MR FOWLER QC:
Well, your Honour, the difficulty there is section 63(3).

Next, your Honours, and I'm closing into the home straight, just a brief point in terms of my learned friend Mr Smith's submissions yesterday and the exchanges between Bench and Bar. One might accuse me here of drilling into semantics, but it could be seen as a more general point, certainly a small one. But my learned friend yesterday said two things that were quite interesting in the course of argument. The first was – that's with reference to this question of what was absolute – "If not," interpolate "absolute", "then very close to it, if not then very close to it," and then in another part of the argument he said that the iwi approach, or the approach that my clients were taking,

"creates obstacles steeper than Parliament intended". I don't wish to be facetious here, but he didn't say "vertical". The point being that in my submission those observations exactly expose the nature of this materiality issue and because at that moment, in terms of what my learned friend was submitting there, his trajectory of argument almost coincides with ours. Because it is about stringency, it is about a more exacting requirement in terms of 10(1)(b) or what the Court of Appeal described as a "lower tolerance for risk", not absolute.

Now the last topic that I wish to address with your Honours is –

WINKELMANN CJ:
Can I just ask, in terms of we also heard argument about whether the Court of Appeal contemplated that there could be no harm that was capable of remedying at a later point, no temporary harm, that rose above the immaterial level?

MR FOWLER QC:
Yes. Again, it's interesting –

WINKELMANN CJ:
So if you could address temporality and rectification?

MR FOWLER QC:
Yes. It's very interesting in terms of the Court of Appeal judgment, again those paragraphs 86 and 89 both use the word "subsequently", the first time it was used one could easily just gloss over it, but the judgment twice uses the word "subsequently" you'll see. So that clearly what the Court had in mind is that it wasn't open, for example, to deposit or, well, to pollute the seabed or whatever on some sort of scale, much more than material or whatever, and then wait five years later or 10 years later and either remedy it then or just leave it to natural processes to restore it. So the use of the word "subsequently" appears to be deliberate and that appears to be the way that

the Court of Appeal approached that particular issue, and certainly the iwi first respondents would consider that that is correct.

GLAZEBROOK J:
So you would say that if it's material harm the fact it could be remedied or mitigated at a later date is not sufficient?

MR FOWLER QC:
Won't cut it, no. But then, to be practical and reasonable about this, to take my learned friend's example of the trawler or tractor or whatever it was, making its way along the sea floor – and incidentally, unless there is a discharge that's a section 10(1)(a) argument, not a (1)(b) argument, but let's turn it into a (1)(b) argument. If that tractor for example at the front of the front of end of it is gobbling up sediment or whatever and then a few seconds later putting it neatly back through the back end, one might then say, well, the word "subsequently" is not engaged, again providing your materiality test is met.

WILLIAMS J:
I find it hard to follow the argument that a condition that required an applicant to heal the harm was beyond the pale.

MR FOWLER QC:
Well, you'd come back –

WILLIAMS J:
And that would always be subsequently.

MR FOWLER QC:
You will come back in the end, your Honour, to a matter of materiality and you would feed in the concept of timing into that. So if you could, if it was set in terms of my front-end loader example, you might say that, in terms you might say that the pollution there is immaterial, it's instantly fixed. But if you can't –

WILLIAMS J:

No, but let's say the healing is, you know, a five-season-cycles process – I'm not talking about this particular application, I'm just speaking more generally.

MR FOWLER QC:

I would still argue that that goes back to materiality, it comes back in the end to materiality in terms of –

WILLIAMS J:

Even if there's a level of certainty about the efficacy of that mitigation?

MR FOWLER QC:

Yes.

WILLIAMS J:

Okay.

MR FOWLER QC:

Because the exhortation of 10(1)(b) is overwhelming, it is crystal clear.

WILLIAM YOUNG J:

So what's the timeframe of materiality?

MR FOWLER QC:

Well, my almost fatuous answer to that, your Honour, will be case-by-case for the particular decision-maker to determine.

WILLIAM YOUNG J:

But, I mean, it's implicit I guess that you'd say that five years is too long?

MR FOWLER QC:

Yes, I would, certainly in terms of –

WILLIAM YOUNG J:

Against the sort of hundreds of thousands of years that the seabed's been there?

MR FOWLER QC:

I don't like what your Honour is about to do to me.

WILLIAM YOUNG J:

No, no, I'm just wondering what it mean. I mean, I suppose you'd say: "We try to avoid immeasurable uncertainties by saying yes, protection is effectively an absolutist standard but with materiality in there," but then if materiality is a matter of impression how helpful is that?

MR FOWLER QC:

Yes, but that will, in terms of helpfulness, I mean, environmental law is replete with extra legislative jurisprudential aids like permitted baseline and things like that.

WILLIAM YOUNG J:

So-called aids?

MR FOWLER QC:

Yes. Well, with great respect, your Honour, it's a critical function of the courts, to give us all that kind of assistance, and perhaps it will be for future cases to assist us in terms of materiality, it doesn't need to be determined in this appeal.

WILLIAM YOUNG J:

Well, it might have to be determined if the case goes back to the EPA.

MR FOWLER QC:

Yes, it might.

WILLIAM YOUNG J:
And a conclusion that materiality might be looked at over a five-year period, would that be outside the range of acceptable outcomes?

MR FOWLER QC:
Certainly in terms of the approach that my clients would take here, and in my submission it would be well beyond the pale, five years.

WILLIAM YOUNG J:
So why?

MR FOWLER QC:
Because you are leaving the seabed or whatever it is in a polluted state for a period of time, and section 10(1)(b) simply doesn't permit that, it's protection against pollution, and you'd have a state of pollution that continues for five years.

Last point that I wanted to cover, your Honours, is this issue of relief. The submission on behalf of the iwi first respondent is that this is a circumstance where the application should be declined if the appeal is dismissed. It should be wrapped up at this point, in other words. Why is that? Because there are some specific DMC findings that would suggest, indeed I would submit compel, the view to be taken that on any correct approach applying section 10(1)(b) here no other outcome could be open. Now those particular provisions, possibly in terms of time the best thing that I can do is give you the references rather than work right through them. They are these. The first is of the DMC decision which is at tab 8, paragraph 350, and the page reference is 102.0320, and the second is paragraph 939 and the page reference 102.0441, and the last one is paragraph 970, page 102.0445.

I will take you to the first one, that's the 350 one, just so you can get a sense of what we're dealing with. If you look at 350, the DMC found there: "We accept that the modelling indicates that there will be significant effects within ESA," just pausing on that expression, ESA. If you look in the glossary you

will see that ESA means "ecologically sensitive area" and in my submission, just to skid sideways for a second, that collides slightly awkwardly with my learned friend, Mr Smith's, submission yesterday that in contrast with *King Salmon* there are no areas of special sensitivity.

Carrying on with 350: "We accept that the modelling indicates that there will be significant adverse effects within ESA to the east-southeast of the mining site extending to at least to Graham Bank. We accept the conclusions of Professor Cahoon that there will be significant effects on the macroalgae on at least part of Graham Bank and minor effects on macroalgae at The Traps. We also accept his opinion that there will be significant effects on MPB within 1 to 2 km of the mining site. Overall, we find that the effect on the primary production of the Patea Shoals is likely to be moderate, but will be significant at ESA such as The Crack and The 'Project Reef'." Now I won't read out the other two but I should be candid about one aspect of this. It's not completely clear, it's not clear or at least expressed in the decision that that's a finding, that those findings are reached after the position's been pulled back, so to speak, by conditions. You can't really tell that. There is no explicit place you'll find in the decision where you could say: "Aha, there we go. That's after it's been pulled back by conditions." However, in my submission, looking at the decision overall, no other conclusion is open because if you look at the discussion on conditions and you look at the way the decision proceeds, there is no discussion at all about that effect of the consequence of that pulling back or how it works or how the conditions would work to create the reduction that would be required.

WILLIAM YOUNG J:

Well, that seems a fair enough view, contention, but were these conclusions time bound?

MR FOWLER QC:

I'm sorry, your Honour, I'm not sure what you mean.

WILLIAM YOUNG J:

So they say there's going to be significant or moderate effects.

MR FOWLER QC:

Yes.

WILLIAM YOUNG J:

But are they effects that are time bound?

MR FOWLER QC:

That is are they temporary and then…

WILLIAM YOUNG J:

Yes. Are they likely to be resolved within, say, a five or 10 year timeframe.

MR FOWLER QC:

Certainly, in the decision and in the evidence that issue is addressed and there's certainly a number of – a number of these sediment effects and so on over a period of time attenuate. There's no question about that.

WILLIAM YOUNG J:

Are we talking about, say, a five year period of time or less?

MR FOWLER QC:

I wouldn't be in a position, your Honour, I'm sorry, to say which particular effect would last for what period.

WILLIAM YOUNG J:

Your argument proceeds on the assumption that's, say, a five year period of time Itself material?

MR FOWLER QC:

I would say that that breaches the materiality proposition, yes. Five years would.

GLAZEBROOK J:

That would be in this context presumably rather than necessarily being a – because you say it has to be done on a case by case basis and it's because of the scale, I'm assuming, of what's at issue here. It's not…

MR FOWLER QC:

Correct, your Honour. This is a very large proposition on any analysis. You're talking kilometres.

WILLIAM YOUNG J:

Even though five years is a blink in the history of time.

MR FOWLER QC:

Well, in geological terms, your Honour, yes. You would ask why we're having the discussion. But…

WILLIAM YOUNG J:

What I'm interested in, I understand your argument and I'm not sort of really dismissing it, I'm just interested to know why we would pick a short period of time rather than a short plus a bit period of time or a longer period of time.

MR FOWLER QC:

Well, carried to its logical conclusion, your Honour, in terms of what happens with seabed processes and so on, you would probably end up in the position of saying why does any period of time matter because for most of this stuff sooner or later natural processes will restore the seabed to what it was.

WILLIAM YOUNG J:

But your staunch position is that the materiality of a temporary but significant disruption is not affected by economic benefits or counterbalancing factors?

MR FOWLER QC:

Correct, yes…

WILLIAM YOUNG J:
So it's just a stand-alone…

MR FOWLER QC:
Because of the exhortation in section 10(1)(b), which is very stringent.

WILLIAM YOUNG J:
And that assumes that protection means a very high level of protection rather than, say, a measure of protection?

MR FOWLER QC:
Yes.

WINKELMANN CJ:
But not absolute protection?

MR FOWLER QC:
But not absolute.

WILLIAM YOUNG J:
So, I mean, there's quite a lot of flex in the bottom line?

MR FOWLER QC:
I'm back to a case-by-case basis, your Honour, in terms of how that would develop.

WILLIAM YOUNG J:
But you're absolutely insistent that materiality of loss, what protection's appropriate, is completely disconnected from the merits, economic or other benefits of the –

MR FOWLER QC:
Yes, because of the overlay of section 10(1)(b) overlaid over the top of (1)(a).

GLAZEBROOK J:

But of course for any other decision is not at all disconnected because it's a sustainable management decision and is 10(1)(a).

MR FOWLER QC:

That's right, yes. So to stay with my learned friend's analogy, absent the discharge, you could be gouging the seabed horrifically, or whatever it was the expression they used, and if the economic benefit was there it might well pass go.

WINKELMANN CJ:

Catastrophically.

MR FOWLER QC:

Catastrophic was the…

WILLIAM YOUNG J:

Does this leave any practical scope for seabed mining, in the EEZ?

MR FOWLER QC:

You'd have to ask Parliament, your Honour.

WILLIAM YOUNG J:

But do I take it from that that you're not in a position to proffer a mechanism by which seabed mining could practically implemented within the economic exclusion zone?

MR FOWLER QC:

Well, it would need to be out there, it would need to be done in a way that met the modern requirements of the New Zealand legislature in terms of – and the Treaty's.

WILLIAM YOUNG J:

Sorry, I don't want to push you, but I'm actually trying to, it's not familiar country for me. Is there actually a practical way in which you could engage in seabed mining without tripping over section 10(1)(b)?

MR FOWLER QC:

That would really require expertise that I simply don't have, your Honour, in terms of technical and scientific, but I –

WILLIAM YOUNG J:

I'd feel more comfortable with your argument if it were possible.

WINKELMANN CJ:

If it didn't involve dumping it would be possible.

MR FOWLER QC:

Well, who knows…

GLAZEBROOK J:

Either dumping or, if it doesn't involve dumping or discharge it's probably 10(1)(a).

WINKELMANN CJ:

Well, dumping or discharge.

MR FOWLER QC:

Yes, that's –

WILLIAMS J:

Well, the answer is certainty.

MR FOWLER QC:

Yes.

WILLIAMS J:
If there's uncertainty about effects that's the problem.

MR FOWLER QC:
Yes.

WILLIAMS J:
And you can't nibble and check and nibble and check because adaptive management's not available. But if the science was certain about impacts and the impacts were below material, then of course there'd be a right to a consent.

MR FOWLER QC:
Correct, your Honour. And, to come back to you, your Honour Justice Young, the other factor in addition to that is the march of technology. Who knows in terms of what – if we're protecting our seabed now, who knows in five years' time or 10 years' time what technology will be available that will ensure that we don't have sediment deposited on The Traps or whatever it is.

WINKELMANN CJ:
Well, it's hard to imagine what a technology could be if you're sending sediment straight back out.

WILLIAMS J:
Well, it'll be the reinjection process.

MR FOWLER QC:
Yes. But the technology may be something that happens at source, your Honour.

WILLIAMS J:
Can I just ask, in respect of the ESAs referred to at 350, what's the monitoring programme for The Crack and The Project and Graham's Reefs?

MR FOWLER QC:

I would have to come back to you on that, your Honour. There's a whole series of conditions that relate to monitoring at some of these places, there's a whole suite of conditions, and one of the things that the DMC did was actually add some extra ones to what had been proposed by TTR. The detail of that I'm afraid I don't have at the front of my mind at the moment.

WILLIAMS J:

Well, it'll tell you, I would have thought, whether there is sufficient knowledge about what the impact will be on those places and how long they'll last, or at least what is deemed acceptable in terms of impact from the DMC, so it may be important.

MR FOWLER QC:

Correct, your Honour, which of course backs into adaptive management-type considerations.

WILLIAMS J:

Sure.

WINKELMANN CJ:

All right, well…

MR FOWLER QC:

Thank you. Those are my submissions.

WINKELMANN CJ:

So perhaps Mr Salmon can tell us when he stands up to address. And you've run out of time, Mr Fowler.

MR FOWLER QC:

Yes, I have, thank you.

WINKELMANN CJ:

Just saying. And, by the way, the rhetorical device is called apophasis.

MR FOWLER QC:
Thank you, your Honour.

WILLIAMS J:
Obviously the Chief Justice's Google is working.

WINKELMANN CJ:
Ms Coates.

MS COATES:
Tēnā koutou, your Honours. Given the subject matter of my submissions and also the parties that we represent, I thought it would be appropriate to briefly do a mihi and summary of submissions in te reo, which I'll then translate into English. I'm happy to do the translation myself; I'm not sure my brain can cope with simultaneous translation today.

Tēnā koutou. E te tuatahi, he mihi tēnei ki te Atua, nāna nei i hanga ngā mea katoa.

Tuarua, ki ngā tāngata i wheturangitia ki te pō, haere, haere, haere atu rā.

Huri noa ki te hunga ora, e te tuatahi ki a koutou katoa, ngā Kaiwhakawā o Te Kōti Mananui o Aotearoa, tēnā koe. Ki te rangatira i tuku karakia inanahi, tēnā koe.

Ki ngā tāngata whenua o Taranaki whānui, ki Ngāti Ruanui, ki Ngā Rauru, he ara roa ki te tae mai ki te Kōti i te rā nei. Ko tō mahi, ki te whawhai mō tō moana, he mahi rangatira, he mahi tērā o te kaitiaki.

Huri noa ki a tātou katoa e huihui mai i raro i tēnei kapua o te mate urutā i ēnei rā.

Ko tōku kōrero i tēnei rā e pā ana ki Te Tiriti o Waitangi, ā, ko te pātai o tētahi o ngā pātai kei mua i te Kōti, ko tēnei. Me pēhea Te Tiriti o Waitangi te

whakaaetanga hōnore i waenganui i te Karauna me Ngāi Māori e pā ana ki te Ture o te EEZ. Ko te ngako o tōku whakahoki, ko tēnei. E ai ki te Karauna, i roto i tēnei ture, kei te whakamana rātou i te Tiriti o Waitangi. E pā ana tēnei kīanga: “Ka hohoro ngā ngutu, me whai ana te tinana.”

So just by way of brief translation, I initially acknowledged the Atua, those who have passed on, before turning to specifically acknowledge the Court and in particular I acknowledged the tangata whenua that are here today and the iwi that are before you and that we represent, Ngā Rauru as well as Ngāti Ruanui. It has been a long journey for them to the Court today and the work that they do, fighting for their moana and the wellbeing of the moana. That is the work of chiefs and that is the work of kaitiakitanga, of kaitiaki, and their being here today is an example of that continuing kaitiakitanga. I also just turn to acknowledge everybody here today that are living under this cloud of COVID.

My submissions today relate to Te Tiriti o Waitangi and one of the primary questions that the Court is being asked to address in this respect is simply what is the relevance of Te Tiriti to the EEZ Act. The thrust of my submissions is that the Crown in this legislation has clearly acknowledged that they have a responsibility to give effect to the principles of the Treaty of Waitangi. Given that, we offer the following metaphor: “Ka hohoro ngā ngutu, me whai ana te tinana,” which translates as “when the lips are quick to speak the body should follow”. Particularly relevant here, if the stated intention is to recognise a responsibility to give effect to the principles of Te Tiriti o Waitangi that is how the body or the sections that follow should be interpreted.

So I have handed up a road map that will give the direction of travel for the oral argument that myself and my learned colleague, Ms Irwin-Easthope, intend to take you through. I just note that the references in that are to the consolidated bundle that was circulated around by the appellant last week, but happy to give the references if you’re working off the hard copies as well.

I'll be taking carriage of those arguments relating to Te Tiriti o Waitangi and my learned friend will specifically be talking to tikanga Māori and that component addresses the interpretation of existing interests and applicable law. Our parts are, of course, interwoven in some respect but we are speaking to sufficiently distinct issues and the road map is there to help you sort of see how we've separated out those issues.

I am conscious of time and will no doubt go beyond the lunch break. We've indicated 45 minutes for our collective sections and we're hoping to, given that some of these issues have already been fleshed out already, hoping to sort of streamline that as much as possible and just make it clear what our points are in this respect.

So turning to Te Tiriti o Waitangi, the constitutional relevance of Te Tiriti o Waitangi is a given and it has already been fleshed out and accepted that that is the case. What the Court really needs to grapple with in terms of Te Tiriti is what the effect of section 12 is on the relevance of the Treaty to the interpretive task. Section 12, as I have already alluded to, recognises the affirmative duty on behalf of the Crown that they have an obligation to give effect to the principles of the Treaty of Waitangi. That responsibility is then elaborated on in section 12 through a combination of specific procedural and substantive sections. What we say is particularly important is that there is a linking between the two. There is a linking between the chapeau as well as specifically listed subsections to a recognition of a duty to give effect to the principles of the Treaty. That is, those sections are there to serve a specific purpose and function. Accordingly, the two parts must naturally be read together and those specific sections interpreted in a manner consistent with the Crown's acknowledged responsibility in relation to the Treaty. Put simply, section 12 should be interpreted as saying, as doing what it says it is going to do and there should be alignment between the chapeau and specific sections. Any other approach would be disingenuous to the stated parliamentary intention.

So we agree with the approach that the Court of Appeal took in relation to the interpretation of this clause which is set out at 162 of their judgment where they say that these sections should be read in a way that accurately characterises the effect that they say that they're having.

I'd also just point you to, I think, an informative paragraph by now Justice Palmer, who was writing prior to judicial appointment in his book, *Te Tiriti*, of the Treaty and its place in the constitution, and that is at – should I give you the consolidated version reference or the sort of hard copy one, I'm not sure what is the most useful – or both?

GLAZEBROOK J:
A hard copy, I'd suspect, because we're, for myself I'm having a slight difficulty with the…

WINKELMANN CJ:
Give us the hard copy.

MS COATES:
Sure. So that reference is in the Attorney-General's bundle of authority, I think, at tab 10 – no, sorry, at tab 6…

GLAZEBROOK J:
Actually, having said that, we don't have the Attorney-General's bundle apart from in…

WINKELMANN CJ:
So is it there is – yes, we've got…

WILLIAMS J:
Just give us the page in the book.

MS COATES:
Volume 6?

WINKELMANN CJ:

It's tab 10.

MS COATES:

The respondents, at volume 6, tab 63?

WINKELMANN CJ:

Well, looking electronically, which I did – it is at tab 10 electronically?

MS COATES:

I'm happy to go and just read it out, the particular paragraph, if that would be useful?

GLAZEBROOK J:

Perhaps give us the page in the book.

MS COATES:

Yes. So the page in the book is 183 to 184, it straddles both pages.

GLAZEBROOK J:

Thank you.

MS COATES:

We refer specifically to this because this paragraph was written subsequent to his original writings, which expressed I guess a strong preference for these sorts of elaborated Treaty clauses. But subsequent to that he did make the comment that: "There are arguments both ways about whether this formulation is stronger or weaker than unelaborated Treaty clauses. This wording could be interpreted by a court generally to incorporate the Treaty into the area of law governed by each Act in which it appears. Alternatively, a court may find that Parliament considered the specific provisions to detail exhaustively what the Treaty means in that area of law. Much will turn on the specific context and behaviour of the parties to a dispute, including the significance of the interests at stake on both sides and

the degree to which the procedure indicates good faith on both sides. As with the State-Owned Enterprises Act 1986, as interpreted in the *Lands* case itself, there will be a point at which very narrowly drawn specific provisions lose their credibility with a court as ways of recognising and respecting the Treaty. At that point, a court could use the general wording to give greater force to the general meaning of the Treat, if it so wished, given the facts and the context."

What he is effectively saying there is that if you boil it down, if the specific clauses are drawn too narrowly and do not recognise and provide for the Crown's expressly acknowledged responsibility, the Court may in those circumstances read in the Treaty more generally whether that is within the specific clauses themselves or potentially where there's a major misalignment between the two more generally than that.

In terms of what this means in the context of section 12 and the EEZ Act, the focus of the Court of Appeal is on section 59 because that's where the Māori interests have the most bite, that's where they've been considered specifically. In our submission, when you are interpreting section 59, so what existing interests are as it relates to Māori, what effect the activity has on those existing interests and how that effect is taken into account, that should all be read consistently and in light of the Crown's responsibility to give effect to the principles of the Treaty. So this is contrary to the position taken by the appellants.

What that means, the Court of Appeal goes through that in a number of different paragraphs. But effectively what they say is that it means the DMC is required squarely to engage with the full existing Māori interests – and my learned colleague will talk more about what that means – but also they must take into account Treaty principles when they're assessing the effects of the activity. They also gave an indication of what that might require. So they said "in a context minus free and informed consent", so here in this context you have all iwi with mana whenua opposed to the proposal, those Treaty principles require that there's at least reasons giving for overriding those. Effectively what this boils down to is you need to engage with those Treaty

principles in a meaningful way, in particularly when it goes against or when it's contrary to, or breaches I guess, the iwi existing interests.

WINKELMANN CJ:
So that paragraph in the Court of Appeal judgment that Mr Ward referred us to and it has that sentence at the end and it's not clear if the Court of Appeal is saying that the reasons have to engage with and address the principles of the Treaty or whether it's saying they have to engage with the interests clearly, so how the principles of the Treaty are being given effect to can be debated, you'd say it's the former, that it actually has to engage its reasons with how this is giving effect to the principles of the Treaty?

MS COATES:
Yes. I note that it's just on 1 o'clock.

WINKELMANN CJ:
Yes.

MS COATES:
Now might be a good time to break?

WINKELMANN CJ:
Good. How are you going with your time?

MS COATES:
I'll definitely be back to make some more points after the lunch break.

WINKELMANN CJ:
Yes. That's very non-responsive, I think.

MS COATES:
But tracking nicely.

WINKELMANN CJ:
Thank you. We'll adjourn.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.00 PM

MS COATES:
Tēnā koutou. Just by way of an update in terms of timing, I anticipate that I won't be longer than about 15 minutes, subject to any questions, of course. My learned colleague, Ms Irwin-Easthope, also anticipates she'll only be around 20 minutes and I've conversed with the rest of my friends and we think we can get through the bulk of our submissions today with maybe one or two left over for tomorrow morning.

WINKELMANN CJ:
Thank you. Well, we were thinking if we could break at 4.15 it would be good because we realise we've got another judgment related engagement at 4.30, and that should still leave us enough time.

MS COATES:
Sufficient time, yes. So I left off just talking about how we think section 12 should be interpreted and I did just want to make a couple of points about the Court of Appeal decision that I think are worth pointing out. One of them, that they are still operating within the legislative wording of the "take into account" clause in relation to section 59 and they're certainly not suggesting that any veto is given but that the "give effect" intention articulated in the chapeau should help go down and fill the statutory discretion that the decision-maker has when they're taking into account existing interests. I think of particular relevance is that section 12 does come under the subpart 2 purposes and principles section of the EEZ Act, so it performs part of the scaffolding of the whare, you might put it, of the Act. So although it isn't specifically listed in the purposes section per se, it is in that subpart in its entirety and has a similar

sort of effect in that it is helping to form that framework that you ultimately refer back to when you're engaging in the specific sections.

There's a number of reasons why we think the Court of Appeal got it right and why our interpretation is the right one. Firstly, I think at a really basic level that chapeau cannot be meaningless or what I would call tantamount to legislative puffery. That is, the Court should be loathe to ascribe an intention to section 12 that renders the stated purpose as having no substantive effect. A statement that operates as mere window dressing to provide the optical perception to Māori of Treaty compliance cannot be what Parliament intended, which I think brings us to the Parliamentary mandate point. Much has been made of the legislative history and alternative wording being rejected. So both the Attorney and the appellant narrowly focus on the statements by members of the opposition that were seeking an alternatively worded clause that was ultimately rejected, but I think the legislative history also shows that there was a deliberate changing in the wording of this section to reflect a strengthening. The chapeau in the original Bill was framed, or the wording that was used in the original chapeau was "to take appropriate account" of the Treaty of Waitangi. So that was the original wording. That was deliberately changed to then say "to give effect to" the principles of the Treaty of Waitangi. That was done in response to concerns from submitters that that clause needed to be strengthened and in particular it's relevant that the Rt Hon Amy Adams, who was the relevant Minister for Environment at the time, stated, and the reference is in our road map, that the select committee has recommended amending the reference to the Treaty of Waitangi in clause 14 to give effect to the principles of the Treaty of Waitangi through the listed provisions. This is a stronger requirement than the previous wording that the Treaty be taken into account. If it's not operative, the change or wording in that section would be meaningless and it wasn't described as such.

