BEFORE A HEARING PANEL: FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER	of the Resource Management Act 1991 (**RMA**)
AND	
IN THE MATTER	of submissions and further submissions on Stage 3 of the Proposed District Plan (**PDP**)

LEGAL SUBMISSIONS ON BEHALF OF REMARKABLES PARK LIMITED AND QUEENSTOWN PARK LIMITED

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MAY IT PLEASE THE HEARING PANEL:

1. INTRODUCTION

1.1. These legal submissions are made on behalf of Remarkables Park Limited (**RPL**) and Queenstown Park Limited (**QPL**) (together "**the Submitters**") in relation to hearing stream 16: Wāhi Tūpuna.

1.2. The Submitters support the intent of Chapter 39 (and the related variations) to implement the strategic direction set out in Chapter 5 of the PDP and to provide for the kaitiakitanga of Kāi Tahu as mana whenua in the Queenstown-Lakes District. However, the Submitters are concerned by the lack of rigour and balance in how the Chapter 39 provisions have been developed and notified. Inadequate consultation has been undertaken by Queenstown Lakes District Council (**Council**) prior to notification of the proposal, especially where extensive mapping is proposed on private land.[1]

1.3. The Submitters filed comprehensive submissions[2] and further submissions[3] in relation to PDP Chapter 39 Wāhi Tūpuna. The submissions questioned the sufficiency of the evidential basis for the overlay mapping. No material was available on notification supporting the often seemingly arbitrary spatial delineation. The Submitters have a particular interest in the following proposed wāhi tupuna which affect their landholdings:

a. Kawarau River - #24;

b. Kawarau (The Remarkables) - #36; and

c. Te Kirikiri – the area around Frankton.

1.4. The Submitters have considered the evidence filed by Kā Rūnaka and respectfully do not consider that this provides a clear evidential basis for the proposed wāhi tūpuna mapping and the extensive lists of identified threats. The key submissions which are therefore advanced are that:

a. The evidential onus of justifying the proposed wāhi tūpuna mapping and the extensive lists of identified threats has not been discharged;

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1 The Submitters acknowledge subsequent consultation with Kāi Tahu consultants.

2 Original Submission 3317 and 3318.

3 Further Submissions 3445 and 3442.

b. Because the evidential underpinnings of the overlay are lacking, Council's section 32 duty has not been discharged.

1.5. The Submitters continue to oppose the mapping and scheduling of the wāhi tūpuna of interest as their primary relief. Amendments to the proposed provisions are sought as alternate relief.

1.6. These legal submissions now address:

a. Case law concerning evidential principles for the identification of Maori cultural values, including in proposed planning documents;

b. The background to the mapping of wāhi tūpuna areas, whether this provides a sufficient evidential basis to justify the mapping, and the section 32 RMA implications of the evidential material available; and

c. The alternative relief now pursued by the Submitters in relation to the balance of the wāhi tūpuna provisions.

2. EVIDENTIAL PRINCIPLES

2.1. This section addresses case law concerning:

a. The appropriate evidential standard and onus on a party asserting the existence of a cultural relationship;

b. The sources of relevant cultural evidence;

c. Application of these principles in the context of similar proposed plan provisions.

Evidential Standard and Onus

2.2. **Heybridge Developments Ltd v Bay of Plenty Regional Council**[4] concerned an appeal to the High Court by Heybridge Developments Ltd against the Environment Court's decision to decline resource consents to undertake earthworks and water course modification. These consents were required to give effect to a four-lot subdivision consent granted by the Western Bay of Plenty District Council in 2006 on Heybridge's 44 ha property at Lochhead Rd, Tauranga. The site was not identified on any planning instrument as being of cultural significance.

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4 **Heybridge Developments Ltd v Bay of Plenty Regional Council** (2011) 16 ELRNZ 593.

2.3. The consents had been opposed before the Environment Court by Pirirakau Incorporated Society who argued that the site was waahi tapu due to the possible burial of their ancestor, Tutereinga, on the site. Pirirakau believed that all the members of their hapu descend from Tutereinga and that Tutereinga was buried at Tahataharoa some 600 years ago. Tradition had it that, when asked where he wished to be buried, Tutereinga replied *"bury me at Tahataharoa so that I might hear the murmur of the sea".* The whereabouts of the burial site was kept secret, as a matter of custom. Tahataharoa comprised approximately 150 ha and encompassed the development site. It was possible therefore that Tutereinga was buried on the site.

2.4. The Environment Court found that:

a. there was no evidence that Tutereinga was buried on the site or, if so, where the burial site might be and accordingly the Court was unable to make a finding that the site was waahi tapu, or was not for that matter;

b. Pirirakau held a genuine belief that Tutereinga might be buried somewhere on the site; and

c. the effect of evidence which Heybridge had adduced, for instance as to tidal movements on the site and the modifications which had occurred both to the site and surrounding area, did not persuade the Court that Pirirakau's belief was misconceived.

2.5. Accordingly, any earthworks on the site would have an adverse effect on Pirirakau's relationship with the site and the appeal against the decline of the consent was dismissed.

2.6. Heybridge argued that the Environment Court had applied an improper evidential onus on Heybridge to disprove Pirirakau's genuine belief that Tutereinga might be buried somewhere on the site. The High Court referred to earlier Environment Court and Planning Tribunal authority regarding the appropriate onus and standard of proof in claims of waahi tapu[5] and agreed that the Environment Court had erred:

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[5] **Greensill v Waikato RC** W017/95 (PT); **Te Rohe Potae O Matangirau Trust v Northland RC** EnvC A107/96; **Heta v Whakatane DC** EnvC A093/00; **Winstone Aggregates Ltd v Franklin DC** EnvC A080/02; **Gibbs v Far North DC** EnvC W076/04.

> [51] Accordingly, a party who asserts a fact bears the evidential onus of establishing that fact by adducing sufficiently probative evidence. The existence of a fact is not established by an honest belief. I am satisfied that the Court erred as a matter of law in this respect.

2.7. The High Court then turned to consider whether this error was material to the outcome of the Environment Court's decision:

> [55] In my view, there is merit in counsel's submission that the recognition and provision which is required to be made pursuant to s 6(e) is to reflect the relationship which is established on the evidence but that it does not extend to providing for a relationship which is founded on a belief, no matter how genuinely held. Of course, from Pirirakau's perspective, its belief may be central to its relationship with the site. The issue is whether s 6(e) requires recognition and provision for such a relationship.

2.8. Acknowledging that the frame of reference of wāhi tūpuna is broader than identification of waahi tapu and the physical presence of urupa, the evidential principles espoused by the High Court are equally applicable to this proposal. The evidential onus rests with the party that asserts the existence of a section 6(e) RMA relationship to establish that relationship with sufficient probative evidence.

Evidential Sources for Establishing Customary Relationships

2.9. **Ngāi Te Hapū Inc v Bay of Plenty Regional Council**[6] concerned appeals to the Environment Court against the grant of consent for the abandonment of the remains of the wreck of the Rena on Ōtāiti / Astrolabe Reef. The nature and extent of cultural relationships with the reef of numerous hapu and iwi was a key issue. The Court made the following findings regarding sources of cultural evidence:

> [36] Sir Wira Gardiner considered that it was important for the Court to understand the relationships between iwi and hapū communities with Motiti Island as well as Ōtāiti. The matters that he, Dr Kahotea and Tahu Potiki identified as markers include:
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> • Whakapapa (Genealogy)
> • Ancestral traditions and cultural associations
> • Ahi kā (occupation) and title to land
> • Mana
> • Customary associations and activities
> • Contemporary Mechanisms such as Treaty of Waitangi settlements, claims to customary marine title.

6 **Ngāi Te Hapū Inc v Bay of Plenty Regional Council** [2017] NZEnvC 73.

> We agree that this is a useful approach and we adopt it in our analysis. We do not, however, accept the basic thesis that Mr Potiki threads through his evidence, namely that unless the cultural significance of a site such as Ōtāiti, its history and traditions, and its customary associations and activities are recorded in written form, and those sources pre-date the Rena grounding, that in some manner weakens the strength of evidence that we have heard on these topics.
>
> [37] By their nature, oral sources are transmitted in forms that are not written sources. The fact that they may be localised may indicate, as in this case, that those with the substantive history and traditions, and customary associations and activities associated to the reef are those with the most proximate relationship to it. In other words, those with the mana whenua and customary authority over the reef, along with those who have cultural and customary associations to Motiti and the reef are likely to be the holders of this knowledge. Mr Buddy Mikaere rightly points out this weakness in the methodology adopted by Mr Potiki, but we do note that there is some merit to aspects of the latter's evidence.

2.10. It is accepted that by their nature, oral sources are transmitted in forms that are not written sources, and that therefore reliance on secondary written material to establish cultural relationships can never be determinative. However, it is submitted that this fact makes it all the more important to have direct probative evidence from those kaumatua that assert the existence of a cultural relationship to establish that relationship. This is particularly so where there are very limited other sources for affected or interested parties to understand cultural relationships.

A relevant example - PAUP sites of value to mana whenua overlay

2.11. The Proposed Auckland Unitary Plan (**PAUP**) included rules to protect listed:

a. 650 sites and places of significance to mana whenua; and

b. 3600 sites and places of value to mana whenua.

The sites were identified by relatively broad mapping notations which avoided specifically identifying the sites. The proposed rules had immediate effect as they related to heritage.

2.12. Submitters did not oppose the 650 sites and places of significance, which were acknowledged to have a clear evidential underpinning. However, the 3600 sites and places of value to mana whenua attracted extensive

submissions. Where these sites were located on or adjacent to a property, any development on the affected property which disturbed earth could not proceed without a resource consent, the application for which had to be supported by a cultural impact assessment.

2.13. The Independent Hearings Panel (**IHP**) found that the sites of value overlay was flawed when it was notified, and recommended that the schedule be deleted from the PAUP. The IHP's recommendation report stated:

> While those sites of value were identified in the notified Plan, no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were. If the Council wishes to pursue a schedule of sites of value with a supporting policy framework, this would need to by a plan change using the Schedule 1 process under the Resource Management Act 1991, with the required section 32 analysis.
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> Overall, the Council's section 32 evaluation for the Sites and Places of Value to Mana Whenua Overlay does not provide an adequate basis for the introduction of that overlay.

2.14. The Council resolved to accept the IHP's recommendation and the Independent Maori Statutory Board (**Board**) appealed to the High Court.[7] The Board alleged a multitude of errors in the IHP's recommendation and the Council's adoption of that recommendation.

2.15. The High Court in **Independent Māori Statutory Board v Auckland Council**[8] found that the sites and places of value to mana whenua overlay was advanced on a precautionary basis to protect possible sites from development until it was finally determined whether or not each site had ongoing value to mana whenua. The IHP and the Council had to balance the potential adverse effects against the restrictions which would be imposed on landowners if the overlay and its associated restrictions were approved. The IHP and the Council had considered whether or not the overlay and the schedule of sites of value were robust, and concluded that they were not. It was held that the conclusion was open to the IHP on the evidence.[9]

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7 Under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010.

8 **Independent Māori Statutory Board v Auckland Council** (2017) 19 ELRNZ 721

9 Paragraphs [90]-[91].

2.16. When considering whether the IHP and Council erred in law in finding that the section 32 report did not provide an adequate basis for the introduction of the SVMW overlay, the Court stated (citations removed):

> [98] I do not consider that the IHP/Council erred in this regard. The Council was required to prepare an evaluation report in accordance with s 32 of the Resource Management Act before the Proposed Unitary Plan was notified. That is what the Resource Management Act required. The IHP was aware of this. The s 32 evaluation report was required to examine whether the proposed objectives were the most appropriate way to achieve the purpose of the Act, and whether the policies, rules and other methods proposed were the most appropriate way to achieve those objectives. The report was required to identify and assess the benefits and costs of the proposals made.
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> [99] The IHP had the report and the Harrison Grierson NZIER audit before it. It heard extensive evidence from a number of submitters and witnesses. It noted in its recommendations that some submitters considered that the proposed provisions contained in the Plan as notified were unreasonable, and not supported by any appropriate s 32 justification. The IHP had before it the Council's evidence and submissions, and the evidence and submissions of other parties, both for and against the SVMW provisions. Having regard to the evidence before it, along with the inferences that it was entitled to draw from its own perusal of the relevant documents, the IHP did not err in law by concluding that the Council's s 32 evaluation prepared prior to notification did not provide an adequate basis for the introduction of the SVMW overlay. That conclusion was open to it.

2.17. The Court commented on the Council's verification to ensure the sites actually existed:

> [107] …. Secondly, the key issue for determination by the IHP was whether or not to retain the SVMW overlay. Its reasoning and its conclusions focus on deficiencies in the identification and evaluation of the sites when they were included in the Proposed Unitary Plan, and the inadequacy of later attempts to clarify which sites/places were in fact of value to mana whenua. It considered that, as at the time of notification, there had been no verification to ensure that the sites actually existed, or what their values were, and that no appropriate criteria subsequently had been applied by which the sites could be properly evaluated. I do not consider that these key findings are undermined by the error the IHP made in its understanding of the effect of the withdrawal resolution.

2.18. The Court further stated:

> [111] In my judgment, the IHP was entitled to reach the conclusions and make the recommendations it did. It heard evidence from a large number of parties, both for and against retaining (and/or expanding) the overlay. It was for the panel as a specialist independent body to exercise its judgment in evaluating the evidence put before it at the hearings. It was open to the IHP to recommend deletion of the SVMW overlay on the basis that, without evidence of mana whenua values that provided support for all of the sites in the schedule and in the overlay, the provisions as a whole lacked a sufficient evidential basis.

2.19. It is noteworthy also that the High Court rejected the submission that without the sites of value overlay the PAUP would fail to discharge the Council's obligations under section 6(e). These obligations were able to be met through other provisions of the PAUP.

2.20. While there are factual distinctions between the PAUP sites of value and the proposed wāhi tūpuna overlays, it is submitted that there are also clear parallels. The reasons for this submission are addressed in the following section.

3. SUFFICIENCY OF EVIDENCE FOR WĀHI TŪPUNA MAPPING

Background

3.1. The opening submissions for the Council state that:[10]

> It is not for others to evaluate the culture beliefs of Maori, that is for Kā Rūnaka to assert and establish.

3.2. The Submitters accept that, as reflected in Policy 5.3.1.4 of the PDP, it is for Kā Rūnaka to establish their cultural relationships with wāhi tupuna.[11] However where cultural relationships underpin plan rules which have a significant effect on people's ability to use their land, the establishment of the values underpinning the wāhi tūpuna overlays must be through probative evidence. Moreover, where mana whenua are the sole repository of evidence, it is incumbent upon them to provide such evidence in a transparent and comprehensive manner such that it may be assessed and understood by affected landowners.

3.3. Ms Picard's s42A report explains that:

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10 At paragraph 5.5.

11 Recognise that only tangata whenua can identify their relationship and that of their culture and traditions with their ancestral lands, water sites, waahi tapu, tōpuni and other taonga.

> The overlay was provided by Rūnaka as being representative of areas of significance. Iwi representatives also explained the significance and origins of the areas selected at a series of public meetings and discussions with landowners. I expect that Rūnaka will address this in their evidence in support of the overlays. The Council is not in a position to justify their extent.

3.4. Counsel understand that Ms Picard confirmed in questions from the Hearings Panel that the mapping was provided in a GIS file by Kā Rūnaka and there had been no specific testing or evaluation of it. The Submitters consider that this gives rise to serious issues with Council's evaluative duty under section 32, which are addressed later in these submissions.

3.5. Given the key role of tangata whenua in development of the provisions, Kā Rūnaka[12] was directed to file its evidence in chief in advance of other submitters. Ms Kleinlangevelsloo provides further detail regarding the process which led to the mapping wāhi tūpuna mapping.[13] This evidence states that the wāhi tupuna were mapped by Kaumatua who, with the exception of Mr Ellison, are not giving evidence. Kaumatua information about ancestral use and values is said to come from a number of sources. Much of this information is thought to have been compiled into Kā Huru Manu, the Ngāi Tahu Atlas. Counsel notes that the sites identified in the proposed wāhi tupuna overlay do appear to be substantially derived from Kā Huru Manu, which provides references to various secondary sources.[14]

Kawarau (The Remarkables) and Kawarau River

3.6. The primary response from Kā Rūnaka to submitters seeking additional information to justify particular mapped wāhi tupuna overlays is found in Mr Ellison's evidence. This evidence, of course, must be read alongside the cultural evidence of Mr Higgins and Dr Carter. Mr Ellison's evidence provides the following additional detail in respect of wāhi tupuna 36:[15]

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12 Submitter #3289 and further submitter #3430.

13 Evidence of Ms Kleinlangevelsloo at paragraphs 45-50.

14 http://www.kahurumanu.co.nz/atlas

15 Evidence of Mr Ellison at paragraph 49 and Appendix 1.

36	Kawarau (The Remarkables)	Wāhi taoka, mauka	Kawarau is the traditional name for the Remarkables.	a. Exotic species including wilding pines b. Buildings and structures c. Energy and Utility activities d. New roads or additions/alterations to existing roads, vehicle tracks and driveways e. Activities affecting the ridgeline and upper slopes f. Earthworks g. Subdivision and development h. Activities affecting natural character

3.7. With respect to Mr Ellison, and his status as kaumatua, the traditional place name (incidentally the same as the adjoining river) does little to advance an understanding of the cultural values and associations which led to the identification of Kawarau as wāhi tupuna, and to understand the drivers of the extensive list of identified threats. The associated categories of values, Wāhi taoka and Mauka, are expressed in generic terms and do not refine or advance the evidential position:

Wāhi taoka	Resources, places and sites treasured by manawhenua. These valued places reflect the long history and association of Kāi Tahu with Otago.
Mauka	Important mountains. Mountains are of great cultural importance to Kāi Tahu. Many are places of spiritual presence, and prominent peaks in the district are linked to Kāi Tahu creation stories, identity and mana.

3.8. The Submitters acknowledge that The Remarkables are an outstanding natural landscape. However, as Ms Kleinlangevelsloo's evidence notes, cultural landscapes are distinct from natural landscapes.[16] It is submitted that there is nothing in Kā Rūnaka's evidence which details a cultural tradition or belief that is particular to The Remarkables and justifies its identification as wāhi tupuna. In comparison, the Kā Rūnaka evidence does explain the cultural association with Kā Kamu a Hakitekura.[17]

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16 Evidence of Ms Kleinlangevelsloo at paragraph 42.

17 See evidence of Dr Cater at paragraphs 24 to 25.

3.9. For the Kawarau River, Kā Rūnaka's evidence does provide some clarity as to the basis of the cultural relationship. Mr Ellison's evidence provides the following additional information in relation to this proposed wāhi tupuna (underlining added):

24	Kawarau River	Ara tawhito, mahika kai, archaeological	The Kawarau River was a traditional travel route that provided direct access between Whakatipu Waimāori (Lake Whakatipu) and Mata-au (the Clutha River). It is also recorded as a kāika mahika kai where weka, kākāpō, kea and tuna (eel) were gathered. *Other sites in the area: Te Wai o Koroiko,Ōterotu - Ōterotu is the traditional Māori name for the Kawarau Falls. Ōterotu is located at the outlet of Whakatipu-wai-māori.*	a. New roads or additions/alterations to existing roads, vehicle tracks and driveways b. Buildings and structures c. Earthworks d. Subdivision and development e. Damming, activities affecting water quality f. Exotic species including wilding pines g. Commercial and commercial recreational activities

3.10. It is accepted that this information provides some clarity as to the ancestral relationship with the Kawarau River as travel route and food source. However, it is not accepted that this information is sufficient to justify the extensive list of identified threats. No explanation is provided of how they relate to the values of the river. For instance, it is unclear how subdivision or wilding pines may adversely affect the cultural values of the river. For other activities, there appears to be a duplication of existing controls in other PDP chapters. Further, the evidence does not justify the seemingly arbitrary mapping in the GIS layer of the land area surrounding the river.

Section 32 Implications

3.11. It is submitted that the lack of an evidential justification for the wāhi tupuna overlay on notification means that the section 32 report does not provide

an adequate resource management basis for the introduction of the overlay and schedule, nor does it assess the efficiency and effectiveness of the provisions.

3.12. The overlay was accepted as a GIS layer with associated threats without the Council being able to justify its spatial extent, or the identified threats, at all. No supporting material, consideration of assessment criteria, or mapping methodology was required of Kā Rūnaka by the Council. This situation bears a striking similarity to the rejected PAUP sites of value to mana whenua overlay.

3.13. Without a detailed understanding of cultural values and the nature of threats to those values, it is not possible to properly assess whether the proposed provisions are the most efficient and effective approach to meeting the requirements of Part 2 of the RMA, the RPS, and chapter 5 PDP. Because of this, it is submitted that the assessment of costs and benefits of the proposal in section 8 of the section 32 assessment does not even scratch the surface of the critical issues.

3.14. No attempt is made to quantity how frequently additional consents will be triggered by the proposed provisions and what the likely additional cost of those consents are. It is submitted that it would have been practicable to do so in terms of section 32(2)(b), and indeed the evidence of Mr Farrell[18] and Mr Devlin[19] on behalf of numerous submitters have quantified the additional costs associated with consultation and consents. These costs are significant, and given the low thresholds for earthworks activities, consents will be required frequently on rural properties for typical farming activities such as the creation of fence lines and the formation of tracks. These activities are expected and necessary in the Rural Zone and are already subject to various earthworks performance standards in Chapter 25 - Earthworks to control their effects.[20]

3.15. Given the lack of clear articulation of the basis for the overlay delineation and identified threats, it is not possible to properly assess the benefits of the proposal in terms of management of cultural effects, even in a qualitative sense. If this information were available, it may be apparent that

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18 Evidence of Mr Farrell at paragraphs 30 to 35.

19 Evidence of Mr Devlin at paragraphs 6.1 to 6.10.

20 It is noted that Kai Tahu are a s 274 party to appeals on the Earthworks Chapter.

many of the issues of concern to mana whenua are regulated by other provisions in the plan, such that much of Chapter 39 is unnecessary regulatory duplication. For instance, there is no evidence that the provisions of the earthworks chapter are insufficient to properly minimise the effects of earthworks on known or readily identifiable cultural values. This begs the question of what additional value the proposed provisions provide. If the benefits of the provisions are the ability to decline expected earthworks activities on the basis of cultural grounds, then the attendant widespread costs of not allowing such activities to occur must also be considered. The proposal also duplicates the functions of statutory acknowledgement areas and the Heritage New Zealand Pouhere Taonga Act 2014. It is submitted that the section 32 report has not properly considered other reasonably practicable options demonstrating that the provisions are the most appropriate way to achieve the proposed objectives.

3.16. While the evidence of Kā Rūnaka and Council has attempted to amend and retrofit the proposal to address its shortcomings, it is submitted that this cannot be a substitute for proper analysis prior to notification.[21] As such, the Submitters primary relief is the deletion of the following wāhi tūpuna:

a. Kawarau River - # 24;

b. Kawarau (The Remarkables) - #36; and

c. Te Kirikiri – area around Frankton.

3.17. This outcome will not leave a gap in the PDP as this land will continue to be subject to substantial existing ODP and PDP regulation to recognise and provide for section 6(e) RMA matters.

4. BALANCE OF CHAPTER 39 PROVISIONS

Urban Areas

4.1. The Submitters support the Council reporting officer's recommendation to delete unmapped wāhi tūpuna identifications from urban areas entirely.[22] The Submitters interest is in the 150ha Remarkables Park Zone which has

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21 No section 32AA analysis is provided in Ms Picard's summary statement which could be said to remediate the gap. The Submitters acknowledge Mr Devlin's section 32AA assessment of the changes to the provisions proposed in his evidence.

22 Section 42A report, Chapter 39 Wāhi Tūpuna at paragraph [4.13].

yet to be reviewed and brought within the PDP. As such this land was withdrawn from the notified stage 3 provisions under clause 8D of Schedule 1 of the RMA. Notwithstanding this, the Remarkables Park Zone will be brought into the PDP eventually and the same approach to wāhi tūpuna and urban areas will in all likelihood be proposed to apply.

4.2. The evidence of Mr Bathgate disagrees with the deletion of wāhi tūpuna identification from urban areas and seeks that mapping of these be added to the PDP. Counsel agrees with the Council's legal submissions that there is no jurisdiction for this mapping change. Mr Bathgate proposes that additional wording be added to Schedule 39.6:

> Due to its extensive level of modification, there are no recognised threats listed for this wāhi tūpuna and the rules specific to wāhi tūpuna do not apply. However, this wāhi tūpuna remains significant to manawhenua and cultural values may form part of any resource consent assessment for discretionary and non-complying activities.

4.3. Again, the scope for this change is queried. Further, it is unclear how this approach would work in practice in terms of the consideration of discretionary and non-complying activity applications. Non-complying activities in urban areas of the district are frequently triggered due to height exceedances. On its face, such an activity would not appear to give rise to cultural concerns. However, no guidance is provided as to what cultural values are sought to be protected in urban areas and therefore it will be extremely difficult for applicants and the Council to determine when cultural effects will be relevant to consideration of discretionary and non-complying activity applications in urban areas. This may result in the Council taking an oppressively conservative and precautionary approach in all such instances and requiring the provision of a cultural impact assessment unless a written approval can be provided. This outcome is submitted to be inefficient and unwarranted cost to impose on landowners in urban areas.

"Threats" vs "Triggers"

4.4. The Submitters note the evidence of Mr Devlin which recommends changing the language of "threats" to "triggers". The Submitters would support this approach as more appropriate, given that the identified threats are so broad as to encompass most activities which could be contemplated. Anticipated or contemplated activities should not be considered "threats".

Policy 39.2.1.6 – Cultural Impact Assessments

4.5. The following relief is in the alternative that the Hearings Panel does not reject the provisions in their entirety or delete wāhi tūpuna, Te Kirikiri – the area around Frankton, 24 Kawarau River, and 36 Kawarau (The Remarkables).

4.6. It is submitted that the requirement to undertake a Cultural Impact Assessment should be limited to "identified wāhi tūpuna areas", as stated in the Council's opening position.

39.2.1.6 Recognise that an application for activities as set out in Policy 39.2.1.1 and Policy 39.2.1.2 ~~that does not include detail of consultation undertaken with Manawhenua mana whenua~~ may require a cultural impact assessment as part of an Assessment of Environment Effects so that any adverse effects that ~~an~~ the activity may have on the cultural values of Manawhenua of ~~on the~~ identified wāhi tūpuna areas ~~a wāhi tūpuna~~ can be understood.

4.7. The Submitter's oppose the changes proposed by mana whenua to Policy 39.2.1.6:

> Recognise that an application for any activity that may adversely affect the cultural values of Manawhenua, including those set out in Policy 39.2.1.1 and Policy 39.2.1.2, ~~that does not include detail of consultation undertaken with mana whenua~~ may require a cultural impact assessment as part of an Assessment of Environment Effects, so that any adverse effects ~~that an activity may have on a wāhi tūpuna~~ on the cultural values of Manawhenua can be understood.

4.8. This change makes the policy so open as to be nebulous and unworkable. Further, it is submitted that requiring a CIA even when consultation has been undertaken is inefficient and increases compliance costs for landowners.

4.9. The Submitters also consider that the process for consultation is uncertain and open ended in terms of time and cost. This is a further layer to a resource consenting process that is already often longwinded and uncertain.

Earthworks - Rule 25.5.11

Maximum Total Volume

4.10. The Submitters oppose the 10m³ maximum total volume for permitted earthworks. This is submitted to be excessively restrictive for any earthworks and, in particular, for rural properties such as QPL's which otherwise have a permitted annual earthworks volume of 1000m³, which is

already subject to detailed performance standards. The section 42A report does not justify, nor refer to any evidence as why this threshold is appropriate in terms of preventing significant adverse effects. It is submitted that the threshold will generate unjustified additional resource consents for normal farming operations within the wāhi tūpuna overlay which will not result in enhanced management of the effects of earthworks. The Submitters' zone earthworks volume limits should continue to apply.

4.11. The Submitters acknowledge the changes proposed by mana whenua to rule 25.5.11:

Rule Table 25.2	Table 25.2 – Maximum Volume	Maximum Total Volume
25.5.11	The following Wāhi Tūpuna areas: Te Rua Tūpāpaku (Number 5) Mou Tapu (Number 9) Te Koroka (Number 12) Punatapu (Number 16) Te Tapunui (Number 20) Kā Kamu a Hakitekura (Number 22) Te Taumata o Hakitekura (Number 27) In other Wāhi Tūpuna areas not listed above: • Earthworks within 20m of the bed of any water body • Earthworks located at an elevation exceeding 400 masl • Earthworks within a wāhi tūpuna that modify a skyline or terrace edge when viewed either from adjoining sites, or formed roads within 2km of the location of the proposed earthworks.	$10m^3$

4.12. The Submitters support incorporating elevation (located at an elevation exceeding 400masl) and ridgeline (modify a skyline or terrace edge when viewed either from adjoining sites, or formed roads within 2km of the location of proposed earthworks) aspects into the wāhi tūpuna earthworks rule. It is unclear whether the proposed performance standard in relation to modification of a skyline or terrace edge when viewed from adjoining sites is sufficiently clear to be workable as a performance standard which determines activity status. Presumably, it is intended that otherwise the earthworks volumes of underlying zones apply.

4.13. It appears that there has been an error in the way this proposed rule change has been adopted in the Council's opening position. The drafting attached to Council's opening submissions specifies the maximum total volume limit as restricted discretionary.

Rule	Table 25.3 – Standards	Maximum Total Volume
25.5.22	Any earthworks undertaken in a wāhi tūpuna, with the exception of the wāhi tūpuna listed in Rule 25.5.11 (Table 25.2) or located in the urban environment shall: 25.5.22.1 Be setback a minimum of 20m from a waterbody; 25.5.22.2 not exceed an elevation of 400masl; or 25.5.22.3 not modify a skyline or terrace edge viewed either from adjoining sites, or formed roads within 2km of the earthworks.	RD

4.14. It is therefore unclear what the Council's position on this rule is. The Submitters suggest that the column is intended to be headed "non-compliance status" rather than 'maximum total volume". The Submitters would support this outcome as providing for earthworks within applicable zone limits, provided that these additional performance criteria are met (without prejudice to their primary position).

Farm Buildings - rule 39.4.1

4.15. The Submitters support the changes proposed by mana whenua to rule 39.4.1:

	Table 39.4 – Activity	Activity Status
39.4.1	Any farm building within a wāhi tūpuna area that: a. Is located at an elevation exceeding 400 masl; or b. Modifies a skyline or terrace edge when viewed either from adjoining sites, or formed roads within 2km of the location of the proposed building. Except that clause (a) does not apply to a farm building that is a replacement for an existing, lawfully established farm building or situated within 30m of an existing, lawfully established farm building on the same site. Discretion is restricted to: a. Effects on cultural values of Manawhenua	RD

4.16. Specifically, the Submitters support the following amendments:

a) incorporating elevation (located at an elevation exceeding 400masl) and ridgeline (modifies a skyline or terrace edge when viewed either from adjoining sites, or formed roads within 2km of the location of

proposed earthworks) triggers into the wāhi tūpuna earthworks volume threshold.

b) insert an exception for clause (1) (which address elevation) so that "it does not apply to a farm building that is a replacement for an existing lawfully established farm building or situated within 30m of an existing, lawfully established farm building on the same site.

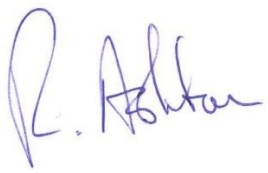
Subdivision

4.17. The Submitters support the proposal by the Council (paragraph 8.4 of Ms Pickard's statement) to vary the activity status for subdivision within a wāhi tūpuna from fully discretionary to restricted discretionary, with discretion restricted to adverse effects on cultural values of mana whenua. Notably, mana whenua supports this amendment as it will avoid unnecessary uncertainty. The Submitters agree.

5. CONCLUSION

5.1. In conclusion, it is submitted that an insufficient evidential basis has been advanced for the proposed wāhi tupuna provisions, at least as they apply to the Submitters' land. In the alternative, changes to the provisions are required in order to achieve a semblance of balance in recognising the legitimate interest of landowners to use their land for zoned purposes.

DATED 3 July 2020



John Young / Rowan Ashton
Counsel for the Remarkables Park Limited and Queenstown Park Limited

Heybridge Developments Ltd v Bay of Plenty Regional Council

High Court, Tauranga (CIV-2010-470-585) 22, 23 February; 19 August 2011
Peters J

Resource management — Consents — Considerations — Values — Maori — Waahi tapu — Relationship with land — Appellant sought resource consents to excavate to create building platforms following subdivisions consent — Interested party representing hapu opposed consent as site was possible burial place of an ancestor — Site not identified as culturally significant on statutory instruments — Appellant unsuccessfully appealed to the Environment Court against the Commissioner's refusal — Environment Court unable to determine on evidence whether burial occurred on site — Court concluded that the earthworks had irremediable adverse effect on the hapu's relationship with the site given the genuine belief that burial may have occurred there — Court wrongly imposed onus on appellant to prove honest belief misplaced — Court may have erred in providing for relationship with site primarily on basis of belief — Question remitted to Court for reappraisal — Court had erred in finding application made on basis fill imported — Appeal allowed — Resource Management Act 1991, ss 2, 6, 104(1).

Resource management — Consents — Type — Land use — Earthworks — Waahi tapu — Relationship with land — Appellant sought resource consents to excavate to create building platforms following subdivisions consent — Interested party representing hapu opposed consent as site was possible burial place of an ancestor — Site not identified as culturally significant on statutory instruments — Appellant unsuccessfully appealed to the Environment Court against the Commissioner's refusal — Environment Court unable to determine on evidence whether burial occurred on site — Court concluded that the earthworks had irremediable adverse effect on the hapu's relationship with the site given the genuine belief that burial may have occurred there — Court wrongly imposed onus on appellant to prove honest belief misplaced — Court may have erred in providing for relationship with site primarily on basis of belief — Question remitted to Court for reappraisal — Court had erred in finding application made on basis fill imported — Appeal allowed — Resource Management Act 1991, ss 2, 6, 104(1).

The appellant, Heybridge Developments Ltd ("HDL"), sought resource consents to excavate land in order to create three building platforms, thereby giving effect to a 4-lot subdivision consent granted by the Western Bay of Plenty District Council in 2007, on HDL's 44 ha property at Lochhead Rd, Tauranga. The site, a former wetland, was part of 50,000 acres which the Crown had confiscated in 1864. Although the site was not identified on any statutory instrument as being culturally significant, the Pirirakau Incorporated Society ("PIC") opposed the proposal on behalf of the Pirirakau hapu.

The PIC argued that the site was waahi tapu, as it was encompassed by Tahataharoa, by tradition the burial place of their ancestor Tutereinga, some 600 years ago. In an earlier interim decision, the Environment Court had stated that it was "unconvinced"

that the whole of HDL's land was waahi tapu, but was "unable to make a definitive finding" on the issue. The BOP Regional Council delegated HDL's applications to an independent commissioner, who identified the effect of the proposed activities on the Pirirakau hapu as the main issue, The independent commissoner declined consent.

On appeal, the Environment Court found that HDL was not being required to relitigate issues that had been decided when the subdivision consents were applied for, that in its earlier decision the Environment Court had made no definitive finding whether the site was affected by a waahi tapu, and it was free to re-examine the matter.

The Environment Court found that, although it was unable to make such a finding, the Pirirakau hapu held a genuine belief, which on the evidence was not misconceived, that Tutereinga might be buried somewhere on the site. Accordingly, any earthworks on the site would have an adverse effect on Pirirakau's relationship with the site and this could not be modified by attaching conditions. The Environment Court dismissed HDL's appeal.

On appeal to the High Court, HDC raised eight grounds of appeal, claiming that the Environment Court had erred by: (i) finding that the interim Environment Court decision did not provide definitive findings that the site was not waahi tapu; (ii) finding it necessary to reconsider the waahi tapu issue; (iii) deciding the onus was on HDL to prove there was no urupa on site; (iv) improperly balancing the evidential requirements as to the burden of proof concerning cultural and factual evidence; (v) finding that Tutereinga was buried on site; (vi) finding that HDL had advanced its subdivision application on the basis that it would import infill to the site, (vii) holding that the Crown's duties of active protection under pt 2 Resource Management Act 1991 ("RMA") were met by declining consent, given that earthworks were a discretionary activity under the relevant plan and no cultural matter was identified affecting site on any statutory instrument; and (viii) finding that HDL had accepted the site was "land" which was confiscated by the Crown.

Held, (1) it was clear from the earlier decision that the Environment Court was not persuaded that the site, or some lesser area "within or in the vicinity" of the site, was waahi tapu. It was equally clear that the Environment Court did not find that the site, or some part of it, was not waahi tapu. The Environment Court clearly had reservations about being asked to rule on this single factual issue in isolation. Both courts reached the same conclusion on the issue. Accordingly, even if an error was made out, it did not materially affect the Court's decision. (paras 37-41)

(2) Questions (iii) and (iv) could be taken together. The Environment Court had found the evidence insufficient to determine whether Tutereinga was, or was not, buried on site, but was left with an "honestly held belief" by PIC that his remains were, or could be, buried there. However, the existence of a fact was not established by an honest belief. The Environment Court had erred in imposing an onus on HDL to prove such a belief was misplaced. The Court accepted that if PIC alleged that s 6(e) of the RMA required the Environment Court to recognise Pirirakau's relationship with the site on the basis of waahi tapu, it was for PIC to establish the existence of waahi tapu. The Environment Court had sought to provide for a relationship with the site under s 6(e) primarily on the basis of a belief, but had already decided there was insufficient evidence that Tutereinga had been buried on the site and that it was waahi tapu. An issue arose as to whether it was correct in doing so, and the Court would remit the matter to the Environment Court for further consideration. (paras 42-57)

(3) The Environment Court's finding that HDL's application for consent to subdivide was made on the basis that fill would be imported was not open to it on the

evidence. If the point remained material in future, all relevant evidence was to be put before the Court. (para 62)

(4) The Crown had no duty of active protection under pt 2 of the RMA. Section 8 of the RMA imposed an obligation on a person exercising a function or power under the Act to take it into account, as a principle of the Treaty of Waitangi, in achieving the RMA's purposes, but in the context of pt 2, this could not afford greater protection to the relationship with ancestral lands given by s 6 of the RMA. Accordingly, the question might fall to be reconsidered by the Environment Court when it revisited whether to grant resource consents. (para 64)

(5) Although it was formerly part of the coastal marine area, the area in question fell within the definition of "land" in s 2(a) of the RMA, and within the category of "site", as these words were used in s 6(e) of the RMA. (paras 71, 72)

(6) The appeal was allowed on questions three, four and six. The Environment Court's decision refusing the consents sought was quashed and the matter was remitted to the Court for reconsideration. (para 74)

Cases referred to

Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)

Friends and Community of Ngawha Inc v Minister of Corrections [2002] NZRMA 401 (HC)

Guardians of Paku Bay Association Inc v Waikato Regional Council HC Auckland CIV-2010-404-8097, 25 July 2011

Land Air Water Association v Waikato Regional Council EnvC Auckland A110/01, 23 October 2001

Minhinnick v Minister of Corrections EnvC Auckland A043/2004, 6 April 2004

Murphy v Takapuna City Council HC Auckland M456/88, 7 August s1989

New Zealand Suncern Construction Ltd v Auckland City Council (1997) 3 ELRNZ 230 (HC)

Waikanae Christian Holiday Park v Kapiti Coast District Council HC Wellington CIV-2003-485-1764, 27 October 2004

Appeal

This was an appeal against an Environment Court decision refusing resource consent to excavate for three building platforms, which would have given effect to subdivision consents granted by the Western Bay of Plenty District Council over the appellant's land.

K Barry-Piceno for appellant
P Cooney for respondent
J Koning for interested party (Pirirakau Inc Society)

Cur adv vult

PETERS J

[1] The appellant appeals a decision of the Environment Court given on 10 June 2010. The Court dismissed the appellant's appeal against a decision of the respondent refusing consent for earthworks and other activities.

[2] A party may appeal against a decision of the Environment Court to the High Court on a question of law (s 299 Resource Management Act 1991 ("RMA")). A question of law arises if the Environment Court:[1]

(a) applied a wrong legal test; or

(b) came to a conclusion without evidence, or one to which, on evidence, it could not reasonably have come; or

(c) took into account matters which should not have been taken into account; or

(d) failed to take into account matters which it should have taken into account.

[3] An appellant ought not to be granted relief unless an identified error of law has materially affected the Environment Court's decision.[2]

[4] It is not for the High Court to enter into a re-examination of the merits of the Environment Court's decision.[3] In *New Zealand Suncern Construction Ltd v Auckland City Council*, Fisher J referred to the decision in *Countdown* and said:[4]

> It follows that the Court should resist attempts by litigants disappointed before the Planning Tribunal/Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law. … This includes attempts to re-examine the mere weight which the Tribunal gave to various conflicting considerations before it … .

Background

[5] The site in issue ("the site") is located in Te Puna on the west bank of the mouth of the Wairoa River, abutting Tauranga Harbour. The site is low-lying and is a former wetland. It comprises 44 ha and is made up of four lots. The proposed earthworks are to be carried out on lot 2 DPS2844. The site was part of about 50,000 acres which the Crown confiscated in 1864 after the Battle of Gate Pa.

[6] The site was first surveyed for subdivision and registered with the Land Transfer Office in 1939. In 1939 or thereabouts the site was drained and it has been farmed and held in private ownership since then. Prior to 1939 large areas of the site were inundated with water during the incoming tide.

[7] A third party purchased the site in 1973 and modified lot 2. He constructed a stopbank around the perimeter, installed drains across the lot and filled in the Hakao Stream, which bisected part of the site.

[8] The site is not identified as a site of cultural significance in any planning instrument.

[9] The appellant acquired the site in December 1996. On 1 April 1999, the appellant applied to the Western Bay of Plenty District Council (the District Council) for consent to subdivide it into 13 lots. The District Council declined the application. The appellant appealed to the Environment Court. The hearing before the Environment Court appears to have come down to a contest between the appellant and representatives of Pirirakau hapu (Pirirakau) as to whether the site was waahi tapu for the purposes of s 6(e) RMA, due to the possible burial on the site of Tutereinga, Pirirakau's ancestor and chief.

[10] Pirirakau believe that all the members of their hapu descend from Tutereinga and that Tutereinga was buried at Tahataharoa some 600 years ago. Tradition has it

1 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 153.

2 Ibid.

3 *Murphy v Takapuna City Council* HC Auckland M456/88, 7 August 1989.

4 *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) 3 ELRNZ 230 (HC) at 240.

that, when asked where he wished to be buried, Tutereinga replied "bury me at Tahataharoa so that I might hear the murmur of the sea". The whereabouts of the burial site was kept secret, as a matter of custom. Tahataharoa comprises about 150 ha and encompasses the site. It is possible therefore that Tutereinga was/is buried on the site.

[11] The Environment Court heard the case over six days, in a hearing presided over by Judge Bollard. The Court gave an interim decision in November 2002 (first decision). The Court was not satisfied that the site was waahi tapu. There was no appeal of the decision.

[12] After the first decision the appellant applied to the respondent for earthworks consents so that it could pursue the subdivision. The low-lying nature of much of the site meant building platforms would have to be created.

[13] In about 2006, the appellant applied to the District Council for consent to subdivide the site into four lots. This application was the subject of a hearing before the District Council. The respondent did not participate in the hearing. Pirirakau sought to do so but was out of time and so was unable to participate. The District Council granted consent to the subdivision in December 2006. The appellant then withdrew its previous application to subdivide into 13 lots.

[14] The appellant then applied to the respondent for the consents now in issue. The appellant seeks to continue an existing road for about one km and to create three building platforms. These works require fill, hence the application for an earthworks consent to excavate up to 221,000 m^3 of fill from a 5.5 ha "borrow" pit the appellant wishes to establish on lot 2. The borrow pit is to be excavated to a depth of up to 3 or 4 metres, with surplus material returned to the pit on completion of the works.

[15] Under the Bay of Plenty Regional Water and Land Plan, earthworks on the site are a permitted, controlled or discretionary activity, depending on volume. They are permitted up to 5,000 m^3 and controlled at up to 20,000 m^3. They are a discretionary activity at 220,000 m^3.

[16] The respondent delegated the applications to an independent commissioner. The commissioner identified that the main issue was the effect of the proposed activities on Pirirakau. The respondent declined consent in a decision dated 17 February 2009.

Appeal to the Environment Court

[17] The appellant appealed to the Environment Court. At [35], the Court said that all the parties had agreed that the issues which Pirirakau had raised would form the basis of the appeal, and that the Court would resolve it accordingly, notwithstanding reservations as to this restricted approach. The three issues before the Court were:

(a) Was the appellant being asked to respond to a relitigation of cultural issues which the Court had already determined in the first decision?

(b) Is the subject site Maori ancestral land and/or a waahi tapu?

(c) Should the consents sought be granted, given the matters in s 104 RMA and pt 2 of the Act?

[18] On the first issue, the Court found that:

- the appellant was not being required to relitigate issues which had already been decided;
- in the first decision the Court had made no definitive finding as to whether the site or part of it was affected by a waahi tapu; and
- the Court was free to look at the matter again.

[19] The Court's findings on the second issue were that:

- the appellant accepted that the site was Maori ancestral land;
- the appellant accepted that the site was within Tahataharoa;
- there was no evidence that Tutereinga was buried on the site or, if so, where the burial site might be and accordingly the Court was unable to make a finding that the site was waahi tapu, or was not for that matter;
- Pirirakau held a genuine belief that Tutereinga might be buried somewhere on the site; and
- the effect of evidence which the appellant had adduced, for instance as to tidal movements on the site and the modifications which had occurred both to the site and surrounding area, did not persuade the Court that Pirirakau's belief was misconceived.

[20] On the third issue, the Court decided that it would not grant consent to the applications. The Court considered that any earthworks on the site would have an adverse effect on Pirirakau's relationship with the site, given the belief referred to above, and that this effect could not be modified by attaching conditions to the consents. The Court dismissed the appeal accordingly.

Statutory provisions

[21] As I have said, the consents which the appellant sought were for discretionary activities. Section 104 RMA sets out matters to which a consent authority must have regard when considering an application for resource consent. Section 104(1), which is the relevant provision for present purposes, reads as follows:

> **104. Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[22] Part 2, referred to in the opening words of s 104(1), is headed *Purpose and Principles* and comprises ss 5 - 8 RMA.

[23] Section 5 sets out the purpose of the RMA, namely the promotion of the sustainable management of natural and physical resources.

[24] Section 5(2) sets out what the term "sustainable management" means in the RMA.

[25] Section 6 is important in this case and I have set it out in full below.

[26] Section 7 sets out the matters to which those who exercise functions and powers under the RMA shall have particular regard in achieving the purpose of the Act. These matters include kaitiakitanga (s 7(a)), also relevant in this case. Kaitiakitanga is defined in s 2 of the Act as:

> **Kaitiakitanga** means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

[27] Section 8 requires that those who exercise functions and powers under the RMA shall take account of the principles of the Treaty of Waitangi in achieving the purpose of the Act.

[28] Section 6 is as follows:

> **6. Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) The protection of historic heritage from inappropriate subdivision, use, and development.
>
> (g) The protection of protected customary rights.

[29] Self-evidently, s 6 requires recognition and provision for the identified matters of national importance. Section 6(e) is the relevant provision in this case. Whether s 6 applies in any given case raises questions of fact.[5] Accordingly, whether an area is of "significant indigenous vegetation" for the purposes of s 6(c) or whether land is Maori ancestral land or is waahi tapu for the purposes of s 6(e) is a question of fact.

[30] There is no definition of "ancestral land" or "waahi tapu" in the RMA.

[31] In the present case, the Court defined ancestral land as "land which has been owned by ancestors … ". As the Court said, this potentially is very widely encompassing in its scope, depending on the interpretation of the word "owned".[6]

[32] Counsel for the respondent referred me to the definition of waahi tapu in *Land Air Water Association v Waikato Regional Council*, being "physical features of phenomena, either on land or water, which have spiritual, traditional, historical or cultural significance to Maori people".[7]

[33] The relationship between the provisions of pt 2 was addressed in *Waikanae Christian Holiday Park v Kapiti Coast District Council*, as follows:[8]

> [99] Some preliminary comment on the interrelationship between ss 6(e), 7(a) and 8 is desirable. As has been recognised in a number of cases, ss 5, 6, 7 and 8 create a hierarchy. At the top is s 5, which sets out the purpose of the Act, to the achievement of which all provisions in the Act are directed. Next comes s 6, which sets out matters of national importance which all persons exercising functions under the Act must, in achieving the s 5 purpose, recognise and provide for. Third is s 7, which contains matters to which all such persons must have particular regard. Standing alongside ss 6 and 7, and also directed to

5 *Minhinnick v Minister of Corrections* EnvC Auckland A043/2004, 6 April 2004.

6 *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 at [124].

7 *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001 at [416].

8 *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-1764, 27 October 2004.

achieving the s 5 purpose, is s 8, which requires all such persons to take account of the Treaty of Waitangi.

Questions raised on appeal

[34] The questions of law which the appellant raises are as follows:

(a) Did the Court err in law when it concluded that the first decision did not provide definitive findings that the whole of the site was not waahi tapu?

(b) Did the Court err in determining that it was necessary to consider afresh the issue of waahi tapu?

(c) Did the Court err in determining that the onus was on the appellant to prove, through probative evidence, that there was no urupa (or burial ground) on the site?

(d) Did the Court properly balance the legal requirements of evidence relating to evidence and burden of proof in relation to cultural beliefs and factual evidence?

(e) Was the Court's finding that Pirirakau's belief that Tutereinga might be buried on the site reasonably open to the Court, given the evidence before it?

(f) Was it open to the Court to find that the appellant had advanced its subdivision application to the District Council on the basis that it would import fill to the site?

(g) On a site where earthworks are a permitted, controlled or discretionary activity and where no s 8 or pt 2 cultural matters are identified as affecting the site in any statutory policy or plan document, did the Court err in holding that the Crown's duties of active protection under pt 2 were met by declining the earthworks consent sought?

(h) Did the Court wrongly find that the appellant had accepted the site was "land" and was confiscated by the Crown?

Question 1: The Court concluded that the first decision did not include definitive findings that the whole of the site was not waahi tapu. The appellant's case is that the first decision did make a definitive finding that the site was not waahi tapu and that the Court erred in saying otherwise.

[35] Counsel for the appellant submitted that in the first decision the Court made a definitive finding that the site was not waahi tapu. Counsel referred to the following passages in the first decision:

> [58] We acknowledge Pirirakau's deep commitment to and respect for the memory of their founding ancestor, but are unconvinced that the whole of the subject land is waahi tapu, having regard to doubts raised in the course of the hearing through conflicting evidence, including evidence on Maori issues adduced for Heybridge. It may be that Tutereinga was buried in a location along the headland foreshore, with a view out to sea across to Mauao (Mount Maunganui), and at a location independent of areas relied on for food gathering, but that is little more than speculation. There is also the fact that today's coastline configuration bears no clear resemblance to what it once was.
>
> [59] In the end, we find ourselves unable to make a definitive finding on the waahi tapu issue, given the conflicting views in evidence. Bearing in mind that the exact burial place of Tutereinga is unknown, coupled with the conflicting views over the location and extent of Tahataharoa, we decline to hold that the whole of the subject land is waahi tapu. Furthermore, we are unable to determine satisfactorily what lesser area within or in the vicinity of the subject land is so classifiable.

[36] Counsel then referred to the following passage in which the Court in the decision under appeal (the second decision) said there had been no definitive finding made in the first decision:

> [47] We agree with Mr Cooney that the Environment Court made no definitive finding on the issue of waahi tapu in the First Heybridge Decision. It said as much. Although the Court in 2002 declined to hold the site was waahi tapu on the basis of the evidence which it heard, it did not find that the site was not waahi tapu. It did not make a definitive finding either way. …

[37] I am not satisfied that any error of law arises on this point. It is clear from [58] and [59] of the first decision that the Court was not persuaded that the site, or some lesser area "within or in the vicinity" of the site, was classifiable as waahi tapu. It is equally clear that the Court did not find that the site or some part of it was not waahi tapu.

Question 2: Did the Court correctly determine that the issue of waahi tapu was required to be freshly considered?

[38] Counsel for the appellant submitted that the Court erred in revisiting the matter of whether the site was waahi tapu. Counsel submitted that the parties were bound by the first decision on this issue, and that it was an abuse of the process of the Court for the respondent and Pirirakau to seek to relitigate the matter. Counsel submitted that the first decision resulted from the appellant and Pirirakau having sought a ruling on the sole issue of whether the site was waahi tapu. Now, years and much expense later, the appellant was being required to litigate the issue again, on what all counsel accepted was the same evidence.

[39] The question of whether issue estoppel or res judicata applies in the resource management field is one of considerable debate and I am grateful to counsel for referring me to the recent decision in *Guardians of Paku Bay Association Inc v Waikato Regional Council*,[9] in which the subject is addressed. However, it is not necessary for me to enter into that debate or to determine whether there was an abuse of process, for two reasons.

[40] First, it is clear from the first decision that the Court had reservations about being asked to rule on this single factual issue in isolation. The Court said that its views were "interim and tentative only, pending further hearing".[10]

[41] Secondly, I accept the submission of counsel for the respondent and Pirirakau, to the effect that both courts reached the same conclusion on this issue. Both courts held that Pirirakau had not established that the site or some lesser part of it was waahi tapu. Accordingly, even if an error were made out, it did not materially affect the Court's decision. The relevant passage of the second decision is as follows:

> [83] While we do not have sufficient evidence before us to find that the subject site is the burial site, similarly we are also not in a position to be able to find that it is not the burial site. What we are left with is the honestly held belief of Pirirakau that Tutereinga's burial site is or may be within the application site. We do not find that belief to be unlikely, implausible or inconsistent with the evidence which we heard.

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9 *Guardians of Paku Bay Association Inc v Waikato Regional Council* HC Auckland CIV-2010-404-8097, 25 July 2011.

10 *Heybridge Developments Ltd v Western Bay of Plenty District Council* EnvC Auckland A231/02, 21 November 2002 at [67].

Question 3: Did the Court wrongly determine that the onus was on the appellant to prove, through probative evidence, that there was no urupa on a site? and Question 4: Did the Court properly balance the legal requirements of evidence relating to evidence and burden of proof in relation to cultural beliefs and factual evidence?

[42] Questions three and four can be taken together and relate to the second issue before the Court.

[43] Having said that the evidence was insufficient to make a finding that Tutereinga was buried on the site, the Court also said that it was not able to find that Tutereinga had not been buried on the site.[11] The Court said that it was left with "an honestly held belief of Pirirakau that Tutereinga's burial site is or may be within the application site".

[44] Counsel for the appellant submitted that the Court then erred by imposing an onus on the appellant to prove that Pirirakau's belief was misplaced or misconceived, in effect requiring the appellant to prove that Tutereinga was not buried on the site.

[45] Counsel for the respondent and Pirirakau rejected this submission and submitted that there was no error in the Court's approach.

[46] Counsel for the appellant referred to the following paragraphs as capturing the gist of the Court's approach:

> [71] In terms of whether the site was the actual burial site of Tutereinga, we find ourselves in a similar position to the Court in the First Heybridge Decision. We are not able to definitively find that it was nor that it was not.
>
> …
>
> [73] We have also noted Mr Cooney's submission that this Court should not focus on identifying where the actual burial site is. Rather its role is to focus on making an objective assessment on the evidence *as to the genuineness* of Pirirakau's beliefs that the subject site may be the burial ground of Tutereinga.
>
> …
>
> [75] However, we cannot accept the submission made by Mr Cooney that we can simply rely on the genuineness of the Pirirakau beliefs without further enquiry. It was entirely open to Heybridge to attempt to establish that those beliefs were misplaced. The success of such arguments depends on this Court being persuaded that such beliefs are misplaced given the existence of contradictory probative evidence.

[47] The Court then considered evidence which the appellant had adduced in an attempt to show that it was improbable Tutereinga had been buried on the site. The evidence went to the history of parts of the site being inundated with water, the geography of the site 600 years ago and the practicalities of access, and whether the site had been respected as waahi tapu in the past.

[48] I have already set out the Court's conclusion on this point at [41]. The Court, was not satisfied that Pirirakau's belief was "unlikely, implausible or inconsistent" with the evidence.

[49] Counsel for the appellant submitted that the Court's approach was in error. If Pirirakau alleged that s 6(e) required the Court to recognise and provide for Pirirakau's relationship with the site on the basis of waahi tapu, it was for Pirirakau to establish the existence of waahi tapu. It was not for Pirirakau simply to assert a belief and for the appellant to be required to disprove it.

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11 *Heybridge Developments Ltd v Western Bay of Plenty District Council* [2010] NZEnvC 195 at [83].

[50] I accept that submission. I note the following extract from *Brookers Resource Management*:[12]

> **A276.08 Waahi tapu**
>
> In *Greensill v Waikato* RC W017/95 (PT), it was noted that tangata whenua may accept without question that a place is waahi tapu on the word of kaumatua. However, the Environment Court stated in *Te Rohe Potae O Matangirau Trust v Northland RC* EnvC A107/96, that the Act does not enable the consent authority, nor the Environment Court on appeal, to apply the same standard. The decision-maker must hear the witnesses, whether kaumatua, kuia or not, who have relevant evidence, and the decision-maker must make a finding on the balance of probabilities. The evidence must relate to the point at issue. Thus, general evidence about waahi tapu over a wide and undefined area would not be probative of a claim that waahi tapu in a specified area would be directly infringed by an activity in that area.
>
> In *Heta v Whakatane DC* EnvC A093/00, the Environment Court held that the evidence that the land in question was waahi tapu, although genuine, was vague and lacked specificity. Given the principle that "he who asserts must prove", the Court preferred the direct and positive evidence of the kaumatua supported by an archaeological report that the land was not waahi tapu.
>
> There is no burden of proof on any party, but an evidentiary burden arises for a party alleging facts such as the existence of waahi tapu or other concepts of tikanga Maori. Allegations must be established with objectively probative evidence which satisfies the Court on the balance of probabilities. Mere assertions are inadequate: *Winstone Aggregates Ltd v Franklin DC* EnvC A080/02. In *Gibbs v Far North DC* EnvC W076/04, the Court expressed concern at the incoherence of the appellant's own evidence and the appellant's failure to provide any credible foundation for claims of the presence of waahi tapu.

[51] Accordingly, a party who asserts a fact bears the evidential onus of establishing that fact by adducing sufficiently probative evidence. The existence of a fact is not established by an honest belief. I am satisfied that the Court erred as a matter of law in this respect.

[52] Counsel for the respondent and Pirirakau submitted that, even if the Court erred in requiring the appellant to disprove Pirirakau's belief, the error was immaterial because the Court found the site was Maori ancestral land. Accordingly, when considering the application for consent under s 104(1), s 6(e) required recognition and provision for Pirirakau's relationship with the site as its ancestral land.

[53] Counsel for the appellant submitted the Court's error was material. Counsel referred me to the passages below to show that the Court recognised and provided for Pirirakau's relationship with the site, not as ancestral land which had been confiscated from Pirirakau's ancestors, but as land on which Tutereinga might be buried, the possibility of such burial not having been disproved:[13]

> [120] *In terms of s 6(e) and (f), we have found that the subject site is part of the ancestral lands of Pirirakau and that it is within an area high in cultural significance to them due to their belief that their ancestor Tutereinga is buried within the area and possibly within the site. Their relationship with and their culture and traditions regarding this land turn on that belief.* We also note that it is possible that that connection forms part of their historical heritage and thus both s 6(e) and (f) may be invoked requiring this Court to recognise and provide for these matters of national importance but we heard limited argument on this point so prefer to base our analysis on s 6(e). We also find that Pirirakau

12 *Brookers Resource Management* (online looseleaf ed, Wellington, Brookers) Evidence, at A276.08.

13 *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195 at [120], [125] and [126] (emphasis added).

