IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAURAU

Decision No. [2024] NZEnvC 075

IN THE MATTER OF	appeal under s 120 of the Resource Management Act 1991 (**the Act**)
BETWEEN	MCCALLUM BROS LIMITED
	(ENV-2022-AKL-121)
	Appellant/Applicant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Judge J A Smith Judge A H C Warren Commissioner S Myers Commissioner K Prime Special Advisor R Howie
Hearing:	17 – 21 July 2023 24 – 28 July 2023 31 July – 3 August 2023 21 – 25 August 2023 28 August – 1 September 2023 4 – 6 September 2023 22 – 24 November 2023 (Final submissions and strike out application)
Last case event:	23 November 2023 (on appeal)
Appearances:	J K MacRae, N A Hopkins, K Katipo and J Matenga for **McCallum Bros** Limited L E Bielby, K A Fraser and L M Leyland for **Auckland Council** D E Clapshaw L Black for Pākiri G Ahu Whenua Trust and R Greenwood (**Pākiri G**) J C Campbell and N R Williams for Friends of Pākiri Beach Incorporated (**FOPB**) J M Pou and T M Urlich for Manuhiri Kaitiaki Charitable Trust (**MKCT**)

V N Morrison-Shaw for Te Whānau o Pākiri (**Te Whānau**)
S Wikaira for herself
L Sutherland and D V van Mierlo for the Director-General of Conservation (**DOC**)
M Downing and P Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**)
L Muldowney and S Thomas for Environmental Defence Society Incorporated (**EDS**)
K R M Littlejohn and S Hiew for Mangawhai Harbour Restoration Society Incorporated (**MHRS**)
A Scharting and N Buxeda for Tara Iti Golf Club Limited, Te Ārai Links, Te Ārai North Limited, Te Ārai Residents' Association Incorporated, Te Ārai South Holdings Limited (**Te Ārai Interests**)

Date of Decision: 11 April 2024

Date of Issue: 11 April 2024

DECISION OF THE ENVIRONMENT COURT

A: The appeal on the application for offshore consent is refused and the decision of the Commissioners is confirmed.

B: Costs are reserved in respect of this appeal, the strike out application, the withdrawal of the midshore application, and inshore surrender/temporary offshore consent.

C: Any applications for costs are to be filed within 40 working days. Any reply is to be filed within a further 20 working days. Final reply submissions, if any, are to be filed 10 working days thereafter.

REASONS

Introduction

[1] Many groups and individuals have varying relationships with the Mangawhai – Pākiri embayment (**the embayment**).

[2] For mana whenua, the relationship is whakapapa based and it forms part of their tribal history and identity. For some the embayment has become their home, a place where they enjoy coastal beauty and tranquil serenity. For others the relationship is statutory based, compelled to protect the flora and fauna of the embayment for all New Zealanders, including providing an active voice for those we cannot hear from in the resource management process i.e., the **tara iti** (the critically endangered New Zealand fairy tern).

[3] For McCallum Bros, the relationship is effectively a commercial one, with their sand mining business providing good quality sand for the concrete needs of New Zealand's biggest city.

[4] These relationships have collided, whereby this Court is required to decide (once again) whether to allow the sand mining operation to continue in the embayment. We say once again, because the embayment has experienced continual sand mining since the 1940s, despite long term opposition by some mana whenua and other Pākiri residents. This has resulted in appeals to this court on a number of occasions over the preceding decades.

[5] Prior to this hearing there were three separate appeal groups. These are described in earlier decisions as the **inshore**, **midshore** and **offshore** appeals. The Commissioners at first instance refused to grant the inshore and offshore consents but granted the midshore consent.

[6] The Commissioners refused to grant the offshore consent, the subject of this appeal, primarily on the basis that the resource consent application had insufficient information to satisfy them that the effects on the environment were minimal. In addition, they concluded there were clear adverse cultural effects, which could not be

mitigated.

[7] McCallum Bros proceeded to hearing on the offshore decision only. The inshore appeal against refusal and the midshore appeals against grant were resolved in several decisions in 2023 by this Court.[1] In short, the midshore application was abandoned by McCallum Bros while the inshore appeal was resolved by all parties agreeing to allow sand mining for a short period within a limited offshore area while the substantive offshore application and appeals were resolved.

The appeals

[8] There were six appeals filed in relation to three applications for consent to remove sand from the sea within the embayment. The applications related to different bathymetric depths or distances from shore. McCallum Bros appealed against refusals to both the inshore[2] and offshore[3] applications. Four appeals were filed in relation to the grant of the midshore application.[4]

[9] Although the Applicant sought three different consents (inshore, midshore and offshore), this is entirely an artificial division based on depth which was a subject of some considerable contention between the parties.

[10] The midshore application, which was granted at first instance, was subsequently withdrawn shortly prior to hearing and this was dealt with in a decision issued on 22 June 2023.[5] Subsequently the inshore consent, which had run on rights under s 124 of the Act, was surrendered after a negotiated agreement between the parties on the basis of a temporary offshore consent being granted.[6] The resolution of both these issues involved hearing time originally set down for all appeals.

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[1] *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 130; *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 138.
[2] ENV-2022-AKL-000220 *McCallum Bros Limited v Auckland Council*.
[3] ENV-2022-AKL-000121 *McCallum Bros Limited v Auckland Council*.
[4] ENV-2022-AKL-000218 *Manuhiri Kaitiaki Charitable Trust v Auckland Council*; ENV-2022-AKL-000219 *McCallum Bros Limited v Auckland Council*; ENV-2022-AKL-000232 *Friends of Pākiri Beach Inc v Auckland Council*; ENV-2022-AKL-000234 *Director-General of Conservation v Auckland Council*.
[5] *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 130.
[6] *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 138.

[11] The reasons for the temporary offshore consent will be explained later in this decision but are also covered in detail in our decision on the surrender of the inshore consent and grant of a temporary offshore consent.

[12] The substantive hearing then progressed only on the appeal by McCallum Bros against the offshore application refusal.

Appeal progress

[13] These applications have something of a tortuous history and the reasons for the particular areas sought, their division and the way they are consented is in part historical, relating to the different holders of resource consent over the years.

[14] McCallum Bros has been extracting sand from the embayment since the 1940s. More recently Kaipara dredging also held a consent to extract sand offshore at Pākiri–Mangawhai. That business and consent was purchased by McCallum Bros during the Council hearing process, and McCallum Bros became substituted as the applicant on the offshore application now the subject of this appeal.

Inshore

[15] The application as originally lodged proposed sand extraction by means of a trailer suction dredge over a 35-year term. Extraction was to be from two identified sand extraction areas in an inshore location approximately between the 5m and the 10m isobaths over an approximate area of 2.57km^2 along 10.8km of the Pākiri shoreline, with no more than 76,000m^3 over any consecutive 30-day period. In addition, McCallum Bros proposed to undertake seabed sampling and related monitoring work in two control areas located outside and to the north and south of the proposed sand extraction areas.

[16] The application was amended during the Auckland Council hearing. The term was reduced to 20 years and the extraction volumes to 70,000m^3 over any consecutive 12-month period, a maximum of 15,000m^3 over any consecutive 30-day period and 20,000m^3 within any 12-month period from each of the four proposed extraction cells.

In addition, conditions were proposed to provide a mechanism by which sand extraction might be discontinued after 10 to 15 years in the event of erosion of sand volumes within defined areas of the beach and dunes.

[17] The consents sought were by way of "renewal" of existing consents for inshore sand extraction Permit Nos. ARC28172 and ARC28165 (for 27,000m^3) and ARC28174 and ARC28173 (for 49,000m^3), which commenced in 2006 following an appeal to the Environment Court, and expired on 6 September 2020.[7] McCallum Bros was continuing to operate under that consent until its further application for replacement consent was determined.