In terms of being distinguished from section 4 of the Conservation Act, I think that comparison is unhelpful as they're simply differently framed clauses in different contexts that need to be interpreted accordingly. Section 4, for example, applies across the whole Act. This one is an elaborated Treaty

clause where there's the pointed references to specific sections. There are a multitude of ways that express how the Treaty applies in a given context. Here we're talking about the interpretation of section 12.

I will just make a couple of final points before turning to why we say the DMC was wrong. First, elaborated Treaty clauses are just that. They are where Parliament has given more flesh to the bones of what Te Tiriti requires in a given context. Section 12 does not expressly purport to be an exhaustive statement on the ways in which the principles of the Treaty are given effect to in the EEZ Act nor does it expressly oust or extinguish the potential relevance of Te Tiriti in this context. Instead, the general commentary is that there is a desirability of there being some guidance as to what should be done in this space. On that, I think it is important that given the constitutional importance of Te Tiriti, if there is an intention to limit or oust the more general relevance of the Treaty, that must be done so expressly and not simply by a side wind which in that respect is a similar interpretative aid to the way that you might look at customary rights where it's clearly been stated that if you're going to extinguish customary rights that needs to be done so outright, out front and expressly.

So in particular it's illogical to purport to limit the relevance of the Treaty through a clause that expressly states it's there to recognise and provide for the Crown's responsibility to give effect to the principles of the Treaty.

In terms of what we say the DMC did incorrectly, we say that they wrongly interpreted the law on how Te Tiriti was relevant to their decision-making. The relevant paragraphs or the relevant legal advice that they then went on to adopt is set out at paragraph 628 of the DMC decision. In summary, they adopt the advice that says it's untenable to read in an obligation to take Treaty principles directly into account. They did go on to say there's scope for Treaty principles to colour the way that the other provisions are interpreted. We say that that interpretation doesn't go far enough and is wrong when you correctly read section 12.

To the extent that they say that they considered Te Tiriti in any event, we say that that's superficial at best. There's one paragraph at paragraph 720 of the decision where they refer to Te Tiriti principles and there they say: "Māori interests in general, and Te Tiriti principles in particular, are important and relevant 'other matters' under section 59(2)(m) of the Act. Our approach in this regard is also consistent with the advice of counsel assisting the DMC; that principles…should 'colour' our assessment. As an example, we have taken into account the potential physical and biological effects of the sediment plume on kaimoana," but that is the extent of any real meaningful engagement with the Treaty and it doesn't reflect meaningful engagement with what those Treaty principles might require.

So in our submission, there just was no engagement with Te Tiriti in any substantive way at all, and in the context of iwi overwhelmingly opposing the application and expressing how their interests are adversely affected, they did not discharge their legal obligations in that respect.

So just finally, Te Tiriti o Waitangi is of fundamental constitutional importance, constitutional and legal importance, as part of the whāriki of our law in Aotearoa. If the listed sections align with the stated intention of giving effect to Te Tiriti, there should be no cause for concern that that is how they are interpreted and legally viewed. This is not about contravening the will of Parliament at all or their sovereignty but about giving effect to their clearly stated intention in section 12.

So unless your Honours have any further question, that concludes my submissions on Te Tiriti o Waitangi.

ELLEN FRANCE J:

Can I just check one thing? You say that treating the Treaty principles as colouring the approach doesn't go far enough. Can you just explain then, so what you say the DMC should have done?

MS COATES:

Yes. I think, so for example in the Attorney's submissions they say you can colour the principles of Te Tiriti o Waitangi but here there's no interpretive thing that needs to occur, there's nothing ambiguous in that respect, so effectively it's not relevant at all. What we're saying is that, well, actually what you needed to do when you are taking into account the existing interests, you needed to understand those interests in the first sort of respect. As well as that, given the overwhelming opposition and impact that the activity has on those interests, you needed to think about and engage with what the principles of Te Tiriti o Waitangi actually are and how they might influence an outcome in this case.

WINKELMANN CJ:

So can you be more explicit about that? Because we're talking about rights to use that area to fish, also stewardship rights. So those are the interests that should have been expressly engaged with?

MS COATES:

Yes, and my learned colleague, Ms Irwin-Easthope, is going to speak specifically about how existing interests should be interpreted.

WINKELMANN CJ:

Right, thanks.

WILLIAMS J:

Well, are you saying that the Treaty and existing interests are co-extensive?

MS COATES:

Yes. I'm saying that the Treaty clause helps interpret existing interests.

WILLIAMS J:

So is there anything covered by the Treaty that is not covered by existing interests?

MS COATES:

I think what the Treaty does is set up, well, the relationship between, or provides a number of principles that help fill in that gap of what you're doing when you're taking into account the effects, so not necessarily just about what the existing interests are as such, it's in light of the impact that it has on those interests, what might "active protection" mean there, what might "partnership" mean in that context and, given that those interests are affected in such a way it may mean that to give effect to the principles of Te Tiriti o Waitangi that when you're looking at these things in their entirety that the application is declined.

WILLIAMS J:

Right. So you would say that the Treaty principles are not so much about the what, that's existing interests, but the how?

MS COATES:

Both.

WILLIAMS J:

Yes, but insofar as it's about the what, the two ideas are co-extensive.

MS COATES:

Yes.

WILLIAMS J:

What the Treaty brings to the discussion is the how?

MS COATES:

Yes.

WILLIAMS J:

So, partnership, utmost good faith, act of protection, so on and so forth. So how does that work with the "take into account" in 59?

MS COATES:

We say it provides a gloss on that and it helps –

WILLIAMS J:

But the problem is that 59(2) is a how as well. You see how you can get into a muddle there?

MS COATES:

Yes. And fundamentally – and this is what the Court of Appeal say, and they've set out some of the things they think you specifically need to engage with – but at a very basic level you need to engage with the Treaty, which we say was just simply not what's happening in this space because the way that they've interpreted Te Tiriti is effectively as being irrelevant and that you're only focusing on the existing interests and how those are taken into account, whereas Te Tiriti provides the gloss on that.

WILLIAMS J:

I guess I'm asking what's the extra layer beyond that word "take into account" which the how in the Treaty introduces? If you could state that crisply that would be really good.

MS COATES:

I'm not sure if I'm able to state it as crisply as you would like. But effectively what we're saying is that you can't ignore the "give effect to" part and that when you are looking and balancing all the things that you need to in the existing interests, because when you're taking into account all of the Māori interests as well as all of the other interests, that might mean, when you're thinking about partnership, that it is relevant. But it may not. It's about, it's another frame, another purpose for which to look at and balance these existing interests through.

WINKELMANN CJ:

But does it give anything more than giving content to what must be taken into account, so therefore the thing that must be taken into account, so existing

interest, those interests may be in something that is guaranteed by the Treaty. So the fact that – so that must be taken into account, and that would tend to be, if it's…

MS COATES:
I think that the "give effect to" adds weight to the Māori interests effectively…

WINKELMANN CJ:
Yes.

MS COATES:
When you're doing the balancing of taking into account.

WINKELMANN CJ:
This is an interest guaranteed by the Treaty?

MS COATES:
Yes.

GLAZEBROOK J:
Can I suggest, well, just ask probably, there is also complaint about the cutting out of consultation through the management plans. Would you, I'm assuming you'd see the Treaty, even leaving aside existing interests or possibly as well as existing interests, having a role to play there and especially the principles of partnership, I would have thought?

MS COATES:
Yes, that's right, and I think, or the way that we've articulated it is, particularly in relation to all of the specifically listed clause in section 12, which includes needing to be accurately informed by the Māori perspective, that the Treaty should also be cast over that, which I think engages sort of what you're saying, is that you also need to not only sort of think about it in that context but you need to accurately understand the Māori interests in their entirety, and that may include all those other sections, sorry, do include ensuring that you

have that perspective, so there is that consultation notification, et cetera, incorporated into or specifically directed to in section 12.

WILLIAMS J:
Except that your clients wouldn't.

MS COATES:
Wouldn't what, sorry?

WILLIAMS J:
Consult.

MS COATES:
Well, yes – well, no. I guess what they're saying – so effectively they were there and they gave their perspective…

WILLIAMS J:
At the hearing or prior?

MS COATES:
My understanding is at the hearing.

WILLIAMS J:
Right, of course, yes.

GLAZEBROOK J:
Sorry, my question was designed to deal with the complaint about those management plans cutting out public participate and by reference therefore the Māori participation at the later stages rather than the earlier stages. I wasn't …

WINKELMANN CJ:
Have you finished?

MS COATES:

Yes, I'm finished, unless there's any more questions. I wasn't sure if you sort of were carrying on.

GLAZEBROOK J:

No, no, I was just clarifying that I wasn't talking about the prior consultation in that, which is a different question, and obviously if somebody doesn't want to consult, well, there's not much anyone can do to make them consult.

MS COATES:

Yes, that's right.

GLAZEBROOK J:

And an offer has to be enough as long as it's a meaningful offer with a meaningful opportunity to participate, and the hearing would have given that, I would have thought.

MS COATES:

And then obviously for those, the participation and those interests to be weighed in the appropriate way.

GLAZEBROOK J:

In the proper way, yes.

MS COATES:

That concludes my submissions. Kia ora.

WINKELMANN CJ:

Thank you, Ms Coates. Ms Irwin-Easthope?

MS IRWIN-EASTHOPE:

Tēnā koutou e ngā Kaiwhakawā. I'd like to seek your indulgence and follow the lead of my friend, Ms Coates, and do a short mihi in te reo and then translate that very briefly, but that won't take long at all.

WINKELMANN CJ:
Go ahead.

MS IRWIN-EASTHOPE:
Thank you.

He rau rangatira mā, tēnā koutou. Tēnā koutou ngā iwi, ngā iwi, ngā whānau, ngā hapū o Taranaki kua haramai nei ki te uru ki tēnei kaupapa o koutou, o tātou katoa, tēnei kaupapa whakahirahira mō Aotearoa.

Tēnei te mihi atu ki a koe, ki a koe, e te rangatira, e te kaikōrero kua whakatūwhera nei tā tātou nei hui, tēnā koe. Otirā, tēnā koutou e te whare.

Tēnā anō koutou e ngā Kaiwhakawā, ka whai, ka kōrero ahau i tēnei – o tētahi kaupapa matua, engari ki roto e rua ngā kaupapa. Ko te tuatahi, ko te tikanga Māori, engari i roto i tēnei whare o te tikanga, ko te *Existing Interests* me te tikanga as *Applicable Law*.

So very briefly I acknowledge those who have travelled here today and the importance of this kaupapa for them and then explained that I have two topics to cover but in one sort of whare of tikanga and that's how we've framed those and so those are existing interests which I think will probably take the bulk of the time, but I'm conscious that we have ventilated some of those issues so I don't want to run over things that have been covered, and then end with tikanga as applicable law.

So at the outset you have the roadmap before you and so my part starts at paragraph 8, and I start intentionally with the whakataukī "he toka tūmoana" which translates to "as durable as the rock pounded by the surf". Now, other than the obvious connection to the marine environment, the purpose of that whakataukī really is – and that's where I'll conclude as well as starting – that tikanga has a metaphysical element and it withstands. And so where we start in this analysis is, and where we say the proper starting point is, is not to, I guess, fall into the reductionist trap that we accused or essentially suggest

that the DMC erred in doing, but frame these matters quite broadly at the outset as matters of tikanga to take into account and then, in doing so, within that whare if you will, talk about what existing interests are at issue here, how they're engaged, and I intend to pick up on where you left off with my friend in terms of what the Treaty means for that process and then tikanga Māori more generally.

And so what I would like to start with, and you've got paragraph 8 there, and there was a discussion with my learned friend for the Attorney, Mr Ward, this morning around tikanga and its bounds, and we've included some references there to various, references that are included in the bundle, and the – sorry, your Honours, I should have said that the references here are to, as my friend said, the electronic bundle, if we need hard copies I'm sure we'll be able to find those with other references.

But perhaps a point of clarification, and I'm not sure it's a major one, at the outset, but "tikanga" is defined in the Act, there's a reference to it in the definition section, in section 4, which links into the definition of the RMA as defined as "Māori customary values and practices", and so that's the definition in the Act itself.

But if we move on to where I'd like to spend probably the most time in terms of existing interests, and I've started here with the definition just above paragraph 10 of the road map, and I think it is useful just to read that out in terms of the chapeau to then getting into the subsections of that. And so I'm at section 4 of the Act, which is at page 15 of the Act, and that starts: "'Existing interest' means, in relation to New Zealand, the exclusive economic zone or the continental shelf, as applicable, the interest a person has in," and then goes on to the various types of interests that are classed as existing interests. But what I did want to emphasise before we get on to those, what we say are the primary categories at issue here, is that it is framed as an interest, it lends itself to the activity and will get there, but it isn't existing activity, and we say that that's important when we get into what the DMC actually conceptualised as the existing interests at play here.

And so before moving to paragraphs 12 to 14 of the road map, which essentially is where we say or what we say the DMC did, the DMC majority, and then the dissenting members of the DMC and their alternative view, which I do want to spend a little bit of time on, and then the Court of Appeal's approach, in a nutshell what we say with respect to the DMC's approach – and so I am at paragraph 12 although I'll summarise this – is that, and what we're doing here, is expressing our view on the approach more generally that the different levels took to the analysis of existing interests. So before diving into whether we're talking about limb (a) of the definition, limb (d) of the definition, limb (e) or (f), I'm stepping back and saying this is the approach that the various levels took to the analysis of existing interests more generally, because I think you can do that, and then come to the various subsections of that section 4 definition. And so what we say in a nutshell that the DMC majority did and why we say there is an error is because when the DMC was looking at the existing interests at issue it was focused on their physical effects on the environment, and so when it went through the various steps in its analysis, which at some points I would say are simply references to particular things, rather than engaging with the issues or the interests at play they focused on the physical effects of those and they focused on the effects of them on the environment, and that we say is quite an important point, albeit a fine one, in that section 59(2) requires, and particularly section 59(2)(a), requires the effects on existing interests and the environment to be taken into account, and of course we've gone through the difference in definition in terms of environment and existing interests. So we say they're focused on the physical effects and then they conflated the analysis between existing interests and the environment, which we say is an error, and then as a result we say they misdirected themselves in its analysis of, one, what they were analysing, and we'll get to that when we talk about kaitiakitanga and the importance of the values at play, including whanaungatanga, and then *how* they did that, and that's where I think the Treaty becomes much more important in the *how* as well, and so that's ultimately why we say that the DMC erred.

Now in contrast, and we haven't spent much time over the last day or so talking about the alternative view that was the other two members of the DMC, and what I did want to do was simply note that where we've referred to those parts of the alternative view is where you can see there is a distinguishment between existing interests as interests and effects on environment. So what the DMC alternative view says is that there are effects on the interests, so there are effects on what we say one is the interests at play here is the kaitiaki relationship and how that manifests in its fullest form, and then the effects, the true effects on the environment, so for example the effects on the fish stock. Now we're not saying that those aren't necessarily sometimes connected in terms of that whanaungatanga that is shared between us, however what we're saying is that if we we're thinking of what it might look like if it's separate, we say the DMC alternate view actually did do that, it separated the existing interests from the effects on the environment and looked at them separately. And I think what they also then did is, as a result of that analysis, including of course other effects which they had taken into account, in applying section 60 – and I wonder if I just might be able to take you to where they do this, which is page 102.0512 of the DMC decision, which is page 270 at the bottom of the decision. What they do there is they go to section 60, which is another part of the decision-making tree, which we say in our road map that the DMC majority did not do adequately and in fact actually in its decision simply refers to it three times without engaging with it, and what that requires, and what –

WILLIAMS J:
So you're at 193, are you?

MS IRWIN-EASTHOPE:
I am, Sir, yes, paragraph 193, that starts with: "In accordance with section 60".

WILLIAMS J:
And this is the alternative view? Right.

MS IRWIN-EASTHOPE:

This is the DMC alternative view, so that's the other two members of the panel. And what they do there is actually say: "In accordance with section 60 we consider a decision to refuse the consents sought would recognise the extent of the overlap between of the sediment plume zone of influence and the areas of statutory acknowledgement and the fact that the area to which tangata whenua interests applies cannot be moved elsewhere," and so that's an example of where the alternate view, or the members of the DMC, are actually applying section 60 and engaging with the interests at play and saying: "Therefore, in our view, we would decline consent on that basis," and I would accept, of course, that they are looking at other effects as well, so that is part of their decision. But what section 60 requires, and this is at page – I'm going to the Act – 58, is when you're considering the effects of an activity on existing interests, the EPA, and the DMC in this case, must have regard to, in particular, (c), whether the existing interest can be exercised only in the area to which the application relates, and what the DMC alternate view says is whilst this activity may be able to be carried out elsewhere Ngā Rauru and Ngāti Ruanui can't move their rohe, and so, when you're considering the effects of the activity on those existing interests, that is relevant and we say that the DMC alternative view really engaged with that and the majority did not.

And then we go onto the Court of Appeal approach and why we say the Court of Appeal was right is because what we say that they effectively say the DMC should have done is taken a holistic approach when they're thinking about existing interests, and so what we say the Court of Appeal does at paragraph 166, or starting at paragraph 166, it views those interests holistically and starts with a consideration of the relevant tikanga values, ie, whanaungatanga, kaitiakitanga and whanaungatanga being grounded in the whakapapa relationships that exist, so they start there and then they move to the practice. We're not – kaitiakitanga is a verb and, with respect, I think your Honours can see that here today with the amount of people that are here. So it is a verb. We're not saying that you simply ignore the word "activity" in limb (a) in particular of the definition of "existing interest". We're

just saying that's not the proper place to start, and if you do start there then we say you run the risk of getting to where the DMC got to which is simply focusing on physical effects in the environment without actually conceptualising what the effect is on the relationship and whether it's actually having a drastic effect, a significant effect or whatever. They don't come to that conclusion, and so we say –

GLAZEBROOK J:
When you say "relationship" you mean – what are you referring to? You're referring to the stewardship relationship or…

MS IRWIN-EASTHOPE:
Yes, and so what I would say to that…

GLAZEBROOK J:
Or the relationship with the environment or what?

MS IRWIN-EASTHOPE:
So I would say it's the relationships that's grounded in tikanga, so it is – it can be conceptualised as the kaitiakitanga relationship. Why I'm hesitating, your Honour, is that what I think the Court of Appeal did was rightfully said that's not just kaitiakitanga. So the relationship is grounded in whakapapa, ie, the whakapapa that these people have to the natural environment and particularly their taonga at issue here and then that leads to the whanaungatanga relationship between them and the obligation actually is for them to protect it and that manifests in the exercise of kaitiakitanga. So I think the short answer to your question is yes.

GLAZEBROOK J:
I was just asking what you would say it was, if you were saying too.

MS IRWIN-EASTHOPE:
Yes, but why we – and why I did do that a little bit painfully was that that is why when we move into category 1 and what we've framed as, so now I'm

moving to, you've got what we say is kind of what different decision-making bodies did and then the different limbs under the definition of "existing interests", that does become more important in terms of how that, particularly for (a), matters in conceptualising the relationship, and so if we move there now, and I'm at paragraph 15 of the road map which is category 1, we say again that you start with the values and that that would have an important effect on then how you conceptualise the interests at play, and then also that we agree with the advice actually that was given to the DMC by counsel assisting that you could have a broad inclusive interpretation of what constitutes a lawfully established existing activity and that may be appropriate in different cases and we say that it is appropriate here and so if you take that advice on what is a broad interpretation of that limb (a), which, just going back there, your Honours, so I'm going back to section 4 and the definition of "existing interest": "Any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation and fishing." We say that what you can do there is say that the kaitiakitanga relationship that's grounded in whanaungatanga and manifests in activity can be recognised through that limb, and we say that Parliament didn't need to expressly include kaitiakitanga after fishing in the non-exhaustive lists of things that that limb includes. We say that for two reasons: one, because you can read it in and, two, and perhaps more importantly, if you're not then effectively what I would say perhaps an illogical consequence of that link is saying that the customary rights that exist in those relationships is somehow not relevant by a side wind because they are not included explicitly as a part of a list of non-exhaustive matters. And so we say that the relationship itself can be recognised through limb (a).

Where you get to in the second category are rights that have been settled under a historical claim, which is limb (d), and there doesn't seem to be any issue I don't think between the parties as to those being existing interests, and of course this part of the coastline that we're dealing with here, all of the iwi have settled their historical claims, the iwi that are here before the Court. However what we say the risk is in saying: "Well, it's okay because you can

just give effect to them, take them into account through that gloss under (d),” is three risks.

The first one is that primary point about these settlements are not bringing these rights into existence, which then leads to the second point, which is the reality of Treaty settlements in that for all the good that they do they are political compacts, and so often they do not reflect the full extent of rights that iwi say that they have over their rohe. And, three, which is not so relevant here, but in terms of me being instructing solicitor for Te Ohu Kai Moana is slightly more relevant for those other iwi around the country who have not settled their Treaty claims, and of course that number is becoming fewer and fewer, however there’s quite a big chunk of the north and, as his Honour Justice Williams alluded to earlier, quite a big chunk of the east in the Bay of Plenty. And so those are important in terms of how the Act is interpreted and applied moving forward in that it’s not sufficient to just say “Oh, well, they’ll be captured” under that part. And with respect to the DMC majority decision, with all due respect to those members of the DMC, the section, or the chapter – I should be more specific – that deals with Treaty settlements doesn’t include a reference to the Fisheries settlement, and so that leads us to the point where we’re saying, well, we agree with the Court of Appeal’s analysis that what the DMC did was lumped the Fisheries settlement in with customary fishing interests and didn’t grapple with it separately at all.

And then when we get to category three, which is at 19 and 20, I think there’s two parts to this, and I think the issues were quite well ventilated this morning. But what I’d like to say in terms of rights recognised under the Marine and Coastal Area (Takutai Moana) Act is that this distinction between applications, and you may just have somebody like my friend, Mr Majurey, referred to yesterday the national applications that have been struck out, how was the EPA supposed to deal with those, I would say two things: one, the application point is a slight red herring in that what we say would have to happen there is an engagement with the rights that are being claimed, and that, we say, is actually a relatively orthodox undertaking that courts – here we’re talking about a DMC – but that courts have to undertake. And so the reference that

I've given there, not so much to the *Ngāti Hokopū ki Hokowhitu v Whakatane District* Council (2002) 9 ELRNZ 111 (EC) case, which has stood the test of time in terms of how you might deal with conflicting evidence, but more so to Justice Whata's recent decision in *Ngāti Maru Trust v Ngāti Whātua Ōrāki Whaia Maia Limited* [2020] NZHC 2768, which I understand the EPA filed. And I would like to take you to a couple of paragraphs there because I think this point is important not only for the MACA point and the point that my friends for the Attorney and the EPA say is of risk, as in, if I could try to summarise it, you know how do we deal with competing claims for mana whenua, mana moana? What this decision does is set out how you might do that and in short what Justice Whata says is you look at the evidence and you assess the interest in the relationship on the basis of the evidence presented and you make a decision. I'm not sure whether you have that to hand but I'm in your Honour's hands as to whether or not you need to be taken there, but it does grapple with this simply because –

GLAZEBROOK J:
So whereabouts is this?

MS IRWIN-EASTHOPE:
The EPA filed it. I understand it's in a very small bundle. If I actually –

WILLIAMS J:
Is it in the supplementaries, is it?

MS IRWIN-EASTHOPE
It is and it should be quite slim.

WILLIAMS J:
That's right, I saw it. Tab 2.

MS IRWIN-EASTHOPE
Tab 2, thank you, Sir.

WILLIAMS J:

Just before you do, because you've probably passed on from this, it's a small matter of detail I just need some information on. So the Māori fisheries settlement covered not just quota but customary fisheries and a number of iwi have customary fisheries regimes. They have kaitiaki appointed under them and so on. Do these iwi have those and were they brought to bear in the process?

MS IRWIN-EASTHOPE:

Yes, so I think we actually have a…

WILLIAMS J:

Just point me to the place unless you want to add something to it.

MS IRWIN-EASTHOPE:

Yes, Sir. There's a diagram at the back of our primary submissions – that's not the diagram.

WILLIAMS J:

Schedule 2?

MS IRWIN-EASTHOPE:

Yes. It's not quite the diagram I'm after. There's definitely a diagram in the DMC decision that sets out, one, where the statutory acknowledgement is but, two, where those areas area.

WILLIAMS J:

Customary fishery areas?

MS IRWIN-EASTHOPE:

Yes, and so that's the Fisheries Regulations, the customary fisheries area, and that's at the DMC decision 102.

WILLIAMS J:

When you say 102 you mean?

MS IRWIN-EASTHOPE:

102, page 388. So it's volume 102, page 388 of the DMC decision, and it's at page 146.

GLAZEBROOK J:

3 – sorry, where are we? 102…

WINKELMANN CJ:

388.

MS IRWIN-EASTHOPE:

102.0388, and that sets out the customary fishing areas of the different iwi but also provides a view of the coastline and those iwi along that coastline.

WILLIAMS J:

So is the only customary fishing area that says "Titahi-Ngaruahine"?

MS IRWIN-EASTHOPE:

Kāo. If you come around there's the Ngā Rauru, come around, that wasn't very specific, to the – I'm terrible with east and west.

WINKELMANN CJ:

To the right of the – just to the right.

WILLIAMS J:

Yes, I see, sorry.

MS IRWIN-EASTHOPE:

Yes, just to the right. There's that area there.

WILLIAMS J:

Running all the way out?

MS IRWIN-EASTHOPE:

Yes.

WILLIAMS J:
Right, okay.

MS IRWIN-EASTHOPE:
And so perhaps if I could take you to Justice Whata's decision in *Ngāti Maru*, and I understand it hasn't been appealed, and this is at paragraph 67.

WINKELMANN CJ:
I think it's a bit too soon to say that, isn't it?

WILLIAMS J:
Yes, might be.