> are the kaitiaki of this site in terms of s 7 and thus we must have particular regard to their exercise of kaitiakitanga regarding the site.
>
> …
>
> [125] We think that the significant issue in any given case is identifying the nature of the present relationship of Maori with the ancestral land in question and how a particular proposal might affect that relationship. While Pirirakau's original relationship with the site has been altered as the result of confiscation and transfer of ownership we find that the hapu still retains a relationship with the site *because of their traditions and beliefs as to the burial of Tutereinga and his particular significance to the hapu.* That relationship is strong, genuine and heartfelt.
>
> [126] We find that relationship of Pirirakau to these particular ancestral lands would be adversely impacted by the commencement of the extensive excavations proposed on this culturally significant site *and more so by disturbance of Tutereinga's remains should that occur. The potential for disturbance to happen (and we accept that there is such potential) of itself is an affront to the kaitiaki of the site.* We refer to our findings in para's [85] and [86] as to the consequences of such disturbance in terms of the hapu and their relationship with this land.

[54] Counsel submitted that the obligation to recognise and provide which s 6(e) imposes does not extend to recognising and providing for a relationship deriving from or based on a belief and that the Court had erred in its application of pt 2 and s 6 as a result. Counsel referred me to *Friends and Community of Ngawha Inc v Minister of Corrections* in which Wild J said:[14]

> I share Mr Milne's difficulty in following how beliefs can be regarded as a natural and physical resource, or how they can be sustainably managed. He described as novel Ms Kapua's submission that beliefs are a part of the environment in terms of s 5. Even if that is correct, Mr Milne is surely right in saying that the Act does not require the absolute protection of beliefs. That is implicit in s 6 which sets the word "protection" alongside the words "use" and "development". …

[55] In my view, there is merit in counsel's submission that the recognition and provision which is required to be made pursuant to s 6(e) is to reflect the relationship which is established on the evidence but that it does not extend to providing for a relationship which is founded on a belief, no matter how genuinely held. Of course, from Pirirakau's perspective, its belief may be central to its relationship with the site. The issue is whether s 6(e) requires recognition and provision for such a relationship.

[56] There is no discussion of this issue and relevant authorities in the Court's decision. That may be because the point was never raised, I should say also that counsel for the respondent and Pirirakau did not address this point in detail in their submissions to me. Accordingly, the view I am expressing is without that assistance. The difficulty with the Court's approach, however, is that it had already decided there was insufficient evidence to find that Tutereinga had been buried on the site and that the site was waahi tapu. The Court found that the site was ancestral land but it did not provide, or provide exclusively, for Pirirakau's relationship with the site, (if any) in its capacity as ancestral land. The thrust of the Court's discussion of this issue is the need to recognise and provide for the relationship based on the belief. With respect to the Court, the appellant could be forgiven for wishing that an identified part of the site had in fact been found to be waahi tapu. The appellant might then have obtained consent to carry out earthworks on an unaffected part of the site.

[57] To conclude, I am satisfied that the Court sought to impose an onus on the appellant to disprove Pirirakau's belief, and that the Court erred in law in doing so.

14 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC) at [49].

I am satisfied that the Court sought to provide for a relationship with the site predominantly on the basis of a belief. I consider an issue arises as to whether the Court was correct in doing so. The matter requires further consideration and I propose to remit it back to the Court for that further consideration.

Question 5: The Court found that Pirirakau believed that Tutereinga was buried on the site and that such belief was not inconsistent with the evidence in the case. The appellant's case is that this finding was not reasonably open to the Court.

[58] Question five is overtaken by my decision in respect of questions three and four and, accordingly, it is not necessary for me to address the issue raised. With respect to counsel for the appellant, however, I note that the Court's finding was that Pirirakau believed that Tutereinga might be buried on the site, not that he was buried on the site.

Question 6: Was it open to the Court to find on the evidence that the appellant advanced its subdivision application on the basis that it would import fill to the site?

[59] This question arises from [122] of the Court's decision which reads as follows:

> [122] Thus there is no right of veto by those asserting Maori interests, what is required is a full review of what is reasonable in the circumstances. This approach is consistent with many of the decisions cited by Ms Barry-Piceno including the Court of Appeal decision in *Water Care Services Ltd v Minhinnick*. But the principle of active protection does require that this Court consider alternatives and we refer in that regard to Ms Barry-Piceno's contention that the alternative of importation of fill to the subdivision is not a viable alternative. Heybridge advanced its subdivision application on the basis that fill would be imported so must have considered that to be a viable alternative at that time. Even if we accept that no longer to be the case we do not consider that to be a factor which outweighs our other considerations.

[60] Counsel for the appellant submitted that there was no evidence before the Court to support the finding that the application for consent to subdivide was made on the basis that fill would be imported. No issue arose on that application as to the source of fill because earthworks and the importation of fill from an approved quarry are permitted activities under the District Plan. Accordingly, the source of the fill was irrelevant to the application to subdivide. Counsel submitted the Court's finding could only have derived from minutes purporting to summarise an answer one of the appellant's witnesses gave to a question during the subdivision hearing

[61] Counsel for the respondent submitted that, whatever the underlying evidence on this point, the simple answer was that the matter was immaterial to the Court's decision. The Court said as much in [122].

[62] With respect, the Court said that matters as to the cost of importing fill would not outweigh its other considerations. Having reviewed the documents to which counsel referred me, my impression on this point is that the Court's finding was not open to it on the evidence. If the point remains material in the future, all relevant evidence must be put before the Court.

Question 7: On a site where earthworks are a permitted, controlled or discretionary activity and where no s 8 or pt 2 cultural matters are identified as affecting the site in any statutory policy or plan document, did the Court err in holding that the Crown's duties of active protection under pt 2 were met by declining the earthworks consent sought?

[63] With respect to counsel for the appellant, this question is not well put.

[64] The Crown does not have a duty of active protection under pt 2 RMA. Section 8 imposes an obligation on a person exercising a function and power under the RMA to take into account the principles of the Treaty of Waitangi in achieving the purpose of the RMA. One such principle is the obligation of active protection. In the context of pt 2, that cannot afford greater protection to the relationship with the ancestral lands given under s 6.[15] It follows that I consider s 8 may fall to be reconsidered when the Court revisits the third issue which it had to decide, namely whether to grant the consents sought.

[65] I add that I do not consider the appellant could be restrained from undertaking earthworks on the site (or sites, given the four lots) to the extent the relevant plan permits earthworks as of right.

Question 8: Did the Court wrongly find that the appellant had accepted the site was "land" and was confiscated by the Crown?

[66] Question eight arises from the Court's finding that the site was Maori ancestral land.

[67] Counsel for the appellant submitted that, although the site has been "land" since 1939, before then much of it was coastal marine area.

[68] The appellant makes two submissions from this.

[69] First, because the site or a part of it was formerly within the coastal marine area, it was highly improbable Tutereinga had been buried on the site. That is an evidential matter, and was considered and rejected by the Court. It is not for this Court to reassess its reasons for doing so.

[70] As I understand it, the second aspect of the submission is that, as the site was formerly part of the coastal marine area, it could not be ancestral "land" for the purposes of s 6(e) and also could not have been confiscated as land.

[71] Land is defined in s 2 RMA as follows:

> **land—**
>
> (a) includes land covered by water and the air space above land; and
>
> (b) in a national environmental standard dealing with a regional council function under section 30 or a regional rule, does not include the bed of a lake or river; and
>
> (c) in a national environmental standard dealing with a territorial authority function under section 31 or a district rule, includes the surface of water in a lake or river.

[72] Counsel for the Pirirakau referred me to subpara (a) of the definition, and submitted that, coastal marine area or not, the site was and is "land" for RMA purposes. I accept that submission. I note also that s 6(e) refers to ancestral "sites". "Sites" is not defined in the RMA. I am satisfied, however, that the appellant's land falls within the definition of "land" or "site" as those words are used in s 6(e) RMA.

[73] In my view, no error of law arises on this point.

Result

[74] I allow the appeal on questions three, four and six. The decision of the Environment Court on the third issue before the Court, namely to refuse the consents sought, is quashed. The matter is remitted back to the Court for reconsideration, in light of this decision.

[75] The parties may submit memoranda on costs if they wish. The appellant has succeeded in part and failed in part, and that should be borne in mind. Any

15 *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-1764, 27 October 2004 at [107].

memorandum from the appellant is to be filed and served by 4 pm, 16 September 2011. Any memoranda in reply from the respondent and Pirirakau is to be filed and served by 4 pm on 30 September 2011.

Appeal allowed on questions three, four and six; the Environment Court's decision refusing the consents sought was quashed; matter remitted to the Environment Court for reconsideration

Reported by Jennie Christianson

AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Report to Auckland Council
Hearing topic 009
Mana Whenua

July 2016

IHP Report to AC – Hearing topic 009 Mana Whenua

Contents

1. Hearing topic overview

1.1. Topic description

Topic 009 – RPS Mana Whenua addresses the regional policy statement plan provisions of the proposed Auckland Unitary Plan relating to:

Topic	Proposed Auckland Unitary Plan reference	Independent Hearings Panel reference
RPS Mana Whenua 009	Chapter B 5	Chapter B 6

Under the Local Government (Auckland Transitional Provisions) Act 2010, section 144 (8) (c) requires the Panel to set out:

> the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or
> (ii) the matters to which they relate.

This report covers all of the submissions in the Submission Points Pathways report (SPP) for this topic. The Panel has grouped all of the submissions in terms of (c) (i) and (ii) and, while individual submissions and points may not be expressly referred to, all points have nevertheless been taken into account when making the Panel's recommendations.

1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

In making and implementing this Unitary Plan, the Council must, as a matter of national importance, recognise and provide for the relationship of Mana Whenua and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. The Council must also:

i. have particular regard to kaitiakitanga;

ii. take into account the principles of Treaty of Waitangi/Te Tiriti o Waitangi; and

iii. recognise the historic, traditional, cultural, and spiritual relationship of Mana Whenua with the Hauraki Gulf/Te Moana Nui o Toi/Tīkapa Moana.

The Panel considers that the regional policy statement, (and the regional and district plan provisions) it has recommended gives effect to Part 2 of the Resource Management Act. In recommending the Mana Whenua chapter, the Panel has made some changes to the provisions from those in the notified Plan. The reasons for this are addressed in more detail below.

In summary the changes recommended include:

i. retaining the objectives recognising the Treaty of Waitangi/Te Tiriti o Waitangi but deleting the specific list of Treaty principles;

ii. deleting explicit reference to Tino Rangatiratanga in the objectives;

iii. deleting the provisions relating to the sites and places of value to Mana Whenua and its overlay (noting that the Council formally withdrew those sites of value identified on privately-owned land). This matter is also addressed in the Panel's Report to Auckland Council – Hearing topics 036,037 Maori Land and Mana Whenua sites July 2016;

iv. removing the explicit reference to cultural impact assessments;

v. amending and refining a number of the provisions, as has occurred throughout the regional policy statement.

Other than these changes, the objectives and policies of the chapter, certainly their intent, have been largely retained; but some have been amended or re-cast.

1.3. Overview

The Panel finds that the issues of significance to Māori and to iwi authorities in the region, as set out in the regional policy statement include:

i. recognising the Treaty of Waitangi/Te Tiriti o Waitangi and enabling the outcomes that Treaty settlement redress is intended to achieve;

ii. protecting Mana Whenua culture, landscapes and historic heritage;

iii. enabling Mana Whenua economic, social and cultural development on Māori Land and Treaty Settlement Land;

iv. recognising the interests, values and customary rights of Mana Whenua in the sustainable management of natural and physical resources, including integration of mātauranga and tikanga in resource management processes;

v. increasing opportunities for Mana Whenua to play a role in environmental decision-making, governance and partnerships; and

vi. enhancing the relationship between Mana Whenua and Auckland's natural environment, including customary uses.

These are all addressed in the Mana Whenua chapter (B6) in the regional policy statement, and in the regional and district plan provisions.

The Council, the Independent Māori Statutory Board and a number of other iwi submitters generally supported the Plan as notified, but sought some refinements. Many other submitters also supported appropriate provisions being in the Plan recognising Part 2 of the Resource Management Act. However some submitters considered that some of the provisions were unreasonable and not supported by appropriate section 32 justification. Those of particular concern included the provisions relating to sites and places of value to Mana Whenua and the need to obtain cultural impact assessments, particularly in relation to

the sites and places of value to Mana Whenua. These two matters were probably the issues of most concern to many submitters. These are addressed below.

In this Plan, the term Mana Whenua is used in preference to Tangata Whenua to be consistent with the particular meaning of 'mana whenua group' as defined in the Local Government (Auckland Council) Act 2009.

As set out in the summary above, the Council must, as a matter of national importance, recognise and provide for the relationship of Mana Whenua and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. The Council must also:

i. have particular regard to kaitiakitanga;

ii. take into account the principles of Treaty of Waitangi/Te Tiriti o Waitangi; and

iii. recognise the historic, traditional, cultural, and spiritual relationship of Mana Whenua with the Hauraki Gulf/Te Moana Nui o Toi/Tīkapa Moana.

In the policies relating to partnerships, the Council, and this Plan, acknowledge the importance of the Treaty and Treaty settlements to Mana Whenua and recognise the aspirations of Mana Whenua. These policies promote meaningful relationships and interactions between Mana Whenua and decision-makers as part of recognising the principles of the Treaty, including greater Mana Whenua participation in resource management through the establishment of joint management arrangements and the transfer of powers over particular resources to Mana Whenua. These policies also identify how Treaty settlements should be taken into account in resource management processes, and outline a process for the Council to work with Mana Whenua as claims under the Treaty are settled, to determine appropriate planning outcomes for Treaty Settlement Land.

In the policies relating to Mana Whenua values, the Unitary Plan seeks to ensure that resource management processes in Auckland are informed by Mana Whenua perspectives, including their values, mātauranga and tikanga. Mana Whenua perspectives need to be considered early within resource management processes, accorded status in decision-making and have an opportunity to influence outcomes.

A number of iwi and hapū in Auckland have developed iwi planning documents (also known as Iwi Management Plans, Hapū Environmental Management Plans, or by similar names) which articulate their specific resource management issues, objectives, policies, and methods. Iwi planning documents are a valuable source of information for integrating mātauranga and tikanga into resource management in Auckland.

These policies also seek to give certainty to, and enhance, the involvement of Mana Whenua in resource management processes. Significant adverse effects on ancestral tāonga occur largely as a result of uninformed actions. Before making decisions which may affect customary rights, an understanding of the nature of the tāonga to Mana Whenua is required. This understanding can only be gained from those who have an ancestral relationship with the taonga.

These policies give guidance on how Mana Whenua values, mātauranga and tikanga should be considered in the management of, and decision-making around, Auckland's natural and physical environments, including freshwater and freshwater ecosystems in accordance with the National Policy Statement on Freshwater Management 2014.

The policies in relation to economic, social and cultural development acknowledge that Māori have identified a wide range of activities they would like to undertake to support social, cultural and economic development. These activities include:

i. establishing and extending papakāinga and marae and associated services;

ii. developing commercial activities, sports and recreation facilities and community gardens;

iii. cultural activities and iwi/hapū revitalisation activities such as historic heritage and environmental management.

Economic activities are necessary to support the ability of Mana Whenua to use and live on Māori land. Some economic activities may be based on promoting Māori culture, or utilising customary rights such as aquaculture. These policies recognise there is little Māori land remaining in Auckland and that it is also necessary to provide for Mana Whenua and mataawaka to support their aspirations through development on land held in general title.

The integration of mātauranga and tikanga in design and development may be expressed in development that, for example, is based around communal facilities and spaces, provides a range of housing sizes and layouts, or responds to the values of Mana Whenua associated with the site or landscape.

Mataawaka represent a significant proportion of the Māori population of Auckland and have the desire to connect to their culture and traditions in an urban setting. The interests of mataawaka are addressed in the Unitary Plan through providing for Māori cultural institutions and through a special purpose zone. These tools recognise rangatiratanga and the right of all Māori to express their Māoritanga, as affirmed by articles 2 and 3 of the Treaty.

The policy approach to Mana Whenua cultural heritage addresses the multiple levels of Mana Whenua cultural heritage. Sites and places where a value of significance has been identified are protected through the D21 Sites and Places of Significance to Mana Whenua Overlay. Assessments of effects on the environment which pay particular attention to potential cultural effects based on history and tikanga are expected for areas subject to structure planning to identify additional sites that warrant protection. Similar assessments are required for resource consent applications where Mana Whenua values are affected.

For reasons such as limited investment, cultural sensitivities and mismanagement of information in the past, the Panel acknowledges that very little Mana Whenua cultural heritage has been scheduled, despite the large number of Mana Whenua groups with strong associations to Auckland. The Council has a statutory responsibility to protect Mana Whenua cultural heritage from inappropriate subdivision, use and development. This will involve a collaborative approach with Mana Whenua, working in accordance with tikanga to identify, assess, protect and manage Mana Whenua cultural heritage, including the context for individual sites and places which are the footprint/tapuwae of Mana Whenua.

The knowledge base of information about Mana Whenua cultural heritage is continually developing and tools that provide a form of protection and inform subdivision, use and development, while respecting Mana Whenua values, are increasingly valuable. An improved knowledge base helps reduce the risk of damage, enables development that properly reflects the values associated with the context of an area, informs landowners and applicants of the

characteristics of their site, and helps to avoid major time and cost implications to applicants when development is halted by accidental discovery of protected items.

The following matters are addressed in more detail below:

i. Mana Whenua, rather than Tangata Whenua, to be consistent with the particular meaning of 'mana whenua group' as defined in the Local Government (Auckland Council) Act 2009;

ii. retaining the objectives recognising the Treaty of Waitangi/Te Tiriti o Waitangi but deleting the specific list of treaty principles;

iii. whether the objectives should retain the explicit reference to Tino Rangatiratanga;

iv. the Plan's approach to Māori and Treaty Settlement Land;

v. deleting the provisions relating to the sites and places of value to Mana Whenua, and its overlay (noting that the Council formally withdrew those sites of value identified on privately owned land). This is also addressed in the Panel's Report to Auckland Council – Hearing topic 037 Mana Whenua Sites July 2016;

vi. removing the explicit reference to cultural impact assessments; and

vii. removing references to cultural landscapes.

1.4. Scope

The Panel considers that the recommendations in 1.2 above and the changes made to the provisions relating to this topic (see 1.1 above) are within scope of submissions.

For an explanation of the Panel's approach to scope see the Panel's Report to Auckland Council – Overview of recommendations July 2016.

1.5. Documents relied on

Documents relied on by the Panel in making its recommendations are listed below in section 10 Reference documents.

2. Terminology - Mana Whenua or Tangata Whenua

2.1. Statement of issue

Whether the terminology of Mana Whenua, rather than Tangata Whenua, should be used in the Plan.

2.2. Panel recommendation and reasons

The Panel recommends retaining text which refers to Mana Whenua rather than Tangata Whenua as this aligns with the approach in the Local Government (Auckland Council) Act 2009.

The Panel sought clarification from the Council regarding the use of the terms Mana Whenua, Mana Whenua group, Tangata Whenua and Māori, and confirmation as to whether the terms have been used consistently in Chapter B5 of the proposed Auckland Unitary Plan as notified. In summary the Council's position was set out at of its closing statement and stated that:

> "Mana Whenua group" is defined in the Local Government (Auckland Council) Act 2009 (LGACA) to refer to iwi or hapū groups who are mana whenua in Auckland. (Paragraph 3.16 (a))

The Local Government (Auckland Council) Act 2009 defines Mana Whenua group as:

> an iwi or hapū group that exercises historical and continuing mana whenua in an area wholly or partly located in Auckland, and in one or more of the following in Auckland: a mandated iwi organisation under the Māori Fisheries Act 2004, a body that has been the subject of a settlement of Treaty of Waitangi claim, or a body that has been confirmed by the Crown as holding mandate for the purpose of negotiating Treaty of Waitangi claims.

The Panel accepts that based on the inclusion of this term in the Local Government (Auckland Council) Act 2009, the term "Mana Whenua group" and "Mana Whenua" have generally been used in Auckland's planning documents to refer to iwi or hapū groups who are mana whenua in Auckland.

The Panel also accepts that the use of the term 'Māori' in the Plan in lieu of 'Mana Whenua' would not be appropriate because the term Māori includes both Mana Whenua and Mataawaka, who are defined in the Local Government (Auckland Council) Act 2009 as:

> Māori who live in Auckland and are not a Mana Whenua group.

The use of the term 'Tangata Whenua' was not considered appropriate either, despite its use in the Resource Management Act, because 'Mana Whenua' would ensure consistency between Auckland's other planning documents which already use this term (and the Local Government (Auckland Council) Act 2009 which establishes the Auckland Council). However, the definition of 'Mana Whenua' in the Plan expressly provides that it is defined as 'Tangata Whenua' in the Resource Management Act 1991 thereby clarifying that these two terms are intended for the purposes of the Plan to have the same meaning. (Council closing statement, paragraph 3.16 (e)

The Panel finds that Mana Whenua are Tangata Whenua who whakapapa to the mountains, rivers, marae, tribal areas and practice Ahi Kaa. The Panel agrees that Mana Whenua for the purpose of this plan is a term that encompasses the term Tangata Whenua.

3. Objectives recognising the Treaty of Waitangi/Te Tiriti o Waitangi

3.1. Statement of issue

Whether the objective should retain the list of specific Treaty principles recognising the Treaty of Waitangi/Te Tiriti o Waitangi.

3.2. Panel recommendation and reasons

The Panel accepts that the objective is an important one. However for the reasons set out below, the Panel has recommended the deletion of the list of specific Treaty principles and simply refer to the "principles of the Treaty of Waitangi/Te Tiriti o Waitangi".

The Council, with the support of the Independent Māori Statutory Board, in its closing statement sought:

1 The principles of the Treaty are recognised and provided for in the sustainable management of ancestral lands, water, air, coastal sites, wāhi tapu and other taonga, and natural and physical resources. The Treaty is articulated in law through an evolving set of principles. These include:

~~a. reciprocity~~

~~b. rangatiratanga~~

~~c. partnership~~

~~d. shareddecision-making~~

~~e. activeprotection~~

~~f. mutualbenefit~~

~~g. rightofdevelopment~~

~~h. redress.~~

a. reciprocity or recognition of the essential bargain

b. rangatiratanga

c. shared decision-making

d. partnership

e. active protection

f. ōritetanga

g. options

h. the right of development

i. redress.

The Panel has retained the objective but has deleted the list of Treaty principles. This is not because the Panel does not support them, but that the submissions and evidence of a number of parties, including the Council, Independent Māori Statutory Board, Democracy Action and others, set out that the principles change and evolve over time. This is also acknowledged in the objective itself.

The Panel acknowledges that the list of principles is a 'non- exclusive' with the objective stating "The Treaty is articulated in law through an evolving set of principles. These include…". However it is the Panel's view that the list of principles be deleted to ensure that the Plan does not become outdated.

The Panel does not consider that anything is lost by deleting the list of principles from the objective.

4. Mana Whenua exercising Tino Rangatiratanga

4.1. Statement of issue

Whether the objective should retain the explicit reference to Tino Rangatiratanga.

4.2. Panel recommendation and reasons

The Panel has recommended the deletion of explicit reference to Tino Rangatiratanga. The objective as sought by the Council in its closing statement was:

> Mana Whenua ~~can~~ exercise Tino Rangatiratanga through participation in resource management processes and decisions.

The Panel has amended this objective to refer to the Treaty principles being recognised through Mana Whenua participation in resource management processes, and the exercising of Tino Rangatiratanga.

A number of submitters, including L and S Short (Democracy Action), Scentre (New Zealand) Limited, Auckland International Airport Limited and the Ports of Auckland Limited, sought changes to this objective. They considered that the notified objective implied that Mana Whenua would take the role of the Council (Tino Rangatiratanga) particularly in terms of decision-making, which is a function of the Council.

The Panel acknowledges that the Council can transfer functions under the Resource Management Act 1991 and it can, and does, appoint independent decision-makers, including those experienced in tikanga Māori, for plan and resource consent processes. However these are administrative matters and do not need to be in the Plan as a regional policy statement objective.

The Panel accepts that the objective should be changed, and agrees with the suggested wording from L and S Short (Democracy Action). The matter of participation in the resource management is retained, as well as recognising the Treaty principles, rather than Tino Rangatiratanga

Overall the Panel's view is that the recommended wording is more appropriate than the Objective as notified.

5. Māori and Treaty Settlement Land

5.1. Statement of issue

The extent to which the Plan should recognise and provide for enabling the use and development of Māori and Treaty Settlement land.

5.2. Panel recommendation and reasons

The Panel supports and has retained the policies relating to the use and development of Māori and Treaty settlement. B6 Mana Whenua contains clear direction that the use and development of Māori and Treaty Settlement Land in Auckland is to be enabled by the Plan.

Dr Mitchell, expert planner for the Independent Māori Statutory Board, set out in some detail in his evidence in chief why the Plan should enable greater development of Māori and Treaty Settlement Land. It was his opinion that enabling use and development on Māori and Treaty Settlement Land should have a policy preference over those of the natural heritage overlays and some urban growth policies.

Dr Mitchell set out at paragraph 3.3 of his evidence in chief that:

> With respect to Māori land in particular, a substantial proportion of that land is located in the rural production and rural coastal zones (~98%), and a substantial amount is also within natural heritage overlays.

He also set out at in some detail at paragraphs 3.5 and 3.6 of his evidence in chief that there are unique circumstances surrounding Māori and Treaty Settlement Land in Auckland. Dr Mitchell considered these to be of particular relevance when considering appropriate provisions in the Plan. These included:

i. the inherent relationship and connection Mana Whenua have with their land is undeniable, and has been sustained for generations. It is rooted in whakapapa and genealogy and notions of sustainability, protection, responsibility and development for future generations;

ii. Mana Whenua connection to their ancestral rohe, including their ancestral lands, marae, papakāinga, wāhi tapu, wāhi tupuna and mahinga kai cannot simply be transferred outside their rohe;

iii. enabling Mana Whenua to live on their ancestral lands and within their ancestral rohe is an important element of enabling Mana Whenua to maintain their identity and provide for their social, economic and cultural well-being .

It is noted that Dr Mitchell's evidence in chief relied on the evidence in chief of Messrs Kapea and Taipari, both representing the Independent Māori Statutory Board.

The Panel acknowledges that a substantial proportion of Māori and Treaty Settlement Land (to date) is located in rural and coastal areas, and within natural heritage overlays including those for significant ecological areas, outstanding and high natural character and outstanding landscapes. Development of land in these areas is subject to the strong policy direction which seeks to protect the natural heritage values. The Panel also acknowledges the strong urban growth policies seeking to limit inappropriate development outside the Rural Urban Boundary, and this could impact on the appropriate development of Māori and Treaty Settlement Land.

The Panel has addressed this issue in the regional and district plan provisions of the Unitary Plan in natural resources and natural heritage overlay provisions, as well in the vegetation management provisions (see the Panel's Report to Auckland Council - Hearing topic 023 Significant ecological areas and vegetation management July 2016). This matter is also addressed in the Panel's report to Auckland Council – Hearing topics 036 and 037 Māori Land and Treaty, and Mana Whenua sites July 2016.

6. Sites and places of value to Mana Whenua

6.1. Statement of issue

Whether the provisions relating to the sites and places of value to Mana Whenua on public land should be retained or deleted. It is noted that the Council formally withdrew from the Plan those sites of value identified on privately-owned land.

6.2. Panel recommendation and reasons

The provisions relating to sites and places of value to Mana Whenua (and the related requirement to obtain a cultural impact assessment addressed below) was probably the issue of most concern to many submitters. This was because a significant number of sites (in the order of 3600) were:

i. not selected by Mana Whenua nor had they been evaluated against any criteria;

ii. it had not determined or verified whether the sites of value actually existed and what values were sought to be protected, and that the majority of the sites had not had site visits undertaken;

iii. that the rules relating to the sites of values were unreasonable, particularly given the points in i and ii above;

iv. that the rules had immediate legal effect; and

v. the sites of value had been notified incorrectly (covering a much larger area than was approved for notification).

Extensive legal submissions and evidence was produced for this matter from submitters including:

New Zealand Archaeological Association, Heritage New Zealand, Ports of Auckland Limited , Scentre (New Zealand) Limited, Ms Lashbrook (property at Red Beach), Atlas Concrete Limited, Auckland International Airport Limited, Auckland Utility Operators Group, C and D McLeod (related to sites on their farm), L and S Short (Democracy Action), Wiri Oil Services Limited, and Z Energy. These submitters addressed in detail the matters listed above.

It is also noted that the Council, the Independent Māori Statutory Board and some iwi groups were concerned about the robustness of and justification for including all of the sites of value.

Dr Mitchell set out at paragraph 4.18 of his evidence in chief that

> with respect to other sites not currently included in either the sites of significance or sites of value schedules, the options for appropriately protecting those sites in the PAUP are limited. In my view the approach taken by the PAUP for those sites is the correct one, namely that:
>
> (a) A proactive work programme be initiated for undertaking a proper assessment of Mana Whenua cultural heritage in Auckland, with a view to including additional sites in the PAUP schedules in an expedient manner via a Council funded plan change

Also Mr Blair for Ngati Whatua Orakei Whai Maia Limited at the 009 hearing said he was concerned that without justification the entire sites of value could be lost and that it was better to retain those which clearly are of value and only include others once assessed.

The Council in its closing statement (paragraph 11.1) clarified its current workstreams regarding cultural heritage and noted:

> The Council is currently undertaking a desktop review of the 3,600 sites currently included in the Sites and Places of Value overlay, to determine whether there is enough information for these sites to remain in this overlay. We have been advised that this process is expected to be complete by early 2015; and
>
> On 26 September 2014, the Council initiated a workstream which will implement B5.4, Policies 1-3 through a Māori Cultural Heritage project. The project will develop a methodology for identifying, assessing and mapping Māori cultural heritage with a view to, amongst other options, introducing sites and places and reviewing Sites and Places of Significance and Sites and Places of Value through a plan change.

The Council indicated that prior to the hearing for Mana Whenua sites (Topic 037) in June 2015 it intended to have refined the content of the sites and places of value overlay and to have re-mapped the overlay to improve clarity and accuracy, including the Māori cultural heritage overlays and the cultural impact assessment provisions.

Notwithstanding the above, the Auckland Development Committee, at its 12 November 2015 meeting passed Resolution number AUC/2015/205, which is:

> That the Auckland Development Committee:
>
> a) agree to remove Sites and Places of value overlay on private land until such a time that all Sites and Places have been accurately identified and mapped.

Accordingly these sites have been withdrawn from the notified Plan. The remaining sites are those on publicly-owned land.

The Panel has recommended the deletion of those sites of value identified on publicly-owned land. This means that all of the sites of values are to be removed from the Unitary Plan. The reasons for removing those sites of value identified on publicly-owned land are the same as those set out above. That is, those sites have not been appropriately identified and evaluated to determine if they are indeed a site of value.

The Panel's approach to protecting places and areas has been set out in the Panel's Report to Auckland Council – Overview of recommendations July 2016 and in the Report to Auckland Council - Hearing topic 010 Historic heritage July 2016. In that report it is stated:

> In the Panel's view, the method of protecting historic heritage by scheduling those places identified as having considerable and outstanding historic heritage value is well-established. The Panel supports this approach because it provides certainty to landowners and is likely to achieve the outcomes sought by the Plan. The Panel considers that significant historic heritage places should be identified, evaluated and included in the schedule following the process set out in the regional policy statement because this promotes effective protection.
>
> For these reasons, the Panel does not support the inclusion of plan provisions relating to unscheduled historic heritage. If the Council wishes to protect historic heritage, it should follow the identification and scheduling process provided for in the regional policy statement, using the plan change procedure.
>
> Overall, the Panel does not support the inclusion of objectives and policies addressing 'unscheduled historic heritage' in the regional policy statement (nor does it support the many references to 'unscheduled significant historic heritage' that occur throughout the Plan, and this is addressed in more detail in the Panel's report on hearing topic 031 Historic heritage as referenced above). Accordingly, provisions relating to unidentified historic heritage places have been removed from the regional policy statement (pages 5-6).

The above paragraphs apply equally to the Sites and Places of Value to Mana Whenua Overlay. While those sites of value were identified in the notified Plan, no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were. If the Council wishes to pursue a schedule of sites of value with a supporting policy framework, this would need to by a plan change using the Schedule 1 process under the Resource Management Act 1991, with the required section 32 analysis.

Overall, the Council's section 32 evaluation for the Sites and Places of Value to Mana Whenua Overlay does not provide an adequate basis for the introduction of that overlay.

This matter is also addressed in the panel's report on Topic 037- Mana Whenua Sites as referenced above. However given the deletion of policy approach to the sites of value in the regional policy statement, the district plan provisions also need to be deleted. Accordingly there no objectives, policies, rules or schedule for any of the sites of value.

7. Cultural impact assessments

7.1. Statement of issue

Whether specific reference should be retained for cultural impact assessments as a method.

7.2. Panel recommendation and reasons

A significant number of submitters (largely those identified in the section above regarding the sites of value) raised concerns about the obligation to provide a cultural impact assessment and how this differed in practice from the processes that are currently used to engage with Mana Whenua about a specific proposal.

The regional policy statement as notified has the following policy:

> Promote the preparation of a cultural impact assessment for activities that may adversely affect the values of Mana Whenua.

During the hearing process the Council proposed the following amendment

> Require ~~Promote~~ the preparation of a cultural impact assessment for activities that may adversely affect the values of Mana Whenua.

There was much contention about this policy, in particular the requirement for a Cultural Impact Assessment as a prescribed method in the regional policy statement. The Council and Independent Māori Statutory Board argued that a cultural impact assessment was not a prescribed 'method' but an approach to an assessment, and could be an email, a brief report or a more detailed report.

A number of submitters disagreed, referring to the definition of cultural impact assessment in the Plan (set out below). The definition requires "a report" and that the cultural impact assessment should be undertaken by Iwi (or their involvement). Submitters considered that due to the policy proposed by the Council and the definition, cultural impact assessments were essentially mandatory; whereas section 36A of the Resource Management Act 1991 does not require consultation with respect to resource consent applications.

> **Cultural impact assessment**
>
> A report which documents Mana Whenua cultural values, interests and associations with an area or a resource, the potential impacts of a proposed activity on these values and offers solutions to address these impacts. A cultural impact assessment should be prepared with the involvement of Mana Whenua recognising that it is the relationship of Mana Whenua with their ancestral lands, water, sites, wahi tapu and taonga that is to be recognised and provided for under section 6(e) of the RMA

The cultural impact assessment issue is also linked with the proposed 3600 sites and places of value to Mana Whenua as discussed above. Given the Panel's recommendation to delete the Sites and Places of Value to Mana Whenua Overlay, the need to obtain a cultural impact assessment is much reduced. However in the Panel's view this is not reason to retain such a specific method in the regional policy statement. It is the Panel's view is that the term cultural impact assessment is too definitive at the regional policy statement level of the Unitary Plan.

The Panel notes, and agrees, with Mr Roberts, expert planner for Ngāti Whātua Ōrākei Whai Maia Limited and Te Ākitai Waiohua Waka Taua Trust, where he states in his evidence in rebuttal at paragraphs 19 and 20 - Cultural Impact Assessments:

> On review, I concur with the evidence of Mr Arbuthnot and Mr Collier that reference to Cultural Impact Assessments in the Regional Policy Statement provisions is unnecessary. CIAs are a method and one tool to enable an appropriate assessment of effects on cultural values. Whai Maia and Te Akitai consider that a CIA is not always required nor the best approach to ensuring cultural values are taken into account in resource management decision making.
>
> The two key requirements that should be reflected in the objectives and policies are to:
>
> • ensure an appropriate assessment of effects on cultural values. An “appropriate” assessment has regard to the location, scale and character of the proposed subdivision, use or development;
>
> • Acknowledge that mana whenua are experts in assessing effects on their cultural values.

References to cultural impact assessments as a specific method in the regional policy statement have been deleted as being unnecessary. It is the Panel's view that ‘environment’ is defined in the Resource Management Act 1991 to include people and communities and the cultural conditions which affect people and communities. It follows that in preparing an assessment of effects on the environment to form part of an application for resource consent, an applicant must address any potential effects of a proposed activity on Mana Whenua, including their relationship with their ancestral lands, water, sites, wāhi tapu, and other taonga as well as kaitiakitanga and the principles of the Treaty of Waitangi, wherever those matters may be relevant.

8. Cultural landscapes

8.1. Statement of issue

Whether specific reference should be retained for Cultural Landscapes as a method.

8.2. Panel recommendation and reasons

The notified regional policy statement contained policies relating to cultural landscapes. The Council proposed to amend some of these policies through the hearings process. No cultural landscapes were mapped in the notified Plan or proposed to be mapped by the Council during the hearing process.

The Panel questioned a number of submitters and their witnesses as to how Māori cultural landscapes might in future be recognised or protected in the Plan rules. Some submitters are clearly concerned that a Māori cultural landscape may give rise to a further layer of physical protection over broad areas of the city, to be implemented by restrictive activity status and policy direction to 'avoid' certain effects.

The Council confirmed in its closing statement that the reference to Māori cultural landscapes was a deliberate decision. The Council considered use of the term 'Māori cultural landscapes' to be appropriate because this concept was gaining increasing recognition and use in New Zealand's planning documents. Mr Murdoch, Council's expert heritage consultant, discussed in evidence some specific examples, including the *Te Aranga Cultural Landscapes Strategy* which was developed by the Ministry for the Environment in conjunction with Te Puni Kokiri and which recognises the concept of a Māori cultural landscape. He also confirmed that through his involvement in the negotiation of Treaty settlement claims, he had seen increasing acknowledgement of Māori cultural landscapes by Government departments.

However the Council at 5.2 and 5.3 of its closing statement stated:

> At this stage, it is too early to speculate how such landscape protection might be implemented, which is why the Council has signalled the ongoing nature of this work in Chapter B5. In particular, B5.4, Policy 5 provides that Māori cultural landscapes will be recognised, enhanced and protected *by developing an agreed methodology to identify, record, assess and map the values associated with these landscapes,* and *determine the most appropriate mechanisms* to recognise the values associated with them (emphasis added). The methods in B5.4 also identify "*ongoing work to identify and map the Mana Whenua values associated with cultural landscapes*".
>
> Given the work to be done, it would be premature for the Council to signal how Māori cultural landscapes might be recognised or protected in the PAUP rules.

There are no cultural landscapes mapped nor is there a clear view of what they are, where they may apply and what type of management response would be appropriate or required if there were mapped cultural landscapes (i.e. objectives, policies and rules). The Panel agrees with the Council that it is premature to signal how Māori cultural landscapes might be recognised or protected in the Proposed Auckland Unitary Plan rules.

The regional policy statement sets out the issues of significance to Māori and to iwi authorities in the region, and this includes:

> protecting Mana Whenua culture, landscapes and historic heritage.

Also the policies in B6.5 Protection of Mana Whenua cultural heritage, include that a Māori cultural assessment identify Mana Whenua values associated with the landscape in structure planning and plan change processes. Other than those provisions above, provisions relating to cultural landscapes have been deleted.

9. Consequential changes

9.1. Changes to other parts of the plan

As a result of the Panel's recommendations on this topic, there are consequential changes to other parts of the Plan as listed below.

The Overlay - Sites and Places of Value to Mana Whenua, and all associated provisions relating to it are deleted. This matter is also addressed in the Panel's Report to Auckland Council – Hearing topic 036, 037 Māori Land and Mana Whenua Sites July 2016.

9.2. Changes to provisions in this topic

There are no changes to provisions in this topic as a result of the Panel's recommendations on other hearing topics.

10. Reference documents

The documents listed below, as well as the submissions and evidence presented to the Panel on this topic, have been relied upon by the Panel in making its recommendations.

The documents can be located on the aupihp website (www.aupihp.govt.nz) on the hearings page under the relevant hearing topic number and name.

You can use the links provided below to locate the documents, or you can go to the website and search for the document by name or date loaded.

(The date in brackets after the document link refers to the date the document was loaded onto the aupihp website. Note this may not be the same as the date of the document referred to in the report.)

10.1. General topic documents

Panel documents

The Submission Points Pathway report

009-Submission Point Pathway - 8 Oct 2014 (17 October 2014)

The Parties and Issues Report

009-Parties and Issues Report - 8 Oct 2014 (6 March 2015)

Auckland Council marked up version

Hearing Evidence - B5 Mana Whenua 1 - Graeme Murdoch (19 November 2014)

Hearing Evidence - B5.3 Māori Economic Social and Cultural Development (30 October 2014)

Hearing Evidence- Attachment B - evidence for B5 Key Matters in Pathways Mana Whenua 2 (30 October 2014)

Hearing Evidence- Attachment B Proposed Track Change Section B5 Mana Whenua 3 (30 October 2014)

Hearing Evidence- Attachment C Proposed Track Change Section B5 Mana Whenua 2 (30 October 2014)

Hearing Evidence- B5 Mana Whenua 2 - Chloe Trenouth (19 November 2014)

Hearing Evidence- B5 Mana Whenua 3 - Maximus Smitheram (19 November 2014)

Auckland Council closing statement

Closing Statement (9 December 2014)

Closing Statement - Appendix One (9 December 2014)

Panel Interim Guidance

RPS General - PAUP Chapter B - Regional Policy Statement (PDF 378KB) (9 March 2015)

10.2. Specific evidence

See the hearings page on the aupihp website https://hearings.aupihp.govt.nz/hearings for the extensive evidence submitted as part of Topic 009 on the matter of sites of value to Mana Whenua, including from the following submitters:

> New Zealand Archaeological Association, Heritage New Zealand, Ports of Auckland Limited , Scentre (New Zealand) Limited, Ms Lashbrook (property at Red Beach), Atlas Concrete Limited, Auckland International Airport Limited, Auckland Utility Operators Group, C and D McLeod (related to sites on their farm), L and S Short (Democracy Action), Wiri Oil Services Limited, and Z Energy

Auckland Council

Hearing Evidence - B5 Mana Whenua 1 - Graeme Murdoch (19 November 2014)

Independent Maori Statutory Board

Hearing Evidence - Philip Hunter Mitchell (4 November 2014)

Hearing Evidence - David Taipari (3 November 2014)

Hearing Evidence - Tokorangi Kapea (3 November 2014)

Ngati Whatua Orakei Whai Maia Limited

Hearing Evidence - Ngarimu Blair (4 November 2014)

Rebuttal Hearing Evidence - Nick Roberts (14 November 2014)

Independent Maori Statutory Board v Auckland Council

[2017] NZHC 356

High Court, Auckland (CIV-2016-404-2261) 20, 21 February; 7 March 2017
Wylie J

Local government — Appeal — Proposed Auckland Unitary Plan — Provision for sites of value to mana whenua and overlay — Council accepted recommendation to delete sites of value to mana whenua — Whether deletion meant the Plan failed to comply with statutory directives, or whether the overall policy framework and all provisions to protect Maori cultural heritage were sufficient — Balancing of potential adverse effects against restrictions imposed on landowners if overlay and associated restrictions approved.

The Independent Maori Statutory Board was constituted under the Local Government (Auckland Council) Act 2009 to advise and work with the Auckland Council on issues relating to mana whenua and mataawaka. In September 2012, the Council released a working draft of the *Proposed Auckland Unitary Plan* to iwi groups after consulting with mana whenua and the Independent Maori Statutory Board.

The draft included regional provisions relating to mana whenua cultural heritage and unscheduled sites and places. Following feedback, the Council decided to amend the mana whenua cultural heritage provisions to include an overlay and specific provision for sites and places of Maori origin.

An Independent Hearings Panel was appointed to conduct hearings and make representations to the Council. The Independent Hearings Panel found that the sites of value to mana whenua overlay was flawed when it was notified and recommended that the schedule of sites of value to mana whenua be deleted. The Council resolved to accept the recommendations relating to mana whenua.

The Independent Maori Statutory Board appealed, under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010, against aspects of the Council's decision. Seven alleged questions of law were raised.

Held, (1) section 158(4) of the Local Government (Auckland Transitional Provisions) Act 2010 provides that appeals may only be on questions of law. (para 60)

(2) In considering whether or not the Independent Hearings Panel and the Council had erred, it was necessary to consider the overall policy framework and all provisions to protect Maori cultural heritage in the *Proposed Unitary Plan*. It would be misleading to single out the sites of value to mana whenua overlay provisions and assert that, because they had been deleted, the Plan as a whole failed to comply with statutory directives. (para 79)

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442, referred to

Man O'War Station Ltd v Auckland Council [2017] NZCA 24, (2017) 19 ELRNZ 662, referred to

Transpower New Zealand Ltd v Auckland Council [2017] NZHC 281, referred to

(3) The Independent Hearings Panel was required to ensure that, if the Council accepted its recommendations, relevant provisions in the Resource Management Act

1991 would be complied with. A very large number of provisions in the *Proposed Unitary Plan* referred to mana whenua values and cultural heritage. The deletion of the sites of value to mana whenua overlay and associated provisions did not compromise or have the potential to compromise the Council's compliance with its statutory obligations under the Resource Management Act 1991. (paras 80, 85)

(4) The Independent Hearings Panel had the powers of a Commission of Inquiry. The hearings were inquisitorial, and the position was similar to that which applied to the Environment Court under s 276 of the Resource Management Act 1991. The sites of value to mana whenua overlay was advanced on a precautionary basis to protect possible sites from development until it was finally determined whether or not each site had ongoing value to mana whenua. The Independent Hearings Panel and the Council had to balance the potential adverse effects against the restrictions which would be imposed on landowners if the overlay and its associated restrictions were approved. To that end, the Independent Hearings Panel had considered whether or not the overlay and the schedule of sites of value were robust, and concluded that they were not. That conclusion was open to the Independent Hearings Panel on the evidence. (para 91)

Ngati Maru Iwi Authority Inc v Auckland City Council HC Auckland AP18-SW01, 24 October 2002, distinguished

Boulder Trust v New Zealand Transport Agency [2015] NZEnvC 84, referred to

RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52, (2017) 19 ELRNZ 628, referred to

Saddle Views Estate Ltd v Dunedin City Council [2014] NZHC 2897, (2014) 18 ELRNZ 97, referred to

(5) The Council was required to prepare an evaluation report in accordance with s 32 of the Resource Management Act 1991 before the *Proposed Unitary Plan* was notified. The Independent Hearings Panel had the report, as well as extensive other evidence before it. Along with the inferences it was entitled to draw from its own perusal of the relevant documents, the Independent Hearings Panel had not erred in law in concluding that the Council's s 32 evaluation prepared prior to notification did not provide an adequate basis for the introduction of the sites of value to mana whenua overlay. Although the Independent Hearings Panel had erred in concluding that only sites of value to mana whenua on public land remained in the overlay, that error was not material. (paras 98, 99, 107)

(6) It was open to the Independent Hearings Panel to recommend deletion of the sites of value to mana whenua overlay on the basis that, without evidence of mana whenua values that provided support for all the sites in the schedule and the overlay, the provisions as a whole lacked a sufficient evidential basis. (para 111)

(7) The policy and rule framework recognised and provided for the relationship mana whenua had with landscapes, and for the identification of landscapes, based on cultural values. Further, the drafting retained by the Independent Hearings Panel and the Council echoed the wording of the provisions in the *New Zealand Coastal Policy Statement* and addressed the issue of cultural landscapes. The *Proposed Unitary Plan* framework implemented the relevant statutory directives. While the decision version of the *Proposed Unitary Plan* deleted specific reference to cultural landscapes, it retained sufficient reference to the evaluation of landscapes for associated cultural values to ensure that the identification of appropriate landscapes remained possible in future and that adverse effects on cultural values associated with landscapes could be assessed where relevant. (paras 115, 116)

Cases referred to

Albany North Landowners v Auckland Council [2017] NZHC 138

Boulder Trust v New Zealand Transport Agency [2015] NZEnvC 84
Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372
Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)
Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442
Man O'War Station Ltd v Auckland Council [2017] NZCA 24, (2017) 19 ELRNZ 662
Ngati Maru Iwi Authority Inc v Auckland City Council HC Auckland AP18-SW01, 24 October 2002
New Zealand Suncern Construction Ltd v Auckland City Council (1997) 3 ELRNZ 230 (HC)
RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52, (2017) 19 ELRNZ 628
Saddle Views Estate Ltd v Dunedin City Council [2014] NZHC 2897, (2014) 18 ELRNZ 97
Transpower New Zealand Ltd v Auckland Council [2017] NZHC 281

Appeal

This was an unsuccessful appeal under s 158 of the Local Government (Auckland Transitional) Provisions Act 2010 relating to the proposed *Auckland Unitary Plan*.

T Hovell and *N Buxeda* for appellant
J Caldwell and *K Wilson* for respondent
M Doesburg for Auckland Utility Operators Group Inc
P McMillan for Democracy Action Inc
R Gardner for Federated Farmers of New Zealand Inc
C Kirman and *A Devine* for Housing New Zealand Corporation
No appearances for trustees of Self Family Trust
Dr K Palmer for himself

Cur adv vult

WYLIE J

Introduction

[1] The appellant, the Independent Maori Statutory Board (the IMSB), appeals aspects of a decision made by the respondent, Auckland Council (the Council), on the *Proposed Auckland Unitary Plan*.[1] The Council decided to accept a number of recommendations made to it by the Auckland Unitary Plan Independent Hearings Panel (the IHP). Inter alia, it deleted from the *Proposed Unitary Plan* as notified:

(a) Some of the provisions relating to sites of value for mana whenua (SVMWs) proposed to be incorporated in the Regional Policy Statement section of the Plan;

(b) A SVMW overlay[2] proposed to be included in the district plan section;

1 A plan for Auckland that meets the requirements of a Regional Policy Statement, a Regional Plan (including a Regional Coastal Plan) and a District Plan.

2 It is recorded in the *Proposed Unitary Plan* — A1.6.2 — that overlays manage the protection, maintenance or enhancement of particular values associated with an area or resource. They can, and do, apply across zones and precincts. Overlays can manage specific planning issues, eg addressing reverse-sensitivity effects between different land uses. They generally apply more restrictive rules than the Auckland-wide zone or precinct provisions that apply to a site, but in some cases they can be more enabling. Overlay rules apply to all activities on the part of the site to which the overlay

(c) An accompanying schedule of SVMWs;

(d) Associated rules and provisions proposed to be included in the District Plan Section; and

(e) Various provisions for cultural landscapes proposed to be included in the Regional Policy Statement section.

The IMSB challenges these various deletions.

[2] The appeal by the IMSB is brought pursuant to s 158 of the Local Government (Auckland Transitional Provisions) Act 2010.

[3] Section 158(5) of the Act provides that, except as otherwise provided in the section, ss 299(2) and 300-307 of the Resource Management Act 1991 apply, with all necessary modifications, to appeals brought under s 158. Inter alia, s 301 of the Resource Management Act applies. It extends a right to appear and be heard on an appeal to any party to the proceedings, or to any person who appeared before the IHP when it heard submissions on the *Proposed Unitary Plan*. Auckland Utility Operators Group Inc, Democracy Action Inc, Federated Farmers of New Zealand Inc, Housing New Zealand Corporation, the trustees of the Self Family Trust and Dr K Palmer all appeared before the IHP and all gave notice under s 301 that they wished to appear and be heard.

[4] When the appeal was called, there was no appearance for the trustees of the Self Family Trust.

[5] Mr Doesburg, for Auckland Utility Operators Group, sought leave to withdraw. His client was concerned with what are known as the cultural impact assessment provisions which were contained in the *Proposed Unitary Plan*. Those provisions have been deleted but the IMSB does not challenge this. Mr Hovell, for the IMSB, expressly accepted that the cultural impact assessment provisions cannot be resurrected as part of this appeal. On this basis Mr Doesburg was content to abide the Court's decision. He did not expressly adopt the submissions of any other party; nor did he vacate his client's appearance. I granted him leave to withdraw.

[6] The IMSB and the Council filed a joint statement of facts in accordance with directions made by the Court. This statement of facts was accepted by Auckland Utility Operators Group and Federated Farmers. Other parties had not, prior to the hearing, confirmed their final position on the document, although Democracy Action had filed a statement in response to aspects of the joint statement. I asked all counsel and Dr Palmer whether they accepted the statement. All accepted the statement of facts, although Ms McMillan, appearing for Democracy Action, took issue with some of the inferences that can be drawn from the factual detail recorded in the statement.

Background

Independent Maori Statutory Board

[7] The IMSB is constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009.[3] It is an independent board comprising nine members. There are seven mana whenua group representatives and two mataawaka representatives.[4]

(cont)

applies, unless the overlay rules expressly state otherwise. There is a separate chapter in the plan — chapter D — dealing with overlay provisions. Overlays are identified on the relevant planning maps.

3 Local Government (Auckland Council) Act 2009, s 81.

4 Schedule 2, cl 1.

[8] The IMSB has both general and specific functions. Inter alia, it is required to develop a schedule of issues of significance to mana whenua groups and mataawaka of Tamaki Makaurau, to advise the Council on matters affecting mana whenua groups and mataawaka and to work with the Council on the design and execution of documents and processes to implement the Council's statutory responsibilities towards mana whenua groups and mataawaka.[5]

The Council/Notification of the Proposed Unitary Plan

[9] The Council was established as a territorial authority on 1 November 2010, following the reorganisation of local government in the Auckland region.[6] One of the planning priorities for the Council was the development of an *Auckland Unitary Plan* incorporating a Regional Policy Statement, a Regional Plan (including a Regional Coastal Plan) and a District Plan for the new "super city".

[10] In preparing a draft plan, the Council consulted with mana whenua and the IMSB in accordance with its statutory obligations.

[11] In September 2012, a working draft of the *Proposed Plan* was released to iwi authorities. The working draft included regional provisions relating to mana whenua cultural heritage and in relation to unscheduled sites and places. It proposed the use of what was referred to as an "alert layer" to protect these sites and places. It also included provisions related to Maori cultural landscapes and information management protocols.

[12] The *Draft Unitary Plan* was released to the public in March 2013. It proposed two layers of protection for sites and places of Maori cultural heritage, namely:

(a) A sites and places of significance to mana whenua layer. It set out draft objectives, policies and rules for these sites and places. There was an accompanying schedule detailing 61 sites and places of significance; and

(b) A Maori cultural heritage alert layer which would extend to approximately 9,000 sites. These sites had been taken from a database known as the *Cultural Heritage Inventory* maintained by the Council. This database in turn had been taken from a list of sites considered to be appropriate for further investigation by the New Zealand Archaeological Association.

[13] Both mana whenua groups and the public provided feedback on this draft version of the *Proposed Unitary Plan*. Following the feedback, in September 2013, the Council's Auckland Plan Committee resolved to amend the draft mana whenua cultural heritage provisions to include an overlay and specific provisions for sites and places of Maori origin where the location of the sites/places had been confirmed.

[14] The Council's *Proposed Unitary Plan* was notified on 30 September 2013. The *Regional Policy Statement* section contained proposed policies intended to recognise, enhance and protect mana whenua values associated with mana whenua cultural landscapes. It dealt separately with other sites and places considered to be part of mana whenua's cultural heritage. It distinguished between sites and places of significance to mana whenua and SVMWs. It proposed:

(a) Objectives, policies and rules for sites and places of significance, and an accompanying schedule listing 61 sites of significance; and

(b) Objectives, policies and rules for SVMWs by way of an overlay showing the location of the sites of value to mana whenua, and with an accompanying schedule detailing some 3,600 such sites.

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5 Section 84(1)(b), (d) and (e).

6 Section 6 and 2(1).

The overlay rules proposed that resource consent should be required, as a restricted discretionary activity, for earthworks on or within 50 m of a scheduled site of value (with some exceptions). A cultural impact assessment would be required as part of any resource consent application. Planning maps formed part of the *Proposed Unitary Plan* as notified. There was, however, an error in the planning maps. SVMWs were shown on the maps by purple circles. It was intended that each circle should have a radius of 50 m. In fact, on the planning maps as notified, they had a radius of 100 m.

[15] Submissions were able to be made on this notified version of the *Proposed Unitary Plan* until 28 February 2014. The Council notified a summary of decisions requested on 11 June 2014. The period for making further submissions in response to primary submissions closed on 22 July 2014.

[16] The IMSB and various mana whenua groups lodged submissions generally supporting the SVMW overlay, the accompanying provisions and the cultural landscape provisions. Submissions were also lodged by various members of the public, by businesses and by other groups opposing the SVMW overlay, the related cultural impact assessment provisions, and the cultural landscape provisions. Each of the various s 301 parties lodged submissions and/or further submissions in relation to the SVMW provisions.

The IHP; the IHP hearings and further Council reports

[17] From the outset there was concern that the *Proposed Unitary Plan* should be finalised in a timely fashion. Representations were made to the government to streamline the process. It was sympathetic and it introduced legislation to this end.[7] Inter alia, the legislation provided for the appointment of a specialist panel (the IHP) by the Ministers for the Environment and of Conservation. It was to be given the powers of a commission of inquiry under the Commissions of Inquiry Act 1908 and it was required to conduct hearings into, and make recommendations to the Council on, the *Proposed Unitary Plan*.[8] The hearing and recommendations process was subject to a strict timetable, with limited provision for extension.

[18] The IHP was duly appointed and, in the exercise of its powers, it scheduled the required hearings by reference to topics based on the way the Council had grouped the submissions lodged. There were approximately 80 topics for hearing. The IMSB and the s 301 parties' submissions and further submissions were grouped either into *Topic 09 Mana Whenua* or *Topic 037 Mana Whenua Sites*.

[19] The hearing on *Topic 09* was held between 19 and 21 November 2014.

[20] In December 2014, two processes were commenced in an endeavour to better assess which sites and places were of value to mana whenua. First, a desktop data audit was initiated by the Council to check the background information held by it in relation to each site. However, the individual sites were not visited. Secondly, a screening process was commenced by mana whenua representatives to determine what specific mana whenua values might be able to be attributed to each site. They sought to apply the various matters which were noted in the *Proposed Regional Policy Statement*.

[21] On 22 May 2015, the Council lodged its evidence with the IHP in advance of the hearing into *Topic 37*. The evidence advised that 2,213 SVMWs were considered to meet the following criteria:

(a) The site was of Maori origin;

7 Local Government (Auckland Transitional Provisions) Amendment Act 2013, s 6.

8 Local Government (Auckland Transitional Provisions) Act 2010, ss 123, 136 and 164.

(b) The site had mana whenua values ascribed to it in accordance with the matters noted in the *Proposed Regional Policy Statement*; and

(c) The location of the site had been confirmed.

It was recommended that these sites should be retained in the schedule of SVMWs. The evidence also recommended that 1,373 sites should be removed from the schedule,[9] either because relevant values had not been assigned to the sites by mana whenua, the sites were not associated with Maori, the sites were already scheduled, their location had not been confirmed or it was not known whether they were natural or archaeological sites.

[22] The hearing on *Topic 037* was held between 2 and 9 June 2015.

[23] In its opening submissions to the IHP, Council representatives advised that the Council's intention was to initiate the withdrawal process for a number of the scheduled sites as a consequence of the data audit and the screening process.

[24] On 3 July 2015, the Council provided a post-hearing memorandum to the IHP. The report updated the IHP on the results of the data audit and the screening processes. Further, on 24 July 2015 the Council filed its closing legal submission on *Topic 37* with the IHP. The Council confirmed that its staff had recommended that 1,387 sites should be deleted from the SVMW schedule and that it intended to initiate the withdrawal process for those sites.

[25] On 12 November 2015, the Auckland Development Committee of the Council met to consider whether to withdraw the 1,373 sites from the schedule of SVMWs contained in the *Proposed Unitary Plan*. Following discussion, the Committee passed an amended resolution as follows:

> to remove Sites and Places of value overlay on private land until such a time that all Sites and Places have been accurately identified and mapped.

[the withdrawal resolution].

[26] Public notice was given on 16 March 2016 advising that the Council had withdrawn 593 sites from the SVMW overlay.

[27] As at 16 March 2016, 3,007 sites remained on the SVMW schedule. There were 2,213 sites which were considered to be of Maori origin, to have cultural values for mana whenua and the locations of which had been confirmed. Notwithstanding the withdrawal resolution, these sites were on both public and private land. There were additional sites where either the location of the site had not been confirmed, the site had not been screened for appropriate values by mana whenua, it was not known whether the site was a natural or an archaeological site, the site was non-Maori or the site duplicated another scheduled site.

