IN THE SUPREME COURT OF NEW ZEALAND **SC 28/2020**

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

SYNOPSIS OF SUBMISSIONS FOR THE ATTORNEY-GENERAL AS AN INTERVENER

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To the Registrar of the Supreme Court

And to the appellant and respondents

1. The Attorney-General has been granted leave to intervene on issues raised in this appeal relating to the Treaty of Waitangi, Māori customary interests, and the applicability of tikanga to marine and marine discharge consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**the Act**).[1]

2. The Attorney-General's primary focus is on the general principles and approach adopted by the Court of Appeal rather than on the specific consent decision at issue between the parties.

3. These submissions address:

   3.1 section 12 of the Act, which specifies how Treaty principles are given effect;

   3.2 the interpretation of "existing interests" in s 4 of the Act; and

   3.3 the nature of the decision-maker's task under s 59 of the Act.

Section 12 specifies how Treaty principles are given effect to under the Act

4. Section 12 of the Act specifies the provisions of the Act which "recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of [the] Act".[2]

5. In the Courts below, the High Court considered s 12 defines how the Treaty is incorporated into the Act.[3] The Court of Appeal said s 12, on its face, appears to be a non-exhaustive statement of the principal ways in which the Act seeks to implement the Crown's obligations under the Treaty. The Court considered, however, that the question of whether s 12 is exhaustive is "more apparent than real" and need not be resolved in this case. Rather, the focus

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1 Minute of Williams J, 11 September 2020 at [1]; *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZSC 67.

2 See *Klink v Environmental Protection Agency* [2019] NZHC 3161, (2019) 21 ELZRNZ 493 at [56].

3 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 [**High Court Judgment**] at [241].

should be on ensuring the provisions referred to in s 12 "are read in a way that ensures that s 12 accurately characterises their effect."[4]

6. Section 12 is not an operative provision (unlike, for instance, s 4 of the Conservation Act 1987). Section 12 specifies the provisions Parliament has decided to put in place to give effect to Treaty principles under the Act. Those provisions, not the chapeau to s 12 (set out in paragraph 4 above), specify the standards decision-makers must apply. Those provisions include:

   6.1 Section 18, which provides for the Māori Advisory Committee to advise marine consent authorities so that decisions made under the Act may be informed by a Māori perspective. The High Court has rightly said the Committee has a significant role in the legislative framework of the Environmental Protection Authority (**EPA**).[5]

   6.2 Section 59 of the Act, which provides the principal means by which Māori interests influence decision-making under the Act.

7. Under s 59 a marine consent authority, in considering an application for a marine consent, must:

   7.1 "take into account" any effects on existing interests of allowing the activity, any other applicable law, and any other matter the marine consent authority considers relevant and reasonably necessary to determine the application (s 59(2));[6] and

   7.2 "have regard to … any submissions made and evidence given in relation to the application … and any advice received from the Māori Advisory Committee" (s 59(3)).[7]

8. The legislative history shows s 12 reflects a deliberate choice by Parliament. The select committee on the Bill rejected a proposal to include a Treaty

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4 *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, (2020) 21 ELRNZ [**Court of Appeal Judgment**] at [162].

5 *Klink v Environmental Protection Authority* [2019] NZHC 3161, (2019) 21 ELZRNZ 493 at [57]. There Cull J said the Māori Advisory Committee, "was established under the Environmental Protection Authority Act 2011, and its function is to provide advice and assistance to the Authority on matters relating to policy process and decisions. The legislation requires that the advice and assistance must be given from the Māori perspective and come within the terms of reference as set by the Authority. The Authority in turn must have regard to the advice of the Māori Advisory Committee." (Footnotes omitted.)

6 Sections 59(2)(a), 59(2)(l), and 59(2)(m).

7 Section 59(3)(a) and 59(3)(c).

provision similar to s 4 of the Conservation Act 1987 (requiring all decision-makers to "give effect" to Treaty principles).[8] A Supplementary Order Paper to introduce a general "give effect" provision was also defeated in the House.[9]

9. Parliament preferred to use language that elaborated or specified the steps a decision-maker must take to give effect to Treaty principles. This contrasts with "unelaborated" Treaty provisions such as s 9 of State-owned Enterprises Act 1986, which apply across an entire legislative regime.[10] The move away from unelaborated references was consistent with Law Commission submissions and recommendations.[11]

10. The Treaty may be an extrinsic aid to interpreting ambiguous statutory language, and may be a relevant consideration even if a statute is silent on the relevance of Treaty matters. Neither situation applies here. Parliament has made its intention plain. It has chosen to provide specific mechanisms and standards for decision-makers. Any application of the Treaty and Treaty principles must be assessed in that light.[12]

Customary rights and interests under s 59

11. Section 4 of the Act defines the categories of "existing interests" which decision-makers must take into account under s 59.