MS IRWIN-EASTHOPE:
I conferred with counsel and he assured me that the time was up but perhaps maybe it wasn't. But just to step back, why I'm taking you here is because I think that there is an issue that's certainly been raised by my friends for the Attorney and the EPA that certainly we can't be expecting the DMC to decide who has mana whenua, if I could put it so crudely, or mana moana, and we're not saying that at all and I don't think the Court of Appeal was saying that either. What we're saying is that the decision-makers have to engage and that's what Justice Whata is saying at paragraph 67 and certainly 68: "Where iwi claim that a particular outcome is required to meet those directions … resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond must apply when different iwi make divergent tikanga-based claims as to what is required to meet those obligations." A slight difference in this case is that we just don't have that here but where you do that "may involve evidential findings in respect of the applicable tikanga and a choice as to which course of action best discharges the decision-makers statutory duties. To hold otherwise would be to emasculate those directions of their literal and normative potency insofar as concerns iwi." So that's in direct response to "surely we can't be requiring the DMC to do X?". We're saying we're not requiring them to determine who has mana whenua but we're requiring them to meaningfully

engage with the interests before them and make an assessment of those on the evidence.

And I'm now moving to – I'm almost at time – but I am now moving to tikanga Māori as applicable law, unless your Honours would like to move through anything else on existing interests?

And so what we say with respect to tikanga Māori as in applicable law, and of course we've traversed what we say tikanga Māori can be conceptualised as, and I've included in the road map another part of Justice Whata's, part of that decision where he links back the tikanga definition from the RMA, which of course is the one that we have referred to in the EEZ Act, and then says "it has come to be understood as a body of principles, values and law that is cognisable by the courts." And so then what we go on to say is of course it can be recognised under this Act as other applicable law where relevant to do so, and we say it is relevant to do so here. And then we also say that tikanga is presumptively protective unless expressly overridden, and why we say that is because this may not look like – and I got the sense from my friend's submissions that perhaps this wasn't intended to be a part of this limb of section 59(2) number 13 of 14. With respect, whether it comes at number 13 or number 1, what we're saying needs to be done is it needs to be grappled with and it needs to be taken into account, and it can be taken into account as applicable law. Now, whether that results in one section of a DMC decision which, with respect, is what the alternate view does, they don't necessarily go into this level of detail but they group things, rather than simply as the majority does, going through each limb of section 59 and saying "Here's what we heard" and then not doing an analysis in our view on section 60 and then section 62 on what that means for their decision and whether or not they're going to decline or grant, and ultimately they got to grant. But we say that it can be taken into account in this way.

And unless your Honours have any questions…

WILLIAMS J:
So where it's defined as "customary values and practices", does that amount to a limitation?

MS IRWIN-EASTHOPE:
So it links back – yes, Sir, it's in section 4. Now you have to go right to the end of section 4 and at section 4(2) on page 19 of the Act and it says: "The following terms have the same meanings as they –

WILLIAMS J:
Yes, I understand that. I'm asking you whether that rather *soft* definition, because it doesn't say tikanga means –

MS IRWIN-EASTHOPE:
Law.

WILLIAMS J:
– Māori customary law…

MS IRWIN-EASTHOPE:
Yes.

WILLIAMS J:
Does that cause you to think about whether your analysis is correct? I'm sure there are other reasons for you to think about whether your analysis is correct but…

MS IRWIN-EASTHOPE:
Yes, Sir, I think what I would say is that I read that definition, and I think Justice Whata has as well, as encompassing it being conceptualised as law, and how we certainly worked through it in thinking about this quite important in our view issue is when you think about customary values and practices, and that's the definition of tikanga Māori in the RMA, and then Justice Whata goes on to say "come to be understood as a body of principles values and law",

when we think about what the common law is in terms of that being a body of law I think you could describe that as a system of customary values and practices, and I probably would add in there rules.

WILLIAMS J:
Now I know you referred to the paragraph where Justice Whata does that. Can you tell me what it was, because I missed it.

MS IRWIN-EASTHOPE:
Yes, 64, Sir. I'll just double-check that. And it's right at the end of that paragraph there.

GLAZEBROOK J:
In fact common law is custom and so it fits very well, you would say I imagine?

MS IRWIN-EASTHOPE:
Yes.

WINKELMANN CJ:
Well, common law is a body of principles , values and law.

MS IRWIN-EASTHOPE:
Yes. And so I would say that it's –

GLAZEBROOK J:
But law based on principles and values in the same way.

WINKELMANN CJ:
Yes, and custom.

MS IRWIN-EASTHOPE:
And therefore analogous in that regard.

WINKELMANN CJ:

Right. Thank you, Ms Irwin-Easthope.

MS IRWIN-EASTHOPE:

Thank you. As your Honours please.

WINKELMANN CJ:

Mr Makgill.

MR MAKGILL:

Good afternoon, your Honours. I'm going to be addressing you on the statutory duty to favour caution in environmental protection. I've summarised the three basic points that I want to make at the beginning. I'd like to try and deal with these points as briefly as possible because I understand we do have some timing issues, but, of course, remain at your disposal in terms of any questions you might have.

Just turning to the questions, and I've had to interpret them a little bit because I don't think they were fully addressed by my learned friend yesterday in his oral submissions but they certainly were in written submissions. The first point that I will address is that the information principles are fundamentally not intended as a mechanism for facilitating or making consents. The second point I'll address is the Court of Appeal's finding that the DMC failed to adopt the approach required under 87E(2) of the Act, and then I will address the Court of Appeal's finding that the information principles can and indeed should be seen as implementing the precautionary principle under international law.

At 1 and 2 I've put down the information principle or the operative provision in terms of favouring caution and protection and then at 2 I've also put down principle 15 of the Rio Declaration, the precautionary principle, and the first point I'd like to make is that although they're formulated using different language, these respective principles convey the same idea, the same approach. They call for protection or prevention where there is uncertainty – or uncertainty or inadequate information concerning the potential adverse

effects of a proposed activity on the environment. The protection element of both principles, because precaution is obviously predicated by the words "in order to protect the environment", means both sets of principles have a protective element to them. The protective element of the principles does not support interpreting the information principles as having been designed to facilitate granting consent. You might look at any legislation that a consent or a permit can be obtained under and say, well, because you can get one it's designed to facilitate it. Well, that ignores the statutory criteria that you need to satisfy in order to be able to obtain a consent. In this particular instance we have a caveat where there is uncertainty about the information, or there's uncertainty about the activity. It calls for caution, prudence. It's not designed to enable consent.

So I'd like to turn to – unless there's any questions on that point?

GLAZEBROOK J:
Where do you say – do you say the majority erred in the DMC decision on that?

MR MAKGILL:
No.

GLAZEBROOK J:
I'm just wondering where this fits in, that's all.

MR MAKGILL:
Well, it was an argument that's been advanced by TTR in the Court of Appeal, they adopted the High Court's finding of facilitate, it's designed to *facilitate* consents, and then in their most recent submissions – and I've given under (a) the reference to 103, they have changed the wording to provide a means for granting consent. I don't see any difference between the language myself, it still intends to convey that those principles are there to enable a consent to be granted.

GLAZEBROOK J:
So it's really to meet an argument that wasn't really made orally yesterday but has been made in the written submissions?

MR MAKGILL:
It has been made in written submissions, yes, thank you.

WINKELMANN CJ:
And do you say it's not designed to do that, it's designed to what?

MR MAKGILL:
I say it's designed to – where an application is made for a consent and there is uncertainty as to the potential effects of that activity on the environment or there's insufficient information to provide certainty about the effects, then it calls for the decision-maker to favour caution, to slow down, and not just to do that but to be read in conjunction with protection, to take a protective approach, that's before you even get to section 10(1)(b), there's a protective element or objective built in to the information principles themselves, irrespective of whether you're talking about section 61(2), which deals with marine consents, or you're talking about 87E(2), which deals with marine discharges and marine dumping.

WINKELMANN CJ:
And what about the definition of "best available information" which brings in a notion of proportionality without unreasonable cost, effort or time?

MR MAKGILL:
"Best available information" is just a direction, with respect to the level of information that the DMC or the EPA should have before it before it makes a decision on a consent. It's not saying that the best available information, if you have it, therefore means you must grant a consent, it's just: "This is the information we were able to obtain without unreasonable time or cost and now we feel that we're able to make a decision one way or another on that information."

WINKELMANN CJ:

Well, I think those points are rather being put differently though, which is that if it's not available because of the unreasonable cost of effort or time involved in getting it then that shouldn't weigh against the grant of a consent.

MR MAKGILL:

Well, I don't think, with respect, I don't think that that's how the precautionary approach is intended to work or how the information principles are intended to work.

WINKELMANN CJ:

You'll just have to speak up, Mr Magill.

MR MAKGILL:

Oh, sorry. With respect, I don't think that that is the objective of the information principles, I don't think that's the objective of best available information. It's simply a direction to the EPA as to the information it should have before it or be satisfied it has before it before it makes a decision one way or another. If you presume that best available information means that you have enough to grant consent, then it obviates the need for the sections that come after it.

GLAZEBROOK J:

You're really saying you get the best available information but on the best available information you still have to meet section 61(2) and section, is it 87E(2), ie…

MR MAKGILL:

Yes, your Honour.

GLAZEBROOK J:

You must favour caution in environmental protection and if the best available information doesn't get you over that hurdle then you can't grant the consent, is that…

MR MAKGILL:
That's my submission, yes.

GLAZEBROOK J:
And that's before you even get to the purpose of protection under section 10(1)(b) I think you're saying?

MR MAKGILL:
Yes. Although there is link between the two.

GLAZEBROOK J:
Obviously.

MR MAKGILL:
Yes. So moving to the second point, the information principles were obviously put in place to deal with a deficit of information in the EEZ. We have the fifth largest EEZ in the world, we don't have complete knowledge over our territorial sea, let alone our EEZ, so it's a mechanism for dealing with risk, for not having complete information but being able to make decisions against the risk of not having complete information. Incomplete information doesn't necessarily mean you don't grant consent because there might not be any risk in not having that information. But if the information you don't have also has a corollary risk of potential damage then you've got to exercise caution and protection.

So while they're formulated in the same way, both information principles or 61(2) and 87E(2), they operate differently and the two key differences are, firstly, as we just discussed, section 10(1)(b) needs to be satisfied, and that really requires that you're achieving the protective purpose of the Act. So it almost elevates that requirement for protection under 87(2)(e) in terms of the purpose to be achieved. And the lower tolerance for risk in respect of pollution or discharges or dumping is further emphasised by the exclusion of the availability of adaptive management in respect of discharges under 87F(4). So there's two fundamental differences between the information

principles for marine consents and the information principles for marine discharge and marine dumping consents.

I'd just like to touch here briefly on the 2013 amendment and its relationship to the 1996 Protocol. This is because section 10(1)(b) actually reflects Article 4(1) of the '96 Protocol. That Protocol, or that Article, prohibits dumping unless it is capable of being regulated under Annex 1. So you've got a prohibition or a regulation, and that's reflected in 10(1)(b) where you have prohibition or regulation, and if you regulate both the London Protocol and section 10(1)(b) allow for consent to be granted if you can show that you're not going to have a material harm or a material adverse effect or material pollution.

WILLIAMS J:
Just the Protocol doesn't use that phrase, does it, "material harm"?

MR MAKGILL:
No.

WILLIAMS J:
Where do you derive it from?

MR MAKGILL:
Sorry, I'm deriving that from the Court of Appeal's decision.

WILLIAMS J:
I see.

MR MAKGILL:
I apologise. I should have explained that. So I think that the DMC, where it erred was that it failed to place the same emphasis on the requirement to favour caution, or any emphasis on the requirement to favour protection. It was cognisant of the obligation to favour caution.

WINKELMANN CJ:
"Conscious"?

MR MAKGILL:
Yes, "conscious". Sorry, thank you. But it wasn't conscious of the obligation to protect. It didn't even discuss the obligation to protect in relation to favouring caution and environmental protection. So while it turned its mind to favouring caution, it didn't turn its mind to environmental protection under that provision, and then went a step further because it didn't turn its mind to environmental protection under section 10(1)(b).

So I'd like to move on to the precautionary principle under international law. Section 11 of the Act enables the implementation of obligations under various international conventions relating to the marine environment. I don't think there's any argument in this case that the principle set out in *Helu v Immigration and Protection Tribunal* [2016] 1 NZLR 298 (SC) applies and therefore there is a presumption that international law may be used to clarify legislation in the absence of contradiction or an avoidance of the statute's express terms.

I think *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) is a very helpful case in this respect because it directly engages with the Law of the Sea Convention and Keith J in that decision went somewhat further and said that the Courts for over a century have made plain that maritime legislation needs to be read in the context of the Law of the Sea. He was looking at a very similar legislative provision under the Marine Transport Act to the one that we're dealing with here in respect of section 11. It enabled the implementation of New Zealand's obligations under the Law of the Sea Convention, or maritime agreements, I beg your pardon. A qualification case is he was considering state jurisdiction in respect of vessels that flew a foreign flag/State or had a foreign flag of another state. So he was considering situations where New Zealand sought to impose law, New Zealand law, on vessels that were not registered in New Zealand when they were engaged in passage in the high seas, and in that decision the Court found that

New Zealand's jurisdiction under the Law of the Sea Convention did not extend to control over foreign flagged vessels in the high seas and that the legislation had to be read down in the context of that international law. There wasn't a jurisdiction to control those foreign vessels.

That's not the situation we have here. In the this situation we're dealing with legislation that's designed to implement New Zealand obligations in respect of territory over which New Zealand exercises sovereign rights.

WILLIAMS J:
Not quite sovereign rights.

MR MAKGILL:
No, no, they're called sovereign rights under the Law of the Sea Convention.

WILLIAMS J:
In the EEZ?

MR MAKGILL:
Over the EEZ, yes.

WILLIAMS J:
But New Zealand's jurisdiction isn't exclusive over the EEZ, is it?

MR MAKGILL:
No, it's not, but the Law of the Sea Convention refers to it as sovereign rights. It's the terminology used. So it's not "sovereignty". They call them rights.

WILLIAMS J:
The rights that are the rights of that sovereign?

MR MAKGILL:
Yes, so the rights that you exercise over the EEZ are subject to obligations that follow from those rights. And I set out – in Article 56 you see the rights expressed in relation to the kinds of things that New Zealand exercises

jurisdiction over and that includes the marine environment and its protection and preservation and also the use of natural resources.

But 193, under Part XII of the Act, says that our sovereign rights are exercised subject to our obligations "to protect and preserve the marine environment".

WINKELMANN CJ:
Which section, sorry?

MR MAKGILL:
It's Article 193, respondents' materials, tab 1, and 194 provides further expression of obligations in respect of the prevention of pollution.

WILLIAMS J:
So I guess the point there is that New Zealand is not the only stakeholder in this zone and that it's having law imposed upon it because this is an international resource, in truth, over which New Zealand has limited jurisdiction and therefore it must take into account the directives of the international community in respect of it.

MR MAKGILL:
Yes. Although New Zealand exercises the rights over the resources…

WILLIAMS J:
Sure.

MR MAKGILL:
There can be said to be a community interest in our responsibility to preserve or protect and preserve the marine environment.

WILLIAMS J:
But the protection and preservation is an obligation the international community places on *us*…

MR MAKGILL:
Yes.

WILLIAMS J:
In exchange for the right to make some laws, because we didn't used to have that right.

MR MAKGILL:
And to – absolutely. And if you read *Sellers* they talk about the Canadian legislation that tried to exercise jurisdiction out to a hundred miles over the marine environment prior to the Law of the Sea Convention, and that claim was rejected by other states because the right wasn't recognised. So although we go through a history of claims in terms of varying kinds of jurisdiction, the Law of the Sea Convention cemented for states what that jurisdiction was and what the obligations were that followed that jurisdiction.

I'll come back to the Law of the Sea Convention in a moment, but I just want to explain for a moment that although the Court of Appeal looked at the Law of the Sea Convention and set out the obligations under it, it really ended up focusing on the 1996 Protocol and the obligation under 3(1) to take a precautionary approach to environmental protection, and what the Court says is that although that obligation doesn't appear in MARPOL and it's not express in the Law of the Sea Convention, it was applied in this legislation as a policy decision to apply to both discharges and dumping. So it was a policy decision to take our obligation under international law, the most restrictive one, and apply it generically.

WINKELMANN CJ:
Can you just repeat that submission? Sorry.

MR MAKGILL:
The Court of Appeal identified – sorry, I'm talking about article 4(1), I conflated the two, I do apologise.

WINKELMANN CJ:

Yes.

MR MAKGILL:

Sorry, let me remake that submission.

WINKELMANN CJ:

Okay.

MR MAKGILL:

In respect of 3(1) the Court said that the precautionary approach for environmental protection, it's the same rationale, it's the piece of international law that expresses the obligation. Now when you first look at that you go, well, how does that, how can that be when the Protocol wasn't introduced to the legislation until the 2013 amendment, because article 61(2) is a way to read the same? And my submission on that point is that section 11 has never been read exhaustively, it's always been various international conventions in relation to the marine environment and then a non-exhaustive list as including. So the previous legislation included the Law of the Sea Convention and the Convention on Biological Diversity, but it didn't exclude MARPOL and it didn't exclude the 1996 Protocol. They are included as various other conventions which convey international obligations. So they are included by way of a general reading.

GLAZEBROOK J:

I suppose again the question I asked Mr Smith which was given there's caution in the Act, does precautionary principle take you any further or is caution in fact wider, especially if you take that narrow of view of what "precautionary principle" means?

MR MAKGILL:

I think the precautionary principle is narrower. I agree that the way it's expressed under legislation is wider and the reason why I took you through the explanation I did is because I think the Court of Appeal was looking for

express provision of obligations in the Conventions. It wasn't as comfortable looking at international decisions of the judiciary, the International Law of the Sea Tribunal, the ICJ, or soft law, the Rio Declaration. Even though some of this was put before them, I think that they took a more conservative approach and looked for direct expression of these obligations which really –

GLAZEBROOK J:
Which is, of course, in the Act itself so – and…

MR MAKGILL:
I think it's whether you can read those obligations as applying in any event by way of the Law of the Sea Convention and that really gets me to my second point which you can take a direct approach where you look for the express provision or you can take an approach where you look at some of the decisions of the Tribunals that have been established to interpret the Law of the Sea Convention under the Law of the Sea Convention and see what they have to say about these things, and, for example, the *South China Sea Arbitration* award, *Re Arbitration Between the Republic of the Philippines and the People's Republic of China,* PCA Case No. 2013-19, Award (July 12, 2016), describes protection under 192 as a general obligation to protect the marine environment from future damage. It's a positive obligation to take active measures to protect and the logical implication is that there are negative obligations not to degrade marine environment.

So that gives us some discussion around how under International Law those obligations are seen to operate. So there's positive and negative obligations associated with it.

And in terms of the precautionary approach, the best decision to look at is the *Seabed Mining Advisory Opinion* because it makes it plain that irrespective of whether the precautionary principle is a rule of international law, customary law or a soft law instrument, it's applicable under the Law of the Sea Convention, and I just draw your attention at 18 to a summary of some of the points I've made there. They describe the precautionary approach as an

integral part of a general obligation of due diligence to act cautiously, to act with prudence, applicable even outside the scope of the Law of the Sea Convention. It applies where scientific information concerning the scope and potential negative impact of the activity is insufficient but there are plausible indications of potential risk. The link between due diligence and precaution is implicit. It requires parties to act with prudence and caution where there is scientific uncertainty, and the last finding they make is incorporation of the principle into a growing number of international treaties and other instruments reflecting the formulation of the principle has initiated a trend towards making it part of customary international law." So they're not saying it's customary international law here, but it's just about there, it's reflected in a lot of different instruments, we know what it means, it may be formulated in different ways, but the intent of the precautionary principle is understood.

And that is the end of my submissions on that point.

WINKELMANN CJ:
Thank you, Mr Makgill.

WINKELMANN CJ:
Thank you. Just indicating to counsel, we might finish for the day after you, Mr Smith, and carry on, is that – if we finish after you today, will we finish by lunchtime tomorrow, is that the feeling?

MR SMITH:
Yes, if we have until lunchtime that will be ample, I envisage.

WINKELMANN CJ:
So, say if we have until 12 o'clock and we sit right through.

WILLIAM YOUNG J:
There is a reply to come, I think.

WINKELMANN CJ:

So tomorrow we would have an hour and 25 minutes…

ELLEN FRANCE J:

And Mr Smith's reply.

WINKELMANN CJ:

And Mr Smith – so probably lunchtime, yes.

MR SMITH:

Yes. In our pre-hearing estimates we had Mr Gardner-Hopkins with about 25 minutes…

WINKELMANN CJ:

That's right.

MR SMITH:

And Mr Salmon with an then my learned friend's reply.

WINKELMANN CJ:

Mr Salmon an hour, so it's an hour and 25 tomorrow, which would take us through to 11.30…

WILLIAMS J:

We could start early, or not.

WINKELMANN CJ:

And then 11.45 to one for reply, which would seem ample, Mr Smith, yes. So I think that's all right. Just, we want to make sure we can pay full attention, we're receiving a lot of information. Right.

MR SMITH:

Yes. So perhaps with a little luck we might be done at closer to four than 4.15 then, if we proceed on that basis.

Tēnā koutou e ngā Kaiwhakawā. One matter of housekeeping. There are three arguments that Forest and Bird has oral carriage of or primary oral carriage of. It's the marine mammals and seabirds conditions, the adaptive management point, although I understand Mr Gardner-Hopkins for the Conservation Board may also have some things to say about that, and then the question of the interpretation of the condition-making power under section 63 of the Act. So I will address the first two of those points and then Mr McQueen will follow briefly on section 63.

So, to begin with marine mammals and seabirds conditions, these are the conditions 9 and 10 and then conditions 66 and 67 imposed in the DMC decision. So perhaps useful to remind ourselves what those provide, which are at, or the conditions begin at page 278 of the DMC decision, which is your hard copy volume 102.

WINKELMANN CJ:
Sorry, what page?

MR SMITH:
Page 280 of what my learned friend's calling the intrinsic pagination, and we have condition 9 relating to seabirds and condition 10 relating to marine mammals.

Condition 9(a) in relation to seabirds: "At all times during the term of these consents the consent holder shall comply with the following: (a) there shall be no adverse effects at a population level of seabird species," and then the equivalent in relation to marine mammals at 10(a): "There are no adverse effects at a population level," on the listed species of marine mammal.

As mentioned in the exchanges yesterday, your Honours have the point there, the complaint is that nowhere in this condition or, as we will see as I carry on, in the conditions for the establishment of management plans or in the draft plans themselves is it defined what will be an adverse effect at a population level on these species, and we say that is, first, that is a matter that ought to

have been provided for in the conditions and if it had been provided for in the management plans that would have been an improper delegation but, in any event, it is not envisaged to be provided for in the management plan so it simply becomes a gap.

So carrying forward –

WILLIAM YOUNG J:
Sorry, Mr Smith, can you just answer, there must be quite, and I may have missed something, but there must be quite a number of cases about conditions that are expressed in perhaps indeterminate language. Is it really not possible to impose a condition that requires a level of judgment later to determine whether or not it's been breached?

MR SMITH:
The cases express themselves, and I don't apprehend there's any real difference between the parties on this point. The *Ferguson* case and the other authority that was referred to by my learned friend yesterday are also part of our submissions. There's also a useful discussion in the *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (HC) case. In terms of certainty, the somewhat circular expression is a "sufficient measure of certainty to give a certain measure of certainty". So it contemplates that there need not be absolute precision in all matters and that there may be matters which it's appropriate to leave to some degree of later judgement but then –

WILLIAM YOUNG J:
I mean a contract to provide services for reasonable remuneration is perfectly enforceable even though what's reasonable remuneration later has to be assessed by a decision-maker.

MR SMITH:
Quite, your Honour. I would say that different considerations may apply to what is an appropriate measure of certainty where there's an enforcement

consequence, including potentially a criminal one, in the specificity with which one would require a condition to be expressed. But the second element of the inquiry, related to but distinct from the requirement for certainty from an enforcement point of view, is also, and this is the particular point that the Court of Appeal alighted on in its decision, is that matters of sufficient importance must be decided by the consenting authority itself in the process which provides for public participation and may not be delegated to a subsequent decision-maker in another forum where those public participation rights are more limited or, indeed, non-existent.

In the *Marlborough District Council* decision I referred to, the question there was about whether the site on which the marine farm was to be established was a site of particular significance for feeding and other matters in relation to a particular population of Hector's dolphin and perhaps it's useful to go to that.

GLAZEBROOK J:
Can I check in this, it seems to be one of the real issues, probably especially with the sea mammals, was that there wasn't actually any information about the population anyway. If there had been, it might be that saying you don't do anything at a population level, or, for a start, I suppose you could have actually set limits, actual limits, hard limits, then if you'd wanted to but also if you do know what it is then it's much easier to know what might be. Is that important to your argument or is this just an argument that says, well, even if you had that information these wouldn't be conditions that gave you enough certainty?

MR SMITH:
We say that even if you had that information the way the conditions are drafted would not give you sufficient certainty but that if the decision-maker had had the required information then they can, and one might infer, expect, would have drafted the conditions with sufficient certainty, and so in that sense the problems that we complain of in these conditions are a symptom of what the Court of Appeal described as the fundamental problem, that there simply wasn't enough information about the receiving environment and the

effects that these activities would have upon it and that that was why a matter that ought to have been specified in the conditions wasn't able to be specified or certainly was not specified.

To return to complete my answer to Justice Young, I was discussing the *Director-General of Conservation v Marlborough District Council*.

WILLIAM YOUNG J:
So where's that?

MR SMITH:
That's in the respondents' volume of authorities at tab 31, respondents' authorities, volume 4, tab 31.

WILLIAMS J:
This is the *Conservation v Marlborough* one that you were talking about or is it…

MR SMITH:
Yes, your Honour.

GLAZEBROOK J:
Which tab, sorry?

MR SMITH:
Tab 31 of volume 4 of the respondents' bundle. So the relevant discussion here is from paragraphs 26 to 30 of Justice MacKenzie in the High Court, but the condition in issue, just to orient, is set out in paragraph 3 at the foot of page 129 of the judgment.

WILLIAM YOUNG J:
This was like a sort of a condition that had to be satisfied before the activity could start?