The IHP's recommendations to the Council

Overview of Recommendations Report

[28] The IHP's *Overview Report* to the Council enjoined that the reasons for its recommendations and the proposed plan as recommended should be read as an integrated whole.[10] Relevantly it adopted an "across the board" approach to the various schedules in the plan. It stated as follows:[11]

> The policies … relating to schedules have generally been recast to require identification and evaluation in terms of specified factors before including items in schedules.

9 Local Government (Auckland Transitional Provisions) Act 2010, s 124; Resource Management Act 1991, sch 1, cl 8D.

10 IHP's report to Auckland Council — *Overview of Recommendations* — Foreword — at 5 and [2.1.2], at 18.

11 [8.2.2] — Schedules — at 74.

> Generalised provisions suggesting that unidentified items should be protected in the same way as identified items have been deleted as being uncertain and lacking in evidential foundation …

[29] The IHP summarised its key recommendations. Item 24 read as follows:[12]

> 24. Delete the Schedule of Sites of Value to Mana Whenua until the evidential basis for it has been assembled.

It then set out a summary of the significant changes it was recommending. In relation to SVMWs, it stated as follows:[13]

> vi. *The schedule of sites of value to Mana Whenua* is recommended to be deleted. On the evidence before the Panel, the restriction of activities based solely on the archaeological database used to create this schedule is inappropriate. The Panel notes that at the end of the hearing session, in response to submitters' complaints that the schedule was not properly based on Mana Whenua values, the Council withdrew the items in the schedule that were located on privately-owned land. The Panel does not consider that ownership is an appropriate basis on which to apply a control such as this and recommends the withdrawal of all the items listed in the schedule. Notwithstanding that, the Panel does consider that a two-tier approach to the protection of sites that are special to Mana Whenua, similar to the two-tier approach to historic heritage places, is appropriate and therefore recommends that the policy framework at the regional policy statement level for the identification, evaluation and scheduling of sites of value to Mana Whenua should remain so that once the further investigation and assessment that is presently being undertaken is completed, a revised schedule can be proposed as a plan change.

[30] A little later in its report, the IHP discussed its recommendations in relation to the *Proposed Regional Policy Statement*. In relation to *Topic 009 Mana Whenua* it stated as follows:[14]

> *B6 Mana Whenua (Topic 009)* — No significant changes are proposed to these policies. However, other recommendations affecting Unitary Plan provisions relating to Mana Whenua should be noted. The Panel recommends retaining text which refers to Mana Whenua rather than tangata whenua as this aligns with the approach in the Local Government (Auckland Council) Act 2009. The Panel recommends retention of express provisions addressing resource management issues relating to Maori and both their ancestral and their on-going relationships with natural and physical resources in accordance with sections 6(e), 7(a) and 8 (as well as other enabling provisions) of the Resource Management Act 1991. Some distinctions, such as provisions for cultural impact assessments and consideration of cultural landscapes, are deleted as being unnecessary given that the former is already part of the required content of assessments of environmental effects (see clause 7(1)(a) of Schedule 4 to the Resource Management Act 1991) and the latter simply reflects that landscape values (and choices about which of those are important) are all inherently cultural in origin. The Schedule of sites and places of value to Mana Whenua has been deleted: while the Panel supports a two-tier scheduling regime as for historic heritage sites, there was no sufficient basis for the items on this schedule which was simply a copy of the New Zealand Archaeological Association list of sites for further investigation.

[31] The IHP said the following about the SVMW overlay:[15]

> The Sites and Places of Value to Mana Whenua Overlay (Topic 037) is linked to the Sites and Places of Significance to Mana Whenua Overlay, both based on policies set out in the regional policy statement. The approximately 3600 sites and places of value

12 Headlines, at 8.

13 Executive Summary, at 13.

14 Para 8.2.2 — Chapter B: *Regional Policy Statement*, at 73.

15 Para 8.3.6 — *Sites of Value to Mana Whenua*, at 79.

> to Mana Whenua were identified using the New Zealand Archaeological Association database of archaeological sites, rather than by a comprehensive identification of Mana Whenua values or the degree of significance of those values.
>
> The Council's basis for this approach was stated to be "precautionary". There were a large number of submissions opposing this overlay on the basis that insufficient investigation had been undertaken. In evidence at the hearings the Council advised that a programme of work had been established to review the scheduled items and assess them in terms of their values to Mana Whenua.
>
> The Panel supports the approach of having two distinct layers of protection for particular sites with which Mana Whenua have ancestral relationships. This is similar to other natural and physical resources for which the Unitary Plan provides two layers of protection.
>
> However, the Panel does not consider there to be a sufficient evidential basis for the schedule at this stage and therefore recommends the deletion of this overlay. The re-application of the overlay can be considered once the values of Mana Whenua and the sites that are important to them in relation to these values have been identified following appropriate consultation and research. This may include a review of the New Zealand Archaeological Association database (and other identified sites).
>
> The Panel notes that, in its reply on this topic, the Council withdrew many of the sites that had been scheduled as being of value to Mana Whenua where these were located on privately owned land. The Panel considered whether such a half-way position was an appropriate method, but concluded that the basis of the effects is the same whoever owns the land, so it would be more appropriate to ensure that all sites of value are properly identified, assessed and scheduled.

Recommendation Report on Topic 009 Mana Whenua

[32] The IHP's *Recommendation Report on Topic 009* provided an overview of cultural heritage matters as follows:[16]

> The policy approach to Mana Whenua cultural heritage addresses the multiple levels of mana whenua cultural heritage. Sites and places where a value of significance has been identified are protected through the … Sites and Places of Significance to Mana Whenua Overlay. Assessments of effects on the environment which pay particular attention to potential cultural effects based on history and tikanga are expected for areas subject to structure planning to identify additional sites that warrant protection. Similar assessments are required for resource consent applications where Mana Whenua values are affected.
>
> For reasons such as limited investment, cultural sensitivities and mismanagement of information in the past, the [IHP] acknowledges that very little Mana Whenua cultural heritage has been scheduled, despite the large number of Mana Whenua groups with strong associations to Auckland. The Council has a statutory responsibility to protect Mana Whenua cultural heritage from inappropriate subdivision, use and development. This will involve a collaborative approach with Mana Whenua, working in accordance with tikanga to identify, assess, protect and manage Mana Whenua cultural heritage, including in the context for individual sites and places which are the footprint/tapuwae of Mana Whenua.
>
> The knowledge base of information about Mana Whenua cultural heritage is continually developing and tools that provide a form of protection and inform subdivision, use and development, while respecting Mana Whenua values, are increasingly valuable. An improved knowledge base helps reduce the risk of damage, enables development that properly reflects the values associated with the context of an area, informs landowners and applicants of the characteristics of their site, and helps to avoid major time and cost implications to applicants when development is halted by accidental discovery of protected items.

16 *IHP report to Auckland Council, Hearing Topic 009 Mana Whenua*, July 2016, at 6-7.

[33] Section 6 of the *Recommendation Report on Topic 009* set out the key findings and reasoning for the IHP's recommendations on the Regional Policy Statement objectives, policies and methods for SVMWs as follows:[17]

> **6.1. Statement of Issue**
>
> Whether the provisions relating to sites and places of value to Mana Whenua on public land should be retained or deleted. It is noted that the Council formally withdrew from the Plan those sites of value identified on privately-owned land.
>
> **6.2. Panel recommendations and reasons**
>
> The provisions relating to sites and places of value to Mana Whenua (and the related requirement to obtain a cultural impact assessment below) was probably the issue of most concern to many submitters. This was because a significant number of sites (in the order of 3600) were:
>
> i. not selected by Mana Whenua nor had they been evaluated against any criteria;
> ii. it had not determined or verified whether the sites of value actually existed and what values were sought to be protected, and that the majority of the sites had not had site visits undertaken;
>
> …
>
> v. the sites of value had been notified incorrectly (covering a much larger area than was approved for notification). …

[34] The IHP then summarised some of the evidence it had heard from a number of submitters and their witnesses. Regarding the Council's position, it noted as follows:[18]

> The Council in its closing statement (paragraph 11.1) clarified its current workstreams regarding cultural heritage and noted:
>
> > The Council is currently undertaking a desktop review of the 3,600 sites currently included in the Sites and Places of Value overlay, to determine whether there is enough information for these sites to remain in this overlay. We have been advised that this process is expected to be complete by early 2015; and
> >
> > On 26 September 2014, the Council initiated a workstream which will implement B5.4, Policies 1-3 through a Maori Cultural Heritage project. The project will develop a methodology for identifying, assessing and mapping Maori cultural heritage with a view to, amongst other options, introducing Sites and Places of Value through a plan change.
>
> The Council indicated that prior to the hearing for Mana Whenua sites (Topic 037) in June 2015 it intended to have refined the content of the sites and places of value overlay and to have re-mapped the overlay to improve clarity and accuracy, including the Maori cultural heritage overlays and the cultural impact assessment provisions.
>
> Notwithstanding the above, the Auckland Development Committee, at its 12 November 2015 meeting passed Resolution number AUC/2015/205, which is:
>
> > That the Auckland Development Committee:
> >
> > (a) agree to remove Sites and Places of value overlay on private land until such a time that all Sites and Places have been accurately identified and mapped.
> >
> > …
>
> Accordingly these sites have been withdrawn from the notified Plan. The remaining sites are those on publicly-owned land.
>
> The Panel has recommended the deletion of those sites of value identified on publicly-owned land. This means that all of those sites of value are to be removed

17 IHP report to Auckland Council, *Hearing Topic 009 Mana Whenua*, above n 16, at [6] — *Sites and Places of Value to Mana Whenua* at 12.

18 IHP report to Auckland Council, *Hearing Topic 009 Mana Whenua*, above n 16, at 13.

from the Unitary Plan. The reasons for removing those sites of value identified on publicly-owned land are the same as those set out above. That is, those sites have not been appropriately identified and evaluated to determine if they are indeed a site of value.

The Panel's approach to protecting places and areas has been set out in the Panel's Report to Auckland Council — Overview of recommendations July 2016 and in the Report to Auckland Council — Hearing topic 010 Historic heritage July 2016. In that report it is stated:

> In the Panel's view, the method of protecting historic heritage by scheduling those places identified as having considerable and outstanding historic heritage value is well-established. The Panel supports this approach because it provides certainty to landowners and is likely to achieve the outcomes sought by the Plan. The Panel considers that significant historic heritage places should be identified, evaluated and included in the schedule following the process set out in the regional policy statement because this promotes effective protection.
>
> For these reasons, the Panel does not support the inclusion of plan provisions relating to unscheduled historic heritage. If the Council wishes to protect historic heritage, it should follow the identification and scheduling process provided for in the regional policy statement, using the plan change procedure.
>
> Overall, the Panel does not support the inclusion of objectives and policies addressing "unscheduled historic heritage" in the regional policy statement (nor does it support the many references to "unscheduled significant historic heritage" that occur throughout the Plan, and this is addressed in more detail in the Panel's report on hearing topic 031 Historic heritage as referenced above). Accordingly, provisions relating to unidentified historic heritage places have been removed from the regional policy statement (pages 5-6).

The above paragraphs apply equally to the Sites and Places of Value to Mana Whenua Overlay. While those sites of value were identified in the notified Plan, no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were. If the Council wishes to pursue a schedule of sites of value with a supporting policy framework, this would need to [be] by a plan change using the Schedule 1 process under the Resource Management Act 1991, with the required section 32 analysis.

Overall, the Council's section 32 evaluation for the Sites and Places of Value to Mana Whenua Overlay does not provide an adequate basis for the introduction of that overlay.

This matter is also addressed in the panel's report on Topic 037 — Mana Whenua Sites as referenced above. However, given the deletion of [a] policy approach to the sites of value in the regional policy statement, the district plan provisions also need to be deleted. Accordingly there [are] no objectives, policies, rules or schedule for any of the sites of value.

[35] Section 8 of the IHP's *Recommendation Report on Topic 009* set out the key findings and reasoning for the IHP's recommendations on the *Regional Policy Statement* objectives, policies and methods for cultural landscapes as follows:[19]

> **8.1. Statement of issue**
>
> Whether specific reference should be retained for Cultural Landscapes as a method.
>
> **8.2. Panel recommendations and reasons**
>
> The notified regional policy statement contained policies relating to cultural landscapes. The Council proposed to amend some of these policies through the hearings process. No cultural landscapes were mapped in the notified Plan or proposed to be mapped by the Council during the hearing process.

19 IHP report to Auckland Council, *Hearing Topic 009 Mana Whenua*, above n 16, at [8] — *Cultural Landscapes* — at 16-17.

The Panel questioned a number of submitters and their witnesses as to how Maori cultural landscapes might in future be recognised or protected in the Plan rules. Some submitters are clearly concerned that a Maori cultural landscape may give rise to a further layer of physical protection over broad areas of the city, to be implemented by restrictive activity status and policy direction to "avoid" certain effects.

The Council confirmed in its closing statement that the reference to Maori cultural landscapes was a deliberate decision. The Council considered use of the term "Maori cultural landscapes" to be appropriate because this concept was gaining increasing recognition and use in New Zealand's planning documents. Mr Murdoch, Council's expert heritage consultant, discussed in evidence some specific examples, including the *Te Aranga Cultural Landscapes Strategy* which was developed by the Ministry for the Environment in conjunction with Te Puni Kokiri and which recognises the concept of a Maori cultural landscape. He also confirmed that through his involvement in the negotiation of Treaty settlement claims, he had seen increasing acknowledgement of Maori cultural landscapes by Government departments.

However, the Council at 5.2 and 5.3 of its closing statement stated:

> At this stage, it is too early to speculate how such landscape protection might be implemented, which is why the Council has signalled the ongoing nature of this work in Chapter B5. In particular, B5.4, Policy 5 provides that Maori cultural landscapes will be recognised, enhanced and protected *by developing an agreed methodology to identify, record, assess and map the values associated with these landscapes,* and *determine the most appropriate mechanisms* to recognise the values associated with them (emphasis added). The methods in B5.4 also identify "ongoing work to identify and map the Mana Whenua values associated with cultural landscapes."
>
> Given the work to be done, it would be premature for the Council to signal how Maori cultural landscapes might be recognised or protected in the PAUP rules.

There are no cultural landscapes mapped nor is there a clear view of what they are, where they may apply and what type of management response would be appropriate or required if there were mapped cultural landscapes (ie objectives, policies and rules). The Panel agrees with the Council that it is premature to signal how Maori cultural landscapes might be recognised or protected in the Proposed Auckland Unitary Plan rules.

The regional policy statement sets out the issues of significance to Maori and to iwi authorities in the region, and this includes:

> protecting Mana Whenua culture, landscapes and historic heritage.

Also the policies in B6.5 Protection of Mana Whenua cultural heritage, include that a Maori cultural assessment identify Mana Whenua values associated with the landscape in structure planning and plan change processes. Other than those provisions above, provisions relating to cultural landscapes have been deleted.

Recommendation Report on Topics 036 and 037 — Maori Land and Treaty, and Mana Whenua Sites

[36] Section 5.2.2 of the IHP's *Recommendation Report on Topics 036 and 037* set out the key findings and reasoning in relation to Sites and Places of Value to Mana Whenua as follows:[20]

> 1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan.
>
> …

20 *IHP Report to Auckland Council, Hearings Topics 036 and 037, Maori Land and Treaty, and Mana Whenua Sites*, July 2016, at [1.2], at 4; [5.2.2], at 13.

ix. Confirming deletion of the Sites and Places of Value to Mana Whenua Overlay consequential to the recommendations in Topic 009 Regional Policy Statement — Mana Whenua.

…

5.2.2. Sites and places of value to Mana Whenua.

The Panel heard wide-ranging evidence on this issue and concluded that the entire schedule should be deleted because it was not properly founded. The reasons for the Panel's recommendation to delete the entire schedule are set out in the Panel's Overview of recommendations (report as referenced above) and in the Panel's Report to Auckland Council — Hearing topic 009 Regional Policy Statement — Mana Whenua.

The IHP went on to repeat its observations contained in [8.3.6][21] of its *Overview Report* set out above at [31].

Summary

[37] In relation to the protection of sites and places of significance to mana whenua, and the SVMW overlay and schedule, the IHP's key findings were that:

(a) The SVMW overlay was flawed when it was notified. It contained sites which had not been properly evaluated against appropriate criteria.

(b) The Council's s 32 evaluation did not provide an adequate basis for the SVMW overlay.

(c) It favoured two tier protection for sites/places which are special to mana whenua — namely sites and places of significance to mana whenua and sites and places of value to mana whenua.

(d) Sites and places of significance to mana whenua should be protected through an overlay and a schedule.

(e) Appropriate policies for sites of value to mana whenua should be retained in the Regional Policy Statement.

(f) If the Council wishes to pursue an overlay/schedule of SVMW's, it can do so using the Sch 1 plan change provisions contained in the Resource Management Act.

[38] It can be assumed that the IHP considered that the Council would be fulfilling its statutory obligations contained in pt 2 of the Resource Management Act, and in particular, s 6(e), if it accepted the recommended policy and rule framework, albeit that it did not include a secondary overlay for SVMW's. The IHP was required to ensure the Council would comply with its statutory obligations pursuant to s 145(1)(f) of the Local Government (Auckland Transitional Provisions) Act 2010.

[39] The IHP was aware, from the evidence which it had heard, that the Council, and mana whenua, had undertaken, and were continuing, work to try and identify and categorise sites and places which might be of value to mana whenua.

[40] In relation to cultural landscapes, the IHP considered that the *Proposed Plan* as recommended by it contained sufficient reference to the evaluation of landscapes for associated cultural values to ensure that their identification remains possible in the future, and that adverse effects on cultural values associated with landscapes can be assessed where relevant.

The Council's decision

[41] The IHP delivered its recommendations, including the changes it recommended to the *Proposed Unitary Plan* as notified, to the Council on 22 July 2016.

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21 The report reads [8.3.8]. This is in error. The correct reference is to [8.3.6] in the *Overview Report*.

[42] The Council publicly notified the recommended version of the *Proposed Unitary Plan* on 27 July 2016.

[43] The Council had to decide whether to accept or reject each recommendation made to it by the IHP. If it rejected a recommendation, the Council had to decide an alternative solution.[22] The Council also had a very strict timetable within which to complete its tasks — 20 working days — again, with limited provision for extension.

[44] The Council met in August 2016 to consider and make decisions on the IHP's recommendations. Council staff recommended that the IHP's recommendations in relation to SVMW's should not be accepted.

[45] Notwithstanding its staffs' recommendation, on 10 August 2016, the Governing Body of the Council resolved to:[23]

> Accept all the recommendations of the Independent Hearings Panel as contained in the Panel reports entitled "Report to Auckland Council Hearing Topic 009 — Mana Whenua, July 2016" and "Report to Auckland Council Hearing Topic 036/037 — Maori land and Treaty and Mana Whenua sites, July 2016" as they relate to the content of the Proposed Auckland Unitary Plan and also the associated recommendations as they appear in the plan and the maps. (Resolution Number GB/2016/87)

[46] The Council released its decisions on the IHP's recommendations, and a decisions version of the *Proposed Unitary Plan*, on 19 August 2015.

The appeal

The IMSB's position

[47] The questions of law raised by the IMSB have evolved since the notice of appeal was filed on 9 September 2016. That document detailed seven questions said to be questions of law. Following a direction given by the Court, a refined list of questions was filed on 26 January 2017. Nine alleged questions of law were raised in this document. A synopsis of submissions was then filed by the IMSB on 2 February 2017, which refined the questions of law further still and, at the hearing, oral submissions were made which changed the emphasis yet again. At least one of the questions of law previously raised — that there were no criteria for evaluation of SVMW's — was abandoned. At my request, counsel, during the course of the hearing, prepared a final summary of the alleged questions of law. It read as follows:

> (a) Did the Council's approach to the consideration of the SVMW overlay preclude it from meeting its statutory requirements, particularly Part 2 of the Resource Management Act and the NZCPS?
>
> (b) Did the Council apply an improper evidential threshold in considering the SVMW [overlay]?
>
> (c) Did the Council err in law in finding that the s 32 report did not provide an adequate basis for the introduction of that overlay?
>
> (d) Did the Council err in law [by] relying on a mistaken understanding of the withdrawal resolution?
>
> (e) [Was] the deletion of objectives and policies for the SVMW overlay and/or the deletion of the rules and schedule a mistake or a finding that could not reasonably have been made given the [IHP's] findings and the evidence before it?
>
> (f) Did the Council apply the wrong legal test in finding that the provisions for Maori cultural landscapes were unnecessary?

22 Local Government (Auckland Transitional Provisions) Act 2010, s 148.

23 Open minutes of meeting of Governing Body of the Council, 10 August 2016, at [6.2.1].

[48] Mr Hovell sought to summarise the IMSB's case. He asserted that the SVMW overlay sought to proactively manage sites and places of cultural value to mana whenua by formally scheduling sites as part of the *Proposed Unitary Plan*. He submitted that mana whenua had affirmed the cultural value of the SVMW sites, and that they were important to Maori in terms of s 6(e) and (f) of the Resource Management Act. He argued that, as a result of the screening process and the data audit, 2,213 sites had been confirmed against a range of appropriate criteria, and that as a consequence, the schedule of SVMWs met "probative evidential thresholds". He submitted that retention of the schedule is necessary if the Council is to comply with the various statutory directives contained in the Resource Management Act, which requires it to actively protect and manage mana whenua taonga within the Auckland region. He put it to me that the proper legal test for considering mana whenua values is informed by the Resource Management Act's framework, and that the provisions of pt 2 of the Act must be taken into account, along with the provisions of the *New Zealand Coastal Policy Statement* and the Regional Policy Statement.

[49] Mr Hovell also argued that the IHP, and the Council in adopting the IHP's recommendations, misinterpreted the withdrawal resolution. He observed that the IHP interpreted the resolution as withdrawing from the SVMW schedule all sites which were on privately owned land, leaving for its consideration only sites on public land. He submitted that this was not the case, and argued that the IHP had proceeded on a mistake of fact, and reached a conclusion which had no evidential foundation.

[50] Further, Mr Hovell referred to s 32 of the Resource Management Act, and argued that the IHP, and the Council, erred in law when they concluded that the SVMW overlay had an insufficient evidential basis and that it should therefore be removed. He submitted that, on the evidence, it could not be concluded that the potential to adversely affect mana whenua values was so low that the duty to actively protect them could be disregarded in future planning for the Auckland region.

[51] In relation to Maori cultural landscapes, Mr Hovell argued that the Council was required to give effect to the *New Zealand Coastal Policy Statement*, and that the IHP and the Council failed to do so, and did not consider whether or not the *Proposed Unitary Plan* gives effect to relevant statutory provisions in relation to Maori cultural landscapes.

The position of the Council and the s 301 parties

[52] Ms Caldwell, for the Council, argued that the IHP's recommendations, and the Council's acceptance of those recommendations, have to be read and understood in the wider context of the IHP's approach to overlays and schedules generally. She submitted that there were no distinct criteria for identifying sites of value contained in the *Proposed Regional Policy Statement*, and no guidance as to the evaluation methodology to be applied. She argued that, as a consequence, there had been no substantive criterion based evaluation of the SVMW overlay, and no proper evaluation under s 32 of the Resource Management Act undertaken prior to notification of the *Proposed Unitary Plan*. She noted that the IHP heard a wealth of evidence from various parties, both in support of and in opposition to the SVMW overlay, and that it was not persuaded that either the work undertaken by the Council and mana whenua during the period between the *Topic 009* and *Topic 037* hearings, or the evidence presented in support of the overlay, was sufficient to cure the defects apparent in the SVMW overlay as notified. She submitted that this finding was consistent with the IHP's approach to schedules generally.

[53] Ms Caldwell accepted that the panel misinterpreted the withdrawal resolution, and in particular that it erred when it observed that it was only sites on publicly owned

land that remained in the overlay for consideration after 16 March 2016. However, she argued that this mistake was not material to the IHP's recommendations in view of its principle finding that there was insufficient evidence for the SVMW overlay.

[54] In relation to cultural landscapes, Ms Caldwell argued that the amended cultural heritage policy framework contained in the Plan, as recommended by the IHP, allows for landscapes with identified cultural values to be identified and assessed in the context of structure plan and resource consent processes, and that the IHP did not err in finding that express reference to cultural landscapes was unnecessary.

[55] In summary, Ms Caldwell argued that the Maori cultural heritage provisions in the decisions version of the *Proposed Unitary Plan* form a coherent framework that is consistent with submissions made and evidence presented by a number of submitters on the notified provisions. She argued that the provisions represent an approach to the issue of protecting Maori cultural heritage that was open to the IHP on the evidence before it, and that they give effect to the Council's obligations in respect of Maori cultural heritage and values under the relevant statutory provisions, including in particular, pt 2 of the Resource Management Act.

[56] Ms McMillan, for Democracy Action, expressed the gravamen of her client's concern by noting that, as from the date of notification, some 18,000 property owners were suddenly obliged to pay up to 13 iwi for cultural impact assessments for what could be very minor works on their own properties. She argued that the IMSB's appeal is effectively seeking to review the merits of the IHP's recommendations and the Council's decision, and submitted that the high hurdle for establishing an error of law has not been reached by the IMSB. She argued that there was no mistake of fact, and that the IHP and the Council were correct when they concluded that there was no sufficient evidential basis for the SVMW overlay. She noted that the panel expressly recorded that the *Regional Policy Statement* as recommended by it gave effect to pt 2 of the Resource Management Act, in the context of the *Proposed Unitary Plan* as a whole, and not just the SVMW overlay. She put it to me that the precautionary approach advocated by Council staff before the IHP was not warranted, and suggested that the Council had failed to undertake a robust analysis in the first place. It was submitted that the sites were not scheduled because of any scientific uncertainty, but rather because there was simply no time for the Council to undertake anything other than a preliminary factual survey. She argued that the resulting provisions imposed a considerable burden on affected property owners.

[57] Mr Gardner, for Federated Farmers, adopted the Council's submissions. He emphasised that, from Federated Farmers' perspective, the Council's decision to adopt the IHP recommendations was open to it, on the evidential material which was available. He also submitted that any error, in the event that error is identified, is not material. He noted that the IHP, and subsequently the Council, made it clear that it may be appropriate to vary the plan to insert an appropriate schedule and overlay, once the values of mana whenua, and the sites that are important to them in relation to those values, have been identified following appropriate consultation and research. He argued that any deficiency is best addressed by way of the plan change process, rather than through the appeal process.

[58] Ms Kirman, on behalf of Housing New Zealand Corporation, also adopted the submissions of the Council. She noted that the Corporation is concerned about ensuring that the *Proposed Unitary Plan* allows for consenting to be undertaken in an efficient and effective manner, and submitted that the proposed SVMW overlay would have resulted in considerable uncertainty regarding when and how mana whenua should be involved in the planning process. She argued that the IHP and the Council made no errors of law, and that the adoption of the precautionary approach,

as recommended when the plan was notified, did not justify the inclusion of an overlay of the kind proposed. She referred me to a number of cases where a precautionary approach has been adopted, and submitted that there is no support in the case law for the application of the precautionary principle where there is no scientific uncertainty, but simply a failure by the parties supporting the overlay to undertake the factual research that should have been done prior to notifying the *Unitary Plan*, and which might have entitled the Council to then apply restrictive rules to sites with certain characteristics. She submitted that the burden of proof of establishing that there was a factual basis for the overlay rested with the Council, and that there was simply no factual basis for the Council to impose restrictions of the type proposed on the use of land.

[59] Dr Palmer argued that the SVMW was an inappropriate use by the Council of its powers under the Resource Management Act, and that the impugned provisions should not be included in the *Proposed Unitary Plan*. He noted that the *Proposed Plan* includes what he called "the conventional list" of places of historic significance, consistent with s 6 of the Resource Management Act and the definition given to historic heritage under s 2 of the Act. He did not object to these provisions, but argued that the Council's approach to the evaluation of SVMWs did not follow this conventional approach. Rather, it reflected a desire by the IMSB and others to expand the recognition of Maori cultural heritage into a second tier layer, initially of 9,000 sites, but then reduced to 3,600 sites. He argued that this went beyond reasonable regulation and that under the Resource Management Act, one level of recognition is all that is required — namely for sites and places of significance to mana whenua. He argued that the SVMW overlay was not reasonably justified under the Act's provisions, and that it added a layer of complexity and uncertainty to the Plan, and placed an added burden on the owners of the affected private land.[24] In common with other parties, he argued that a precautionary approach was inappropriate, and that the Council's pre-notification s 32 analysis was manifestly inadequate.

Section 158 — Question of law

[60] As I have already noted, the appeal is brought pursuant to s 158 of the Local Government (Auckland Transitional Provisions) Act 2010. Section 158(4) provides that the appeal may only be on a question of law.

[61] Appeals from the Environment Court to the High Court are also limited to questions of law.[25] In this context, the leading judgment is the decision of a full High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.[26] The Court there recorded that it should allow appeals from decisions of the Environment Court only if it considers that that Court:

(a) Applied a wrong legal test; or

(b) Came to a conclusion without evidence or to a conclusion which, on the evidence, it could not reasonably have come; or

(c) Took into account matters which it should not have taken into account; or

(d) Failed to take into account matters which it should have taken into account.

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24 I note that the IHP favoured a two tier approach — see above at [20], [30], [31] and [33]. Dr Palmer did not appeal those findings. Nor did he give notice under s 305 of the Resource Management Act 1991. This issue raised by Dr Palmer is not before the Court.

25 Resource Management Act 1991, s 299.

26 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 157-158.

[62] It accepted that the Environment Court should be given some latitude in reaching findings of fact within its areas of expertise. It also accepted that any error of law found must materially affect the result of the Environment Court's decision before the High Court should grant relief.

[63] This analysis has been applied by the courts, generally without comment, for many years. Recently it was adopted by Whata J in *Albany North Landowners v Auckland Council* in dealing with a number of appeals (and applications for review) arising out of the Council's decisions on the *Proposed Unitary Plan*.[27] The IMSB, the Council and the s 301 parties before me did not seek to criticise or distinguish the *Countdown* decision. In my view it is a correct statement of the applicable law.

[64] It is also trite law that this Court must resist attempts by litigants to use an appeal limited to a question of law as an occasion for revisiting the factual merits of the case under the guise of a question of law.[28] Where it is alleged that the court or tribunal below came to a conclusion without evidence, or one to which, on the evidence it could not reasonably have come, the appellant faces a "very high hurdle". It does not matter that this Court would almost certainly not have reached the same conclusion as the court or tribunal below. What matters is whether the decision under appeal was a permissible option. The appellate court will almost always have to be able to identify a finding of fact which was unsupported by evidence or a clear misdirection in law by the inferior court or tribunal.[29]

Analysis

[65] It is the Council's decision which is the subject of the appeal. It adopted the IHP's recommendations in relation to all matters at issue in this appeal. As the decision-maker, the Council was required to comply with s 148 of the Local Government (Auckland Transitional Provisions) Act. As I have already noted, that section required it to accept or reject each recommendation, and if it rejected a recommendation, to decide on an alternative solution. The only requirement to provide reasons placed on the Council by the section was that imposed by s 148(4)(a)(ii). If the Council rejected a recommendation of the IHP, then it had to give its reasons for doing so. Decisions to accept recommendations were not required to be accompanied by reasons.

[66] Ms Caldwell, for the Council, accepted that, by implication, where the Council accepted a recommendation made to it by the IHP, it could be taken as having accepted the IHP's reasoning.

[67] This concession by Ms Caldwell was, in my judgment, properly made. The Council was expressly precluded from considering any evidence or other submission that was not before the IHP.[30] Unless it accepted the IHP's findings and reasoning, the Council would have been acting in a vacuum.

[68] I now deal with each of the various errors alleged by the IMSB, by reference to the *Countdown Properties* classification of questions of law, although I note that it is a little difficult to slot some of the alleged errors into the appropriate *Countdown* classifications.

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27 *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [90]-[91].

28 *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) 3 ELRNZ 230 (HC) at 240.

29 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [25]-[28].

30 Local Government (Auckland Transitional Provisions) Act 2010, s 148(2)(b).

Did the approach taken by the Council/IHP to the SVMW overlay preclude the Council from complying with its statutory obligations?

[69] The first error of law alleged by Mr Hovell on behalf of the IMSB falls into the first category in *Countdown* — namely that the IHP/Council applied a wrong legal test.

[70] Mr Hovell asserted that the Council erred in law because its approach to the consideration of the SVMW overlay precluded it from meeting its statutory obligations.

[71] The relevant Resource Management Act obligations relied on by Mr Hovell are found in pt 2 of the Resource Management Act. Section 6 sets out matters of national importance, and requires that all persons exercising functions and powers under the Act recognise and provide for them. Specifically, s 6(e) refers to the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Section 6(f) provides for the protection of historic heritage from inappropriate subdivision, use and development. Section 7 deals with other matters which persons exercising functions and powers under the Act are required to have particular regard to. Relevantly, s 7(a) refers to kaitiakitanga. Section 8 requires persons exercising functions and powers under the Act to take into account the principles of the Treaty of Waitangi.

[72] Mr Hovell also referred to the *New Zealand Coastal Policy Statement*.[31] He noted that it contains an objective — Objective 3 — namely, to take into account the principles of the Treaty of Waitangi, to recognise the role of tangata whenua as kaitiakitanga and to provide for tangata whenua involvement in the management of the coastal environment by inter alia recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua. He went on to refer to the following policies:

(a) Policy 2 which is concerned with the Treaty of Waitangi, tangata whenua and Maori heritage. It says that in taking into account the principles of the Treaty, iwi authorities or hapu, on behalf of tangata whenua, should be involved in the preparation of Regional Policy Statements and Plans, and that there should be effective consultation with them.

(b) Policy 2(g)(i) which recognises that tangata whenua have the right to choose not to identify places or values of historic cultural or spiritual significance or special value, but which also provides for consultation and collaboration with tangata whenua and requires that the importance of Maori cultural and heritage values should be recognised through methods such as historic, heritage, landscape and cultural impact assessments. The policy also provides for the identification, assessment, protection and management of areas or sites of significant or special value to Maori.

(c) Policy 10 which deals with reclamation and de-reclamation. It records that where reclamation is considered to be a suitable use of the coastal marine area, when considering its form and design, particular regard should be had to whether the proposed activity will affect cultural landscapes and sites of significance to tangata whenua.

31 The IHP also referred to the *National Policy Statement on Freshwater Management — Report to Auckland Council — Hearing Topic 009 Mana Whenua*, July 2016, [1.3] at 5. Mr Hovell did not, however, suggest that the IHP/Council failed to give effect to this policy statement.

(d) Policy 14 which seeks to promote the restoration of natural character, and specifically Policy 14(c)(viii) which refers expressly to the restoration of cultural landscape features.

(e) Policy 15 which deals with natural features and natural landscapes. It seeks that they should be identified and assessed, and that Regional Policy Statements, Plans and maps should identify where their protection requires objectives, policies and rules.

(f) Policy 17 which deals with historic heritage, and seeks to protect it through identification, assessment and recording.

[73] It was common ground that the purpose of a Regional Policy Statement is to achieve the purpose of the Resource Management Act by providing an overview of the resource management issues of the region, and the policies and methods to achieve integrated management of the natural and physical resources of the whole region.[32] It must be prepared in accordance with pt 2 of the Resource Management Act.[33] Further, a Regional Policy Statement "must give effect" to a National Policy Statement.[34] A Regional Plan "must give effect" to a National Policy Statement and a Regional Policy Statement,[35] as must a District Plan.[36]

[74] The Supreme Court has held in *Environment Defence Society Inc v New Zealand King Salmon Co Ltd*,[37] in the context of the *New Zealand Coastal Policy Statement*, that the words "give effect to" mean implement, and that this is a strong directive, creating a firm obligation on the part of planning authorities. There was, however, a caveat noted by the Court. The implementation of any directive is affected by what it relates to. A requirement to give effect to a policy which is framed in a specific and unqualified way may be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.[38]

[75] In the *King Salmon* decision the Supreme Court also held that the *New Zealand Coastal Policy Statement* gives substance to the principles in pt 2 of the Resource Management Act in relation to New Zealand's coastal environment, by translating those general principles into more specific or focussed objectives and policies, and that, in principle, when considering a plan change in relation to the coastal environment, a decision-maker will necessarily be acting in accordance with Part 2 by giving effect to the *New Zealand Coastal Policy Statement*.[39]

[76] I note a submission made by Dr Palmer — namely that the *New Zealand Coastal Policy Statement* applies only to the coastal environment. While those words are not defined, as Dr Palmer pointed out, logically, large parts of Auckland do not fall within the coastal environment.

[77] It follows that for those parts of Auckland which fall within the coastal environment, the Council was required to give effect to the *New Zealand Coastal Policy Statement*. It did not need to separately consider pt 2 of the Resource

32 Resource Management Act 1991, s 59.

33 Section 61(1)(b).

34 Sections 62(3).

35 Section 67(3).

36 Section 75(3); And see *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281.

37 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442 at [77] and [91].

38 At [80] and [128]-[130].

39 See [85], [88] and [90]; and see *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662.

Management Act. For those parts of Auckland which do not fall within the coastal environment, the Council was required to consider pt 2 of the Act. Given the Supreme Court's observations in *King Salmon*, the end result should be the same.

[78] In my judgment, the objectives and policies in the *New Zealand Coastal Policy Statement* relied on by the IMSB are not particularly directive. Broadly, they relate to historic heritage, consultation, tangata whenua and mana whenua values, and the protection of both heritage and values through consultation and other non-statutory methods. The policies are framed at a high level of abstraction. They are not directed specifically to decision-makers; they do not require decision-makers to "avoid" certain matters. I do not consider that the policies are particularly directive. The requirements impugned by ss 6, 7 and 8 of the Resource Management Act are, however, more forcefully expressed — "shall recognise and provide for", "should have particular regard to", and "shall take into account". These imperatives are directed to all persons exercising functions and powers under the Act.

[79] I agree with Ms Caldwell that, when considering whether or not the IHP and the Council erred as alleged, it is necessary to consider the overall policy framework and all of the various provisions seeking to protect Maori cultural heritage in the *Proposed Unitary Plan*. In my judgment, it would be misleading to single out the SVMW overlay provisions and assert that because they have been deleted, the Plan as a whole fails to comply with the various statutory directives I have noted.

[80] There are a very large number of provisions in the *Proposed Unitary Plan* which refer to mana whenua values, and to cultural heritage:

(a) In the *Proposed Regional Policy Statement* there are references to mana whenua values and to cultural heritage. By way of example, issue B1.4(5) identifies issues of significance to mana whenua as an issue of regional significance. There are references to mana whenua values and cultural heritage in the urban growth provisions (B2),[40] in the infrastructure, transport and energy s (B3),[41] in the natural heritage s (B4),[42] in the built, heritage and character s (B5),[43] in the mana whenua s (B6),[44] natural resources s (B7)[45] and in the coastal environment s (B8).[46]

(b) In the *Regional Plan* and in the *Regional Coastal Plan* there are further references to mana whenua values and to Maori cultural heritage. Such recognition occurs, eg in the infrastructure s (E26),[47] in the outstanding natural features (D10) and outstanding natural landscapes overlays (D11 and D14),[48] in the historic heritage overlay (D17),[49] in the sites and places of significance to mana whenua overlay (D21), in the regional land

40 Issue, B2.1(8); Policy, B2.2.2(f),(g) and (h); Growth Policies, B2.4.2(4)(c) and (5)(a); B2.5.2(4)(g); B2.6.1(1)(a) and B2.6.2(2).

41 B3.2.2(3).

42 Issue B4.1; B4.2; Objective B4.2.1(2); Policy B4.2.2(1)(g); B4.2.2(4)k).

43 Objective B5.2.1(1); Policy B5.2.2(1)(c).

44 Issues B6.1; B6.2, B6.3, B6.5; Objectives B6.5.1(1)-(5) and Policies B6.5.2(1)-(9); B6.6.

45 Objective B7.4.1(6); Policy B7.4.2(3); B7.7.

46 B8.2; Objective B8.2.1; Policy B8.2.2(5); B8.5.2(11) and (13); at 11 (cross references).

47 E26.6.5.1 (accidental discovery rule).

48 Objective D10.2(2); Policy D10.3(1); D11 and D14.

49 D17.1; Objective D17.2(1)-(2); Policy D17.3(8)(d)-(f) and (12)-(15); Schedule 14.1.

disturbance provisions (E11)[50] and in the coastal — general coastal marine zone — (F2).[51]

(c) There is also extensive reference to mana whenua values and cultural heritage in the District Plan section of the *Proposed Unitary Plan*. In addition to the overlays, which I have already noted for historic heritage and sites of significance to mana whenua, there are references to mana whenua values in the land disturbance provisions (E12).[52] There are similar references in the Waitakere Ranges heritage area overlay (D12). Sites of significance to mana whenua are covered in an overlay (D21)[53] and the sites are listed in schedule 12 in Chapter L of the *Proposed Unitary Plan*. There are 75 such sites.[54] They are afforded a very high level of protection through a number of provisions contained in the *Proposed Unitary Plan*.

[81] Some places/sites of importance to mana whenua, particularly archaeological and waahi tapu sites, are included in the *Proposed Unitary Plan*'s historic heritage list — schedule 14.

[82] Scheduled sites/places are not the only sites/places protected. Unscheduled mana whenua sites and places are protected in various ways, albeit not by a dedicated overlay, or by identification in a schedule.

[83] Protection is afforded to unscheduled sites in various overlays, for example, landscape overlays D10, D11, D12 and D14. There is also a very large number of objectives and policies that recognise mana whenua values, and which do not distinguish between scheduled and unscheduled sites. Specifically, policy B6.3 in the Regional Policy Statement seeks to ensure that any assessment of environmental effects for an activity that may affect mana whenua values includes an appropriate assessment of adverse effects on those values. Policy B6.3.2(6) requires that resource consent decisions have particular regard to potential impacts on various matters, including the holistic nature of the mana whenua world view; the exercise of kaitiakitanga; mauri, particularly in relation to freshwater and coastal resources; customary activities; and sites and areas with significant spiritual or cultural heritage value to mana whenua. Policy 6.5.2 deals with the protection of mana whenua cultural and historic heritage. These policies focus on specified outcomes and set out processes for the protection of both scheduled sites and unscheduled sites. There are accidental discovery rules which apply when an item of significance to mana whenua is accidentally uncovered in the course of land disturbance. There are various discretionary assessment criteria in both the Regional and District Plan provisions, both generally and for specific activities, which refer to mana whenua values. The Plan also refers to non-regulatory methods, for example, use of the Council's cultural heritage inventory, by resource consent planners, in the context of requirements for assessment of effects.

[84] As I have already noted, the IHP was required to ensure that, were the Council to accept its recommendations, relevant provisions in the Resource Management Act

50 Objective E11.2(1); Policy E11.3(2)(c) and (d) and E.3(3); Rule E11.6.1 and E11.8.1(d).

51 Objective F2.2.2(3)(d); Objective F2.5.2(2); Policy F2.6.3(3)(j); F2.23.1(1)(f)(iv) and F2.23.2(1)(f)(i).

52 Policy E12.3(1), E12.3(2)(c) and E12.3(4); Rule E12.6.1 and E12.8.1(2)(a)(viii); E12.8.1(2)(c)(ii).

53 Sites and places of significance to mana whenua overlay D21.

54 The number of sites of significance was increased from 61 to 75 by the IHP/Council as a result of the hearings process.

would be complied with.[55] It considered that if the Council accepted the *Proposed Unitary Plan*, with the changes recommended by it, it would comply with its obligations under the Resource Management Act.

[85] Having considered all relevant Plan provisions, I do not consider that the deletion of the SVMW overlay, and associated provisions, either has compromised, or has the potential to compromise, the Council's compliance with the various statutory obligations imposed on it by the Resource Management Act. This ground of appeal does not succeed.

Did the IHP/Council apply an improper evidential threshold in considering the SVMW provisions?

[86] Mr Hovell argued that the IHP/Council applied what he referred to as an "improper evidential threshold". In terms of the *Countdown* decision, again, he was asserting that the IHP/Council applied a wrong legal test.

[87] Mr Hovell referred to a decision of this Court, *Ngati Maru Iwi Authority Inc v Auckland City Council*.[56] He referred not to the substantive decision, but rather to a decision given by Baragwanath J, when granting leave to appeal to the Court of Appeal. In the leave decision, Baragwanath J observed that, unless evidence as to *Ngati Maru's* claim to continuing participation in the planning processes, and of the waahi tapu attaching to the site there in question, could be dismissed as "insubstantial", it could reasonably be argued that the changes there in issue were not necessary and not appropriate in terms of s 32 of the Act as it then stood.[57]

[88] I do not consider that the observations made by Baragwanath J assist. The Judge was considering whether or not to grant leave to appeal from a decision of another Judge who had retired. His comments were made in that context and were strictly *obiter*. He was not advancing a considered judgment as to the appropriate evidential threshold in cases before the Environment Court. While leave was granted, the appeal did not proceed. The issues between the parties were settled.

[89] As I have noted, the IHP had the powers of a commission of inquiry. The hearings before it were inquisitorial and not adversarial. The Commissions of Inquiry Act 1908 applied. Relevantly, s 4B(1) of that Act provides as follows:

> The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

The position is similar to that which applies to the Environment Court, pursuant to s 276 of the Resource Management Act 1991.

[90] In Resource Management Act proceedings, the allocation of the evidential and persuasive burdens of proof can be problematic, and sometimes inapposite.[58] Ordinarily, where a party is seeking to persuade a decision-maker in the resource management context to make a decision in his or her favour, the onus is on that party to prove, on the balance of probabilities, the factual matters relied on support the position the party wishes to advance. The same standard does not apply when the decision-maker is asked not to ascertain what has already happened, but rather to prophesise what may happen at some stage in the future. An assessment of potential

55 Local Government (Auckland Transitional Provisions) Act 2010, s 145(1)(f)(i).

56 *Ngati Maru Iwi Authority Inc v Auckland City Council* HC Auckland AP18-SW01, 24 October 2002.

57 At [24].

58 *Boulder Trust v New Zealand Transport Agency* [2015] NZEnvC 84 at [56]; *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZHC 2897, (2014) 18 ELRNZ 97 (HC) at [90].

effects depends on an evaluation of all of the relevant evidence, but it does not depend on proof to a preordained standard that the potential effect is more likely to occur than not.[59]

[91] The SVMW overlay was being advanced on a precautionary basis — essentially to protect sites it was thought might be of value to mana whenua from inappropriate development — until which time as it was finally determined whether or not each site does have ongoing value to mana whenua. The focus of the SVMW overlay was on potential adverse effects. Essentially, the IHP/Council had to balance the potential adverse effects against the restrictions which would be imposed on landowners if the overlay and its associated restrictions were approved. To this end, the IHP considered whether or not the overlay and the schedule of sites/places of value was robust, and it concluded that it was not. That conclusion was open to the IHP on the evidence.

[92] Mr Hovell did not point to any specific finding to which the IHP/Council applied the alleged improper evidential threshold, and I cannot see that there was any error by the IHP or the Council in this regard. Insofar as I have been able to ascertain from considering the detail of the recommendations relevant to this appeal, the IHP proceeded in an orthodox fashion, consistent with accepted principle. This ground of appeal also fails.

Did the Council err in law in finding that the s 32 report prepared by the Council did not provide an adequate basis for the introduction of the SVMW overlay?

[93] This ground of appeal is presumably said to fit into the second category in *Countdown*, namely that the IHP/Council came to a conclusion to which they could not reasonably have come on the evidence before them. As I have noted, when this type of error is raised, there is a very high hurdle on an appellant.

[94] Both regional and territorial authorities, in preparing their Regional Policy Statements, Regional Plans and District Plans respectively, must do so in accordance with their obligation to prepare an evaluation report in accordance with s 32 of the Resource Management Act, and their obligation to have particular regard to the evaluation report prepared in accordance with that section.[60]

[95] Here, the Council prepared a s 32 report in relation to the *Proposed Unitary Plan*. It is dated 30 September 2013. It expressly recorded that it would be updated as the planned development process continued.[61] Part 1 of the Report set out in some detail the processes which the Council had undertaken, and intended to continue to undertake, relevantly to consult with tangata whenua and iwi authorities, with mana whenua, and with mataawaka representatives. Counsel did not refer me to anything in this part of the s 32 report relevant to SVMW's. Part 2 of the s 32 evaluation did however contain four sections relevant to mana whenua.[62] For example, s 2.15 dealt with mana whenua cultural heritage. It noted the processes undertaken, and referred to the provisions contained in the *Proposed Regional Policy Statement*. It commented on the effectiveness and efficiency of these proposed provisions and, very generally, on their assumed costs and benefits.

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59 *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, (2017) 19 ELRNZ 628.

60 Resource Management Act, s 61(1)(c) and (d), s 66(1)(d) and (e) and s 74(1)(d) and (e).

61 Section 32 Evaluation, Part 1 for the *Proposed Auckland Unitary Plan*, 30 September 2013, at [1.1.1].

62 Section 32 Evaluation, Part 2, at [2.15] — Mana Whenua Cultural Heritage; at [2.16] — Maori Development; at [2.17] — Maori Land, and at [2.18] — Maori and Natural Resources.

[96] The s 32 evaluation was audited by Harrison Grierson NZIER.[63] Relevantly, the audit noted that:[64]

> The topic report does not identify the limitations of the data or place caveats on the information relied upon. In particular, the topic report could have acknowledged the lack of information available on the total number of sites likely to be affected by the proposed overlays as not all sites or places "of value" to mana whenua had been identified.
>
> No justification has been provided for why the costs or benefits have not been assigned monetary value. Although it is apparent that a monetisation exercise would have been difficult given the subject matter involved in this topic, it would have been appropriate to include a section in the report justifying this approach.
>
> None of the benefits and costs have been monetised.
>
> A qualitative cost benefit analysis was undertaken using a framework that described both the costs and benefits of the four wellbeings (environmental, economic, social or cultural) and on whom the costs and benefits would fall on. However, no explicit weighting exercise was used to compare whether the relative costs outweigh the benefits.
>
> The report comes to a strong conclusion that the preferred option results in cumulatively greater long-term benefits than costs, and that associated costs are mainly related to financial costs to Council. Without some indication of the scale and significance of the issue and the number of private landowners who may face constraints on use of their land as a result of the policies, it is difficult to assess the reliability of this conclusion.

Under the heading *Areas where further analysis or information could assist*, the audit noted as follows:[65]

- the topic report needed to articulate the scale and significance of the issues in terms of geographical extent, and the potential reach of proposed policies in its effects on other landowners, their development prospects, and implications for economic development and employment potential
- the topic report could have identified the limitations of the data or placed caveats on the information relied upon. For example, the topic report could have acknowledged the lack of information available on the total number of sites likely to be affected by the proposed overlays as not all sites or places of "value" to Mana Whenua have been identified
- a section justifying why a monetisation exercise had not been undertaken could have been included.

[97] Mr Hovell submitted that the IHP/Council erred by requiring that there had to be a s 32 report, providing a sufficient evidential basis for the SVMW's, prior to notification of the *Proposed Unitary Plan*.

[98] I do not consider that the IHP/Council erred in this regard. The Council was required to prepare an evaluation report in accordance with s 32 of the Resource Management Act before the *Proposed Unitary Plan* was notified. That is what the Resource Management Act required.[66] The IHP was aware of this.[67] The s 32 evaluation report was required to examine whether the proposed objectives were the most appropriate way to achieve the purpose of the Act, and whether the policies,

63 Section 32 of the RMA *Report of the Auckland Unitary Plan — Audit* — Harrison Grierson and the NZIER Report to the Ministry for the Environment November 2013.

64 Table 12, at 79.

65 Section 32 of the RMA *Report of the Auckland Unitary Plan — Audit*, Harrison Grierson and NZIER Report to the Ministry for the Environment, above n 66, at 81.

66 Report to Auckland Council, *Overview of Recommendations on the Proposed Auckland Unitary Plan*, 22 July 2016, at [2.2].

67 Resource Management Act 1991, s 32(5).

rules and other methods proposed were the most appropriate way to achieve those objectives. The report was required to identify and assess the benefits and costs of the proposals made.

[99] The IHP had the report and the Harrison Grierson NZIER audit before it. It heard extensive evidence from a number of submitters and witnesses. It noted in its recommendations that some submitters considered that the proposed provisions contained in the Plan as notified were unreasonable, and not supported by any appropriate s 32 justification.[68] The IHP had before it the Council's evidence and submissions, and the evidence and submissions of other parties, both for and against the SVMW provisions. Having regard to the evidence before it, along with the inferences that it was entitled to draw from its own perusal of the relevant documents, the IHP did not err in law by concluding that the Council's s 32 evaluation prepared prior to notification did not provide an adequate basis for the introduction of the SVMW overlay. That conclusion was open to it.

[100] I note that in any event, any error in this regard would be immaterial. The IHP's recommendations constituted a further evaluation of the Proposed Plan provisions, in accordance with s 32AA of the Resource Management Act. This evaluation related to the changes that the IHP recommended be made, and it was undertaken at a level of detail that corresponded to the scale and significance of the changes. The IHP's further evaluation was contained in the body of its recommendation report for each topic.[69] This further evaluation, in effect, rendered the initial s 32 report moot.

[101] Again, this error of law has not been made out. The IMSB has failed to get over the very high hurdle necessary to establish this error.

Did the Council err in law by relying on a mistaken understanding of the withdrawal resolution?

[102] As I have noted above — [29], [31], [33] and [34] — the IHP referred in a number of contexts to the withdrawal resolution. The resolution is set out above at [25]. It was "to remove Sites and Places of value overlay on private land until such time that all Sites and Places had been accurately identified and mapped".

[103] Mr Hovell pointed out that not all SVMW's on private land were withdrawn, and that the IHP made a mistake in its interpretation of the resolution. Ms Caldwell, for the Council, was prepared to agree that the IHP made a mistake.

[104] I am not persuaded that the IHP did misunderstand the resolution. The relevant papers from the meeting of the Auckland Development Committee, which passed the resolution on 12 November 2015, were included in the bundle of documents. The resolution recorded that the Development Committee agreed to remove sites and places of value overlay on private land. This resolution on its face was broad enough to permit an interpretation requiring that all SVMW's on private land be removed.

[105] However, the withdrawal resolution did not explicitly refer to "all" SVMW's on private land and it was not interpreted by council officers to mean that all 3,600 sites within the notified overlay on private land should be withdrawn. Ms Caldwell advised that, instead, council officers interpreted the resolution to require the removal of any site within the recommended group of 1,387, the location of which could not

68 Report to Auckland Council, *Hearing Topic 009 Mana Whenua*, July 2016, at [1.3].

69 Report to Auckland Council — *Overview of recommendations on the Proposed Auckland Unitary Plan*, above n 64, at [2.2].

be confirmed, and where any part of the 200 m diameter buffer circle (as notified) affected privately owned land. This resulted in 593 sites (of the recommended 1,387) being withdrawn from the SVMW overlay.

[106] I was advised from the bar that the 593 sites which were withdrawn were all located on privately owned land, but that they represented only a subset of the sites which were on privately owned land. Assuming that this is correct, it follows that the IHP's conclusion that only publicly owned sites remained in the overlay was incorrect.

[107] While I am not persuaded that the IHP misinterpreted the resolution, as it was perhaps capable of more than one interpretation, I am persuaded that it was wrong when it concluded that only SVMW's on public land remained in the SVMW overlay. However, I do not consider this error to be material. First, the IHP's misunderstanding about the effect of the withdrawal resolution was pointed out to the Council by Council officers in a report they made for the *Unitary Plan* decision-making meetings held in August 2016.[70] The Council nevertheless accepted the IHP's recommendations. Secondly, the key issue for determination by the IHP was whether or not to retain the SVMW overlay. Its reasoning and its conclusions focus on deficiencies in the identification and evaluation of the sites when they were included in the *Proposed Unitary Plan*, and the inadequacy of later attempts to clarify which sites/places were in fact of value to mana whenua. It considered that, as at the time of notification, there had been no verification to ensure that the sites actually existed, or what their values were, and that no appropriate criteria subsequently had been applied by which the sites could be properly evaluated. I do not consider that these key findings are undermined by the error the IHP made in its understanding of the effect of the withdrawal resolution.

[108] Accordingly, this ground of appeal must fail as well.

Was the deletion of the objectives and policies for the SVMW overlay and/or the deletion to rules and schedule a mistake, or a finding that could not reasonably have been made given the IHP's findings and the evidence before it?

[109] Again, this question of law is founded in the second classification contained in the *Countdown* decision — namely that the IHP came to a conclusion without evidence, or to a conclusion which, on the evidence, it could not reasonably have come. Again, the IMSB faces a very high hurdle if it is to make out this ground.

[110] In its recommendation paper on *Topic 009 Mana Whenua* — the IHP summarised the evidence it heard. It listed a number of submitters who gave evidence addressing the issues which were before it, and noted that the Council, as well as the IMSB and some iwi groups, had expressed concern about the robustness of, and justification for, including all of the SVMW's scheduled in the Plan as notified. The IHP summarised the evidence of key witnesses in this regard. It referred to the evidence of a Dr Mitchell, and a Mr Blair, to the effect that it was better to retain on the schedule only those sites which were clearly of value, and to include others only once they were assessed via a plan change. I was told from the bar that, at best, only some 140 of the 2,213 sites proposed were the subject of specific submissions and evidence from mana whenua, and that only 16 were supported by detailed evidence at the hearing.

[111] In my judgment, the IHP was entitled to reach the conclusions and make the recommendations it did. It heard evidence from a large number of parties, both for and against retaining (and/or expanding) the overlay. It was for the panel as a specialist independent body to exercise its judgment in evaluating the evidence put before

70 Auckland Development Committee Agenda and Addendum for a meeting dated 10 August 2016, item 11, at [6.2.A(ii)].

it at the hearings. It was open to the IHP to recommend deletion of the SVMW overlay on the basis that, without evidence of mana whenua values that provided support for all of the sites in the schedule and in the overlay, the provisions as a whole lacked a sufficient evidential basis.

[112] Again, this ground of appeal must fail. The IMSB has not surmounted the very high hurdle required to make out this error of law.

Did the IHP/Council apply the wrong legal test in finding that the provisions for Maori cultural landscapes were unnecessary?

[113] The alleged error of law falls into the first category discussed in *Countdown*.

[114] Mr Hovell referred to pt 2 of the Resource Management Act, and in particular to s 6(e) and (f), 7(a) and 8. He also referred to the *New Zealand Coastal Policy Statement*. He referred to the IHP/Council's decision, namely that consideration of cultural landscapes could be deleted as being unnecessary, and argued that the test of necessity was not the proper statutory test for determining the outcome of provisions which seek to give effect to the *New Zealand Coastal Policy Statement* and to provide for ss 6, 7 and 8 matters.

[115] As I have set out in some detail above — [80] to [83] — the policy and rule framework does recognise and provide for the relationship mana whenua have with landscapes, and for the identification of landscapes, based on cultural values. Further, the drafting retained by the IHP and the Council echoes the wording of the provisions in the *New Zealand Coastal Policy Statement*, and addresses the issue of cultural landscapes.

[116] Overall, I am satisfied that the *Proposed Unitary Plan* framework implements the relevant statutory directives. While the decision version of the *Proposed Unitary Plan* deletes specific reference to cultural landscapes, it retains sufficient reference to the evaluation of landscapes for associated cultural values to ensure that the identification of appropriate landscapes remains possible in the future, and that adverse effects on cultural values associated with landscapes can be assessed where relevant.

[117] I agree with Ms Caldwell that the rules and the policy framework recommended by the IHP, and accepted by the Council, complies with the relevant statutory requirements, and that there was no error law in the IHP/Council's approach.

Result

[118] For the reasons I have set out, the appeal is dismissed.

Costs

[119] The Council and the s 301 parties (with the exception of Dr Palmer who represented himself), are entitled to their costs and reasonable disbursements.

[120] I direct as follows:

(a) Counsel for any party seeking costs, is to file a memorandum in this regard, within 10 working days of the date of this decision.

(b) The IMSB is to file a memorandum in reply, within a further 10 working days.

(c) Costs memoranda are not to exceed five pages.