12. The Court of Appeal found the reference to "existing interests" in s 59 must be read as "including the interests of Māori in relation to all the taonga referred to in the Treaty."[13] The Court appears to say that in order for the decision-maker's consideration under s 59 to be consistent with the chapeau in s 12

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8 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (231-2) at 4. The amendment sought, and which was not accepted, was, "The Bill should impose a general obligation on the Crown to administer and interpret the Act so as to give effect to the Treaty/Te Tiriti principles as legislation such as the Conservation Act 1987 does." .

9 Supplementary Order Paper 96 (16 August 2012) 682 NZPD 4519.

10 Another such provision was s 4 of the New Zealand Public Health and Disability Act 2000. See Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 531–533, which says at 531 on this approach to Treaty clauses, "Parliament in recent years has *not* used general wording relating to the Treaty, but has instead been more explicit: it has worked out precisely how it wants particular legislative schemes to provide for and protect Māori interests in the light of the Crown's responsibility under the Treaty."

11 See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC, SP9 2001) at [352]–[353]. For commentary on this drafting approach, see Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 101. See also Geoffrey Palmer "The Treaty of Waitangi – Where to from here" (2007) 11 Otago LR 381 at 383 and Matthew SR Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 212. Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 533–534.

12 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46].

(referring to the Crown's responsibility to give effect to Treaty principles), the definition of existing interests needs to be read in light of the Treaty's recognition of Māori rights and interests.[14]

13. For the reasons set out below, the Attorney-General submits the definition of "existing interests" also needs to be read in light of the statutory history, scheme, and purpose. The Court of Appeal's approach risks mis-stating the relationship between customary rights or interests and the statutory scheme. Customary interests may manifest in different ways in future cases, and the Court of Appeal's approach is therefore potentially problematic for decision-makers.

"Lawfully established existing activity"

14. Section 59 requires decision-makers to take into account the effects of a proposed activity on the environment and on "existing interests". "Existing interests" is exhaustively defined by reference to six categories. Each category relates to interests that are identified and established separately from an interest raised simply by those referring to those interests. "Lawfully established existing activity" is one of the six defined categories.

15. In relation to legislative history, the departmental report to the select committee, and the committee's report itself, indicate an intention that existing interests should be "explicit and identifiable".[15]

16. Tikanga interests, such as particular kaitiaki interests, are ordinarily a matter for evidence, unless the interest is so well-known that it is "notorious".[16] Even if the court accepted that the principle of kaitiakitanga was so well-known as to not require proof by evidence, the status of a particular group or individual as kaitiaki, and the particular nature of that obligation in a locality, may not be so well-known or established. (That such an issue did not arise here does not preclude it arising in the future.) In some cases, claims to mana whenua or mana moana may be disputed between groups. Further, differing tribal histories, different accounts of tikanga, and different accounts of a group's

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13 Court of Appeal Judgment at [163].

14 Court of Appeal Judgment at [162], [163], and [166].

15 Ministry for the Environment "Departmental Report on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill, March 2012, at 29.

16 *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378 at [171].

representative authority or status may be presented to the decision-maker. A decision-maker under the Act, while not adjudicating claims as a matter of tikanga, may have to consider the specific issues raised in any particular situation, in relation to a statutory function or decision.

17. In that regard, it is relevant that an "existing interest" under paragraph (a) of the definition is an interest in a lawfully established existing *activity* and s 60 directs the decision-maker to specific considerations that focus on identifying and delineating particular elements, and the effect, of the proposed activity on the existing interest.[17]

18. An approach that treats all customary interests as falling within paragraph (a) of the definition of "existing interest"–generally, and without further consideration being given to the detail of the interest–would not be consistent with the statutory scheme.[18]

Interests in the natural environment

19. The Attorney-General respectfully submits caution is needed in treating "the marine environment", and all fisheries as "taonga".[19] Taonga status ought to be demonstrated through particular cultural or spiritual significance and korero tuku iho, and a number of indicia may be relevant.[20] Taonga status may engage specific obligations on decision-makers: it may be inapt to treat an entire "environment" as taonga or to treat fisheries generally as having that status.[21]

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17 In terms of kaitiakitanga, for example, a particular activity that manifests from the exercise of kaitiakitanga, and on which the consent activity will impact, must be identified. Neither the existence of a kaitiakitanga interest or obligation, nor the rights/responsibility to exercise kaitiakitanga alone will be enough.