[18] McCallum Bros lodged an appeal against the decision by Auckland Council to refuse consent. As stated above, the inshore appeal has been dealt with by a decision issued on 22 June 2023.

Midshore

[19] The application as originally lodged proposed sand extraction by means of a trailer suction dredge over a 35-year term. Extraction was to be from an identified sand extraction area in a midshore location approximately between the 15m and 25m isobaths from an area of 6.6km^2 along 10.4km of the Pākiri shoreline, with extraction volumes to be no more than an average of 125,000m^3/year over any consecutive five year period, a maximum of 150,000m^3 over any 12-month period and a maximum rate of 15,000m^3 over any consecutive 30 day period.

[20] The application was amended during the Auckland Council hearing to reduce the term to 20 years and the extraction volumes to an average of no more than

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[7] *Sea-Tow Ltd v Auckland Regional Council* A066/06. Sea-Tow Limited applied to Auckland Regional Council for resource consents to enable extraction of 27,000 cubic metres of sand per year for 20 years from the extraction sites, and McCallum Bros Limited applied for resource consents to enable extraction 49,000 cubic metres of sand per year for 20 years from the extraction sites. Those extractions would be largely continuations of previous consents which had expired. The appellants agreed that McCallum Bros Limited would acquire Sea-Tow's sand extraction business (which McCallum Bros has been carrying out as contractor), subject to obtaining the necessary consent to transfer of the permits. Appeal dismissed: *Friends of Pākiri Beach v Auckland Regional Council* HC Auckland CIV-2006-404-3544, 26 March 2009.

70,000m^3/year over any consecutive five-year period, a maximum of 84,000m^2 over any 12-month period and a maximum rate of 15,000m^3 over any consecutive 30-day period. In addition, the proposed conditions of consent provide a mechanism by which sand extraction might be discontinued after 10 or 15 years in the event of erosion of sand volumes within defined areas of the beach and dunes.

[21] Again, McCallum Bros proposed to undertake seabed sampling and related monitoring work in two control areas located outside and to the north and south of the proposed sand extraction areas.

[22] Auckland Council granted the application in part, but for a reduced term of 10-years, over a smaller extraction area and subject to an average extraction volume of no more than 50,000m^3/year over any consecutive five-year period, 60,000m^3 over any 12-month period and at a maximum rate of 10,500m^3 over any consecutive 30-day period. In addition, a number of further restrictions on the exercise of the consent were imposed by way of amendments to the proposed conditions of consent.

[23] Manuhiri Kaitiaki Charitable Trust, Friends of Pākiri Beach Incorporated, the Director-General of Conservation, and McCallum Bros lodged appeals. Subsequently McCallum Bros withdrew their application just prior to the notified hearing of all appeals. As set out above, the midshore appeals have been dealt with by a decision issued on 22 June 2023.

Offshore

[24] The application proposed sand extraction by means of a trailer suction dredge to a maximum total of 2,000,000m^3 of sand over the 20-year term of the consents. Extraction was to be from an identified sand extraction area in an offshore location between the 25m and the 40m isobaths over an approximate area of 44.13km^2, with no more than 150,000m^3 to be extracted in any 12-month period from between the 25m and 30m isobaths. In addition, it was proposed to undertake seabed sampling and related monitoring work in two control areas located outside and to the north and south of the proposed sand extraction areas.

[25] The consents were sought by way of "renewal" of an existing consent for offshore sand extraction (Coastal Permit 20795), on similar essential terms and generally in a similar location, which commenced in 2003, following an appeal to the Environment Court.[8] The consent expired in 2023.

[26] The application for the offshore consent was originally held by Kaipara Limited and was transferred to McCallum Bros on 8 October 2021 by the provision of a notice of transfer to the Council. Coastal Permit 20795 was transferred from Kaipara Limited to McCallum Bros on the same day.

[27] The offshore application was refused by Auckland Council. McCallum Bros lodged an appeal. This appeal regarding the offshore consent is the focus of this decision.

[28] The application on appeal has evolved in several respects from the proposal that was considered and decided by the Commissioners:

(a) the proposed extraction area has been reduced to 30.89km^2, this involves the northward relocation of the extraction area to nearby Poutawa Stream;

(b) the proposed extraction limit has been reduced to no more than 75,000m^3 in any 12-month period from between the 25m and 30m isobaths;

(c) a mātauranga Māori expert panel has been introduced in McCallum Bros proposed conditions of consent;

(d) introduction of a navigation restriction directing the vessel away from the shore as it is approaching and departing from the extraction area; and

(e) provision for a biosecurity plan.

Case management progress

[29] McCallum Bros resisted reference to mediation through the pretrial process.

[8] *McDonald v Auckland Regional Council* A204/2002, 18 October 2002; *McDonald v Auckland Regional Council* A1/2003, 9 January 2003 (EC).

Given the strong level of opposition to the application and the Applicants concern for an urgent hearing given expiry of the volume consent for offshore, the Court set the matter on a timetable to hearing.

[30] Evidence was circulated and read in relation to all three applications which continued to be supported during judicial call-overs and until quite close to the commencement date for hearing.

[31] It was clear on the reading of the evidence supporting the applications that there was very limited evidence, if any, to support granting an inshore consent and significant issues with the granting of a midshore consent, notwithstanding that the Council had granted it in the first instance.

[32] The Court was advised by memorandum dated 7 June 2023 that McCallum Bros wished to withdraw its application to extract sand from the midshore location. In a memorandum dated 12 June 2023, McCallum Bros advised that it had given the Respondent notice of its withdrawal of its midshore application. The withdrawal was confirmed by decision dated 22 June 2023.[9]

[33] Subsequently the Court suggested that given the lack of supporting evidence for an inshore consent, it was concerned about a continuing threat to the tara iti from the exercise of that consent relying on the s 124 provisions.

[34] The parties then entered into discussions. The end result was an agreement that the inshore consent would be surrendered and an interim/temporary consent for an identified part of the offshore application area would be permitted on a temporary basis to allow time for this appeal to be heard and any subsequent appeals that might arise.[10] The terms of that temporary consent are annexed hereto as "**A**". All parties agreed to this consent without prejudice to their primary positions.

[35] These issues delayed the commencement of the substantive hearing, as time was

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[9] *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 130.
[10] *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 138.

utilised to address the midshore and inshore issues.

[36] The Court takes no cognisance of that agreement or the provisions of the temporary consent in reaching this decision. The temporary consent was argued on substantively different grounds to those addressed in this decision. In particular, McCallum Bros seek a consent that allows them to extract sand within the two-kilometre line up to the 25-metre contour. It also seeks a greater and new area/s for take, including greater depths than those in the temporary consent.

Amendments through the hearing

[37] Throughout this hearing the application and the proposed conditions changed.

[38] These changes together with a very late application to strike out the case presented by MKCT led to considerable changes to how we would normally manage closing submissions to ensure all parties had adequate opportunity to reply and address new legal issues arising.

[39] The Court directed a further hearing on the strike out application before moving to consider final submissions of opposing parties and the reply for McCallum Bros.

[40] Although Auckland Council did not seek a formal opportunity for further submissions, they considered that if consent was to be granted there should be an interim decision so conditions could be discussed.

Mana whenua matters

[41] Having addressed cultural matters in opening Mr MacRae advised the Court part way through the hearing that his client had engaged Ms K Katipo and Ms J Matenga to lead cross-examination and submissions on mana whenua matters (cultural).