I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

Appeal dismissed

Reported by Catriona MacLennan

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 073

IN THE MATTER	of the Resource Management Act 1991
AND	appeals pursuant to s 120 of the Act
BETWEEN	NGĀI TE HAPŪ INCORPORATED
	(ENV-2016-AKL-42)
	NGĀ POTIKI A TAMAPAHORE TRUST
	(ENV-2016-AKL-45)
	Appellants
AND	BAY OF PLENTY REGIONAL COUNCIL
	Respondent
AND	ASTROLABE COMMUNITY TRUST
	Applicant

Court: Environment Judge JA Smith
Alternate Environment Judge CE Fox
Environment Commissioner SK Prime
Environment Commissioner ACE Leijnen

Hearing: In Tauranga

Appearances: ME Casey QC, JDK Gardner-Hopkins with SJ Ryan for Astrolabe Community Trust (the Applicant)
T Bennion for Ngāi Te Hapū Incorporated (Ngāi Te Hapū)
TL Hovell for Ngā Potiki a Tamapahore Trust (Ngā Potiki)
RA Makgill for Te Runanga o Ngāti Whakaue Ki Maketu (Ngāti Whakaue) and Te Arawa Takitai Moana Kaumatua Forum (Te Arawa Takitai)
PH Cooney and RC Zame for Bay of Plenty Regional Council as respondent (the Respondent)
JM Pou, JA Hope and AM Neems for Maketu Taiapure Committee, Ngā Tangata Ahikāroa o Maketu, Ngāti Makino Heritage Trust, Ngāti Pikiao Environmental Society and Ngāti Tunohopu
IM Gordon for Te Kāhui Kaumatua o Te Patuwai (the Korowai of Elders)
K Barry-Piceno for Motiti Environment Management Incorporated
JR Welsh for Mount Maunganui Underwater Club Incorporated
VJ Hamm for Bay of Plenty Regional Council as s 274 party

Date of Decision: 17 May 2017

Date of Issue: 18 MAY 2017

INTERIM DECISION OF THE ENVIRONMENT COURT

A: Consent for both the abandonment of the vessel from 1 April 2016 under s 15A and the discharge of contaminants from the vessel from 1 April 2016 under s 15B should be granted upon conditions of consent similar to those discussed in this decision and annexed hereto as "**D**". We annex as "**E**" an analysis that may assist the condition review.

B: The parties are to consult on the appropriate conditions of consent and the Applicant is to forward to the Regional Council and all other parties its proposed conditions of consent within 40 working days.

C: The Council and all other parties are to advise their position in respect of the conditions within a further 20 working days. Thereafter the Applicant is to file a memorandum setting out the proposed Consent and Conditions with:

(a) its commentary on the conditions of consent;

(b) which issues are in dispute; and

(c) the reasons for that dispute,

with the Court within a further 20 working days. The Court will then consider the position and either make further directions or conclude the final consent and conditions thereof.

D: If any party wishes to make an application for costs they are to do so within 40 working days; any party is to reply within a further 15 working days, with a final reply, if any, a further 5 working days thereafter.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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REASONS FOR DECISION

Introduction

[1] This appeal relates to the final resolution of issues relating to the MV Rena, a 235m container vessel that ran aground on Astrolabe/Ōtāiti reef (Ōtāiti) on 11 October 2011. The application was originally to dump the remains (as that term is defined under the RMA). However the Applicant now seeks to "abandon" the remains and permit future discharges of identified contaminants subject to comprehensive conditions of consent.

[2] The Applicant is not the owner of the vessel. The intention is to transfer the vessel to the Applicant and to place the Applicant in funds in order that it can ensure that the conditions of consent are adhered to both during the consent period and subsequently (in relation to ongoing conditions).

[3] Although there was significant opposition at the hearing before Council Commissioners, there now remains only two appeals: that for Ngāi Te Hapū Incorporated represented by Mr Bennion, the other for Ngā Potiki a Tamapahore Trust (**Ngā Potiki**) represented by Mr Hovell.

Background of appeal

[4] There were originally some seven appeals, and five of those have been subsequently withdrawn:

(a) H Bennett (AKL -39);

(b) Te Patuwai Tribal Committee and Te Runanga o Ngāti Awa (AKL -41);

(c) Te Runanga o Ngāi Te Rangi Iwi Trust (AKL -43);

(d) Te Whānau o Te Motuere Trust (AKL -44); and

(e) Royal Forest & Bird Protection Society of New Zealand (AKL-46).

[5] All issues relating to those withdrawals have been addressed.

[6] The two remaining appeals are supported by:

(a) Ngāti Whakaue ki Maketu Incorporated and Te Arawa Takitai Moana Kaumatua Forum, represented by Mr Makgill;

(b) Ngā Potiki, represented by Mr Hovell;

(c) There was also evidence given for other marae or groups supporting the appeals.

[7] The position of the Astrolabe Trust was supported not only by the Regional Council and the Mount Maunganui Underwater Club, but also by a number of different groups representing interests either in Motiti Island or in various iwi and hapū throughout the Bay of Plenty. In particular, a number of groupings based around Maketu including Ngāti Pikiao, Ngāti Makino and Ngāti Tunohopu were represented by Mr Pou and Mr Hope. Various supporting groupings of residents including people who ahi kā to Motiti Island were represented. Mr IM Gordon appeared for the Korowai o Te Patuwai and Ms Barry-Piceno for the Motiti Environmental Management Incorporated group (MEMI). MEMI also represents Pakeha landowners on the island.

The Rena

[8] The MV Rena collided with the Ōtāiti reef on 11 October 2011 at a speed of some 17 knots. We understand there is no sign of deviation of course or reduction in speed. Given that the laden weight of the vessel was some 37,000 tonnes the vessel ran well onto the reef, with the bow section running alongside the highest area of the reef.

[9] Initial photos showed the vessel in a relatively upright position with cargo intact and relatively light seas. The reef, however, is in open sea and some 12km from the coast spanning from Tauranga to Maketū, with Motiti Island being the closest inhabited land mass some 7km to the south-east.

[10] Although initial hopes were held for the refloating of the vessel, it appears to have been clear to the emergency response crew that the vessel was significantly damaged and well onto the reef. The aft section of the vessel was still floating freely at that stage, and priority steps were to remove bunker fuels and then cargo. Unfortunately, significant weather intervened and the vessel began to move. Structural integrity of the vessel began to fail and it began breaking up particularly from March 2013 when a more major storm event struck. Attached is a photo marked "**A**" showing the vessel when the midsection failed.

[11] Through successive storm events, and with the deterioration of the structural integrity of the vessel, the aft and bow sections broke between the third and fifth hold, with extensive discharge of remaining bunker oils and materials including contents of containers. These required extensive mobilisation within the Bay of Plenty community in response to extensive damage to the coastline between Waihi and Maketū, particularly from oil and bead products.

[12] In the meantime the salvage of the vessel, undertaken by major international salvors Switzer, became increasingly hazardous due to the movement of the vessel, with the aft section beginning to settle and move and the bow section caught on the reef.

[13] We have particularly had regard to the Commissioners' decision at first instance. Extensive details of the events are contained within the decision of the Commissioners before the Council and need not be rehearsed in full again in this decision. Suffice to say tropical cyclone Pam in March 2015 contributed significant changes to the wreck site, including:

(a) moving the aft section into deeper water and further to starboard;

(b) portions of the bow have been relocated across the reef; and

(c) exposure of deposits of copper clove.

[14] As became the focus in this hearing, further substantial work was done from this time to February 2016, which involved the removal of some further 4,000 tonnes of material, including much of the available copper clove (around 14 tonnes). Although the estimates vary and there seems to be issues between the translation from New Zealand to US dollars, the total costs of salvage works to the time of this hearing is estimated in the region of US$650m (around NZ$900m). Behind the Costa Concordia, this would make this the most significant marine salvage event in the world.

[15] Again, estimates vary as to the costs of removal of the remnant portions of the vessel. Assuming that this could be undertaken (and there is some dispute as to whether this could be done safely and without damage to the reef) the cost of removing the bow portions is something in the order of NZ$80m, and the balance of the vessel in the order of NZ$450m (this may include the cost of the bow).

Current situation of the wreck

[16] The wreck has not moved since cyclone Pam except for those parts that have been removed by the salvors. Much of the removal since 2015 has been at the instigation and insistence of Mr Joe Te Kowhai, a very experienced salvage diver who has worked not only on this vessel but also in relation to the Costa Concordia and the BP oil rig disaster in the Gulf of Mexico. It is clear from the Applicant's evidence that his involvement has led to significant further efforts by the salvors and the owner to remove further wreckage.

[17] The aft section is now in water between 26-36m deep, laying on its side and gradually flat-packing (collapsing downwards on itself). There is some debris associated with this part of the vessel in the near proximity, but in water even deeper. Between this section and the bow section there are some portions of the middle, probably holds 3-5 and container remnants that have not been able to be removed for whatever reason. Further onto the reef, and near the higher section, are the remains of the bow section – of which parts are embedded into the rock of the reef as a result of the collision speed. Other portions of the bow have moved off the edge of the reef into slightly deeper water, probably around 20m, with four sections being in one hole ranging in weight between 40 and 170 tonnes. There is also the bow thruster section, which has remained in one piece.

[18] We annex hereto and mark as "**B1**", a map showing the parts of the vessel in relation to the reef. To assist with identification throughout this decision we attach "**B2**" that has overlain on the reef a grid which is being uniformly used by the salvors and scientists in identifying particular places of interest within the reef. We shall utilise the same grid reference system in relation to this map.

[19] Video footage taken just prior to the commencement of the hearing, and confirmed by a number of witnesses, is that the remains of the wreck have now been covered by marine organisms, which appear similar to those on the balance of the reef both in the immediate area and over the balance of the reef. There was no contrary evidence on this issue. In addition, photographic and other evidence is that the wreck area has aquatic life of diversity and abundance similar to other areas of the reef. There was no contrary evidence on this point. Again, some witnesses suggested that there were now species present that had not been seen regularly on the site in the past, including sting and eagle rays. Twelve of the seventeen taonga species identified in

the Regional Plan had been sighted by Dr Paul-Burke, a marine scientist who gave evidence for the Applicant.

[20] The expectation of all experts was that there would be a gradual flat-packing of the aft of the vessel (the collapse of the vessel structure in on itself) and that it was most unlikely that this section would move significantly given its current depth. In respect of the bow section it was acknowledged that significant events (such as tropical cyclone Pam) might have the effect of breaking off other pieces of the bow section or moving those already broken off into deeper water. Nevertheless, this was considered unlikely given that the broken pieces had already moved off the reef, and that degradation and flattening of the structure even on the reef itself had continued in the meantime.

Contaminants from the wreck

[21] The parties also clearly agreed that the contaminants of concern were Tributyl Tin (TBT) from previous coating of the hull to discourage marine contamination (anti foul). These were older coats that had since been covered with more modern materials since TBT was banned around 1998. Nevertheless, with the degradation of the wreck, areas of TBT were exposed and subject to release both to the water column, and more particularly through paint flakes, to the sediments on and around the reef. It was acknowledged that this had occurred firstly as a result of the wreck itself, secondly as a result of the salvage works undertaken (particularly the removal of the bow portions) and would continue to occur mainly from the aft section as it degraded.

[22] The vessel had one container with some 24 tonnes of copper clove, being copper recovered after the Canterbury earthquake. This was being shipped for re-use overseas. This container was situated in hold 6 and could not be extracted prior to the aft section of the vessel sinking. After cyclone Pam copper spill was revealed on the lower portion of the reef proximate to the area now identified as G18 and surrounding grids. This is in the approximate position of where the container would have been situated within hold 6 towards the aft of the vessel.

[23] There was uncontested speculation that the copper was essentially trapped beneath the hull of the vessel, and that the copper had been exposed as the section had moved during tropical cyclone Pam. At the time of the commissioners' hearing some 50 tonnes of reef sediment had been removed. An update copper recovery

report suggests a total of nearly 14 tonnes of copper was recovered, with something in the order of 90 tonnes of sediment also removed from the reef (described as copper-laden sediment).

[24] Whilst there is still some copper in the area of G18, which is showing up in testing, the Applicant's evidence (supported by the Council) is that removal of further copper would sustain damage to the reef (by removal of further sediments) and it is unlikely to substantially reduce the total amount of copper remaining. This is because the majority of the copper remaining (estimated to be around 10 tonnes) is now believed to be trapped beneath the vessel.

[25] There was some evidence that there may still be oils from the ship that had not been recovered. Notwithstanding the factual dispute all experts agreed any discharge is unlikely to be detectable being either dispersed or incorporated in other materials given the open conditions. Overall we have concluded that this risk is so minimal it can be addressed by general monitoring and response conditions proposed for a consent is granted.

The Applicant's position as to the consents

[26] The Applicant's position is that consent for abandonment of the vessel would enable conditions to be imposed controlling potential effects from the vessel from three major causes:

(a) further movement of parts of the wreck;

(b) effects of TBT release; and

(c) effects of potential copper contamination.

[27] It is essential to the proposition of the Applicant for the resource consent that:

(a) all works that are feasible for wreckage removal have been done; and

(b) all works which can safely be done have been done.

[28] Although different wording has been used throughout the evidence to address these matters, it can best be summarised by Mr Te Kowhai's evidence to the Court at page 1276 of Transcript "...I don't think you could do any more. I mean you can clean up the site and then you go overboard intending to take away more matter than what

should be taken away or is necessary, with adverse effects on the environment."

[29] In relation to feasibility this does not include only costs but also technical feasibility. In respect of safety, this does not only mean diver safety, but safety to the reef (in the sense of avoiding further damage to it).

The Applicant's submissions

[30] For the sake of completeness we should note that Mr Casey QC for the Applicant made a significant number of jurisdictional submissions that the Court was limited in its consideration of this matter, including:

(a) the ability of parties to participate;

(b) consents;

(c) what is a discharge;

(d) the environment;

(e) the time at which the application is to be considered;

(f) the role of Ngā Potiki;

(g) the role of Ngāi Te Hapū ;

(h) the role of Ngāti Whakaue;

(i) whether the Court could order the removal of the whole of the vessel or part of the vessel (particularly the bow).

[31] Mr Cooney for the Regional Council suggested that, rather than addressing jurisdiction first, we could first approach this matter on the basis of its merits and consider whether, in the absence of any constraint upon the Court, the consent might be granted. He accepted, and Mr Casey QC accepted in reply, that if the application was satisfied on the merits, then most if not all of the jurisdictional and other legal issues were avoided.

[32] Given our clear conclusions on the merits of this matter we consider that this is the appropriate approach to take in this case, and therefore intend to deal with the matter in the following ways:

(a) cultural background to the Bay of Plenty coastal area and Ōtāiti;

(b) position of the appellants;

(c) the existing environment;

(d) should there be a consent?;

(e) if so, the type of conditions appropriate;

(f) any direct provision of offset mitigation.

Ōtāiti – Astrolabe Reef

[33] It is generally accepted that the name Ōtāiti was given to the reef by Ngātoroirangi, the tohunga (priest and navigator) on board the Te Arawa waka. That traditional name was superseded in favour of the name given to the reef by the French explorer, Jules Dumond d'Urville after his ship (Astrolabe) nearly ran aground there on 6 February 1827. Thus for nearly a decade shy of 200 years, the Māori name of the reef was left to the oratory of Motiti Island elders and the people who supported their ahi kā and kaitiakitanga.

[34] The name has now been restored to sit alongside the Astrolabe name, primarily due to the work of Ngāi Te Hapū - Te Patuwai pukenga (historian) Mr Ranapia. His original mapping has been augmented by evidence of other Māori who have presented evidence to local authorities, the Waitangi Tribunal, the Independent Panel and to this Court.

The Cultural Environment

[35] In this case, there is a complex array of iwi and hapū groups all vying for recognition and provision for their relationship and their culture and traditions to Ōtāiti. To assist our analysis, the applicant's experts in tikanga Māori suggest a hierarchal approach to the manner in which this Court should determine the Māori issues under the RMA. We consider that approach is helpful for the purposes of determining issues under s 6(e), s 7 concerning kaitiakitanga and s 8 requiring us to take into account the principles of the Treaty of Waitangi.

[36] Sir Wira Gardiner considered that it was important for the Court to understand the relationships between iwi and hapū communities with Motiti Island as well as Ōtāiti. The matters that he, Dr Kahotea and Tahu Potiki identified as markers include:

- Whakapapa (Genealogy)
- Ancestral traditions and cultural associations
- Ahi kā (occupation) and title to land
- Mana
- Customary associations and activities
- Contemporary Mechanisms such as Treaty of Waitangi settlements, claims to customary marine title.

We agree that this is a useful approach and we adopt it in our analysis. We do not, however, accept the basic thesis that Mr Potiki threads through his evidence, namely that unless the cultural significance of a site such as Ōtāiti, its history and traditions, and its customary associations and activities are recorded in written form, and those sources pre-date the Rena grounding, that in some manner weakens the strength of evidence that we have heard on these topics.

[37] By their nature, oral sources are transmitted in forms that are not written sources. The fact that they may be localised may indicate, as in this case, that those with the substantive history and traditions, and customary associations and activities associated to the reef are those with the most proximate relationship to it. In other words, those with the mana whenua and customary authority over the reef, along with those who have cultural and customary associations to Motiti and the reef are likely to be the holders of this knowledge. Mr Buddy Mikaere rightly points out this weakness in the methodology adopted by Mr Potiki, but we do note that there is some merit to aspects of the latter's evidence.

Matters of National Importance – s 6(e)

[38] We are required under s 6(e) of the RMA to recognise and provide for the relationship of Māori and with their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. Applying the approach above based upon the criteria we have accepted should apply, the evidence demonstrates that there are different layers of relationships, cultures and traditions with Ōtāiti that require different forms of recognition and provision.

Ngā Iwi o Motiti

[39] Ōtāiti is located approximated 7km off Motiti Island and on a clear day it is possible to see the position of the reef from the island.

[40] Motiti Island has been at the centre of contests over mana primarily between hapū and iwi of Ngāti Awa, Te Arawa and the tribes of Tauranga Moana. Motiti's history of occupation reflects that contestability. We traverse that history below through the stories that were presented to us and recorded in the publications referred to in proceedings.

Ngātoroirangi

[41] Ngātoroirangi was the tōhunga (priest and navigator) of the Te Arawa Waka. Oral history has it that Tamatekapua (the captain of the waka) lured him on to the Te Arawa Waka when it left Hawaiiki - Circa 1340-1350.[1] On board were Tamatekapua's family, including Tia and Hei. These men were respectively the fathers of Tapuika and Waitaha. According to Mr Thomas McCausland, Tia and Hei were twins and uncles to Tamatekapua.

[42] The waka first made landfall in Aotearoa/New Zealand on the Whangaparoa Peninsula (named by Captain Cook as Cape Runaway). It then sailed into the Bay of Plenty, pausing at Ahuahu (Mercury Island) and then on to Māmangi, the original name for the sea area to the north of Motiti around Ōtāiti reef. Mr Ranapia advised that:

> 3.6 On arrival at Te Māmangi, Ngātoroirangi paused at the reef to say karakia, to give thanks, to humble himself and seek safe spiritual arrival at the island.
>
> 3.7 The reef became known as Te Tau o Taiti ... for what it meant to Ngātoroirangi – the place where he paused, gave thanks and humbled himself before continuing on to the island. Te Tau o Taiti is now simply but not widely known as Ōtāiti.
>
> 3.8 On reaching Motiti, the waka made landfall at the south end where the crew rested and Ngātoroirangi placed an Atua known as Hani in a rock now known as Hani Rock, which is where Ngātoroirangi established a pa at Matareheu. Later, Ngātoroirangi placed a second Atua in the sacred rock known as Tū Whakāri, in the centre of Motiti.

[43] In its final report on the Rena, the Waitangi Tribunal elaborated further on the incident involving Ngātoroirangi:

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[1] A Matherson *Motiti Island Bay of Plenty* (Reprint, Man Printing Ltd, Tauranga, 2009) p 1.

> ... Traditions recite that, as the crew of the waka rested at the reef, Ngātoroirangi performed karakia rendering the reef tapu, and named it 'te taunga o ta iti i te tangata ... (We note that there are other variations of the name of the reef, such as Te Taunga Iti o Te Tangata and Te Tau o Taiti). Schools of fish are said to have appeared as Ngātoroirangi recited his karakia; this was viewed as an omen of good fortune and motivated the crew to journey to and from Hawaiki. Dr Grant Young, in the customary interests report he prepared for the Crown, notes that these traditions are 'consistent with other off shore islands along the East Coast which were the initial points of landfall for the waka after long voyages from the Pacific.'[2]

[44] Ngātoroirangi resided on the island and after conducting his famous journey of discovery into the interior of the mainland commencing at Te Awa o te Atua (Tarawera River) and ending at Tongariro, he returned to live with Waitaha on Motiti Island. His descendants became Ngāti Tūwharetoa, but they moved inland to Kawerau and on to Taupo. Dr Kahotea told us that they believe he is buried on Motiti. Tahu Potiki noted that:

> The residual impact of mana is tapu. Where there is mana, which is the power of gods, the influence creates an effect that is holy or tapu – the residue of gods. Those important ancestors, such as Ngātoroirangi, were not only tapu as a result of their descent but also their other works that required them to be a vessel or channel of godly activities such as controlling weather, volcanic activity and the seas. Where they ventured, places they named or built would become tapu thanks to the power of their mana.

[45] Ngātoroirangi, Tama Te Kapua, and the other ancestors such as Tia and Hei of the Te Arawa Waka are revered in this manner by their descendants who comprise the tribes of Te Arawa and Ngāti Tūwharetoa. The latter, including those of Ngāti Tūwharetoa mai Kawerau ki te Tai (from Kawerau to the sea) with coast line interests between Otamarakau and Matatā, supported the grant of consents. Reverend Te Rire advised that Ōtāiti is intrinsically significant to Tūwharetoa who are the descendants of Ngātoroirangi. He also produced a letter from the current ariki (paramount chief) of the tribe, Sir Timu Te Heuheu, supporting the position taken by those elders of Te Arawa who have supported the application for consents, and he supported the establishment of a research centre "Te Whare o Ngātoro" to honour their ancestor, Ngātoroirangi. Those of the Te Arawa tribes who appeared before us are not his direct descendants, and thus it is important to acknowledge this position.

Waitaha a Hei & Tapuika

[46] The evidence was that the hapū Waitaha of the Te Arawa Waka remained on

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[2] Waitangi Tribunal, *Final Report on the MV Rena and Motiti Island Claims* (Wai 2391 & 2393, Wellington, 2014) p 17.

Motiti for several generations until an incident occurred that caused them to take flight to the Papamoa area. The incident involved the migration of Te Rangihouhiri to Tauranga and the laying of the tapu on the island after the killing of Rangitukua. It was Te Hapū who lifted that tapu and enabled his people to occupy it. Mr McCausland told us that he was able to do so because he was Waitaha. As a result, there remains a strong customary relationship between Waitaha and Ngāi Te Hapū who recognise them as part of Waitaha. Their ancestral connection to Te Arawa Waka, Ngātoroirangi, their whakapapa to Ngāi Te Hapū and their prior occupation is the source of that relationship, along with their general use of the area for fishing purposes. However, they can no longer claim to have mana whenua over Motiti or mana over the surrounding waters as they no longer hold ahi kā there.

[47] As for Tapuika, there were some hints that Tapuika and Ngāti Makino may have been on the island for a time as well, but nothing substantive was ever put to us in evidence. There was also evidence given that Ngāti Pukenga lived for a time on the island. We discuss the relationship of these hapū below. Here we note that Waitaha and Tapuika do not support the application while Ngāti Makino does.

Ngāi Te Hapū

[48] Te Hapū was a descendant of Toroa, the captain of the Matātua Waka. That waka is particularly associated with seven major tribal groups, and in terms of the cultural environment that we are concerned with the list includes Ngāi Tūhoe of Te Urewera, Ngāti Awa in Whakatane and Ngāi te Rangi in Tauranga.

[49] According to Mr Ranapia, Toroa's grandson was Tamatea ki te Huatahi. Tamatea's eldest son was Ueimua and his second son was Tūhoe Potiki, the eponymous ancestor of Ngāi Tūhoe. They lived in Te Urewera. He told us that after a battle between the brothers, Ueimua was killed by Tūhoe, so the former's people left the Te Urewera district and became known as Ngāti Ruaroa. After scattering to various places, Ngāti Ruaroa eventually settled at Ohiwa Harbour. Ueimua's grandson was Te Hapū, and he was part of a section of the iwi that moved to Ohiwa from Tōrere.

[50] Te Hapū's mother's tribe was a member of Waitaha. Waitaha sought the help of Te Hapū to help them reassert their mana at Motiti after an incident involving the killing to Te Rangitukua. He was killed by a member of Waitaha for fishing on Motiti. This resulted in those hapū of Motiti coming under the umbrella of Te Hapū and

adopting the identity: Ngāti Te Hapū / Ngāi Te Hapū.

[51] When Te Hapū moved up the coast and then to Motiti he was accompanied by his relative Maruhaira who remained at Otamarakau and Pukehina. Some suggest that they all moved up the coast as part of the migration of Te Rangihouhiri - the ancestor from whom Ngāi Te Rangi descend. However, Te Hapū left the migration and diverted to Motiti and Maruhaira took Pukehina.

[52] According to Mr Ranapia, from Te Hapū came two primary lines of hapū descent. From the first son came Ngāti Pau. From the second came Ngāti Tūtonu, Ngāi Kauaewera, Ngāti Makerewai and Ngāti Takahanga. Consequently, and as you would expect given this lineage, the hapū of Motiti are descended from both the Te Arawa Waka (Waitaha) and the Matātua Waka (Toroa). Collectively they are referred to as Ngāi Te Hapū.

[53] There are two operative marae on the island. These are Ngāti Takahanga Marae with the meeting house called Tamatea ki te Huatahi and the dining hall is called Hinewai who was of Waitaha. This marae is set aside for the benefit of the "Patuwai hapū" and Māori generally.[3] The other marae is called Ngāti Makerewai, and the associated buildings are Te Hinga-o-tera and Puna. This marae is set aside for Ngāti Makerewai and Ngāti Patuwai.[4] Mrs Butler is the Chair of Māori Reservation Trustees who administer the two existing marae. An earlier marae associated with Ngāti Pau and Ngāti Kauaewera was near the Wairanaki stream until the late 19th Century.

[54] Other than when there were uncertain times with Ngā Puhi raids and counter raids from Ngāi Te Rangi, Waikato, and Te Arawa, particularly during the various battles at Maketu,[5] Ngāi Te Hapū continued to have members live on the island, with the odd retreat for safety reasons. In contemporary times the descendants of Ngāi Te Hapū have ahi kā rights at Motiti, including kaitiakitanga responsibilities and customary use rights. They have, without doubt, established mana whenua over their lands on Motiti and mana moana over Ōtāiti. The evidence of the use of the reef as a fishery pre the grounding of the Rena was substantial, with examples of that customary association summarised in the evidence of Mr Mikaere.

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3 *Re Motiti B20* (2016) 116 Waikato MB 147, 148 (Minutes of the Māori Land Court received by the Court from Mr Bennion).
4 As above.
5 A Matherson *Motiti Island Bay of Plenty* (Reprint, Man Printing Ltd, Tauranga, 2009), pp 2-24.

[55] Ngāi Te Hapū Incorporated Society are not the mandated governance body for the traditional hapū, although they do have several dozen supporters, with Mrs Butler who lives on the Island being their primary local spokesperson. She gave evidence that, according to her grandfather and father, Ngāi Te Hapū was the proper name for the people. The Incorporated Society has opposed the consents in these proceedings.

Te Patuwai

[56] Mr Ranapia explained the origin of this name. Te Patuwai is the name of an event, not an ancestor, and the name has been "applied to a collective of hapū, who are of the different "ancestral origins and tribal estates."

[57] The event concerns a battle on the water when members of various hapū of Ngāti Awa and Ngāi Te Hapū set out to attack Te Whakatohea, from the Ōpotiki area. Their canoe was intercepted at sea and, according to Mr Ranapia, all on the war canoe were killed and the name Te Patuwai was "coined in memory of the event." Another account refers to only the wife of a chief being killed. This event united certain hapū of Ngāti Maumoana/Te Patuwai of Whakatane, Ngāti Whakahemo of Pukehina and Ngāti Pukenga from Tauranga. They united to avenge the battle. The alliance became known as Te Korowai o Te Patuwai and Mr Ranapia explained:

> Those involved in the battle became known by the name Te Patuwai, recognising their connection to a common event, but they nonetheless were still separate tribes with different ancestors and different tribal estates. That is why I regard Te Patuwai as more properly an alliance than a single tribe.

[58] Mr Ranapia is the chairman of the Korowai Kāhui o Ngā Pakeke o te Patuwai (the Korowai). Essentially they comprise the Council of Elders of Te Patuwai for Motiti. They support the grant of consents in these proceedings. They are an unincorporated body operating in accordance with Te Patuwai tikanga. Obviously, those who are descendants of Te Hapū who call themselves Te Patuwai have mana whenua over their lands on Motiti and mana moana over Ōtāiti. He gave evidence of the fishing practices and other spiritual practices of Te Patuwai both pre and post the Rena, as did Paku Akuhata.

Te Whānau a Tauwhao

[59] This hapū of Ngāi Te Rangi have a traditional relationship with Motiti and

Ōtāiti and with Tuahu Island. They migrated to the region with Te Rangihouhiri and Dr Kahotea advises that their leader was Te Hikitu. The hapū take their name from the female ancestor, Tauwhao, who was married to Tamaoho, a grandson of Te Rangihouhiri. During the colonial period, disputes concerning Motiti were frequently erupting between Ngāi Te Rangi and Te Arawa. Hori Tupaea (Paramount Chief of Ngāi Te Rangi) represented the interests of Te Whānau a Tauwhao during this period, and subsequently in the Native Land Court.

[60] Their sphere of influence includes Motiti, Tuhua and Rangiwaea Islands, and on the mainland they are to be found at Otawhiwhi (Bowentown), Athenree, and Otumoetai. In 1867 Tupaea claimed before the Native Land Court that the hapū had been in occupation on the island for 12 generations, and that they had taken the island by force at the time of the migration of Rangihouhiri.[6] The Native Land Court awarded 1090 acres of the Te Whānau a Tauwhao land to Tupea in trust for the other members of the hapū under the Confiscated Lands Act 1867. However, in 1886, five years after his death, the Crown Grant was cancelled by order of the Native Land Court and smaller grants to individuals were subsequently made to members of the hapū.[7] Te Patuwai also received a Crown Grant under the same legislation.

[61] The history between Te Patuwai and Te Whānau a Tauwhao is marked by disputes that continued into the 1800s. During these skirmishes, Te Patuwai was supported by their Ngāti Awa relatives in Whakatane and by Ngāti Pukenga in the Coromandel. Te Whānau a Tauwhao were supported by Ngāi Te Rangi. Later, during the land wars, sections of Te Patuwai supported Te Arawa. Conversely, Tauwhao with Ngāi Te Rangi sent contingents to help Waikato and the Māori King.[8] The history between these hapū is also laced with inter-marriage, with the most famous union occurring between Tutonu of Ngāi Te Hapū and Hinewai of Tauwhao. Hinewai is the name of the dining hall at the Tamatea ki te Huatahi Marae on Motiti.

[62] Although Te Whānau a Tauwhao collectively left Motiti in the late 1800s, they all whakapapa to the island, and some of them have individual land holdings there. Their old urupa (burial ground) on Taumaihi (at the southern end of Motiti) remains as a symbol of their occupation. Thus they have ahi kā rights on the island. On that criteria they remain tangata whenua with mana whenua over their lands on Motiti, and their

6 A Matherson *Motiti Island Bay of Plenty* (Reprint, Man Printing Ltd, Tauranga, 2009), p 27.
7 As above, p 36.
8 As above, pp 28-27.

mana moana rights are still intact at Ōtāiti.

[63] The section of Tauwhao on Rangiwaea Island represented by Brendon Taingahue have supported the application for consents, a decision made by the hapū after he dived the site and was satisfied that it was recovering. Conversely, Kevin Patrick Tohiariki, as a representative of his hapū - Te Whānau a Tauwhao o Otawhiwhi – at the southern side of Waihi Beach, opposed the application. Mabel Wharekawa-Burt, as an individual member of Te Whānau a Tauwhao, also opposed the application.

Ngāti Awa

[64] Ngāti Awa (the descendants of Awa) are the earliest recorded iwi in the Whakatane region, and their relationship to the reef is through the hapū Te Patuwai. As the Environment Court has previously noted:

> Their eponymous ancestor, Awanui-a-Rangi, was the son of Toi-kai-rakau, and he lived in the Eastern Bay of Plenty area well before the major migration fleet from the Pacific. ... by the time the Matātua Waka captained by Toroa, arrived in this district Toi's many descendants, including Ngāti Awa, populated the region. The crew of the Matātua intermarried with Te Tini-a-Toi.[9]

[65] Ngāti Awa and the Te Patuwai Tribunal Committee support the application. Sir Wira Gardiner, who is also Ngāti Awa, claims that the mana of the ancestor Te Hapū lies "firmly with Te Patuwai Tribal." Thus Ngāti Awa claim mana whenua status on the island through Te Hapū. Te Runanga o Ngāti Awa asserted the right to engage with the applicant for Te Patuwai, and it has representatives of the Te Patuwai Tribal Committee on the Runanga. The Committee claims to represent all of Te Patuwai both in Whakatane and on Motiti, including the marae-based interests of Te Patuwai at Motiti. We note that only the marae reservation trustees appointed under the Te Ture Whenua Māori Act 1993 have the right to represent the 'marae-based' interests of Te Patuwai. That noted, both Mr Ranapia and Mrs Butler acknowledge the relationship with Ngāti Awa and they are open to working with the recently elected trustees for the Te Patuwai Tribal Committee.

[66] Mr Mikaere claims that the connection with Ngāti Awa relates to a section of Te Patuwai choosing to leave Motiti and take up residence at Paparuhe and Manukatutahi where they were subsumed as a hapū of Ngāti Awa. They are now known as as Te Patuwai ki Uta – Patuwai on the Shore. Consistent with Mr Mikaere's

[9] *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90; (2015) 18 ELRNZ 620.

evidence, Mr Ranapia told the Waitangi Tribunal that Te Patuwai tuturu have mana whenua at Pupuaruhe in Whakatane. However Ngāi Te Hapū, he stated "have no rights at Whakatane." What seems clear is that some Ngāi Te Hapū members took the name Te Patuwai after the event described above by Mr Ranapia – but not all Ngāi Te Hapū are Te Patuwai.

Tauranga Moana Iwi – Te Moana a Toi

[67] It was recognised by the applicant, and we agree, that the following iwi or hapū of Tauranga Moana have ancestral, cultural and customary associations with Ōtāiti, including as a fishing ground as the reef falls within the Customary Fishing Management Rohe Moana (Sea Zone) gazetted in 2004 pursuant to the Fisheries (Kaimoana Customary Fishing) Regulations 1998.[10] Under these regulations the three iwi of Ngāti Pukenga, Ngāi te Rangi and Ngāti Ranginui formed the Tauranga Moana Iwi Customary Fisheries Trust. The regulations recognise that tangata whenua can appoint tangata kaitiaki and establish a rohe moana in accordance with those regulations. Tangata whenua in relation to a particular area are defined in regulation 2 as the whānau, hapū and or iwi that hold mana whenua and mana moana over that area. The regulations authorise tangata whenua to nominate kaitiaki for appointment. Thus, these three iwi have legislative recognition of their relationship to Ōtāiti. We turn now to discuss any additional associations with Ōtāiti.

Ngāti Pukenga

[68] This iwi was represented by the Chairman of the Ngāti Pukenga Iwi ki Tauranga Trust, Mr Rehua Smallman. They descend from ancestors on the Matātua Waka. They once were highly sought after mercenaries, hired for their prowess as warriors. They have four traditional kāinga at Maketū, Tauranga, Manaia in Hauraki, and Whangarei.

[69] They claim close traditional ties to Motiti and Ōtāiti as they derive part of their whakapapa from the ancestor Te Hapū. They assisted in the battle that followed the Te Patuwai event. They also lived on the island for a period, and some are landowners. We note that the Native Land Court in 1867 rejected claims to Motiti made by Te Arawa, Ngāti Tūwharetoa, Ngāti Awa, Ngāti Pukenga and Te Whānau a Apanui.[11]

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[10] Promulgated under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
[11] A Matherson *Motiti Island Bay of Plenty* (Reprint, Man Printing Ltd, Tauranga, 2009) p 24.

Logically, and as Mr Mikare conceded, the ownership of land by Ngāti Pukenga on Motiti must rest upon their whakapapa or relationship to Ngāi Te Hapū – Te Patuwai or Te Whānau a Tauwhao, with whom they are also related.

[70] They consider that Ngāi Te Hapū have mana whenua over Motiti and Ōtāiti. They also claim a relationship to the island and the reef on the basis described above. Their members who appeared before us opposed the application for consents.

Ngāi Te Rangi

[71] Ngāi Te Rangi are descendants of those who arrived from Hawaiiki on the Matātua Waka. They arrived in Tauranga from the East Coast with the migration of Te Rangihouhiri. Te Runanga o Ngāi Te Rangi Iwi Trust represents the interests of the 9 hapū that comprise its members. In the Deed of Settlement for Ngāi Te Rangi and Ngā Potiki, Te Whānau a Tauwhao is listed as one of their hapū. Their deed contains a statutory acknowledgement that includes a seaward boundary that includes Motiti and Ōtāiti.

[72] They have a cultural and customary relationship with Motiti through the lands of Te Whānau a Tauwhao. The following Ngāi Te Rangi hapū appeared before us:

- Ngā Potiki descend from Tamapahore a brother to Rangihouhiri. Tamapahore's mother was of Tapuika. Tamapahore was invited to live at Maketu by his cousin, and due to his relationship with Tapuika, for a time he and his people lived there peacefully. Eventually disputes occurred between Tamapahore, Waitaha and Tapuika. During the battle that subsequently occurred, Te Rangihouhiri, who had come to help his brother, was killed. The people adopted the name Ngāi Te Rangi in his honour and Tamapahore assumed leadership of the tribe. Dr Kahotea records that Ngā Potiki were allies with Te Whānau a Tauwhao in their war of the 1830s against Te Arawa.

  Ngā Potiki now hold influence in the area around Rangataua, Papamoa, Maungatapu and Otawa. They tend to act independently from Te Runanga o Ngāi Te Rangi Iwi Trust, and this is recognised in the Deed of Settlement for Ngāi Te Rangi and Ngā Potiki settling all their Treaty of Waitangi claims.

They were represented in these proceedings by the Ngā Potiki a Tamapahore Trust, who are the post-governance entity for hapū. In their application for engagement towards a 'recognition agreement' under the Marine and Coastal Area (Takutai) Act 2011, they claimed interests in the seabed and waters around Motiti including Ōtāiti. That application was declined by the Minister for Treaty of Waitangi Negotiations. In this case they claim a relationship with Te Moana a Toi based upon ancestral connections to their ancestors who travelled over the sea and across the land. These ancestors were the source of their mana as a people. They also consider the moana to be their food basket and they depend on kaimoana for important customary activities such as tangi and hosting visitors. Ōtāiti was used for fishing purposes pre the grounding of the Rena. They continue to claim a rohe moana that includes Motiti, Ōtāiti and beyond. The hapū opposed the application.

- The other hapū represented before us was Ngāi Tamawhariua ki te Rereatukahia. Mr Tiki Bluegum is located in Katikati and he is the kaitiaki representative for their hapū. He declared "ko au te moana, ko te moana ko au." (I am the moana and the moana is me.) He explained that the moana was their pataka kai (food cupboard). He claims the hapū are tangata whenua and kaitiaki for their rohe, and he opposes the application for consents.

- Ngāi Tuwhiwhia ki Opurerora are a hapū of Matakana Island and were represented by Nessie Kuka. They have customary associations to Te Moana a Toi and they use it as a pataka kai (food cupboard) for fishing and kaimoana.

Ngāti Ranginui

[73] Ngāti Ranginui descend from those who arrived in Aotearoa on the Takitimu canoe. The majority of marae of this tribe support the application. Ngāti Ranginui comprises several hapū including Ngāi Te Ahi, and Ngāi Tamarawaho who opposed the application.

Te Arawa

[74] The relationship to Ōtāiti for the majority of Te Arawa is through the ancestral connection to Ngātoroirangi, who discovered the reef and who occupied Motiti. Both Te Ariki Morehu and Tame McCausland consider the reef to be tapu.

[75] Mr Hohepa, a respected Ngāti Makino and Ngāti Pikiao pukenga, gave the Te Arawa account of the naming of Ōtāiti. He advised that Ngātoroirangi named the reef Ōtāiti because of its resemblance to a series of reefs that surrounded the islands of Hawaiiki from which Te Arawa left on its journey to Aotearoa. Ōtāiti was the point that marked the entry to the calm and rippling seas of Te Arawa, and its full name was "te Tau o Taiti." Ngātoroirangi likened the reef here in Aotearoa to those left behind, and that is why he performed his karakia before moving into calmer waters of 'te moana o Te Arawa' and landing at Māketu. Maketū estuary is the final resting place of the Te Arawa Waka. According to the Te Arawa Cultural Impacts Assessment Report, Tame McCausland of Waitaha explained that this was Ngātoroirangi's way of demarcating the deep waters of Te Moananui a Kiwa and the calmer inner coastal waters. Maria Horne contended that Te Arawa have kaitiaki responsibilities over Ōtāiti and Te Moananui a Kiwa, and as a result they have exclusive jurisdiction over Te Moana o te Arawa.

Pan-tribal Te Arawa Organisations

[76] A number of pan-tribal Te Arawa groups support the application for consent or have settled their issues. These include Te Arawa Koeke Trust, Te Kotahitanga o Te Arawa Fisheries, and Te Pumautanga o Te Arawa Trust. Also represented in this group was the Committee of Management of the Maketū Taiapure by its Chairman, William Emery. The Maketū Taiapure was established in 1996. The gazetted area covers the shoreline from Wairakei in the north-west to Otamarakau in the south-east. It includes the estuaries of Maketū and Little Waihi, extending from inshore out to 1,000m. The taiapure represents the "collective coastal presence of the tribe." The Committee of Management supports the application for consent. Te Arawa Lakes Trust was represented by Sir Toby Curtis, who indicated that they maintain a neutral position.

[77] A number of representatives of community groups at Maketū also supported the application for consent, and these included the Chairpersons of the Ngāti Whakaue Marae at Maketū (Niven Rae) and the Maketū Hauora - Health (Elaine Tapsell).

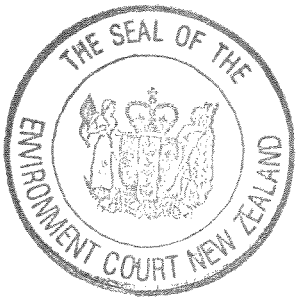
The Position of Hapū

[78] The following hapū of the Te Arawa confederation have taken positions in these proceedings.

- Ngāti Mākino is a coastal Te Arawa hapū. As with Waitaha, Hei was an ancestor of Ngāti Makino. According to Dr Kahotea they may have been on Motiti with Waitaha and Tapuika prior to the arrival of Te Hapū. The majority

support the application for consents. Peretini Hawea-A-Rangi Te Whata, for the Te Arawa Takitai Moana Kaumatua Forum, gave evidence that he was never consulted by the Rena owners or their agents and does not support it.

- Ngāti Rangwewehi are the owners of Papakikahawai Island located in Ongatoro at the Maketū Estuary. They support the application for consents with appropriate conditions, including those offered for Te Arawa.
- Ngāti Tunohopu, as a division of Ngāti Whakaue, support the application for consents.
- Ngāti Pikiao have land at Maketū. They support their coastal whānau and they support the application for consents.
- Waitaha, according to Mr McCausland, opposed the grant of the consents. However, they support the establishment of a Scientific Research Centre and support ongoing monitoring of the reef.
- Tapuika was represented by the Reverand Reremanu Wihapi. He gave evidence as the Chair of the Tapuika Koeke Kaunihera Wharekonehu. Tapuika supported the appeal and therefore opposed the application. Another member of the iwi, Te Moni, supported the application for consents with appropriate conditions for Te Arawa.
- Ngāti Rangitihi, represented by Te Mana o Ngāti Rangitihi Settlement Trust, the post settlement governance entity for the hapū, support the application for resource consent. They are centred at Matatā.
- Ngāti Whakaue ki Maketū trace their descent to Tama Te Kapua, the Captain of the Te Arawa waka. Their ancestral name is in honour of Whakaue Kaipapa who lived on Mokoia Island on Lake Rotorua. For Ngāti Whakaue, Ōtāiti was an area where the elders would pass on the hapū knowledge of fishing and diving. They are worried about the loss of that knowledge and the impacts on the environment. They were represented in these proceedings by Te Runanga o Ngāti Whakaue ki Maketū and a number of respected kaumatua, including Te Wano Walters, who initially opposed the application. After being encouraged to hold discussions with Te Ariki Morehu, rangatira ki te rangatira, the two resolved their differences, a matter we discuss later in this judgment as it impacts on what conditions, if any, should be applied.
- Ngāti Whakahemo were represented by Tane Junior Ngawhika. They are the descendants of Maruahaira who accompanied Te Hapū on the migration from



> Ohiwa. They settled the Pukehina area. These people affiliate to two canoes, the Takitimu and the Matātua. Their ancestral lands are at Pukehina, Maketū, Motiti, and Motunau. Their ancestor Maruahaira accompanied Te Hāpu on the migration from Ohiwa. They are also described as Te Arawa in some of the evidence. Mr Ngawhika stated they were kin to Ngāti Makino through inter-marriage, but that they have their own whakapapa. It is recorded that the Ōtāiti was a valuable fishery, and that during the summer Ngāti Whakahemo would move to the island and stay with their relatives.

[79] Waitaha, and perhaps Tapuika and Ngāti Makino, also have prior occupation associations and Ngāti Whakahemo have had an enduring relationship based upon solidarity with the Islanders as a result of the event Te Patuwai, and through inter-marriage. Ngāti Whakahemo also has land interests on the island.

[80] Te Arawa hapū representatives gave an array of customary fishing evidence, including that of Maria Horne and Liam Tapsell, indicating that the reef was a well known fishing ground pre the grounding of the Rena.

[81] Ngāti Whakaue ki Maketu Incorporated opposed granting consent and Te Arawa Takitai Moana Kaumatua Forum also opposed. Both these groups wanted this Court to order removal of all or part of the wreck. A number of the hapū were represented by Te Arawa ki Tai Incorporated Society who support the grant of the consents.

Kaitiakitanga, Customary Values and Practices

[82] Under s 7 we must provide for kaitiakitanga and the ethic of stewardship. "Kaitiakitanga" is defined in s 2 as the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources, and includes the ethic of stewardship. Under the same section, "tangata whenua" in relation to a particular area means the iwi, or hapū, that holds mana whenua over that area. "Mana whenua" means customary authority exercised by an iwi or hapū in an identified area, and "tikanga Māori" means Māori customary values and practices. Sir Wira Gardiner considered that we should identify who has mana whenua over the island and the reef, and given s 2 of the RMA and the contestability between the tribes on the mainland over the issue, we have no choice but to do so. We should stress that, normally, this Court is not required to undertake such an analysis.

[83] The first issue raised by the definitions in s 2 in the context of the Ōtāiti Reef is whose claim to kaitiakitanga should be recognised, and whose rangatiratanga or customary authority and tikanga should be applied in the context of the case before this Court.

[84] In our view, the answer provided by the evidence above is that Ngāi Te Hapū - Te Patuwai and Te Whānau a Tauwhao are tangata whenua, and therefore they are the kaitiaki of Ōtāiti, with mana whenua over Motiti and its associated islands and reefs.

[85] We make this finding based upon the recognition of their status by all parties and witnesses who appeared before us and based on:

- Their ancestral connections;
- Their continuous occupation;
- Their proximity to the reef;
- The nature of their cultural and customary associations with the reef;
- Their traditional use of the area as a fishing ground; and
- The manner in which they have exercised their kaitiakitanga including through the use of tikanga, their customary values and practices pre and post the Rena disaster.

[86] It logically follows that Ngāi Te Hapū – Te Patuwai and Te Whānau a Tauwhao have the right to exercise rangatiratanga or customary authority over the reef. Mr Mikaere stated that this position is unchallenged in terms of Motiti and Ōtāiti. The position of Te Whānau a Tauwhao is equally unequivocal. As a result of this finding, it is the tikanga of these hapū that should be applied to Ōtāiti, a matter that becomes important in our consideration of how the mauri of the reef is recovering, if at all.

[87] We also consider that evidence demonstrates the iwi of Te Arawa are tangata whenua on the mainland that are affected. They have kaitiakitanga responsibilities for Ōtāiti and its mauri through their ancestral connection to Te Arawa Waka and Ngātoroirangi. Those responsibilities are based upon the mana of Ngātoroirangi and his occupation, along with Waitaha and other Te Arawa occupations. However, as those occupations occurred prior to Te Hāpū lifting the tapu on the Motiti, Te Arawa no longer claim ahi kā on the island or over the reef. We accept that Waitaha have

whakapapa to Te Hapū, but this is not sufficient for the maintenance of mana whenua over this area. We also accept that the relationship with Ngāti Whakahemo is very close and that they own land on the island. It is just not clear how that land was derived. However, we do know that the Native Land Court in 1867 only granted land to Te Whanau a Tauwhao and Ngāi Te Hāpu - Te Patuwai.

[88] Thus Te Arawa's position as kaitiaki at Ōtāiti, have the right to protect the history of their cultural and customary associations to the reef. The history of Te Arawa Waka and its tohunga Ngātoroirangi, and the mauri and integrity of the reef, are the basis of their associations.

[89] Ngāi Te Rangi, Ngāti Pukenga, and Ngāti Ranginui and their various hapū have legislative recognition of their tangata whenua status at the Ōtāiti reef, giving them the right to exercise kaitiaki responsibilities for the fisheries. However, that status can only relate to the fisheries of the area, as that legislation does not confer rights to the land of Mōtiti, its islands and its reefs. Thus, any right to exercise kaitiakitanga obligations with respect to those lands and taonga must depend on cultural and customary associations with Te Whānau a Tauwhao and for Ngāti Pukengā through Ngāi Te Hapū.

[90] Te Rūnanga o Ngāti Awa settled their Treaty of Waitangi claims with the Crown with the passage of the Ngāti Awa Settlement Act 2005. Te Patuwai is recognised by the legislation as a hapū of Ngāti Awa. As part of the historical account contained in the Preamble, Motiti Island is recorded as being within the Ngāti Awa rohe and area of interest. All their claims to Motiti were settled by the 2005 legislation. There is, however, no reference to Motiti Island in the Ngāti Awa Statutory Acknowledgement granted by the 2005 Act.

[91] Mr Ranapia stated that, while Ngāti Awa is the constituted iwi authority for Te Patuwai on the mainland, it is not accurate to record Te Patuwai on Motiti as a Ngāti Awa hapū. As there is no statutory acknowledgment in the legislation regarding Motiti, we are not required to elevate the status of Ngāti Awa.

[92] Only Ngāi Te Hapū – Te Patuwai and Te Whānau a Tauwhao have direct mana whenua over Motiti and its associated islands and reefs. The relationship that Ngāti Awa has to Ōtāiti can only be through Te Patuwai who have maintained ahi kā on Motiti. Thus Ngāti Awa and all their hapū (who are not Ngāi Te Hapū – Te Patuwai or

Te Whānau a Tauwhao) do not have direct kaitiaki responsibilities other than those based upon their whakapapa and tribal affiliations to Te Patuwai, their broader connections to Te Moana a Toi and their use of Ōtāiti and other reefs in the Bay of Plenty as a fishing ground.

[93] We consider that we should reflect these different forms of kaitiakitanga by ensuring that Ngāi Te Hapū – Te Patuwai and Te Whānau a Tauwhao hold the numerical majority on any Kaitiaki Reference Group if consent is granted. We would also need to ensure that the membership recognises the ancestral, cultural and customary associations of the other iwi of Te Moana a Toi, and Maketū should we grant the consent.

Mauri

[94] While a number of Māori values were described by all the expert witness for all parties, including Mr Potiki, Dr Kahotea, Sir Mason Durie and Mr Waaka, and by a number of witnesses including Sir Wira Gardiner, Mr Tohiariki, Mr Ohia, Mr Thatcher and Mr Mikaere, there is really only one issue that is immediately relevant to the issues before us – and that is the state of the mauri of the reef. Other values raised we have touched upon above; or we refer to those as they inform the values and tikanga associated with mauri.

[95] As noted by Mr Potiki, mauri is the life force connection between the gods and earthly matter. It is to be found in all things, including inanimate objects. It is the life force and also the generator of health. In his view, if the mauri is damaged, then the owner or the seat of that mauri is also damaged. Conversely, mauri can be mediated, strengthened and restored, but it is a spiritual intervention that must recognise Māori gods. Mr Mikaere noted that the mauri of Ōtāiti relates to its value as a fishery, and that it has a mortal element. Mortality, he stated, "is essential to the nature of mauri because it provides an inbuilt imperative for resource protection." Consistent with the evidence of Mr Potiki, Mr Mikaere noted that protecting the "mortal" mauri of a resource such as the reef is a "religious and spiritual imperative that underpinned the sustainable management of the resource." Mr Mikaere noted that transgressions are punishable on a scale ranging from bad luck, to sickness and even death, something he believes is afflicting Ngāi Te Hapū.

[96] The evidence of Mr Ranapia was also clear that the mauri of Ōtāiti is connected to the people of Motiti and their traditions. He advised that:

> The spiritual connections between the island and its sacred rocks and reefs is such that the island is affected by the life force of Te Haa o te Taiao (life force of the living environment) or mauri of those places.

[97] He stated that "the single most significant threat to that mauri was the grounding of the Rena" and the salvage efforts. There is no doubt that the mauri of Ōtāiti was damaged and depleted when the Rena struck the reef, and that remained the position for many months thereafter. However, it was his view that the mauri could be restored through a range of traditional activities including "atonement, karakia, rāhui/tapu (exclusion/restriction), puretumu/ whakangawari (redress/mitigation)."

[98] That is why the elders of the Korowai Kāhui o Ngā Pakeke o te Patuwai agreed to help with the traditional rituals. He then explained how they mediated the mauri. They began by performing a ceremonial karakia. They then moved out to Ōtāiti, and other rituals were performed in order "to bring about balance between the physical and spiritual worlds so that the salvage work would continue safely." In this way the intervention described by Tahu Potiki was performed. The elders now believe that the mauri of the reef is being restored and its progress can be monitored. Mr Ranapia advised that:

> In terms of the cultural elements of mauri restoration, the owners of the Rena have met kanohi ki te kanohi (face to face) with the tribal leadership (rangatira ki te rangatira), leader to leader (ki te haangai kōrero te kai o ngā rangatira) to attempt to find a common ground. The common ground has been fostered through the traditional values whakatuhonohono (building bridges), whakawhiriwhiri (bringing about discussions) and whakangawari (making amends). This has gone some way towards amending the hara (shame) caused by the grounding of the Rena and has shown respect to the cultural values of our ancestors.

[99] Despite these measures, a number of witnesses for Ngāi Te Hapū Incorporated Society were still contending that the mauri of the Ōtāiti was affected negatively by the continued presence of the wreck on the reef. Mrs Butler, for example, stated that "the mauri of the reef is hurting, I feel it, I know it." For Mrs Butler, Alice Kiwa, Mabel Wharekawa-Burt and Buddy Mikaere, as long as the wreck is on the reef, the mauri will never be restored. They all claimed that it is affecting the well-being of Ngāi Te Hāpu. Nearly all the witnesses for Ngā Potiki and Te Runanga o Ngāti Whakaue raised similar well-being issues. We also note the evidence of Mr Te Wano Walters and Reverend Wihapi. The Reverend discussed the malaise as mate Māori,

and described its symptoms.

[100] Sir Mason Durie's evidence explained the psychological impact as being sourced to their whakamā impacting on the mauri of the people. The whakamā emerges when people are unable to perform their responsibilities as kaitiaki. This explanation of this condition we found helpful at the general level. The evidence of trauma provided by Dr Donna Clarke was also informative at a generic level. We accept that those people who believe that their well-being is affected by the wreck remaining on the reef hold sincere views. However, we also accept the evidence of Joe Te Kowhai and Dr Paul-Burke, which demonstrates that the reef is restoring itself.

[101] We note further that Mr Ranapia and the Korowai believe the mauri of the reef is restoring itself, and that the spirituality of the environment will also continue its healing process without full wreck removal. He added that the associated risk of harm to people working on the reef had diminished "as it has done since the elders performed the ritual karakia." We further note the evidence of Dr Paul-Burke and Joe Te Kowhai, who testified to this recovery.

[102] The Court was referred by Maria Horne, Piatahi Bennett and Mr Hope to the Mauri Model as a means of ascertaining to what extent, if at all, the mauri of the reef was being restored.[12] Essentially the model was constructed based upon kaitiakitanga, and it assesses the impact on mauri through the use of four well-beings - environmental, social, economic and cultural – both pre and post development. We consider these aspects throughout this decision, but specifically focus on the cultural elements in this section.

[103] Raewyn Bennett was one of the authors of the Te Arawa Cultural Impacts Assessment Report for Te Arawa. In that report the mauri model is referred to due to an assessment completed by Dr Kepa Morgan. The analysis compared three different time spans - 2011, 2018, 2025 - within a 'leave the wreck scenario.' Referring only to the cultural section of the analysis, it demonstrated a slower recovery than if the wreck was totally removed. However, it did not take into account the independent underwater assessment of Mr Joe Te Kowhai. Thus Te Arawa wanted to have a reassessment completed peer reviewing the underwater assessment. In the end Te Arawa followed the advice of Mr Te Kowhai that removal of further pieces of the wreck would lead to

[12] MAI Review *Implementing Māori Indigenous Knowledge (mātauranga) in a scientific paradigm : Restoring the mauri to Te Kete Ponamu* (2011) 3.

damage to the reef. Drawing on this advice, it was considered inconsistent with their role as "kaitiaki to protect the mana of Ngātoroirangi and to restore the mauri of Ōtāiti" to allow that to happen. That is the reason so many in Te Arawa support the application for consent.

[104] The model was considered in the decision of this Court in *Sustainable Matatā v Bay of Plenty Regional Council.*[13] The Court in that case was told by one of the authors of the model, Dr Hikuroa, that the value of mauri and the customary practices associated with its mediation were dependent upon the views of tangata whenua. It was further noted that, if efforts are made to restore the mauri of a water catchment, that in turn would restore the mana of the people. It was his view that one is not separate from the other as they are inextricably linked. We think that an assessment of this type would be useful to undertake, should we grant the consent with conditions.

[105] We note that, on the day of our site visit to the reef, schools of fish were present, as were many sea birds and a pod of dolphins – leading our expert in tikanga Māori, Commissioner Prime, to opine "Kua hokimai te mana ki a Tangaroa" (the mana has been returned to Tangaroa – the Māori deity of the sea). Given the evidence we have heard and what we saw ourselves, we are persuaded that the reef is recovering its mauri.

The Treaty of Waitangi

[106] Under section 8 of the RMA, and in achieving its purpose, we must take into account the Treaty of Waitangi. In this respect the Waitangi Tribunal has found that the Ōtāiti Reef is a taonga (treasure) of considerable importance, that it is covered by the plain meaning of article 2 of the Treaty of Waitangi,[14] and that the reef was a site of cultural, spiritual, and historical importance to a range of hapū and iwi groups.[15] The Tribunal did not fully review who those groups were. That task has now been completed above and we have found that the tangata whenua of Motiti Island have mana whenua and mana over Motiti and the Ōtaiti Reef.