MR SMITH:

Yes. So that was – it was characterised explicitly as a condition precedent which was a problem in itself, but what that characterisation allowed the Court to see as a factual matter was that the decision-maker regarded this as a matter of sufficient importance that it needed to be determined before in substance the consent, well, before the consent could be exercised.

WILLIAM YOUNG J:

That's a little different from here, isn't it?

MR SMITH:

Well, the principle we say holds. I accept that there can be room for argument about whether a particular matter is one of the kind that the condition precedent dealt with in this *Director-General* case addressed. We certainly submit that having, identifying in a specific way the effects that were intended to be prevented by specifying that the consent could not have adverse effects at a population level on seabirds and marine mammals was one such matter that you…

WILLIAM YOUNG J:

But that required the consent authority to form a judgment whether the site was of particular significance for Hector's dolphins before the consent could be activated, and that really was like a second consent hearing.

MR SMITH:

Yes, and…

WILLIAM YOUNG J:

But there must be – well, going back to what I asked, there must be cases where conditions have been expressed in terms such as "must not operate the premises so as to create a nuisance" or "must not conduct operations from premises so as to create noxious smells". That can't be uncommon. I'm sorry, but that must happen from time to time.

MR SMITH:

Those are matters though which I would submit are substantially better defined than the question of what is a population level impact on these species where there is no information about what that population is, either in a qualitative or a quantitative sense. We don't –

WINKELMANN CJ:

Well, that was the evidence before the DMC, wasn't it, that there wasn't sufficient information about the populations or, for instance, the extent to which Māui dolphins were going through that area? So how are you going to measure the population impact on Māui dolphins unless you're measuring an enormous area? How do you do that?

MR SMITH:

Indeed, and so there is in the DMC decision…

WINKELMANN CJ:

Perhaps it might just be good if you stepped back for a moment, Mr Smith, and told us exactly what your arguments are in relation to these conditions, just to be recapping now that we've had a little bit of an exchange?

MR SMITH:

Yes, your Honour. So we say that the conditions that there be no population level effects as set out in section 9 and 10, or conditions 9 and 10, on seabirds and marine mammals were, as drafted, so open-ended as to be meaningless, that they needed to specify what these effects were, that had they delegated, left that matter to management plans, though that that would have been an improper delegation of a matter that ought to have been determined at the consenting stage –

WILLIAMS J:

It depends on when the management plan is done. If it's fixed at the consent and compliance with it is a condition then there's no problem with that, I

wouldn't have thought, since you're not handing the content over to anyone else, you're affirming that that content is appropriate as a condition.

MR SMITH:
That would be correct on the premise that the content is fixed…

WILLIAMS J:
Absolutely.

MR SMITH:
Yes, which –

WILLIAM YOUNG J:
But what if it were –

WINKELMANN CJ:
I don't know if Mr Smith's finished his overview. It would be helpful just to allow him to finish his overview before we – is that the overview of the argument or is there – there's also the second limb, is there?

MR SMITH:
Well, that is the overview of the points.

WINKELMANN CJ:
Yes.

MR SMITH:
What I was hoping to do was go to conditions 9 and 10, to conditions 66 and 67, and to the draft plans to see what is actually done.

WINKELMANN CJ:
Right.

WILLIAMS J:

So isn't the problem that one can't know whether these conditions have been breached without there being some underlying standard against which to measure. So even where you have "don't be too noisy" there'll be an internationally applicable noise standard referred to in the condition, and if it's "don't be too smelly" there'll be "in accordance with olfactory" whatever it is, I can't – you know the sort of thing – so there will be a standard behind it which someone can point to to know whether they're breaching it, even if it's a relatively subjective thing. The problem with this is that it's stated broadly and there's nothing behind it to guide what the hell it means, isn't it?

MR SMITH:

Yes.

WINKELMANN CJ:

Well, at several levels, isn't it? Because what is an "adverse population effect"? Is it the birds and mammals ceasing to be in that area, which is in itself actually an adverse effect, or is it that they have a drop in population numbers, is it that they change their breeding pattern so that in a hundred years' time we'll see a change in the overall population, is that because they have adequate information about blue whales that they know that at a certain level of noise they will beach? So it could be, you know, there's uncertainty about what's an adverse effect and then there's uncertainty about what conditions create adverse effects, that's your point, is it?

MR SMITH:

Yes. And so there's even, as I say, qualitative uncertainty about what is the population we're concerned about to be measuring in the first place. Is it the local population, as your Honour's questions there tend to indicate, or is there a broader population, perhaps not a relevant question in the case of something like the Māui's dolphin but potentially relevant in terms of internationally migratory species like the Blue whales where there does seem to be evidence that there are distinct local populations, is that what we're concerned about and then so on?

WILLIAMS J:

Is there an optics problem with stating a body count?

MR SMITH:

Well, that's perhaps more a question for my learned friend than me.

WILLIAMS J:

It just seems, I mean, I'm trying to work out there isn't a number there somewhere or a percentage. Even if you don't know what the population is, you could at least set some sort of proportion, that will be known.

MR SMITH:

Perhaps in principle, though that would be problematic if one didn't know what the population was, there's a, in my submission, a significant difference even in saying, you know, a 5 per cent or a 10 per cent drop in the population of a critically endangered species versus a threatened species or another species.

WILLIAMS J:

Yes, well, the experts seem to agree that one Hector's dolphin is catastrophic.

MR SMITH:

Indeed

WILLIAMS J:

So we're not talking about those ones, that's probably relatively easy since there are so few of them. It's the blue whales and the seals and the little penguins that are the ones that are going to present a problem in terms of knowing whether you get one bird strike, the penguins, or 10 in a day, whether you're having the effect that's breaching the condition.

MR SMITH:

I accept that, your Honour. In terms of Māui's dolphin, it may be easy to judge when we're talking about mortality, but nonetheless some of the lower-level effects that could be adverse in terms of displacement, again that judgement

is not self-evident, and in my submission it's not an answer to say this is a term of art, as my learned friend did, because that's still – even if that's correct, and I don't know that it is, the question of the application of that term of art to the particular circumstances is where the rubber hits the road and it's what the consent does not and in our submission should give us assistance with.

WILLIAM YOUNG J:
Mr Smith, there are other issues about this but there were pre-commencement monitoring arrangements in the conditions which presumably, if implemented, would provide a baseline for the implementation of these conditions that you take exception to. I'm looking at condition 48.

MR SMITH:
Yes.

WILLIAM YOUNG J:
So the concern that there's no baseline is at least addressed, you might say, by an improper delegation but it is addressed in the condition.

MR SMITH:
Well, we have, yes, other problems with that structure –

WILLIAM YOUNG J:
I appreciate there are other problems.

MR SMITH:
– but taking the point as far as it goes, let us say that that would give us information about the populations, then there is still a judgment to be made about what are the effects on those populations that we are actually concerned about in terms of conditions 9 and 10.

WILLIAM YOUNG J:

That could be made by the enforcing authority, couldn't it? I mean, if there's a prosecution wouldn't that just be something the Court would have to determine?

GLAZEBROOK J:

Too late.

WILLIAM YOUNG J:

Well, it's not too late because you can say that in relation to every condition, that it might be breached and in the end you've got to rely on Court enforcement. But are you suggesting it would be impossible for a Judge to determine whether there's been an effect at population level?

WILLIAMS J:

It might be impossible for the prosecutor to determine whether to bring a prosecution.

MR SMITH:

I'm not going as far as impossibility. Obviously –

WINKELMANN CJ:

I would have thought that what is an effect at a population level is the question I keep on asking myself because it doesn't necessarily mean deaths. It may in fact mean effects and behaviour which are detrimental. So an effect on their migratory patterns, an effect on their breeding patterns, an effect on their feeding patterns, those are effects at a population level, aren't they, or is there some contrary reading?

MR SMITH:

No, these are the very questions we seek to raise and –

ELLEN FRANCE J:

But adverse effects per se is a term that those enforcing would be familiar with. I mean it's a term used in the Resource Management Act, isn't it, as well as in this Act?

MR SMITH:

That's true. It's a term of art in that sense, but nonetheless not one which one would normally, I submit, see used unelaborated at the level of a consent in relation to an important matter. So one might have a policy in the Coastal Policy Statement that one would avoid significant adverse effects on outstanding natural landscapes or the like, but when it came to the question of the consent one would expect to see explored and appropriate limits to understand what are the effects we're concerned about and therefore how do we prevent them, and this is coming perhaps more to the fundamental problem that there was not information before the DMC to allow them to make that judgment. The submission is that the question that there should not be adverse effects at a population level on these species was of sufficient importance in terms of the kind of analysis carried out by Justice MacKenzie in the *Director-General* case that it ought to have been dealt with at the level of the consent because these questions of what are the relevant effects at a population level are not self-evident. They are matters that are potentially contestable, whether the consent authority intended that they include the kind of matters that the Chief Justice has been putting to me or whether it's limited to mortality. Potentially, that – well, I think there would be a real question about whether it's appropriate for a criminal court to be making a judgment on that contestable matter after the fact in a way that could lead to a criminal conviction, and that's where the certain measure of certainty comes in.

WILLIAM YOUNG J:

Well, the criminal courts in a manslaughter case have to determine whether a breach of duty was a major departure, which is no more how long is a piece of string question than this sort of issue is.

WINKELMANN CJ:

Well, there's some clarity about what the duty is that's been breached though, isn't there?

WILLIAM YOUNG J:

Well, that's the duty, but what's a major departure is a question of degree.

WINKELMANN CJ:

But this is the duty, what's the duty is the question here.

WILLIAM YOUNG J:

Not to carry on if you are going to produce an adverse effect at a population level.

WINKELMANN CJ:

And what is that?

MR SMITH:

Yes, but my point is no one, no one knows what that effect is at the moment. TTR doesn't know, the DMC doesn't know. They've said therefore: "Well, we don't know but we know that that's bad so we're imposing a condition that that qualitative thing can't happen." But without knowing what it is that would constitute that thing, the condition is, as we submit, at least inappropriately open-ended and, assuming that thing is intended to be established at some stage, that would constitute an improper delegation. But, as we say, we don't actually see in the management plan conditions or in the draft management plans themselves an intention to define what is a population level adverse effect. What we see is, when we come over to condition 66 and 67, which describe what these management plants are to address, that they are intended to set out indicators of adverse effects at a population level and so perhaps the flashing light that tells that you are approaching the danger point but without specifying exactly what that danger point is.

I am conscious, as we have all been, of time…

ELLEN FRANCE J:

Just one question. In the expert evidence, for example, in terms of fish ecology and operational noise on that, the experts accepted that population level impacts are unlikely, which suggests that that too is a term that has some meaning. I understand your point about, well, you don't actually know what the population, the information point, but I'm not sure that the notion of a population level doesn't have some meaning, albeit here there might not be much context to it because of the lack of other information.

MR SMITH:

Yes, your Honour, I take the point and, as I said, I'm not sure whether it can fairly be said that a population level effect is a term of art, as my learned friend said, or not. But my submission is that's not an answer to our objection, which is that even if it is a term of art the particular application of that in the circumstances of this case is hopelessly unclear because it's not specified in the conditions and it's not appropriate to leave that either completely unspecified so that it becomes a matter for an enforcing court later on potentially to apply an interpretation to ex post facto or to delegate to a certification process where public participation rights are not available.

I'm feeling my hope to be done by 4 o'clock slipping away from me. Adaptive management, if I can turn to that now…

WILLIAMS J:

Can you just tell me, because this is a three-second answer, the condition in the *Marlborough* case, is it similar in substance to condition 48 or was it entirely different?

WILLIAM YOUNG J:

Can I help you? Entirely different.

MR SMITH:
It did, it was different in the sense that it was avowedly a condition precedent, and that was objectionable for a separate reason. And so there was more explicit –

WILLIAMS J:
But was it count the Hector dolphins or something else?

MR SMITH:
It was identified that it is very probable that the site is not of special significance to Hector's dolphin for specified purposes, breeding…

WILLIAMS J:
So it wasn't the baseline kind of condition that you see in 48?

MR SMITH:
No. So turning to the adaptive management points, if I may, and picking up in EEZ Act at section 61, these are the information principles that apply to ordinary marine consent applications. And, of course, as we're all familiar with, section 61(3) introduces adaptive management as a response to uncertainty. If favouring caution and environmental protection, as is required, means 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. So we say that is the first relevant statutory signpost that confirms the general understanding that, when we use "adaptive management" in these contexts, we're talking about a tool to respond to uncertainty.

Coming over then to section 64 we have the inclusive statutory definition of what is an adaptive management approach, and as my learned friend fairly said yesterday, we are concerned really in this case with whether the approach taken by the DMC is an approach of the kind contemplated in section 64(2)(b). But looking at both of those limbs, both of them use the words so that to link what is undertaken with a monitoring or assessment of

effects. So we see, under (a), allowing an activity to commence on a small scale or for a short period so that its effects on the environment can be monitored, and then under (b), any other approach that allows an activity to be undertaken so that its effects can be assessed. So we see there the link to the gathering then of further information and the potential adaptation of the activity in response. So between section 61(3) and section 64 we say you find the three key indicia of adaptive management which are the response to uncertainty, the gathering of further information and the potential adaptation of the activity in response.

GLAZEBROOK J:
What do you say to what was the argument that while it includes the stopping, potential adaptation is a necessary ingredient and here it's either stop or carry on?

MR SMITH:
Yes, so this is –

GLAZEBROOK J:
Sorry, I haven't put that as well as Mr Smith put it but…

MR SMITH:
I mean, my learned friend yesterday sought to contrast an adaptive management approach, which he says was not taken here, with an approach involving hard limits and to say that, well, there are hard limits of a consent and if you breach them or are in danger of breaching them you may wish to change the way you carry out your activity so that you comply with the limits, otherwise your other option is to stop, and that is a normal feature of any consent, that the limits have to be complied with and that in itself that does not indicate an adaptive management approach.

That is correct so far as it goes but there are two points to make. First is that it's a false dichotomy to draw between a consent involving hard limits and an adaptive management consent because an adaptive management consent

will contain hard limits or should contain hard limits, and in deference to the time I won't take your Honours to that. But there's a useful discussion of that point in the *Burgoyne/Te Taumaua o Ngāti Kuri Research Unit v Northland Regional Council* [2019] NZEnvC 28 case, which is at tab 38 of TTR's authorities at paragraphs 42 to 48, there's a discussion in the Environment Court, an adaptive management consent was proposed which contained, in the relevant area did not contain hard limits for the first period of the consent until they could be determined by adaptive management processes, and the Court said: "Well, that's not appropriate, we need to have limits and under an adaptive management approach they may be adapted but that doesn't mean we don't have limits." So the dichotomy that my learned friend sought to draw between a hard limit and an adaptive management consent is not one that we accept.

WILLIAMS J:
Can you give me a paragraph?

GLAZEBROOK J:
And also the case and where it is, sorry, I missed.

MR SMITH:
The case is the *Burgoyne* case under tab 38 of TTR's authorities and, in answer to Justice Williams, the paragraph references were 42 to 48.

The second point in response to my learned friend's characterisation that change of the activity does not mean it's adaptive management in the relevant sense is that one needs to, it depends on why the adaptation is required, and that brings you back to what I identified as the key indicia of an adaptive management approach being the uncertainty in the information and the fact that you are gathering further information as you go and adapting the activity in response. And on this point I would refer to some paragraphs of the High Court decision, and that's under tab 6 of volume 101 and the paragraphs, I'll read them to save time, but paragraph 388, which directed to the review condition, says this: "The submission," the submission for TTR, "is

not entirely apposite to the types of conditions imposed in the present case. These conditions do not simply relate to unanticipated developments. The need for them arises from the fact that, because of a lack of certainty about what could be described as the environmental bottom line, the DMC is not able to accurately predict what the effects will be, so it cannot be said with any certainty that particular effects are unanticipated.

WINKELMANN CJ:

Is the point, I mean, is this one way of formulating it or thinking about it, that the conditions don't actually have limits other than those conditions you've taken us to, other than "don't cause the adverse effect" because they don't have enough information to give limits other than "don't cause the adverse effect"?

MR SMITH:

That is true of the conditions I have taken you to. I think, in fairness, if you look at the noise condition for example, there is a specification of a decibel level…

WILLIAM YOUNG J:

But is there always?

MR SMITH:

Sorry, is there always what?

WILLIAM YOUNG J:

I mean, I understand that you might have a condition saying don't exceed 50 decibels at the boundary between the hours of 8 pm and 7 am, so I understand that sometimes it will be as specific as that. But are conditions against adverse effects always tied to an ascertainable standard?

MR SMITH:

Well, they must be tied to a standard that is ultimately ascertainable.

WILLIAM YOUNG J:

Well, but everything, I mean, I was thinking of a case of where the offence was dealing in drugs substantially similar to other drugs. Well, you know, what's substantially similar was something that the jury had to decide.

MR SMITH:

Well, yes, I mean the law is full of standards that require evaluative judgment but in this context we submit there's, and this is perhaps backtracking into my previous argument, there's a line to be drawn. There has to be a sufficient level of certainty, whatever that is, and we submit this falls short. The need here, to pick up on the Chief Justice's point, this does come back to this fundamental problem the Court of Appeal identified with the process which is a thread linking many of the legal errors that the respondents complain about which is that the information was not adequate in various respects. That meant, among other things that the consent had to provide for the gathering of further information after the consent was granted and the development of meaningful conditions through the management plans and through the use of the extended review condition that's contained in condition 106 and which goes considerably beyond the default review power that would be available to the EPA under section 76 in any event and that while it is, of course, correct to say that any consent holder might change their activity as it progresses and, in particular, if they were in danger of exceeding the consented limits in various respects, what tells you that this is adaptive management is the fact that it's a response to the inadequacy of the information and that because they didn't know really what the effects were going to be with what would be the level of certainty required for a full consent, they provided for this process of monitoring and gathering further information and adapting the activity in the way that they did, both through, in particular, through the use of the management plans and through the review condition.

WILLIAMS J:

So do you say the DMC should have sent them away to do some work and then come back with some hard limits?

MR SMITH:

Yes. So just perhaps to round off the adaptive management point by dealing as I should with what we say is the error in the Court of Appeal judgment specifically. That is found – well, perhaps briefly to look through the Court of Appeal's reasoning we start at 217 which is under tab 7. So that's in – the Court of Appeal holds, as the High Court had, that the DMC's approach to adaptive management was unduly narrow. But then coming over to 226 we get the kernel of the Court of Appeal's judgment on this point which is that: "However, the conditions imposed by the DMC do not contemplate adjustment of the consent envelope … 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." So we say that's in error in two respects. One is in principle this concept of the consent envelope is an unwarranted gloss which doesn't emerge from what I have identified as the proper sign posts of an adaptive management approach under the Act, and the second is to say that through the management plans and the review condition that this consent does, in fact, contemplate adjustment of the effects permitted over and above the adjustment contemplated by the EEZ Act in relation to consents generally. So even if the Court of Appeal approach were right, these consents didn't meet it.

Perhaps in the interests of getting Forest and Bird's submissions at least done today, now I would propose to hand over to Mr McQueen with…

WINKELMANN CJ:

And how long will Mr McQueen be?

MR SMITH:

Ten or 15 minutes he says.

WINKELMANN CJ:

Yes, we'll hear from Mr McQueen.

MR McQUEEN:

Tēnā koutou e ngā Kaiwhakawa. I will briefly address Forest and Bird's argument that the pre-commencement monitoring conditions, that is conditions 48 to 51, are not imposed to deal with adverse effects as required by section 63 of the Act. This ground is found in Forest and Bird's notice to support on other grounds in its written submissions from paragraph 88.

Section 63(1) permits conditions to be imposed to "deal with adverse effects of the activity authorised by the consent". Forest and Bird submits that the pre-commencement monitoring conditions which require two years of environmental monitoring before the mining can commence are not imposed to deal with adverse effects. Instead they are imposed for the purpose of baseline investigation and identifying effects. "Deal with" connotes that the condition is a response to adverse effects, not conditions to determine what the nature of the baseline environment is that the activity is occurring in. Now that information was required to be before the decision-maker at the time of granting the consent.

So there's this distinction between baseline investigation or establishment determining the nature and characteristics of the environment and pre-commencement monitoring to update information against which ordinary monitoring conditions can be carried out, and this is a distinction that TTR recognises in its written submissions, and note its primary submissions at paragraph 261 and 262 that says: "Pre-commencement monitoring and baseline information are different concepts, with different purposes." That's at 261. It says baseline information is to collect information about the environment to establish what the effects of the activity will be. Pre-commencement monitoring is to provide an up-to-date statistically valid date set against which the effects of the activity can be measured. And Forest and Bird accepts that what TTR terms here "pre-commencement monitoring", that is obtaining up-to-date information, can fairly be described as being imposed to deal with adverse effects. However the conditions, condition 48 in this case, are not in that category, their purpose is to fill significant information gaps in the material before the DMC.

WILLIAM YOUNG J:

You'd agree that a condition can be imposed to deal with a *possible* adverse effect?

MR McQUEEN:

If the decision-maker considers there's a risk of – yes, if the decision-maker considers there is a risk of an adverse effect arising then they can oppose a condition to respond to that.

WILLIAM YOUNG J:

And in a broad sense isn't the baselining exercise a condition addressed to the possibility of adverse effects, that is population-level effects on certain species?

MR McQUEEN:

Well, I'd submit there's a difference between a condition that responds to an anticipated risk of an effect and identifying what those effects actually are or what…

WILLIAM YOUNG J:

But it depends on whether you read it narrowly or broadly. Do you accept you can read it broadly?

MR McQUEEN:

Sure – well, the condition-making power must be read within the scheme of the Act in which favouring caution, the information principles are baked into the Act.

And TTR's response to this argument is not that it is lawful for it conduct post-consent baseline monitoring but that the purpose of condition 48 is to provide up-to-date measurements so that the conditions to manage effects are maximally effective, and that submission is found in its reply written submissions at paragraphs 60 to 63.

And the first response to that argument is this is not actually what the DMC said the purpose of condition 48 was. The DMC said the purpose of those conditions was baseline establishment and, given the time, I won't turn to the passages where it says that but I will –

WINKELMANN CJ:
Well, can you just give us a paragraph reference?

MR McQUEEN:
The references are the decision at paragraph 36, so intrinsic page 9, paragraph 155, intrinsic page 37, paragraph 1104, page 226, also the condition itself at the bottom of page 292 describes a purpose of the condition as "establish a set of environmental data that identifies natural background levels". And I'd also note at the bottom of page 293 of the decision there's the advice note recording the change in the name of condition 48 from the pre-commencement environmental monitoring plan – sorry, from the baseline environmental monitoring plan to the pre-commencement environmental monitoring plan, and I'd submit that name-change invites particular scrutiny about whether the label "pre-commencement monitoring reflects the real work this condition is performing, and that's a point picked up in the alternative view at paragraph 33 of the alternative view. And this is also what the High Court found – and I'll refer your Honours to paragraph 401 of the High Court decision – in the context of its findings on adaptive management the High Court concluded that the monitoring conditions here were different from what it called "normal monitoring conditions" because they were "not just monitoring to ensure compliance with environmental standards, it is monitoring to establish what the environmental baselines are because of uncertainty or inadequate information", and TTR's response to this in its reply submissions is that it provided extensive information as part of its application and that there was evidence before the DMC that the purpose of this condition was just to provide an up-to-date data set.

Forest and Bird's response to that is that that was not the DMC's view, the passages I just referred your Honours to say the purpose was baseline

establishment. There are also significant information gaps in the information provided by TRR to the Authority. Forest and Bird's written submissions from paragraphs 26 to 40 used the examples of marine mammals and seabirds.

The DMC at paragraph 579 concluded there was a lack of detailed knowledge about habitats and behaviour of seabirds, it said it was difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself. Similarly, the primary data available to the DMC about the presence of threatened marine mammal species was limited. It comprised DOC sightings and strandings database, spatial and descriptive information about generic habitat suitability for some species and unlimited aerial survey, and these are described from paragraph 446 of the decision. And at paragraph 524 the Authority accepted that the information about the presence of marine mammals was not systematic and needed to be treated with caution, that is, there was a lack of baseline information about the distribution and abundance of marine mammals, and that lack of information –

WILLIAMS J:
Didn't the experts say that TTR's expert hadn't been asked to provide that data in their agreed statement, Mr – I can't remember his name – said that TTR hadn't asked him to prepare baseline data so he hadn't done so?

MR McQUEEN:
I'm not about the point about if he'd been asked but…

WINKELMANN CJ:
It's in the agreed statement which is referred to in the chronology.

MR McQUEEN:
Yes. Well, I thought – I was going to turn to the agreed statement briefly, which is at tab 53, volume 203, and look at some of the agreed statements in there about the information on marine mammals, and the experts set out there areas of agreement and disagreement at a table beginning at page 203.0628.

Row SC2: “All the experts agreed that additional marine mammal surveys would have provided valuable information for the DMC on marine mammals in the area affected by noise and ecological impacts from the proposed mining operation.”

WINKELMANN CJ:
What page are you on?

GLAZEBROOK J:
Yes, I’m there, I just don’t know where exactly.

MR McQUEEN:
The table is in rows labelled –

GLAZEBROOK J:
I’ve got the table. I’m just not sure where you’re…

MR McQUEEN:
I’m reading from the column on the right, “Areas of agreement and disagreement.”

GLAZEBROOK J:
And what page, sorry?

MR McQUEEN:
628 of the electronic bundle. And then SC3: “All the experts agreed that the modelling was based on incidental sightings data limited to DOC, Cawthorn and MPI datasets.”

Over on page 630, SC4: “All the experts agreed that the noise levels and frequencies from the proposed mining operation are currently unknown and that relevant data need to be gathered from other marine mining operations.”

631, SC7: “All the experts agreed that it isn’t known if the area impacted by the sediment plume is a preferential area for marine mammal foraging and therefore it would be useful to investigate this.”

Over on 633, SC13: “All the experts agreed that there are no actual measurements of the noise likely to be produced from the mining operation nor of baseline ambient noise for the proposed PPA.”

And finally page 635, SC18: “All the experts agreed that the lack of information on the intensity and frequency range of the noise from the proposed mining operation means it is not possible to determine the likely impacts on marine mammals, including physical and behavioural effects.”

WINKELMANN CJ:
And on 633: “There is a very high level of uncertainty about Māui dolphin distribution, due to the very low population size of Māui dolphins and therefore it would be extremely difficult to robustly describe their distribution.” So that’s all part of not knowing where they are.

