Trans-Tasman Resources v Taranaki-Whanganui Conservation Board [2021] NZSC 127: A New "High-Water Mark" for Seabed Mining

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1. INTRODUCTION

On 30 September 2021, the Supreme Court released its much-anticipated judgment unanimously dismissing the appeal by Trans-Tasman Resources (TTR) in the long-standing legal dispute surrounding its application for seabed mining consents under the Exclusive Economic (Environmental Effects) Act 2012 (EEZ Act).[1] The proceedings have attracted considerable international and domestic interest from legal scholars and commentators,[2] in addition to the concerns of environmental non-government organisations, affected iwi, and commercial fishing parties who opposed TTR's application (opposing parties).[3] The judgment has far-reaching implications for marine management in terms of state implementation of international law obligations and Indigenous rights, including the importance of tikanga Māori (Māori law and custom) in Aotearoa

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1 *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 [*TTR case*].

2 D Anton and R Kim "Current Legal Developments: New Zealand" (2015) 30 The International Journal of Marine and Coastal Law 175; and "'New Zealand Ruling against Deep-Sea Mining Set a Global Precedent — Now Ardern Should Ban It" *The Guardian* (online ed, London, 4 October 2021) <www.theguardian.com>.

3 We note that there are a range of Māori organisations (such as rūnanga) and iwi/hapū/whānau involved in or affected by the proceedings, but here for consistency we adopt the Court's terminology of "affected iwi".

New Zealand. It provides valuable guidance and directions to decision-makers as to the scope and function of the EEZ Act, in line with New Zealand's international obligations, and Crown obligations under Te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty).

The extensive 130-page judgment addresses numerous legal questions raised by TTR on appeal against the Court of Appeal's judgment, and arguments raised by the respondent parties in defence. In this analysis, we unpack three key aspects of the Supreme Court's decision: the relevance of international environmental law domestically; the role and importance of tikanga, the Treaty and existing interests of iwi; and the nature and effect of the activity on other marine management regimes. We discuss the implications of these three key findings more broadly, in terms of environmental law and regulation in Aotearoa New Zealand and beyond.

2. BACKGROUND AND CONTEXT

The TTR case concerns an application under the EEZ Act for consent to extract and process iron ore in the South Taranaki Bight, within a 66 km^2 area located in the exclusive economic zone (EEZ) off the South Taranaki coast abutting the coastal marine area (CMA). TTR had already obtained a mining permit allocating rights to mine Crown-owned minerals under the Crown Minerals Act 1991, and was required to obtain marine and marine discharge consents to address the potential adverse effects of the proposed mining activity under the EEZ Act.[4] TTR's second application to commence seabed mining activities under the EEZ Act was approved following a lengthy public hearing in August 2017.[5] The approval decision was quashed on appeal, successively, by the High Court and the Court of Appeal (albeit for different reasons).

The location of the site has significant implications in terms of which legislative framework applies. Activities in the CMA (or territorial sea), as sovereign territory, are principally governed by the Resource Management Act 1991 (RMA) whereas activities in the EEZ, the jurisdictional area between the territorial sea and the high sea, are governed by New Zealand's obligations

4 The Crown Minerals Act determines allocation, whereas the EEZ Act, as with the RMA, is concerned with managing the impacts of mining activities on the environment. For discussion see R Makgill and H Rennie "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991" (2012) 27 The International Journal of Marine and Coastal Law 135 at 143–144.

5 Environmental Protection Authority *Trans-Tasman Resources Ltd Marine Consent Decision* EEZ000011, 3 August 2017 <www.epa.govt.nz> accessed 2 December 2021.

under international law, the EEZ Act, and the Economic Zone and Continental Shelf (Environmental Effects — Discharge and Dumping) Regulations 2015. However, as found on the evidence at first instance, the principal adverse effects of the proposed mining activity would have occurred within the CMA.[6]

The consents sought by TTR would permit the extraction of 50 million tonnes (per annum) of seabed material within the EEZ for a term of 35 years. Around 10 per cent of the mined material would be retained to be further processed into iron ore concentrate. The remaining 90 per cent of material would be discharged to the seabed resulting in a large sediment plume. TTR required a marine discharge consent to return this material to the sea under the EEZ Act. The actual and potential adverse effects of the sediment plume was the major environmental issue to arise out of the application. However, there were also significant concerns raised as to the proposal's adverse effects on "existing interests", including the impacts on affected iwi and commercial fishers, and noise impacts of the proposed mining activities on marine mammals and other fauna.