[42] We regret to say that the presentation of the application and its amendment both during and after the hearing have led to a difficult case to follow for the Appellant/Applicant. This is conflated with Ms Katipo and Ms Matenga not being

involved in opening and having to address an extremely complicated history and mana whenua background. It is a credit to them that we found their closing assisted us in coming to grips with the mana whenua issues.

[43] In particular, we understand Ms Katipo accepts that metaphysical effects are adverse effects on the environment under the Act. Given Mr MacRae asserts they are not adverse effects on the environment we have a difference between co-counsel which we shall address in due course.

Section 290A – The Commissioners' decision

[44] An appeal to this Court from a decision of Commissioners is by way of rehearing. However, s 290A of the Act requires us to have regard to that decision.

[45] The case before the Council Commissioners was plagued by a lack of clear information and one of the key findings of the decision was that there was inadequate information to determine the application including in relation to effects on coastal processes, ecological effects, natural character and tara iti.[11] In particular the Commissioners concluded there was inadequate information on:

(a) the nature and extent of cumulative effects of offshore extraction;

(b) the issue of coastal processes;

(c) mana whenua;[12] and

(d) the lack of evidence that the effects of the proposal were disconnected from the coastal processes and the inshore environment.[13]

[46] Given this fundamental failure identified by the Commissioners, we expected to see far more detailed information in relation to the effects of offshore extraction and

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[11] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [384], [551], and [594].
[12] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [171].
[13] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [181] – [183].

the issue of coastal processes, on mana whenua, and on ecological effects, natural character effects and tara iti.

Summary of Court concerns on information

[47] As far as we are able to tell (we do not have the evidence from the first hearing), much of the evidence seems to be similar to that before the Commissioners at first instance. A significant difference was that Mr Todd resiled from some critical conclusions in his evidence-in-chief and reply in a subsequent brief of evidence. His evidence-in-chief to this Court seems similar to that recited by the Council Commissioners.

[48] Mr Todd's correction and recalculation was based upon a significant error having been made during the survey stages which fundamentally changed the mathematical outcomes for whether or not there was an onshore accretion or erosion of sand. This difference makes a fundamental and significant difference to the quantity of sand calculated at various stages over the period, reducing the volume of sand in the near shore environment.

[49] This meant Mr Todd significantly amended his sand budget to similar figures to those of the Council witness. Thus, Mr Todd found the inshore and midshore extractions (to the 25-metre bathymetric) could no longer be supported at least in the southern part of the embayment.

Coastal processes

[50] The argument for the Applicant was that there was no effect from offshore extraction based upon an agreed position of the parties that the net transfer of sand over the 25-metre contour was nearly nil.

[51] However, we conclude from the evidence that in particularly high energy episodes, such as Cyclone Gabrielle, significant mobilisation of sand can occur across that contour. Accordingly, the calculations supporting the 25-metre contour is a net position but there is a movement of sand backwards and forwards over that contour. This may have ramifications for both the seabed and coast both inshore and offshore

of the 25m bathymetric contour given the potential for changing seabed volumes on at least a temporary basis.

[52] Nevertheless, the Applicant considered that provided they remove sand beyond the 25-metre contour there would be no adverse effect on the near shore or inshore area. This point was fundamentally disagreed with by several parties including FOPB and Mr Clapshaw. We will discuss in due course the evidence that was presented to us on this issue but suffice to say that the doubts that were expressed by the Commissioners are also expressed by the Court to different degrees.

[53] As we will discuss in due course, there appears to have been an assumption by the Applicant that it was for the opposition parties to prove that there was an adverse effect. We remind ourselves and the parties that the obligation in terms of the Act is that we must be satisfied that the information we have received is sufficient to enable us to make a decision. To grant consent we must be satisfied the application will meet the sustainable purpose of the Act and the various national and regional documents, including the New Zealand Coastal Policy Statement (**NZCPS**) and the Auckland Unitary Plan (Operative in Part) (**AUP(OP)**).

[54] For reasons we will go into in far greater detail in due course we have reached the conclusion that we are not satisfied that we have sufficient information on the coastal processes to be satisfied there is no effect.

[55] Accordingly, and for the reasons discussed in more detail in this decision, we conclude, under s 104(6) of the Act, that the application is declined on the basis that there is inadequate information to determine the application. We concur with the Council Commissioners in this conclusion.

[56] We also go on to discuss substantive concerns in the event we are wrong on this issue. In part, we do so to recognise the significant evidence given to this Court on the various issues.

Ecological concerns

[57] The Applicant relied on ecological information from a survey undertaken in 2019 of the southern portion of the application area and, as far as we are able to ascertain, this had not been updated in light of the Commissioners' concerns.

[58] Particularly in relation to the offshore area, little is known about the deeper waters and the species within it. What we are able to state quite clearly from all of the evidence is that the benthic communities are scattered and patchy, and frequently form community groupings of organisms. The small groupings or solitary organisms such as stony corals are unlikely to be detected by the sampling methodologies, including grab sampling and camera drops, as is proposed by the Applicant in this case.

[59] It appears to be the Applicant's proposition that the area between the 25 and 30-metre contours, having been the subject of extraction to date, can be assumed to have been modified sufficiently such that no further damage would occur. In relation to extraction from greater depths, particularly between 35-40 metre contour, the Applicant's proposition is that we should grant consent but require ecological studies before extraction occurs.

[60] However, this requires the Court to conclude a consent could operate to avoid unknown effects on an unknown range of species, some of which (like stony coral) are absolutely protected under the Wildlife Act 1953.

Mana whenua issues

[61] The Commissioners found that cultural/mana whenua effects were adverse and significant.[14] They found the adverse effects of the proposed activity on the cultural landscape, taonga species, rangatiratanga, kaitiakitanga/guardianship, cultural wellbeing compelling and required to be addressed by Policy B6.3.2(6) of the RPS.[15]

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[14] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [581].
[15] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [271] and [590].

They found an absence of evidence to confirm the effects and natural character values at acceptable levels.

[62] Again, the evidence produced for McCallum Bros on appeal appears to be largely similar to the Council level but for the evidence of two witnesses, Mr A B Thompson from Te Uri o Hau and Ngāti Whātua, and Mr T A Te Rangi of Ngāti Whātua and Ngāpuhi (who described himself as being a facilitator to assist the tangata whenua parties). We will discuss their evidence in more detail in due course.

[63] Suffice to say this evidence does not address the concerns identified by those under the umbrella of Ngāti Manuhiri.

[64] We should also add that the application for strike out seems to be based upon an assertion that MKCT's opposition is motivated by the desire to set up their own sand mining operation on land. However similar evidence was given by Pākiri G and Te Whānau witness, including from the Ōmaha Marae. Some of these witnesses spoke with considerable authority on mauri/life force, tikanga and mātauranga Māori/Māori knowledge.

[65] Even if the strike out was successful, the evidence from these witnesses is compelling and authoritative. It is also entirely consistent with the mana whenua evidence given by the MKCT witnesses.

Other matters in the Commissioner's decision

[66] Issues on natural character values, tara iti, and what is permitted within the permitted baseline were also part of that decision but largely feed into the earlier matters we have discussed.

[67] As far as tara iti are concerned, all parties identified the importance and the critical position of this critically endangered bird. There is something in the order of 30 birds remaining (not all of which are breeding). The position of this tern is precarious.

[68] Although there was some level of agreement that there would be extremely low threats to the birds if extraction occurred more than two-kilometres from the shore at night, there was still evidence given by witnesses that the birds could fly further out to sea and might be affected by the mining operation. On this basis, there were also concerns that there may be some interruption of the food web, although these were very generalised.

[69] Again, the question arises as to whether we are satisfied that the risk to the tara iti from the activity has been avoided. For reasons we will go into in due course we consider this is one of those exceptional circumstances where the loss of even one of the species is significant, given they only nest in this area and there are so few breeding pairs.