[107] The Tribunal discussed the following principles relevant to the claims it heard concerning the Rena, and we consider the following summary of their expert findings

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[13] [2015] NZEnvC 90 [396]-[398].
[14] Waitangi Tribunal *The Interim Report on the MV Rena and Motiti Island* (Wai 2391 & Wai 2393, 2014) p 6.
[15] As above, p 14.

are relevant to the circumstances of the case before us:

- The principle of partnership and mutual benefit giving rise to the duty to act reasonably, honourably, and in good faith taken from the Preamble and all articles 1-3. This principle obliged those making decisions to be informed about the impact of proposed legislation, policies, actions or omissions impacting on Māori interests in the environment and natural resources.[16]

- The exercise of kawanatanga in article 1 in exchange for the protection of the exercise of rangatiratanga (control and authority) over resources as listed in article 2.[17] Kaitiakitanga is an obligation of rangatiratanga.[18] Thus the Crown should provide ways for Māori to fulfil their obligations as kaitiaki, or guardian communities, over their taonga.[19] In a previous report the Waitangi Tribunal noted that it is the degree of control exercised by Māori, and their influence in decision making, that needs to be resolved in a principled way through the concept of kaitiakitanga.[20]

- The duties of active protection of taonga[21] and the need to consult with Māori where the particular circumstances of a case requires fully informed decision making.[22]

Application of Treaty Principles

[108] In this case the mammoth effort to clean up the Ōtāiti Reef was evident from the many briefs of witnesses who were engaged and worked in teams across the Bay of Plenty Coast and on Motiti. At sea the extent of the salvage operation was led by Captain King. He worked with Joe Te Kowhai, who was commissioned by Te Arawa to review the site. During his commission Mr Te Kowhai persistently required that salvage work continue on the wreck until the operation was on the margin of causing significant damage to the reef, and creating real and significant risks to life for the salvage divers.

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16 As above.
17 As above.
18 As above, p 16.
19 As above, p 15.
20 As above, p 16.
21 As above, p 14.
22 As above, p 15.

[109] His evidence, combined with the evidence of Dr Paul-Burke for the Motiti Islanders, convinced Te Arawa Ki Tai and Te Patuwai to desist from requiring further removal. We note the salvage effort by the applicant provided for the rangatiratanga of Te Patuwai and for the relationship held by Te Arawa with the reef. The issue of how to accommodate Ngāi Te Hāpu Incorporated is a different story. In reply to their demand that full removal should have been pursued, the evidence was that those responsible continued their efforts until Mr Te Kowhai was satisfied that enough had been done without posing any risk of damage to the reef or endangering lives. We conclude that nothing further at this stage can be done to actively protect the taonga that is Ōtāiti, as it would not be reasonable to require it in these circumstances.

[110] Furthermore, the engagement with the majority of iwi and hapū affected by the disaster and who are affected by the application for consents meets the consultation standard required by the Treaty. The focus on engagement by the applicant has enabled those with the primary responsibility of kaitiakitanga on Motiti, namely Ngāi Te Hapū-Te Patuwai and Te Whānau a Tauwhao, to exercise their role and have a say on what they wanted to see happen. Their settlements have addressed the concerns of Ngāti Awa. Finally, the conditions offered will address the remaining kaitiakitanga concerns of the parties who have some form of kaitiakitanga authority at Ōtāiti, with the possible exception of Ngāi Te Hāpu Incorporated who are determined to maintain the position that the wreck should be removed.

[111] The fact that the applicant has also provided for the relationship of mainland groups from Tauranga Moana and Te Arawa, through their settlement agreements and seats on a Kaitiaki Reference Group, indicates, as Sir Wira Gardiner stated, the unprecedented nature of the efforts made, which in the circumstances of the devastation and trauma that followed the wreck required an exceptional response.

What is the existing environment?

[112] To establish the existing environment for this case, the core question is when the application is to be considered as commencing. Mr Casey QC pressed the Court heavily to a view that the Court would be assessing the existing environment with the wreck in it (even though not consented) from the date on which the Court grants the consent.

[113] Given this is an appeal from a grant of consent this proposition is, at face

value, problematic. Other parties suggest that the environment should be judged as that which existed prior to the Rena, given that the wreck and the aftermath and salvage were not consented. We have reached a clear view as to the position, which requires some brief explanation as to the background to the wreck.

At the time of the wreck

[114] Prior to the wreck in 2011 the environment on the reef can be regarded as pristine for practical purposes. It could be regarded as similar to that of other reefs around Motiti and also Tuhua (Mayor Island). That said, there had been extensive fishing within the regional catchment, with an expert for the Applicant suggesting that the existing fish stocks were something less than ten per cent of those which would have existed in the 1920s. It is clear that many species of fish previously inhabiting the Ōtāiti reef, particularly hapūka, had become a rarity, not only on this reef but within the bay generally.

[115] Accordingly, we conclude that, even if we were measuring this consent application against an environment as at the time of the wreck, this would need to take into account any general regional/bay-wide changes within the water columns since the wreck occurred. No particular differences at Ōtāiti prior to the wreck were suggested and accordingly, for current purposes, we can regard the situation as at 2011, just prior to the wreck, as being the same as that generally applying throughout the bay, including Ōtāiti reef.

[116] Of course, any impacts of the Rena itself upon the bay after the wreck would need to be discounted as these were unconsented. Nevertheless, we immediately begin to realise that there are difficulties with the assessment of the existing environment in such circumstances.

[117] Matters are further complicated by the fact that the wreck itself was an accidental and unexpected event. This does not excuse the need for a resource consent; and in many cases the emergency provisions of s 330 of the RMA would apply.

The MTA notices

[118] However, in this particular case the activities in relation to the wreck are governed by the Marine Transport Act. In particular, the Director is empowered to issue

notices requiring works to be undertaken in certain circumstances. Where those notices are issued they must be complied with, and relevant sections (9 and onwards of the RMA) do not apply to such notices. For practical purposes, all parties acknowledged that this took effect as a deemed consent for the works described in the notice. In this case, all parties are agreed that there were a series of notices issued from 2011 onwards, all of which required, until 31 March 2016, the removal of the wreck.

[119] Mr Casey QC suggested to this Court that the Director could only require the removal where pre-conditions were met, including that the vessel must be a hazard to navigation. That would be a matter for argument in another jurisdiction. For current purposes we see the notices as having legal effect unless and until they are declared to be invalid.

[120] In those circumstances we are satisfied that there were notices requiring the removal of the wreck until 31 March 2016. Although notices from October 2015 indicated that the works could be paused when certain positions were achieved, it is quite clear that those notices still required the removal of the wreck (subject to the works being suspended for a time).

[121] We have concluded that all works conducted on the wreck by way of salvage and removal of items, from the times of those notices in 2011 until 1 April 2016, were authorised by the MTA notices, which for all current purposes should be treated as resource consents.

[122] The notices themselves did not legitimise the placement of the MV Rena on the reef nor discuss the remains. However everything that has been removed from the reef was done so in an authorised way. We accept that as part of that authorisation, the cutting up of the vessel for removal, the other works which were performed (such as sawing off the accommodation block) would have created a discharge at least of TBT. For current purposes we accept that there may have been some discharge of copper also, depending on where the works took place.

[123] We also acknowledge that there were significant adverse effects from the containers on the vessel, from escaping bunker oil and other flotsam and jetsam from the vessel, which had a significant impact on the coast. Although some of those discharges would have been covered by the notice of removal if their discharge was in

furtherance of the consent, others would have been further unconsented discharges from the wreck itself.

A real world and practical approach

[124] We have considered the Commissioners' decision under s 290A of the Act. The Commissioners at first instance looked at this matter on what they described as a real world and practical basis. No witness before us suggested that there is any other basis on which we should view the matter, although they disagreed as to the application of that principle in these current circumstances. For our part, we consider that we need to examine:

(a) what we are considering consent to;

(b) what environment we are comparing that to; and

(c) how we are going to deal with the discharge issues occurring both as part of the wreck, the salvage and subsequently?

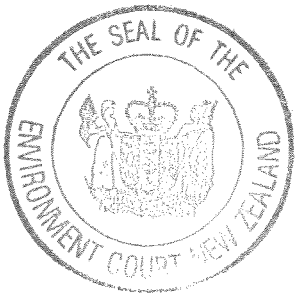
[125] In the end we have concluded that the appropriate practical and real world approach in this case is as follows:

1. The wreck as it now remains is what is left after the Director's notices have been complied with and/or expired. Accordingly, on 1 April 2016 the wreck is in the form that we now understand it.

2. To compare that wreck with either an earlier consented position (ie while the works were being undertaken) or with the vessel when it ran aground, would be difficult. We do not know the exact state of the reef at the time and could lead to the Court including adverse effects that were removed as part of the salvage operation.

3. If the Court compares the wreck as it existed on 1 April 2016 (and presently) with the environment prior to the wreck occurring this is a realistic comparison basis to assess what changes have occurred relevant to this application.

4. In doing so, there are a number of plans under the RMA (regional, coastal, iwi) that have been formulated subsequent to the original wreck but prior to the date of hearing. Those plans were assessing the situation as it either now exists or was at the time the plan was drafted or proceeded through



submission stages. For example, the Outstanding Natural Character and ONFL provisions of the Regional Coastal Plan identify that the Rena was on the reef. The effects on the values and attributes of the reef at that time can be compared with the effects of the current proposal. These plans apply variously as they proceed through the process of submission to their operative dates.

The discharges

[126] This leaves the significantly more complicated issue of contaminant discharges particularly TBT and copper. Firstly, it is acknowledged that it is not possible to tell from a particular contaminant remnant or element within the tissue of flora or fauna whether it was received as a result of the wreck, from the salvage work, or subsequent to 1 April 2016.

[127] In this case the Applicant has conceded that the measurement of such discharges should be treated on a cumulative basis. No party disagreed with the Court using a cumulative approach to discharges, particularly of TBT and copper. In those circumstances it appears to us that the timing of the discharge becomes of little relevance, given that the proposed conditions address total loading of the particular contaminants.

[128] In this way, we consider that the various matters under the Act are balanced and integrated to enable a proper assessment of the effects of the activity by:

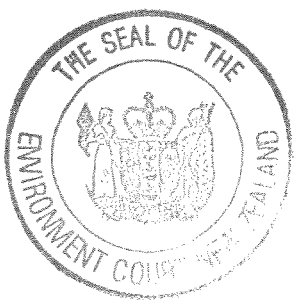
(a) comparing the effects of the current remains with the reef prior to the wreck;

(b) considering the plans as they apply now and were relevant at the time of their operation for comparative purposes; and

(c) treating the discharges as cumulative.

Retrospective consent

[129] Accordingly, at the time the application was made, the consent was prospective. When the Commissioners issued their decision it was at a time when the MTA notices still applied and in theory at least the MTA still required the removal of the rest of the vessel. This, in our view, is where the parties' confusion as to removal being the alternative has arisen. However, by the time of this hearing in 2017, there are no



MTA notices and accordingly there is no mandated outcome if the application for consent is refused.

[130] The other consequence of this is that the activity commenced on 1 April 2016 and thus this application is now for a retrospective consent from 1 April 2016. If we grant consents, they would cover the period of some 12 months prior to our hearing of this matter. This has important ramifications for the Applicant because it means that the consent and its conditions have mandatory effect from the Court's final decision. Where a consent is entirely prospective the Applicant has an option to adopt it. Where the consent is retrospective it must take effect on finalisation. It also means that the Court can take into account the more recent studies as part of the consent process, if resource consents are appropriate.

The alternative to a consent

[131] Prior to the hearing commencing Ngāi Te Hapū Incorporated had pursued an appeal seeking the removal of the entire wreck, notwithstanding the Court's indication in 2016 that it did not consider it had authority to make such a decision. Ngāi Te Hapū Incorporated conceded at the hearing that the Court could not order removal of the wreck, but continued to seek a refusal of consent on the basis that this might open other options up to address removal.

[132] The Regional Council has been clear, both to us and the Commissioners, that it has neither the funds nor the will to undertake the removal of the vessel, or part thereof. No other party during the course of this hearing offered to undertake the removal. At best, Mr Bennion seems to suggest that political pressure might be brought to bear on the owner or insurer may resolve to remove the vessel in any event.

[133] In the absence of:

(a) a party taking enforcement action; and

(b) a party having the funds to give effect to the removal,

the real world approach is that its removal is unlikely at least in the short term. Even if there was a willing party it would have to obtain a resource consent to undertake the work (unless MTA make further directions).

[134] If this consent is refused, we conclude that there is no certainty as to what will occur. Nor, as we understand it, are there any precedents or international conventions that would apply in such circumstances. We consider the only practical situation we can compare the granting of consent to in this case is that there would be abandonment without consent and that there would be considerable uncertainty as to what would occur in relation to the wreck in the future.

[135] Given that scenario, we nevertheless conclude that there needs to be positive benefits to the granting of the consent. Some parties suggested that a gun was being put to the head of themselves and the Court. We suggest, however, that the position can be more kindly put: there is, at this stage, no known alternative as to what might occur in the future. Overall we conclude that we should put to one side the issues as to the alternative to granting consent and deal with the matter instead on its direct merits.

Can more of the wreck be removed?

[136] A fundamental contention of the appellants, particularly Ngā Potiki and Ngāti Whakaue, is that the owner and insurer have stinted in their efforts on vessel removal and that more could be done if the company had the will. They considered that the question of financial cost was the main driver for the application.

[137] We acknowledge that at the time the original application was made the wreck was in a significantly different condition to that it is in now. A number of witnesses acknowledged this, including some for the Applicant.

[138] Importantly for this Court, two people with significant familiarity with the reef went to the reef in around 2013 when the owner and salvor were suggesting that the wreck should remain. Mr Joe Te Kowhai, as we have already mentioned, is a person we regard as having significant expertise in this area. As well as his significant diving experience he is also a mechanical engineer. He was asked to undertake inspections for members of Te Arawa, given their significant concern as to whether the owner and salvor were making full efforts to remove the wreck. He freely admits that he started with a suspicious approach, and that from his initial inspections he considered that the site was far short of that which was acceptable. We concluded that Mr Te Kowhai's evidence was both illuminating and honest.

[139] He stated that, in relation to his inspection in July 2014:

> At that time there was still much that needed cleaning up, so these recommendations were included in my report.
>
> [26] In addition, my report notes the damage that can be caused to the reef when the salvors try to go too far in the clean-up process. Photos are provided in my updating report, which showed the scouring that was caused by a grapple hook.
>
> [27] When I showed these photographs to our working group they asked for the clean-up with the grapple, which was damaging the reef, to be stopped as it was clearly doing more harm than good.
>
> [28] These recommendations that were made around the clean-up were adopted by the Rena owner and salvors and I was able to make a number of further dives to witness the progress. In this way the working party was able to influence the clean-up and ensure that we were kept informed.

[140] As this Court has already noted, the evidence of the Applicant's witnesses goes considerably further, and suggests that Mr Te Kowhai advocated for and obtained a significant reduction in the wreck volume (some 4,000 tonnes) by advising and working with the salvors until he was satisfied that all that could be done had been done. We cannot over-emphasize the influence Mr Te Kowhai had on getting Captain King and the owner to extend salvage works on the wreck. Mr Te Kowhai was a forthright and impressive witness, with significant expertise. He described the process in working with the salvors as follows:[23]

> ...I said the initial steps into getting my point across or our point across, well...to Roger took some time but in saying that eventually, as we worked through the process and both being divers, we both knew how difficult this was going to be so those views came closer and closer together. As I expressed them to Roger we began to gel and what we were seeing were the same thing. With Roger he wanted, or the owner of the site wanted it tidied up. I wanted it cleaned and that's the agreement that we had and we started working towards that so we both had a goal at the end.

[141] Mr Te Kowhai understates his influence. We are in no doubt that the insurer and owner committed significant further funding after 2017 based on Mr Te Kowhai's input. This yielded significant improvements to the site, with over 4,000 tonnes of further material at a cost of over NZ$80m.

[23] Transcript, page 1276 [minor amendments to the Transcript].

[142] Mr Barry Wilkinson, a witness called for the appellants, is a person with considerable experience of fishing the reef and had been the fisherman for Ngāti Whakahemo Kaipapa marae at Maketu. He attended at Ōtāiti in 2013 and his view then was that it would take three to four years to recover. In cross-examination he confirmed that he was extremely pleased to hear that a lot of further work had been done since his visit to "clean up the rubbish".

[143] From the Court's perspective these two witnesses fairly acknowledge the significant improvements that had occurred over this site. We note that these concessions by Mr Te Kowhai came at considerable personal cost, and that it appears he has been subjected to criticism and pressure from other groups in relation to his actions. Curiously no witness, including any witness for the appellants, contradicted Mr Te Kowhai's evidence or vouchsafed his experience in this area. His evidence is entirely consistent with other witnesses for the Applicant, including Captain King who was in charge of the salvage operation.

[144] Dr Paul-Burke is also a marine scientist, with considerable experience diving and assessing marine environments in the Bay of Plenty. Dr Paul-Burke holds a PhD in Marine Māori Management, and a Masters in Indigenous Studies. She also has majors in marine ecology, qualifications in diving and boat skipper. We accept that she has had considerable experience in marine scientific work in the Bay of Plenty area. She is also a member of and whakapapa's to both Ngāti Awa and Ngāti Whakahemo, and has personal knowledge of tikanga and kaitiakitanga matters.

[145] Dr Paul-Burke assessed this environment not only in marine ecology terms, based particularly on dive observations, but also in terms of kaitiakitanga. Her conclusion is that the "reef looks and feels vibrant and busy with life. The dynamic energy is consistent across the reef and areas where pieces of wreck are present and are not present". She notes that the RPS listed 17 taonga species, of which she observed 12 on the site. The five species she did not see included hapūka, kuku (mussels), pioki or rig shark, tupa or scallops and takeke or piper. Of those identified, some species such as hapūka and scallops do not occur on the reef (or at least not for some time). This evidence is supported by other evidence for the Applicant of a scientific nature.

[146] Essentially, the proposition is that all that can be done in respect of the reef from wreck removal, has been done and that further works would have not only

detrimental effect on the reef and its biology (at least in the short term) but also be a safety risk for workers, particularly divers.

Can the aft section be removed?

[147] By the end of the hearing, we understood that it was conceded that there was little further that could be done in respect of the aft section. This section of the vessel is in deep water and is unlikely to move. It has already suffered significant structural failure and the vessel is flat-packing. Any attempts to lift or move the vessel are likely to lead to collapse of sections and potential scattering of the pieces further around the reef. The feasibility of such an action is at best questionable and we received no cogent evidence that it was possible to lift the aft sections. At most it was suggested to several witnesses that it must be possible.

[148] In this regard we refer to the attempted lifting of the Vinca Gorthon off Camperduin approaching the port of IJmuiden in the Netherlands. This was a vessel that had sunk in deeper waters on a more stable bottom over pipelines in the North Sea near the port.[24] The vessel sank in 1988. Due to navigation issues, attempts were made in 2010 and 2011 to raise the vessel. Those attempts failed, and led to a loss of life plus significant damage to equipment.

[149] Given the difficulties encountered in the removal of part of the MV Rena accommodation section, we consider that any difficulties in attempting to undertake lifts on this site are compounded by the difficult position of the reef and the possibility of adverse weather conditions arising during the works. A number of witnesses for the appellant conceded that loss of life in respect of the reef, or significant damage to the reef, would be unacceptable. Since the hearing concluded, there have been two major weather events, cyclones Debbie and Cook, the former leading to extensive flooding in Edgecumbe. This demonstrates the potential for cyclones of PSR to arise.

[150] The argument essentially appeared to be that the Applicant's witnesses had vastly overestimated both the difficulties and the safety issues arising from the works. Having closely examined the evidence we are particularly convinced by the evidence of Mr King and Mr Te Kowhai in this regard. They support the detailed Wreck Removal Feasibility report of 2014. These are two expert witnesses who are familiar with the

[24] Detailed description appears in the Full Wreck Removal Feasibility Appraisal report by TMC (Marine Consultants Ltd) 18 June 2014, pages 98 to 102.

exigencies and practicalities of working in such difficult circumstances on this site. We conclude that the prospect of removing the aft section is negligible. The best course of action is to leave it in situ to flat-pack in due course.

Can the mid section be recovered?

[151] We turn now to the mid section of the vessel. This has already largely flat-packed and consists of large and interconnected sheets. We again accept the evidence that the removal of any large sections within this area (up to 600 tonnes) would require significant work to break those pieces down into liftable pieces. This involves working on a more active part of the reef, which would increase the technical difficulties of both the lifting and removal but also increase the practical working dangers for divers.

[152] We accept Mr Te Kowhai's evidence that the use of grapples, chains and the like are likely to also have a significant adverse impact on the reef. We also conclude that there is sufficient evidence before us to give us considerable concern as to whether all of the sections can be recovered without further scattering or breaking them up. Accordingly, we conclude that all that has been done in this regard reasonably has been done.

Can the bow section be removed?

[153] We move now to the bow sections. Part of the bow we conclude is embedded on the reef and is likely to simply break up and flat-pack in due course. Parts of the bow might break away into smaller parts, say less than 20 tonnes, and could move around the reef and possibly over it like other pieces. If small enough, it would be a relatively simple matter for those to be recovered without requiring either long periods of time or complex machinery.

[154] The Applicant acknowledges this, and has proposed conditions that where the parts get into shallower waters described as Lowest Astronomical Tide (LAT –1m) or become a navigational hazard, they could be removed. Mr Hovell for Ngā Potiki recognised that an improvement of these conditions, and particularly the circumstances in which removal would be considered, may address some of their concerns about the bow sections.

[155] We have concluded that wholesale removal of the bow, including the pieces that have gone over the reef, is not appropriate. It involves working in difficult circumstances with large pieces of the vessel that would need to be broken into smaller pieces. Nevertheless, we accept that there might be conditions in any consent that address smaller parts that may break off or degrade, especially where they may move around the reef. This is a matter we will address when we come to discuss possible conditions in due course. Mr Hovell for Ngā Potiki recognised that one way in which this issue could be dealt with is by amending the conditions of consent as it relates to bow pieces to allow a broader ambit for consideration of removal.

Conclusion on removal of parts of the vessel

[156] The only way in which removal of parts of the vessel could be considered feasible or safe is if small parts of the bow section were to break off in circumstances where they are identified as being readily recoverable safely. At this stage we are not convinced that this needs to be related to only those pieces in shallow water, or only those pieces that are navigational hazard. That is a matter than can be discussed by us further as proposed conditions of consent. Nevertheless, overall we are satisfied that, to date, all that can be done has been done. The only issue remaining is what might be done in the future if smaller parts of the bow sections were to break off.

Should there be a consent?

[157] Having reached the conclusion that everything that can be done in relation to the wreck has been undertaken, the fundamental question asked early in the hearing by members of the Court, and the focus of attention, is whether or not there is any particular purpose in granting a consent.

[158] The consent itself clearly seeks to permit the abandonment of the balance of the vessel left on the reef, but cannot of itself deal with either the initial wreck and its aftermath or those discharges or events that occurred as a result of the removal of parts of the wreck subject to the MTA notices. There was a real concern by several of the parties that, in granting a consent, we would be legitimising the wreck and the subsequent aspects of removal, as well as the remaining part of the wreck. There was a feeling that this might preclude attempts to have the balance of the wreck removed even if technology improved to enable this to occur. More fundamentally, several witnesses suggested that it gave the wrong message – that insurers would assume that they were able to leave their "rubbish" on New Zealand shores – and that it would

create a precedent into the future.

[159] From the Court's perspective we too were concerned that the granting of a consent may simply enable the identification and measurement of adverse effects without providing any real remedy, if all that could be done had been done.

[160] However, as the case progressed, it became clear that at least several of the participants saw real benefits in conditions of consent. Even some of the parties in opposition recognised some aspects of consent conditions as being beneficial. We conclude that the following benefits of consent conditions were subject to focus during the hearing:

(a) the ability to measure and notify parties, including the public, as to the state of discharges on the reef;

(b) the ability to check for and then consider any changes to the positioning of the wreck, particularly as the result of major weather patterns;

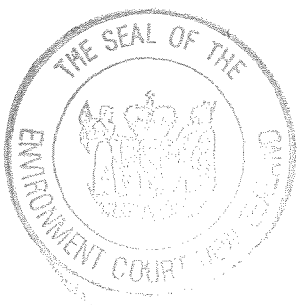
(c) the ability to proactively review changes, either to the discharges or to the wreck position, and to review whether or not modern technology would enable removal; for example, whether discharges were recoverable, or if smaller parts of the bow were to move and become recoverable;

(d) the ability to recognise the role of kaitiaki, a specific reference group, and to acknowledge the role of the local iwi, hapū and kaitiaki in relation to the wreck;

(e) to make specific provision to enable offset compensation and enable the kaitiaki role of coastal Māori, particularly those who are ahi kā to Motiti Island.

[161] Any removal of the wreck in the future would depend on the potential to remove either contaminants (particularly copper clove), or smaller parts of the vessel, if those became available as a result of major movement (mainly through storms) or general degradation. It appears to us that one of the fundamental questions as to whether all that can be done has been done is answered by grant of a consent and imposition of conditions.

[162] As a matter of principle this Court agrees that the granting of consent and the imposition of conditions may be effective in achieving the purpose of the Act if it:



(a) enables better information to the public;

(b) makes provision for removal of any contaminants or smaller parts of the vessel if and when they can be appropriately removed;

(c) provides information to locals; and

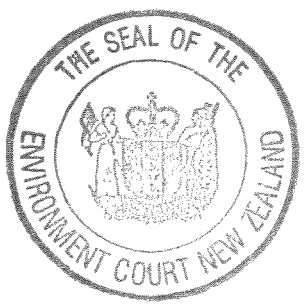
(d) recognises the role of kaitiaki and makes specific provision to strengthen that role.

The continuing role of Māori as kaitiaki

[163] It was acknowledged by all parties at this hearing that those who live on Motiti, have a home on Motiti or are landowners are the ahi kā in terms of Ōtāiti. A number of other iwi and hapū whakapapa to the reef through the eponymous ancestors Ngātoroirangi or Te Hapū. This includes not only Ngāti Awa and Ngāi Te Rangi through Te Hapū, but also Te Arawa. For the Te Moana a Ti group representing Ngāi Te Rangi, Ngātiranginui and Ngāti Pukenga, this encompasses other hapū including Ngā Potiki (who is an appellant in this case) – all of whom have a relationship with the waters off the coast of Tauranga, particularly as a food source. For Te Arawa ki Tai the (coastal Māori of Te Arawa), particularly those around Maketū, the waters, reefs and islands also represented a food source as they did for Ngāti Awa.

[164] From an early stage, the owners and insurers obtained expert advice on the various Māori groups they were dealing with, including from Sir Wiri Gardner, Mr Chad Rolleston and Mr Antoine Coffin – all with recognised experience in this area. We accept that the intention of the owner and insurer was to ensure that each of the major groups was addressed within the various agreements and discussions it had. Of particular importance to this case was the recognition that all those who ahi kā to Motiti (whom we shall call **Motitians** for the time being) should be included in settlements, as should coastal Māori of Te Arawa. Various other groups were also dealt with both individually and on a group basis.

[165] There was a significant argument before this Court as to who had agreed to the arrangements and who had not. We will deal with that technical issue in due course. For current purposes, we are satisfied that the majority of Māori in all of these groups have reached a position with which they can live. Within each of these groups there are also those who still are adversely affected, largely by the trauma surrounding the wreck and the subsequent efforts at removal. Their evidence focused around the



significant damage done to the coastline as a result of the flotsam, jetsam and escaped products from the various containers or the vessel.

[166] It is not unusual for the Court to be faced with a segment of the population more sensitive to such impacts than that of the generality. Common examples include adverse effects from noise to do with airports and kindergartens, where sensitivity can be rated in studies. Although no data was produced to us, we suspect there are similar population responses to other trauma, including events such as the current one.

[167] We are satisfied that at the time the original application for these consents was filed a majority of Māori groups within the Bay of Plenty were opposed to the wreck being granted consent and wanted it removed. Over the ensuing period of time there has been significantly greater work done by the owner and insurer to improve the site and there have been numerous discussions with other parties relating to both the conditions of consent and offset mitigation. The end result is that many of the parties who filed submissions, appeals, or were s 274 parties, have now either withdrawn or reached a position with the Applicant where they consider their concerns are addressed.

[168] Annexed hereto and marked "**C**" is a schedule produced by the Applicant setting out the various parties with the Applicant's understanding as to their position in respect of the application. We make no comment on the legitimacy of those statements at this stage. We simply demonstrate that a considerable number of parties have had discussions with the owner and insurer/applicant and have now reached a position where they are no longer appearing before this Court.

[169] We stress that this does not make the concerns of the remaining parties less legitimate. The Applicant may be suggesting that, because a majority agree with the proposal, the evidence of a minority must be ignored. Certainly, beyond the technical arguments, this is the flavour of some submissions for the Applicant. Such a reductive interpretation of Māori in the Act to a single voice or iwi and hapū would ignore that the Act recognises the right of citizens (including individual Māori) to submit and appeal. Person includes unincorporated bodies as well as companies and societies. The rights of people or groups to participate is subject to only some constraints, but those minority views remain relevant.

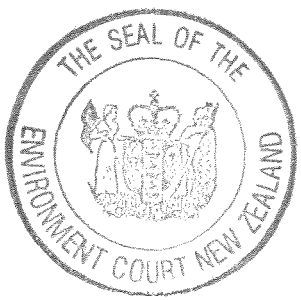
[170] What it does demonstrate, however, is that there has been an ongoing effort by the applicant through the owner and insurer to recognise and provide for the various groups within the Bay of Plenty. In addition to the direct negotiations there has also been further work done on the conditions of consent and also in particular to strengthen the Kaitiaki Reference Group.

The parties pursuing the appeal

[171] Much of this case turned, in the end, upon who the various parties before this Court were representing. Initial assumptions that the name of the group displayed who it represented were in the end illusory. Even such phrases as "mandated authority" became less clear in the hearing.

[172] In relation to Motiti Island itself, there were various parties representing groupings who ahi kā to the island. All the members of these groups are not necessarily ahi kā, but some are. This included

- Te Patuwai Tribal Committee; a sub-committee of Ngāti Awa mandated (apparently) for negotiations on the treaty issues for Ngāti Awa in relation to Motiti Island. Mr Ranapia is a former chairman of Te Patuwai Tribal Committee and is a member of the current Korowai Elders.
- "Te Korowai" – a group based on the island consisting of elders and with a relatively close relationship with Te Patuwai Tribal Committee and to the island Marae. Mr Ranapia is chair of this group and he noted Mrs Butler had also been a member.
- The various Marae Reservation Trustees appointed by the Māori Land Court to operate both the marae and the church on the common land in the centre of Motiti. This group is chaired by Mrs Rangi Butler, but was not a participant directly before us.
- The Motiti Rohe Moana Trust, which has many members who ahi kā to the island, is actively involved in RMA matters before the Court in relation to the Motiti Plan, the Regional Policy Statement and Regional Coastal Plan. Key figures within that group include Mr Hoete and Mr Matahaere, who have been involved with the Trust for a considerable period of time. They did not appear at this hearing, but are actively involved in other matters within waters around Motiti (including in relation to the RCEP relating to the area around Motiti).



- The Motiti Environmental Management Incorporated (MEMI) group consists of predominantly landowners on Motiti, including both European and Māori landowners, some of which are ahi kā.
- Ngāi Te Hapū Incorporated – this group includes Mrs Rangi Butler. Unfortunately, we were unable to ascertain the exact persons included in this group, but it includes at least some who either live on the island, own a home or have land interests, and are thus ahi kā to the island. Mr Buddy Makaere is not one of these people but has an eponymous ancestor through Te Hapū and his Ngāti Pukenga affiliations.

[173] Of these groups, Ngāi Te Hapū Incorporated was formed by Mrs Butler at a time when it appeared both Te Patuwai Tribal Committee and the Korowai of Elders may reach an accommodation with the owners and applicant in relation to this matter. Although Mr Makaere has purported to speak for Motiti on a number of occasions, it is clear that the Ngāi Te Hapū Incorporated group or the Move the Rena Group were not in any way mandated by the majority or all of the ahi kā of the island.

[174] Longstanding divisions on the island would mean that it is unclear as to whether any one of these groups is mandated to speak for all those who ahi kā to the island. We should note that Mrs Butler also is the current chair of the Māori Reservation Trustees appointed by the Māori Land Court for the Church and marae, and therefore has some level of support on the island itself.

Te Arawa

[175] We accept from the evidence given overall by the witnesses for Te Arawa that it is acknowledged that those who are Coastal Te Arawa have the primary involvement in relation to this issue. Although all Te Arawa whakapapa through Ngātoroirangi to the reef, the role of the coastal hapū is acknowledged. The following hapū includes:

- Ngāti Pikiao
- Ngāti Makino
- Ngāti Whakaue ki Maketu
- Waitaha
- Tapuika
- Ngāti Rangitihi

- Ngāti Tuwharetoa ki Kawerau
- Ngāti Rangiwewehi.

[176] In initial negotiations with the owners a group was formed, Te Arawa ki Tai, to represent those coastal Arawa having an interest. Ms Horne told the Court that Te Runanga o Ngāti Whakaue ki Maketū did not join the group officially, or continue with the group, because they had other issues to attend to, including their Treaty negotiations at the time. They are clearly part of the coastal Te Arawa, and reserved their position to reconsider rejoining at a later point in time.

[177] When the position was reached that it appeared that the various other hapū of coastal Te Arawa would reach an agreement, those groups led by Ms Pia Bennett and Ms Raewyn Bennett created a trust known as Te Arawa ki Tai Trust, which then negotiated and reached a settlement with the owners. Thereafter, Te Runanga o Ngāti Whakaue ki Maketū formed another group, Te Arawa Takitai Kaumatua Forum, which also represents senior kaumatua within Te Arawa but continued to oppose the application.

[178] They have maintained opposition as a s 274 party through to this hearing. Their status is significantly challenged by Mr Casey QC and we shall discuss the details of that in due course. For current purposes there is a proportion of coastal Te Arawa who do not agree with the settlement reached with Te Arawa ki Tai Trust Incorporated.

[179] The Court spent some considerable time trying to ascertain a common position for Te Arawa. Two very senior rangitira for Te Arawa gave evidence, Mr Te Wano Walters and Mr Te Ariki Morehu. Mr Walters attended, notwithstanding that he was unwell, and the Court later directed that he and Mr Morehu meet to see if matters could be advanced any further. Mr Morehu met with Mr Walters at his home and then reported to the Court on the outcome of that.

[180] We accept Mr Morehu's evidence concerning that meeting and acknowledge that both witnesses were very clear that there was no "take" (or dispute) between them. On a number of occasions during his evidence to this Court, Mr Walters told us in Māori that "the root was the young ones". The Court is unanimous on his meaning in relation to this. He sees the conflict between Ms Bennett and Ms Horne as the cause of the issues and the division between Te Arawa.

[181] Having heard all of the witnesses we agree entirely. We are not sure as to the origin of this dispute but we acknowledge that it appears very difficult for Ms Pia Bennett and Ms Maria Horne to work together. We commented in the recent Maketū case[25] on this conflict. Both of these women whakapapa to the same hapū, and both are in key roles with the relevant hapū. It was also clear from evidence given by other witnesses that they both have a different vision for the site than was necessarily being promoted either by Mr Walters and Mr Morehu, Te Arawa ki Tai Incorporated or Ms Raewyn Bennett.

[182] In practical terms, the objective that was agreed between Mr Morehu and Mr Walters was that settlement with the owners should be utilised for the benefit of all coastal Te Arawa, but particularly to provide a research centre for Ngātoroirangi at Maketū and to support coastal monitoring. From discussion between Mr Walters and Mr Morehu we understand that Mr Walters instructed Mr Morehu to bring this to fruition.

[183] The Court understood from the evidence of these two rangatira that the house for Ngātoroirangi should celebrate the history and relationship of tangata whenua with this coastal area. This somewhat differs from the objective of the Te Arawa Ki Tai Trust Incorporated for the establishment of a marine research centre. However, the two are not mutually exclusive especially when the function of monitoring the environmental effects of the abandoned wreck from the Māori kaitiaki perspective is added.

[184] We have concluded that the objective of the senior kaumatua is to ensure that the money that the settlement has achieved be used for the benefit of all Te Arawa Ki Tai. Given that there is a private settlement with the incorporated society, the mechanism by which this can be achieved will require some consideration. Our clear conclusion is that the proper course of action would be to enable the Applicant to hold the monies for the benefit of the coastal Te Arawa for the purposes we have described. In this way, the division between the parties is resolved and the issue with Ngāti Whakaue resolves to one around conditions that might be imposed around monitoring of the wreck and removing any parts that might become dislodged for feasible and safe removal.

The position of Ngā Potiki

[185] Ngā Potiki recognise that they are part of the Ngāi Te Rangi iwi, which has

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25 *Ngāti Pikiao Ki Maketu v Bay of Plenty Regional Council* [2016] NZEnvC 97.

reached a settlement in respect of this matter. They are not a part of that settlement, and it was not suggested they were bound by that decision.

[186] By the time of the hearing they recognised that, effectively, their support was for those who ahi kā to Motiti but who had not reached a settlement – namely Ngāi Te Hapū Incorporated. Mr Beetham indicated, in particular, their intent to support the ahi kā of Motiti, and I think it is fair for us to assume that he understood that Ngāi Te Hapū Incorporated represented the true voice of Motiti. That position may have been brought about by the later settlement of Te Patuwai Tribal Committee and Motiti Rohe Moana Trust with the owners prior to the hearing. This had effectively isolated Ngā Potiki along with Ngāi Te Hapū Incorporated in relation to the hearing.

[187] Given the co-operation between counsel for Ngā Potiki and Ngāi Te Hapū Incorporated, it is perhaps not surprising that the position had not been reviewed. Nevertheless, we did not understand Ngā Potiki to assert any particular and separate status beyond that accorded through the ancestor Te Hapū, and their particular relationship was that in common with the other iwi and hapū of Te Moana a Toi. The end result is that Ngā Potiki reflects concerns raised by both Ngāi Te Hapū Incorporated and Ngāti Whakaue in respect of the conditions, and the preference for the removal, at least, of the bow section. This issue we have already discussed in some detail. It is clear to us that Ngā Potiki was not seeking a separate offset mitigation provision for their hapū, and recognised that, if consent was to be granted, their concern was to ensure that the conditions appropriately addressed adverse effects and potential bow removal.

Other hapū

[188] There were several other hapū who did not agree to the position of either Tauwhao or Ngāi Te Rangi generally. These included witnesses from Te Whānau Tauwhao o Otawhiwhi, based around Bowentown, and Ngāti Ranginui. These witnesses established to our satisfaction that there is not a unanimous view among the various marae or hapū within the iwi, but nevertheless those who were pursuing issues before the Court have reached settlements. These witnesses supported the position of Ngāi Te Hapū Incorporated and Ngā Potiki (a Tamapahore Trust) rather than asserting any particular or separate relationship beyond that of their relevant iwi and hapū. In respect of Tauwhao, it was acknowledged that they do hold a particular relationship with Motiti, and various tribal members own land there. There is also a significant direct

relationship between Tauwhao at Matakana and those at Motiti. Mr Tangahue who had been dealing with the appeal on behalf of Tauwhao forwarded a further letter to the Court indicating that Tauwhao supported the grant of consent. We also recognise that the Kaitiaki Reference Group is intended to have one representative for Tauwhao on it. No other party disputed their particular relationship or role, both through ahi kā and because of their historical association with the island.

[189] In respect of Ngāti Ranginui witnesses referred to a resolution at a hui a iwi where the settlement was put where the great majority did not agree. Nevertheless it appears that the Trust, who had undertaken negotiation, then met with some ten marae separately of which eight appear to have agreed to the course of action adopted.

Mrs Butler

[190] Mrs Butler is not only the chair of Ngāi Te Hapū Incorporated; she is its guiding person from Motiti. We recognise her as a genuine witness and her sadness at what has occurred to Ōtāiti and concern for the future is clear. Mrs Butler recognised the evidence for the applicant indicating that the ship could not be moved, but still felt that as a matter of principle the Court should not agree to it being abandoned on the reef. She described her feelings of riri (anger) and whakamā (shame) and we acknowledge these are genuinely felt by her and others within Ngāi Te Hapū Incorporated, particularly those who ahi kā to Motiti.

[191] We are, therefore, faced with the genuine and deeply held belief of Mrs Butler that the consent should not be granted. The basis of that is that she holds out a faint hope that the refusal of consent may lead to a better overall outcome. Mr Ranapia gave evidence, as pukenga for those living on Motiti, that he considers that the mauri of the reef is recovering, and that further intervention will do more harm than good. Although recognising Mr Ranapia and his particular experience and background in these matters, it does little to assuage Mrs Butler's riri and whakamā.

[192] In the end, we have concluded that the granting of a consent recognises and provides for mauri better than the refusal of any consent. The reasons for this conclusion is that the grant of a consent gives an opportunity to explicitly give recognition to concerns of the various groups, particularly those on Motiti, and provide for them not only through offset mitigation, but also through the provision of the Kaitiaki Reference Group and conditions designed to recognise and, if possible, allow remedial

action.

[193] We accept, in doing so, that this does not directly address Mrs Butler's grievances. The Court would see her as being an ideal candidate for membership of the Kaitiaki Reference Group, but Mrs Butler rejected any possibility of her being involved. Whilst we respect that, we wonder whether Mrs Butler might revisit that view after this decision is released and before the conditions are finalised. Accordingly, we have concluded that the interests of the various parties who do not agree to the course of action adopted are better met by granting consent and allowing for explicit recognition and provision, at least in general terms, for their relationship.

The type of conditions

[194] Again, Mr Casey QC raised a number of technical issues as to whether the Court had any power on this appeal to deal with an amendment of conditions. As we have noted we intend to deal with all of these legal and technical matters at the end of this decision. For current purposes we shall assume that we have the power to make such changes to the conditions as are necessary to satisfy us that a consent should be granted.

[195] What is clear from the Court's decisions on the merits so far is that the minimisation of adverse effects would essentially relate to the potential for fresh release of contaminants or the breaking up of bow pieces through movements of the vessel or the wreckage, probably during a major storm event. In addition to this, regular grid checks of the site would assist in identifying any escalation in the level of contaminants.

[196] One of the issues that arose during the hearing is whether or not there should be a reference site to allow for identification of changes that have occurred throughout the whole region, not just on this reef. For reasons that were not clear to this Court the Applicant opposed such a course of action, notwithstanding that there are reefs around 4-5 miles away, near Motiti, which would constitute good comparative examples to understand any wider changes within the region. Examples in recent years include the generation of various types of jellyfish, PSP, increase in the number of kina due to depletion of fish stock and the like. All of these wider changes would be picked up by utilisation of a nearby reference site that was not affected by the wreck.

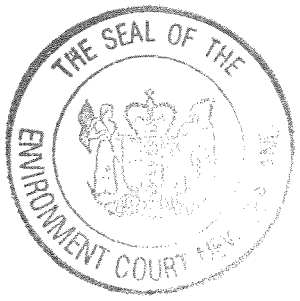
[197] We have concluded that there is clear advantage in having a reference site to ensure that general anomalies are accounted for and avoid argument that any change on the reef is due to other factors. Furthermore we accept the position of Dr Mead that grid transects should include areas that are currently unaffected to check that there is no unexpected contamination in other areas.

[198] To that end this Court saw some merit in adopting a Monitoring Plan that increased or decreased the level of testing on a particular part of the grid depending on whether or not contaminants had been detected. It was clear from the evidence produced, particularly in the Petch report on contaminants, that we were at or near peak TBT on the reef and that the impacts of this needed to be provided for in the coming few years. This theory, of course, needs to be both tested and verified with on the ground analysis. If there is a TBT plume (largely of paint flakes in sediment) then one would anticipate identifying the outer edge of this plume and then checking its movement and concentration in upcoming studies. In relation to copper, we understand that the plume is much smaller, but the same principles, we would have thought, apply.

[199] Beyond this the major issue of concern was to check that the wreck does not move, especially after storm events. Accordingly we have concluded that an inspection and study regime based on regular interval studies and visual checks after major weather events would provide a suitably robust matrix to ensure that studies are undertaken and proper, appropriate changes are picked up.

[200] To that end we would have thought that a study should be undertaken at least on an annual basis. This could test sediments for TBT and copper and also the water column close to the site. This would give long term data on contaminant levels.

[201] We note the concern about damage which can occur through widespread studies on biota for contaminant levels, and we consider that these might be undertaken at less regular levels and based around particular outcomes of general studies or the ITAG or Kaitiaki Reference Group review and recommendations. The actual design of such a monitoring system would appear to us to be a matter to be undertaken by the ITAG in consultation with the Kaitiaki Reference Group and the Regional Council.



[202] We conclude that any conditions need to make clear what the objective of the monitoring. We would have thought that these would have included:

(a) the limits of contamination of both sediments and the water column; and

(b) where these are above guideline levels, potential impacts upon biota.

[203] The objective would be to ensure that over the period of the consent the contamination levels both reduce in scope and concentration beneath the guideline levels and close to background levels, and that monitoring would continue until contamination levels are less than half below guideline level or the monitoring period ends (rather than the consent), whichever comes first. In relation to the movement of the vessel, we would have thought that this would require divers to observe the vessel and whether any part of the wreck (including debris) has moved, and if so the extent of movement, whether it is near any area known to contain contaminants. In respect of the area within the reef itself to –26m whether the part is:

(a) less than 20 tonnes;

(b) in an area from which recovery is feasible and safe;

(c) whether it constitutes any potential for further movement or danger to vessels or members of the public; and

(d) whether its removal would have a beneficial effect on the reef.

[204] Again, we would have expected the ITAG or KRG to generate a more detailed matrix for the examination of the type of visual assessment to be undertaken, and the feasibility and safety criteria to apply. In the first instance it may simply be necessary to undertake the visual observation, either by diver or remote controlled submersible, to ascertain whether movement has occurred and if so the ITAG or KRG could then tailor-make any further studies to try and ascertain the extent of any impact.

[205] On this basis, we conclude that the question of whether or not any part of the vessel (particularly the bow) might move would be addressed if and when the issue arose in terms of feasibility and safety. We conclude that this would give some real potential for an examination of further removal if it became both feasible and safe (to both people and the reef).

[206] So far as the various groups in the conditions are concerned, we consider that the Kaitiaki Reference Group would constitute a major provision under s 6(e) for both the recognition and also the provision for the relationship between Māori and the reef. The intention would be that it would not only advise and guide the ITAG group and the

owner, but it would also constitute a direct recognition of the s 6(e) relationship by way of the conditions of consent.

[207] Furthermore, it appears to us that the Kaitiaki Reference Group would have a particular goal in examining whether there is an improvement to the mauri of the reef over the period of the consent and a subsequent period monitoring conditions. To that extent we would consider that the Kaitiaki Reference Group should have a life not only through the consent period, but also for ongoing monitoring periods that may be required as for the ITAG. During initial start up (say 2 years) we would have thought that quarterly meetings would be appropriate; thereafter at least annually. After the period of consent this would be more occasional, when there was identified change in either the regular studies or as a result of storm movement.

Direct provision through offset mitigation

[208] Whilst we recognise that only three groups were to be recognised directly through conditions of consent, it is clear that a number of other parties have reached separate settlements. Our preference would be to acknowledge this by saying in the conditions that the recognition and provision was also made to these groups through those settlements. It appears to us that this would require little more than the naming of the parties in terms of Appendix "**C**". This in itself would constitute recognition of those relationships.

[209] So far as the parties covered by conditions are concerned, we consider that the provision that is made in respect of the MEMI group for Motiti is clearly intended to provide for all Motitians through the provision of infrastructure. We would like to see a similar provision in respect of Te Arawa ki Tai through the provision of a Whare o Ngātoroirangi. Mr Morehu saw this as a building celebrating the history and relationship to Ngātoroirangi. To that end we consider, given the dispute, that until any dispute is resolved the monies could be held and applied on application by the trustees for the Applicant. We note similar provisions already made in respect of the final Ngāi Te Rangi group.

[210] Beyond this there appears to be a number of improvements that could be made to the wording of conditions. The Applicant produced a tracked series of conditions, including the Council's suggesting wording. We annex these as "**D**". We note that both the Bay of Plenty Regional Council in its submissions and the Applicant

in their final submissions acknowledged that there were further improvements that could be made. It is not the job of this Court to provide wording for the parties, but we do annex as Appendix "**E**" a brief commentary on those provisions now suggested by the Applicant in their final submissions that we would consider could be further improved.

Assessing the application for consent

[211] We now come to consider the application for consent itself against the relevant provisions of the Act and plans. Primary among the matters we need to consider is the form of application and the statutory documents against which it must be assessed. Having done that we will move on to other technical issues relating to the status of various parties, jurisdiction of the Court (including in relation to conditions) before undertaking a full assessment to satisfy ourselves as to whether a consent should be granted.

[212] This is an application for two consents: to dump a ship and/or any other matter from any ship under s 15A of the Resource Management Act (arguably the application could be made either under s 15A(1)[26] or under 15A(2).[27] Dumping is covered in s 2 of the Act in the following terms:

> (a) In relation to waste or other matter its deliberate disposal; and
> (b) In relation to a ship, an aircraft or an offshore installation, its deliberate disposal or abandonment.

There are provisos which do not affect the definition for current purposes.

[213] The applicant was reluctant to describe this as a dumping of the ship, perhaps because of its broader connotations, and preferred to use the word "abandonment" from part (b) of the definition. In our view nothing particularly turns on this. For current purposes there appeared to be an argument as to whether or not remains of the MV Rena were now a ship or not. Ship is defined by s 2(1) of the Maritime Transport Act 1990.

> Every description of boat or craft used in navigation, whether or not it has any means of propulsion and includes a barge, lighter or other vessel ...

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[26] No person may in the coastal marine area (a) dump any ... other matter from any ship unless the dumping ... is expressly allowed by a resource consent.

[27] No person may dump in the coastal marine area any ship... unless expressly allowed to do so by a resource consent.

(b) and (c) not relevant for current purposes

[214] There is no doubt whatsoever that MV Rena was a ship fitting within the definition under the Maritime Transport Act, and was clearly subject to that Act until 2016. Whether what remains is a ship is not clarified by the definition under the Maritime Transport Act. In our view little turns on this matter, given the wording of s 15A that it is either "other matter from a ship" (being its remains after the wreck and removal), or remains a ship plus cargo under subsection (2).

[215] In either event we are in no doubt that it requires a consent for its abandonment on the reef. As we have already concluded the remains of the ship required a consent from the time when the Marine Transport Act notice was lifted at the latest on 1 April 2016. Mr Casey QC suggested that the notice issued by the Director under the Marine Transport Act may no longer have been valid if it was not for the purpose of protecting navigation. Again we see little advantage to any party in any finding that the vessel was not covered by the notices at an earlier time. This would simply mean that any application for dumping under s 15A was required from the date on which there was no notice.

[216] Based on our conclusion we have determined that in practical and real world terms the consent would apply from 1 April 2016. It was therefore prospective from the Commissioners' point of view at the time they made the decision but is now in part retrospective from this Court's point of view. This has important ramifications as it would mean that if the consent is refused, abandonment would still require a consent under s 15A.

[217] The other aspect of this matter is the discharge of contaminants. In this case this has been isolated to two essential components, being TBT and copper. There is no doubt that there is a discharge continuing from 1 April 2016 into water.

[218] We did not receive any evidence on whether the wreck itself constituted a contaminant, and given that this position was not argued it seems difficult for us to conclude that the hull of the vessel or remains of containers are in themselves a contaminant rather than "any other matter" from the ship. Clearly, in the use of the word "from" we see this as including parts of the vessel itself which, in ordinary usage would be part of and therefore, if they fell off, "from" the ship. Decomposition of the ship may take up to 200 years.

[219] Again, we have discussed contaminant discharge earlier in our decision and we have concluded that there is ongoing discharge of copper and TBT from 1 April 2016. This could have created significant issues in relation to isolating that discharge which occurred after 1 April 2016 and that which occurred earlier. It is clear that most of the loading that is currently in the environment being:

(a) as at the time of the last inspection in 2016, and

(b) that which was in the environment in 2015;

has occurred either as a result of the original wreck, part of the ongoing degradation process or as a result of the salvage activities that occurred under the Marine Transport Act notices.

[220] For current purposes we are satisfied that there is an ongoing discharge of contaminants to the environment that requires a consent under the Act as of 1 April 2016. Given the agreement of the applicant that this will be managed as a cumulative effect in common with the other copper and TBT already in the environment from the other activities associated with the wreck, we consider that the matter can be addressed in the conditions of consent.

Contaminants under s 15(1)(b) or 15B

[221] The question arises whether that discharge is under s15(1) or 15B, which relates to harmful substances from ships. We accept that if 15B applies this would exclude 15(1). In practical terms the apparent difference between the two is s 15B(1)(b) which provides:

> (b) after reasonable mixing, the harmful substance or contaminant discharged (either by itself or in combination with any other discharge) is not likely to give rise to all or any of the following effects in the receiving waters:
>
> (i) the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:
>
> (ii) any conspicuous change of colour or visual clarity:
>
> (iii) any emission of objectionable odour:
>
> (iv) any significant adverse effects on aquatic life; or...
>
> (c) – not relevant

[222] In both cases there is no provision permitting the activity and therefore a discretionary consent is required. Although on the face of it it appears that s 15B may

give a reasonable mixing approach whereas 15(1) does not have an equivalent provision, we think this is largely illusory. Clearly, when evaluating an application under s 15(1), similar criteria to those in 15B would be applied in any event.

[223] Arguably, the TBT is "from the ship" and therefore covered by 15B. The discharges that have occurred from the wreck since 1 April 2016 are arguably not discharges from the ship but rather from the hull of the wreck. The added complication is that the copper clove, according to the evidence, was never part of the vessel and was discharged only as part of the wreck itself rather than by deliberate action. Accordingly it gets caught in the same difficulties as the original vessel on the reef through to 1 April 2016.

[224] The applicant has sought the consent under s 15B. Arguably it might be considered under s 15(1). Given our view that nothing particularly turns upon which section applies, we consider that the applicant has appropriately sought consent for these discharges under s 15B for the following reasons:

(a) the MTA definition of wreck includes any ship that is abandoned, stranded or in distress;

(b) even the definition of "dumping" indicates that the abandonment of a ship is covered under that section;

(c) we have already acknowledged that there are ongoing discharges both of copper and TBT into the environment from the wreck which is sought to be abandoned.

[225] We agree with the Commissioners (paragraphs [80] – [98]) that the appropriate course in this case is to deal with it under s 15B. Nevertheless we note that the discharge discussed by the Commissioners at paragraphs [97] and [98] relates to the wreck itself and possibly the further work under the notice. In the end we have adopted a logical and pragmatic application of the RMA provisions and utilise s 15B given that is the terms in which the consent was sought.

The relevant statutory documents

[226] An application under s 104 is a full discretionary activity, and accordingly the Court on appeal, after considering the evidence, may grant or refuse the application, and if it grants the application impose conditions under s 108. Sections 104(1) to

subsection (5) apply to the application for consent. For current purposes we shall deal with each of those sections in turn.

Section 104(1)

[227] In order to assess this we intend first to deal with the various relevant provisions under s 104(1)(b) and then consider the actual and potential effects in relation to that. We shall also consider any other matter that might be necessary. Having concluded that we will then deal with the other subsections, particularly as they relate to subsection (3) and (4) – written approvals, and then move on to consider matters under Part 2 and the law applying thereto.

[228] Prior to undertaking that final evaluation we will, however, deal with other legal matters raised by Mr Casey QC and his submissions.

The relevant provisions

[229] In this particular case the following documents were identified by all parties as being relevant to the applicant:

- The New Zealand Coastal Policy Statement (NZCPS);
- The Regional Policy Statement (RPS); and
- The proposed Regional Coastal Environment Plan (RCEP). (For all relevant purposes the parties agreed that that Plan would be regarded as being operative in respect of the provisions that are relevant. Although there is an outstanding appeal relating to the Motiti Rohe Moana, the parties have specifically agreed that that appeal is unaffected by the processing of this application. (In practical terms, that appeal can be disregarded for the purposes of this appeal.)
- Other matters –
  - Motiti Island Native/cultural policy and administration plan
  - Motiti Island Environmental Management Plan
  - Tauranga Moana Iwi Management Plan 2016-2016.

The framework

[230] In this case all parties accepted that the RCP was informed by and took into account the relevant provisions of the RPS. In turn it was acknowledged that the RCP

took into account the relevant provisions of the NZCPS. Although there was significant discussion around the decision *Environmental Defence Society v King Salmon Limited* (*King Salmon*)[28] there appeared to be no argument by any of the experts or other witnesses that the relevant provisions of the NZCPS had been fully considered and implemented in the promulgation of the RPS. The RPS itself was subject to amendment after the last change to the NZCPS to ensure that it was consistent with that document. In turn, the RCEP took into account and implemented both the RPS and the NZCPS. This is therefore not a case where there is any inconsistency between the RCEP and superior documents. We now briefly analyse these on a themed basis relevant to this consent and derived from the topics identified in the NZCPS. We address the last three plans separately.

The planning documents

[231] We analyse these documents on a themed basis following the order set out in the NZCPS. The lower order documents, while honouring these objectives and policies, have a broader, more local emphasis, and particularise matters in terms of detail appropriate to their function. There has been no suggestion from the parties that the lower order documents do not achieve and implement the NZCPS.

[232] We were provided with evidence from three planning experts, and though there were differences in interpretation there was no dispute as to the general matrix of provisions which apply. We have not set out all of them here, although we have considered them. Rather, we have attempted to draw on those more relevant to the issues before us and we have delved a little deeper where more particular guidance can be obtained at the RCEP level. Broader concepts such as integrated management are relevant, but we do not repeat them here as we have drilled down to the actual detail of the issues in this case.

[233] The planners agreed that the status of the proposal is that of a Discretionary Activity. Mr Fraser, for the Bay of Plenty Regional Council, relies on Rule 9.2.4(b) of the operative RCEP (discharge permit relative to s15A), and if that is wrong the proposal would default to a discretionary activity under section 87B(1)(a) of the RMA. We have concluded the application is made in respect of 15A and 15B of the RMA. However matters are viewed, the resultant status is discretionary and this is consistent with the Commissioners determination at the first instance hearing.

[28] [2014] NZSC 38.

[234] There was some discussion as to whether a proposal of this nature is anticipated by the statutory framework. We can see no particular lacuna relating to this proposal, and it is clearly anticipated by the RMA itself. We now briefly set out our analysis.

Safeguarding the integrity, form, functioning and resilience of the coastal environment and sustaining ecosystems

[235] Objective 1 of the NZCPS is:

> To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:
>
> - maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;
> - protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and
> - maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

[236] The Objective is developed by NZCPS Policies including (more relevantly here):

Policy 1: Extent and characteristics of the coastal environment;

Policy 3: Precautionary approach;

Policy 11: Protection of indigenous biodiversity;

Policy 21 Enhancement of water quality; and

Policy 23 Discharge of contaminants.

We now briefly address these matters by subject.

<u>Biodiversity/ecology</u>

[237] The PRPS addresses these issues in a high level way such as in Objective 2 and Policy CE 6A. It is the RCEP which provides a more refined approach and methods to address biodiversity and sustaining ecosystems.

[238] The RCEP has reached the stage where most appeals are now resolved, and various parts are now effective and supersede the operative plan. For this reason the experts focused on the proposed reviewed RCEP rather than the operative Plan. It was agreed that the RCEP provisions in dispute explicitly excepted this application from their scope.

[239] This reviewed RCEP takes a different approach to grouping subject areas and includes a Natural Heritage section which addresses Indigenous Biological Diversity Areas (IBDA), and Outstanding Natural Features and Landscapes (ONFL).

[240] RCEP Objective 2A seeks, amongst other things, to protect the Indigenous Biological Diversity Areas A (IBDA-A), maintain IBDA-B and promotes the maintenance of indigenous biodiversity generally. IBDA-A and B are identified through mapping and scheduling.

[241] Ōtāiti is identified in Schedule 2 Indigenous *Biological Diversity Areas in the Coastal Environment*. Table 1 of the schedule sets out IBDA-A which describes *areas that meet the criteria listed in Policy 11(a) of the NZCPS.* Here the reef is described as *threatened or rare ecosystems and vegetation types - NZCPS Policy 11(a)(iii)* and thus adverse effects on it are to be avoided. The site is described as regionally significant and its ecosystem is described as (reference IBDA-A76):

> Ecosystem uncommon in NZ as it has both tropical fish and a strong pelagic school fish component. Coastal rock stack ecosystems (pinnacles) are naturally rare ecosystems in New Zealand.