The Environmental Protection Agency (EPA), responsible for administering the EEZ Act and considering applications for marine consent, referred the application for consideration to a Decision-making Committee (DMC). A previous application by TTR had been refused in June 2014 after a differently composed DMC found that the application was premature and that more time was required to understand the proposed operation, its effects on the receiving environment and existing interests.[7] TTR reapplied for consent in 2016. The most fundamental change between the 2014 and 2016 proposals was that the latter proposal was supported by a more sophisticated predictive model for environmental effects. TTR sought to withhold that predictive model and certain related data on sediment plume effects from public notification on the basis that the information was commercially sensitive. However, the Environment Court ruled that the "public's right to information enabling its effective participation" overrode "trade secrecy and commercial prejudice considerations".[8] The Act's information principles, requiring any decision to be based on the "best available information", obliged the decision-maker to have the full relevant information

6 *TTR case*, above n 1, Appendix 3: diagram prepared by iwi parties.

7 Environmental Protection Authority *Trans-Tasman Resources Ltd Marine Consent Decision* EEZ000004, 17 June 2014 <www.epa.govt.nz> accessed 2 December 2020. For discussion see R Makgill and AP Linhares "Deep Seabed Mining — Key Obligations in the Emerging Regulation of Exploration and Development in the Pacific" in R Warner and S Kaye (eds) *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge, London and New York, 2016) 249; and Anton and Kim, above n 2.

8 *Kiwis Against Seabed Mining Inc v Environmental Protection Authority* [2016] NZ EnvC 217 at [62].

before it.[9] "Ultimately… the crucial nature of the Sensitive Information in informing the conclusions in the Impact Assessment, when combined with the public's right to participate effectively in the consent process, [outweighed] any trade secret or business prejudice interest of Trans-Tasman by a considerable margin."[10]

The four-person DMC appointed to consider the 2016 application issued a split decision. The majority decision to approve the consents required a casting vote from the DMC chair (ie a second vote). The DMC majority determined that the proposal's adverse effects would be acceptable, despite uncontested joint expert witness statements confirming that there was inadequate information to establish whether TTR's predictive sediment plume modelling was accurate as to the scale of the effects of the activity. Due to the lack of information, the DMC imposed conditions requiring a two-year monitoring programme to establish sufficient baseline information prior to the commencement of the mining activity, and management plans with broadly stated goals to be defined as hard thresholds once the pre-commencement baseline information had been collated.[11]

The DMC majority decision was appealed to the High Court by the opposing parties. Churchman J allowed the appeal on the ground that the consents adopted an "adaptive management approach" to manage pollution effects (ie the discharge of harmful substances) which is prohibited under the EEZ Act.[12] It is noteworthy, in light of the following judgments, that Churchman J went on to observe that it was doubtful that an adaptive management approach would have been available, in any event, "… because one of the pre-requisites for using an adaptive management approach is to have sufficient baseline information so that appropriate conditions can be drafted. There must be real doubt that this is the case here."[13] TTR filed an appeal against the High Court's adaptive management decision with the Court of Appeal. The opposing parties filed cross-appeals on a variety of findings including the Act's purposes, information principles, Treaty of Waitangi obligations, and "nature and effect" of the RMA. The Court of Appeal, in a judgment delivered by Goddard J, unanimously held that the EPA through the DMC had erred in law in granting the consent to TTR to mine the seabed.[14] Goddard J set the scene for the judgment by describing it

9 At [64].
10 At [68].
11 R Makgill, J Gardiner-Hopkins and N Coates "Current Legal Developments: New Zealand" (2020) 35 The International Journal of Marine and Coastal Law 835 at 837.
12 *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 at [404].
13 At [405].
14 *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] 21 ELRNZ 700 at [12] and [13].

as an inquiry that "… must be informed by the principles of international law to which the EEZ Act is intended to give effect, and by the principles of the Treaty as they apply to decisions made under the EEZ Act".[15]