Section 124 RMA and appeals

[70] The Commissioners, in three separate decisions, granted the midshore consent but refused both the inshore and the offshore consents. As we have noted the midshore decision was subject to four appeals. The Applicants subsequently withdrew their application for midshore consent before this Court.

[71] It transpired that the reason the inshore consent was appealed related to the provisions of s 124 of the Act. Section 124 of the Act provides:

> **124 Exercise of resource consent while applying for new consent**
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> (1) Subsection (3) applies when–
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> (a) a resource consent is due to expire; and
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> (b) the holder of the consent applies for a new consent for the same activity; and
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> (c) the application is made to the appropriate consent authority; and
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> (d) the application is made at least 6 months before the expiry of the existing consent.
>
> (2) …
>
> (3) The holder may continue to operate under the existing consent until–
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> (a) a new consent is granted and all appeals are determined; or

(b) a new consent is declined and all appeals are determined.

[72] The Applicant was relying exclusively upon s 124(3) and this section does not require the Applicant to have any evidence to support the continuation of the consent. Accordingly, the Applicant was entitled to continue to extract notwithstanding its own evidence identifying significant effects on the beach and the continued danger to tara iti as a result.

[73] As we will discuss in due course, the predictions as to impacts given to obtain the previous consent have proved to be overly optimistic given the continued decline of the tara iti population and the now acknowledged impacts upon the inshore area including at least some erosion. Those assumptions themselves were based upon expert evidence, some given by the same witnesses, which has now been modified by them and in effect accepted to be incorrect.

[74] Our view of s 124 is clear, that it was not contemplated that people would utilise this provision where there were clearly unacceptable adverse effects. However, any change would require legislative intervention.

[75] In the event, an examination of any further form of action by the Court, such as enforcement action, was avoided by the parties agreeing to allow a temporary consent offshore. Notwithstanding this, evidence was given to the Court that the transitional provision was being utilised up to the date the temporary order became operative.

[76] This is gravely concerning to the Court given the risk to both the onshore and the inshore area and tara iti.

Other preliminary matters

[77] There are several other preliminary matters we should address at the commencement of this decision. The first is that the application for strike out is subject to a separate decision.[16]

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[16] *McCallum Bros Limited v Manuhiri Kaitiaki Charitable Trust* [2024] NZEnvC 072.

[78] There is one issue underlying of the strike out application relevant to this decision. Mr MacRae argues that metaphysical effects are indirect effects and therefore are not adverse effects on the environment. This seems to hinge upon a quotation from the decision in the previous case on this matter of *Sea-Tow Limited v Auckland Regional Council.*[17]

[79] As we have noted, Ms Katipo did not repeat that assertion in her substantive filed submissions. We do not consider Mr MacRae's position to represent the correct position in law. We understand the Act identifies effects as including positive or adverse effects, temporary or permanent effects, past, present or future effects, and any other cumulative effects which arise over time or in combination with others regardless of the scale, intensity, duration or frequency of that effect.[18]

[80] Moreover, the environment includes:[19]

(a) ecosystems and their constituent parts, including people and communities;

(b) all natural and physical processes;

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in (a) to (c) above or which are affected by those matters.

[81] Amenity values are defined as "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes."[20]

[82] Curiously enough there are several definitions of affected persons now included by virtue of sections 95E, 95F and 95G of the Act. Section 95F relates to protective

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[17] *Sea-Tow Limited v Auckland Regional Council* A066/2006.
[18] RMA, s 3.
[19] RMA, s 2.
[20] RMA, s 2.

customary rights groups and s 95G to customary marine title groups, both refer to the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA**). These words have been given little attention in any court's decisions to date, but the definition for both includes that the activity may have adverse effects on a protective customary right and/or on the exercise of the rights applying to a customary marine title group under Part 3 MACA.

[83] Given we understand that Ngāti Manuhiri has MACA claims currently before the Courts, it could be argued that it may have an impact if such declarations are made. This matter is covered for completeness rather than to reach any conclusion in respect of it. As we understand it, until there is a MACA order the Act is unaffected by the filing of a MACA application. On this basis the extant MACA claims have no direct bearing on this appeal.

[84] What we can say is that the Resource Management Act discusses persons or groups. This wording on affected person was included in the definition of affected person in s 95E around the same time as the ss 308A - 308I provisions. Although these were inserted for a particular purpose, the contemporaneous use of the definition of an affected person and the use of the word in s 308C of the directly affected person shows a linkage to the person rather than the effect.

[85] This Court had considered that this issue of direct effect had been dealt with many years ago and was surprised that the issue was raised again in the context of this hearing. As we note in the strike out decision, if there was any doubt on the question we are clearly of the view that the position has been regularised in *Tauranga Environmental Protection Society v Tauranga City Council.*[21] We acknowledge that while biophysical effects may provide a useful indicator of metaphysical effects as noted in *Wakatu Inc v Tasman District Council,*[22] biophysical effects to establish a metaphysical effect are not essential.

[86] To that extent, we agree with the following propositions from Ms Katipo's

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[21] *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZHC 1201.
[22] *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75.

submissions to us that metaphysical effects are not a trump card. The evidence on that is to be tested on the rule of reason approach set out in *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council,*[23] *TV3 Network Services v Waikato District Council*,[24] and in the more recent reiterations of the courts.[25]

[87] Fundamentally, we agree with the Commissioners' decision that there are clear adverse effects on mātauranga Māori, mauri and tikanga. Furthermore, there is no hierarchy of effects, and it cannot be said that effects on mana whenua have a lower value than other effects. For example, other amenity effects have been identified in other cases, such as a crematorium and its impact on Pasifika Values.[26]

[88] Nevertheless, we conclude amenity values include cultural reactions to visual and other cues, plus mauri and metaphysical effects generally, such that they can be seen as an aspect of amenity effects. Sometimes these can be supported by scientific information as well, but this is not essential.

Cultural

[89] While there is a reference to cultural attributes under amenity values, there has been a disquiet through the hearing at the way in which the reference to cultural effects have been separated from other amenity effects including the landscape amenity and other matters.

[90] Some witnesses advised that they gave evidence on matters of landscape rather than cultural perspectives. While there are references to landscape from time to time in the Act including s 6, no particular evaluative methodology is specified. As is made clear by the latest guidelines for landscape architects, the cultural landscape is an important component of relevant landscapes. Ms Lucas was criticised for assessing

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[23] *Ngāti Hokopū Ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (EC).
[24] *TV3 Network Services v Waikato District Council* [1997] NZRMA 539 (HC).
[25] *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352.
[26] *Cook Islands Community Centre (HB) Inc v Hastings District Council* (1994) 1B ELRNZ 205. See also for example, *Blakeley Pacific Ltd v Western Bay of Plenty District Council* [2011] NZEnvC 354 and *Genesis Power Ltd v Franklin District Council* (2005) 12 ELRNZ 71.

this based upon the uncontested evidence of the Ngāti Manuhiri witnesses.

[91] For the majority of the Court, the Applicants landscape witness failed to apply a cultural lens to landscape analysis. Similar shortcomings were noted in ecological and coastal analysis. The mana whenua lens is an important component of the landscape and assessments were made by some relevant witnesses. Similarly, we can see no language in the Act that excludes mātauranga Māori from relevant ecological analysis.

[92] We acknowledge immediately that intellectual rigour needs to be applied to all analysis, but it is not acceptable simply to criticise witnesses undertaking the full range of duties imposed upon them by their own guides of practice. This was an issue for both ecology and for landscape where both disciplines have developed guidelines.