[242] Policies NH 1, 4, 4A, 9A, 10 from the RCEP are relevant to not only biodiversity but also Natural Character, Outstanding Natural Features and Landscapes. These policies are largely generic to these features and include the recognition that existing activities were occurring in these identified areas at the time they were assessed as being outstanding. While the schedules pertaining to ONC and ONFL specifically mention the Rena, Schedule 2 (IBDA) does not.

[243] Policy NH 5 sets out the very limited circumstances where uses within these scheduled sites might be considered appropriate and specifically mentions the continuation of a use that was lawfully established on or before the 14 June 2014. That would not apply here. Policy NH 5(a)(v) provides for:

...the restoration or rehabilitation of indigenous biodiversity, natural features and landscapes or the natural character of the coastal environment in a manner that maintains or enhances the values and attributes associated with the areas listed in Policy NH 4;

[244] Policy NH4A states:

Policy NH 4A When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules 2 and 3 to this Plan and Appendix I to the RPS:

(a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature and Landscape or an Indigenous Biological Diversity Area A;

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor; and

(d) Have regard to any restoration and enhancement of the affected attributes and values of the area affected that will occur.

(Emphasis added)

[245] There has been much redrafting to the Natural Heritage provisions of the reviewed RCEP and the Council Appeals Version as at 3 April 2017 indicates that most are resolved pending the outcome related to appeals on the Iwi Management Policies. However, there is in any version, the permitting of certain uses (as set out in NH 5) where there is no practical alternative location available outside of the ONC, ONFL and IBDA-A. This is caveated by Policy NH 11 where the "adverse effects are avoided to the extent practicable reasonable, having regard to the activity's technical and operational requirements".

[246] While the circumstances of this proposal may not be captured by NH 5 the sentiments of Policy NH 11 are helpful. Policy NH 11A also introduces the consideration of a biodiversity offset. The proposal put to the court does not include a biodiversity offset but does include cultural offsetting. We address this later in our assessment.

[247] We note that the Natural Heritage policies include a generic policy (NH 9A) integrating with the Iwi Management section of the Plan which we set out here for completeness.

Policy NH 9A Recognise and provide for Māori cultural values and traditions when

assessing the effects of a proposal on natural heritage, including by:

i) Avoiding significant adverse effects, and avoiding, remedying, mitigating or offsetting other effects, on habitats of indigenous species that are important for traditional or cultural purposes; and on cultural and spiritual values associated with natural features and natural landscapes;

ii) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;

iii) Assessing whether restoration of cultural landscape features can be enabled; and

iv) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

Water quality and Discharge of Contaminates

[248] Again, subject to broader policies in the BOPRPS the detail for assessment purposes is contained in the reviewed RCEP. Specifically Objectives 7 and 8:

Objective 7: Discharges of contaminants to the coastal marine area are managed to meet the following goals:

(a) After reasonable mixing, discharges of contaminants meet the water quality classification of the receiving water bodies as a minimum; and have no more than minor adverse effects on aquatic life, habitats, and recreational uses.

(b) Discharges of contaminants occur in a manner that recognises and provides for the cultural values of mana whenua acknowledged for that area.

(c) Cumulative effects of discharges are managed in a way that recognises the sensitivity and assimilative capacity of the receiving environment.

Objective 8: Prevent the discharge of persistent toxic contaminants into the coastal marine area.

[249] Policy CD 1 provides guidance as follows:

Policy CD 1 Discharges to the coastal marine area must:

(a) Avoid significant adverse effects, including cumulative effects, on aquatic life, habitats, feeding grounds, kaimoana (including shellfish gathering), ecosystems, contact recreation and amenity values in the coastal marine area after reasonable mixing;

(b) Minimise adverse effects on the life-supporting capacity of water within the mixing zone;

(e) Avoid the discharge of persistent toxic contaminants into the environment, and where avoidance cannot be practically achieved, the adverse effects of such discharges must be mitigated or remedied;

(f) .....;

(g) Maintain or enhance the physical characteristics of receiving waters (including salinity) that contribute to their life-supporting capacity, including their ability to support

indigenous flora and fauna and kaimoana beds; and

(h Be of a quality that has particular regard to:

(i) The sensitivity of the receiving environment;

(ii) The capacity of the receiving environment to assimilate contaminants; and

(iii) The nature of the contaminants to be discharged, the concentration of contaminants needed to achieve the required water quality in the receiving environment, and the risks if that concentration of contaminants is exceeded.

(Note numbering as set out in the proposed RCEP. Emphasis added)

[250] Policy CD 3 assists in understanding what is meant by reasonable mixing and Policies CD 4 (reference to mauri), CD 5 (accidental discharges) and CD 11 (hazardous substances) are also particularly relevant and support the potential conditions which might be applied to resource consents. These are set out below:

Policy CD 3: To define the radius of a reasonable mixing zone in the conditions of a resource consent for the point source discharge of contaminants to coastal waters having regard to the following matters:

(a) Use of the smallest mixing zone necessary in order to minimise adverse effects on the life-supporting capacity of water within the mixing zone and achieve the required water quality standard of the receiving environment.

(b) The water quality standard in Schedule 10 to this Plan.

(c) The hydrological regime of the receiving water.

(d) The ambient concentrations of contaminants in the receiving water.

(e) and (f) .....

(g) The need to avoid significant adverse effects on ecosystems and habitats after reasonable mixing.

(h) The values and existing uses of the area affected by the proposed point source discharge.

(i) Māori cultural values (refer to Policy CD 4 and Iwi Resource Management policies).

(j) Proximity to bathing sites.

(k) Adverse environmental effects of the discharge, including cumulative effects in relation to (a) to (j).

(l) The location of the discharge and position of the outfall.

(m) .....

(n) Information provided by the applicant.

(o) Any other information relevant to the nature of the discharge and the site characteristics.

Policy CD 4: To recognise and provide for the effects on the mauri of the receiving environment caused by the discharge of contaminants to the coastal marine area by:

(a), (aa) and (b) .....

(c) Avoiding, remedying or mitigating adverse effects on coastal resources or sites that are of significance to tāngata whenua, where such resources or sites have been identified by tāngata whenua.

Policy CD 5: To maintain a response capability with regard to unauthorised or accidental discharges or spills of contaminants into the coastal marine area.

Policy CD 11: Prevent the disposal of hazardous substances to the coastal marine area.

[251] We have extracted parts of the table from Schedule 10 (referred to in CD 3) for completeness as these provide receiving water quality standards for coastal waters:

Coastal Water Quality Classifications: Equivalent Qualitative and Quantitative Standards:

Qualitative Standard	**Quantitative Standard**	**Mātauranga Māori**	**Coastal Water Classification**
There shall be no conspicuous change in the colour or visual clarity.	The decrease in secchi disc vertical depth or black disc horizontal range shall not be greater than 20%.	Te Hauora o te Wai / the health and mauri of water Coastal waters support a healthy ecosystem appropriate to that locality (open coastal water, lagoon, estuary, coastal wetland, saltmarsh, intertidal areas, rocky reef system etc. Coastal water quality enables ecological processes to be maintained, supports an appropriate range and diversity of indigenous flora and fauna, and there is resilience to change.	All coastal waters. Water managed for aquatic ecosystem purposes.
There shall be no significant adverse effects on aquatic life.	Refer to: Australian and New Zealand Guidelines for Fresh and Marine Water Quality Australian and New Zealand Environment and Conservation Council, 2000.		
There shall be no production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials.	None		
.....			
The visual clarity of the water shall be suitable for bathing.	The horizontal sighting distance of a 200 mm black disc should exceed 1.6 metres (in the active surf zone it is not possible to use this method). Australian and New Zealand Guidelines for Fresh and Marine	Kei te ora te mauri (the mauri of the place is intact). Coastal resources are able to be used for customary use and customary practices are able to be exercised to the extent desired. Tikanga and	Within all harbours and estuaries, and into the open coast out to a distance of 400 metres from the line of mean high water springs, and within 500 metres of any consented aquaculture farm. Water managed for

	Water Quality, Australian and New Zealand Environment and Conservation Council, 2000.	preferred methods are able to be practised.	contact recreation purposes and for the gathering or cultivating of shellfish for human consumption.
.....			
The water shall not be rendered unsuitable for bathing by the presence of contaminants.	Microbiological: The concentration of enterococci must not exceed 280 cfu/100ml. See Microbiological Water Quality Guidelines for methodology (MfE & MoH, 2003).		
Aquatic organisms shall not be rendered unsuitable for human consumption by the presence of contaminants.	Microbiological The median faecal coliform content of samples taken over a shellfish-gathering season shall not exceed a Most Probable Number (MPN) of 14/100 mL, and not more than 10% of samples should exceed an MPN of 43/100 mL (using a five-tube decimal dilution test). See Microbiological Water Quality Guidelines for methodology (MfE & MoH, 2003).	Kaimoana is safe to harvest and eat.	
.....			

(Emphasis added)

[252] This table provides understanding and guidance for environmental expectations particularly in relation to any consideration of a consent.

Preservation of natural character of the coastal environment and features and landscape values

[253] Objective 2 of the NZCPS sets out the obligation to recognise the characteristics and qualities that contribute to *natural character*, *natural features* and *landscape values* and their location and distribution; identifying such areas where use/development would be inappropriate; and protecting them and encouraging restoration of the coastal environment.

[254] Policies 13 and 14 of the NZCPS require preservation of the natural character and protection from inappropriate use. Policy 13 requires *avoidance* of adverse effects on *outstanding natural character* (ONC), *avoidance of significant* adverse effects and the avoidance, remedy, mitigation of other adverse effects on *all other areas* of natural

character.

Natural character

[255] Natural character is not the same as natural features and landscapes or amenity values. Natural Character may include matters such as natural elements and processes, biophysical, ecological, geological and geomorphological aspects, natural landforms include reefs, places or areas that are wild or scenic and can range from pristine to modified and include experiential attributes. (NZCPS Policy 13(2).)

[256] Restoration or rehabilitation of natural character is to be promoted by amongst other things, imposing conditions on resource consents. The nature of this restoration is set out in some detail in Policy 14 of the NZCPS and includes:

> (ii) encouraging natural regeneration of indigenous species
>
> ...
>
> (vi) reducing or eliminating discharges of contaminants;
>
> (vii) removing redundant structures and materials that have been assessed to have minimal heritage or amenity values ...
>
> (Emphasis added)

[257] As expected, the BOPRPS Appendix I, Map 21 picks up the NZCPS directives and sets them out in greater detail and specifically maps natural character in the coastal environment including Astrolabe Reef (Ōtāiti) which is identified as having the level of *outstanding* natural character (ONC). It is described as:

> Astrolabe Reef is located 25 km northeast of Tauranga, some 7 km north of Motiti Island. The volcanic reef structure rises some 70 – 75 m from the seabed and breaks the surface at low tide. The extent of the reef is broadly mapped at points between the sandy bed and the volcanic structure.
> The reef is renowned for its abundant marine life and is a regular haulout for NZ fur seals. More recently the reef is renowned nationally for the grounding of the now shipwreck *Rena*.

[258] The elements which describe its natural character are set out as:

> 1 Dominant volcanic processes and formation of sub tidal reef system.
>
> 2 Dynamic coastal processes occurring.
>
> 3 The natural environment dominates the reef with the only visible modification due to the grounding and wreckage of the Rena.

[259] The reef's attributes include elements that *enhance and diminish* natural character:

Water:

1 No modification to open coastal water body surrounding the reef.

2 The reef breaks the water surface at low tide creating large breaking waves in rough seas.

3 Reef has regional significance for seal use and fish communities with high abundance and diversity.

4 Some modification due to the presence of Rena wreckage and sediment contamination.

Abiotic systems and landform:

1 Water movement around the reef enhances natural character.

2 The physical structure of the reef remains largely unmodified. The rock formation is expressive of the formative natural processes created by volcanic activity and the ocean.

3 Vertical rock faces, underwater caves and tomes and large boulders are distinctive of the natural processes.

4 The Rena shipwreck has damaged a small part of the overall physical reef structure.

Perceptual:

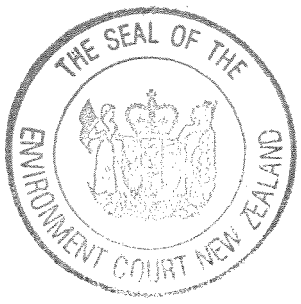
1 Some level of activity around the reef, as a popular dive and fishing location, otherwise a high level of remoteness exists around the reef.

2 Activities related to the Rena grounding.

3 Breaking waves across the reef outcrops with remnant of ship wreck below the waterline

4 Perceptions are of a natural reef system impacted by the Rena grounding and wreckage. The wreck is now not visible above water and perceptual values relate to the underwater experience of visitors.

[260] We understand that these particular provisions were resolved on 3 June 2015. The salvage and clean up ceased in early 2016, after the BOPRPS drafting, submission and decision period. Thus we can conclude that the above identification was made in circumstances which would have had greater environmental impact than we are currently addressing. The important observation being that Ōtāiti is an ONC irrespective of the presence of the remains of the Rena.



[261] The operative and proposed RCEP rely on the RPS for identification, and the recorded attributed values and attributes for areas of ONC. Policy NH 4A of the RCEP specifically references back to the provisions of the RPS and guides our consideration. While some RCEP provisions are still subject to appeal and await a decision of the court, for current purposes this recognises the Rena and related salvage activities existed when the reef was assessed as ONC, ONFL and IBDA-A.

> Policy NH 4A: When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules 2 and 3 to this Plan and Appendix I to the RPS:
>
> (a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature and Landscape or an Indigenous Biological Diversity Area A;
>
> (b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;
>
> (c) Recognise the potential for cumulative effects that are more than minor; and
>
> (d) Have regard to any restoration and enhancement of the affected attributes and values.
>
> (Emphasis added)

Natural features and landscapes

[262] Policy 15 of the NZCPS provides an underwriting framework for the lower order documents. It adopts a hierarchical approach to the protection of natural features and landscapes set out in sub clauses (a) and (b) which we set out here for reference:

> To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:
>
> i) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and
>
> ii) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;
>
> ....
>
> (Emphasis added)

[263] Relevantly here, the effective provisions of the RCEP specifically identify Ōtāiti as an ONFL (reference number 44 Schedule 3). That is, of outstanding significance both as a feature and a landscape. As with the ONC, Policy NH4 is relevant and adverse effects on the values and attributes must be avoided.

[264] ONFL 44 is made up of Motiti Island margin and associated islands, reefs and shoals. The description of this ONFL includes *reefs and shoals exist around this wide*

grouping of islands including the Astrolabe Reef, Brewis Shoal and Okaparu Reef, which form part of a wider complex of island features in the area and are included in the ONFL. Schedule 3 includes an explanation of the selection process, values and methods employed to determine those sites of ONFL significance. The assessment took place against 7 attributes or values and these are set out in the schedule for each ONFL. We have extracted those particularly relevant to Ōtāiti given that it is part of a group of features which make up ONFL 44. We set them out in the following table:

Evaluative attribute	**Evaluation**	**Rating** H = high M = Medium
Natural science factors	.....The Astrolabe Reef and Motunau Island are known as nationally significant scenic dive sites, more recently the Astrolabe has been affected by the grounding of the cargo ship Rena.	H
	Research and education: Significant research surrounding the Astrolabe and associated reefs as a result of the grounding of the Rena.	H
	Rarity: The small islands along with the associated reefs and shoals, supporting marine and coastal habitats are not common within the region, but are not rare or threatened in the New Zealand context	M-H
Aesthetic values	Coherence: High degree of aesthetic coherence relating to the vegetation patterns surrounding Motiti Island's margin and the entire coverage of the smaller islands.	H
	Vividness: Motiti Island and Astrolabe Reef are highly vivid landscapes due to visual connection and more recent media coverage of the reef as a result of the grounding of the cargo ship Rena.	M-H
	Naturalness: reference to islands only	NA
	Intactness: .....The majority of the reefs and shoals are intact with some wrecks, including the remains of the wreckage MV Rena on Ōtāiti /Astrolabe Reef.	M-H
Expressiveness (Legibility)	The outer islands and Motiti Island's margins, along with the reefs and shoals are highly expressive of the natural processes that have formed them.	H
Transient values	The seasonal changes of the indigenous vegetation (i.e. pohutukawa) and associated terrestrial and marine wildlife is valuable. The dynamic character of open water and coastal marine processes, such as tides, swells, currents, water clarity, fish and seabird migration reflect the highly transient nature of the environment.	These attributes/values are not rated in the table
Shared and recognised values	Highly recognised and valued. The waters, shoals and rocky outcrops surrounding Motiti are widely recognised for their natural science, aesthetic and recreational values – particularly as places to dive and fish. There are strong tangata whenua associated values with these features. The presence of shipwrecks including the MV Rena and Tahoma, are also recognised features of the maritime history of the area	
Māori values	Kainga, mahinga kai, taunga ika. Motiti has a rich Māori history. The island and surrounding island and reefs have ancestral interests to various hapū and tribes of the Bay of Plenty area. The coastal marine area is identified as an area of Significant Cultural Value (ASCV 25) in Schedule 6.	

Historical associations	Landscape contains many archaeological sites, recorded in the New Zealand Archaeological Association Site Recording Scheme, which comprise physical evidence of past human activity.	

[265] Of significance here is the importance of Ōtāiti as a feature of a wider complex of features in this location, its relative rareness within the region, its significance to Māori (the relevance of which we will come to shortly), its importance for recreational diving and to research and education, the visual connection between the reef and particularly Motiti Island, and its intactness irrespective of the presence of the Rena which in itself is described as a *recognised feature of the maritime history of the area*.

[266] What is clear from this Plan, unsurprisingly, is the coincidence of ONC, the ecological/biodiversity, and the ONFL values of the reef.

Financial Contributions

[267] Clause 1.1.2 *How to Remedy and Mitigate* is relevant to all the matters under the Natural Character Section of the plan. We specifically note Policy 16:

> Policy NH 16 Where the natural heritage values of the coastal marine area are likely to be adversely affected by the effects of activities, the consent authority may impose financial contributions as set out in Schedule 11 Financial Contributions, in order to remedy, mitigate or offset those adverse effects.

[268] The RMA requires the Regional Council to specify in the Plan the circumstances when a financial contribution may be imposed, the manner in which the level of contribution that may be imposed will be determined, and the general purposes for which the contribution may be used. Section 108(10)(a) of the RMA states that a financial contribution may be for the purposes specified in the plan, including the purpose of ensuring positive effects on the environment to offset any adverse effect. Schedule 11 of the RCEP (now an effective provision as amended by appeal), sets out the Regional Councils guidance for financial contributions. This includes at paragraph 3A:

> Para 3A If adverse effects can be appropriately avoided, remedied, mitigated or, offset, and this is identified in a resource consent application, then financial contributions will not be required. However, the Regional Council may require financial contributions or a contractual agreement if mitigation or offsetting is dependent on a third party.

[269] The circumstances and purposes of Financial Contributions are set out in Table 1 to Schedule 11. The following excerpts from the table are relevant:

	Circumstance	Purpose
1	**Protecting Aquatic Habitats of Indigenous Species** Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on any ecosystem values (aquatic habitats of indigenous fish species and spawning areas).	To restore or enhance aquatic habitats at the site, or to provide an offset or environmental compensation by restoring or enhancing aquatic habitat characteristics at another suitable location where avoiding, remedying or mitigating adverse effects at the site is not practicable or effective. To provide for research and/or protection to enhance marine habitats.
3A	**Protection of water quality for public use and kaimoana gathering** Where the activity for which a resource consent is granted is likely to cause or contribute to adverse effects on public use of the CMA or on kaimoana and related ecosystems.	To provide on-site mitigation or remediation measures, or works in other areas to mitigate or offset the effects of the discharges.
4A	**Protection, Restoration or Enhancement of beds in the open ocean** Where the activity for which a resource consent is granted is likely to mine the seabed or cause or contribute to adverse effects on the benthic environment and/or water quality.	To provide off-site mitigation or remediation measures, or works in other areas to mitigate or offset the effects of the disturbances
6	**General Works** Where the activity for which a resource consent is granted will cause or contribute to adverse effects on the environment which will not be adequately mitigated by any of the types of contribution described elsewhere in this section.	To provide works for the purpose of offsetting the adverse effects of the activity, including protecting, restoring or enhancing natural and physical resources elsewhere in the same general locality.
7	**Structures in the coastal marine area** Where the structure may cause a risk to navigational safety or public health and safety or cause adverse effects on the environment if abandoned, damaged or derelict.	To provide for: 1 The removal of abandoned or derelict structures; 2 The reinstatement of the environment; and 3 Any emergency repairs or rescue undertaken by the Regional Council on behalf of the consent holder in the event of any part of the structure breaking loose or causing a potential navigational hazard.

[270] The quantum of financial contribution is set out in the following clause:

Para 1 The amount of financial contribution must be an amount determined on a case-by-case basis by the Bay of Plenty Regional Council to be fair and reasonable. The amount must not exceed the reasonable cost of funding positive environmental effects required to offset the net adverse effects caused directly by the activity.

Para 2 For the purposes of this section, 'net adverse effects' means a reasonable assessment of the level of adverse effects after taking into account:

(a) The extent to which significant adverse effects will be (a)avoided, remedied or mitigated by other consent conditions;

(b) The extent to which there will be positive environmental (b)effects from the activity which may offset any or all adverse effects; and

(c) The extent to which other environmental compensation is (c)offered as part of the

activity which may offset any or all adverse effects.

[271] The matters which the Council has identified it will consider when it decides to impose a financial contribution including the types of contribution and the value are:

i) Financial contributions shall be for the purpose of avoiding, remedying, mitigating or offsetting adverse effects on natural and physical resources.

ii) Financial contributions must be used to avoid, remedy, or mitigate or offset adverse effects of the same type as those caused or potentially caused by the activity for which consent is sought.

iii) Preference shall be given to the use of financial contributions at, or close to, the site of the activity for which consent is sought. This shall not prevent the use of financial contributions at other locations when appropriate or agreed between parties to the application.

iv) Financial contributions will only be required when:

(i) The avoidance, remedy or mitigation of adverse effects could not be practically achieved by another condition of consent, or

(ii) A financial contribution would be more efficient than another condition of consent in achieving the avoidance, remedy or mitigation of adverse effects, or

(iii) A financial contribution is agreed by parties to the application to be the best outcome to avoid, remedy, mitigate or offset adverse effects on the environment.

(iv) The financial contribution is for the purpose of mitigating or offsetting adverse effects on natural and physical resources.

v) An assessment as to whether a financial contribution is appropriate to the activity will be made on a case by case basis.

vi) Preference will generally be for a financial contribution of money, except where land may be more appropriate.

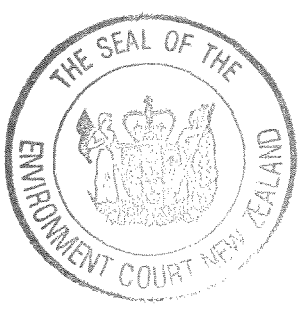
vii) The value of the contribution will be the actual and reasonable costs of measures required to offset the residual adverse effects that are unable to be avoided, remedied, or mitigated.

[272] Further, the RCEP also sets out general provisions applying to financial contributions:

Para 1 In imposing a financial contribution, the following general provisions will apply:

(a) All financial contributions shall be GST inclusive.

(b) Where the financial contribution is, or includes, a payment of money, the Regional Council may specify in the condition:



(i) The amount to be paid by the consent holder or the methods by which the amount of the payment shall be determined;

(ii) How payment is to be made, including whether payment is to be made by instalments;

(iii) When payment shall be made;

(iv) Whether the amount of the payment is to bear interest and, if so, the rate of interest;

(v) If the amount of the payment is to be adjusted to take account of inflation and, if so, how the amount is to be adjusted;

(vi) Whether any penalty is to be imposed for default in payment and, if so, the amount of the penalty or formula by which the penalty is to be calculated.

(c) -(d) .....

Taking into account the principles of the Treaty of Waitangi and recognising the role of tangata whenua as kaitiaki and providing for tangata whenua involvement in management of the coastal environment.

[273] Tangata whenua claim ongoing and enduring relationship over their lands, waters and natural resources. Persons exercising powers under the RMA should promote meaningful relationships and interactions between themselves and tangata whenua. Further, mātauranga Māori should be incorporated into sustainable management practices including the consideration of resource consents (NZCPS Policy 2) and the characteristics of the coastal environment that are of special value to tangata whenua should be recognised and protected (NZCPS Objective 3).

[274] Specifically the following sub clauses of Policy 2 are relevant to this decision:

....

(c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori[29] in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

[29] Mātauranga Māori defined in NZCPS Glossary as: Māori customary knowledge, traditional knowledge or intergenerational knowledge.

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district;

...

(f) provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;

...

[275] While noting that integrated management of the coastal environment will be achieved by, amongst other things, enabling the exercise of kaitiakitanga, as required by the NZCPS and the BOPRPS, the reviewed RCEP contains specific Objectives at part 2.4 *Iwi Resource Management.* In the annotated RCEP appeal version dated 3 April 2017 there is reference to "seeking new objectives relating to the aspirations of Iwi Māori and marine spatial tools" which currently waits determination. We do not comment on those proceedings here, but can indicate that the Decisions Version of the RCEP follows the higher order documents and, as expected, provides greater particularity and introduces mapping /identification of sites or areas of particular significance to Māori as suggested by Objective 14:

> Objective 14 The protection of those taonga, sites, areas, features, resources or attributes of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tāngata whenua (where these are known).

[276] In evidence provided to the court on the appeals to the provisions of this part of the RCEP, the following objectives were left largely intact as they are set out in the Council Appeals Version (3 April 2017) of the Plan. These objectives were relied upon by the planning witnesses in the current proceedings and are important to our determination:

> Objective 13 Tāngata whenua are able to undertake customary activities in the coastal marine area, and access to sites used for cultural practices, gathering kaimoana, mahinga mātaitai and areas of cultural significance is maintained or enhanced.
>
> Objective 15 The restoration of areas of cultural significance, including mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.
>
> Objective 16 Where appropriate, cultural health indicators are used that recognise and

express Māori values, and tāngata whenua are involved in monitoring the state of the coastal environment and impacts of consented activities.

Objective 17 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

[277] Given the outstanding determination on the Plan appeal, we cannot place full weight on these objectives but we note that that appeal does not seek to dilute these provisions. The sentiments expressed in them are helpful and particularly relevant to these proceedings. Similarly, the Policies which follow in Section 3 of the Plan provide greater particularity. These are also currently under challenge. They cover the requirement for appropriate consultation. They also cover a requirement that proposals which affect the relationship of Māori and their culture, and traditions must recognise and provide for traditional Māori uses, practices and customary activities. These include mahinga kai, mahinga mātaitai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori. These objectives reference back to the NZCPS and while the method for achieving these things might be in dispute, the directive to achievement is not (see ss 6(e) and 7(a) of the RMA).

[278] Significant to the methods adopted in the RCEP is the Areas of Significant Cultural Value (ASCV) which are set out in Schedule 6 of the Plan. This schedule identifies *Motiti Island and Associated Islands/Reefs and Shoals* (reference ASCV-25, Map Sheet 43b)). The following description is provided:

Tāngata whenua of Motiti are Ngāi Te Hapū, Te Patuwai and Te Whānau a Tauwhao ki Motiti.

Motiti Island has a long history of Maioriori and Māori occupation beginning from the ancient 'Uru' ancestors and the arrival of the ancestral migration canoe, Te Arawa waka haurua, which landed at Maketū directly on-shore from Motiti. The first occupant was the esteemed Tohunga, Ngātoroirangi who named the parts of the island and lived there with Waitaha descendants.

There are 30 distinct pā sites, 18 settlements and 20 ancient monuments that are situated throughout Motiti Island and the seabed and foreshore. These areas are located and coded in the "Motiti Island Native/Cultural Policy Management & Administration Plan 2012"; however, the detailed cultural and historical data information regarding wāhi tapu and wāhi taonga is found in the Cultural Heritage Wāhi Tapu document held exclusively in the care of "Korowai Kāhui o Te Patuwai Native Tribal Council". Access to this information is restricted.

Motiti Island Management Plan identifies the reefs surrounding Motiti as mahinga kai, the

> fish species that was harvested and their cultural and spiritual significance.
>
> The seabed and foreshore boundaries of Ngāi Te Hapū extend out to seven significant historical ocean landmarks anchored to the bottom of the ocean floor. This relates to a proverb that link together the territorial boundary of Moutere o Motuiti.
>
> Ngā Tauranga tai kukume o te hukarere o ngā Aturere (the anchors that connect to the wind and the tides – that pathway of Aturere). Significant wāhi tapu heritage sites are located within the seabed and foreshore boundaries. Sites in the coastal marine area in close proximity to Motiti Island are identified in Appendix 3 to the Motiti Island Environmental Management Plan (MIEMP). Other wāhi tapu sites in the coastal marine area are identified in the Motiti Island Native/Cultural Policy Management & Administration Plan.

[279] A table provides the identification of the traditional area of the foreshore and seabed, a map reference, traditional site name and then nature of the site (wāhi tapu wāhi taonga). While included in the overall mapped area of ASCV-25, Ōtāiti sits outside the table and has the following reference made to it.

> Otāiti is a reef within an area culturally known as Te Maamangi of particular cultural and spiritual significance to Te Patuwai, Ngāti Whakahemo, Ngāti Te Hapū and Ngāti Awa. The source of the mauri (spiritual essence) of Otāiti stems from ancient 'Uru' ancestors and rituals performed by the (high priest) of Te Arawa waka haurua Ngātoroirangi, who spent his last years at Motiti Island. Ōtāiti is a significant historical site of Te Arawa and is connected to the ancestor tohunga Ngātoroirangi who gave it its name. Ōtāiti marks the outer gateway to the moana o Te Arawa. It is connected to the geothermal pathways discovered by Ngātoroirangi.
>
> Te Patuwai, the hapū on Motiti Island (of Matātua waka origins) continue to regard Otāiti as a toka tipua (reef imbued with spiritual and sacred qualities) alongside Mōtū Haku Island to the north east that holds the same status. Otāiti, Mōtū Haku and the Oromai Tāngata ancient rock monuments, that link to a spiritual rock at the rear of Motiti Island named Kopu Whakaari, with the same reverence iwi and hapū on the mainland have towards their maunga or mountain. These areas are also a significant traditional fisheries "kāinga mahinga ika and mahinga mataitai".

[280] Additionally sites of cultural value are also recognised outside the Plan provisions by way of Treaty of Waitangi claims where the Crown is able to formally acknowledge the mana of tangata whenua over a specified area. This recognises the particular cultural, spiritual, historical and traditional association of Iwi with the site, which is identified as a statutory area. The document of statutory acknowledgements in the Bay of Plenty (Ngā Whakaaetanga-ā-Ture ki Te Taiao ā Toi) is identified as a *compendium* to the RCEP. In the introductory passage to Schedule 6 of the Appeals version of the RCEP (3 April 2017) it states:

> .....incorporates statutory acknowledgements arising from Treaty of Waitangi settlement legislation with the Bay of Plenty region's iwi. Iwi that currently have statutory acknowledgements are Ngāti Awa, Ngāti Tūwharetoa (Bay of Plenty), Te Arawa, affiliate Te Arawa iwi and hapū, Ngāti Whare, Ngāti Manawa, Ngāti Mākino, Waitaha, Tapuika, Ngāti Rangiwewehi and Ngāti Rangiteaorere.[30]

[281] Since these provisions of the reviewed RCEP are subject to appeal we have reviewed the operative RCEP particularly Chapter 8 *Tangata Whenua Interests*. The objective is in three parts as set out below:

> 8.2.2 Objective
>
> 8.2.2(a) The involvement of tangata whenua in management of the coastal environment.
>
> 8.2.2(b) The protection of the characteristics of the coastal environment of special spiritual, cultural and historical significance to tangata whenua.
>
> 8.2.2(c) Sustaining the mauri of coastal resources.

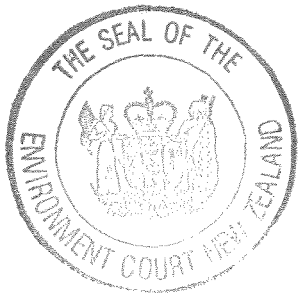
[282] These plans are consistent in their adherence to the RMA imperatives of s6(e) and s7 and the provisions of the reviewed RCEP have been developed to the extent that they do provide sufficient weight for us to rely on them in a general sense.

The maintenance and enhancement of the public open space qualities and recreation opportunities of the coastal environment

[283] The coastal marine area is recognised as an extensive area of public space for public use and enjoyment. While the NZCPS objective includes maintenance and enhancement of public access to and along the coastal marine area this is of less relevance to this proposal than the more general recognition of public use and enjoyment in NZCPS Objective 4. The extensive evidence of diving and fishing values demonstrates that public access to this area is viewed by locals and visitors as a matter of importance. The recognition of Ōtāiti's ONC and ONFL attributes as detailed in the schedules of the RCEP confirm the relevance of this national objective.

Enabling people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development

[284] Objective 6 of the NZCPS although enabling, carries a caveat through a number of recognitions including relevant to these proceedings:



[30] Introductory passage Schedule 6 RCEP Appeals Version 3 April 2017.

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected;
- historic heritage in the coastal environment is extensive but not fully known, and vulnerable to loss or damage from inappropriate subdivision, use, and development

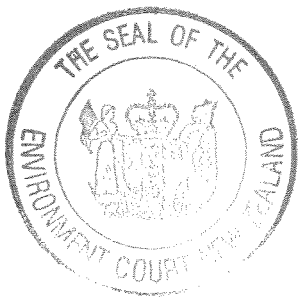
[285] We have not discussed Historic Heritage and note the single objective to protect these values and resources from inappropriate use etc. The historic value of the Rena is relevant in terms of the potential positive effects of the abandonment. We have noted its reference in the ONFL evaluation of recognised values which include the Rena and the Tahoma ship wrecks. We were given some evidence that the wreck was a significant historical event but was not recognised by Heritage New Zealand as such.

[286] Relevant to the enabling provisions of the NZCPS is the context that use is not precluded in appropriate places and form. In the context of Objective 6 of the NZCPS, the tiered framework anticipates when and how uses may be accommodated in the coastal environment and as we have indicated, anticipates that subject to appropriate circumstances, there will be instances when this cannot be avoided.

Precautionary approach

[287] Policy 3 of the NZCPS introduces the precautionary approach, and we have been directed to Policy 3(1) which is repeated in provisions of the lower order documents. We have also included Policy 3 (2), which we consider more relevant as the site is in a dynamic location particularly prone to the effects of storms and vulnerability due to climate change:

> (1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
>
> (2) In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:



(a) avoidable social and economic loss and harm to communities does not occur;

(b) natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and

(c) the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

[288] It was argued that the NZCPS, and discussed in *King Salmon*, required that the ship be removed to avoid ongoing adverse effects on the environment (primarily copper, TBT and wreck movement). However, in examining the options of removal we also need to be precautionary given the effects of such actions are unknown. Firstly the wreck may break up and cause further damage. Secondly, there may be a new and expanded release of contaminants. There is also likely to be damage to the reef and, potentially, life. We conclude we should be cautious to interfere unless there are clear benefits.

Other Plans and statutory requirements

[289] We have discussed the relevance of the Marine Transport Act relationship with the RMA elsewhere. The evidence was that the Director of Maritime New Zealand is satisfied that the requirements of the MTA have been met.

[290] We were referred to the Resource Management (Marine Pollution) Regulations 1998, and the Marine and Coastal Area (Takutai Moana) Act 2011. We understand the application meets the regulations and in respect of the latter Act, there are no customary marine titles (CMT) or protected customary rights (PCR) held for the reef or the surrounding water and therefore the statue does not apply. We do acknowledge though there are claims for CMT or PCR which have still to be resolved.

[291] We were also referred to several Iwi Resource Management Plans which we now list and address:

a) Motiti Island Native Cultural Policy Management and Administration Plan, Vol II, 2013:

Ōtāiti is identified in this plan as a Defined Landmark below sea level (1.12.5 Map 21B; Territorial Boundary). The Plan address Wāhi Tapu and Wāhi Taonga in Section 2 but it does not map them; this process is intended in the future (10.0.9. Method 9). These sites include outlying rocks and reefs

within its territorial boundary (10.0.1.17 Method 17).

We were told this is the only such plan which specifically refers to Ōtāiti/ Astrolabe Reef. Mr Frentz addressed this plan and highlighted Section 7 *Coastal Foreshore and Coastal Marine* of the plan. Here Objectives 1 is to protect and enhance the values of the coastal marine environment that are significant to Ngāi Te Hapū and the whānau whanui and this includes marine environments and features, taonga, areas of indigenous habitat and ecosystems. Objective 2 seeks to give practical and measurable effects to kaitiakitanga through up skilling of whānau and hapū and whānau whanui. Objective 4 promotes the implementation of management models that will protect customary fisheries and give effect to kaitiakitanga in the coastal marine area. Objective 6 seeks cooperation with Maritime New Zealand (MTA) to identify key known hazardous and heritage sites and create and manage safety and monitoring protocols. Implementation methods include:

- Encouraging joint ventures with MTA and the Regional Council in monitoring and conducting scientific survey of the coastal habitat (Method 25(1)
- That a known hazard or heritage site near a shipping land is marked by indicators so that large ships will be able to identify them (Method 26.1(1).
- That in the event contamination and pollution, compensation is a consideration based on the source of the issue that has affected the indigenous people and their marine environment and resources (Method 26.2(4).
- In the case of a major environmental disaster, the *source of the disaster* will have the responsibility of paying *reparation* to fix the damages and where this is a *human made disaster*, the perpetrator must meet face to face with Te Patuwai tribal council of elders (Methods 26.2 (6) and (7). This sentiment is repeated in Method 26.3 concerning wild life protection, sustainable management and monitoring with damage being compensated for.

b) Tauranga Moana Iwi Management Plan 2016 - 2026:

This plan includes the coastal marine area from Ngā Kurī-a-Wharei in the north-west to Wairakei Stream and extending seaward. This boundary sets

an edge at the eastern side of Motiti Island and includes Ōtāiti. It is a joint Environmental Plan for Ngāti Ranginui, Ngāi Te Rangi and Ngāti Pūkenga. While we did not receive much in the way of evidence on this Plan we note that:

- The Plan's policy application within the resource management context involves:
    - personifying Tauranga Moana and viewing it as a living entity
    - finding linkages between the five elements – mind, body, spirit, family, land and policy topics.
- Section 6.4 *Coastal* includes objectives and policies relating to amongst other things: integrated management, discharges, and coastal use. Objective 1 includes the restoration and protection of coastal areas such that amongst other things water is clean enough for sustaining plentiful and healthy kaimoana, ecosystems are healthy and diverse, cumulative impacts are investigated and managed, and there is a balance between natural, cultural, recreational and ecological values and commercial use and development. Objective 2 seeks empowerment of the Tauranga Moana Iwi and hapū to be actively involved in coastal management and decision making. Policy 9 is to avoid further degradation of water quality within Tauranga Moana.
- Section 8 deals specifically with cultural heritage and would appear to support the mapping of this site in the RCEP.

c) Ngāti Whakaue ki Maketū Iwi Resource Management Plan Phase 2, 2011, Matakana and Rangiwaea Island Hapū Management Plan, 2012, Te Awanui Tauranga Harbour Iwi Management Plan, 2008, Te Mahere a Rohe a Ngāti Rangitihi, Waitaha Environmental Management Plan, Tapuiuka Environmental Management Plan:

Mr Frentz also provided an analysis of these plans and noted that Ōtāiti sits outside the identified rohe and interests are generally captured by the Te Arawa ancestral connection to the reef.

[292] These additional Plans do not raise anything additional to the matters covered in the statutory and regulatory documents we have discussed. They do, however, strengthen the importance of the cultural issues before this Court and demonstrate the

various relational overlays of the coastal area islands and reefs.

Do the policy framework/Plans support a grant of consent and suggested conditions?

Avoidance

[293] The end result is that both the RPS and the RCEP identify particular values and attributes of Ōtāiti reef as ONL, ONFL, IBDA-A. Policy NH 4 in the RCEP seeks to avoid adverse effects on those values and attributes. In each case the values and attributes of each of those mapped areas – are set out in the Plan.

[294] Importantly, there is recognition of the presence of the wreck as an existing factor. Some of the features identify the state of affairs as existed prior to 2016, including the bow section protruding above low water. Recently, in *RJ Davidson v Marlborough District Council*[31] the High Court applied *King Salmon* to a resource consent process. That decision appears to conflict with the decision of the High Court in *NZ Transport Agency v Architectural Centre Incorporated Basin Bridge* which held the *King Salmon* approach was not applicable to designations where the subject to Part 2 requirement is the same as for the resource consent. The decision in *Davidson* has been taken for leave to appeal to the Court of Appeal. Accordingly, its applicability to resource consents at this stage is still unclear.

[295] As we have indicated the provisions relating to the areas identified as ASCV have been the subject of appeals and the court's decision is pending. Nevertheless the fact that Ōtāiti is identified as an ASCV is not in dispute and neither is its significance as māuri taonga. Thus regardless of the provisions of the RCEP, matters of national importance and the NZCPS provisions importantly guide us in our consideration of these effects.

[296] We have concluded that we should take a cautious approach in such circumstances and assume that the *King Salmon* case does apply to resource consents. Taken at its strongest, it could be said that the Court in this case should seek to avoid adverse effects on the values and attributes that are identified in the RCEP and the RPS. This approach has been subject to recent comment in the Court of Appeal in *Man 'o War*,[32] which cites *King Salmon* at paragraph [102] that it is the

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[31] [2017] NZHC 52.
[32] *Man o War Station v Auckland Council*, [2017] NZCA 24.

particular attribute sought to be protected which are relevant to the consideration of what is inappropriate.

[297] Such an approach is consistent with the Supreme Court's emphasis in *Discount Brands v Westfield NZ*[33] that the provisions in the plan in the Regional Policy Statement and Regional Coastal Environment Plan in this case provide the frame within which the relevant landscape and natural character effects are to be assessed.

[298] We have concluded that this application for abandonment avoids adverse effects on the values and attributes of Ōtāiti reef identified in both the Regional Policy Statement and the Regional Coastal Environment Plan. In particular landscape terms, the wreck itself is no longer visible from the water, even at low tide, and thus this represents a positive effect since the time when the RPS and RCEP provisions were made operative (both of which recognise parts of the wreck being visible).

[299] The expert witness joint witness statement is clear that the reef's pinnacle, structure, biota and flora are largely similar to that prior to the wreck. In particular, Dr Paul-Burke refers to it being difficult to distinguish between the biota that is on the wreck and that which is in the reef. We were shown photographs and videos, and combined with the consistent evidence of all witnesses who had dived the site we are satisfied that the values and attributes of the reef identified in the RPS and RCEP are being maintained.

[300] In some respects the values have been improved, ie the reduction of the bow height to at least 3m below low water. The diversity of aquatic species is supplemented by evidence from several witnesses and the Court's own site visit of birds feeding in the area and large schools of fish congregating around the reef. The blue water nature of the site is also evident from our site visit and photographic evidence, as well as the evidence of the witnesses. The dominant feature of the waves breaking over the reef, the mix of swirling currents and species around the rock pinnacles are now similar since the work has been completed.

[301] In relation to abundance and diversity of species, we are satisfied from the expert evidence that the situation is improving towards that prior to the Rena and represents a high range of diversity similar to some of the better sites within the Bay of

[33] [2005] 2NZLR 597, at paragraph [10].

Plenty such as reefs around Motiti and Tuhua.

[302] There are, however, several issues around adverse effects which are relevant to our overall determination. These relate to effects of contamination on biota and cultural effects on an area of significant cultural value.

Contamination effects on Biota

[303] Although there have been several examples of copper being found in fish and crayfish, the examples are not numerous nor are the levels significantly high. The clear expert evidence is that the loadings from copper or TBT are well below any level that would have an impact on human health. On this basis we are therefore satisfied that, as an area for fishing and diving, there are no more than minimal adverse effects.

[304] There is a broader concern about the presence of imposex on whelks in areas affected by TBT paint flakes. There was no evidence given to us that the area has affected a recognised value or attribute of these whelks, which are relatively common within the Bay of Plenty, or that they are exploited as a food source. Moreover there was no evidence to suggest that the presence of imposex (both male and female genitalia combined with infertility) had any effect on whelks from the point of view of their place in the food chain.

[305] In this regard we have noted that the evidence relates to tributyl tin, a product commonly used as anti-fouling in vessels. Although its use has ceased, many vessels, including the MV Rena, had earlier coats of anti-fouling overlain with new TBT free product. If the hull paints are exposed to a lower level or the steel is exposed there is a prospect of the TBT paint flakes being released and thereby becoming active in the environment again. While they are covered by other anti-fouling we understand they are largely inactive. As a result of the wreck and subsequent salvage works the paint flakes have been distributed through storm and current events in the area of the wreck itself, but also to the south-southwest where evidence of the TBT has been detected up to 1km from the centre of the vessel (around G8). Concentrations on occasions have been high and the common scientific evidence is that the readings will vary on where the paint flakes are sampled in the sediment. The imposex in the whelks which we have referred to is accepted as being an effect of the TBT.

[306] We are satisfied that this is no more than a minimal adverse effect on the values and attributes of the reef for the following reasons:

(a) the whelks are not identified as a separate element of the values or attributes of the reef;

(b) although they form part of the biotic chain there is no evidence of widespread impact due to imposex in whelks;

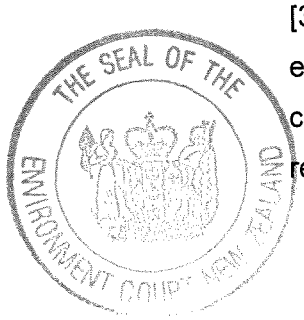
(c) when viewed in the context of the feature as a whole,(ie the reef which is protected) then the effect is both limited in terms of the biota affected and the scale of that effect; and

(d) there is no evidence to support an adverse effect to human health from kai moana sourced from the reef.

[307] Although Dr Shaw Mead suggested we should assume something in the order of 300ha spatial area affected by TBT, the evidence shows a parabola centred around grid reference G8 to the south-southwest. We have concluded that the area affected is likely to be less than one quarter of the entire reef, and then only to the extent that paint flakes may be present within the sediment.

[308] When viewed in the wider context of the entire feature covered by the IBDA area A, we have concluded that these effects would be minor. We now recognise that much of the discharge, which has been caused already and is having an impact on the environment, is due to the wreck itself and the subsequent works in salvage and recovery conducted under the MTA notice. The ongoing contribution of TBT since April 2016 is relatively minimal. This essentially is a cumulative effect on the TBT already existing in the environment (through those activities not the subject of this consent) that has created the current measured impact. It is anticipated that the TBT cumulative levels will peak within the next few years and thereafter will drop off in the future as the product breaks down to its inert state. We therefore conclude that the adverse biological effects on the values and attributes of the reef is minimal having regard to the contribution the subject of this consent.

[309] Overall we have concluded that the ability to impose conditions that would enable monitoring and potentially some control over discharges of TBT and copper clove, no matter when discharged, has a particular attraction to the Court. We recognise that those contaminants that are already well-distributed within the



environment from the wreck and subsequent salvage work are less likely to be the subject of any mitigation works, there is always the possibility that new technologies or approaches might enable a more broadly based mitigation of the effects of TBT and/or copper. Put another way, the adverse effects of the discharge occurring prior to 1 April 2016 are already part of the environment. Their effects may be able to be measured and even perhaps controlled to some extent, through the imposition of conditions relating to cumulative effects in this consent.

Other effects

[310] The most significant values and attributes recognised within the RPS and plans are its widespread recognition as a fishery resource. It is also recognised for its diving resource, which would have benefits not only for the Māori but also for European divers.

[311] Beyond this the question of its effects on those values and attributes turns in part upon its sense of place. Given that none of the other core features are identified as being affected, those that remain turn around the more metaphysical aspects, including mauri. Beyond this there are a range of effects described by witnesses – riri, muru, whakamā, utu – which largely are a response to the original wreck and its placement on the reef. As we have repeatedly said, this application for consent does not address those issues; nor does this Court have any power to require the removal of the wreck from the reef in these proceedings.

[312] Given this issue, it seems to us that the appropriate approach is for us to deal with these more relational issues in a broader consideration of effects on Māori and how the plan and this consent can recognise and provide for that relationship. Our conclusion is that the adverse effects on Māori cultural values identified within the relevant plans are adverse effects generally. Section 104(1) requires the Court to have regard to the actual and potential effects of allowing the activity. As we have already identified, this is two-fold, namely:

(a) the abandonment of the vessel from 1 April 2016; and

(b) the discharge of TBT and copper from 1 April 2016.

[313] We have already identified some of those effects when we considered the question of avoiding effects on attributes and values. Nevertheless we acknowledge

that there are other effects, both actual and potential, of allowing the activity. This may include positive and negative effects.

The effect of approving the wreck remaining on the reef

[314] The effect that was referred to by a number of witnesses is that there was a negative signal given both to the owner and insurers and to the public at large that a vessel wreck of this type could be abandoned in the future, and thus avoid the costs of removal. We do not accept this argument for the following reasons:

(a) the owners/insurers have paid for and undertaken salvage to the full extent that is both feasible and safe. We reached that factual conclusion earlier in our decision;

(b) that the cost of doing so was very significant, making it the second most expensive salvage after the Costa Concordia;

(c) it is clear to us and accepted by most witnesses that both the owner and insurer have been committed to a resolution of the issues surrounding the wreck. This has included extensive consultation with community and tangata whenua groups throughout the Bay of Plenty. The director of the owner company and its parent company (Meer), Mr Zacharos, gave evidence to this Court and spent a number of weeks in New Zealand in discussion with various parties.

[315] Overall, we conclude that this is not a case which creates a precedent in terms of cost avoidance. In part this decision is informed by our fundamental factual decision that further works on this site are currently neither feasible nor safe.

Potential further adverse effects on the coastline

[316] Some witnesses had a residual concern that there might be further releases of contaminants or contents of containers onto the shoreline around the Bay of Plenty. We were advised that the owners/insurers hold response contracts and there is a response plan in place for any detected discharges. As we understand it, there have not been such responses required for nearly three years. Although this is a potential effect, we have concluded on the evidence of the expert witnesses that the potential for an adverse effect on the coastline or on the seascape generally around the reef is minimal and even so it has been captured by the suggested conditions. Accordingly we

disregard that effect in our considerations.

Cultural effects more generally

[317] In this regard the understanding of cultural effects is informed not only by ss 6(e) and 7(a) but also from the hapū management plans and the evidence of the many cultural witnesses before this Court. Hapū management plans would at least be relevant under s 104(1)(c), and it is noted that the Motiti Island management plan and particularly the cultural policy management and administration plan includes maps showing the reef.

[318] More importantly there is a clear oral history identifying connection between an eponymous ancestor for several of the iwi in this area with Ngātoroirangi and occupation of the island with Te Hapū. In fact the common name for the island hapū Te Patuwai (formerly Ngāi Te Hapū) has its basis in a sea battle conducted in the area. There was no dispute and there is no doubt in our mind of the interconnectedness between Motiti island and the surrounding toka reefs and islands, including Ōtāiti. This is confirmed in the relevant planning documents. Mr Ranapia's evidence in this regard was compelling, and was not disputed by any other witness. Although Mr Makaere suggested that Ngāi Te Hapū represented a different connection, he acknowledged in answer to questions of the Court that Te Patuwai and Ngāi Te Hapū were interchangeable terms – Te Patuwai was Ngāi Te Hapū and Ngāi Te Hapū was Te Patuwai.

[319] The connection of the Tauwhao hapū to Motiti Island was also not disputed and members of that hapū remain as landowners on the island.

[320] For the Court the difficulty has been separating out the effects many witnesses spoke of that relate primarily to the circumstances of the wreck and its aftermath on the reef, and the situation as it now exists in relation to the remnants that are on the reef. Considering all this evidence we have reached the conclusion that the remnant represents an ever-present signal or telltale of the more fundamental whakamā and trauma occasioned by the original wreck and its aftermath.

[321] The impact on the relationship with Māori within the Bay of Plenty was significant. Not only did it include the impact on the reef and the wreckage that occurred to the coastline as a result, but the ongoing events including the splitting of the

ship, release of further contents, movement of the vessel and the like. This application does not provide any form of consent for those events, nor in our view should it. What this Court is concerned with is the effects of the wreck as it now remains on the reef and the impact upon the relationship of Māori with the reef and their kaitiaki functions.

[322] We recognise that during the time of the wreck the entire area was an exclusion zone, and thus Māori were not able to maintain their kaitiaki and stewardship functions in respect of the reef, nor use it for kai moana. That situation is now rectified. To that extent there is nothing preventing iwi, hapū and individual Māori from maintaining a relationship with the reef. If they do so there is no ever-present sign of the wreck beyond four buoys used to reference the various diving sites. They in themselves in our view create no adverse effect because they enable a vessel in the area to moor and enhance safety for access recognition to parts of the reef. Moreover the natural functions and features of Ōtāiti continue. Whilst we recognise that the particular fishing attributes have reduced over the last century it is clear that that is not attributable to the Rena and had taken place well before 2011. Evidence we received was that the temporary exclusion from the area has allowed improvement to the quantity of fish now present.

Recognition and provision

[323] We have concluded that one of the positive effects of this application for consent and the various other RMA actions that have occurred in the near future has been to focus attention on Te Moana a Toi and the toka reefs and islands of the Bay of Plenty as a whole. This commenced with the Motiti Island Plan and that for Tuhua, but has continued into provisions within the RPS and now the RCEP. It would be fair to say that Māori have become more focused on the recognition and provision for their interests within the coastal area. This is shown in such things as the current appeals before this Court in relation to the coastal plan, leading to the declaration in relation to fisheries and its current appeal to the High Court. The relevance of Ōtāiti within the Bay of Plenty has also been highlighted by the Rena, and has led firstly to recognition of its Māori name (formerly Astrolabe reef), but more particularly the highlighted issues in relation to the fisheries and biota of the Bay as a whole. Certainly we are unable to conclude that recognition within the various plans does not fulfill aspects of the iwi and hapū relationship with Te Moana a Toi and particularly the toka reefs and islands within the Bay.

[324] On this basis we conclude that the provision envisaged within s 6(e) must be seen in the context of the wider activity in the region. This includes Tauranga harbour and the recent Ngāti Ranginui, Ngāi Te Rangi and Ngāti Pūkenga iwi management plan, the various taiapure on water and joint management on land (ie mauao), cooperation between Māori and the Conservation Department on Tuhua, and the focusing, particularly by the Motitians, on issues relating to Motiti and its surrounding toka reefs and islands.

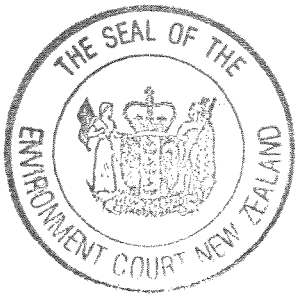
[325] In this regard we see the potential to explicitly recognise and provide for the relationship of Māori with Ōtāiti reef as a potential positive benefit of the granting of consent. Although there are other mechanisms, for example the RCEP, which may also recognise and provide for the reef and for such relationships, we have concluded that the granting of a consent could explicitly recognise and enable provision for the relationship of local iwi, hapū and other Māori groups with the reef.

[326] Central to this is the relationship of the Motitians to the waters and reef and toka including Ōtāiti. There have been various attempts to address this issue through both Treaty claims and other issues, but it is clear that the various relationships with the coastal waters of the Bay of Plenty remain at large. We note, for example, the current appeal to the RCEP by Ngāti Makino in relation to the ASCV associated with Maketū. That decision is still pending from this Court, but highlights issues as to the relevant relationship of individual hapū and iwi generally with various areas within the Bay of Plenty.

[327] In the end we ask ourselves the question "How would the refusal of this consent better recognise and provide for the relationship of Māori and for the kaitiaki functions than the granting of a consent?"

[328] This dilemma was one faced also by the Commissioners. At paragraph [691] to [694] the Commissioners discussed the certainty of outcome achieved by the granting of consent. This was discussed in the context of controlled surveillance and ongoing management of the wreck and the reef. In relation to Māori values they noted:

> It is apparent from the evidence relation to Māori values that the proposed conditions of consent would not adequately address many of the issues raised by them. However, a number of Māori groups did state it would be better to address the effects on Māori values by controlled conditions than to leave the wreck on the reef with an uncertain prognosis.



[329] Given the evidence now before this Court on appeal it is clear that many of these areas of effect and uncertainty have been addressed for Māori. The extensive offset mitigation now agreed with most parties (which is a legislative mitigation method and is anticipated in the RCEP), the much improved provisions in relation to a Kaitiaki Reference Group and the potential for direct recognition through the conditions of consent for those relationships suggest a significant positive benefit that would not be achieved if consent was refused.

Overall evaluation on cultural effect

[330] We recognise that for a percentage of marae, hapū and members of various iwi through the Bay of Plenty the granting of consent will not resolve their ongoing concerns. For some it will break their relationship with Ōtāiti and their confidence in their local environment. For others it may mean that they will not eat food from the reef.

[331] For most Māori they will move on whether or not the consent is granted. In our view there should be steps taken to positively recognise and provide for Māori and the ongoing effects of granting the consent. This has the broader effect of recognising the relationship of Māori with the reef and the broader recognition of the rohe moana and Te Moana a Toi in general.

Scope and jurisdictional issues

[332] Having undertaken an assessment under s 104(1) we now turn to various scope and jurisdiction matters. We commence with s 104(3) and move through others before reaching an overall assessment and conclusion

Written approvals

[333] Mr Casey QC asserted that written approvals had been obtained from a number of parties that are exhibited in Annexure "**C**". Firstly we note that none of these approvals were in the standard Regional Council form, or purported on their face to be written consents under s 104(3). The question is whether or not by implication they constitute written approvals.

[334] In this regard Mr Casey QC relied upon a decision of the Environment Court *Queenstown Property Holdings Ltd v Queenstown-Lakes District Council.*[34] The relevant part of that decision related to a resource consent application and at page 19 the Court discusses approvals of third parties. Although the wording of the Act 20 years ago was slightly different, we accept for current purposes that its intent was the same. The Court held at page 20/21 that the approval only needs to be an agreement to the proposal and noted:

> ...an agreement (or approval) need not be positive but may be couched in the negative way it is in the deed and still satisfy s 104(6)(c). We hold that the restrictive covenant in the deed is a binding approval from the landowners of lot 2 and any adverse effects on that land should not be grounds for refusing the resource consent.

[335] In *Waiheke Island Airpark Resort v Auckland Council*[35] at paragraph [74] the Court said:

> In [Queenstown Property Limited v Queenstown-Lakes District Council] a party had agreed in writing that it would not either directly or indirectly oppose or support any opposition to a proposed development. The wording of the then s 104(6) of the Act was little different to that currently in force but is sufficiently similar for us to gain guidance from the findings of the Court in that case. We concur that an agreement or approval need not for the purposes be positive but may be couched in somewhat negative terms and still amount to a binding approval.

[336] Mr Casey QC then argues on the basis of these two cases that various iwi, hapū and marae are excluded and the effects on these groups cannot be taken into account. He then goes on to state that the written approvals have been given by mandated authorities for those iwi and hapū who could claim to be most affected. He asserts it was they who entered into the process on their constituents' behalf, lodging submissions and filing appeals opposing the application and the consent.

[337] With respect, we consider that this proposition goes significantly too far. Mr Casey QC on many occasions referred to mandated authorities. However in terms of the RMA there is no such thing recognised by the Act. The Act frequently discusses Māori in generic terms and on other occasions identifies iwi or hapū. Nevertheless, the Act itself recognises bodies of persons incorporated or unincorporated as persons who may participate in the proceedings before the Court.

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[34] [1998] NZRMA 145.
[35] EnvC A 88/09.

[338] Thus, there are two issues arising from these documents:

(a) what form does the court require to satisfy s 104(3);

(b) 'precisely' who is covered by the document; and

(c) whether it is intended and functions as a consent under s 104(3).

[339] That requires an evaluation in each case. The fundamental problem for Mr Casey QC is that he has not produced all the documents that he purports to be consents, and instead is relying upon an abbreviated summary produced by the applicant with excerpts of the document. This neither:

(a) demonstrates who the parties are purporting to represent; or

(b) constitutes a written consent required under s 104(3).