TTR was granted leave to appeal to the Supreme Court, with a bench comprised of Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ. Their judgment is delivered in four parts, with Young and France JJ giving a joint opinion (written by France J), and Winkelmann CJ, Glazebrook and Williams JJ giving separate written opinions. The Judges' reasoning differed on some points, stemming mainly from Young and France JJ's differing minority approach to the purpose of the EEZ Act. However, they largely agreed on the matters before them, including New Zealand's obligations in international law, and the Crown's obligations under the Treaty and the place of tikanga. Other significant findings concern the nature and effect of other marine management regimes, the approach to economic benefit considerations under s 59, what would amount to an adaptive management approach, bonds versus insurance protections, and the weight of a casting vote.

3. INTERNATIONAL LAW, ENVIRONMENTAL BOTTOM LINES, AND FAVOURING CAUTION AND PROTECTION

3.1 International Law Obligations

The Supreme Court's decision establishes further precedent on the implementation of New Zealand's international law obligations under the United Nations Convention on the Law of the Sea 1982 (LOSC), other international agreements concerning the marine environment, and the precautionary principle or approach.[16] Section 11 of the EEZ Act provides that the Act "continues or enables the implementation of New Zealand's international obligations relating to the marine environment". These obligations are listed, non-exhaustively, as including the LOSC, the Convention on Biological Diversity 1992, MARPOL,[17] and the London Convention.[18]

15 At [3]; and Makgill and others, above n 11, at 839. For further discussion see D Grinlinton "The Legal Regime under the EEZ Act" [June 2020] Resource Management Bulletin 104.

16 Rio Declaration on Environment and Development (14 June 1992) 31 ILM 874, Principle 15.

17 International Convention for the Prevention of Pollution from Ships (adopted on 2 November 1973).

18 Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter 1972.

The LOSC and Convention on Biological Diversity are both identified as directly applying to TTR's application. MARPOL and the London Convention, while relevant, are not considered to directly apply.[19] Most of the Court's discussion focuses on the LOSC, reflecting the fact that it is the principal source of state jurisdiction and obligations within the EEZ. The judgment is notable, not only for its reference to the express provisions of the LOSC, but also the International Tribunal for the Law of the Sea (ITLOS) and commentary from international jurists. This commences with the simple observation that the LOSC applies to activities within the EEZ. Coastal states have sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources" within their EEZ (art 56). The judgment identifies pt XII of the LOSC, set out in art 192, as establishing the fundamental obligation on all state parties to "protect and preserve the marine environment".[20]

Article 194 of the LOSC is referenced as establishing obligations to take measures to prevent, reduce and control pollution of the marine environment. Art 194(3) is specifically identified as requiring that the obligation to take measures includes, amongst other things, "those designed to minimise to the fullest possible extent" pollution from various sources, including pollution from seabed activities subject to national jurisdiction. The judgment notes, referencing one commentator, that the objective of art 194(3) "is not to eliminate pollution as such but to reduce it, thus minimising it to the greatest extent possible". That is seen as a "realistic approach, as otherwise most kinds of ocean uses would have to be banned".[21]

It is evident, the Court reasoned, that environmental protection has priority over economic development because art 193 "provides that states can exploit resources '*in accordance with*' their duty to protect and preserve the environment".[22] The characterisation of the art 194(1) obligation as one of "due diligence" rather than strict liability indicates that something less than absolute protection is envisaged. The judgment cites, in this respect, the ITLOS *Advisory Opinion on Seabed Activities* (*Advisory Opinion*),[23] finding "that the obligation of due diligence is a variable standard that changes over time and in relation to the risks, with the standard of due diligence being more severe for riskier activities".[24]

The judgment concurs with the Court of Appeal that all the international instruments it identified inform the interpretation of the EEZ Act. The EEZ Act

19 *TTR case*, above n 1, at [87] per Young and France JJ.
20 At [88] per Young and France JJ.
21 At [89]–[91] per Young and France JJ.
22 At [93] per Young and France JJ (emphasis as added in the judgment).
23 *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion* (1 February 2011) ITLOS Reports 2011, 10.
24 *TTR case*, above n 1, at [94] per Young and France JJ.