MR McQUEEN:
Correct.

WILLIAMS J:
Well, there’s also the point that the experts agree they don’t know whether blue whales forage in the 66 square kilometre area and they also all agree that they shouldn’t interfere in foraging areas.

MR McQUEEN:
Correct. So I haven’t taken your Honours to all of these.

WINKELMANN CJ:
No, there’s quite a lot there though.

WILLIAMS J:
SC20.

MR McQUEEN:
The point being that information to respond to these types of concerns is plainly not just updating information. It is gathering information to fill and respond to very real gaps.

TTR in response says that the DMC had evidence from its expert, Mr Govier, that the information was sufficient to assess effects. However, I would note the alternative view at 139 quotes from Mr Govier's primary evidence where he says the baseline environmental monitoring plan has been developed to ensure there is sufficient environmental baseline information. So I would submit that is not just updating information. It is to ensure there is sufficient environmental baseline information, and while on the topic of the alternative view I would just note also paragraph 138 where the alternative view lists what it calls "significant gaps in the existing baseline information". These included, for example, acoustic surveys to determine marine mammal distribution. And also paragraph 127 where the alternative view recorded that it had been provided with no information on background noise levels.

All of this is to say there were significant gaps in the information before the DMC. The apparent purpose of these conditions is to fill those information gaps about the nature of environment and the submission is that therefore the pre-commencement monitoring conditions do not deal with adverse effects. The Court of Appeal therefore erred in describing these conditions as permissible. While it recognised the Authority did not have adequate information about likely adverse effects and it recognised that uncertainty meant the DMC's decision was unlawful on a number of grounds, it ought also to have found these conditions were independently unlawful as they were not authorised by section 63.

WINKELMANN CJ:
Thank you, Mr McQueen.

TIMETABLING DISCUSSION

WINKELMANN CJ:

All right. Well, we can skip morning tea and get through by 12. We'll do that and we'll start at 10. We'll now retire.

COURT ADJOURNS: 4.22 PM

COURT RESUMES ON THURSDAY 19 NOVEMBER 2020 AT 10.06 AM

WINKELMANN CJ:
Good morning. Mr Gardner-Hopkins.

MR GARDNER-HOPKINS:
Good morning, your Honours. My submissions this morning for the Taranaki-Whanganui Conservation Board focus on two issues. They take into account the nature and effect of the RMA and NZCPS as another marine management regime and then, time permitting, I'll supplement the submissions that my friend made on behalf of Forest and Bird yesterday on the prohibited adaptive management approach. I won't intend to cover ground that had been addressed already but I do intend to take your Honours to some of the conditions which I submit clearly reveal a prohibited adaptive management approach has been taken.

WINKELMANN CJ:
So you also are addressing the take-into-account approach?

MR GARDNER-HOPKINS:
Yes. The marine management regime of the RMA and NZCPS, and that is where I will start, and of course these were addressed in the submissions filed for the Conservation Board. I intend to address your Honours on four key points.

Firstly, I intend to take your Honours to the Court of Appeal's decision and the three key paragraphs that contain its analysis and its findings, and my submission is it is very clear from those passages that the Court of Appeal was not given effect to but was very conscious to apply the proper test of taking into account the nature and effect of the RMA and the NZCPS and also in the circumstances of the case before it, and my submission is that the context of this application was influential in what the Court of Appeal said was required to understand the nature and effect of the RMA and the NZCPS, and

I will take your Honours to some of that contextual material that I say is relevant.

I will then take your Honours to the RMA itself and, in particular, section 107 which in my submission is directly relevant, and the issue of the marine management regime is not just about the NZCPS, it is also about the direction of the RMA itself through section 107 which relates to discharges to the marine environment.

I will then turn to the NZCPS and take you to one policy in particular to illustrate the issues and then round off in terms of the relevance of both of the purpose clause in the EEZ Act and why say that supports the Court of Appeal's approach to its consideration of the marine management regime, of the RMA and the NZCPS.

So if I can start with what the Court of Appeal said, and its analysis is found at paragraphs 199 through to 201 of the judgment, I think that's volume 101, tab 7, for your Honours. So that passage starts with a recognition that the mining will take place close to the boundary of the EEZ and the CMA: "Many of its effects will be felt within the CMA. In particular, the effects of the sediment plume will be felt mostly within the CMA," and it's with that in mind that the Court of Appeal said: "In those circumstances, section 59(2)(h) required the DMC to consider the objectives of the RMA and the NZCPS," so not just the NZCPS, "and the outcomes sought to be achieve by those instruments." And then at (b) "whether the proposal would produce effects within the CMA that are inconsistent with those outcomes sought". Then at 200 it says "the DMC needed to consider whether the proposal would be inconsistent with any environmental bottom lines" and so clearly a requirement to look at the RMA and look at the NZCPS and I identify the environmental bottom lines established through those instruments. Then, importantly, to the end of the page, the Court of Appeal said "that would be a highly relevant factor for the DMC to take into account" and my submission is that is a very clear statement that aligns with the statutory language of section 59, it is a take-into-account requirement that the Court of Appeal was acknowledging and applying, it was

not going further and it was not saying that the NZCPS or the RMA had to be given effect to. The outcome sought needed to be identified and then they had to be taken into account.

WILLIAMS J:
Do you think that was code for "this is really important and you haven't weighted it enough", in which case would they be beyond their remit?

MR GARDNER-HOPKINS:
Yes. The Court of Appeal went on explicitly, at paragraph 201, to say this is not an issue solely of weight, and it refers to the difference in approach between the DMC majority and minority and says it is not solely one of weight. And in my submission the requirement has to be to identify the nature and effect of this particular marine management regime and, if the nature and effect is not identified, if the objectives, if the environmental bottom lines established as important under that regime are not identified, then there is an error in how that regime has been taken into account, and my submission is that was the fundamental error that the DMC made. Yes, it had regard to the RMA and the NZCPS in a broad way, it listed a number of the policies in the NZCPS, but it did not seek to identify or acknowledge the outcomes sought through those policies and under the RMA, and so it didn't confront the key issue of what the marine management regime for the coastal marine area anticipated in terms of outcomes or environment bottom lines, and my submission is that is not a matter of weight but that is an error in the statutory exercise required to identify the nature and effect before it can be taken into account and given the weight that the DMC then considered appropriate in the context.

And back on context, and I think this is important, and it may answer some questions as to the extent to which the RMA and the NZCPS may need to be examined in other cases. But if I can ask your Honours to turn to my friends' submissions for the iwi authorities, and I think your Honours were nearly taken there yesterday, but schedule 2 of the iwi parties submissions contains a summary diagram and a table of cross-references to effects. My submission

is this is a good summary of the context and effects that the Court of Appeal had in mind when it referred to “in those circumstances” at its paragraph 199.

So I’m not sure if your Honours have found that schedule 2.

WINKELMANN CJ:
This is DMC’s findings on effects?

MR GARDNER-HOPKINS:
Correct, and there’s a plan and if you have a colour version there’s an orange area that identifies the mining area and you can see that essentially one face of it abuts the 12 nautical mile limit which is the interface between the CMA and the EEZ, and if you see the arrows, and they have some distances notated on them, they identify the ecologically significant areas, the ESAs, that are all found within the CMA, and we see here some of the distances. It’s 20 kilometres to the Patea Shoals. It’s perhaps eight kilometres to The Crack, 10 kilometres to the Project Reef, 28 kilometres to The Traps and so on, and then the table below it captures the findings made by the majority of the DMC in terms of effects on those ecologically significant areas, and the summary there is captured in the second column.

WILLIAMS J:
Doesn’t that get you to having to decide a section 107 discharge consent as well? Where do you draw that line?

MR GARDNER-HOPKINS:
The position taken by TTR is that no consents, as I understand it, are required under the RMA but –

WILLIAMS J:
Of course, but my point is that if you’re right that they had to think about and write about what RMA and CPS say about these effects, aren’t you running a ghost discharge consent process and isn’t that going too far?

MR GARDNER-HOPKINS:
My submission is that 107 has to be considered –

WILLIAMS J:
Sure.

MR GARDNER-HOPKINS:
– because that identifies what the RMA anticipates in terms of discharges and environmental bottom lines. But I don't go so far as to say it is a de facto consent or it is a barrier to the grant of consent by the DMC.

WILLIAMS J:
Where do they draw their line? How do they know when to stop in terms of their application of 107?

MR GARDNER-HOPKINS:
Yes. So where they stop is that the requirement under section 59 is to take that into account, and my submission is –

WINKELMANN CJ:
And other things?

MR GARDNER-HOPKINS:
And other things in terms of the NZCPS and its key policies, and so if the assessment is there are changes in clarity or there are significant adverse effects on aquatic life then 107 would suggest consent under the RMA would be declined. That activity is not anticipated by the RMA and that has to be taken into account under section 59 and the weight then is a matter for the DMC.

WILLIAMS J:
The logic of that is they have to sit there, pretend they're the regional council or DOC, say: "We will decline this," and then decide what to do with that ghost consent in the context of the actual consent. That's pretty tough.

MR GARDNER-HOPKINS:

Well, my submission is in the circumstances of this case it's not that tough. The effects that the DMC identified are clearly identified. In some cases they are significant. There are findings about changes to visual water quality and the requirements of section 107 and the key policies of the NZCPS, like policy 11, are very clear, and so my submission and my answer to I think some of the criticisms my friends make of the Court of Appeal's approach is it's not that hard to figure out whether this sort of activity and its effects are anticipated under the RMA regime or whether the RMA and the NZCPS set their face against those types of effects.

WINKELMANN CJ:

Is the point that you're – I don't know if this is the point you're making, but is the distinction between having to decide acting as if you're deciding section 107 and taking into account that the outcome under section 107 is not determinative, so if it has any of those effects that are precluded, the DMC is not precluded from granting consent, it's just simply a very – it's a very relevant matter?

MR GARDNER-HOPKINS:

Correct.

WINKELMANN CJ:

But it must also take into account all the other matters that it's directed to under section 59?

MR GARDNER-HOPKINS:

Yes. Yes, and as you've heard measured against the purposes of the EEZ Act. And really part of my reason for taking you to this plan is that in a different scenario with a different application that may not be so close to the coastal marine area boundary then fewer effects may be felt within the CMA and it may be that that particular proposal therefore does not butt up against the RMA and the NZCPS regime to the same extent or if there are still some effects, and even some significant effects, they won't be of the same scale

potentially. And so in that context the weight that the DMC would then give to the marine management regime of the NZCPS and the RMA could well be less, but that's would be its evaluative exercise with the proposal in front of it.

If I can take your Honours briefly to section 107 itself, I think this is found in the first respondents' authorities at volume 1, tab 8, because I don't think your Honours have been taken to that previously and in my submission this does reflect what the Court of Appeal referred to as the objectives and policies of both the RMA, and I say they're found in section 107, and the NZCPS as well. And so just to be clear, 107 is a restriction on the grant of certain consents, discharge consents under the RMA, and essentially it prohibits discharges into water if, after reasonable mixing, the contaminant is likely to give rise to any of the following effects in the receiving waters, and at paragraph (d) it includes any conspicuous change in visual clarity, and I won't take you there but I'll give you the reference. The majority of the DMC acknowledged at paragraph 1015 that there could be a 20% reduction in visibility in areas. So my submission is that 107(1)(d) would be met and –

WILLIAMS J:
Is that reduction inside the CMA?

MR GARDNER-HOPKINS:
Yes. And at paragraph (g), and this is perhaps clearer: "Any significant adverse effects on aquatic life," and, of course, I've referred to that table that the DMC identified significant effects on the ESAs and they, of course, are aquatic life or areas where there is aquatic life.

Subparagraph (2), or section (2), provides a release valve, if you like, in exceptional circumstances these types of consents can be granted. But it is a very clear indication in my submission that the RMA itself does not anticipate an activity with these types of effects within the coastal marine area. I've emphasised this because I think my friend for TTR submitted that the only issue in respect of the marine management regime was the NZCPS. In my submission, it is the RMA as well as its subordinate instrument, the NZCPS.

WINKELMANN CJ:
It's interesting that it contemplates permitting temporary adverse effects of the nature at 107(1).

MR GARDNER-HOPKINS:
Yes, and it would be a consideration of how long these effects will persist for, and there was some discussion yesterday in terms of the effects at the mining site and how long it might take for the benthos to recover there. My submission is that these effects on these ESAs in the coastal marine area are long-term and they arise from the sediment plume and the consequences of the sediment plume and, of course, that sediment plume will persist throughout the term of the consent which was sought for 35 years, and so in my submission effects for the duration of a consent of a 35-year term are certainly not temporary.

WILLIAM YOUNG J:
Is it one sediment plume or a variety of sediment plumes?

MR GARDNER-HOPKINS:
Well, it would be a sediment plume that varies over time depending on where the mining is occurring and where the point of discharge is.

WILLIAMS J:
It's one mobile chimney, shall we say.

MR GARDNER-HOPKINS:
Yes, in effect.

So if I can take your Honours to the NZCPS and to just illustrate one particular policy and its direction, and the NZCPS I think is found in the TTR authorities at tab 75. I've referred in my written submissions to several policies but I wish to just touch on policy 11, and this is about protecting indigenous biological diversity. As I say, I think it's tab 75 of the TTR authorities, and it starts, the policy is: "To protect indigenous biological diversity in the coastal

environment," and then it has a number of subclauses, and the first: "(a) avoid adverse effects … on indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are –

WILLIAMS J:
Can you just give me the objective number again? I'm a very bad librarian.

MR GARDNER-HOPKINS:
So policy 11, and it has a policy there to avoid adverse effects on a number of things, including: "(iii) indigenous ecosystems … that are threatened … or are naturally rare." My understanding is that these ESAs that were identified, the Patea Shoals, The Crack, the Graham Bank, are examples of indigenous ecosystems that are rare.

But we don't even need to rely on policy (a) and its strict avoidance of adverse effects because policy (b) says "avoid significant adverse effects" on certain listed things. (iii) is again relevant: "indigenous ecosystems and habitats that are … particularly vulnerable to modification." I understand that could be these ESAs, but even clearer, (iv), avoid significant adverse effects on "habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes," and we have a specific finding of the DMC at its paragraph 134, so a finding of the majority of the DMC, 134, that the Patea Shoals are important ecologically, culturally and recreationally. So we have a clear finding that aligns with (iv) and the director for policy 11 is to avoid significant adverse effect, and the DMC itself, the majority found significant adverse effects on the Patea Shoals.

GLAZEBROOK J:
Do you give a paragraph reference for that finding?

MR GARDNER-HOPKINS:
Yes, for the DMC decision it is paragraph 134 where it confirms that the Patea Shoals are important ecologically, culturally and recreationally.

WILLIAMS J:
Not commercially?

MR GARDNER-HOPKINS:
It didn't refer to that item.

WILLIAMS J:
Do you know, did the evidence suggest it was?

MR GARDNER-HOPKINS:
I don't know that detail, sorry.

WINKELMANN CJ:
So can I just ask you this, the subparas of the policy 11(b), what subparas were you referring us to?

MR GARDNER-HOPKINS:
Yes, (iii) and (iv), and my submission is that there is the clearest finding from the DMC that meets subclause (4). So my submission is that that policy was specifically engaged by the DMC's own findings, and in terms of its duty to take into account the nature and effect of the NZCPS it should have identified that that policy was engaged and, as the Court of Appeal said, it should have confronted it and addressed that policy.

WILLIAMS J:
Do you know if it was argued that way before it?

MR GARDNER-HOPKINS:
I don't. I wasn't at that hearing.

WILLIAMS J:
Was the Conservation Board there?

MR GARDNER-HOPKINS:
It was, yes, but not represented by counsel.

WILLIAMS J:
What did they say?

MR GARDNER-HOPKINS:
They generally concerned about adverse effects and consistency with the RMA and NZCPS policies.

WILLIAMS J:
Including 11 and the ones you're talking about?

MR GARDNER-HOPKINS:
I can't help with that, I would have to check.

But certainly – and I will take you there very briefly – this type of assessment was undertaken by the minority. Now of course that's not determinative, but at paragraph 45 and following of the minority decision of the DMC – and that's at the intrinsic page 236 of the DMC decision report – the minority does the sort of assessment referring to both the RMA and then the detail of the policies of the NZCPS that I say the majority should have done, and my further submission is that this illustrates that it is not that difficult to do –

WILLIAMS J:
Can you – sorry, I'm just a bit slow – give me the paragraph?

MR GARDNER-HOPKINS:
Yes, paragraph 45 of the minority decision, it's at intrinsic page 236, and that particular paragraph starts with the RMA issue and clearly confronts section 107, and then it moves on to the analysis under the NZCPS. In my submission this is not, at least in the circumstances of this case, a difficult or onerous task because of the findings on effects and the clarity under section 107 and policies like policy 11 that make that assessment an easy task, and if I can in terms of that task by analogy refer to the *RJ Davidson* case of the Court of Appeal, and I don't think I need to take your Honours there, but the context there was a resource consent application and so the consideration of

the NZCPS under section 104 of the RMA, the requirement under 104 is to "have regard" to the NZCPS, which I understand is a similar obligation to "take into account", and the Court of Appeal there in terms of the NZCPS policies and their potential relevance and the ability to refer to part 2 – and I'll just read the relevant parts from two paragraphs of *RJ Davidson.* The first is, it's paragraph 71, "resort to part 2 to subvert a clearly relevant restriction in the NZCPS adverse to the applicant, would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal." So essentially if there is a clear and directive policy in the NZCPS, under the RMA caution needs to be exercised by referring to part 2 in order to subvert a directive policy, and at paragraph 74 the Court of Appeal said: "It may be that a fair appraisal of the policies means an appropriate response to an application is obvious and effectively presents itself." In my submission in terms of consideration of the effects of the TTR proposal against the policies of the NZCPS the appropriate response is obvious and it effectively presents itself. The NZCPS does not anticipate the effects of the TTR proposal and in fact it seeks to avoid those effects, and that answer presents itself very quickly on examination of the detail of the policies.

WILLIAMS J:

It looks like there was evidence on the CPS' reference to Natasha Sitarz' evidence at 50, dealing with the issues, the points that you've just made, in the minority's decision.

MR GARDNER-HOPKINS:

Yes. I just want to round out my submission on this topic. In my submission the approach taken by the Court of Appeal is supported by the purposes of the EEZ Act for two reasons. The first is the sustainable management purposes under section 10(1)(a) and my submission is that that purpose was deliberately aligned with the sustainable management purpose of the RMA, and my submission is that was to enable better integrated decision-making because of the similar purposes, and my submission is that reinforces the requirement to look into the detail of the RMA and the NZCPS when taking into account its nature and effect, and in terms of the protect-from-pollution

policy, section 10(1)(b), my submission is that the NZCPS in its policies, particularly policy 11 but also 22 and 23, has similar objectively to protect the coastal environment from pollution and the effects of pollution. So my submission is that both of the EEZ purposes support the nature of inquiry that the Court of Appeal said was inquired as to what the nature and effect of the NZCPS and RMA was.

Unless your Honours had any questions on that topic, I'd like to move briefly –

WINKELMANN CJ:
Now you're quite over time.

MR GARDNER-HOPKINS:
Yes.

WINKELMANN CJ:
So very briefly?

MR GARDNER-HOPKINS:
Very briefly. And really just to emphasise the particular conditions that in my submission clearly trespass –

WINKELMANN CJ:
Well, is that just repeating? I think your diagram makes your case, the diagram in the iwi submissions.

MR GARDNER-HOPKINS:
This is moving on to the topic of the adaptive management question.

WINKELMANN CJ:
All right, okay.

MR GARDNER-HOPKINS:
And really just emphasising four conditions, and I may not need to take your Honours there, given the time. The first is condition 51, and this is a condition

dealing with the SSC levels, so the extent of suspended sediment. My submission there is that that condition enables the SSC levels to be amended and it specifically says that an amendment to the SSC levels does not require a change in the conditions. So my submission is there is a change to the standards that need to be met, anticipated through that condition, which at least contributes to an adaptive management approach.

I then refer your Honours to condition 19 which refers to unanticipated adverse effects, and it requires those, if they are identified, to be notified to the EPA, and that then feeds into condition 55 which is the EMMP, the environmental management plan, and that also requires unanticipated effects to be addressed in the EMMP.

GLAZEBROOK J:
That wouldn't be unusual, would it? I can't quite see that's adaptive management because it's – I mean assuming there's enough information to give the consent, and obviously that's a question that we've got to look at, but assuming there was, you can never rule out unanticipated effects and it would be very odd not to deal with it in consents, so to say you can go ahead but if it turns out this is absolutely catastrophic you can still go ahead.

MR GARDNER-HOPKINS:
Yes, but it's what is then to be done if those effects are identified, and let's suppose the expectation was moderate adverse effects on some of those ESAs, what if in practice the monitoring reveals significant effects on those ESAs? Something would need to be done about it and condition 55 sets the framework for that.

GLAZEBROOK J:
All right, so the submission is not 19 on its own. It's that it's dealt with not by saying the consent comes to an end or has to be looked at but just feeding into the management plan because that's at the –

MR GARDNER-HOPKINS:

Feeding into the management plan, and this is not just a management plan that is at the consent holder's whim, it is a management plan that has to be prepared by an independent person. It has to be independently peer reviewed, it has to be reviewed by the technical review group established by the conditions, it then has to be submitted to the EPA for certification, and my submission is that if it identifies unanticipated adverse effects it will require a response and that response has to be certified by the EPA through that process and that response could include limitations on how the consent is exercised. It may require mining to be avoided in a particular area, it may require mining to occur to a lesser depth or a number of other adaptations to how that consent is exercised. In my submission, that contributes or is an adaptive management approach.

WILLIAMS J:

To use their language, that describes a shift in the envelope, doesn't it?

MR GARDNER-HOPKINS:

Yes, in my submission it is. It could require that envelope to be reduced.

WINKELMANN CJ:

So in terms of the definition, in section 64, it's an approach that allows an activity to be undertaken so that its effects can assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

MR GARDNER-HOPKINS:

Yes, and my submission is that amendment in this instance occurs through the management plan and that is not just up to the consent holder because it goes through a rigorous process and has to have final certification by the EPA and that is what would allow the activity to continue and potentially with amendment through that process.

I'm very conscious of time. There is one other condition I wish to take your Honours to and it is condition 106, and this is the review condition. In my submission, this also reveals clearly an adaptive management approach. Condition 106 allows the EPA to review the conditions, including as a response to concerns from the TRG, and in conditions (a) and (b) it can add, amend, cancel any discharge limits, environmental limits, or operational controls. It can include new discharge limits, environmental limits or operational controls. And in my submission that is very squarely adaptive management if the EPA were to exercise those powers of review and they go further than the standard powers of review contained in section 67 of the EEZ Act.

Unless there are further questions, those are the submissions for the Conservation Board.

WINKELMANN CJ:
Thank you.

MR SALMON:
Mr Smith is telling me it's 10.47. I have an hour allocated but I hope to be quicker. I am going to, to give you advance warning, cover the following topics: best available information, materiality, casting vote and economic benefit. The latter will be, I think, reasonably confined. And then Mr Bullock will deal with the question of the bond. His time comes within my time estimate.

The thing I wanted to do briefly is just, before getting into those, is to adopt the submissions from the iwi parties and from my learned friend just now regarding the ESA areas within the CMA and just to supplement the references my learned friend's given with a couple of observations. Firstly, regarding the RMA interface. Our written submissions, I won't go through them in detail, but paragraphs 71 through 73 deal with specific references about the New Zealand Coastal Policy Statement and policy 11, the point my friend has been taking you through, some of those are footnoted

in paragraphs 71 and 72 of our written submissions. I think the material point that I'd make in addition to what my learned friend has said about policy 11 of the Coastal Policy Statement is that set out in paragraph 72 of the submissions which details, with one example, being The Traps, of an area that under the TRCP is designated as an area, was "an outstanding natural feature" and that's significant, we say, for reasons set out in more detail in submissions because policy 13 of the NZCPS specifically requires no adverse effects to such areas. So my learned friend is right to say that policy 11 is engaged and that the DMC failed to give that weight in the decision we call the majority decision. But it also failed to address policy 13 at all, and policy 13 squarely prevents such a discharge were there to be an application within the CMA.

So that leads me to just briefly engage with the question from Justice Williams, which is whether this inquiry that the respondents are saying needed to be undertaken in relation to other marine management regimes was onerous and required some sort of ghost RMA inquiry, a mini-trial about a 107 application. Respectfully I would submit that, like many of the factors that we have regard to, what is required is not a full inquiry. But in any event, this is a simple case because those provisions of the NZCPS show that the DMC would have been able to quickly identify that this was a prohibited activity absent exceptional circumstances under section 107 and that that identification, the plain wording of policies 11 and 13 by reference to the presence of these areas of outstanding character, was enough to identify that this applicant was brought or, to put it another way, if the plumes' initiation was one kilometer to the east this would be a prohibited activity under the RMA because of its effects. I won't go further into that point beyond emphasising that is not a difficult inquiry in a context when many of the issues that the DMC had to look at and would have to look at are complex, nuanced and do take a great deal of time.

WINKELMANN CJ:

Can I just ask you to clarify, is your position though not that it would be automatically precluded because of that under this, but simply that that would be a powerful factor under section 59?

MR SALMON:

Correct, your Honour. It would be precluded if, as one would expect is probably the case, the designation under the Coastal Policy Statement of outstanding natural character to those areas was because of their environmental qualities, because of course that would mean that the requirement of section 10(1)(b) was not met in relation to areas within the coastal management area. So it's not by virtue of it being prohibited under the RMA that it would by definition be prohibited here, it's that it's likely prohibited under the RMA because of its negative environmental payload, if that makes sense, your Honour.

So that was just dealing with that point. The other was to come back on a point I'm told I missed but the Chief Justice said I might be able to provide some assistance on, which is whether there were any conditions dealing specifically with The Traps and other ESAs, and my learned friend pointed to one condition, condition 53 – 51, sorry – just now regarding sediment plume levels and the percentages based on the modelling undertaken to guess or estimate what sediment levels would be in place. Can I just add to those references the following, because the way the conditions work do index to The Traps and a few other points in schedule 2. So one reference is schedule 2 where specific modelled assumed sediment levels are set out for various ESAs, including The Traps –

WINKELMANN CJ:

This is schedule 2 to the…

MR SALMON:

To the DMC decision. Given time, I just don't think it's practical to step through these in details.