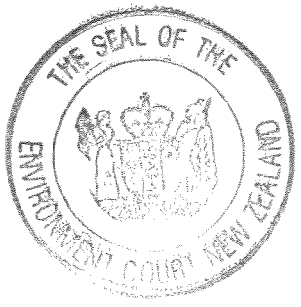
Several such consents were provided, but most are summaries in the Applicant's summary attached as "**C**".

[340] We are not required to determine this issue where no document is produced under s 104(3) for us to reach an assessment on. However, we note that under s 104(4) we would need to ignore any consents so far as they may have been withdrawn by a particular marae or individuals.

[341] To that extent such an argument cannot be used to invalidate evidence given by individuals such as Mr D Heke and Mr K Tohiariki.

[342] If Mr Casey QC was suggesting that the agreement with Ngāti Ranginui prevented Ngā Potiki from participating in opposing this application, then it is clear that any consent could not apply to them under s 104(4). However we did not understand Mr Casey QC to go this far.

[343] In relation to Te Arawa ki Tai Incorporated's approval, it is quite clear that that does not represent all of Te Arawa. The incorporated society itself does not seem to hold any form of mandate from Te Arawa as a whole. Even the extent of its mandate in respect of the individual hapū is unclear.



[344] Overall, our view is that the comments in the cited Environment Court cases were not intended to apply in relation to s 104(3) approvals for the more complex

situation of iwi or hapū or marae groups, especially when various bodies were being utilised such as runanga, trusts, forum and other bodies incorporated and unincorporated. If the Court were to rely on such consents, it appears that a decision would always be subject to potential review or appeal on the basis that a group that had provided the consent was not endorsed or authorised to do so on behalf of all of the constituent members.

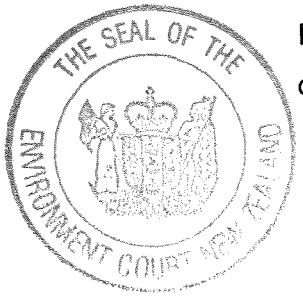
[345] In the end this issue appears to be simply a technical issue given the Court has concluded that, taking into account all effect on Māori, the application otherwise addresses the relevant statutory plan requirements.

[346] We acknowledge that in relation to the appellants, and other parties supporting that position, they too can only speak for either themselves or an identified group of persons represented by the body before this Court. We have already discussed the importance of that in relation to the Ngāi Te Hapū Incorporated and Te Arawa ki Tai Incorporated, and now we move to Te Runanga o Ngāti Whakaue ki Maketū as a s 274 party.

[347] The role of Te Runanga o Ngāti Whakaue ki Maketū and the Te Arawa Takitai Moana Kaumatua Forum before this Court was a matter in dispute. Originally Mr Hemi Bennett, who is of Ngāti Whakaue ki Maketū, had been a submitter before the Commissioners, and through him evidence was produced from other members of Ngāti Whakaue ki Maketū, including Ms Horne. Originally an appeal was filed by Mr Bennett, but subsequently withdrawn.

[348] At this point in time Te Runanga o Ngāti Whakaue ki Maketū gave notice under s 274 of the Act. As both Te Runanga o Ngāti Whakaue ki Maketū and Te Arawa Takitai Moana Kaumatua Forum were not original submitters they sought to join the proceedings under s 274(1)(d) of the Act as a person who has an interest in the proceedings greater than the general public. The non-competition provisions do not apply.

[349] Mr Casey QC's proposition to this Court in final submissions was that, if the Commissioners' decision (first instance) was based on the interests of, or effects on Te Runanga o Ngāti Whakaue ki Maketū or the Forum, it was beyond their jurisdiction to do so and should be corrected on appeal.



[350] In response to the proposition that effects on Māori cannot be disregarded simply because they are not submitters, Mr Casey QC made the proposition that the Court is limited in the matters it can take into account, even under s 6, by the scope of the issues that were put before the Council and that were within the scope of any submission appeals. In short, the proposition is that the Court can only consider matters raised by a submitter, even if there is a clear breach of other provisions of the Act.

[351] The authority produced by Mr Casey QC for this proposition was the High Court decision in *Simons Hill* where the High Court in fact confirmed the jurisdiction of the Court to consider matters if they had been addressed in broad substance at first instance. At paragraph [32], His Honour noted:

> The case was argued by Mr Casey QC for the applicant for strikeout and appellants before Gendel J. The application for partial strikeout is noted by His Honour at paragraph [6] as being two-pronged:
>
> (a) an appeal against the grant of resource consent is constrained as to scope by the appealing parties' original submission lodged with the consenting authority; and
>
> (b) matters raised by RFB on its appeal to the Environment Court were not, as a matter of interpretation, within the scope of its 2007 submission to the consent authority.

[352] Arguments very similar to those put to this Court were raised, including, in paragraph [15]:

> (a) an appeal cannot widen the scope of the original submission put before the consenting authority;
>
> (b) scope of submissions concern not only the grounds on which the submission is sought but the relief sought;
>
> (c) Part 2 of the RMA cannot be used to widen the scope of appeal beyond the scope of the original submission made...
>
> (d) and (e) not particularly relevant in this case.

[353] What is clear from the context of this decision is, although it dealt in broad terms with a resource consent, it was argued that the Waitaki Plan and the 2007 submission related only to water allocation whereas any issue relating to water allocation was, *Simons* contended, abandoned by RFB. In paragraph [32] of the decision the High Court, considering these arguments, stated:

> It would be anathema to the purpose of the RMA that a submitter was required at the

> outset to specify all the minutiae of its submissions in support or opposition. The originating tribunal would be inundated with material if this were the case. So long as a broad submission puts an issue before the originating tribunal the matters on which the appellant seeks to appeal, the appellate court or tribunal of first instance should entertain that appeal. Thus I reach a different interpretation of the scope and operation of s 20 to that of the Environment Court. RFB, as a submitter who appealed the decision of the Commissioners on *Simon's* resource consent application under s 120 of the RMA is not constrained by the subject matter of its original submission and is able to appeal the whole or any part of that original decision. As such RFB's cross-appeal here must succeed.

[354] At paragraph [33], the High Court then went on to note:

> The position regarding 120 can then therefore be summarised as follows:
>
> (a) an appealing party must have made submissions to the consent authority if it is to have standing to appeal that decision;
>
> (b) the Court's jurisdiction on appeal is limited by:
>
> (i) Part 2 of the Act;
>
> (ii) The resource consent itself (the Court cannot give more than is applied for);
>
> (iii) The whole of the decision of the consenting authority, which includes all relevant submissions put before it and not just those submissions advanced initially by the appellant and before the notice of appeal;
>
> (c) successive documents can limit the proceedings but are unable to widen them;
>
> (d) on appeal arguments not raised in submissions to the original tribunal may, with leave of the Court, be advanced by the appellant where there is no prejudice to the other party.

[355] With respect, none of the above affects the question of the status of a s 274 party under the Act and in particular the specific requirements of s 274(1)(d), which I have already cited, and also in particular provisions of subsection 104 and sections 4A, 4B, 5 and 6 of the Act.

[356] Dealing first with s 274(b), it is clear that Ngāti Whakaue Kaumatua Forum and Te Runanga o Ngāti Whakaue ki Maketu both have an interest that is greater than members of the public generally. This was acknowledged by evidence of the witnesses for the applicant. They are clearly one of the coastal Te Arawa hapū affected by the application and have an interest in the waters around Ōtāiti and the reef itself. They also have ancestral links through Ngātoroirangi, as do other Te Arawa. Section 274(4) says that a person who becomes a party can appear and call evidence in accordance

with s 274(4A). This must include the persons who can participate pursuant to s 274(1)(d). Under (4A) evidence must not be called under s 274(4) unless it is on matters within the scope of the appeal, enquiry or other proceeding.

[357] There is an important distinction with s 274(4B), where parties who were submitters at first instance can only give evidence:

(a) within the scope of the appeal, inquiry or other proceeding, as for 4(a); but also

(b) on matters arising out of that person's submission in the previous related proceedings or in any matter on which that person could have appealed.

(emphasis added)

[358] The Court has struggled to understand Mr Casey QC's submission. The issues that now arise with Ngāti Whakaue are not new or different to any which were before the Commissioners. The Commissioners themselves discuss the issues raised not only in the context of Ngāti Whakaue ki Maketu but in the broader context of Māori cultural impacts. We do not accept that the applicant has faced any case different to that which it faced before the Council. Clearly, the issue of cultural impacts upon Te Arawa and the groups in the coastal area were before the Commissioners and considered by them. The applicant's witnesses recognise the distinction between Ngāti Whakaue ki Maketu and other Coastal Te Arawa.

[359] Similarly, the appeal is against the whole of the decision and therefore these issues must be available as being within the scope of the appeal on the authority of the *Simon's Hill* provisions we have just noted. With respect, it appears that Mr Casey QC has sought to narrow the terms of the issues before the Court to suggest that this can be broken down to individuals, marae, hapū and iwi.

[360] At the same time Mr Casey QC has argued that mandated authorities can bind these parties in total, even where parties have provided notices under s 104(4) to the contrary.

[361] We are particularly concerned that Mr Casey QC suggests that issues under Part 2, particularly s 6, can only be addressed by the Court in circumstances where these have been raised by a party in a submission. This would suggest that Part 2 is irrelevant where there is a non-notified application or a particular party does not raise

them in their submission. On this approach protection to the environment envisaged under Part 2, particularly s 6(e), would be dependent on a submission in every case before there was any obligation upon the deciding authority or the Court to consider such matters. With respect this must be anathema to the Act, similar to that identified by the Court in *Simon's Hill* at paragraph [32] quoted. With respect this appears to be a relitigation by Mr Casey QC of matters already decided in a superior court.

[362] Further strength is given to this proposition by the fact that this matter was raised several times during the preliminary stages prior to this hearing. In the end the Court issued a decision on the matter[36] (9), including:

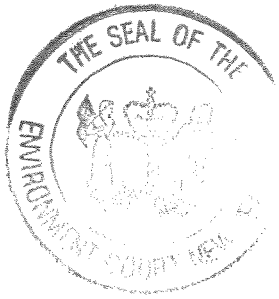
> The Court declines to make the orders and directions sought in relation to witnesses and evidence as set out in this decision, costs being reserved.

[363] In its decision the Court noted that this was the fifth time the Court had been asked to address directions for hearing in this matter, that it had issued some four minutes setting out its intentions as to process including a decision and directions of 29 June 2016. Having heard arguments as to scope and the number of appeals the Court noted at paragraph [12] that it made direction in paragraphs [7] and [8] of that decision that:

> ...the issues identified in this direction are issues that any party may argue to the extent they wish to do so, and having been recognised it is covered by one or more appeals before the Court.

[364] The Court had therefore adopted an approach centering on identifying the issues and witness lists to provide a proper scope for the hearing. This was identifying that, at that time, there were some five appeals extant. Subsequent to a written comment by Mr Casey QC on those directions the Court noted:[37]

> No application for variation has been filed and the Court refuses to make any variation to its directions. It of course acknowledges that parties' positions do change during the course of a proceeding and what we notified as witnesses as subjects may be subject to reduction in due course if issues are clarified or resolved. However the purpose of the direction is to ensure there is no continued expansion of witness lists and evidence through the process. The application for strikeout will be dealt with through the separate process and directions issued.



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[36] *Simons Hill Station Ltd v Canterbury Regional Council* [2016] NZEnvC 209.
[37] *Ngāi Te Hapū and others* [2016] NZEnvC 164.

[365] The application in that case sought to prevent any evidence of adverse effect on persons or groups who had given written approval, including Te Arawa, Ngāti Awa, Te Patuwai, Ngāti Ranginui, Te Whānau a Tauwhao, Waitaha, Maketū Taiapure Trust and Te Kotahitanga o Te Arawa Fisheries and any evidence advancing the interests of persons who were not originally submitters, including Ngāti Whakaue ki Maketū, Ngāti Whakahemo, Tapuika Iwi Authority and Te Arawa Takitai Moana Kaumatua Forum.

[366] The Court then discussed *Simon's Hill* and the approach taken and then the approach of the Court in centering on the evidence and witness lists. At paragraph [26] the Court said:

> To suggest that the *Simon's Hill* decision supports the contention that witnesses cannot give evidence of adverse effect on Māori cultural values and on Māori generally (see paragraph [10], clause (b) of the application) goes significantly too far. The Court may still receive that evidence under s 104(3)(a)(ii). The Court acknowledges and reminds the parties that it must disregard any effect on any person who has given their written approval to the application (sic) understand that a number of parties have done so and those written approvals should be produced to the Court in order that the Court can understand the extent of those approvals.

At [29] it went on to say:

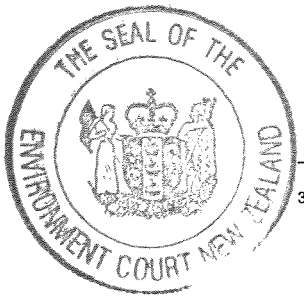
> However, in the circumstances of this case the repeated applications for further directions, clarification and strikeout concern the Court that there appears to be a focus on parties and their witnesses rather than on the substantive issues before the Court.

[367] In *Society for the Protection of the Society for the Protection of Auckland City and Waterfront Incorporated v Auckland City Council* [38] the Court noted:

> Over recent years the Courts have moved a long way from considering standing as a separate issue, and from considering it substantially unconnected with the main issue in the case. The distinction between standing in private law and standing in public law has become blurred to a point where the Courts now concentrate more on the merits of a particular claim than on the standing of a person to bring a claim.

later notes:

> This general principle is equally applicable in determining a preliminary question of status.



[38] [2001] NZRMA 209.

and concluded:

> This is a case best addressed on its merits rather than on the basis of repeated applications for strikeout and further directions.

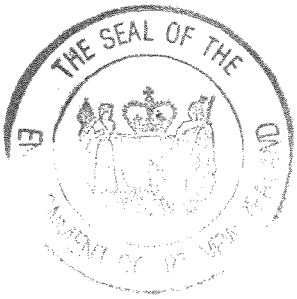
[368] Mr Casey QC suggested to the Court, in respect of the Court's interlocutory decision, that this was simply a decision to delay the determination of status until such time as the hearing. With respect, there is nothing in that decision which could be interpreted in the way suggested by Mr Casey QC. We conclude that, to the extent the matter is not already *res judicata* by this Court, Te Runanga o Ngāti Whakaue ki Maketū and the Forum are entitled to appear under s 274(1)(d) and advance evidence on such matters as are before the Court (in the issue lists) on this appeal including matters under Part 2 of the Act.

[369] We have assessed the evidence on the basis that they do have status and reached the conclusions accordingly. As noted by the High Court in the *Society for the Protection of the Auckland City and Waterfront Incorporated* case we have addressed this case on its merits rather than on the basis of status or applications for strikeout.

[370] As we have already identified the issues for Te Runanga o Ngāti Whakaue ki Maketū and the Forum, this resolved to concerns held by other witnesses on this appeal in relation to what portions of the vessel might be removed. As Mr Bennion conceded in opening, this might be a matter properly addressed through conditions of consent. Given our factual conclusion as to both feasibility and safety the issue then resolved itself to one as to the appropriate conditions to recognise the relationship of all Coastal Te Arawa, and in that regard this matter can best be addressed through recognition and provision in the grant of consent with conditions for the reasons we have already set out.

Limitation issues

[371] Again for reasons that are not clear to this Court, Mr Casey QC persisted with and reiterated in his closing submissions in relation to the potential to obtain further orders requiring the removal of the vessel. At best this is a collateral objective and not within the scope of this particular hearing.



[372] It is not for this Court to make declarations as to the meaning of s 86 of the Marine Transport Act or whether the notices issued by the Director were valid, and if so

for what periods. For the purposes of examining the merits the Court has concluded that the Director does have authority to make such orders if appropriate.

[373] Given our conclusion that there is no jurisdiction for this Court to grant a consent for an activity not sought by the applicant, this appears to deal with the limitation issue also. The suggestion is that the insurer's liability in New Zealand was limited to the less than $30m proffered to claimants. We can see no basis for that assertion given the nearly $800m expended by the insurer to date. We must assume for current purposes that the applicant is genuine and that the intention of the insurer and owner is to transfer not only the vessel to the Trust as applicant but also sufficient funds to complete the tasks the subject of the consent. Any other interpretation based on some limitation of liability would in our view render the entire process otious.

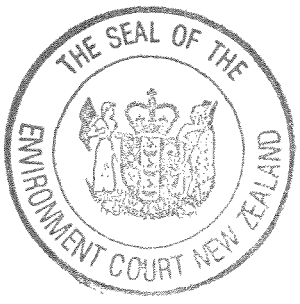
[374] There are a number of other points made by Mr Casey QC in relation to jurisdiction of individual parties or their evidence in opposition. For the reasons we have stated in generality in relation to the more substantive parties, we have concluded that we should determine the matter on its merits rather than on the basis of the inclusion or exclusion of various arguments or parties.

[375] We conclude that one of the objectives of the Act is to recognise relationship of Māori with their taonga. The Privy Council in *McGuire v Hastings District Council*[39] saw that thread permeating every level of the RMA process. The Board noted it in relation to ss 5 – 8 of the RMA para [21], "These are strong directions, to be borne in mind at every stage of the planning process". The Board further noted at para [22] "[the council] is under a general duty to provide for the relationship of Māori with their ancestral lands."

[376] We conclude that it would create a contradiction with the Act if we were then to exclude the consideration of such evidence based upon a technical approach where it is otherwise within the scope of the appeal.

Applicant disputing findings and consents granted by the Commissioners

[377] As part of the Applicant's case they disputed a number of factual and legal conclusions the Commissioners reached in their decision. In the preliminary phases the Court directed that the Applicant file an appeal if it considered it had grounds to do



[39] (2002) 8 ELRNZ 14.

so. The matter is addressed in Minute of pre-hearing conference dated 29 April 2016, paragraphs [4] to [10].

[378] At paragraph [4] to [6] the Court noted:

> [4] Later in the pre-hearing conference Mr Casey QC raised an issue as to the consents sought and granted. The Council Commissioners identify two applications lodged:
>
> (i) under s 15A to dump the remains of the shop;
>
> (ii) under s 15B for consent to discharge any harmful substances from the remains of the ship over time from degradation of the vessel.
>
> [5] The Council Commissioners granted two consents:
>
> (a) to dump (or abandon) the remains of the MV Rena, its equipment and cargo, and associated debris on Ōtāiti/Astrolabe Reef, in the coastal marine area, Bay of Plenty; and
>
> (b) to permit any future discharge of contaminants (including harmful substances) from the MV Rena, its equipment and cargo and associated debris to the Coastal Marine Area, Bay of Plenty.
>
> [6] Mr Casey QC seemed to suggest that the consents granted may be beyond the application. At the time I did not appreciate the significance of this remark, and it was not further elaborated by Mr Casey QC.

[379] At paragraph [8] the Court said:

> Given the significant interconnection between the vessel and its debris and its cargo, the Court would have considerable difficulty in refusing the consent granted or giving proper weight to the Council decision.

[380] The legal position is succinctly stated by the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*:[40]

> It is fundamental that an appeal must be against the result to which a decision-maker has come, namely the order or declaration made or other relief given, not directly against the conclusions reached by the decision-maker which led to that result, although of course any flaws in those conclusions may provide the means of impeaching the result. A litigant cannot therefore, save perhaps in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result. The successful litigant cannot seek to have the appeal body overturn unfavourable factual or legal conclusions made on the journey to that result which have had no significant impact on where the decision-maker ultimately arrived. In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

[40] [2009] NZLR 13 at [25].

[381] Thus, to the extent the Applicant's submissions or their witnesses ignored or disagreed with the Commissioners' decision, the Court has no jurisdiction to reach alternative conclusions unless sought in another appeal. Here Mr Frentz, in particular, simply asserted different conclusions to the Commissioners without any discussion of the Commissioners' decision. To the extent we have not addressed any further legal or jurisdictional arguments by Mr Casey QC these are rejected for similar reasons we have set out in the more substantive issues.

Conditions of consent

[382] In order to assess whether we are satisfied that a consent can properly issue, it is necessary now to examine the particular conditions of consent. In this regard Mr Casey QC again suggested that the Court had limited or no power to alter conditions unless these were put in issue by the parties in the notice of appeal, and in their evidence.

[383] We have already rejected that argument in general terms. Given the significant change in position since the Commissioners' decision, and the fact that this is now a retrospective consent, the Court is properly entitled to ensure that the conditions of consent meet the purpose of the Act and reflect the evidence that was given to it at the hearing.

[384] Both the Regional Council and the applicant in closing recognised that there were improvements to the conditions that could be imposed. We also recognise that the final wording might be further improved. It is not the part of this Court to remedy drafting errors but we do provide as Appendix "**E**" some commentary on the conditions generally to assist the parties in finalising the wording.

[385] We have concluded that in order for the consent to properly achieve the objectives we have outlined in this decision it is necessary to have a thorough and robust monitoring and reporting system that should be:

(a) timely;

(b) regular but allow for extra inspections when there is a major storm event;

(c) transparent;

(d) prepared for and referred to both the Regional Council, the Kaitiaki committee and the ITAG committee;

(e) allow recommendation for remedial or mitigation steps as well as modification of the monitoring plans.

[386] In order to achieve the objectives in respect of robust review of the situation at the reef, we consider that the ITAG and Kaitiaki Reference Group should be more central to the decision-making. In this regard we consider that reports should be provided to the ITAG, KRG, Regional Council and the owner after each round of regular and storm reporting.

[387] It is intended that those reports would allow recommendations by the owner, ITAG and/or KRG to be considered by the Regional Council. In those circumstances we consider that the most transparent and robust system would be for the Council then to make decisions on the basis of the reports, which are then public, given wide-ranging nature of the potential impacts. To allow flexibility and adaptive management we consider that there should be the potential for all four parties to agree on changes to monitoring conditions. Where there is no such agreement then clearly the Regional Council would need to make any decision to review conditions and/or an application made to the Regional Council for variation.

[388] Given that it would be intended that the actual monitoring programme be contained within a monitoring plan, rather than a condition of consent, we would anticipate that the core elements of the management plan would be attached to the conditions of consent to show the core contents.

Contents of Monitoring Plan

[389] We also note that in the interests of transparency and involvement of such a large number of people from various aspects of the local community a website to host the various consents, reports etc is considered appropriate. This would be particularly helpful to disseminate information regarding the monitoring reports. The applicant resiled from this provision at the close of hearing. However, it is the Court's strong view that such a method of communication offers real information to those who hold an interest and can be accessed at their will. It may be that the Council offers to host this on their website.

Composition of the ITAG and KRG

[390] The parties are largely agreed on the composition of the ITAG. Given the

levels of disagreement between various hapū, reaching an agreed composition for the KRG is somewhat more problematic. In general terms the council, supported by the applicant, now suggest:

(a) two representatives for the Ngāi Te Hapū /Te Patuwai who ahi kā to the island;

(b) one representative for Tauwhao;

(c) one representative for Te Arawa ki Tai;

(d) one representative for the Tauranga Moana a Toi; and

(e) one representative for the applicant.

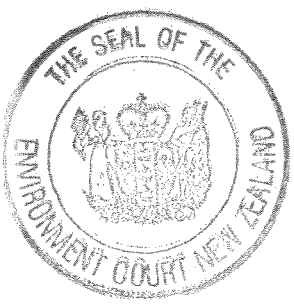
[391] Although there was some criticism around the inclusion of the applicant, we have carefully thought about the composition of the group and have concluded that the balance suggested by the Regional Council is correct. We agree that there should be a representative for the applicant. It is important that there be a clear line of communication between the consent holder and the KRG.

[392] The constitution should require the applicant to recommend somebody who is recognised as kaitiaki within the region's Te Moana a Toi, and there would be a hope that this person would be somebody who had a direct relationship to the area. Nevertheless, the appropriate person is for the selection of the applicant.

[393] This gives the potential for the applicant to choose a person who has both kaitiaki and technical knowledge such as Mr Te Kowhai or Dr Paul-Burke, although there are inevitably other people who would be available who would have the necessary mix of technical and kaitiaki experience.

Members for the KRG

[394] The issue is not so much the composition as the selection of members, particularly for coastal Te Arawa and for those who ahi kā to the island (the Motitians). Given the Court's experience with difficulties in resolving issues of this type in the past, we have concluded that the appropriate course would be to make a default selection of particular members for the KRG on the basis that these members could be replaced by their respective constituency in due course. For our part we would suggest (and this is an interim guide only):



(a) Mr Ranapia and Mrs Butler as representatives for Te Patuwai/Ngāi Te Hapū;

(b) Mr Te Kowhai or Mr Morehu as representatives for Te Arawa ki Tai;

(c) a representative for the Tauranga Moana o Toi, say Mr Rolleston/Coffin/Ohia and

(d) a representative for the applicant, i.e. Dr Paul-Burke/Mr Coffin.

[395] We make this suggestion based on the relatively wide acceptance of these witnesses before the Court, but there may be other persons who various groups would prefer to suggest. The important issue for the Court is to ensure that the wide variety of interests (including those who are still concerned with the Rena) are encompassed within any reference group.

Offset mitigation

[396] There are a series of offset mitigations that have been reached with groups. The details of all of these agreements have not been disclosed to the Court, and it is not necessary for current purposes. Suffice to say those parties listed in Appendix **C** are parties that have reached accommodations with the applicant/insurer/owner. Some involve payments of monies, the establishment of trust funds, but not all.

[397] There are, however, three that are sought to be established as conditions of consent. One is a payment to Te Arawa ki Tai Incorporated; a fund in relation to Tauranga Moana o Toi group, and the establishment of a fund to be administered by the consent holder to assist the Motiti island community and particularly the environmental, cultural and/or social wellbeing of that community,

[398] Given the concerns raised by Ngāti Whakaue groups (and some other witnesses) we agree that the condition to the incorporated society for Te Arawa would need either stronger conditions in relation to its application or, by preference, be another trust administered by the applicant with contestable funding applications similar to the other two payments. Given the arrangements already entered into with Te Arawa ki Tai Incorporated, we would prefer to see a consensus reached among coastal Te Arawa. In this regard we note Mr Morehu's discussion with Mr Walters and would hope that some agreement could be reached as to how the monies would be administered and the purposes for which the money would be applied. Failing that we would anticipate that the conditions of consent would need to explicitly make the fund a

contestable fund on application to the consent holder.

The bond

[399] It was clear from the Council's evidence that the calculation of the bond turns on the type of conditions that are imposed, the period for which they run, and what they might involve. Accordingly we would anticipate that the bond will be recalculated once the final conditions can be assessed.

[400] As we have already identified, we consider that there should be the ability to reassess the removal of parts of the bow depending on both feasibility and safety; subject, of course, to technical, cost and cultural considerations. In the end, if the reference groups, owner and Council cannot agree it would appear appropriate that the Council should make any decision as to removal of any part of the bow that may be separated through degradation or storm events. Similarly, we consider that provision should be made to consider removal of contaminants TBT and copper, if circumstances arise where this is both feasible and safe and it meets the other considerations we have already identified.

[401] We would consider that the obligations should be ones that adapt to whether or not there is an increase in levels of detection or movement, or whether there is a gradual decay in both contaminants and movement of the pieces of the vessel over the next ten years. We would anticipate that the bond and power to review conditions would be revisited at intervals, say initial, five and ten years into the consent with a further evaluation at year 15.

The term of the consent

[402] We are now some five years post the wreck event. We are told that most of the degradation of the wreck will take place within 15 to 25 years. A ten-year consent with a ten-year maintenance provision would give a total of 25 years from the wreck event. We have considered carefully whether this is an appropriate period. Like the Commissioners we consider that the combination of a ten year consent with a further ten year maintenance period is an appropriate way to deal with the consent in this case, provided that there is sufficient bond to deal with the events that may occur in that period.

[403] Given the dynamic nature of the environment here, we would anticipate most further activity to occur in relation to the wreck within the next ten years. Nevertheless, we recognise that major events are likely to have the most significant impact on changing both the contaminant discharge rates from the wreck and the movement of the pieces. We conclude that a number of the conditions need to contemplate that a major storm may not occur within the first ten year period but could occur during the following maintenance period. To that extent a recalculation of the bond to include potential for removal of parts of the bow (up to 20 tonnes) and /or exposure of copper clove, in particular, should be included for a major storm event up to 20 years. Whether that will occur within the next 20 years is, of course, difficult to know.

Trigger points for storm events

[404] This leads us on to the question of trigger points for storm events. For reasons that were not entirely clear to us, a trigger point of 5.5m at A Beacon was chosen based upon the TRS Pam which moved pieces in 2015. Given the extent of movement on that occasion we consider that this is overly conservative as an event given it is calculated to be a 50 year return event. In our view something closer to a 2-5 year return event should warrant further investigation, at least during the initial 10-year consent, inspection can take place after such an event to check whether there is any movement. It seems to me that thereafter the terms might be adjusted by the ITAG group depending on the outcome from these lower level events. Certainly we would consider that something less than a 5.5m swell at A beacon would warrant re-inspection.

[405] Given the storm events that occurred after this hearing, those levels may assist us in setting a more conservative inspection threshold.

Overall assessment

[406] In the end this Court must be satisfied that consent should be granted under s 5 of the Act. There appears to be dispute as to whether it is necessary to separately consider Part 2 given that matters have been largely covered in terms of the NZCPS, the RPS and the RCEP. As this Court noted in *Envirofume*, such a check can be useful to ensure that nothing has been missed and that the outcome is one which meets the purpose of the Act.

[407] Assuming for current purposes that conditions meeting the Court's requirements can be established (and we understand there is no technical difficulty in doing so) we conclude that the grant of consent in these circumstances would achieve the purpose of the Act particularly by:

(a) recognising and providing for the relationship of Māori with the reef;

(b) identifying and if possible mitigating any the adverse effects that may occur from the abandonment of the wreck from 1 April 2016 and the continuing discharge from that date; and

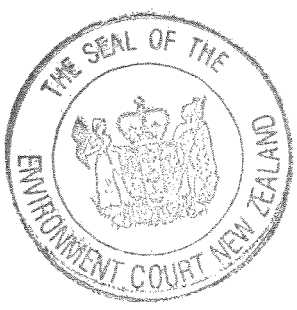
(c) at least identify and if possible seek to address any cumulative effects which may have occurred combined with the discharges from 1 April 2016;

(d) in the end to achieve sustainable management of the reef and of the remains of the vessel.

[408] In doing so the Court is satisfied that there is a positive purpose to granting the consent, and that conditions will not only provide for offset mitigation for continuing adverse effects but will also enable the identification and possibly the mitigation or remediation of any further adverse effects that might be identified in the future.

[409] We note Mr Pou's statement to this Court that information in itself can be a useful tool. It appears to us that such information will increase the knowledge of the moana in the Bay of Plenty and also enable a long term analysis of the effects of the abandonment of the wreck within the Bay of Plenty.

[410] Given the significant reliance of Tauranga on the port facilities there is at least a potential long-term benefit to the operation of the port and the wellbeing of the people of Tauranga region, including Māori. Overall we are satisfied that the grant of consent will achieve the purpose of the Act, the relevant plans and documents, and that the effects are adequately avoided, remedied or mitigated through the imposition of appropriate conditions of consent.



Outcome

[411] For these reasons we conclude that:

A. Consent for both the abandonment of the vessel from 1 April 2016 under s 15A and the discharge of contaminants from the vessel from 1 April 2016 under s 15B should be granted upon conditions of consent similar to those discussed in this decision and annexed hereto as "D". We annex as "E" an analysis that may assist the condition review.

B. The parties are to consult on the appropriate conditions of consent and the Applicant is to forward to the Regional Council and all other parties its proposed conditions of consent within 40 working days.

C. The Council and all other parties are to advise their position in respect of the conditions within a further 20 working days. Thereafter the applicant is to file a memorandum setting out the proposed Consent and Conditions with:

(a) its commentary on the conditions of consent;

(b) which issues are in dispute; and

(c) the reasons for that dispute,

with the Court within a further 20 working days. The Court will then consider the position and either make further directions or conclude the final consent and conditions thereof.

D. If any party wishes to make an application for costs they are to do so within 40 working days; any party is to reply within a further 15 working days, with a final reply, if any, 5 working days after that.

For the court:

JA Smith
Environment Judge

C Fox
Alternate Environment Judge

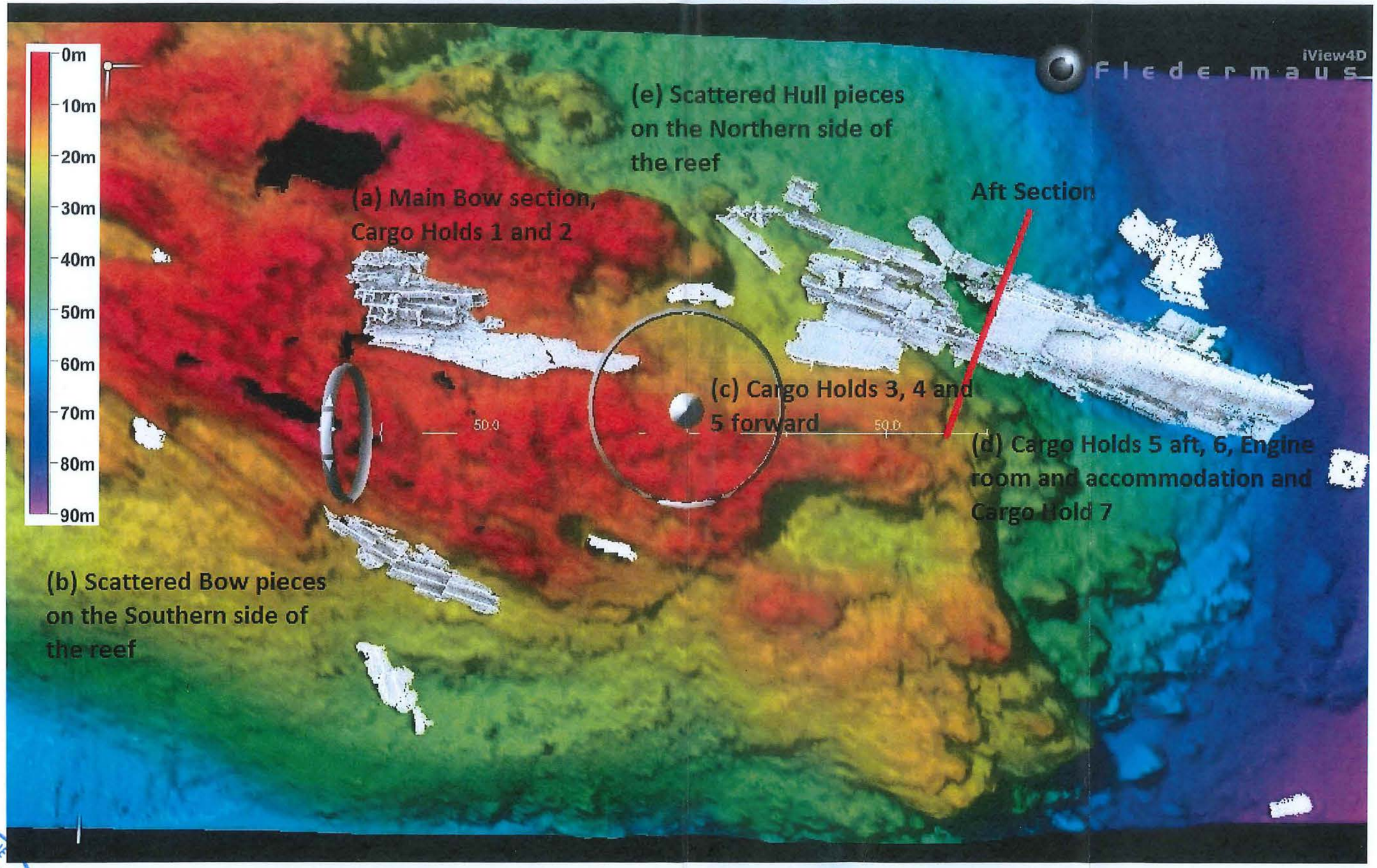
A

10 January 2012

RENA Project

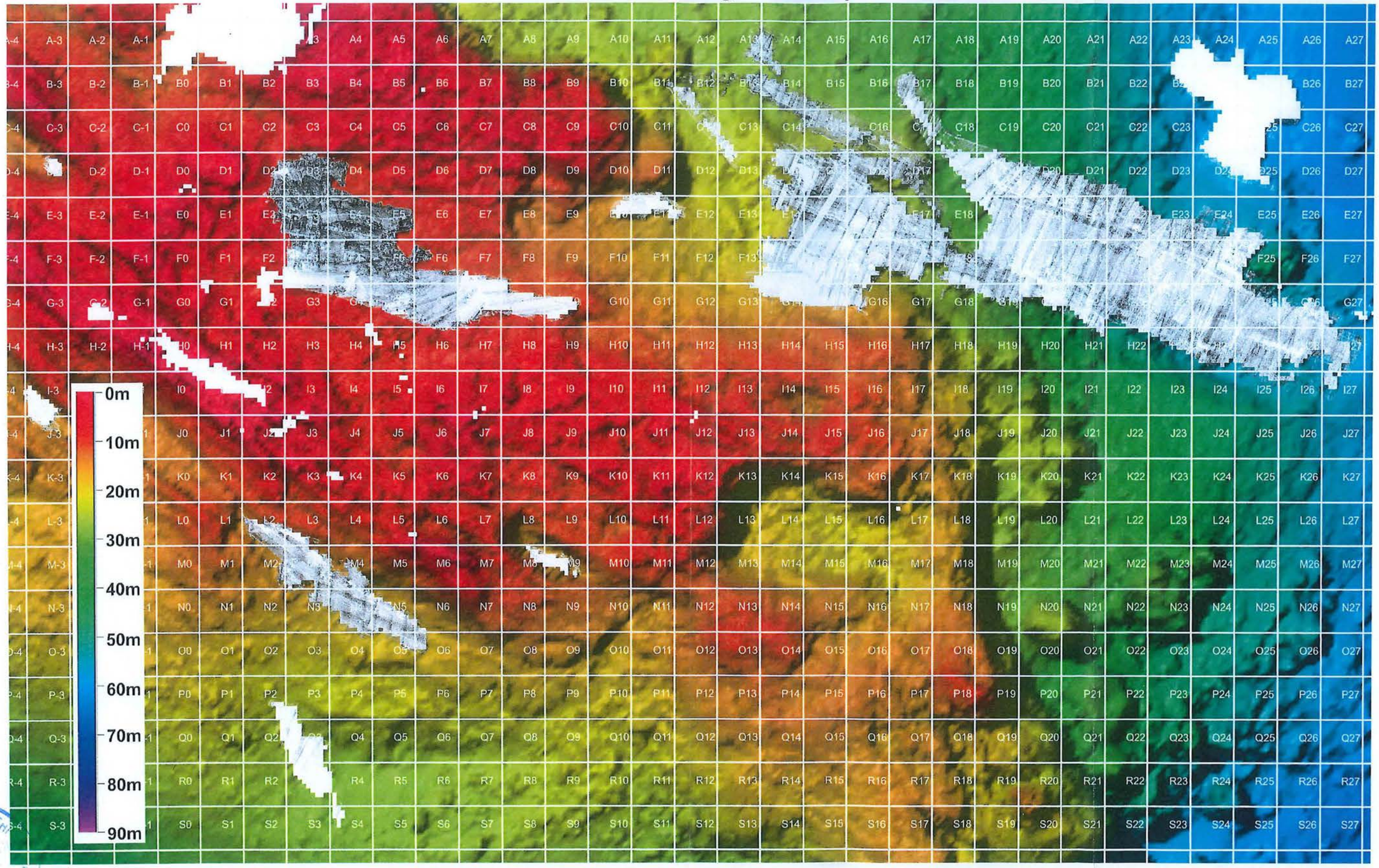
B1

ADUS 2015: AREAS BY JWS WRECK DESCRIPTION



B2

ADUS 2015 with grid overlay



C

Asserted **Table of Written Approvals - including the relevant obligations in the Agreement**

Affected Party		Date and nature of approval	Withdrawal/Notice of Discontinuance (extract)	Obligation in agreement (extract)
1.	Ngati Ranginui Iwi Society Inc Original submitter in opposition	3 June 2015 Settlement and withdrawal of submission. See letter: **CB, 20**	A requirement/obligation/condition: *Over time, we have gained a better understanding of the efforts by the owner and insurer … assisted by the engagement that has been led by the owner's representative, Mr Konstantinos Zacharatos … [who] has been respectful to the mana of Ngati Ranginui.* *We also have a better understanding now of the way in which the environment is expected to continue to recover as a result of the work that has been undertaken since the grounding, and which is continuing. It is understood that any consent will include conditions and mechanisms to monitor to deal with contingencies arising over the next 10 years. These provide a further level of comfort.* *…* *Ngati Ranginui no longer wishes to be heard in opposition to the consent being granted and we wish to withdraw our submission.*	A requirement/obligation/condition: *… Ngati Ranginui withdrawing all submissions to the Application (without payment from the Trust or any other party) and not having opposed whether directly or indirectly or in whole or in part the grant of the Consents or the Conditions, not having taken any part in any hearing or other process relating to the Application or the Consents or the Rena, not having taken any other steps to prevent the Trust obtaining the Consents acquiring the Wreck of the Rena and leaving it on Otaiti, not having sought to recover or have imposed by way of financial or other conditions any payment or other compensation relating to the Rena (except as provided for in this agreement), and not having provided any encouragement or assistance to any other party to oppose the Application or the Consents, unless otherwise agreed by the parties in writing. …*
2.	Mataatua District Maori Council (MDMC) Original submitter in opposition	22 June 2015 Withdrawal of submission Letter setting out role of MDMC and reasons for withdrawal: **CB, 21**	Letter of withdrawal: *For these reasons the Mataatua District Maori Council no longer opposes consent being granted and we wish to withdraw our submission.*	A requirement/obligation/condition: *It shall not oppose whether directly or indirectly or in whole or in part the grant of the Consents or the Conditions, and not take any part in any hearing or other process relating to the Application or the Consents or the Rena, nor take any other steps to prevent the Trust obtaining the Consents acquiring the Wreck of the Rena and leaving it on Otaiti, nor provide any encouragement or assistance to any other party to oppose the Application or the Consents, unless otherwise agreed by the parties in writing.*
3.	• Te Arawa ki Tai Charitable Trust	July 2015 Settlement Agreement signed by the Te	*Te Arawa acknowledge and agree that any actual or potential effects on Te Arawa, or its interests, including any cultural effects have now been satisfactorily mitigated by this Agreement.*	*[In evidence / actively supporting]*

Affected Party		Date and nature of approval	Withdrawal/Notice of Discontinuance (extract)	Obligation in agreement (extract)
	• Ngati Makino Heritage Trust* • Ngati Pikiao Iwi Trust* • Te Arawa Lakes Trust • Te Kotahitanga o Te Arawa Fisheries • Te Pumautanga o Te Arawa Trust • Ngati Tuwharetoa (BOP) Trust • Waitaha Iwi • Te Arawa Koeke Council • Te Mana o Ngati Rangitihi • Maketu Taiapure Trust* • Nga Tangata Ahikaaroa o Maketu* • Ngati Tunohopu* (together 'Te Arawa')	Arawa listed entities	*Te Arawa agree to … participate in any appeals against a decision of the Hearing Panel … in support of the Application on the basis of the Supported Conditions.* Section 274 notice in support by those marked (*) Continued support – see evidence	
4.	Te Kaahui Kaumatua o Te	August 2015 Support at council hearing	Section 274 notice Continued support – see evidence.	*[Actively supporting]*

Affected Party		Date and nature of approval	Withdrawal/Notice of Discontinuance (extract)	Obligation in agreement (extract)
	Patuwai (the Korowai) (See full list attached to Memorandum of 3 October 2016 and Mr Ranapia's evidence)	Section 274 party in support		
5.	Motiti Environmental Management Inc (MEMI)	August 2015 Support at council hearing Section 274 party in support	Section 274 notice Continued support – see evidence.	*[Actively supporting]*
6.	Motiti Rohe Moana Trust (MRMT) Original submitter in opposition	6 September 2015 Letter setting out support: **CB, 22**	Letter of withdrawal states: *On that basis, the Motiti Rohe Moana Trust wishes to record its support for the application.*	A requirement/obligation/condition: *... To not directly or indirectly and/or in any manner whatsoever:* *(i) oppose the Application; and/or* *(ii) support any other person opposing the Application.*
7.	Royal Forest and Bird Protection Society of New Zealand Inc. Appellant in ENV-2016-AKL-46 and s 274 party	31 May 2016 Withdrawal of appeal and s 274 notices	Notice of withdrawal states: *Forest & Bird is satisfied that the environmental and other effects of the Application have been appropriately avoided, remedied, and mitigated and has no further interest in the Application.*	A requirement/obligation/condition: *b. To not directly or indirectly and/or in any manner whatsoever :* *(i) oppose the Application; and/or* *(ii) support any other person opposing the Application.*
8.	Te Whanau o Tauwhao ki Nga Moutere Trust	1 June 2016	Notice of withdrawal states: *In giving this notice Te Whanau a Tauwhao Ki Nga Moutere Trust acknowledges the Application, with the imposed conditions, sufficiently avoids, remedies,*	A requirement/obligation/condition: *b. not directly or indirectly and/or in any manner whatsoever:*

Affected Party		Date and nature of approval	Withdrawal/Notice of Discontinuance (extract)	Obligation in agreement (extract)
	Appellant in ENV-2016-AKL-44 and s 274 party	Withdrawal of appeal and s 274 notices	*mitigates and/or offsets the environmental, social, cultural, and other effects of concern to it.*	*(i) oppose the Application or take any action that would have the effect of opposing the Application; and/or* *(ii) support any other person opposing the Application or taking any action that would have the effect of opposing the Application.*
9.	Te Patuwai Tribal Committee Appellant in ENV-2016-AKL-410 and s 274	1 July 2016 Settlement and withdrawal of appeal and s 274 notices	Notice of withdrawal states: *In giving this notice Te Patuwai Tribal Committee and Te Runanga O Ngati Awa agree to the grant of the resource consents on the conditions set by the Council decision, as may be amended in accordance with the agreements reached at the Court-assisted mediation on 30 and 31 May 2016 (or to like effect)*	A requirement/obligation/condition: *(b) not directly or indirectly and/or in any manner whatsoever:* *(i) oppose the Application or take any action that would have the effect of opposing the Application; and/or* *(ii) support any other person opposing the Application or taking any action that would have the effect of opposing the Application.*
10.	Te Runanga o Ngati Awa Appellant in ENV-2016-AKL-410 and s 274 party	1 July 2016 Settlement and withdrawal of appeal and s 274 notices	Notice of withdrawal states: *In giving this notice Te Patuwai Tribal Committee and Te Runanga O Ngati Awa agree to the grant of the resource consents on the conditions set by the Council decision, as may be amended in accordance with the agreements reached at the Court-assisted mediation on 30 and 31 May 2016 (or to like effect)*	A requirement/obligation/condition: *(b) not directly or indirectly and/or in any manner whatsoever:* *(i) oppose the Application (as that term is defined the Settlement Agreement) or take any action that would have the effect of opposing the Application; and/or* *(ii) support or assist any other person opposing the Application or taking any action that would have the effect of opposing the Application;*
11.	• Ruihi Shortland • Ngarangi Chapman • Adrienne Paul Section 274 parties	1 July 2016 Withdrawal of s 274 notices	Notices of withdrawal state: *In giving this notice the section 274 party agrees to the grant of the resource consents on the conditions set by the Council decision, as may be amended in accordance with the agreements reached at the Court-assisted mediation on 30 and 31 May 2016 (or to like effect)*	A requirement/obligation/condition: *(b) not directly or indirectly and/or in any manner whatsoever:* *(i) oppose the Application or take any action that would have the effect of opposing the Application; and/or*

Affected Party		Date and nature of approval	Withdrawal/Notice of Discontinuance (extract)	Obligation in agreement (extract)
				(ii) support or assist any other person opposing the Application or taking any action that would have the effect of opposing the Application;
12.	Hemi Bennett of Ngati Whakaue Appellant in ENV-2016-AKL-39	24 August 2016 Settlement and withdrawal of appeal	Notice of withdrawal states: *In giving this notice the Appellant acknowledges the Application, with the imposed conditions, sufficiently avoids, remedies, mitigates and/or offsets the environmental, social, cultural, and other effects of concern to him.*	A requirement/obligation/condition: *b. to not directly or indirectly and/or in any manner whatsoever:* *(i) oppose the Application or take any action that would have the effect of opposing the Application; and/or* *(ii) support any other person opposing the Application or taking any action that would have the effect of opposing the Application;*

PROPOSED CONSENT CONDITIONS
COMPARISON OF COUNCIL'S SUBMISSION VERSION AND APPLICANT'S VERSION 27 MARCH 2017

THE ASTROLABE COMMUNITY TRUST is hereby granted the following resource consents:

a) **To ~~dump (or abandon)~~ the remains of the MV Rena, its equipment and cargo and associated debris on Otaiti / Astrolabe Reef, in the Coastal Marine Area, Bay of Plenty**; and

b) **To permit any future discharge of contaminants (including harmful substances) from the MV Rena, its equipment and cargo and associated debris to the Coastal Marine Area, Bay of Plenty,**

subject to the following conditions:

A. Purpose, scope and principles

A.1 These consents shall be exercised in general accordance with the application and supporting materials dated 27 May 2014 (except to the extent modified by these conditions). In summary the wreck[1] ~~and associated materials~~ to be abandoned includes:

a) Bow Section: The bow double bottom, including the starboard side about cargo hold 1 and scattered bow pieces on the southern side of the reef.

b) Aft Section: Holds 3/4/5 (fwd) double bottoms and starboard side; holds 5(aft)/6/7 engine room and accommodation; and scattered hull pieces on the northern side of the reef.

c) Any debris remaining in the former debris field: The debris field has now been substantially cleared of debris, but ~~remaining~~ some smaller structural parts, equipment and cargo pieces remain.

d) Other debris: Such as the containers and any of their cargos in deep water to the north and south of the aft section.

A.2 Discharge of Contaminants: These consents authorise ~~potential~~any future discharges from the wreck of harmful substances or contaminants ~~where these might~~that exceed the threshold of effects described in s 15B, Resource Management Act 1991 (RMA), after 'reasonable mixing'.

A.3 The purpose of these consents is to provide for monitoring and management of the effects of abandoning the wreck, and for mitigation, in a way that will provide for social, economic and cultural wellbeing and for health and safety. The conditions provide for:

a) monitoring to detect adverse changes to the Otaiti ~~/ Astrolabe Reef~~ environment resulting from the ~~abandonment~~exercise of ~~the wreck~~these consents, and ~~any future discharges, and~~

b) if the monitoring identifies ~~that~~:

- risks to human health, or

[1] Application Volume 1, Glossary, 27 May 2014, defines "wreck" to mean "the remains of the Rena ship and its cargo, including debris field material". This is the definition of the term "wreck" as used throughout these conditions.

- significant adverse ecological effects beyond identified trigger levels established in accordance with conditions 5, 7 and 8 have occurred or are likely to occur (without distinction as to whether any increase in adverse effects beyond identified trigger levels arises from pre- or post-consent discharges) ~~beyond identified trigger levels have occurred, or are likely to occur, those matters will be addressed, to the extent practicable, through contingency measures to be undertaken by the consent holder; and~~), or
- adverse changes to effects on Cultural Values

those matters will be dealt with under the conditions of these consents and, addressed, to the extent practicable, through contingency measures to be undertaken by the Consent Holder; and

c) the ability to ascertain whether the expected long-term natural recovery of the Otaiti ~~/ Astrolabe Reef~~ environment is being impaired; and

d) recognition and provision for the relationship of tangata whenua with Otaiti~~, and the principles of partnership~~, including through the Kaitiakitanga Reference Group (KRG) and the provision of restoration and mitigation funds; and

e) the establishment of an Independent Technical Advisory Group (ITAG) to assist the Council in its supervision of the exercise of these consents, including its approval of the required management plans and any proposed contingency measures.

1 Location

Seabed (Otaiti / Astrolabe Reef) Bay of Plenty, at or about: 37° 32.439' S, 176°25.692' E (referred to generally as "Otaiti").

1A. Commencement and change to the Astrolabe Community Trust (the "Consent Holder")

1A.1 The commencement date of these consents shall be the date that notice of abandonment ~~has been~~is given by, or on behalf of, the Consent Holder to the Regional Council provided that notice shall not be given prior to the dates specified in section 116(a) and (b) RMA.

1A.2 At any time the trustees of the Astrolabe Community Trust change, the Consent Holder shall provide the Regional Council with the updated details of the trustees, together with any necessary supporting information (such as any deed of appointment).

2. Kaitiakitanga Reference Group ("KRG")

2.1 Within one month of the commencement~~, and maintain for the duration~~ of these consents, ~~a KRG. Once the KRG is formed~~ the Consent Holder shall provide ~~details~~an offer to the following parties to establish and maintain a KRG, each of~~, and any subsequent changes to, its membership, , to the Regional Council.~~ whom may nominate one member:

~~2.1. The Consent Holder must make an offer to:~~

a) Te Patuwai ~~to nominate two representatives; and~~Tribal Committee;

b) Korowai Kahui O Nga Pakeke O Te Patuwai (the "Korowai");

c) Te Whanau a Tauwhao ~~to nominate one representative; and~~;

d) Te Arawa ~~to nominate one representative~~; and

e) The Tauranga Moana Iwi ~~Leaders Forum to nominate one representative~~Collective;
~~to become members of the KRG.~~

On acceptance of the offer ~~shall be formalised through~~ a Memorandum of Understanding ("**MoU**") shall be signed by the Consent Holder and the members of the KRG that includes as a minimum:

a) The conditions of these consents;

b) The composition of the KRG and the process by which membership may be amended;

c) The rates of remuneration for members of the KRG;

~~The process for engagement and the rates of remuneration for professional advisers to the KRG;~~

~~a) The process for replacing KRG representatives;~~

~~b) The process for disseminating information to the KRG representatives constituent groups, reporting to those groups and providing feedback from those groups; and~~

~~c)~~d) Period of review of the MoU and rates of remuneration.

~~2.2: Membership of the KRG shall include a representative of the Consent Holder but that representative will not have formal voting rights.~~

2.2 The purposes / role of the KRG shall be to:

a) Recognise the importance of Otaiti ~~/ Astrolabe Reef~~ as a taonga and to recognise the kaitiakitanga of Maori who have a kaitiaki relationship with Otaiti ~~/ Astrolabe Reef~~;;;

b) Review and make recommendations to the ~~Bay of Plenty~~ Regional Council and the Consent Holder on the Cultural Monitoring Plan including on any proposed changes to the Cultural Monitoring Plan;

c) Provide ~~for the ongoing involvement of~~that Maori who have a kaitiaki relationship with Otaiti ~~/ Astrolabe Reef as kaitiaki~~,may have an involvement in monitoring the effects of the activities authorised by these consents;

d) Provide for the kaitiaki responsibilities and values to be reflected in the monitoring of the wreck and of the surrounding marine environment undertaken under these consents, including:

(i) To advise and make recommendations to the Consent Holder and the Regional Council on monitoring for change to risk, or threat, to ~~the cultural values of Otaiti / Astrolabe Reef~~; Cultural Values;

~~i.~~ To evaluate the data obtained from cultural and physical monitoring insofar as they relate to the ~~cultural values of Otaiti~~Cultural Values and the effects on ~~those values~~them of leaving the wreck on Otaiti and, in the event that adverse changes to effects on Cultural Values are identified, ~~advise the Consent Holder on possible monitoring or response or contingency measures or actions;~~

(ii) To advise and make recommendations to the Consent Holder and the Regional Council on possible monitoring or response or contingency measures or actions;

~~(ii)~~(iii) In the case of adverse changes to effects on Cultural Values being

identified, to advise and make recommendations to the Consent Holder and the Regional Council on the appropriateness of any proposed contingency measures ~~proposed by others~~;

~~(iii)~~(iv) To provide a means of liaison ~~and the ability to develop a partnership~~ between Maori who have a kaitiaki relationship with Otaiti ~~/ Astrolabe Reef~~ and the Consent Holder through providing a forum for discussion about the implementation of these consents;

~~(iv)~~(v) Being responsible for receiving requests for, and facilitating the provision of, any cultural ceremonies deemed appropriate by Maori who have a kaitiaki relationship with Otaiti ~~/ Astrolabe Reef~~;.

2.3 Membership of the KRG shall also include a representative of the Consent Holder.

2.4 Once the KRG is formed the Consent Holder shall provide details of, and any subsequent changes to, its membership to the Regional Council.

~~2.3~~2.5 The Consent Holder shall:

a) Facilitate and fund the administration of each formal meeting of the KRG. The first KRG meeting shall ~~convene within 3 months of the commencement of these consents and may meet before and~~ be held as soon as practicable after the establishment of the KRG. As a minimum the KRG shall meet after each monitoring round ~~(~~as ~~defined~~provided for in the Physical Environment Monitoring Plan~~) is undertaken. As a minimum, meetings shall be held at a sufficient frequency to ensure that the obligations of the KRG are met,~~ ("**Monitoring Round**"), but in any event shall not ~~be~~meet less than ~~one time~~twice per year for the first two years following the commencement of these consents, and at least annually thereafter.

b) Take minutes of the KRG meetings, which shall be forwarded to members and the Regional Council, within four weeks of each meeting being held.

c) Give members at least ~~3 weeks'~~three weeks' advance notice of the date, time and location of ~~the next~~ KRG meetings.

d) Facilitate the ~~inclusion~~dissemination of information to Maori who identify as having a relationship with Otaiti ~~/ Astrolabe Reef in the KRG~~ at any time during the period of these consents.

e) Ensure that the ~~agreed~~ outcomes from the KRG are available to other Maori groups and the ~~wider~~ public.

~~2.4~~2.6 The KRG may nominate one of its members ~~or a representative~~ to be a member of the ITAG.

~~2.5~~2.7 The Consent Holder shall meet the reasonable costs incurred by the KRG for providing the services required of it by these consents, subject to normal business practice of invoicing and accounting and in accordance with the MoU required under condition 2.1.

~~2.6~~2.8 For clarification, the Consent Holder may engage with Maori ~~representatives~~ who are not members of, or represented on, the KRG.

~~2.7~~2.9 The Consent Holder shall establish and maintain a register of parties wishing to receive information provided to the KRG and provide those parties with that information at the same time it is provided to the KRG, or as soon as possible following provision to the KRG. Those parties may provide feedback on the

information received to the Consent Holder and/or the Regional Council.

3 Independent Technical Advisory Group ("ITAG")

3.1 Within two months of the commencement of these consents, the Consent Holder shall, following consultation with the KRG (if established within this timeframe), nominate, for the approval of the Regional Council, the composition of the ITAG comprising at least four (4) ~~people.~~ persons.

3.2 The Consent Holder shall maintain, for the duration of these consents, the ITAG and will from time to time, add to, or replace, members of the ITAG ~~provided the requirements of Conditions 3.1, 3.3 and 3.4 are met.~~ in accordance with the following conditions. Any additional or replacement members of the ITAG shall be approved by the Regional Council.

3.3 Members of the ITAG shall be suitably qualified and experienced in at least the following areas: matauranga Māori, marine ecology, sediment and/or water quality, ecotoxicity, or human health.

3.4 In the event the KRG nominates a member under condition 2.6, the ITAG shall also include that nominee in addition to the four or more ITAG members required under condition 3.1, unless the KRG confirms to the Regional Council in writing that it considers that its nominee to be suitably qualified and experienced in matauranga Māori to fulfil that role on the ITAG.

3.5 The ITAG may recommend to the Regional Council that other specialists be seconded, or technical studies be commissioned, from time to time, for the proper exercise of the ITAG's functions. The decision on whether to act on such a recommendation will rest with the Regional Council after consultation with the Consent Holder.