is intended, as discussed in *Hela v Immigration and Protection Tribunal*,[25] to give effect to New Zealand's international obligations. Although the language in the EEZ Act differs from that used in the relevant conventions, decision-makers are required to apply the EEZ Act with reference, where necessary, to those relevant international instruments to clarify the meaning of the Act.[26] The Supreme Court held, in this respect, that the LOSC and Convention on Biological Diversity support the proposition that the s 10(1)(b) purpose of the EEZ Act, of protecting the marine environment from pollution, imposes a heightened threshold in favour of environmental protection.[27]

3.2 The Purpose of the EEZ Act and "Environmental Bottom Lines"

The Supreme Court is generally unanimous in its support of the reasoning in the Court of Appeal's judgment. However, Winkelmann CJ, Glazebrook and Williams JJ held (by majority) that the DMC's key legal error was its failure to apply the decision-making criteria to achieve the environmental bottom line imposed under the s 10(1)(b) purpose of the EEZ Act (ie to protect the environment from pollution).[28] The majority explained that s 10(1)(b) is cumulative on the s 10(1)(a) purpose of sustainable management, and therefore is a separate consideration from (and something in addition to) sustainable management.[29] The environmental bottom line under s 10(1)(b) means that, if the environment cannot be protected from material harm, then a proposed discharge (ie pollution) must not be allowed.

The practical consequence of the majority's environmental bottom line approach is that applicants for discharge consents are required to establish that there will be no material harm from a proposed discharge activity.[30] They must take steps to avoid material harm, mitigate any pollution effects so that harm is not material or, considering the period over which the harm is caused, remedy the harm so the overall harm is not material.[31] Any remediation will need to be considered in light of the specific circumstances, taking into account a range of factors, including the time that the harm subsists and the time it would take to remediate the harm.

25 *Samuela Faletalavai Helu v Immigration and Protection Tribunal* [2015] NZSC 28.
26 *TTR case*, above n 1, at [100] per Young and France JJ.
27 At [101] per Young and France JJ.
28 At [3] Summary of Result; at [239]–[250] and [267] per Glazebrook J; at [294] per Williams J; and [305] and [320] per Winkelmann CJ.
29 At [245] per Glazebrook J.
30 At [260] per Glazebrook J.
31 At [260] per Glazebrook J.

The majority concluded that the EPA must follow a three-step test when assessing applications for marine discharge and dumping consents under the EEZ Act in line with the environmental bottom line approach:[32]

(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping? If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.
(b) Is the decision-maker satisfied that conditions can be imposed that mean:
    (i) material harm will be avoided;
    (ii) any harm will be mitigated so that the harm is no longer material; or
    (iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

If not, the consent must be declined. If yes, then step (c) must be undertaken.
(c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

3.3 Favouring Caution and Environmental Protection

Section 61 of the EEZ Act sets out the information principles for making decisions under the Act.[33] Key to these principles is the s 61(2) requirement that, if, when making a decision, "the information available is uncertain or inadequate, the [EPA] must favour caution and environmental protection".

TTR challenged the Court of Appeal's finding that the requirement to favour caution and environmental protection in the Act is a statutory implementation of the "precautionary principle", or approach, under international environmental law. The Court acknowledged that opposing counsel, while observing the ITLOS *Advisory Opinion* had identified "a trend towards making" the precautionary "approach part of customary international law",[34] did not contend that precaution had attained that status.[35] Referencing international commentary, the Court concurred that: "[a]t its most basic, environmental precaution involves

32 At [261] per Glazebrook J.
33 It is noted that the Court was considering a decision under an earlier version of the EEZ Act in which the information principles applying to applications for marine consent and marine discharge consents were set out under different parts of the Act (ie ss 61 and 87E). Section 87E was subsequently repealed and consolidated under s 61.
34 *Advisory Opinion*, above n 23, at [135].
35 *TTR case*, above n 1, at fn 290 per Young and France JJ.

the idea that it is better to be safe than sorry when the effects of activities are uncertain". The concern underlying the reference to the need to favour caution in the EEZ Act clearly reflects that idea,[36] and the language of s 61 could "be taken to embody" that precautionary principle.[37] The Court found that there was no reason to read down the wording adopted in the EEZ Act or to depart from the ordinary meaning of the terms "favour" (meaning "[t]reat with partiality" and "have a liking or preference for") or "caution" (meaning "a taking of heed", "[p]rudence", "taking care" and "attention to safety, avoidance of rashness").[38]