WINKELMANN CJ:
Right.

MR SALMON:
But I'll give you the references. Schedule 2 is referred to in condition 51, which my friend just went to, and also condition 5, which sets out the 25th, 50th, 80th and 95th percentiles of sedimentation.

The additional point to note is condition 53 deals with not just that two-year pre-commencement modelling period which is covered by 51 but post-commencement ongoing adjustment as effects are understood. So, with respect to the Tribunal, it's a difficult cluster of conditions to read but the net effect of 5, 51 and 53 with schedule 2 and schedule 2's addressing of the ESAs is that the model and the thresholds continue to be adjusted as real-world effects are learned and the model is shown to be right or wrong. You don't need to hear more from me on why that meets the statutory definition of adaptive management but that is coming back on that question about whether the conditions deal at all with the ESAs.

The only other point to come back on from this morning is Justice Williams' question as to whether this point was raised before the DMC, the ESA point, and the principles under the NZCPS. Mr Currie has shown me his submissions from the closing submissions before the DMC and the principle 11 point.

WILLIAMS J:
For KASM and Greenpeace?

MR SALMON:
For Greenpeace and KASM, correct, and the point was argued, it's also in the transcript, principle 11 he hasn't – 13 he hasn't found yet but principle 11 he has.

And then finally, and this is a theme I'll come back to briefly when dealing with the casting vote, we have, of course, all described the longer decision as the majority decision and the shorter decision as the minority and I'll continue to do that because it's easy, and looking at sedimentation and how much was unknown and how it so squarely meets what the respondents say is adaptive management as defined in the Act, it is worth reading the minority's decision and just some paragraphs that show their concerns about just this sedimentation issue would be paragraphs 4, 17, 20 and 147 through 158, reading –

WILLIAMS J:
Just a sec. 20, 157 and 158?

MR SALMON:
147 to 158. So then beginning on my core topics, and I apologise for any speed here but time, the requirement for the best available information to be before the DMC is one that is, of course, stipulated in the Act but informed by the reasons for such a requirement which flow from a very detailed scheme in international law which includes protections and baselines for protection of the environment, as you've heard, and information, protections and, of course, the precautionary principle which has as an incident of it a need for full information and also, and this is noted in our submissions with references, the international legal requirement now, and this is recognised as an incident of international law, for an environmental impact assessment. Much is written on how full they need to be, much scholarly writing and international law analysis of them. They are not simple matters. They are not short. They are not once over lightly and they do not choose just not to look at what's in the water or just to model it. They are something of a term of art now and they are complex and they are expensive to do for big projects but they are part of international law and it's worth bearing that in mind because UNCLOS, the founding treaty which establishes the right to exploit the EEZ, requires in Article 208 that the rules New Zealand establishes to govern its seas and the EEZ shall be "no less effective than international rules". So that means no less effective than what's in UNCLOS but also no less effective than the

subsequent rules, and in this context, before looking closely at the information point here, Justice Williams' observation yesterday to one of my colleagues was correct that UNCLOS is a bargain in a sense. It gave each nation state a right it did not have, the right to exploit for commercial interests the EEZ. It established the EEZ. There was no such right prior to that, but it carried with it an obligation to preserve and prevent environmental damage, and the extent to which those points are linked is clear even from the key articles in that Treaty. Articles 192 and 193, the protection and the ability to exploit, link the obligation to preserve to the right to exploit. So that bargain seems slightly abstract in a country with so distant neighbours and no overlaps of EEZ but it is, of course, those set of principles, the need for a precautionary approach, for environmental impact statements, for not moving without perfect information and where there is imperfect information favouring precaution, those are the same rules that will apply in clustered areas of the ocean, in the Mediterranean or in the North Sea, and they're the same rules that will apply if there's a proposal to release Fukushima waste water into the Pacific. They're rules that require detailed investigation because it's not our water, we only have limited rights, and because this chaotic complex system affects everything around it and others, EEZs as well as everybody's oceans. So it's easy to see this particularly large application as somehow more benign because it's so distant from neighbours, but it in fact raises issues that are well established in international law as requiring great care and strict safeguards.

In that context – and I take it I won't need to go through the legislation in detail, I won't go to any references unless they'll help the Court – it is helpful to step back and look at the context in which the applicant brought this application to this DMC with only modelling and small observations from a plane for example as to the marine mammal life. As you'll be aware from the record, this was the second application for a permit, the first several years before was declined specifically because TTR had not done the legwork required for a proper environmental impact assessment and thus there was not all the necessary information on which to make a risk assessment. In the intervening years TTR chose not to fill the gap by doing all the things it is

under the current permit said to be able to do after the permit is granted, and the core submission that we make is if it can do it immediately after then it could have done it before making its application, it quite literally had those two years in which to do the work. It's of course commercially rational to want to not spend that money until it knows it's got a permit, the question is whether that's lawful. And so I'll just focus on that backing-out or hiving off or putting off of the key information-gathering that's required to provide an environmental impact assessment in accordance with the Act's requirement, one has to be provided with the application, and instead to do it after the application is granted.

Now TTR say, well, section 61(5) provides a definition of what is the best information available and it's that information that can be obtained with unreasonable cost, effort or time, and its submission is, well, it wasn't reasonable to expect more. Now the obvious first answer to that is even if that's right it doesn't mean that the application has to be decided in favour of the application. The requirements you're already well aware of and have heard submissions on of the Act were that it be treated with precaution or caution and declined. But we go a little further than that and submit that because by definition it's possible for TTR to do this before commencing mining, it was possible for it to do it before it applied and it should have, and so it was simply not unreasonable cost, time or effort.

The second point is this isn't an application to dredge a harbour mouth to allow shipping in and out in one square kilometer over a month, this is a huge project and a banner project and it has a 35-year term, and unreasonable cost, effort or time must be proportional to the size of the project and the size of the potential impact, the bigger it is the more work that needs to be done, and in the context of this project the type of monitoring that could have been done and yet will be, albeit we say in an adaptive management context, is simply not unreasonable.

The third point is that because the international regime and article 208 of UNCLOS is particularly relevant here. Because that is plainly relevant in

interpreting the level of obligation under our Act, the obligation that our Act be no less forceful than the international legal regime speaks against some sympathetic reading of the threshold of best available information. The international standard is strict and high, as it should be. Heavy metals put into seafood or radioactive material put into the North Pacific, these are big issues, and under international law they're dealt with strictly. It's not open to promote a loose or relaxed reading of "best available information" in an Act that is intended to give effect to our international obligations. And in that respect again, emphasising that, an environmental impact assessment done in accordance with the international legal obligations recognised in UNCLOS and the advisory opinion on seabed mining and elsewhere, they being an obligation of customary law. The environmental impact assessment should be detailed in every way that it has not been here.

So, in short, and putting aside the problem of adaptive management, the decision by TTR not to undertake the sort of investigation it says it can do later or should do later would be to subvert not just our Act on its terms but also international legal obligations which, to the extent there's doubt in the Act, we say should control the position.

The second argument from TTR is that a degree of practicality is required about how much information should be sought or before the DMC, because the Act requires the DMC to move quickly in giving a decision. This is section 68 which says decisions are to be advanced as soon as – or hearings are to be done as soon as reasonably possible. The answer to that, of course, is all the information can be gathered before the hearing commences and that's the idea. This should all have been in the EIA, the impact assessment filed by TTR when it first made its application. So the only problem causing delay is one TTR chose to embed in its application.

The second point, though, is the need to move speedily does not subvert the primary obligations to decline if in doubt, and that obligation, just as it's in UNCLOS, is in our Act. So faced with inadequate information the Act is quite clear that the DMC should or must favour precaution and may decline, and

that really is the answer to haste. This is not a situation where there's an onus or a balance of probabilities finding required and a court inherits what information it gets. It is required to favour caution, give no result or to refer the matter back to the parties to try again as the first DMC did.

WILLIAMS J:
Are there the usual extension provisions in this Act as there are in the RMA?

MR SALMON:
I think from, and forgive me, Sir, I'll stand to be corrected on this, there's a specific timeframe for giving a decision which can be extended. From memory, 20 days, but it can be extended.

WINKELMANN CJ:
And it was in this case?

MR SALMON:
Yes, but the speed required is not in specific timeframes for the hearing itself, so section 68 is something like as speedily as practicable or something like that. So again, proportionate to the issues and so on, proportionate to the need recognised in the Act to potentially call for more information and so on. So a question of degree in terms of speed but never a situation where the primary requirements of protecting the environment under section 10(1)(b) and of favouring precaution become weakened.

In short, and again a trite point of international law now, if things are hurried and in doubt the answer is no. It's not like the Fisheries Act where lack of precision means we go ahead anyway. In this context we do not.

Again just some brief references to deal with what sort of information, and this is just one example of the deficit of information dovetailing into the discussion about sound and the 120 decibel line, the majority at paragraph 485 note that key sound data that's supposed to guide this decision is in fact obtained from 80 kilometres away from the drilling site. That's at 485. The minority speak

quite strongly on this point at 126 and 127, addressing that as an incurable almost deficit in information that will be key to issues such as, and these are my words now, not the minority's, marine life protection, mammal protection and, of course, issues such as whale navigation, observing here that, for example, mass strandings of the number of whales that in this area are unstudied could be not just one death but all of them. So –

WILLIAMS J:
Can you just give me those paragraphs again?

MR SALMON:
Certainly, Sir. 126 and 127 of the minority, 126 beginning: "Noise impacts on marine mammals is a key concern for us. We consider the information available is extremely uncertain and inadequate."

WILLIAMS J:
Yes, you don't need to go through that, and give me the number for the majority?

MR SALMON:
The majority is 484.

WINKELMANN CJ:
Can you just explain to me, Mr Salmon, what was meant by it was gathered 80-something kilometres away?

MR SALMON:
I hope I'm not overly simplifying this, and my learned friend will be correct me in reply, but almost everything, every point where TTR could grab available data, Lyttleton data on ambient sound noise quite literally was used here, as if that's relevant from a harbour with surrounding land. In this particular case background noise levels, the closest they got was reliance on a site where there were measurements taken, I think anyway, by some other, NIWA

perhaps, was 80 kilometers away, as a proxy for what might be happening here.

So it's all very well for us as lawyers to, for example my learned friend showed you the shipping diagram showing how much traffic there is through the Cook Strait and nearby and ask us to infer that it's as loud as Deep Purple concert, somewhere near there. Whales and frequency and duration and navigation are complex issues, they require detailed scientific evidence, and we can't assume that a ship in the Cook Strait has inoculated whales against being stunned by the noise of this seabed mining operation where – and this will be apparent, I think already – but where there was no evidence on what frequency or noise would be produced by TTR's mining apparatus because it didn't exist yet. So quite literally a spot guess from the wrong place as to what background noise levels were and no understanding of what frequencies would be produced by TTR and how they would interact with that background noise or how they would impact on mammals, respectfully on any view that's just not the best available information, it's not even information. So that's best available information.

I'll deal briefly with materiality, if I might, and again just cautiously noting that this is such a complex ecosystem and a chaotic one and such an interconnected one that there's a danger in us assuming that short-term changes in something like marine life are not material, and I'll give an example on that. We've heard from my learned friend, Mr Smith, that sea life would recover after five years. Now I'll come back to that because that's not quite how I read the conditions of what's required. But let's assume for a moment it's five years that sea life is down. To decide that that's not material is a deeply nuanced factual process because bringing down benthic sea life, for example, for five years might impact in a tipping-point way on Māui's dolphin, we don't know. It might impact on neighbouring populations of krill, we don't know, sunlight on krill impacting on blue whales, the cascade of biodiversity consequences is unknown because the area hasn't been studied. Also, to say that five years without the level of sea stocks that are there now is not material, requires understanding whether people are fishing for food, which is

a right, possibly a customary one, as well as whether the fishing companies who object to this are economically affected, and a temporal change like that is not cured by fish stocks returning to their current level, that's five years of custom or traditional recreation permanently lost, putting aside the fish themselves. So just a note of caution about us rushing too quickly to decide time periods, for example, are not material in a system where species loss can be irrecoverable and where every year matters and has value in and of itself. Again, noting the information deficit makes it impossible for us now inheriting a DMC decision without any data on or any adequate data on marine mammals' whereabouts, behaviours and so on, without any data on frequencies, stranding possibilities, any of those things. We are devoid of the data needed for even a layperson's estimate of materiality.

And, finally, just to deal with the five-year point, I might go to condition 8 in the DMC decision which deals with what I think is the five-year estimate. This is at page 102.0522, and this is immediately before the provisions my friend, Mr Smith, was dealing with regarding seabirds and mammals. It does mention five years but the wording is: "No later than five years following the completion of all seabed material extraction," which I initially and still do, I think, read as meaning probably 40 years of unrecovered sea life. It goes on to say, "within two kilometres of the location where extraction has first occurred," and then, "the Consent Holder shall be required to demonstrate that recovery of the macroinfauna benthic community at that location has occurred, provided that the annual monitoring results for that area indicate that such recovery is on track to be achieved," and then "recovery" is defined to being within 15% of the average pre-mining total abundance, biomass and species richness, but taking into account natural variation. Now there seems to be –

WINKELMANN CJ:
It's quite a strange condition, isn't it, really, because what happens if you can't demonstrate it?

MR SALMON:
Well, you call in the bond, your Honour, I guess.

WILLIAM YOUNG J:
Sorry, you what?

GLAZEBROOK J:
The non-existent bond.

MR SALMON:
The bond, yes.

WILLIAMS J:
What? To do what? Buy some more benthos?

MR SALMON:
Exactly, your Honour, and I was being glib but it's a serious point. This is the damage inherited with a cheque at the back end, which is, respectfully, impossible to reconcile with a system that's about avoiding risk at the front.

So I considered whether this was in some way suggesting, because of the reference to the "within two kilometres of the location" that what it was envisaging was recovery in block-by-block areas, but I don't think that reading is really available and it can't be what is meant because that definitely would be adaptive management.

WINKELMANN CJ:
Well, it says "of all seabed material extraction".

MR SALMON:
Yes, but I think it's meaning the test of recovery is within two kilometres of the starting point. But that's right, Sir, it is checking whether something that might now never recover after 40 years may recover and it's uncompensatable, uncurable, if it's gone. So I don't read that as being five years and,

respectfully, I think it's infused with a degree of suck-it-and-see that to the extent it's not adaptive management it must be a breach of the best available information requirements and a precautionary principle.

WILLIAM YOUNG J:
Just looking at that, I agree it's not very clear but doesn't (d) suggest that it's envisaged that the consent will still be operative when the problem is detected?

MR SALMON:
It envisages that it will be although that doesn't have to be demonstrated until drilling has ended. So that would happen, of course, if drilling ceased before the end of the consent period, Sir, yes.

So I don't want to spend undue time on that because that's an example of how a key issue, but only one issue, has been hived off to be dealt with later in a context of lack of information, and lack of information that's, respectfully, clear on both the minority and the majority decision. My friends contest this in written submissions but the majority decision clearly shows an acceptance that not enough is known because the two-year pre-commencement monitoring programme is required.

Just very briefly then before I move onto casting vote, the question was asked yesterday is the effect of the interpretation the respondents advanced that no real seabed mining would take place. I understand that question. It's a legitimate point to focus on, so can I just briefly address the position Greenpeace and KASM take on that which is, firstly, this is not a good guide, this case, to that question because it's such a big application. It's such a long, sustained, wide plume squirting straight into an area of special ecological significance and an area that's unknown. So this one can't take place, but there will be all sorts of discharges that are different that might, and, of course, there'll be all sorts of mining with no discharges. So the first point is any mining that has no discharge, oil, for example, where the only discharge is when they clean the rig, a cup of Janola in their water, based on the last

case I saw on that, they don't need a discharge consent and that will take place. So nothing in this stops that area of industry.

WILLIAM YOUNG J:
Can you mine, practically mine seabed for iron sand without creating a plume?

MR SALMON:
And the answer to that is you practically can. Whether you economically can or whether you can without investing in technology I think might be the question. So one of the issues asked of TTR is can you use it as – can you carry in the refuse and instead of just spraying it through the water use it as landfill, use it in the way they use for dredging, for example, dredging often rather than seek a discharge consent. They take the dredge material in and use it as they reclaim as landfill. That's a use. I suspect in some –

WILLIAMS J:
But then you haven't – how are you replacing the benthos?

MR SALMON:
Well, you're not replacing the inert material and the dead biomass but you're not discharging into the environment.

WILLIAMS J:
Of course not.

WILLIAM YOUNG J:
So 10(1)(b) doesn't apply?

MR SALMON:
10(1)(b) doesn't apply.

WILLIAMS J:
What's under the, say, five to eight metres? What's the substrate?

MR SALMON:

Sir, I certainly don't know that and I doubt TTR does either, and it is the unknown frontier at the bottom of the ocean so it would depend, I think, where and how it was made up and on geological activities over time and which rocks have been thrust up.

WILLIAMS J:

Perhaps I'm too terrestrial but I was just worried that you were stripping out the topsoil and giving it to the land and leaving clay on the bottom.

MR SALMON:

Well, in the New Zealand property development tradition we'll wash it back in as we subdivide, Sir, so it'll get back there in the end. Certainly, that's a legitimate environmental concern, but addressing Justice Young's query from yesterday, if a mining company wished not to have a discharge it has an easier task here. So that explains, of course, to some of the provisions of this Act which deal with applications that don't involve a discharge, the permissiveness and the wider, in the round assessment with less of a bottom line will happen where there's not a discharge consent but the discharge consent engages UNCLOS and engages 10(1)(b).

So also again just to round out on whether any mining can take place, one was identified by Justice Williams, one area where it could, which is certainty, and certainty about effects will enable some discharge applications to proceed. That might be certainty about the environment and the nature of the discharge or it might even be, grimly, certainty that there is no more marine life, that the South Atlantic is a desert of most fish now, it's gone, you know, you don't catch a fish there. That might be an area where there's so little sea life that there's certainty that it won't be harmed, for example. So certainty on that level or certainty about the type of discharge and the marine life involved.

WINKELMANN CJ:

Well, even then would you allow it? Wouldn't you be hoping that the sea life would come back? Isn't there a cumulative effect thing, if you just carry on the decimation or the catastrophic damage?

MR SALMON:

I'm sure it's recoverable if given the chance, your Honour, but my point was really just about the impact test being different with knowledge. What we lack here is the knowledge. We know enough to know there are species that will be affected.

WINKELMANN CJ:

Well, just on that, what do you say about Mr Smith's point regarding the number of ships going backwards and forwards, the amount of mining in the area?

MR SALMON:

Firstly, your Honour, none of them are releasing sediment in this way. None of them. None perpetually and none with 24/seven noise, and reading what they say about the noise levels, and 120 is not the peak of the noise from this, it goes way up from that. Shipping and whales is a studied topic. I've had to brief witnesses on it. It's complex and difficult to understand. Even the periodic seismic testing in whales is a can of worms, but this is not something that anyone can safely assume to be safe because there's no correlation between a 24/seven, 35-year air raid siren driving mammals that echo locate crazy and ships that they have learned to live with. We just don't have a safe basis for assuming that that's analogous at all. So what I would say is I understand why my friend raises it but it's not science, and we lawyers are guilty of it all the time but it's a little bit of knowledge being a dangerous thing.

WINKELMANN CJ:

The cumulative effects though, I mean in some ways it argues against Mr Smith but how was that taken into effect, because it's making it a more hostile environment, you're just adding in more?

MR SALMON:

Even worse, yes.

WINKELMANN CJ:

Well, Mr Smith can reply to that.

MR SALMON:

So I would say my submission is we don't have enough knowledge to know whether it's the straw that breaks the camel's back or not or whether instead it's not a cumulative point but an entirely new menace because it's different frequencies, different natures. But that's only noise, of course, your Honour. The sediment plume and its sedimentation impacts and whatever unknown impact it would have stripping the, I'll call it topsoil for a moment, out, we don't know.

Dealing with casting vote, and again seeking to move as swiftly as I can on time, the case for Greenpeace and KASM is not that there was a breach of natural justice around the exercise of a casting vote and it is not that the person exercising a casting vote had no choice but to decline. Our submission is simply this: the casting vote – and this is clear from the procedures adopted in clause 13 set out in appendix 5 – the casting vote is a separate vote and it is not exercised when the first vote is exercise, it is exercised once there is a impasse, that's proposition one. And proposition two is – and this must be right, respectfully – it's a decision under the Act, so that separate casting vote decision doesn't have to be made one way or the other in every case but it has to be made applying the principles of the Act, which include precaution. And I understand why the reaction to the proposition that the casting vote should be considered afresh is that it's an artificial submission because anyone voting yay the first time would be expected to vote yay the second time. But all the cases that we've referred you to, respectfully, do not help this question because none of them are in an environment where there's a requirement to show caution, and so I don't intend to go to the cases but rather just address why we say caution had to be exercised afresh in a different environment to the first decision.

Now, firstly, it is obviously open to the Chair to vote nay, having voted yay the first time. Had he done so, had he said: "I'm going to favour caution now," TTR I think would have no basis on which to challenge that change of vote or different vote as the Chair and, as we know, Chairs sometimes do favour status quo or the calm if they can. So it was open to him to be different, which illustrates I guess that this is an independent, fresh decision. And we say, in a nutshell, set out in our submissions from paragraph 89, we say respectfully that Chair needed to read both sides, my friend is right to say the Chair knew by that time it was two/two, of course he did, he was exercising a casting vote, but he needed not to treat the casting vote as just having double the power, double the voting heft, he needed to treat the casting vote as a fresh decision where he had read the minority's view as well, and in that a sense a useful thorough experiment is to read the DMC decision as if one's making a casting vote, reading first the minority and then the majority and keeping the Act's requirement for caution in mind. Our submission is simply that he needed to do that, he might –

WILLIAMS J:
You mean if there were a fifth person with a casting vote?

MR SALMON:
Correct. A fifth person who had not yet made up her or his mind, and we do not say that he was incapable or legally constrained from exercising the casting vote to say yay. I had an old recollection that there was law on exercising casting votes to favour the status quo but it seems not and my recollection was wrong, he's not bound to do that, but he is bound to make an independent decision afresh. And reading the competing views of the world, reading a strangely structured majority decision in which often consideration of points is undertaken by quoting a report or quote advice and then making a decision that doesn't relate to it, against a minority decision which, albeit with flaws, repeated references to the Act's requirements for information and precaution. The question is, should he have had regard to that? We can infer he did not because he's given no reasons for his decision, and this is a judicial

type quasi-judicial decision, he would have if he'd done it in that way. So that –

ELLEN FRANCE J:

If you've engaged in a deliberative process, as they appear to have done in exchange of views so they know each other's positions and if you then turn your mind to what the Act requires, why does the fact that your vote is then decisive change the approach?

MR SALMON:

And if – we don't know – but if the deliberative process meant that his decision was not made and was open-minded until he had read the minority's decision, then I can see I would have a harder argument. But I'm not sure we know that to be the case.

WILLIAM YOUNG J:

It must be, mustn't it? I mean, it must be made having seen at least a draft of the minority decision.

MR SALMON:

Well, possibly.

WILLIAM YOUNG J:

I mean, doesn't the executive summary at the start refer to the minority decision?

MR SALMON:

Yes, it does. The decision is bundled together. My point is at the point at which he had made his decision the first time he had not yet made his decision the second time, because you only find out you were going to make the decision the second time once the deadlock is crystallised. So he by definition has decided vote one before knowing he needs to vote vote two.

WILLIAM YOUNG J:

He doesn't really vote until the decision's signed, does he?

WINKELMANN CJ:

Do we know he consciously voted again?

MR SALMON:

No. Not that I'm aware of, your Honour.

ELLEN FRANCE J:

Well, I mean, what they say is after hearing and considering all the evidence, et cetera, members of the DMC did not agree in final deliberations, so-and-so voted one way and other. So…

MR SALMON:

And then he, having the casting vote.

WILLIAMS J:

Interestingly in the summary of the decision it doesn't, apart from that, refer to the content of the dissent, it doesn't say: "Two of our members took, a different view as follows."

MR SALMON:

Correct. And I'm unable to be too helpful with Justice France's question because we don't know, and I don't profess to have experience in how decisions of this nature are made but anticipate it's possible that his mind was made up, his decision written, before there was real engagement with the other two. My instructions are there was a clear divide between the "let's get it done" and the "caution" camps from the start, but we don't know. Reasons would have clarified that and, coupled with the submission that he had to make an independent decision based on everything he had then, he needed to give reasons so I would be able to answer your Honour's question. So it's hard for us to analogise with because we don't have a casting vote in a court such as this and we, at least to my knowledge, when there's been the

possibility of deadlocks through historical circumstances haven't taken a casting vote approach but have taken a cautious approach to change without a true majority. And in this case the casting vote in the context where it sat can be seen as really the entire decision. In a precautious environment, an environment with a lack of information acknowledged even on the face of the majority's decision, he became the decision-maker, and in that sense we say this casting vote is a decision under the Act, and a decision under the Act, we say, needs reasons and needs to comply with the Act's requirements to favour caution. So that is not to say always the status quo is required, often it will be, if our legal propositions are accepted, but it is just to say this was one of those decisions, and it is not at odds with the international scheme to expect a casting vote to be cautious.

WILLIAMS J:
You might expect a lawyer to be awake to that issue, but would you really expect that of real people?

MR SALMON:
I try not to deal with them, Sir.

WILLIAMS J:
But, you know, these are in legal terms "lay people", they don't know anything about natural justice and the exercise of statutory discretions except the job in front of them. It wouldn't be an obvious thing for a layperson to come to, don't you think?

MR SALMON:
Well, yes, absolutely, Sir, but equally I'm cautious about calling them lay people who aren't capable of dealing with complex issues. We handed them the –

WILLIAMS J:
I didn't say that.

MR SALMON:

No.

WILLIAMS J:

I'm just talking about the culture of natural justice.

MR SALMON:

I did look at the backgrounds of the various members of the committee – this is from the Bar – but the Chair's qualification really was, he's described in the media as a "professional committee member".

WILLIAMS J:

Yes.

MR SALMON:

This is what he knew: there was a scientist, there was someone else, there was an engineer…

WILLIAMS J:

Exactly, and that wouldn't be in his DNA because casting votes in the context within which that person operated did not require separate reasons or separate consideration, they just were a double-banger.