3.6 The role of the ITAG is to provide the Regional Council with advice ~~and recommendations~~ to assist ~~the Council~~it to manage, supervise, and monitor the exercise of these consents in an integrated and coordinated manner. The ITAG may also provide advice and recommendations to the Consent Holder directly and to the KRG if requested. The functions and responsibilities of the ITAG shall include:

a) Reviewing and ~~advise~~advising the Regional Council and the Consent Holder on the suitability of the Physical Environment Reference Report and the Physical Environment Monitoring Plan to meet the purpose of these consents, as set out in condition A.3, having regard to the Guidelines in Appendix 1;

b) ~~Review~~Reviewing and ~~advise~~advising the Regional Council on the trigger values, circumstances or thresholds for implementation of response or contingency measures in the Physical Environment Monitoring Plan, having regard to the Guidelines in Appendix 1;

c) ~~Provide~~Reviewing the results of the monitoring required by these conditions, and providing technical advice to the Regional Council on the interpretation of ~~monitoring~~those results, including reporting on trends, identifying any matters of concern and recommending changes to the monitoring requirements;

~~a) Review the results of, and recommend changes to, the monitoring required by the conditions of these consents;~~

d) ~~Provide~~Providing recommendations on the need for, and form of, contingency measures where required, including recommendations on the appropriateness of any contingency measures proposed by the Consent Holder;

e) ~~Review~~Reviewing and ~~provide~~providing advice to the Regional Council (and, if requested, to the KRG) on the reports submitted by the Consent Holder; and

f) ~~Recommend~~Recommending to the Regional Council that a review of conditions be undertaken ~~for the purpose of avoiding, remedying or mitigating adverse effects on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage~~.

3.7 The ITAG shall meet before and after each ~~monitoring round (as defined in the Physical Environment~~ Monitoring ~~Plan)~~Round undertaken for the duration of these consents, and at other times as directed by the Regional Council.

3.8 The Consent Holder shall fund the administration of each formal meeting of the ITAG, as set out in condition 3.7, and shall meet all actual and reasonable costs incurred by the ITAG and actual and reasonable costs of any technical experts consulted by the Regional Council in order to fulfil their roles and responsibilities in terms of dealing with compliance with the ~~consent~~ conditions of these consents. This shall also include any costs associated with seconding other specialists to the ITAG or commissioning technical studies, as provided in condition 3.5.

3.9 Minutes shall be taken of the ITAG meetings, and shall be ~~agreed by~~ circulated to those present to confirm they are a true and ~~uploaded to~~ accurate record and forwarded to members, the ~~website required under Condition 4~~Consent Holder, the Regional Council, and the KRG within four weeks of each meeting being held.

~~3. MV RENA Website~~

~~3.1. The Consent Holder shall establish and maintain a dedicated website for the purpose of ensuring all information prepared under these conditions is publicly available. The following documents or reports must be uploaded to the website as soon as practicable and no later than 20 working days after being received or prepared by the Consent Holder:~~

~~a) The final approved copies of the Monitoring Plans and Physical Environment Reference Report, including any formal requests for amendments to those Plans, and if amended, the amended versions of these Plans;~~

~~b) The results of all monitoring and sampling undertaken pursuant to the Monitoring Plans, including all video records and visual survey reports and summaries of the results;~~

~~c) Any recommendations made by the ITAG or the KRG;~~

~~d) Minutes of the meetings of the ITAG and the KRG;~~

~~e) Any reports prepared under the Response and Contingency conditions, including any Regional Council reports or advice provided under those conditions;Wreck Access and Shoreline Debris Management Plans; and~~

~~f) The Annual Reports.~~

~~3.2. The Consent Holder shall maintain a register of persons and groups who wish to be notified of any material being uploaded to the website and shall notify those persons and groups within 5 working days of material being uploaded. The register must at all times include the Regional Council, the Harbourmaster, and the members of the ITAG and KRG.~~

~~Significant Storm Event~~

The Definition of Significant Storm Event has been moved to condition 8.2(d)

~~Physical Environment Reference Report ("PERR")~~

The conditions relating to the Physical Environment Reference Report have been moved to condition 6

MONITORING

4 Monitoring and Monitoring Plans

4.1 The Consent Holder shall provide the Regional Council with all monitoring reports, monitoring data, information, and survey data, required to be collected or undertaken under these consents. Such information shall also be provided in a timely manner to the ITAG and/or the KRG and others by way of a register of interested parties held as an electronic database by the Consent Holder.

4.2 Within four months of the commencement of these consents ~~(unless otherwise agreed with the Regional Council),~~, the Consent Holder shall submit to the Regional Council for its approval the following monitoring plans:

a) Cultural Monitoring Plan;

b) Physical Environment Monitoring Plan; and

c) Wreck Condition and Debris Monitoring Plan.

(together the "**Monitoring Plans**")

4.3 The Consent Holder may submit the Monitoring Plans either separately, or together in the form of a single document.

4.4 The Consent Holder shall undertake all monitoring in accordance with the approved Monitoring Plans.

Process for Amending the Monitoring Plans

4.5 Following the completion of any Monitoring Round, or at any other time on the recommendation of the ITAG or of the KRG, the Consent Holder may submit a request to amend the ~~Monitoring Plans~~Physical Environment Monitoring Plan and/or the Wreck Condition and Debris Monitoring Plan (including where relevant, but not limited to, methodology, frequency, contaminants, parameters, and sampling sites, areas or locations) to the Regional Council for approval. ~~The Cultural Monitoring Plan may only be amended following formal consultation with, and feedback from, the KRG. Any recommendation of the KRG in respect of a proposed amendment to the Cultural Monitoring Plan that is not adopted must be identified and provided to the Council, together with an explanation as to why any such recommendation was not adopted, in an addendum to the proposed amended Cultural Monitoring Plan.~~

~~3.3. The amended Plan must provide (where relevant) for monitoring frequency and/or locations to be revised if the results of monitoring demonstrate a reversal of an established trend, or otherwise unexpected monitoring results.~~

4.6 Following consultation with the KRG the Consent Holder may, at any time, submit a request to amend the Cultural Monitoring Plan to the Regional Council for approval.

~~4.6~~4.7 The Consent Holder may submit a request to the Regional Council to cease ~~some or all of the~~ Physical Environment Monitoring provided that:

a) The Consent Holder has undertaken a reduced sampling programme agreed by the Regional Council in accordance with condition 4.5.

b) The request to cease monitoring includes an allowance for the resumption of monitoring if so directed in writing by the Regional Council.

4.74.8 The Regional Council may request the Consent Holder to make amendments to one or more of the Monitoring Plans to ensure that the purpose of these consents outlined in condition A.3 are achieved. The Consent Holder shall amend the relevant Monitoring Plan(s) and submit it/them to the Regional Council for approval within 20 working days of receiving the request.

4.84.9 Where the Consent Holder submits an amended Monitoring Plan to the Regional Council for approval, if no response is received from the Regional Council within 20 working days then approval shall be deemed to have been given.

5 Cultural Monitoring Plan

Objectives of Cultural Monitoring

5.1 The objectives of Cultural Monitoring are to:

a) Monitor the effects over time on identified cultural values (including but not limited to mana, ara-wairua, mahinga kai, mauri and kaitiakitanga) of Maori who have a kaitiaki relationship with Otaiti (in these conditions referred to as the "**Cultural Values**") resulting from the implementation of these consents; and

b) Identify circumstances in which measures may need to be implemented to avoid, remedy or mitigate any adverse changes to effects on identified cultural valuesCultural Values at the wreck siteOtaiti and at customary fishing grounds around the wreck siteOtaiti, of Maori who have a kaitiaki relationship towith Otaiti, resulting from the implementationexercise of these consents; and

c) Include monitoring of species important to customary or cultural needs, including from customary fishing grounds around the site, of Maori who have a relationship to the siteOtaiti.

Minimum Requirements for the Cultural Monitoring Plan

5.2 The Cultural Monitoring Plan shall identify, as a minimum:

a) The role and responsibilities of parties who are to conduct the cultural monitoring;

b) The methodology to be employed in the cultural monitoring, including to minimise the risks to health and safety and the environment;

c) The Cultural Values/indicators to be monitored and any thresholds for actions to be taken to avoid, remedy or mitigate any adverse changes to effects on cultural valuesCultural Values resulting from the exercise of these consents;

d) Any components of the Monitoring Plans that provide information on the cultural values and indicators; and

e) A reporting mechanism for results of the cultural monitoring to the Consent Holder, who shall uploadprovide them to the website required under Condition 4. Regional Council.

6 Physical Environment Reference Report ("PERR")

6.1 The Consent Holder shall, within the first year of the commencement of these consents, produce a PERR. The purpose of the PERR is to establish a body of data that describes the environment as at the commencement of these consents against which future changes resulting from the exercise of these consents may be measured. The PERR shall take into account the Physical Environment Monitoring Plan's purpose and minimum requirements and shall be informed by the Guidelines in Appendix 1 to these conditions, and shall include, but not be limited to, the following:

a) An analysis, synthesis and review of the available data in respect of ecology, contaminants and the wreck to determine the baseline or reference point against which future changes that occur as a result of these consents can be assessed;

b) Mapping of reef habitats at a broad scale across Otaiti; and

~~a~~)c) Any recommendations as to any amendments to the Physical Environment Monitoring Plan ~~(PEMP)~~so that the results of the monitoring can be better assessed against the Reference environment.

6.2 The PERR shall be prepared by a suitably qualified and experienced person or persons, following consultation with the KRG and the ITAG and submitted by the Consent Holder to the Regional Council.

6.3 The Regional Council, on receipt of the PERR, shall provide it to the ITAG for its review in accordance with condition 3.6.

6.4 The Regional Council shall advise the Consent Holder of the outcome of the ITAG's review of the PERR and whether the Regional Council considers any further quantitative or qualitative data is required.

6.5 The Consent Holder shall undertake any further quantitative or qualitative surveys required by the Regional Council under condition 6.4, as soon as is reasonably practicable.

6.6 Once the PERR has been reviewed by the ITAG (condition 6.3) and any agreed recommendations have been implemented (condition 6.5), the report shall be available as a record of the baseline against which future comparisons can be made.

6.7 Prior to the commencement of the Monitoring Round following completion of the PERR, the Consent Holder shall review, and may amend, the Monitoring Plans, including the frequency of monitoring required, as necessary to reflect the PERR.

7 Physical Environment Monitoring Plan

Purpose of Physical Environment Monitoring

7.1 The purpose of Physical Environment Monitoring is to determine whether the exercise of these consents is resulting in, or is likely to result in, risks to human health, or significant adverse effects to ecology by:

a) Comparing the results of on-going monitoring to the PERR;

b) Measuring the concentration and location of contaminants in sediment and

biota on, and adjacent to, Otaiti~~/ Astrolabe Reef, including to determine whether the spatial extent of contaminants is increasing~~;

c) Assessing the effects of any on-going discharges of contaminants and any associated contamination on human health and/or ecology;

d) Measuring the scour/smother effects resulting from the movement of the wreck;

e) Assessing whether the expected long-term natural recovery of the ~~Otaiti / Astrolabe Reef~~ environment at Otaiti is occurring or being impaired;

f) Identifying circumstances in which ~~Level One, Level Two and Level Three responses are~~response, contingency, or (with regard to copper clove) offset mitigation measures or actions, may be required ~~under Conditions 11 to 13]~~;;

g) Establishing a framework for the assessment, reporting, feedback and review measures and the effectiveness of any response or contingency measures or actions undertaken; and

h) Using adaptive management principles to review and refine the monitoring programme.

Minimum Requirements for the Physical Environment Monitoring Plan

7.2 The Physical Environment Monitoring Plan shall be informed by the Guidelines in Appendix 1 to these conditions, and shall identify, as a minimum:

a) The role and responsibilities of parties who are to undertake the Physical Environment Monitoring;

b) The sampling methodology to be employed for Physical Environment Monitoring, where appropriate, including:

1 areas of scour or smother,

2 water quality,

3 sediment quality,

4 ecology including marine invertebrates and fish and species important to customary needs.

and the elements to be analysed from the different samples (unless otherwise amended in accordance with conditions 4.5 – 4.9);

c) The contaminants to be monitored including, as a minimum (unless otherwise amended in accordance with conditions 4.5 – 4.9):

1 Copper clove

2 Antifouling derived contaminants including copper applied in antifouling paint and Tributyltin (TBT) (including its consequential breakdown states);

~~1 Fluoride, as a tracer of sediment movement or as a contributor to multi-stressor effects.~~

d) Sampling locations, zones, areas and sites;

e) The circumstances, trigger values or thresholds for implementation of response or contingency measures or actions~~, and details as to how these circumstances, trigger values or thresholds have been determined as required by condition 9.2.~~;

~~a)~~ Frequency and duration of Physical Environment Monitoring, providing for a minimum of~~:~~

f) ~~Annual~~ annual sampling (unless otherwise amended in accordance with conditions 4.5 – 4.9).

~~An assessment following a Significant Storm Event in circumstances where the Wreck Condition and Debris Monitoring identifies that significant scouring, significant additional smothering and/or significant movement of the wreck in the vicinity of G18 and G19 has occurred (unless otherwise exempted by the Regional Council.~~

8 Wreck Condition and Debris Monitoring Plan

Purpose of Wreck Condition and Debris Monitoring

8.1 The purposes of Wreck Condition and Debris Monitoring are to:

a) Identify any changes to the condition of the wreck structure and the ~~associated~~former debris field, the extent of movement of the ~~shallower~~ bow pieces (LAT -30m and above) and significant changes in the stability or position of the wreck structure ~~on Otaiti / Astrolabe Reef~~, including those that may create recreational diving or navigational hazards;

b) To provide the Regional Council and the public with up-to-date information on the status of the wreck and any potential hazards; and

c) To identify aspects of the wreck condition that may ~~affect~~result in the ~~risk~~release of copper clove ~~release~~, or which present opportunities for the further recovery of copper clove.

Minimum Requirements for the Wreck Condition and Debris Monitoring Plan

8.2 The Wreck Condition and Debris Monitoring Plan shall identify, as a minimum:

a) The reference survey information in the PERR identifying the location and condition of the wreck against which any visual record will be compared;

b) The visual survey methodology and the recording methods (as a minimum still and video images);

c) Measures to ensure the health and safety of those conducting the survey and protection of the environment;

~~Provision for a visual survey programme to occur annually (which may occur at the same time as Physical Environment~~d) Frequency and duration of Wreck Condition and Debris Monitoring~~),~~, providing for:

(i) A minimum of annual monitoring (unless otherwise amended in accordance with conditions 4.5 – 4.9), and

(ii) Monitoring following a Significant Storm Event[2]; and

(iii) One month prior to the expiry of these consents;

e) The aspects of the wreck condition that will be surveyed including, as a minimum, changes in wreck structure, exposure of new debris, the extent of movement of the ~~shallower~~ bow pieces above LAT -30m and significant changes in the stability or position of the wreck structure on Otaiti ~~/ Astrolabe Reef~~;

f) The method and timeframes for informing the Regional Council and the Harbourmaster of any new recreational diving or navigational safety hazards;

g) How the visual surveys will be reported and communicated to the Regional

[2] For the purposes of these consents a 'Significant Storm Event' is a storm event with a significant wave height of more than 5.5m, recorded at the Port of Tauranga 'A' Beacon, as measured over a 10 minute interval.

Council and the ~~wider public, including as a minimum, placement of information on a dedicated website, preparation~~public; and ~~circulation of education material; and~~

h) A protocol for addressing any recreational diving or navigational safety hazards ~~in accordance with Condition 16.~~.

8.3 If any Wreck Condition and Debris Monitoring Report ~~recording the monitoring~~ identifies that significant scouring, significant additional smothering, and/or significant movement of the wreck in the vicinity of G18 and G19 has occurred then an assessment of the adverse effects of that scouring, smothering or movement shall be undertaken ~~shall be provided to~~in accordance with conditions 9.3 – 9.6 (unless otherwise exempted by the Regional Council~~, Harbourmaster, ITAG and KRG within one month of the completion of each visual monitoring round (including following a Significant Storm Event)~~.

~~3.4. A final video record of the entire wreck structure and associated debris field and a visual survey report shall be provided to the Regional Council within 10 working days of the expiry of the consent.~~

9 RESPONSE AND CONTINGENCY MEASURES

Conditions 9.1 – 9.28, 10 and 11 replace the Regional Council's Contingency and Response measures conditions, practicability and completion reporting.

9.1 Response and contingency measures shall be implemented as follows:

a) A Level 1 ecology response as identified in condition 9.2, which is triggered if sampling, monitoring, and/or analysis identifies that the Level 1 (but not the Level 2) thresholds specified in Appendix 1 Table 2 of these conditions, or as otherwise specified in the Physical Environment Monitoring Plan), are being exceeded;

b) A Level 2 ecology and cultural response as identified in conditions 9.3 – 9.6, which is triggered where the:

(i) sampling, monitoring, and/or analysis identifies that the Level 2 thresholds specified in Appendix 1 Table 2 of these conditions (or as otherwise specified in the Physical Environment Monitoring Plan), are being exceeded; and/or

(ii) Cultural Monitoring identifies that the thresholds for actions to be taken to avoid, remedy or mitigate adverse changes to effects on Cultural Values identified in the Cultural Monitoring Plan have been exceeded.

c) A copper recovery response as identified in conditions 9.7 – 9.10, which is triggered upon discovery of a significant release of copper clove.

d) A human health response as identified in conditions 9.11 – 9.18, which is triggered where the sampling, monitoring, and/or analysis demonstrates that there is, or is likely to be, a risk to human health.

e) A debris response as identified in condition 9.19, which is triggered in the event that further debris is exposed or relocated to a depth of less than -30m LAT.

f) A navigational hazard response as identified in conditions 9.20 – 9.26.

g) A diver safety response as identified in conditions 9.27 – 9.28.

Advice note: What constitutes a 'significant release of copper clove' shall be determined by the Regional Council, following advice from the ITAG.

Ecology: Level 1 response

9.2 A Level 1 Ecology response shall include, where relevant, the following:

a) Re-analysis of samples if it is considered appropriate by the Consent Holder following consultation with the ITAG, the KRG and the Regional Council;

b) Further investigation that may include additional sampling, monitoring, and/or analysis to determine the likelihood, extent, and significance of any effects and, following consultation with the ITAG, the KRG and the Regional Council, the response shall identify whether any further action is required, unless any re-analysis indicates that no further investigation is required;

c) Following the further investigation, the production of a report to the Regional Council, the KRG and the ITAG summarising the results of the further investigation and recommending (with reasons) that:

(i) No further action be undertaken; or

(ii) Additional or modified monitoring requirements be included in the Physical Environment Monitoring Plan and/or the next Monitoring Round including, if necessary, the timing of that monitoring; or

(iii) Escalation to a Level 2 ecological response, in which case conditions 9.3 – 9.6 shall apply;

d) Provided that, if on receipt of the Consent Holder's report the Regional Council determines, following consultation with the ITAG that, notwithstanding the recommendations of the report, escalation to a Level 2 ecological response is required, then conditions 9.3 – 9.6 shall apply;

e) Provided that, if at any point the re-analysis or the further investigation indicates that there is, or is likely to be, a risk to human health then the human health response under conditions 9.11 – 9.18 shall be immediately required.

Ecology and Cultural: Level 2 response

9.3 A Level 2 response shall include, where relevant, the following:

a) The identification and assessment by the Consent Holder, in collaboration with the ITAG and the KRG, of the options available to address the identified or likely adverse effects. The options may include recovering or containing any contamination causing such effects or, if not practicable, any alternative contingency measures to address the increased contaminant levels and/or adverse effects if the contamination cannot practicably be recovered or contained.

b) The Consent Holder shall submit a report (**"Response Report"**) to the Regional Council as soon as practicable, and no later than three months following the receipt of the monitoring report that initiated the Level 2 response (or as otherwise agreed with the Regional Council), that includes:

(i) The circumstance, condition, trigger or threshold that has been activated or exceeded that resulted in the response;

(ii) A description of work involved in the response, including, but not limited to, reanalysis, further monitoring, and/or further analysis;

(iii) Details as to the options identified and assessed by the Consent Holder under condition 9.3(a) including any alternative response or contingency action;

(iv) Recommendations (and reasons), including, but not limited to, whether or not further action is required; and whether the monitoring plan should be amended.

(v) With regard to the release of copper clove that is deemed to be less than significant but that has, or is likely to have, a significant adverse ecological effect, recommendations (and reasons) for any practicable response or contingency action or, if the recommendations cannot be implemented, offset measures;

(vi) Where actions are recommended by the ITAG or the KRG and the Consent Holder does not adopt those recommendations, the Response Report shall also include the following:

1. The recommendations made by the ITAG or the KRG not adopted by the Consent Holder;

2. The reasons why those recommendations are not adopted or proposed to be implemented;

(vii) Consideration of the practicability of any recommended actions taking into account the matters in condition 10.1.

(viii) A programme of overall actions and a timeframe for implementation of any response and contingency actions to be undertaken.

9.4 The Regional Council shall, within 30 working days of receiving the Response Report, provide the Consent Holder with a determination in respect of the proposed actions ("**Contingency Determination**"). In making its Contingency Determination, the Regional Council may assess the adequacy of the Response Report and any proposed response or contingency actions required taking into account the matters in condition 10.1, and:

a) Approve the Consent Holder's proposed course of action; and/or

b) Identify any alternative or additional response, or contingency actions or, with regard to copper clove, offset measures required if, in the view of the Regional Council, the measures proposed by the Consent Holder are inadequate; and/or

c) Engage the assistance of the ITAG, the KRG, or any other independent expert.

9.5 The Consent Holder shall then implement, as soon as is reasonably practicable, the course of action required by the Contingency Determination.

9.6 If at any point, re-analysis or further investigation indicates that there is, or is likely to be a risk to human health, then the Human Health Response under conditions 9.11 – 9.18 shall be immediately required.

Copper clove release response

9.7 In the event that a significant release of copper clove is discovered:

a) The Consent Holder shall recover that copper clove as soon as is practicable in accordance with the Rena Project Copper Recovery Report[3] or other methodology proposed by the Consent Holder and approved by the Regional Council; or

[3] Rena Project Copper Recovery Report, TMC Marine Consultants, April 2015 and Rena Project Copper Recovery Addendum Report, TMC Marine Consultants, October 2016.

b) If, in the opinion of the Consent Holder, the copper clove cannot practicably, or should not, be recovered (for example because to do so would cause greater adverse ecological effects than leaving it), then conditions 9.8 – 9.10 shall apply.

9.8 If copper clove is not proposed to be recovered the Consent Holder shall, within three months of discovering the copper clove (or a later date as agreed with the Regional Council), provide to the Regional Council for its approval a report ("**Copper Response Report**") prepared by a suitably qualified and experienced person or persons in consultation with the ITAG and the KRG identifying:

a) The location and estimated volume of copper clove;

b) The recovery methods considered;

c) The reasons why the copper clove cannot practicably, or should not, be recovered. The practicability of copper clove recovery shall consider the matters identified in condition 10.1;

d) Whether any alternative or offset mitigation is proposed to address the copper clove deposit, including a timeframe for implementation of the mitigation; and

e) Where actions are recommended by the ITAG or the KRG, and the Consent Holder does not adopt those recommendations, the report shall also include the following:

(i) The recommendations made by the ITAG or the KRG not adopted by the Consent Holder;

(ii) The reasons why those recommendations are not adopted or proposed to be implemented.

9.9 The Regional Council shall, within 30 working days of receiving the Copper Response Report, provide the Consent Holder with its determination in respect of the Copper Response Report ("**Copper Contingency Determination**"). In making its Copper Contingency Determination, the Regional Council may assess the adequacy of the Copper Response Report and any proposed response or contingency actions required taking into account the matters in condition 10.1, and:

a) Approve the Consent Holder's proposed course of action; and/or

b) Identify any alternative or additional response, or contingency actions, or offset measures required if, in the view of the Regional Council, the measures proposed by the Consent Holder are inadequate; and/or

c) Engage the assistance of the ITAG, the KRG, or any other independent expert.

9.10 The Consent Holder shall then implement, as soon as is reasonably practicable, the course of action required by the Copper Contingency Determination.

Human health response

9.11 The trigger for the implementation of a human health response shall be where the sum of organotins expressed as tin content in finfish, rock lobster, shellfish and urchins (kina) exceeds 0.04 mg/kg wet weight.

9.12 If the monitoring results demonstrate that there is a risk to human health in accordance with condition 9.11, the Consent Holder shall immediately:

a) Notify the Regional Council, Toi Te Ora (Bay of Plenty District Health Board), the ITAG and the KRG.

b) Provide all the information it holds that may be relevant to the identified risk to human health to those entities.

c) Provide any assistance it reasonably can to those entities to assist them in understanding the identified risk to human health.

d) Implement, or assist in the implementation of, any actions determined by Toi Te Ora as being required to respond to the risk to human health.

9.13 On completion of the immediate response in accordance with condition 9.12 the Consent Holder shall prepare a report ("**Human Health Response Report**") for submission to the Regional Council. The Human Health Response Report shall be prepared as soon as practicable and no later than three months following the immediate response (or as otherwise agreed with the Regional Council).

9.14 In preparing the Human Health Response Report the Consent Holder shall:

a) Engage with the KRG and consider how any additional information and notice should be given to tangata whenua.

b) Undertake further analysis as may be recommended by Toi Te Ora, the results of which shall be included in the report.

c) Give regular updates to the Regional Council, Toi Te Ora, the ITAG and the KRG as to its progress in undertaking further analysis and the production of the Human Health Response Report.

d) Consult with the ITAG, the KRG and the Regional Council.

e) Collaborate with Toi Te Ora.

9.15 The Human Health Response Report shall include:

a) A description of the work undertaken in the immediate response and recommendations (with reasons) for any further response or contingency actions proposed to address the risk to human health. Further response or contingency actions may include, but are not limited to, reanalysis, further monitoring, and/or further analysis and recommendations may include whether the Monitoring Plans should be amended.

b) Where further response or contingency actions are proposed, a programme and timeframe for implementation of those response or contingency actions.

c) Details of the collaboration with Toi Te Ora including any recommendations made.

d) Details as to the options considered by the Consent Holder to address the risk to human health including any alternative response or contingency action.

e) Where actions are recommended by the ITAG or the KRG, and the Consent Holder does not adopt those recommendations, the Human Health Response Report shall also include the following:

(i) The recommendations made by the ITAG or the KRG not adopted by the Consent Holder; and

(ii) The reasons why those recommendations are not adopted or proposed to be implemented;

f) Consideration of the practicability of any recommended actions taking into account the matters in condition 10.1.

9.16 The Regional Council shall, within 30 working days of receiving the Human Health Response Report, provide the Consent Holder with a determination in respect of the proposed actions ("**Human Health Contingency Determination**").

9.17 In making its Human Health Contingency Determination the Regional Council may assess the adequacy of the Human Health Response Report and any further proposed response or contingency actions required taking into account the matters in condition 10.1, and:

a) Approve the Consent Holder's proposed course of action; and/or

b) Identify any alternative or additional response, or contingency actions required if, in the view of the Regional Council, the measures proposed by the Consent Holder are inadequate; and/or

c) Engage the assistance of Toi Te Ora, the ITAG, the KRG, or any other independent expert.

9.18 The Consent Holder shall then implement, as soon as is reasonably practicable, the course of action required in the Human Health Contingency Determination.

Debris response

9.19 In the event that the Wreck Condition and Debris Monitoring Report shows that further debris has been exposed or relocated to within a depth of less than LAT -30m when compared to the PERR, the Consent Holder shall remove as much as is practicable any plastic beads, TCCA canisters, aluminium ingots and inorganic material (such as tyres and plastic materials), unless otherwise agreed to in writing by the Regional Council. Under this condition consideration shall be given to the practicability of the response in accordance with condition 10.1.

Navigation safety response

9.20 In the event that the Wreck Condition and Debris Monitoring Report, or any other relevant report, shows that any part of the remains of the wreck:

a) Has risen to be less than LAT -1m; or

b) Would otherwise constitute a hazard to navigation;

The Consent Holder shall immediately notify the Regional Council and the Harbourmaster and shall within 30 working days provide to the Regional Council a report (the "**Navigation Safety Report**") prepared by a suitably qualified and experienced person in consultation with the KRG identifying a course of action for the Regional Council's approval that may include:

a) The removal of the hazard; and/or

b) Providing current bathymetric information or issuing an appropriate notice to mariners; and/or

c) Any other appropriate response.

9.21 Any course of action considered under condition 9.20 shall take into account the practicability of implementing such action in accordance with condition 10.1.

9.22 The Regional Council shall, on receipt of the Navigation Safety Report under condition 9.20 and following consultation with the Harbourmaster, assess the adequacy of the Navigation Safety Report and its proposed course of action taking into account the matters in condition 10.1 and:

a) Approve the Consent Holder's proposed course of action; or

b) Identify any alternative or additional actions required if, in the view of the Regional Council, the measures proposed by the Consent Holder are inadequate; or

c) Determine that no further action is required.

9.23 The Regional Council shall advise the Consent Holder of the outcome of its assessment (the "**Navigation Safety Contingency Determination**") within 30 working days of receiving the Navigation Safety Report.

9.24 The Consent Holder shall then implement, as soon as is reasonably practicable, the course of action required in the Navigation Safety Contingency Determination.

9.25 The Consent Holder shall report to the Regional Council and the Harbourmaster on completion of the approved course of action. The Harbourmaster shall review the outcome to ensure that the approved course of action has been undertaken.

9.26 The outcome of the works shall also be notified to the KRG, the ITAG and dive and fishing clubs.

Diver safety response

9.27 In the event that the visual survey undertaken during the Wreck Condition and Debris Monitoring identifies new diver entanglement hazards located within a depth of less than LAT -30m, the Consent Holder shall:

a) Immediately notify the Regional Council and the Harbourmaster; and

b) Following consultation with the KRG and dive clubs as soon as practicable, undertake works to remove or otherwise make the entanglement hazards safe.

9.28 The Consent Holder shall notify the Regional Council, the Harbourmaster, the KRG and dive clubs on completion of the works.

10 Practicability

10.1 Where any response and/or contingency measure requires consideration of the practicability of any action, practicability shall be considered taking into account (but not being limited to) the following matters:

a) Any risk to human health and safety or significant adverse effects that may be caused by the implementation of the response or contingency actions;

b) The accessibility of the wreck site including water depth;

c) Whether the costs and/or the effects on the environment of implementing the response or contingency actions are proportionate to the risks posed and/or the benefit likely to be achieved;

d) Any impact on the rights or interests of other persons.

11 Completion Reporting

11.1 On the completion of any response or contingency action, or (with regard to copper clove) any offset mitigation measure, under any of the conditions of these consents, the Consent Holder shall provide a report to the Regional Council recording the circumstances and actions undertaken.

ACCESS AND MANAGEMENT PLANS

12 Wreck Access Plan

12.1 The Consent Holder shall continue to implement the approved Wreck Access Plan ("**WAP**") dated 25 August 2015.

12.2 The purpose of the WAP is to ~~outline the measures~~provide information and guidelines for visitors to ~~the~~ Otaiti ~~/ Astrolabe Reef~~ and ~~shall provide~~ the approved WAP provides for~~, as a minimum~~:

a) The provision of marker buoys in accordance with the current WAP to be installed and maintained at the wreck site for a minimum of two (2) years from the date of public access being reinstated to Otaiti ~~/ Astrolabe Reef~~ (see Advice Note 3);

b) The provision of underwater visual surveys of the wreck and debris field to be undertaken following a Significant Storm Event at ~~Astrolabe Reef~~Otaiti (refer to ~~the Wreck Condition and Debris Monitoring Plan conditions~~condition 8.2(d)) and how the details of the surveys will be communicated ~~with~~to the Harbourmaster and the public; and

c) ~~Any proposed~~The provision of a website to be updated regularly by the Consent Holder for the duration of these consents providing relevant details on the current status of the wreck and any known areas of potential hazards, providing the most up to date survey information.

12.3 The Consent Holder may propose changes to the WAP which shall be prepared by a suitably qualified and experienced person~~(s),~~ following consultation with the KRG, the ITAG and dive and fishing clubs and be submitted ~~by the Consent Holder~~ to the Regional Council for approval ~~before being implemented.~~. If no response is received from the Regional Council within 20 working days then approval shall be deemed to have been given by the Regional Council.

13 Shoreline Debris Management Plan

13.1 The Consent Holder shall continue to implement the approved Shoreline Debris Management Plan ("**SDMP**") dated ~~(which includes as a minimum the monitoring of plastic beads).~~ 3 March 2016.

13.2 Any proposed changes to the SDMP shall be prepared ~~and certified~~ by a suitably qualified and experienced person~~(s)~~ and submitted by the Consent Holder to the Regional Council for approval ~~before being implemented.~~. If no response is received from the Regional Council within 20 working days then approval shall be deemed to have been given.

Advice Note: The Consent Holder has offered Conditions 13.1 and 13.2 and agrees to be bound by them pursuant to the Augier principle.

REPORTING

14 Monitoring and Annual Reports

Monitoring Reports

14.1 Within 12 months of the commencement of these consents the PERR shall be

provided to the Regional Council in accordance with condition 6.1.

14.2 A Physical Environment Monitoring Report ("**PEMR**") recording the monitoring undertaken, including details of sampling, analysis, evaluation and recommendations, and whether any response under condition 9 has been initiated, shall be provided to the Regional Council, the ITAG and the KRG within three months of completion of any sampling round (subject to the provisions of analytical results in a timely manner to achieve this deadline).

14.3 A Cultural Monitoring Report ("**CMR**") recording the evaluation undertaken shall be completed within one month of the PEMR being provided to the KRG and provided to the Regional Council and the ITAG.

14.4 A Wreck Condition and Debris Report ("**WCDR**") recording the monitoring undertaken shall be provided to the Regional Council, the Harbourmaster, the ITAG and the KRG within one month of the completion of any monitoring undertaken in accordance with the Wreck Condition and Debris Monitoring Plan.

Annual Report

14.5 By 31 July of each year, the Consent Holder shall produce and provide to the Regional Council, the ITAG and the KRG an Annual Report that provides a summary of:

a) The monitoring results of all monitoring undertaken in accordance with the Monitoring Plans since the previous Annual Report;

b) The outcomes of any recommendations~~, advice~~ from the KRG or the ITAG and/or directions from the ~~KRG, the ITAG, and / or the~~ Harbourmaster;

c) The state of compliance with the conditions of these consents; and

d) Where relevant, any responses or contingency measures undertaken.

RESTORATION AND MITIGATION

15 Restoration and Mitigation Funds

15.1 The relationship which the residents, landowners and tangata whenua of Motiti Island have with Otaiti ~~(Astrolabe Reef)~~ is to be recognised and provided for by the Consent Holder through:

a) The establishment of a fund of $1.5 million to be administered by the Consent Holder.

b) The purpose of the fund is to provide for, or assist in, the establishment of projects for the benefit of the island community, in particular the environmental, cultural and/or social wellbeing of the community. Projects shall be located on Motiti, or within the sea, or on the rocky islets immediately around the island.

15.2 The relationship which the iwi of Te Arawa ki Tai have with Otaiti ~~(Astrolabe Reef)~~ is to be recognised and provided for by the Consent Holder through:

a) The establishment of a fund of $1.25 million to be administered by the Te Arawa ki Tai Trust.

b) The purpose of the fund is to assist in the establishment of projects for the benefit of Te Arawa ki Tai, in particular for the environmental, cultural, and/or social wellbeing of the community. The establishment of Te Whare o Ngatoroirangi, an institute to develop kaitiakitanga through the education of

tamariki in marine science and protection of local ecosystems and taonga would meet this purpose.

15.3 The relationship which the iwi and hapu of Tauranga Moana, have with the moana is to be recognised and provided for by the Consent Holder through:

a) The establishment of a fund of $250,000 to be administered by the Consent Holder.
b) The purpose of the fund is to provide for or assist in the establishment of projects for the benefit of the Tauranga Moana community, in particular the environmental, cultural and/or social wellbeing of the community.

15.4 The actual and potential effects of responding to, and recovery from, a contingency event by the coastal volunteer community of the Bay of Plenty is to be recognised and provided for by the Consent Holder through a contribution of $440,000 to the surf lifesaving clubs within the Bay of Plenty area.

15.5 The actual and potential social effects of leaving the remains of the wreck of the Rena on Otaiti ~~(Astrolabe Reef)~~ are to be recognised and provided for by the Consent Holder through:

a) The establishment of a contestable fund of $160,000 to provide for annual research and education scholarships for the duration of these consents. The fund is to be administered by the Consent Holder.

b) The purpose of the scholarships is to provide for education and/or research involving the marine environment, seamanship or navigation for residents of the ~~wider~~ Bay of Plenty.

Advice Note: The Consent Holder has offered Conditions 15.1 to 15.5 and agrees to be bound by them pursuant to the Augier principle.

16 Bond and Letter of Undertaking

16.1 Prior to the commencement of these consents, the Consent Holder shall post and maintain a Bond in favour of the Regional Council of **Six Million, Three Hundred and Fifty Thousand New Zealand Dollars ($6,350,000)** for the purposes set out in condition 16.4, to be maintained for the duration of these consents, and subject to any review, amendment, or discharge in accordance with conditions 16.6, 16.7 and 16.12.

16.2 At the expiry of these consents, the amount of the Bond shall be reduced to reflect that the conditions of consent will no longer need to be complied with beyond the term of these consents. Provided that the amount of the Bond is not amended or discharged in accordance with conditions 16.6, 16.7 and 16.12 prior to the expiry of these consents, the amount of the Bond shall reduce to **Two Million, Nine Hundred Thousand New Zealand Dollars ($2,900,000)** on the expiry of these consents, and shall be maintained for a period of up to ten (10) years after the expiry of these consents.

16.3 In addition to the Bond, the Consent Holder shall also provide surety in the form of a Letter of Undertaking from The Swedish Club in the sum of Five Million New Zealand Dollars ($5,000,000) in favour of the Regional Council ("**Letter of Undertaking**"), to be maintained for a period up to ten (10) years after expiry of these consents for the purposes set out in condition 16.5.

Purposes

16.4 The Bond shall be for the following purposes:

a) To ensure compliance with the conditions of these consents and the Monitoring Plans and remedying any situations arising due to non- compliance;

b) To enable the monitoring of the wreck site following the expiry of these consents at a minimum of five yearly intervals (i.e. Years 15 and 20) and to enable the undertaking of visual surveys following expiry of these consents at Years 15 and 20 and following any Significant Storm Event to determine whether there are, or are likely to be, ongoing effects on the environment arising from the exercise of these consents;

c) To ensure that contingency measures (including additional monitoring ~~where required~~) required in order to address environmental effects are undertaken where necessary;

d) To remedy any unforeseen effects on the environment arising from the exercise of these consents and which become apparent for a period of up to ten (10) years after the expiry of these consents (including any effects identified in the report required under condition 16.11);

e) The Bond is not for the purpose of fulfilling any conditions or undertaking any contingency measures relating to removal of the bow pieces of the wreck, as that purpose is to be fulfilled by the Letter of Undertaking in accordance with condition 16.5 below.

16.5 The Letter of Undertaking shall be ~~in order~~ to provide for the undertaking of any contingency measures relating to removal, cutting down or relocation of bow pieces of the wreck that ~~is~~may be required in terms of these conditions to address adverse effects arising during the term of these consents and for a period of up to ten (10) years after the expiry of these consents.

Review

16.6 The amount of the ~~Consent Holder's bond~~Bond may be reviewed every two years for the duration of the Bond. If, on review, the amount of the Bond to be provided ~~to~~by the Consent Holder is greater than the sum secured by the ~~current bond~~existing Bond, then within 30 days of the Consent Holder being given written notice of the new amount to be secured by the Bond, the Consent Holder shall execute and lodge with the Regional Council a variation of the existing Bond or a new Bond for the amount fixed on review by the Regional Council.

16.7 The Consent Holder may apply to have the Bond amended or discharged at any time, in which case the Regional Council shall advise the Consent Holder of its decision on the application within 60 days of receiving the application. An application by the Consent Holder to amend the amount of the Bond should be supported by a risk assessment.

Bond

16.8 The Bond shall be in favour of the Regional Council as a cash bond with a bank approved by the Regional Council and carrying on business in New Zealand. The Bond shall be in a form approved in advance by the Regional Council and, subject only to these conditions, be on the terms and conditions required by the Regional Council (the **"Bond Agreement"**).

~~3.5.~~

16.9 The Consent Holder may not exercise these consents until the Regional Council approves the form, terms and conditions of the Bond Agreement and the Bond is in place. The Consent Holder shall forward evidence to the Regional Council, at the end of each twelve month period thereafter, that the Bond remains in place.

16.10 The Bond Agreement shall provide that:

a) The Bond shall be an irrevocable and unconditional bond maintained in favour of the Regional Council, on terms and conditions acceptable to the Regional Council, for the purposes and period set out in conditions 16.1, 16.2 and 16.4;

b) The Consent Holder and the surety remain liable under the Bond for compliance with the conditions of these consents and for the remedy of any significant adverse effects on the environment arising from the exercise of these consents and which become apparent for a period up to ten (10) years after the expiry of these consents;

c) In the event that it is necessary for the Consent Holder to remedy significant adverse effects, these are to be remedied to the satisfaction of the Regional Council;

d) The Bond may be used by the Regional Council for the purposes set out in condition 16.4, being to carry out any works or actions required under these conditions of consent or to carry out any response or contingency measures necessary to remedy any significant adverse effects on the environment arising from the exercise of these consents. The funds secured by the Bond shall not be called upon and utilised for that purpose during the term of these consents unless, at the Regional Council's discretion, the Consent Holder has first been given the opportunity to carry out such work within a reasonable time and failed to do so;

e) The Bond shall enable multiple calls upon the Bond by the Regional Council at any time for such sums as the ~~Chief Executive~~ Regional Council shall certify as being reasonably necessary to enable ~~the Regional Council it~~ to complete any of the bonded obligations;

f) The Bond shall require payment to Regional Council upon demand and without condition or proof. The Bond shall require payment to Regional Council of the full amount demanded without any set-off, deduction or withholding on any account;

g) The Consent Holder is to pay the Regional Council's reasonable costs associated with such approval and execution of the Bond;

h) The Consent Holder's liability is not limited to the amount of the Bond; and

i) The Consent Holder is to pay the Regional Council's reasonable costs associated with investigation under, and implementation of, the Bond. For the avoidance of doubt, these costs include the Regional Council's costs to monitor and investigate whether any significant adverse effects on the environment are arising from the exercise of these consents for a period of up to ten (10) years after the expiry of these consents in accordance with condition 16.4(b).

16.11 No later than one (1) year before these consents expire, the Consent Holder shall prepare and provide to the Regional Council a review report summarising and interpreting the monitored effects and changes in comparison to ~~these contemplated~~the environment as described in the ~~application for resource consent and accompanying Assessment of Environmental Effects.~~PERR. The purpose of that report is to determine whether there are, or are likely to be, ongoing significant

adverse effects on the environment after the expiry of these consents, and if so, any remediation work and/or measures to address those.

16.12 The Regional Council shall release the Bond if it is satisfied at its discretion that:

a) The Consent Holder has complied with all the conditions of these consents; and

b) There are no ongoing significant adverse effects on the environment; and

c) If ongoing significant adverse effects have been identified, that these effects have been remedied.

16.13 The Consent Holder shall not transfer these consents to any person unless prior to the transfer, the transferee enters into and thereafter maintains a Bond in favour of the Regional Council on the same terms and conditions required under these conditions and any Bond Agreement.

Letter of Undertaking

16.14 The Letter of Undertaking shall:

a) Be expressed, for the amount and period identified in condition 16.3, as unconditional and irrevocable;

b) Provide for the amount to be paid to the Regional Council on demand (including multiple and/or successive demands, by the Regional Council, provided that, during the term of these consents, the Consent Holder has first been given the opportunity to carry out any work the Letter of Undertaking is to be called for, within a reasonable time and has, in the Regional Council's opinion, failed to do so;

c) Acknowledge, notwithstanding the surety provided, that the Consent Holder's liability is not limited to the amount of surety provided;

d) Provide that the Regional Council's reasonable costs associated with making or enforcing any demand of surety, including reasonable costs associated with investigation under, and implementation of, the Letter of Undertaking, will be paid by The Swedish Club; and

e) Provide that the Letter of Undertaking is to lapse after the period of ten (10) years after expiry of these consents.

16.15 At any stage prior to the Letter of Undertaking lapsing in accordance with condition 16.14(e), the Regional Council may release the surety by return of the Letter of Undertaking or agree that a lesser amount of security be required at its discretion.

16.16 The Consent Holder shall not transfer these consents to any person unless prior to the transfer, the transferee enters into and thereafter maintains a surety in favour of the Regional Council on the same or similar terms and conditions required under these conditions to the satisfaction of the Regional Council.

REVIEW

17 Review of Consent Conditions

17.1 The Regional Council may, within three (3) months of receiving information from any surveys or other monitoring data or reports serve notice on the Consent Holder under

section 128(1)(a) of the Resource Management Act 1991, of its intention to review the conditions of these consents. The purpose of such a review is to ensure that the monitoring regime and surveys are appropriate and can if necessary be extended.

17.2 The Regional Council may, within two months of receiving the Annual Report (under condition 14.5), serve notice on the Consent Holder of its intention to review the conditions of this resource consent in order to deal with any adverse effect on the environment that occurs as a result of the exercise of these consents and which it is appropriate to deal with at a later stage.

17.3 The Regional Council's reasonable costs associated with any such review shall be recovered from the Consent Holder.

OTHER

18 Resource Management Charges

18.1 The Consent Holder shall pay the Bay of Plenty Regional Council such reasonable administrative charges as the Regional Council is entitled to charge under section 36 of the Resource Management Act 1991.

18.2 The Resource Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

19 Term

19.1 These consents shall expire on the tenth anniversary of their commencement.

Advice Notes

1. *Unless otherwise specified all monitoring records and notification required under consent conditions shall be directed to the Bay of Plenty Regional Council, PO Box 364, Whakatāne 3158, or fax: 0800 884 882 or email: notify@boprc.govt.nz. This notification shall include reference to the consent number 67891.*
2. *The Consent Holder is advised that non-compliance with consent conditions may result in enforcement action against the Consent Holder and/or their contractor(s).*
3. *The Consent Holder is advised that any surface mooring floats and Aids to Navigation shall be sourced for and by the Bay of Plenty Harbourmaster. The Regional Council will arrange for the production of surface mooring floats that permanently display 24 hour contact details for the Harbourmaster, for reporting any inappropriate behaviour or breaches of navigational bylaws on site.*
4. *'Regional Council' for the purpose of these consents is taken to mean the Chief Executive of the Regional Council or delegate.*

APPENDIX 1

Guidelines to inform the Preparation of the Physical Environment Reference Report and the Physical Environment Monitoring Plan

The following replaces Appendix 1 to the Council's submission version of conditions in its entirety.

Physical Environment Reference Report

Purpose: To establish a body of data that describes the environment as at the commencement of these consents against which future changes resulting from the exercise of these consents may be measured (condition 6.1).

The following information is available for development of the PERR:

1) **Environmental Chemistry**

Sediment chemistry data are available for the past 4-5 years through the scientific sampling programme. The locations of samples are the former debris field, wider on-reef and off-reef areas and reference locations.

The samples map the spatial and temporal distribution of contaminants on and adjacent to the wreck and Otaiti.

Studies have been conducted to delineate the spatial extent of effects of copper clove (around grid reference G18/19) on water quality. This information has been collected using Diffuse Gradients in Thin Film (DGT) samplers.

2) **Habitat**

A ground-truthed broad scale habitat (BSH) map has been established showing the distribution of major ecological habitats across Otaiti. The map identifies the location of wreck pieces.

The BSH map allows for the measurement of change in the distribution and condition of ecological habitats.

3) **Community**

Three pieces of benthic community ecology research have been conducted at Otaiti since the 2011 grounding:

- A benthic survey conducted by the Toi Ohomai (formerly the Bay of Plenty Polytechnic) and the University of Waikato in August 2012 as part of the Rena Long Term Recovery Programme;
- An ecological characterisation of Otaiti conducted by the Cawthron Institute and University of Waikato in February 2015; and
- A benthic survey conducted by the University of Waikato in August 2016.

This information provides a baseline for the ecology of Otaiti and allows for the assessment of ecological changes in time and space.

Settlement plate surveys were conducted in 2016 to examine potential impacts of water-borne contaminants on recruitment of benthic invertebrates.

4) **Biota**

Biota contaminant body burden data are available for the past 4-5 years. The locations of samples are the former debris field, wider on-reef and off-reef areas and reference locations.

The following ecotoxicity assays have been conducted:

- Imposex surveys, both on and adjacent to Otaiti;
- Urchin embryo assay on organisms from Otaiti and a reference location; and
- Sediment and elutriate assays at three trophic levels (microalgae, amphipods and mussel larvae) using sediment from the former debris field and reference locations.

Scope of Physical Environment Monitoring

Table 1 outlines the components, frequency, location and purpose of monitoring to be applied in physical environment monitoring. Table 2 sets out the trigger points for the purposes of the responses provided for in the conditions. Table 1 and Table 2 (and the Monitoring Plans) may be amended by the process set out in the conditions.

Table 1: Monitoring Components, Frequency and Purpose

Component	Frequency and Location	Purpose
Copper and TBT in sediment	Annually at current monitoring sites on and adjacent to Otaiti.	To confirm expectations of decreasing concentrations and spatial extent. For TBT some increase is expected in the short term. To determine if copper clove moves from current location.
TBT in biota (sea perch, urchins, rock lobster)	Annually for first five years at Otaiti. Frequency to be reviewed after five years.	Ecology: To determine if significant adverse effects are occurring. Human health: To confirm expectations of no exceedance of tissue concentrations above human health guidelines refer condition 9.11.
Scour	Visual survey of the reef around or adjacent to the main bow section and former debris field. Annually for first five years at Otaiti and after significant storm events. Frequency to be reviewed after five years.	To determine if bow pieces have become mobile so as to cause significant adverse effects on reef ecology.
Benthic community and imposex	At five and ten years, survey the benthic community at previously physically impacted and non-impacted sites at Otaiti, including settlement plate surveys Imposex surveys will be conducted at five and ten years both on and off Otaiti.	To confirm the ecological health of the reef (and seabed adjacent to the reef). To confirm expectations that benthic communities are not significantly affected by TBT.

Table 2: Thresholds to trigger Level 1 or Level 2 responses

Component	Level 1 Threshold	Level 2 Threshold
TBT in Sediment	• Any one sample being double the maximum recorded since 2013 within each zone (former debris field, outer reef, off-reef); or • 50% of samples within each zone exceed the maximum recorded during the previous two survey rounds.	• 50% of samples within each zone exceed double the maximum recorded in that zone during the previous two survey rounds.
Copper in Sediment	**Excluding G18/19** • Any one sample being double the maximum recorded since 2013 within each zone (former debris field, outer reef, off-reef); or • 50% of samples within each zone exceed the maximum recorded during the previous two survey rounds. **Within G18/19** • Any single sample exceeding 100,000 mg/kg.	**Excluding G18/19** • 50% of samples within each zone exceed double the maximum recorded in that zone during the previous two survey rounds. **Within G18/19** • Any single sample exceeding 300,000 mg/kg.
Scour	• Within each habitat type, a visual survey indicates >5% of the area of that habitat type is scoured.	• Within each habitat type, a visual survey indicates >15% of the area of that habitat type is scoured.
TBT in Biota	• Any one sample being double the maximum recorded since 2013; or • 50% of samples exceed the maximum recorded during the previous two survey rounds.	• 50% of samples exceed double the maximum recorded during the previous two survey rounds.

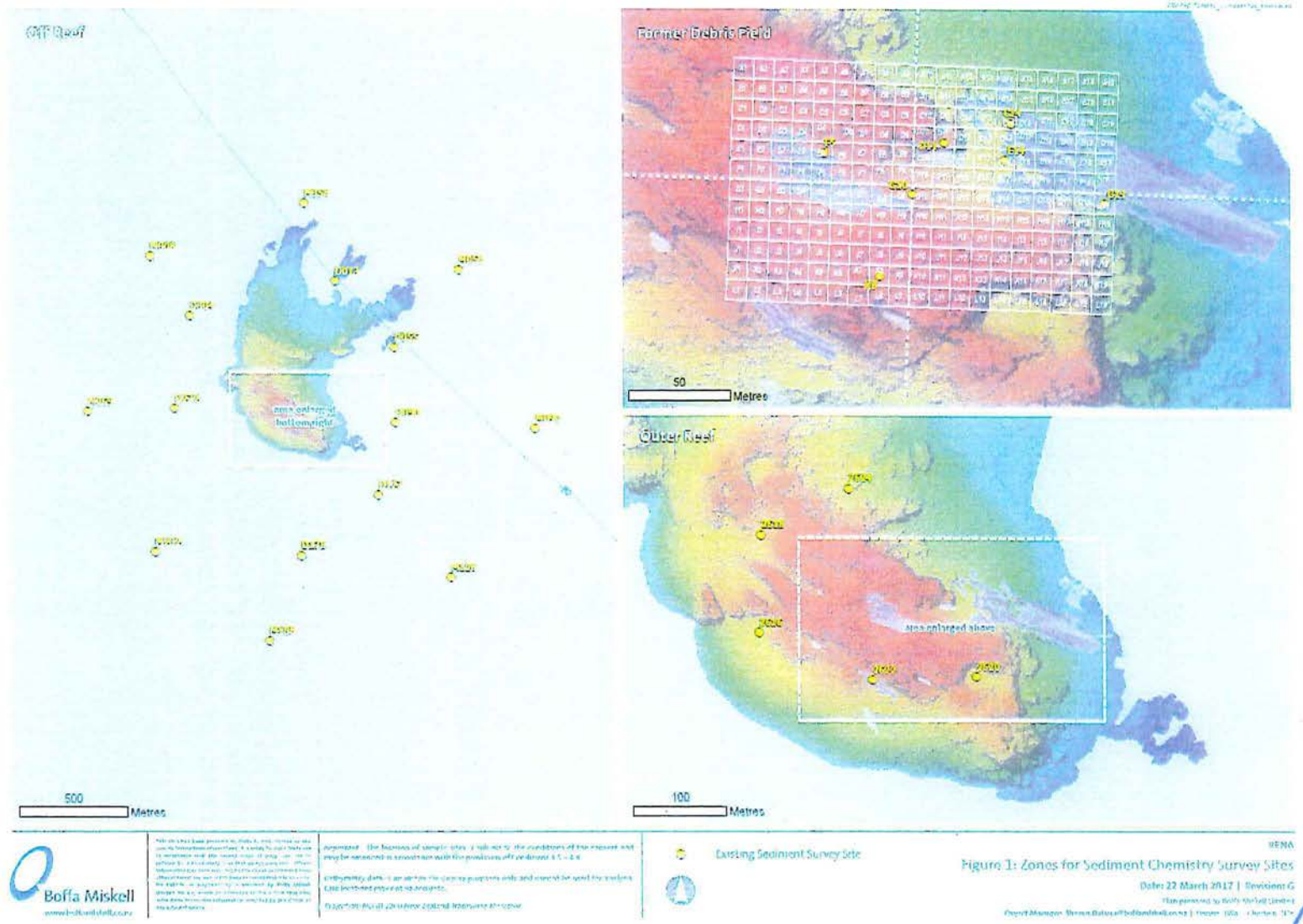


Figure 1: Zones for Sediment Chemistry Survey Sites

Commentary on Conditions

Preliminary

1. A.2: The consents authorise the discharges from the wreck – the discharges are not distinguishable in terms of future or otherwise. The cumulative discharges are addressed.

2. A.3 : The purpose of the *consents* is not to provide monitoring – it is the *conditions* that do this. The purpose of the consents is to permit the abandoning of the Rena and the discharge of contaminants.

    a. A.3: (b): The adverse effects identified through monitoring should be linked to identified trigger levels. These triggers lead to certain actions which are required to take place to mitigate the adverse effects in accordance with the relevant condition(s) which address that effect. In relation to adverse ecological effects these should be measured against trigger points to set in place appropriate stepped responses for mitigation purposes. Also the monitoring and management conditions also address adverse effects to navigational safety and access to the reef for recreational purposes including fishing and diving. These matters are not so clearly set out in this condition as they should be.

Kaitiaki reference Group (KRG)

3. 2: KRG

    a. The constitution should require

        - two representatives for the Ngāi Te Hapū/Te Patuwai who ahi kā to the island;
        - one representative for Tauwhao;
        - one representative for Te Arawa ki Tai;
        - one representative for the Tauranga Moana a Toi; and
        - one representative for the applicant.

    b. As an interim guide only the first appointment should consist of the following persons:

        - Mr Ranapia and Mrs Butler as representatives for Te Patuwai/ Ngāi Te Hapū;
        - one representative for Tauwhao;
        - Mr Te Kowhai or Mr Morehu as representatives for Te Arawa ki Tai;
        - a representative for the Tauranga Moana a Toi, say Mr Rolleston/Coffin/Ohia and
        - a representative for the applicant, ie Dr Paul-Burke/Mr Coffin.

4. 2.2: The purpose / role of the KRG: note that (d)(iii) given that advice on contingency methods, is covered in the preceding subparagraph, subparagraph (iii) should refer to the appropriateness of any proposed mitigation.

5. 2.5 (a): As a minimum the KRG will need to meet to provide input into the various plans etc required by the conditions of the consent and then after each monitoring round.

Website

6. Accepting that the KRG will need to establish communication with iwi and hapu there should be a requirement that a web site be established by the consent holder perhaps hosted within the Regional Council's website. The purpose being that it can provide a repository where information such as monitoring reports, timeline and process for action, management plans, decisions and recommendations of the various parties obligated under the conditions, including the Regional Councils resolution of matters concerning the conditions, are placed so that they can be access by the public generally. This will ensure transparent administration of the consent and an informed community which has broad benefit to issues of health, safety and cultural wellbeing.

   This requirement may obviate the need for condition 2.5(d) and (e) if this information is captured on the web site. Although a notification system so identified parties know when new information is available will be required with the direction to go to the website. Such notification would need to be made in sufficient time to obtain feedback prior to the KRG reporting its findings / making recommendations as required by the consents conditions.

   We see the redacted condition as addressing the website requirement although we accept some fine tuning might be desirable from the parties point of view.

Independent Technical Advisory Group (ITAG)

7. 3.7: ITAG should provide input into the initial formulation of plans required by conditions of consent as well as their obligations around review and monitoring.

Monitoring

8. There needs to be a clear obligation to comply with approved plans.

9. 4.8: Requirement to include KRG consultation and advice in the case of the Cultural Monitoring Plan.

10. 6 and 7: The methodology for monition the site through the Physical Environment Reference Report and Monitoring Plan shall include a suitable reference reef/site for verification of general trends not associated with the Rena Wreck.

11. The definition of a *Significant Storm Event* shall be reintroduced as a numbered condition rather than a footnote as it applies to these conditions of consent. The reason for this is to capture the definition if conditions require review. Further, the proposed definition shall be revisited in light

of the comments made by the Court in the decision and verified based on recent storm events prior to the issue of this decision.

Response and contingency measures

12. The outcome needs to be determined quicker than waiting for, in some cases, 4 months based on the current draft conditions. Waiting for up to 3 months on a level 2 response report is too long (9.3(b).

    There needs to be immediate notification of the Regional Council of a level 2 issue and the Council involved in the decision as to appropriate response. Also there needs to be a requirement for some remedial action such as in the case of a significant release of copper clove rather than another report. We invite the parties to consider how a significant release of copper clove could be identified at the outset – ie what triggers the decision needing to be made by the Council that it is significant and a timely response to that situation.

    Condition 9.7 (b) should rely on the opinion of the Council after advice from the Consent holder (and ITAG) that the copper clove cannot be practicably or should not be recovered.

Human Health Response

13. Requires at least a temporary public notification method. Could also provide onsite notice. Should be placed on Website. If there is indeed a risk to human health waiting for a response from Toi Te Ora may not be appropriate so some signal of the issue needs to be required to prevent public consumption of kai moana from the area until the issue and methodology for moving forward is resolved.

Bond

14. The bond will need to be recalculated to reflect this decision in relation to provision for removal of parts which might become practical for removal due to circumstances other than the need for removal to address navigation.

Advice note

15. An advice note is required to make reference to the other payment/settlement agreements which have been reached which address off-set mitigation. A list of those parties where such settlement has been reached would suffice.