The Supreme Court unanimously found that the principal error in the DMC's decision was its failure to favour caution and environmental protection. The judgment states, in a finding reminiscent of the pre-DMC hearing Environment Court decision,[39] that the DMC's attempt to rectify the information deficits by pre-commencement monitoring inappropriately deprived the public of the right to be heard on a fundamental aspect of TTR's proposal.[40] The Supreme Court, ultimately, agreed with the Court of Appeal that there was insufficient information for the DMC to be satisfied it had taken the required cautious approach under the Act. Young and France JJ stated that:[41]

> There is much force in the argument for the first respondents that these conditions and other pre-commencement monitoring conditions are a mechanism for providing baseline information as to effects, which was lacking in TTR's application. There is some support for that in the descriptions used in the decision of the DMC. And we agree, as the Court of Appeal also found, that these conditions suffer the more fundamental problem we have identified above in that they do not meet the requirement to favour caution and environmental protection.

And Glazebrook J similarly found that:[42]

> As discussed below in relation to seabirds and marine mammals and some other factors, the DMC majority simply could not be satisfied, on the basis of the information before it and taking the required cautious approach favouring the environment, that the conditions imposed would ensure all of the material harm would be remedied, mitigated or avoided.

36 At [108] per Young and France JJ.
37 At [110] per Young and France JJ.
38 At [111] per Young and France JJ.
39 *Kiwis Against Seabed Mining Inc*, above n 8.
40 *TTR case*, above n 1, Summary of Result at [11].
41 At [205] per Young and France JJ (footnotes omitted).
42 At [271] per Glazebrook J.

4. THE TREATY OF WAITANGI, TIKANGA MĀORI AND EXISTING INTERESTS

The Supreme Court decision was unanimous, and unequivocal, as to the impact and implications of the Treaty and tikanga in the case.[43] In support of the approach taken by the Court of Appeal, the Supreme Court made definitive statements on the application of the EEZ Act's Treaty clause (s 12), implications of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act), and the place of tikanga as law in Aotearoa New Zealand. The decision will have far-reaching implications in terms of the impact of the Treaty and tikanga Māori on issues of environmental regulation on land and sea alike, providing clear and definitive statements that reflect the growing acknowledgement of the place of tikanga in New Zealand's legal system.[44]

The Treaty clause, s 12, places a number of procedural and substantive obligations on the Crown in terms of decision-making under the EEZ Act, as follows:

> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise marine consent authorities so that decisions made under this Act may be informed by a Māori perspective; and
> (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
> (c) sections 33 and 59, respectively, require the Minister and a marine consent authority to take into account the effects of activities on existing interests; and
> (d) section 46 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

In terms of taking into account the effects of activities on "existing interests", s 59(2) provides a list of matters that a marine consent authority must take into account, including at (a) "any effects on the environment or existing interests of allowing the activity" and (l) "any other applicable law".

43 At [151] per Young and France JJ.

44 At [151]. In this sense it adds to a growing line of jurisprudence including *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; and *Peter Hugh McGregor Ellis v The Queen* [2020] NZSC 89.

All members of the Supreme Court agreed at the outset that:[45]

> The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction.

This "broad and generous" construction of the Treaty clause was required, and "[a]n intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear",[46] especially "given the constitutional significance of the Treaty to the modern New Zealand state".[47]

In terms of the need for the decision-maker to take into account "existing interests", the Attorney-General (who had been granted leave to intervene in the Supreme Court proceedings primarily on issues that related to the interpretation of the Treaty clause and the applicability of tikanga to consent applications under the EEZ Act) argued, consistent with TTR, that the Court of Appeal went too far in treating Māori customary interests as existing interests.[48] In response, the affected iwi and Māori fisheries parties argued that existing interests include kaitiakitanga (obligations to care) exercised in their rohe (area of influence or territory), interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and customary marine title and rights claimed but not yet granted under the MACA Act.[49] The Court agreed.[50]