[93] For our part, we have concluded we will refer to mana whenua values to identify those values which are to be taken into account under the Act. They encompass a number of the aspects of effects. In this case the views of mana whenua are relatively consistent. Also, there is no apparent dispute as to the rohe of Ngāti Manuhiri as it relates to the area south of Te Ārai Point. For current purposes, mana whenua values could also be included which would include Te Uri o Hau's interest to the north of Te Ārai Point which is co-extensive with Ngāti Manuhiri.

[94] We note that the involvement of Mr Te Rangi was not based upon him giving evidence as to mana whenua values in this area. To the extent that Te Uri o Hau gave evidence, Mr Thompson made it clear that his evidence was approved by Te Uri o Hau and had been passed through kaumātua. Te Uri o Hau's conditional consent to McCallum Bros offshore proposal must be seen in the context of a management plan which identifies preference for land-based sand mining and Te Uri o Hau's strenuous opposition to previous applications for sand mining at sea in the Mangawhai area (north of Te Ārai Point).[27] This is a point we examine further when we address mana whenua issues in more detail.

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[27] For example, *Sea-Tow v Auckland Regional Council* A066/06; *Friends of Pākiri Beach v Auckland Regional Council* HC Auckland CIV-2006-404-3544, 2546, 26 March 2009.

The relevant statutory documents

[95] Mr Carlyon, Mr Ross, Mr Hopkins and Mr Hay all agreed that the NZCPS, the Hauraki Gulf Marine Park Act 2000 and the AUP(OP) were relevant to this application.

[96] There was reference by Mr Hay and Mr Hopkins to the National Policy Statement on Urban Development 2020 (**NPS-UD**). However, an examination on the relevance of this document appears to relate to the direction for enabling and supporting well-functioning urban environment under the Act. Objective 3, to enable more people to live in the region and more businesses and community services, is only possible to achieve if infrastructure, buildings and housing can be provided. Given that concrete is a key ingredient, it is suggested it might be relevant.

[97] We conclude that the NPS-UD is not relevant to this application to take sand. The extent of any policy statement may have indirect consequences or effects in other areas. We recognise that any NPS may have indirect effects in other areas. Nevertheless, any consequential effect taken to be addressed by the objectives in the segregation of various policy statements would serve no particular purpose. For current purposes, we ought to consider that the NPS-UD has very limited relevance but indicates that Auckland city will continue to grow.

[98] We agree with Mr Carlyon that the NPS-UD "…does not assist consideration of matters associated with these appeals."[28] In particular, we agree with his reason that objectives and policies of the NPS-UD do not refer to securing the resources for the purposes of development.

[99] Mr Hay, for the Applicant, conducted a review of the various provisions of the superior documents. Mr Hay is of the opinion that both the NZCPS and the Hauraki Gulf Marine Park Act 2010 have been given effect to by the AUP(OP). It appeared that the majority of the planners agree with this position although the position for Forest and Bird is that the NZCPS as it relates to preserving Endangered Species

[28] Evidence of Gregory Carlyon, dated 21 April 2023, at [8.61].

Policy is engaged.

[100] Whether this arises directly as a result of the AUP(OP) or by virtue of the obligations that arise under the NZCPS, it is clear that all parties agreed that adverse effects on tara iti must be avoided.

[101] Because of the rarity and particularly precarious nature of the species, we conclude the effects of the loss of one bird due to the activity could be a matter of concern. It would be fair to say that this has governed our extremely precautionary approach to the question of effects. Nevertheless, that consideration in our view takes into account the obligations arising under the AUP(OP) and the NZCPS in relation to tara iti.

[102] In fact, some other protected species including stony coral and other rare benthic species may have been undetected to date.

[103] Similarly with the Hauraki Gulf Marine Park Act 2010, there appears to be no dispute that the provisions of that Act were incorporated within the AUP(OP) objectives, policies and other provisions adequately for current purposes.

[104] The question of mineral extraction including within the coastal marine area (**CMA**) is addressed both at the regional policy statement level of the AUP(OP) and in the regional coastal plan. We will discuss the broad provisions of the regional plan (Chapter B of the AUP(OP)) in due course. But B.7.6 notes that minerals are essential for Auckland's development. Given the increase in demand for Auckland, dependence on minerals and an accessible supply of minerals is a matter of regional importance. This means that the use of resources needs to be used as efficiently and effectively as possible.

[105] The regional coastal plan chapter of the AUP(OP) also includes relevant objectives and policies at F.2.6.

[106] The application site is within the General Coastal Marine Zone and this is described in F2.1 in the following terms:

> The Coastal – General Coastal Marine Zone comprises the majority of the coastal marine area. …
>
> …
>
> The purpose of the Coastal – General Coastal Marine Zone is to provide for use and development in the coastal marine area, in particular those forms of use and development that have a functional or operational need to be undertaken or located in the coastal marine area, while:
>
> - enabling people and communities to provide for their social and economic wellbeing, through the appropriate use and development of the coastal marine area;
> - enabling the construction, operation, maintenance and upgrading of infrastructure within the coastal marine area (that cannot be practicably located on land) where it has a functional or operational need;
> - protecting natural character, landscape values and natural features;
> - maintaining and enhancing water quality and the life-supporting capacity of the marine environment;
> - protecting significant ecological values;
> - protecting historic heritage values;
> - recognising and providing for Mana Whenua values in accordance with tikanga Māori;
> - maintaining and enhancing public access, open space, recreational use, amenity values, and access to and along the coastal marine area;
> - not increasing the risk of subdivision, use and development being adversely affected by coastal hazards; and
> - managing conflicts between activities within the coastal marine area.

[107] Part of the inshore area is overlayed by an Outstanding Natural Landscape, Area 22 Pākiri Beach SEA Marine 2 (SEA-M2-87a) and the High Natural Character Zone – Area 48 Te Ārai and Pākiri Beach overlays.

[108] Furthermore, mana whenua values are specifically addressed in B6 of the Regional policy statement chapter of the AUP(OP) with the introduction of that chapter stating:

> … Mana whenua participation in resource management decision-making and the integration of mātauranga Māori and tikanga into resource management are of paramount importance to ensure a sustainable future for Mana Whenua

> and for Auckland as a whole;

[109] Objective B6.3.1(1) requires sufficient weight to be provided to mana whenua values, mātauranga and tikanga in resource management decision-making.

Regional policy statement

[110] At the regional policy statement level, the relevant parts are B4 Te tiaki taonga tuku iho - Natural heritage, B6 Mana Whenua, B7 Toitū te whenua, toitū te taiao - Natural resources, B8 Toitū te taiwhenua – Coastal environment.

[111] There is an issue between the parties as to whether Policy B7.6.2(1), (4) and (6) are relevant to the application as they specifically relate to "mineral extraction activities". "Mineral extraction activities" are defined in Chapter J and commences with the sentence "activities carried out at a quarry". If there is any doubt as to the application in the coastal marine area, the definition excludes common marine and coastal area mineral extraction. The is a separate definition in the AUP(OP) for "common marine and coastal mineral extraction". The two activities are separated with different rules for the extraction on land and within the CMA.

[112] Mr Hay makes the point that there are no separate objectives and policies at the regional policy statement level addressing the CMA mineral extraction in B7.7 of the objectives and policies. In relation to the coastal marine ecosystems this recognises the particular pressures the coastal environment is subject to from use and development.

[113] The Auckland Council's Commissioners at first instance concluded:[29]

> We find that the provision of B7.6 are irrelevant and relate to only to land based mineral extraction activities.