MR SALMON:

Well, I would put that in a slightly different way without disagreeing with you, Sir. In his normal trade they wouldn't be required, but reasons wouldn't be required because the normal committee is not quasi-judicial. And I'm not criticising the people involved, it's not a personal criticism of his approach to a casting vote, it's a submission about what the casting vote should have been. Yes, experience in non-judicial contexts without the statutory overlay might mean that a casting vote's a casual matter. Although one can imagine in a heated environment someone exercising a casting vote standing in front of a club room full of angry people or a school board would think carefully, so it wouldn't be alien to think carefully. But the novel part arises because of the

obligations that were on him when casting the casting vote that are unique to this case. And that's why I acknowledge the cases aren't going to help, because none of them deal with precaution and none of them deal with the information requirements.

So that, I guess, sits with and echoes with the comments about information. To round out on casting vote, here was a Chair who by then knew he was carrying the day, that his views were not one of four but were the controlling views, and who knew that both sides of the debate within the committee thought there was not enough information but one thought more could be obtained by something framed not as adaptive management. Properly legally directed – I understand why this wasn't a point on which advice was perhaps taken – but properly legally directed on any view he had to show caution, and I think the instinct might be to give him the benefit of the doubt that he did show caution because he'd shown caution the first time, but that's where we need reasons, that's where we need to understand why he cast the casting vote in the way he did.

WILLIAM YOUNG J:
But it can't be just – I mean, isn't the simplest thing and probably the correct thing to assume that his casting vote is effectively based on the same reasons as are revealed in the decision? Because that decision, at least by the time it's signed, must have been made with absolutely full awareness of what was being said by the other two members.

MR SALMON:
Yes, if he'd read it, yes. Assuming he'd read it, which one assumes.

WILLIAM YOUNG J:
Well, I mean, why would we assume that he hadn't read, that he didn't know what the views of the dissenting members were?

MR SALMON:

Well, I'm merely observing, Sir, that we're assuming something, no matter what. I understand why it's a likelihood that he would –

WILLIAM YOUNG J:

Well, I mean, he signs a competent document that's got those views set out in it.

MR SALMON:

Yes. So, I agree it's likely. I'm just being cautious about assuming anything in the absence of reasons, and I'll just round out on reasons. The lack of them is the reason that I can't answer your question, Sir, and also the reason we can't be certain that he did read it or, indeed, that he put his mind to the expressed ideas of the minority and considered them, we don't know his answers to most of those points because –

WILLIAM YOUNG J:

But you could say that – I mean, say it had been a three/two vote, would it really be fair to say, if there'd been a committee, to say of the majority decision: "Well, how do we know they actually read the dissent?".

MR SALMON:

Well, it would be one thing if they'd made a one of five decision before reading the dissent, because a democratic vote of five envisages –

WILLIAM YOUNG J:

But they don't make a decision till the decision's signed, do they?

MR SALMON:

The decision's not a decision of the committee until it's signed, but they must have each voted. One couldn't complete the document without them each having expressed their vote, if you follow, Sir? Any rate, I'm mindful of time, that's the casting vote point.

WINKELMANN CJ:

Is that your submissions before we move on to Mr Bullock?

MR SALMON:

Economic benefit, your Honour, which I can be very brief on.

WINKELMANN CJ:

Okay, well, we might just take the morning adjournment.

MR SALMON:

Certainly, your Honour.

WINKELMANN CJ:

You'll have to be very brief though.

COURT ADJOURNS: 11.38 AM

COURT RESUMES: 11.52 AM

MR SALMON:

Economic benefit is a brief topic and just before commencing on it I failed to mention one other comment that one of my learned friends mentioned to me before today regarding the impossibility or not of seabed mining which is the trend towards point source treatment in RMA jurisprudence generally and the prospect that iron sands mining could be done with point source…

WILLIAM YOUNG J:

Sorry, I didn't catch that.

MR SALMON:

Point source drilling or point source mining for iron sands, magnetic treating or something like that or flocculent treating that enables the sediment to fall straight back down. These are technologies in other areas. I mention that only because I told one of my friends I would.

But I'll deal with economic benefit now which is dealt with briefly in our submissions as well from paragraph 99, and it's noted there that, or at paragraph 103, 101, that we have three grounds we're advancing. None of them, I think, respectfully, involved the sort of overlap between other section 59 criteria and the requirement to look at economic benefit but I'll answer questions on those if there are concerns about them.

The primary point is the Court of Appeal accepted the appeal point that a gross economic analysis was wrong to the extent there was one. I did trouble in the High Court on that point. Thus the Court shouldn't just look at the upside from this but if there were legitimate economic downsides factor those in as well. The point that Greenpeace and KASM were unsuccessful on in the Court of Appeal was whether or not the DMC in fact did investigate the economic downsides. And in that respect we do take issue with the Court of Appeal's reading of the DMC's decision. The reasoning is from paragraph 805 of the majority and I think, respectfully, does allow for a reading in which by various paths of reasoning the majority found a path in which no economic negatives were taken account of at all.

Now one package of economic negatives, so to speak, is the extent to which financial value, as is often done in cost benefit analyses, is put on amenity and social and cultural factors. That is done. It's done by our Treasury. It's done by various government departments all the time. We know it can be done, and the Court of Appeal was correct in saying there's debate about that. But that can be done and wasn't here. That's one category that we say –

WINKELMANN CJ:
So which category?

MR SALMON:
The category of not directly pecuniary but capable of being valued, social, amenity, environmental factors. Now we say that's not a double counting because their use in other contexts or under other heads of section 59 do not preclude the extent to which they give value in some albeit difficult to value or

unfungible way to the economy can be assessed. For example, one discussion in the Court of Appeal was the Bench's suggestion that the clean, green tourism brand could be damaged by this, which logically is possible. Valuing that is hard but it doesn't mean it's irrelevant. It's just hard to value and, as the Court of Appeal notes, that might favour a qualitative rather than a quantitative cost benefit analysis, in other words one that is more in the round than putting those precise Treasury numbers that enable a cost benefit analysis of a cycleway to be undertaken. But that's one category.

Then there are the category of specific economic downsides that were not explored and the short point there is that the DMC respectfully conflated the definition of "existing activities" with the possibility of economic harm for future activities. So by deciding that future whale-watching activities, for example, shouldn't be had regard to, tourism possibilities, because they weren't existing, the DMC erred in backing out of a cost benefit analysis negative factors that would impact on the net position and in doing so erred. We don't know the value of them because they weren't explored or decisions weren't made on it, but there can be no doubt that there is some future potential value and some downside in ecological harm to an area that might have whale-watching exercises and so on. So that's a second category.

And the third are in a different category altogether and in this respect they dovetail with some of the submissions you heard yesterday. If my learned friend's arguments are not accepted regarding the significance of the iwi interests in this area, if they are not, for example, existing interests, or if in some way the DMC's decision does cause a contemporary breach of the Treaty of Waitangi, then in my respectful submission that's a negative that will hit the Crown account. So if, as seems entirely possible but not explored by the DMC, there is on the one –

WINKELMANN CJ:

So can you just restart what you just said, Mr Salmon?

MR SALMON:

Certainly. If the DMC's decision survives and does result in harm to existing customary rights, which as I read things it cannot be ruled out based on the exploration the DMC undertook, that's quite possible, then that could result in a claim for a contemporary breach of the Treaty, and that will give rise to a liability of some value on the Crown account, contingent, but of some value.

WINKELMANN CJ:

How contingent should these enquiries – how far should the DMC on your submission stray from that which is before them and that which is contingent – that which is before them and easily valued or quantified and that which is contingent, hypothetical?

MR SALMON:

The answer I think is twofold. One is it's a question of the nature of the application. In this case they should go into detail and that is because this is not a public good dredging of a channel, making of a thoroughfare, reclaiming of land for public purpose. This has no raison d'être but the economic value for the Crown. That 2% the Crown skims on extraction revenues and any tax take is it. So all of the evidence points against this except for the money.

WINKELMANN CJ:

Well, is it just economic benefit for the Crown? What about the region?

MR SALMON:

Well, so public economic benefit, I should say. You're right, your Honour. There's some economic benefit for the region and there's public benefit for the Crown through the Crown's account, but if there is a material contingent liability for a breach of the Treaty, for example, then that benefit is not as large as it seems, and I think the question your Honour's putting to me is can one really expect the DMC to consider that? And my respectful answer is yes, and I'll advance two reasons why I think it's not just appropriate but necessary that they consider such contingent liabilities.

Firstly, they already have to have regard to all of the issues that would enable some degree of assessment of this because they must have regard to those existing customary rights, and I'd adopt my friend's observations as to why it's a very difficult argument for TTR or the Crown to say that regard to existing customary rights is somehow curtailed by the language of the Act. So that's already going to be before the DMC and thus it's easy to take account of it. It might be hard to put a contingent value on it, and we know from our experience of losses of a chance it's hard. It doesn't make it impossible and there are economic tools to do it. They heard from economists on other issues, they didn't look at this, but they should have.

WILLIAMS J:
Well, at some level this is equivalent to impact on quota holders, but the finding of the majority is that there wasn't one. And isn't it implicit in the majority reasoning that there's no impact on customary rights either?

MR SALMON:
Respectfully, Sir, I would say parking the – it's a surprising finding given we have fisheries companies in the unusual position of siding with Greenpeace, first, I think, they're here, concerned about it – my friend says *some* of the fishing companies.

WILLIAMS J:
Yes.

MR SALMON:
Thank you.

WILLIAMS J:
Some of them are on TTR's side, or at least one of them is.

MR SALMON:
Right, yes. Putting aside that, that's commercial quota-holder interests. There are other rights here that may be hard to value that matter. Capturing –

WILLIAMS J:
You're talking about kaitiakitanga rights?

MR SALMON:
Certainly, and the associated ability to eat, which in coastal communities in New Zealand matters and is a poverty issue. How one values that, I don't know, but it's a hit –

WILLIAMS J:
My point is didn't the DMC implicitly find that the impact was not significant?

MR SALMON:
On the commercial catch species…

WILLIAMS J:
No, no, on the kaitiakitanga customary gathering rights.

MR SALMON:
Right.

WILLIAMS J:
In other words, isn't that the answer to your argument, they have to be proved wrong about that?

MR SALMON:
Possibly, but they might not have to be proven wrong with foresight in a Treaty claim. For example, and my second point was going to be if one imagines a different hypothetical, a *Deepwater Horizon*-type mischief, where one is dealing with what one might call a "peso problem", a smaller chance of a massive loss with the oil spill onto the Gulf of Mexico. It must be that an economic analysis weighs up the chance of losing the entire current account of the Crown against a small gain. And, yes, that will involve saying this is unlikely but would be catastrophic, against the upside. It must, respectfully, be that that sort of – albeit if done in a crude and qualitative way – that sort of

MPV analysis must be necessary, because the economic upside was the only, it was the point on which TTR laid down all its chips. So if one's imagining some prospect such as the destruction of tourism in the Bay of Islands, if this were up there because of a spill, one would expect the DMC, and I would respectfully say they *must*, to add up the potential costs of liability if that goes wrong.

WINKELMANN CJ:
Sorry, I'm worried about timing, Mr Salmon.

MR SALMON:
Certainly. I'll round this out, your Honour. The short point is this is a liability, albeit one the Crown might decline to confront, it should be assumed that if there's a Treaty breach it should meet its obligations. But it is another point on which there is a potential real consequence of allowing an activity which, while the DMC majority, as we call it, found there was insufficient impact on kaitiaki. It may be wrong and it may be proven to be wrong in a catastrophic way is because of the lack information care, and it wouldn't be a stretch to say poor information and this process was the path by which a breach of the duty to protect took place, in other words, the decision is not a shield to a Treaty claim.

Unless there are any other questions, those are my submissions and I'll hand over to Mr Bullock, and thank you for that time.

WINKELMANN CJ:
Thank you.

MR BULLOCK:
May it please the Court, KASM and Greenpeace support the decision of the Court of Appeal as it relates to the bond. I propose to supplement those reasons by making three brief points, first relating to the statute, second relating to the DMC decision and third relating to the conditions themselves.

In relation to the statute, and I don't think the Court needs to turn it up unless it wishes to do so, my first point relates to section 63(2)(a) which is the provision that empowers the DMC to require the consent holder to either provide for a bond – not either, it's up to the DMC, but to require the consent holder to provide for a bond for the performance of any one or more conditions of the consent, and (ii) alternatively to obtain and maintain public liability insurance for a specified value, and the submission there is simply that the Act treats public liability insurance and a bond as separate concepts and they are provided for separately under section 63(2).

The second provision I wish to refer to is section 65 which elaborates on what a bond is and what it is for. Section 65 provides, first, that a bond or a condition requiring a bond may continue after the expiry of the consent and it can do so to secure the ongoing performance of conditions relating to long-term effects, including conditions relating to remedial and restoration work and conditions providing for ongoing monitoring and long-term effects, and the submission here is really that under the Act a bond has dual performative functions. First, it encourages the fulfilment of conditions by the consent holder and is in that sense an ambulance at the top of the cliff. Secondly, it ensures the fulfilment of conditions even if the consent holder fails to do so by providing a pool of money that can be used for that purpose, and in this way it ensures that the consent holder rather than the taxpayer or the environment itself bears the risk of non-compliance or non-fulfilment of a condition.

I'll now move on to the DMC's decision and it might be helpful to turn that up. So this is at paragraph 1071 of the decision which is at page 102.0463 of the case on appeal and that is intrinsic page 221 of the DMC's decision. The DMC's reasons on the bond and insurance are the single page.

GLAZEBROOK J:

Can you just – you gave about 15 different numbers and I got lost about half way through. So what paragraph number?

MR BULLOCK:

1071. So what we see here is the DMC setting out both the legal and expert advice it received on the issue and what's striking about both the legal and the expert advice is that for the most part it is not directed to the question of whether there should be a bond or what is different between public liability insurance and a bond, rather it's directed to how one determines the amount of a bond, and the reason for this I submit is actually not surprising. If we scroll up a few pages to intrinsic page 217, which is paragraph 1051, we see a discussion of the EPA's own analysis of conditions report prepared by Dr Lieffering who is the same expert the EPA referred to.

WINKELMANN CJ:

I'm sorry, Mr Bullock, I'm going to ask you to repeat that number.

MR BULLOCK:

Certainly. It's paragraph 1051 and it's intrinsic page 216 or 217. The important point here is that we can see there's a reference to a condition 104 having been recommended by the EPA's expert, Dr Lieffering, and that recommendation was a condition to include a bond. So we have the EPA's own expert recommending a bond and the DMC simply notes here that "our eventual decision has been not to use a bond, and that condition has therefore been struck out," but that explains why the advice received by the DMC from EPA's expert was targeted towards setting the amount of a bond, not to whether it should have one, because the EPA itself had recommended one.

So if we return to the DMC's reasons for refusing a bond, and these are at paragraph 1074, we see reasons that are, with respect, so conclusory as to almost be meaningless. The DMC says that it's had regard to the circumstances of the application, it says it's taken into account its legal and technical advice which, as we've just seen, were to have a bond, not to refuse one, and then it simply concludes that a bond is not necessary in addition to the 500 million insurance offered by TTRL. And it's here we submit that it's

clear and demonstrable that the EPA or the DMC has erred in conflating the function of public liability insurance with the function –

WILLIAM YOUNG J:
Why do you say that? I mean, I agree it's conclusory, but why would the DMC have thought that the losses covered by public liability insurance are exactly the same as the losses that would be covered by a bond?

MR BULLOCK:
All we know, Sir, is that the –

WILLIAM YOUNG J:
I know, it's just sort of a stupid proposition, why would they think that?

MR BULLOCK:
That's all we can discern from the reasons given.

WILLIAM YOUNG J:
But, I mean, a more likely assessment is they may have though that the likelihood of losses not covered by public liability insurance occurring wasn't sufficiently high to justify the expense of requiring a bond.

MR BULLOCK:
Well, they've given no reasons to that effect, Sir, they've given no reasons to that effect.

WILLIAM YOUNG J:
I know the reasons are conclusory. But why attribute to them a sort of a stupid line of reasoning instead of a sensible line of reasoning?

MR BULLOCK:
Well, they had a duty to give reasons, Sir, and they've written a long decision and it was open to them explain so it could be analysed, the proper basis and the proper understanding on which they've made this decision they have not.

WILLIAM YOUNG J:

Yes, well, it's a complaint then that they didn't give adequate reasons rather than they conflated insurance in a bond.

MR BULLOCK:

No, the submission is that they conflated it, Sir, and both the High Court and the Court of Appeal took the view that there was a conflation and the High Court found that conflation was lawful, the Court of Appeal found it was not.

WINKELMANN CJ:

Is your submission then, Mr Bullock, that actually the absence of reasons suggests that they conflated it because they felt no need to explain why they were choosing one over the other?

MR BULLOCK:

Yes, and…

WILLIAMS J:

Isn't a better one to – I suggest respectfully…

WINKELMANN CJ:

You hesitate to suggest that.

WILLIAMS J:

That in light of the stated risks it's not rational for them to have concluded that a bond was not necessary unless they thought that risk could be adequately dealt with by insurance.

MR BULLOCK:

That certainly is a better reason, Sir, and I'm happy to adopt that. That is right, and that would accord with the error of law frame discussed in cases already referred to by this Court.

WILLIAM YOUNG J:

Well, what's the nature of the risk in detail, just, well, in the detail, what's the substance of the risk that granting the consent created that would not be covered by public liability insurance?

MR BULLOCK:

Sure. So let's go to condition 8, which is the condition Mr Salmon referred to earlier. This is the benthic recovery condition.

WILLIAM YOUNG J:

But who claim on a – say there was a bond associated with that, who would claim on it?

MR BULLOCK:

The Crown, Sir.

WILLIAM YOUNG J:

For what?

MR BULLOCK:

Well, if we look at the conditions, Sir, there's a requirement for recovery to be on track. If recovery is not on track the consent holder is in a quarterly report to provide information to the EPA highlighting its monitoring, including a report of a benthic ecology expert explaining the reasons why recovery is not on track, potential measures to enhance recovery and explaining how recovery is to be occurred. If TTRL falls off the cliff and this hasn't been done, the result will be either it is not done or the Crown is going to have to pay for it. This is classic example of a long-tail condition relating to ongoing monitoring, ongoing remedial restoration work, which would just not happen if the mining company were to go into liquidation, for example, that would not be an unplanned event covered by public liability insurance.

WILLIAM YOUNG J:
I agree it wouldn't be covered by public liability insurance. But what size of bond did you have in mind?

GLAZEBROOK J:
Well, they had advice on that is what you'd say.

MR BULLOCK:
They had advice on that, Sir, and it's a matter for the EPA.

WILLIAM YOUNG J:
Yes. What was the recommendation?

MR BULLOCK:
I don't think they had advice on a specific amount but they had advice on a methodology, which is set out at 1072, 1073, legal and technical advice.

WILLIAM YOUNG J:
A bond could only really secure losses that someone incurs as a result of the consent not being complied with, it couldn't be in terrorem, it couldn't be a penalty.

MR BULLOCK:
The statute says it's –

WILLIAM YOUNG J:
It couldn't be in terrorem. There couldn't be a penalty.

MR BULLOCK:
The statute says it's to secure performance and the advice was that that is primarily directed at fulfilling the condition, not as a penalty, as you say.

The issue here is that there are a range of conditions with these ongoing monitoring obligations and some with remedial obligations which, if TTRL

were not to perform them absent a bond that is either not going to happen or it's going to be up to the taxpayer.

GLAZEBROOK J:
And the advice seems to be that you can have a rolling bond so as matters become clear and costs become clear you can have a rolling bond or an increasing or decreasing bond.

MR BULLOCK:
Yes, perhaps if things were shown to be on track the bond could be produced in due course. If things were looking problematic the bond might need to be out. You could have a rolling bond. That is provided for in the Act, yes.

WILLIAMS J:
You referred I think to a paragraph in the DMC where the issue of how the calculation would be done – was that 107 or did I hear that wrong?

MR BULLOCK:
Sorry, 1072. It's a long decision, Sir.

WILLIAMS J:
That's the advice quoted there?

MR BULLOCK:
That's the legal advice and then 1073 we have Dr Lieffering's advice. "The value of the bond specified in the condition should be based on the estimated cost of the works subject to the bond." They "should not be used as a penalty for non-compliance. The purpose of a bond is to ensure that an event such as restoration occurs," so to take the example of condition 8 it might be the cost of ensuring monitoring occurs, ensuring an expert can be engaged to provide a report on what's gone wrong if things have gone wrong and to look at solutions.

Unless the Court has further questions, those are my submissions on the bond.

WINKELMANN CJ:

Thank you, Mr Bullock. Mr Smith.

MR SMITH QC:

Thank you, your Honour. Despite the gathering of materials to the lectern, I will be very quick indeed. There are five areas I wish to cover plus a miscellany of matters at the end. The first is the question of ESA. The term "ecologically sensitive area" was referred to by Mr Fowler with reference to an argument I made with respect to ONL in *King Salmon*. Here says used in the glossary to the DMC's decision and in a number of paragraphs, for example, 335, 349, 350, 394, for example, in relation to the reefs in particular, and the point that Mr Fowler made was that he used the word there was an inelegant or awkward collision between my reliance on ONL in *King Salmon* and the presence of the term "ESL" or ecologically sensitive areas in this case. However, the point if properly understood in my submission in fact goes against the respondents and that's for two reasons. The first is that in *King Salmon* not only was the environment ONL but under the NZCPS adverse effects were to be avoided, not remedied or mitigated, and section 67 of the RMA required the NZCPS to be given effect to, not merely taken into account as is the position here. So we do not have an area in this case, that is to say a particular area in the *King Salmon* sense, which is required to have adverse effects avoided and on the contrary the full gamut of avoid, mitigate and remedy is available and in addition, of course, we're operating under a "take account" standard as opposed to a "give effect" standard.

GLAZEBROOK J:

Weren't they answering your submission that there were no effects on anything that was – or did they misunderstand your submission because that's how I'd understood your submission as well, that there was nothing of any significance that was going to be affected and they say no, that's not right,

and if you look at the schedule 2 diagram that's clearly wrong, they say. Was your submission different from what they'd understood?

MR SMITH QC:

I think that the reference to ESL was to say, in a crude way, not that I'd attribute that to my friend, that in point of fact I was wrong in relying on *King Salmon* because just as in *King Salmon* there was ONL which required protection, there was ESL in this case which require protection. My point is that the statutory instruments are wholly different in the way I've just described.

GLAZEBROOK J:

So you weren't saying there weren't any ecologically significant areas…

MR SMITH QC:

No, no, I wasn't saying that.

GLAZEBROOK J:

You were just saying you just take them into account. Because one would assume if they were ecologically significant you'd give them greater weight than if they weren't.

MR SMITH QC:

One would think so, but of course, A, you take them into account and, B, importantly, although I mentioned them the other way round, you're not obliged to give effect to a requirement to avoid –

GLAZEBROOK J:

No, no, I understand that point.

WILLIAMS J:

So don't apply *King Salmon* duties to take account obligations here?

MR SMITH QC:

No, that's correct and in addition the full – with *King Salmon* there was a necessity to *avoid* adverse effects as opposed..

WILLIAMS J:

One of the duties I was talking about, yes.

MR SMITH QC:

So the second point about ESA –

WINKELMANN CJ:

Although of course Mr Fowler would say there was a duty to protect the environment here from adverse effect.

MR SMITH QC:

There was a duty to protect.

WINKELMANN CJ:

To *protect* in terms of section 10(1)(b).

MR SMITH QC:

Yes, that's right, and section 10(1) – I'll come on to that, because that's a question of materiality and the relationship of 10(1)(b) with 10(1)(a).

So the next issue is the reference to ONL and *King Salmon* also raises the second reason why *King Salmon* and the ONL/ESA comparison doesn't assist. I simply rely on paragraphs 43 – I'm putting them in this order for a reason, which you'll see when you come to them – 39, 40, 41 and 153, and a reading of those paragraphs in *King Salmon* in my submission makes it very clear that the approach towards decision-making consisting of holistic evaluation or overall broad judgement, as that type of decision-making is referred to in *King Salmon,* was ruled out but only by dint of the precise statutory instruments which were under examination in that case. It did not

hold that overall broad judgement or an evaluative decision-making process in this case is ruled out. So I'm saying that the overall –

GLAZEBROOK J:
Well, I think that's a misreading of the case, but it's a submission, we understand the submission.

MR SMITH QC:
Then the next point is a point raised by my friend, Ms Casey, for the EPA, which relates to section 59(2)(j) of the EEZ Act. The general issue is whether section 10(1)(b) and section 10 generally envisages no material harm to the environment or whether harm that is material may be permitted to occur, and of course TTR have said the latter. In the submission she made Ms Casey, correctly I might add, with respect, drew your attention to section 59(2)(j). So for discharge consents section 59(2)(j) could have been removed from the decision-making criteria which required to be applied, just as for example section 59(2)(c) was removed for discharge consents and sections 59(2)(c), (f), (g) and (i) were removed for the purposes of marine dumping consents. But notwithstanding the removal of those subparagraphs, 59(2)(j) remained in for all types marine consents, and so there is an obligation to consider the questions of avoidance and remediation and litigation in respect of marine consents which are discharge consents. The importance of that is it effectively backs into 10(1)(b), avoidance, remediation and mitigation, if in point of fact it isn't already there on an overall reading of that provision with its inclusion of regulation. My point is that having – it's made more clear by 59(2)(j) and its continued applicability that material harm can be envisaged by 10(1)(b) and if not one would wonder what kind of non-material harm the EPA would be directed to avoid or mitigate or remedy.

WINKELMANN CJ:
Is there a possible of reading of that, though, that the only operative part of that provision is avoid, or mitigate so it's minor?

MR SMITH QC:
In my submission not. It leaves the full gamut in there expressly.

The next point I wanted to raise is AMA and…

WILLIAMS J:
Sorry, that's quite a subtle argument and I'm just getting my head around it, but that's a reference, one presumes, back to the applicability of 10(1)(a), right, because that's where the avoid, remedy, mitigate obligation is contained in the purpose, right?

MR SMITH QC:
No.

WILLIAMS J:
So isn't that just saying that 10(1)(a) applies too and that you don't ignore it when you're dealing with discharge and dumping consents, as long as you can protect?