The Supreme Court held that s 12(c) provided a "strong direction" to the DMC to take into account the effects of the proposed activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty.[51] It confirmed the Court of Appeal's finding that tikanga-based customary rights and interests are existing interests under s 59(2)(a) and are therefore required to be taken into account by decision-makers. Williams J specifically pointed out that "what is meant by 'existing interests' and 'other applicable law' … must not only be viewed through a Pākehā lens".[52] All members agreed that tikanga, as law, must be taken into account as "other applicable law" under s 59(2)(1), where its recognition

45 *TTR case*, above n 1, at [151] per Young and France JJ (footnotes omitted).
46 At [151].
47 At [151] per Young and France JJ.
48 At [154] per Young and France JJ.
49 At [154]–[155] per Young and France JJ; at [237] per Glazebrook J; at [296]–[297] per Williams J; and at [332] per Winkelmann CJ.
50 At [154] per Young and France JJ.
51 At [149] per Young and France JJ; at [237] per Glazebrook J; at [296] per Williams J; and at [332] per Winkelmann CJ.
52 At [297].

and application is appropriate to the circumstances of the application under consideration.[53] This meant that, "[c]onsidering the proposed activity in terms of tikanga may indicate that material harm extends beyond the physical effects of a discharge, or that pollution can be spiritual as well as physical".[54] The Court confirmed that the right to take into account existing interests is not a power of veto, but that the decision-maker must give reasons for the way the "balance has been struck".[55]

On the question of whether the Court of Appeal had gone too far in its treatment of existing interests, the Supreme Court responded that the answer is to be found in the guarantee of tino rangatiratanga under art 2 of the Treaty.[56] The Court reiterated the point, made by the Court of Appeal, that the processes provided for by the MACA Act in order to determine marine customary title and rights are not the source of the customary interest, but merely a mechanism by which recognition of a pre-existing interest can be obtained.[57] This meant that the decision-maker could not disregard marine and customary title claimed by iwi or hapū Māori, pending their determination.

5. THE NATURE AND EFFECT OF THE ACTIVITY ON OTHER MARINE MANAGEMENT REGIMES

As mentioned above, although the mining activity was to be carried out in the EEZ, the area to be mined abutted the CMA which included areas of special ecological significance. Many of the impacts of the mining activity would be felt in areas within the CMA. The DMC had found (amongst other things) that the mining would have adverse effects on an outstanding natural feature in the territorial sea, the Patea Shoals.[58]

53 At [9] and [169].

54 At [172] per Young and France JJ.

55 At [157] per Young and France JJ.

56 At [154] per Young and France JJ. Generally, in the context of the environment, the exercise of tino rangatiratanga is a way of living according to tikanga that safeguards the land and its resources for future generations. See *Tau & Others v Attorney-General* [2021] NZHC 3108 at [5] and [34]–[36]; Jacinta Ruru "Legislative provision for Tino Rangatiratanga: A National park case study" [2005] NZYbkNZJur 24; Ministry for the Environment & Stats NZ *New Zealand's Environmental Reporting Series: Our land 2021* (April 2021) at 9. See also <https://environment.govt.nz/assets/Publications/our-land-2021.pdf>.

57 This is consistent with the conceptualisation of native title rights and interests as preceding the acquisition of sovereignty and capable of recognition by the common law. See *Ngati Apa v Attorney-General* [2003] NZCA 117; *Mabo and Others v The State of Queensland [No 2]* (1992) 175 CLR.

58 *TTR case*, above n 1, at Appendix 3.

The judgment acknowledges the practical reality that the effects of a proposed activity in one part of the marine environment could well spill over into or have effect on another part. The Supreme Court noted, as had the Court of Appeal, that the effects of the sediment plume would be apparent in the CMA and that there were "good policy reasons for not ignoring the fact that if the proposed [seabed mining] took place on the other side of an arbitrary line between two regimes, its proposed effects would be assessed differently".[59]

Another matter that the DMC was required to take into account, under s 59(2)(h), was "the nature and effect of other marine management regimes", established under other legislation and applying to the territorial sea, exclusive economic zone or continental shelf.[60] By reference to the ordinary meaning of the words "nature" and "effect" the Court stated that the DMC was required to consider the objectives of the RMA and the New Zealand Coastal Policy Statement (NZCPS) in the area affected by the proposed seabed mining, and also whether the proposal would produce effects within the CMA that were inconsistent with the outcomes sought to be achieved by those marine management regimes.