[114] Because of the structure of Mr Hay's evidence dealing with the inshore consent, the midshore consent and the offshore consent, many of his comments relate to applications that are no longer before the Court. It is difficult for this Court to

[29] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [545].

understand whether his particular opinion can continue to apply when, for example, the inshore site is no longer the subject of an application. An example of this is where he says:[30]

> In respect of Objective B7.6.1 (minerals), I consider that granting consent for the continuation of sand mining at the inshore site ensures that the sand resource is utilised in an effective and efficient manner. …

[115] He then goes on to discuss this but does not expand his opinion to relate to either the midshore or offshore areas. His conclusion is therefore unclear as to whether he includes the offshore consent.

[116] In a further amendment to his evidence filed just prior to the commencement of the hearing, Mr Hay deleted certain portions of his evidence including paragraphs [343] to [352] and [371] to [375]. This would be his evidence on this matter at large (paragraph [366]) but it does not appear to address directly the offshore consent. As for rebuttal evidence, he does discuss natural heritage but again this appears to address the inshore and midshore applications. There is no reference to the offshore.

[117] In relation to B6 Mana Whenua, that discussion engages with Mr Carlyon's evidence and does in part relate to the offshore area. When it comes to B7 and the subject of consistency with the inshore, midshore and offshore areas, Mr Hay states he does not agree with Mr Hopkins, Ms Thorne, Mr McKay and Ms Sitarz that the applications are inconsistent with the direction to protect and avoid adverse effects on the values. In that regard, he relies on Dr Thompson and Mr West.

[118] Accordingly, this turns on the matters we will discuss as part of the evidence in relation to inshore and midshore. Mr Hay also notes Ms Sitarz's opinion of the offshore application may also be inconsistent with B7.2. Again, this turns on the evidence relating to effects.

[119] Mr Hay states:[31]

> In respect of the Off-shore application Mr Hopkins has come to a differing

[30] Evidence of David Hay, dated 29 December 2022, at [366].
[31] Rebuttal evidence of David Hay, dated 15 May 2023, at [4.37].

> opinion that the applications are non-consistent with the direction to protect and avoid adverse effects on the avifauna values in the SEA and I am in agreement with Mr Hopkins.

It is unclear from the cross-examination whether this statement is an error or there is a miswording of it.

[120] As to B4 and B6 of the RPS, Mr Hay's evidence is somewhat unclear as to the application of these provisions. This is a matter that we have dealt with as part of the effects of the activity. Again, this distinction between the inshore and midshore consents and discussions of the offshore consents makes it difficult to understand the position of the Applicant as it relates to the evidence on the offshore area.

[121] In relation to B8 - Coastal environment, Mr Hay largely addresses the inshore and midshore consents before noting that Mr Hopkins has concluded that the offshore applications are generally consistent with the broad of directions of the regional policy statement for managing the issues of significance in the coastal environment. He then goes on to discuss Policy B8.3.2(5) and agrees that the precautionary approach needs to be adopted. He then goes on to discuss this in the context of the inshore and midshore applications with no further commentary in relation to the offshore areas.

[122] Similarly, B10 engages an environmental risk with the inshore and midshore applications. He goes on to add that he considers that a further assessment of B10 is required in the event the scope of the applications and the recommended conditions are changed.

D9 Significant ecological Areas Overlay

[123] Again, Mr Hay's opinion as to the applicability of D9 turns on the evidence of Dr Thompson and Mr West. He goes on to discuss the inshore and midshore consents in his reply. There is then a discussion of adverse effects on benthic biota within the SEAs and adverse effects on threatened and at-risk species.[32]

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[32] Rebuttal evidence of David Hay, dated 15 May 2023, at [4.49]-[4.50].

[124] Unfortunately, this again is not related to which of the applications Mr Hay is addressing. Given the earlier paragraphs relating to the inshore and the midshore applications, we can only conclude that he remains silent on the offshore application as it relates to these matters. Nevertheless, each of these would require assessment as to whether there are effects and that is a subject of a fuller discussion on this matter.

D10 Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay and D11 Outstanding Natural Character Overlay

[125] The discussion of D10 by Mr Hay and some other witnesses related to the inshore and midshore applications. Mr Hay does mention in his reply that Mr McKay considers that the offshore application is also contrary to D10.3(3)(c).[33] He notes Mr Brown, the landscape architect called for the Applicant, concludes the proposals at all three sites (including the offshore) would be consistent with those objectives and policies. Mr Hay then goes on to note that he considers that Mr Brown would need to reassess the matter taking into account the reply evidence of Mr Todd and the changes to the inshore and midshore applications and recommended consent conditions.[34] As we understand it, this again turns on the questions of effects which we deal with more generally.

[126] Mr Carlyon took a broader view on the mana whenua chapter. Chapter B6 which was not discussed by Mr Hay in particular detail. The provisions Mr Carlyon considered relevant were B6.2, including B6.2.1, B6.2.2, B6.3, B6.3.1 and B6.3.2. As we will discuss in due course, there appears to be some disconnect between the Planning witnesses as to the relevance of these policies which are expressed in strong terms. Copies of all those provisions are annexed hereto as "**B**".

[127] The wording of B6.3.2(3) and (6) 'ensure' and 'require' are mandatory in nature. They are in a superior regional policy document. We expect that all decisions under the district provisions would be impacted by Policy B6.3.2(6) in particular.

[128] We note that D21 – Sites and Places of Significance to Mana Whenua Overlay,

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[33] Rebuttal evidence of David Hay, dated 15 May 2023, at [4.54].
[34] Rebuttal evidence of David Hay, dated 15 May 2023, at [4.56].

of the AUP(OP) is both a RCP (Regional Coastal Plan) and DP (District Plan) provision. D21.3(2) provides:

> **Avoid** significant adverse effects on the values and associations of Mana Whenua with sites and places of significance to them.
>
> (Emphasis added)

[129] Again, the use of the word 'avoid' is mandatory in nature. Whilst we accept that the word 'significant' modifies the provision we are nevertheless required to be satisfied that decisions have particular regard to the matters in B6.3.2(6) and avoid significant effects on values in association of mana whenua with sites and places of significance.

[130] It appears that the view of the Applicant was that this only protects sites and places scheduled within the plan. However, the policy in D21.3(2) does not identify sites and places of significance identified in the plan but ones of significance to mana whenua.

[131] We acknowledge that D9 – Significant Ecological Areas Overlay and its policies deal with significant ecological areas which are identified in terms of the plan or otherwise might meet the requirements but there are no provisions identifying those beyond the scheduled items. Nevertheless, Schedule 3 factors for accessing ecological values in the regional policy statement notes:

> An area shall be considered to have significant ecological value if it meets one or more of the sub-factors 1 to 5 below. These factors also referred to in B7.2.2(1).
>
> These factors have been used to determine the areas included in Schedule 3 Significant Ecological Areas – Terrestrial Schedule, **and** will be used to assess proposed future additions to the schedule.
>
> (Emphasis added)

[132] The question of whether or not an area exhibits those features which may be significant and they are not identified in the plan is one that the Court has had to deal with both at appeal level[35] but also more generally, including whether or not an area

[35] *Auckland Council v Cabra Rural Developments Ltd* [2019] NZHC 1892.

that is protected in terms of the NZCPS but not identified in the plan is nevertheless subject to the protections of the coastal plan.

[133] For our part although it is not critical for determination of this case, we consider those areas that meet the criteria of Schedule 3 or 4 (the marine schedule) nevertheless constitute areas protected under the NZCPS. They may also be protected in terms of the policy directly. However, if they are not protected by the original policy statement and the provisions of the plan, it seems clearly arguable there has been a lacuna or failure of the plan to properly identify all significant ecological areas, both land based and marine.

[134] An example would be in relation to tara iti and the area seawards of their nesting area. It would seem to meet the features of uniqueness in Schedule 4, factor 3 that it is endemic in the Auckland region, and probably meets sub-factor 1(a) being an area identified as internationally or nationally significant to the species (tara iti) that utilise that ecosystem. This may also apply to other matters such as stony coral and other assemblages which have yet to be identified to occur within this area but have not been identified at this point in time.