18 The Attorney-General agrees with the Court of Appeal that the Treaty recognises the continued existence of Māori customary rights and interests. But he does not read the Court as saying that the Treaty does more than that, for instance by establishing the content of those rights, how that content may be expressed in common law or relation to statute, or establishing that the Treaty delineates which group holds which rights. Article 2 represents the continuity of certain rights post-1840 but without determining how such rights are given expression to in relation to other parts of the broader legal system. The constitutional principles that inform Article 2 of the Treaty are therefore not operational mechanisms for the exercise of statutory limits under the Act.

19 Court of Appeal Judgment at [170] and [174].

20 For example, see Waitangi Tribunal in *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identify* (Wai 262, 2011) vol 1, at 114–115 and 117.

21 This was discussed by the Waitangi Tribunal in *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identify* (Wai 262, 2011) vol 1, at 269. See also the Tribunal's *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 81. In the former the Tribunal disagreed with the idea that the environment as a whole is a taonga and said, "Such an all-encompassing interpretation devalues the status of taonga and the rights and obligations that flow from them."

Undetermined claims under the Marine and Coastal Area (Takutai Moana) Act 2011

20. The Court of Appeal considered that customary interests that are the subject of undetermined applications under the Marine and Coastal Area (Takutai Moana) Act 2011 (the **MACA**) represent customary interests that qualify under (a) of the definition of "existing interests".[22] The Court reasoned that the MACA does not bring the underlying interests into existence, but rather provides for their recognition; and that pending recognition under the MACA "tangata whenua with customary interests continue to have and enjoy those customary interests."[23]

21. The Attorney does not dispute that recognition of interests under the relevant MACA process does not bring those customary interests into being. But, he says such interests are not "existing interests" under s 4(a) of the EEZ Act, construed in light of the statutory scheme:

    21.1 Undetermined applications may be disputed between groups or parts of descent groups.[24] It cannot be presumed that an application that is yet to be heard accurately reflects customary interests; and it not the role of the EPA, or any other decision-maker under the Act, to pre-empt the outcome of processes under the MACA.[25] (The situation may be different for kaitiakitanga interests under the MACA (s 47), for which there is no statutory criteria or prior requirement for recognition by either the High Court or the Crown.)

    21.2 Paragraph (f) of the Act's definition of "existing interest" specifically includes "a protected customary right or customary marine title *recognised* under [the MACA]" (emphasis added). A protected customary right or customary marine title may only be recognised by way of an agreement with the Minister responsible for the Act or by way of an order of the High Court.[26] Including undetermined MACA

22 At [168].

23 Court of Appeal Judgment at [168].

24 See for instance *Re Ngāti Pahauwera* [2020] NZHC 1139.

25 *Klink v Environmental Protection Agency* [2019] NZHC 3161, (2019) 21 ELZRNZ 493 at [66].

26 Marine and Coastal Area (Takutai Moana) Act 2011, s 94.

applications in the sub-section (a) definition of "existing interests" cuts across Parliament's wording in sub-section (f).[27]

Tikanga as the "applicable law"

22. Tikanga Māori is a system of customary law and practice that either needs to be proven by evidence,[28] unless a particular proposition is so well-known (by prior proof) so as to not be subject to a requirement of proof. The latter has been found to include the treatment of whanaungatanga,[29] and the breadth of familial connection in Māori society.[30]

23. In *Takamore v Clarke* tikanga was not treated as a body of applicable law. Instead, this Court found that tikanga Māori must be considered as a set of values which inform the common law, to be considered alongside—and with regard to—relevant statutory and common law considerations.[31]

24. In light of this approach, it does not necessarily follow that because tikanga Māori is recognised by the common law, tikanga Māori falls within the meaning of "applicable law" as used in s 59(2)(l).[32] Tikanga Māori encompasses a range of rights, obligations, principles, norms, associations, and relationships. This requires caution in referring in general terms to tikanga Māori as a single body of law. It demonstrates s 59(2)(l) is an unlikely location for Parliament to signal the direct incorporation of tikanga Maori within a statutory regime. The Attorney-General submits that such incorporation would be made expressly by Parliament.