The Court referred to its earlier decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,[61] noting that policy 13(1)(a) of the NZCPS was seen as providing something of an environmental bottom line, establishing strong policy direction as to effects which are adverse and to be avoided or not allowed. The Court found that there was an error of law by the DMC majority in failing to assess whether the proposal would produce outcomes inconsistent with the objectives of the RMA and NZCPS within the CMA, and most notably they did not "identify relevant environmental bottom lines under the NZCPS and did not consider whether the effects of the TTR proposal would be inconsistent with those bottom lines".[62]

6. CONCLUSION

The Supreme Court TTR decision suggests "a new high-water mark" for Aotearoa New Zealand and for other countries considering seabed mining proposals. Like its predecessor Court of Appeal decision, the Supreme Court's findings provide a "strong statement on the kinds of measures States should

59 At [178] per Young and France JJ.

60 See s 7 for a non-exhaustive list of legislation providing for other marine management regimes, including the RMA and MACA Act.

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

62 *TTR case*, above n 1, at [187].

implement in order to comply with their obligations towards seabed mining under international law".[63]

The Court confirmed that an "environmental bottom line" approach is required by the EEZ Act's purpose provision (s 10(1)(b)), in line with international obligations to favour caution and environmental protection. The decision serves as a clear message to decision-makers about the need to protect the marine environment from pollution, and suggests a growing domestic appetite for implementing international law standards (at least in the EEZ), which may offer new inroads for environmental protection.

The decision also affirms the constitutional significance, and Crown responsibilities in respect, of the Treaty of Waitangi in the context of marine use and development. It suggests further possible paths towards environmental protection provided by obligations under both international conventions that New Zealand is a party to, and those environmental protections that are key components of tikanga Māori, recognised as law. It provides a strong signal to the Crown, to respect Māori and Treaty rights, interests and kaitiakitanga in marine areas, especially pending the recognition of MACA claims.

The Supreme Court's findings about the impact of regulatory decisions within the EEZ on the CMA is a significant win for ecosystem-based marine management approaches that emphasise connectivity within and between marine areas, in response to what many see as the absurdity of drawing jurisdictional lines through ecosystems.[64] It may even set a precedent for the environmental management of other boundary areas, including the highly contentious land/sea interface.[65] The decision also illustrates the tensions inherent in managing marine areas in the presence of competing sectoral uses and interests — evident, for example, in the impacts of mining activity on other resource interests (eg customary uses and fishing). The decision reinforces the need for an ecosystem-based approach to management and use within marine ecosystems, with marine management regimes that "talk to each other".[66]

63 Makgill and others, above n 11, at 837. See also Catherine J Iorns Magallanes and Greg Severinsen "Diving in the Deep End: Precaution and Seabed Mining in New Zealand's Exclusive Economic Zone" (2015) 13(1) New Zealand Journal of Public and International Law 201.

64 Elizabeth Macpherson and others "'Hooks' and 'Anchors' for Relational Ecosystem-Based Marine Management" (2021) 130 Marine Policy 104561; Makgill and Rennie, above n 4; and Makgill and others, above n 11.

65 Parliamentary Commissioner for the Environment *Managing our estuaries* (August 2020) <www.pce.parliament.nz>. See the recent High Court decision about the application of freshwater planning policy beyond the river mouth in coastal planning *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113.

66 Macpherson and others, above n 64.

7. EPILOGUE

In terms of next steps, the majority of the Supreme Court agreed with directions enabling the application to be referred back to the EPA for reconsideration in light of its findings.[67] Glazebrook J disagreed on this point, being of the view that the application should be declined and that relitigating the application before the EPA would put undue hardship on the opposing parties.[68] The Judge noted that it was difficult to see how a more than 35-year duration of significant effects could meet the test of the environment being remediated within a reasonable period.

On 10 November 2021, the EPA filed a memorandum with the High Court seeking directions regarding TTR's request to have the application reconsidered. The directions sought to allow the reconsideration of the application to be undertaken by a new DMC, as opposed to the originally composed DMC. The High Court issued directions on 1 December 2021 for written submissions from the parties and a hearing has been fixed for 30 May 2022.

67 *TTR case*, above n 1, at [12].
68 At [288] per Glazebrook J.