[135] From the Court's point of view the difficulty with the plan as worded is that on the face of it, it may miss areas that are protected under the NZCPS Policy 13, particularly rare and represented species but for whatever reason have not yet been identified.

[136] It would seem contrary to the purpose of the Act and the NZCPS if those assemblages or species are not protected simply because they have not been identified in the plan. This approach is reinforced by having reference to several of the other provisions of the AUP(OP) itself.

[137] D9.3 - Policies - Managing effects on significant ecological areas - terrestrial and marine, states:

> (1) Manage the effects of activities on the indigenous biodiversity values of areas identified as significant ecological areas by:

> (a) avoiding adverse effects on indigenous biodiversity in the coastal environment to the extent stated in Policies D9.3(9) and (10);
>
> (b) avoiding other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values;
>
> …

[138] More pointedly, D9.3(9) – Protecting significant ecological areas in the coastal environment, states:

> (9) Avoid activities in the coastal environment where they will result in any of the following:
>
> (a) non-transitory or more than minor adverse effects on:
>
> (i) threatened or at risk indigenous species (including Maui's Dolphin and Bryde's Whale);
>
> (ii) the habitats of indigenous species that are at the limit of their natural range or are naturally rare;
>
> (iii) threatened or rare indigenous ecosystems and vegetation types, including naturally rare ecosystems and vegetation types;
>
> (iv) areas containing nationally significant examples of indigenous ecosystems or indigenous community types.
>
> …

[139] In considering whether we are satisfied that adverse effects are avoided on tara iti, stony coral, and other rare but as yet identified assemblages within the benthic area offshore in Pākiri Beach, we conclude that a duty arises whether or not the area is identified as SEA. Either those effects are to be avoided by virtue of the AUP(OP) or, if not, the NZCPS does require them to be avoided and the AUP(OP) is to that extent inconsistent with that requirement.

[140] We conclude that we can interpret the AUP(OP) to be consistent with the NZCPS by seeking to avoid effects on rare and endangered species and that the wording of the AUP(OP) can be interpreted in that way without straining the language unduly.

F2 Coastal - General Coastal Marine Zone

[141] Mr Hay identified several sections he considered relevant being F2.3, F2.5, F2.6, F2.11 and F2.14. Mr Hay's opinion was that all consents were consistent with that provision. Mr Hopkins' view was that all consents were consistent with that provision with certain mitigation measures proposed in the application. We conclude it would come down to the question of whether effects arising which would make it inconsistent. Again, it becomes part of the overall assessment of effects.

[142] In relation to F2.5 – Disturbance of the foreshore and seabed, again this turns on the impact of the extraction of the sand and the discharge of the uncaught materials. This again turns not so much on physical effects as we understand it but upon the cultural impacts of the disturbance of the seabed and changes that may occur as a result. Again, this feeds into the assessment of effects.

[143] Mr Hopkins for the Council, and other parties agree that given the cultural effects the application is inconsistent with the AUP(OP). Mr Hay on the other hand maintains that it is consistent. Again, Mr Hay considers the application is consistent with mineral extraction F2.6 at the rate proposed and for a 20-year duration. Mr Hopkins recognises the impacts upon tangata whenua but his evidence-in-chief at least acknowledged that he considers the extraction was generally consistent with the direction of the AUP(OP) and sought to avoid remedy or mitigate the effects. This is a matter we have regard to in addressing effects rather than as a matter of direct application of Policy F2.11.

[144] Mr Hopkins and Mr Hay contend that the application is generally consistent. The same objection raised in relation to mana whenua values is a matter that needs to be judged as part of the effects rather than an application of policy.

Underwater noise

[145] We have heard the evidence on underwater noise and reached a conclusion on the effects of that. This therefore addresses F2.18 – Underwater noise and E25 – Noise and vibration. It must be said again there it comes down to the question on

effects and whether these are appropriately identified and addressed.

Overall evaluation

[146] The difficulty with the objectives and policies of the AUP(OP) is they incorporate effects as part of the evaluation and the appropriateness of the activity. As such, the objectives and policies do little to assist the deciding body or the Court on appeal in applying criteria to the application as we identify a number of the provisions relate largely to effects.

[147] As far as the objectives and policies are concerned, we have concluded some of the mandatory language in Chapter B – Regional Policy Statement, relating to mana whenua values and effects is directly applicable to evaluating the evidence on effects, to the extent the parties suggest that there is no hierarchy in this plan in relation to the way in which the factors are viewed.

[148] The Superior Courts have stated we should have careful attention to the language use and the context of those words to understand how the various identified issues and values are to be assessed as whole. In this regard, we have concluded that the Chapter B2 provisions, particularly requiring certain courses of action and avoiding certain things, are mandatory in nature.

[149] These provisions give significant weight to Chapter B2 matters depending on the evidence. Again, we come to evaluate these matters as part of this case and effects. On the other hand, although the value of the mineral is recognised in terms of the plan, there is no mandatory wording as to the weight to be given to that evidence or mandating any particular outcome that must be achieved.

[150] In that regard, we see that plan provides for mana whenua values as pre-eminent compared to economic values. It must be said both the Act and the NZCPS and plan sees the avoidance of effects on rare and endangered species as being the significant priority. If the AUP(OP) provisions do not have that effect, then we conclude that they would be inconsistent with and not give effect to the NZCPS, Policy 13.1(a)

[151] Having assessed the relevant statutory and planning framework, we now turn to address the key issues arising from the application for consent of offshore extraction of sand from the embayment.

[152] Appropriately we start by addressing mana whenua issues.

Mana whenua effects

[153] In general terms two hapū/subtribe identities have presented their *take/issues* during this appeal. The voice of Te Uri o Hau was presented through McCallum Bros, with the Ngāti Manuhiri voice spread across individuals and representative groups as s 274 parties.[36]

[154] As noted, Te Uri o Hau conditionally support the resource consent, whereas all Ngāti Manuhiri voices vehemently oppose it, on the basis that the effects through a Ngāti Manuhiri lens, will be significantly adverse.

[155] We must determine whether we agree and if we do, whether this class of effects can be remedied, mitigated or avoided.

How do we describe these effects?

[156] We use the term 'mana whenua effects' to replace the commonly used 'cultural effects' because, in our view, it better captures those effects cloaked in tikanga, mātauranga Māori/Māori knowledge, and the underpinning relationships, rights and obligations.

[157] We use mana whenua as a pronoun, as it's used in Chapter B6 of the AUP(OP),[37] but also as a verb, to describe hapū or iwi/tribes actively exercising

[36] We acknowledge that while Ngāti Manuhiri and Te Uri o Hau are at the forefront of this appeal, other hapū, iwi and Māori may have interests in the embayment and their relationships are acknowledged. We also acknowledge that many witnesses have Ngāti Wai whakapapa and claim that Ngāti Wai also has mana whenua in the embayment. Olivia Haddon stated that today all Ngāti Manuhiri can claim to be Ngāti Wai, but not all Ngāti Wai can claim to be Ngāti Manuhiri. – Evidence of Olivia Haddon, dated 20 April 2023, at [17].
[37] As defined in the Resource Management Act 1991, s 2.

customary authority in an area.[38] Mana whenua is used to reflect the intangible metaphysical aspects of Te Ao Māori/the Māori world, where Māori are intrinsically and holistically connected with the natural world and that world with them.