MR SMITH QC:
It says that you are, if we just go to section 59, for discharge consents, putting aside dumping, you consider what's required to avoid, remedy or mitigate the adverse effects and if you do that for a discharge consent then that must indicate that you, under section 10(1)(b) for the purpose of regulation, are permitted to undertake not merely conditions that avoid the harm but also conditions which remedy or mitigate it, in which case that indicates that material harm is envisaged to occur in some circumstances because it is only material harm that one would mitigate or regulate in any other way.

WINKELMANN CJ:
Or you might actually regulate or remedy minor harm.

WILLIAMS J:
That's right, or you mitigate material harm.

MR SMITH QC:

Now we have a difficulty –

GLAZEBROOK J:

That's what you'd expect to do if you could. You'd expect to get rid of all harm if it was easy to mitigate. You wouldn't say it didn't matter and it's just minor. You'd actually say, well, make sure it doesn't happen, wouldn't you?

MR SMITH QC:

No, the difficulty with that argument, with respect is the use of the word "minor" because minor is in itself capable of being a broad church. If you were to use the word "negligible" then that carries with it the connotation that as it's negligible it can be safely ignored, but one would not think, even if you were to be required to mitigate harm, it would relate to all harm which was more than negligible.

GLAZEBROOK J:

Well, that was the point I was making, wasn't it? You can't assume that it's just material harm that you can mitigate.

MR SMITH QC:

Yes, but it is unlikely.

GLAZEBROOK J:

I don't see where you get it from. You can have material harm from a mitigation provision because a mitigation provision could be one that says you have to mitigate every harm that's non-negligible.

MR SMITH QC:

To read the provision in the way which the respondents want it to be read you would have to read down the remediation and mitigation provision, in my submission, so that it only operates in respect of harm which is minor or negligible.

WILLIAMS J:

I don't think that's necessarily right at all. The more consistent way to read it is that where you have significant harm, ie, material harm, mitigation is appropriate if its effect is to render the harm immaterial. That's where mitigation works. It doesn't remove it entirely. It just takes away its materiality.

MR SMITH QC:

There is no argument there. The point is –

WILLIAMS J:

But that may be all it's talking about, you see, because that would make it consistent with "protect" in (b).

WINKELMANN CJ:

Yes, but Mr Smith's point is it also has remedy.

MR SMITH QC:

Remedy and mitigate. And mitigate –

WILLIAMS J:

But that's the same.

MR SMITH QC:

Well, no, it's not the same, with respect.

WILLIAMS J:

Because if you remedy a harm to the point of it being non-material by some means then you've achieved the protection purpose.

MR SMITH QC:

There has to be a difference between the words "remedy" and "mitigate". To remedy is, one would think, in contradistinction to the word "mitigate", a total measure to remove it, and the only difference between that and avoiding it is that you allow it to happen in the first place but then you remediate it and

one would – it has a connotation of full remedy. In contradistinction, "mitigate", which is a – a word that you used as a synonym a little earlier in the argument, Sir, was "mollify" and the word which I suggested –

WILLIAMS J:
You said "attenuate" which is a better word, thank you very much.

MR SMITH QC:
– was to attenuate. But to attenuate is to lessen or mitigate.

WILLIAMS J:
Correct.

MR SMITH QC:
And in that case it suggests that something less than full remediation would occur in which case there may well be harm which is material which is permitted to occur and remain.

WILLIAMS J:
After. You're saying afterwards?

MR SMITH QC:
Not –

WILLIAMS J:
After the remediation?

WILLIAM YOUNG J:
Continuing.

MR SMITH QC:
Notwithstanding the mitigation.

WILLIAMS J:

Well, you see, I don't, one, I don't think you have to read it that way and anyway remedy can be payback so that the overall effect is non-material even if there is site-specific harm because you're paying back in some other way. I can't think of circumstances but on land that is done. It's not uncommon.

GLAZEBROOK J:

Well, remediation usually means after the fact, so there has been harm in the middle, because you can never take away the fact that you've dug up something. I'm just thinking in inland terms for that period that it's been dug up, and the question is does remediation, putting it all back in, actually restore it enough that overall it's immaterial, isn't it?

MR SMITH QC:

There will be a view, in some cases correct and other cases not, depending on the facts, that remediation doesn't achieve the full effect of restoration of what was formerly there.

GLAZEBROOK J:

Absolutely.

MR SMITH QC:

I accept that. I'm not – but that doesn't alter the fact that there is likely to be a difference in the meaning of this Act between the terms "remediation" on the one hand and "mitigation" on the other.

WILLIAMS J:

Yes.

WINKELMANN CJ:

Okay, so I think we've got your submission on that, thanks, Mr Smith.

MR SMITH QC:

Next point I wanted to come to was AMA and I can deal with that very quickly.

WINKELMANN CJ:
The acronyms.

MR SMITH QC:
I'm very sorry.

WINKELMANN CJ:
Don't overload my mind with the acronyms. Adaptive management.

MR SMITH QC:
What happens, your Honour, is that you learn them then you start using them unconsciously. I'll unlearn and say "adaptive management approach", which is what it's called, and the only point that I wanted to make, having heard what Mr Smith said yesterday, Mr Martin Smith, and what Mr Gardner-Hopkins has said today, is that a ready reference guide to the arguments which are made, and the arguments which are made in response to it by TTR because it is in the nature of a cross-appeal, are set out in the schedule at the end of the primary submissions made by TTR. You just simply have them available there to cross-reference it, and that, for instance, deals with the, or should I say it answers all the arguments made about conditions 51 and 5, et cetera. You can just go through them and have a ready reference.

Next point is in relation to seabirds and mammals which was under course of discussion yesterday and in particular, as has arisen during the course of the hearing from time to time, the question of what population effects or effects at a population level are, and in argument I have said that that is a term of art and the respondents don't accept that. It's also been the subject of discussion between his Honour, Justice Young, and Mr Martin Smith. There is, as it turns out, some assistance on this term which can be obtained from the DMC decision. If you go to page 102.0274 you there see a table which talks about the consequence levels for intensity for the activities in relation – it's non-species specific. It relates to all species. And, for example, it describes "negligible" and in the third –

WINKELMANN CJ:

It's page 32.

WILLIAMS J:

Page 32 intrinsic.

MR SMITH QC:

I'm sorry, do you have that table?

WINKELMANN CJ:

Yes.

MR SMITH QC:

And in the third column: "Interactions may be occurring but unlikely to be ecologically significant (<1% changes in abundance, biomass, or composition)," et cetera, "or to be detectable at the scale of the population, habitat or community," and mentioning the word "population" in I think each of the sections of that column right the way down to the bottom, it gives an escalating description of scales of ecological responses, referring in each case to effects on population size on a percentage basis according to what is known to be there in the first place. So that's –

GLAZEBROOK J:

What was known to be there in the first place?

MR SMITH QC:

Well, no, this is the question of pre-commencement monitoring. I'm going to come on to that just to make sure there's no –

GLAZEBROOK J:

Okay, I understand, sorry.

MR SMITH QC:

Only dealing with what this term means.

WINKELMANN CJ:

So you're saying this is a disaggregation of what is meant in a composite way with population effects?

MR SMITH QC:

Yes, and what I'm meaning to say is that –

GLAZEBROOK J:

So kit didn't they refer back to it then or put those figures in the conditions rather than the very vague conditions that were put at the back?

MR SMITH QC:

Well, I'm not sure but I think that there are some later provisions in the DMC which shows that in terms of what an effect at a population level is, it's anything above "significant" which seems to be to include negligible – sorry – to be above negligible, minor or moderate on this table. All that's happened here is –

GLAZEBROOK J:

Sorry, where did you say that was?

MR SMITH QC:

I'm coming to that.

GLAZEBROOK J:

Okay, sorry.

MR SMITH QC:

All that's happened here is that there has been a degree of shorthand used by the experts and they, in my submission, all understand what they're saying. There is no reason for us to be concerned that they may have had a less than perfect understanding of what they were discussing.

WINKELMANN CJ:

The only problem with that though is that these are conditions which are legally enforceable, aren't they, and one would expect them to be sufficiently – to stand on their own terms?

MR SMITH QC:

Yes, but they stand – well, I can certainly deal with that, but they stand to be perfected by further expert input, both by the EPA and by the independent experts which are hired by TTR who presumably, having been involved in the application for consent, will have no less of an idea as to what is in effect at a population level effect at that time than they did during the time when the consents were applied for.

WILLIAMS J:

So this was Dr MacDiarmid's table, was it, in her report?

MR SMITH QC:

I don't know that it was Dr – I am told that it is Dr MacDiarmid's table.

WILLIAMS J:

So that's quite useful because it's got its attached numbers. That's good. But everyone agrees that they don't actually know what the population is so they won't know whether they're breaching them.

MR SMITH QC:

No. That is not the position. That's – the point of pre – at this point all that the experts are dealing with is what in principle is a population effect.

WILLIAMS J:

Yes, sure, but if you're saying we apply that condition using these numbers, so a 50 to 90% kill rate is severe, but if we don't know what the absolute population is how do we know whether we've hit the kill rate?

MR SMITH QC:

That is the point of the pre-commencement monitoring under condition 48 and the reason – in other words, these are the concepts which you apply to the data which you later ascertain as to population numbers and, indeed, to a good many other things. The rationale for why you do that at a later point as opposed to an earlier point is abundantly clear in the submissions made at paragraph 60 and onwards of TTR in relation to –

WILLIAMS J:

Here, in this Court?

MR SMITH QC:

In this Court. And that refers to and relies on the evidence of Dr Govier for TTR. That is evidence which dealt with the rationale for carrying out pre-commencement monitoring at a later stage as opposed to doing it all before the first application. There are two applications that were made. One was, I think, in 2014. It matters not when it was. This application was filed or lodged in 2016. As expressed in Dr Govier's evidence, the concern was on an expert basis that if all the ecological evidence was compiled as a result of data collection and surveys carried out over a number of years and included in the application then by the time the application was dealt with they'd been through one appeal, two appeals, three appeals, possibly gone back to the DMC, and then began mining effects. The data on which the seabirds monitoring condition was to be settled by that time could well be out of date or even invalid, and this is clearly what his evidence says, and that is the rationale for the work being done post the application and for having heard at great length not only complaints about it being done later as opposed to sooner but also the rationale for doing it later as opposed to sooner. The DMC accepted the evidence that it should logically and rationally be done later, not sooner, and –

WILLIAMS J:

Where do they say that?

MR SMITH QC:

That's, well, it's implicit that they did if there's not a clear paragraph because they approved the consent on the –

WILLIAMS J:

Sure, but they didn't –

MR SMITH QC:

Well, they heard Dr Govier's –

WILLIAMS J:

It would help if, because I can't remember everything that's in those thousands of paragraphs, if at some point you could send a note pointing to it, that would be helpful.

MR SMITH QC:

Yes, I will, Sir. I'm grateful for the opportunity. Now the next issue is the question of – it's the last of the major issues that I need to deal with which is the question which arose –

WINKELMANN CJ:

Before you do, can I just take you back to your answer to me when I said, queried with you about the difficulty caused when you go to enforce these conditions because there's no detail, and you said it would stand to be enforced by whom?

MR SMITH QC:

The enforcement provisions in the Act are, first of all, by way of – I've just got them noted down here and I'll find them for you in a moment. They are section 125 and 126 which are abatement. I'll just take you to them. Just so that there's no mistake about this, first of all, I'll begin with 76. Section 76 is "Environmental Protection Authority may review duration and conditions", and so section 76 provides – it may serve a notice on the consent holder of its intention to review the duration of a marine consent and the conditions of

consent at any time or times specified for that purpose in the consent by way of the following purposes: "to deal with any adverse effect on the environment that may arise from the exercise of the consent and with which it is appropriate to deal after the consent has been granted;" "any other purpose specified in the consent," and it goes on.

There is then section 87, and these all subsist wholly irrespective of any possibility of adaptive management. "Change or cancellation of consent –

WINKELMANN CJ:
I'm wondering about what happens when you go to enforce under, say, the insurance policy for adverse population effects, and where would you do that?

MR SMITH QC:
There would only – if we're talking about insurance or bond then there would only be the insurance. So we would go – but in terms of the actual process, there is section 115 which is enforcement orders: "In this Part, enforcement order means an order made by the Environment Court or an Environment Judge (… in accordance with section 114) that does 1 or more of the following: requires a person to stop doing something, or prohibits the person from starting to do something that, in the opinion of the court, breaches or is likely to breach this Act … requires a person to do something that, in the opinion of the court, is necessary to" – avoid, remedy, mitigate, et cetera, et cetera, and there's a detailed provision.

WINKELMANN CJ:
Yes, so just out of fairness to you I just wonder how an Environment Court Judge would know what "population effects" means and I know you'd say they'd go back to that paragraph but they might well face an argument from the person who's subject to the application for enforcement that that chart is not in fact the content of population effects, so where's the evidence it is?

MR SMITH QC:

But that would just be a matter to be decided on the facts in the case at hand. It could well be that that was being advanced as a perfectly respectable defence. The point is though that we have population effects ultimately decided by means of the expert evidence, the setting of the – the carrying out of the pre-commencement monitoring and the decision in the seabirds plan or the marine mammals plan to decide what are those levels, and if you fall below them then so far – putting aside any question of a prosecution, you are required to stop. These conditions, conditions 9 and 10 and 66 and 67, clearly say that you're required to stop unless you can show how it is that you're going to bring yourself within those conditions. If you decline – because that's what the conditions say. If you decline or fail to demonstrate how you're going to bring yourself inside the conditions then that's the beginning of a process where it may well be that enforcement order is applied for.

WINKELMANN CJ:

So the short answer to your point is, well, the Court would just have to take a view about what the content of the population effect is and they would have a sufficient basis for that from the decision.

MR SMITH QC:

That is the position but the position ought to be clear from what emerges in the process envisaged by the consent in the marine mammal plan, for instance, which is sought to be enforced. It produces in the end a clear result, whether anybody likes it or not, and after you have failed to comply with it and failed to show how you're going to comply with it then you're obliged to – you are outside your consent, and not only that, you can, as Mr Martin Smith indicated earlier in argument, you can be prosecuted for it but he relied I think on the prospect of prosecution because there was a higher standard of proof than there would be in a civil case and therefore it would be more difficult. I would say, with respect, that even in a number of criminal cases there are standards which are not necessarily clear in every case and yet criminal liability hinges upon them. For example, criminal nuisance under the

Crimes Act is essentially similar to a civil negligence act in every single case. It's a complex issue for a jury, for instance, to understand, if there was a jury trial, and there are no clear guidelines in the Act or anything else until you look at it at a case by case basis.

WINKELMANN CJ:
So just to be clear on what you're saying, it would emerge from the DMC but also from the conditions or from the management plan, or both?

MR SMITH QC:
Yes. So as a result of the result of the monitoring you know what the population is present, under, for example, well, under the pre-commencement monitoring condition, condition 48. Having sorted that out, you then enter into and conclude, with the assistance of experts from TTR certified by the EPA with the use of their expertise and other bodies as well which are specified in the condition, what is the level of seabird population present and after that you know what the effect, as a matter of expertise, what the effect on a population basis is or what adverse effects on a population basis are, and we saw that from the table that I showed you a little earlier. We then get to the point where, contrary to TTR's expectation, seabirds have adverse effects higher than the limit which is covered in their consent. They have to stop their activities unless they, according to the clear wording of condition 9 or 10, I can't recall which one it is applies to seabirds, they have to stop their activities in the event they cannot satisfy EPA.

WINKELMANN CJ:
Okay, right.

GLAZEBROOK J:
Can I just take you back because I quite understand conclusions that say, well, there's not much doing a whole pile of updating information before you know that you're proximate to the time, but what we're looking at, as I understand it, with seabirds and mammals is absolutely no information on the population whatsoever and if there's a requirement to be caution – because

you said something like higher than the limit in the consent, but in fact you have no idea what that limit is because there's been absolutely no information before the pre-commencement and how can that be consistent with caution?

MR SMITH QC:

There is quite a body of evidence, for example, in relation to marine mammals as to what the population levels are, and they're in the decision that I referred, yesterday I think or the day before, to some of those paragraphs. However, it is correct to say that, and the DMC went out of its way to say, that because, these are my words, not its, because marine mammals don't line up for roll call it's not possible to know, at least on the information presently available, what numbers there are. However, if you carry out pre-commencement monitoring then you will know, and whatever the limit is –

GLAZEBROOK J:

But giving the consent before you know anything about that, how is that consistent with monitoring, and how is it actually consistent with having the best available information either?

MR SMITH QC:

There's post-commencement monitoring as well. In other words, you don't just have pre-commencement monitoring. Find out what the limits are, say: "Right, we can't have adverse effects on a population level which is X," and then leave it. You're required to carry out post-commencement monitoring as well so you know and are required to report on that very fact, I think on a quarterly – in fact you are required to on a quarterly basis as we see, for example, from condition 8 as to what is happening in respect of those conditions.

GLAZEBROOK J:

Well, what happens with caution though before you grant the consent? Is that just the answer?

MR SMITH QC:

That is the answer.

GLAZEBROOK J:

You deal with it by monitoring both pre and post?

MR SMITH QC:

One might think that there is a reasonably high level of caution, in my respectful submission, implicit in the requirement to have, as against existing levels as they are ascertained, provided they are properly ascertained, no adverse effects at a population level. Therein lies the caution. And that's my submission.

WILLIAMS J:

If you look at schedule 6 that is attached to the pre-commencement monitoring in condition 48…

GLAZEBROOK J:

Have we got a page?

WILLIAMS J:

330 is the schedule, intrinsic 330, and the condition is at 292.

MR SMITH QC:

I'm sorry, you're ahead of me, Sir. Can you just tell me where –

WILLIAMS J:

Condition is 48 at page 292 and then the attached schedule 6 at 330. I'm just trying to understand, your point was that pre-commencement there'd be a head count, so to speak? And if you look at marine mammal monitoring, fur seals, and then marine mammal acoustic surveys, which is the monitoring of indicators that seems to be required by condition 48, it doesn't seem to indicate that there's a population count required. Am I missing something?

MR SMITH QC:

I don't anticipate that they would necessarily have a head by head count for each blue whale, for instance, but they would have, through this exercise, a very clear indication of what the population is generally in the area in which they're surveying and that if they –

WILLIAMS J:

But they're not instructed to find that.

MR SMITH QC:

Well, I imagine that the experts would have said that it's not possible to isolate every single one in the area in any way, shape or form, but they get an indication as a result of these survey levels. All these things are measures. They can be no more than measures which is as good as reasonably can be obtained because that's what the requirement is in the Act for the level of information required, and then by adopting the same measure at a later point post-commencement and there is a drop in any of those data numbers then you have the possibility of an adverse effect at some level.

What I do mean to say, Sir, is that these – expert evidence was given on the subject and they felt that, having heard what these experts had to say, that this was an acceptable means of determining whether or not, through other means as well, there would be adverse effects at a population level. In my submission it would be necessary for the respondents to do what they haven't done which is to show that on the basis of an acceptable and plainly, so far as this Court is concerned, preferable assessment they were so wrong on the facts as to have misdirected themselves and, with the greatest of respect, the respondents haven't gone into the conditions in that kind of way because that's not this kind of appeal. That's the stuff of general appeals, in my submission. It's far too much of detail at this level.

WINKELMANN CJ:

All right, so I think we have your submission on that point.

MR SMITH QC:

Just coming back to what I want to deal with, there was a question during yesterday which is when do the effects stop, and I wanted to just give you some paragraph references in the DMC decision which give you some assistance with that. First of all chapter 1 of the DMC decision, paragraph 43, the effects will stop when the mining stops, or within a reasonable time after that point. Effects will be long term, but they will not be permanent. Then paragraph 40 in chapter 1: "The consent holder will not be handed a carte blanche in respect of this mining operation. They will have to conduct the operation in such a way that they avoid adverse effects, remedy adverse effects, or mitigate them. We have imposed conditions which manage the potential for effects on the environment …"

GLAZEBROOK J:

I'm sorry, I didn't catch the paragraph number.

MR SMITH QC:

40. Then in relation to effects –

WINKELMANN CJ:

"We will impose conditions which", "we impose conditions which"?

MR SMITH QC:

"Manage the potential for effects on the environment in each of these three ways." It clearly says what they do. Effects on reefs was a particular matter of Mr Fowler's concern and he relied, I think, on paragraph 350. I simply ask you to read that in conjunction with 349 and 353.

WINKELMANN CJ:

Can you repeat those paragraphs again?

MR SMITH QC:

Mr Fowler is relying on paragraph 350 and I ask you to read that in connection with 349 and 353.

The rest of the matters that I have are in the nature of housekeeping but I'll go through them very quickly. The first is the question of substrate which your Honour, Justice Williams, asked my friend, Mr Salmon, about today and the question was: "Do you know what's under the level of sand which is going to be taken out in the mining operation?" and in response to that Mr Salmon found himself saying that he didn't and he suspect that TTR didn't either. In fact, the answer may be found at a number of points but it will suffice if you look at paragraph 3.31 at page 201.0049.

GLAZEBROOK J:
Sorry…

MR SMITH QC:
Yes, I know. It's under tab 36, page –

GLAZEBROOK J:
Just tell us the paragraph number.

MR SMITH QC:
3.3.1.

GLAZEBROOK J:
Of what?

MR SMITH QC:
This is the Impact Assessment and it is –

GLAZEBROOK J:
Okay, sorry, I didn't know what you were talking about.

WINKELMANN CJ:
Start at the beginning again. What volume, Mr Smith?

MR SMITH QC:

It's in the hard copy, volume 201, Impact Assessment behind tab 36, and the page number – sorry, I'd just gone to it thinking that you're looking on your screens – 201.0049, paragraph 3.3.1 Geological Setting: "TTR commissioned a desktop assessment of the geological conditions of the project area from the STB by NIWA (Orpin). Orpin provides a detailed geological summary of the STB and identifies it as a shore-connected Holocene sand prism that is up to 20 metres thick at the coast, and extends seaward to approximately 22 to 29 kilometres offshore. At the seaward limit the sand prism thins to a transgressive erosional surface, delineated by coarse-grained lag deposits. The project area borders these two environments within the sand prism," meaning that mining is done within the sand. The mining goes down to a maximum of 11 metres and although this matter hasn't emerged in the series of appeals since the DMC in any way, shape or form, my instructions are that they are in sand the whole time and what they leave behind is sand. I can also say that they did their own drill holes and in addition they have the benefit of the petroleum mining drill samples, core samples, which are taken to a considerable depth, of course, but are on open file record and that's what enables Orpin et al to do their desktop surveys. When it says "desktop" it doesn't mean to say they're not using proper information. They are.

Finally, two more things. The first is the question of condition 8 which my friend, Mr Salmon, relied upon and read somewhat differently or interpreted somewhat differently than the interpretation which, in my submission, is the correct one. Condition 8 is in the conditions and the DMC volume at page 102.0522 and I think Mr Salmon's point was that what TTR was effectively able to do was to say that it's within five years after the cessation of all mining and so that in point of fact it had a time window of something in the order of 40 years. Read a little more carefully, I'd urge on your Honours a different construction. When you get to the third paragraph, or subparagraph, of 8: "In the event that annual monitoring shows that recovery is not on track to be achieved, then the consent holder … in the next quarterly report, shall provide information …" and then (d) explains how the consent holder will comply with the obligation to demonstrate. That clearly indicates, if we're

carrying out annual monitoring, that the expectation in relation to recovery of the benthos would be expected to be observable within a period of not five years but one year because that's what the condition says, and then, of course, in the event that you can't show that it is recovering and you can't show how you're going to do it, then as the consent holder you've got enforcement problems.

GLAZEBROOK J:
So that's after the 35 or not, after the 35 years or…

MR SMITH QC:
No, you've got to do it straight away because you have to explain how the consent –

GLAZEBROOK J:
No, no, sorry. Do you say that it is a rolling thing so that if you've done a bit here and then move over it's got to be recovering already within one year?

MR SMITH QC:
That's the only construction you can place, in my submission, on that –

GLAZEBROOK J:
But it's not realistic, is it, given the nature of the operation?

MR SMITH QC:
No, given the nature of the operation it is realistic. What happens is that you start in one area, you mine all of the deposits in that area and you move to the next.

GLAZEBROOK J:
But it's only two kilometres within the site. You only do two kilometres with where you start. It doesn't say you – well, I mean, it doesn't make any sense to me actually anyway but – that it's only the two kilometres but…

MR SMITH QC:

Well, you don't go over the same ground twice. One doesn't go over the same ground twice. It begins to recover and continues to recover after you've mined it and the indication from this is that it starts to recover within a calendar year because you report quarterly and are required to show recovery commencing within a calendar year and if you can't the consequences which I talked about a little while ago begin to accrue.

WILLIAMS J:

Can I just ask a point of detail? So the indicators of recovery are in the management plans, are they? Is that – how do we know they're recovering?

MR SMITH QC:

Actually, I'm not exactly sure what –

WILLIAMS J:

It just might help if at some point you provide that information.

MR SMITH QC:

I'll ask just for a note to be sent in and circulated around all the other parties at all as well.

Now that's the substrate. The last point is a completely housekeeping point, but forgive me, which is that if you go to the volume which has the Hansard debates in it you will recall some time ago that Justice Williams asked about whose legislation this was and which, misunderstanding the question, I said, well, it was National's, but you wanted to know how it was that Mr Smith was speaking to the Bill. That becomes clear if you look under the next tab which is 16 in volume 3 and that is a subsequent debate, and at the end of that or near the end of the Minister's, Ms Adams', speech on the third reading at page 478 you will see that she says at the end of the second to last paragraph: "Finally, can I acknowledge and thank my predecessor, the Hon Dr Nick Smith, for his commitment to the shaping of this legislation and for taking charge of seeing it into this House." So it was the predecessor.

You may also think that the next five lines and the first five lines of Ms Moana Mackey's speech in response have a certain resonance with these proceedings.

WILLIAMS J:
When you said this really was housekeeping you intended that pun?

MR SMITH QC:
I'm sorry, Sir?

WILLIAMS J:
Never mind.

WINKELMANN CJ:
Right, does that complete your submissions?

MR SMITH QC:
That completes my submissions.

WINKELMANN CJ:
Thank you, counsel, for your extremely helpful submissions. We will take some time to consider our decision. Before we retire, I would like to add also my thanks to all those who have travelled to be here today to hear this appeal. We understand the significance of the issues to New Zealand and to the particular region of New Zealand.

KARAKIA WHAKAMUTUNGA

COURT ADJOURNS: 1.10 PM