25. The EPA, or a decision-maker considering a marine consent application, will nevertheless need to engage with relevant tikanga Māori where raised in submissions or evidence on an application, and on the terms expressed by the submitter. As the High Court has recently held, albeit in the resource management context, where iwi claim a particular outcome or weighting is required by tikanga Māori, decision-makers must meaningfully respond to that

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27 The High Court has favoured this approach in *Klink v Environmental Protection Agency* [2019] NZHC 3161 at [83], and in its judgment in these proceedings, High Court Judgment at [233].

28 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95] per Elias CJ.

29 *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 (CA) at [38].

30 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

31 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ, and [150] and [164] per Tipping, McGrath, and Blanchard JJ.

32 Court of Appeal Judgment at [178].

claim with reference to the specific tikanga asserted and in relation to the specific function at issue (that is, not in the abstract).[33] This Court's approach in *Takamore v Clarke* demonstrates that the decision-maker's task is to identify the specific values—based on evidence—that inform the decision-making task or discretion at issue.

Statutory requirement of consideration by the decision-maker under s 59

26. Section 59 matters are mandatory considerations.[34] As the High Court has recognised, the decision-maker's consideration of Māori interests is not confined to those that come within "existing interests" under s 59(2)(a) of the Act.[35] The requirement to "take account" or "have regard to" considerations requires a decision-maker to be informed and to consider the matters closely, though the weight or balancing to be given to different criteria will generally be a matter for the decision-maker.[36]

27. The Court of Appeal was correct to highlight the need for the decision-maker to clearly set out their reasoning. However, the Court's suggestion that s 59 required a decision-maker to "justify a decision to override existing interests of this kind, absent the free and informed consent of affected iwi" overstates the position. [37] The Court's approach in a later paragraph, that if the Decision-Making Committee concluded "that consents should be granted notwithstanding their inconsistency with tikanga, reasons needed to be given for reaching that conclusion" is more apt. This Court has held s 4 of the

33 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited* [2020] NZHC 2768 at [68] and [70].

34 *Klink v Environmental Protection Agency* [2019] NZHC 3161, (2019) 21 ELZRNZ 493 at [20]–[21].

35 *Klink v Environmental Protection Agency* [2019] NZHC 3161, (2019) 21 ELZRNZ 493 at [66].

36 *Christchurch Medical Officer of Health v J & G Vaudrey Limited* [2015] NZHC 2749, [2016] 2 NZLR 382 at [77]–[78]. This was referred to in *Klink v Environmental Protection Authority* [2019] NZHC 3161 at [59]. See also *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 at [63], as referred to in the High Court Judgment at [159].

37 Court of Appeal Judgment at [171].

Conservation Act, which is an unelaborated "give effect" provision, does not require decision-makers to have Māori consent before taking a decision which is contrary to their preferred outcome.[38]

4 November 2020

J R Gough / D A Ward / D Hunt
Counsel for the Attorney-General

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The applicant
AND TO: The respondents

[38] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [50(b)] and [95]. The Supreme Court referred to *Ngāi Tahu Māori Trust Board v Director-General of Conservation* where the Court of Appeal held s 4 did not require whale-watching permits only be granted with Ngāi Tahu's consent (even where that consent is not to be unreasonably withheld). See *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 559.

List of supplementary authorities to be cited by the Attorney-General

Statutes

1. Marine and Coastal Area (Takutai Moana) Act 2011, ss 47 & 94

2. New Zealand Health and Disability Act 2000, s 4

3. State-Owned Enterprises Act 1986, s 9

Cases

4. *Christchurch Medical Officer of Health v J & G Vaudrey Limited* [2015] NZHC 2749, [2016] 2 NZLR 382

5. *Klink v Environmental Protection Agency* [2019] NZHC 3161, (2019) 21 ELRNZ 493

6. *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)

7. *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, [2016] 3 NZLR 378

8. *Ngāti Pahauwera* [2020] NZHC 1139

Texts

9. Geoffrey Palmer "The Treaty of Waitangi – Where to from here" (2007) 11 Otago LR 381 at 383

10. Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 101

11. Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 212

12. Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 531-534

13. Tribunal's *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 81

14. Waitangi Tribunal in *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identify* (Wai 262, 2011) vol 1 at 114-115, 117 & 269