[158] The resource consent process is by design, a participatory one, allowing individuals, representative bodies and natural collectives to participate. Te Ao Māori is inherently collective. Given this reality and because of the way s 274 parties, under the mana[39] of Ngāti Manuhiri have chosen to participate, the location and management of mana looms large in this process and forms another important layer to support using the term "mana whenua effects".

How do we assess mana whenua effects?

[159] In the same way that we have set out the planning framework, there is also the need for an appropriate mana whenua based framework.[40] This type of framework will, at least in theory, provide a safer, principled basis to enter Te Ao Māori and, the world of Ngāti Manuhiri and Te Uri o Hau, to ensure the relevant planning objectives and policies are understood and applied through a mana whenua lens. It is also a helpful reference point to tackle the difficult mana whenua issues, as they arise.

[160] The obvious starting point to such a framework is to adopt a Māori/mana whenua lens when addressing tikanga and related mātauranga Māori. The High Court in *Ngāti Maru* provided a timely reminder that we must apply the Māori terms and

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[38] Hirini Moko Mead, *Tikanga Māori – Living by Māori Values* (Revised edition, Huia Publishers, Wellington, 2016) at 306; states that:

> Mana whenua is based on occupation by a group of people over an area of land they settle on for several generations (take ahikāroa). Ultimately this land becomes the rohe, or tribal estate of the new group…

[39] An english definition of mana is a combination of respect, authority, power and prestige, whereby to have mana is to have influence and authority. See Te Runanga o Ngāti Awa Act 1988, s 11; Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013; *Te Runanga o Ngāti Whātua v Kingi* [2023] NZHC 1384; and *Ellis v R* [2022] NZSC 114.

[40] Given this reality, we would have benefitted from opening submissions by the Appellant on how tikanga and mātauranga Māori should be assessed, as a guide as the evidence unfolded, given its centrality to this appeal. That said, we acknowledge that some s 274 parties did provide helpful guidance in this respect and that McCallum Bros did close on these matters and we draw upon those submissions.

concepts in the Act according to tikanga Māori:[41]

> The RMA is replete with references to kupu Māori, including Māori, iwi, hapū, kaitiakitanga, tangata whenua, mana whenua, tāonga, taiapure, mahinga mataitai and tikanga Māori. Parliament plainly anticipated that resource management decision-makers will be able to grasp these concepts and where necessary, apply them in accordance with tikanga Māori. …

[161] That makes it incumbent on us to better understand tikanga and how it works.

[162] The challenge of course, is understanding how to do this. In that respect, decision makers now have the benefit of the Law Commission's report *He Poutama,* which provides, among other things, a guide for decision makers to consider using when they are required to engage with tikanga and mātauranga Māori in cases before them. In summary the guide provides a three-step process:[42]

(a) Step one is to identify the tikanga concepts that are engaged by the factual situation;

(b) Step two is to identify any relevant kōrero tuku iho and related mātauranga; and

(c) Step three is to identify any similar situations that have occurred within the iwi, hapū or whānau.

[163] We endorse this approach and use it to the extent necessary.

[164] Ms Morrison-Shaw provided a very helpful overview of the guidance that the courts have given about the approach to considering and weighing mana whenua evidence. They are worth repeating here as part of the mana whenua framework:[43]

(a) persons holding mana whenua are best placed to identify the impacts of a

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[41] Law Commission *Pūrongo Rangahau: Study Paper 24 - He Poutama* (NZLC SP24, September 2023) at 169; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352, at [64]; and that proposition must naturally extend to any Māori concepts in the AUP(OP).

[42] Law Commission *Pūrongo Rangahau: Study Paper 24 - He Poutama* (NZLC SP24, September 2023).

[43] Submissions of Te Whānau o Pākiri, Ngā Tāpaepaetanga a Te Whānau o Pākiri, , dated 22 August 2023, at [36].

proposal on the physical and cultural environment valued by them;[44]

(b) there can be more than one tangata whenua group for a particular area;[45]

(c) where a particular tangata whenua group states that a specific outcome is required to meet the Part 2 directions in accordance with tikanga Māori, RMA decision makers must meaningfully respond to those claims;[46]

(d) recognising and providing for Māori interests under s. 6(e) necessarily involves seeking input from them about their relationship – as defined by them in tikanga Māori – is affected by a resource management decision;[47]

(e) for sand mining proposals, decision makers are required to "*effectively grapple*" with:[48]

- the effect of a proposal on kaitiakitanga and the mauri of the marine environment; and
- the extent to which monitoring (or in my submissions, any other mechanisms) are able to address concerns that tangata whenua will be unable to exercise their kaitiakitanga to protect the mauri of the marine environment – particularly where a long-term consent is sought;

(f) decision makers are entitled to, and must, assess the credibility and reliability of evidence for tangata whenua using the well settled "*rule of reason approach"* set out in *Ngāti Hokopū*.[49] But where the considered, consistent and genuine view of tangata whenua is that a proposal will result in significant adverse effects it is not open to a decision-maker to decide otherwise: a decision-maker cannot substitute its view of the cultural effects for that expressed by tangata whenua;[50]

(g) a logical extension of this principle, and one previously recognised by the Environment Court,[51] is that nor should a decision-maker substitute its view for that of tangata whenua as to whether such effects are able to be appropriately avoided, remedied or mitigated; and

(h) while there can be a role for technical evidence in interpreting values and concepts into terms comprehensible to non-Māori,[52] such evidence cannot itself

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[44] *SKP Incorporated v Auckland Council* [2018] NZEnvC 081, at [157], which was upheld on appeal, and supported and endorsed by the High Court in *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZRMA 492, at [66].

[45] *Director General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203, at [234] and confirmed on appeal in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, at [109] and [254].

[46] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, at [68].

[47] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, at [73].

[48] *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, at [160].

[49] *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (EC), at [53]. This rule of reason approach has been cited with approval in (at least) two recent High Court decisions: *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* (2020) 22 ELRNZ 110 (HC), at [117]; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* (2020) 22 ELRNZ 202 (HC), at [106]-[108], and [167]-[168].

[50] *Tauranga Environmental Protection Society v Tauranga City Council* [2021] NZRMA 492, at [65].

[51] *Director General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203, at [3] – acknowledging the different factual circumstances in that case did effectively provide Ngāti Tama with a right to veto.

[52] *Land Air Water Association v Waikato Regional Council* EC Auckland, A110/01, 23 October

redefine the tangata whenua values and beliefs.

[165] It is vital that we avoid the common surface level assessment of tikanga. Instead, looking "under the hood" of tikanga, is vital, to the cogency of any findings where tikanga and mātauranga Māori are engaged. For example, the exercise of locating mana (for place and people) is important, once the mana is appropriately located then it should be easier to recognise the relationships Māori/mana whenua have with the natural world and with each other. And importantly how these should be provided for. This requires a good understanding of who the hapū are and how they relate (to place and people) and naturally requires a solid evidential base.

[166] Care needs to be taken when assessing tikanga, by firstly appreciating the nature of the knowledge systems that underpin it. In *He Poutama* the learned authors describe two interconnected knowledge systems. The first is mātauranga Māori, knowledge shared by all Māori. The second is mātauranga a-iwi which is localised knowledge based on Māori kinship groups' own experience and whakapapa. There is also a third system, which is considered generic knowledge that does not originate from Māori.[53]

[167] Tikanga also reflects this way of classifying knowledge and can be divided into two categories; tikanga Māori and tikanga a-iwi.[54] We must carefully navigate between these different knowledge and tikanga systems and not just apply generic knowledge.

[168] A more in-depth analysis of tikanga and one cloaked in Te Ao Māori and/or Te Ao hapū/iwi will also allow tikanga to be seen and considered as an entire system of law or norms and not a grab bag of individual concepts, which unfortunately legislation and planning documents can unintentionally invite. That said, we find that Chapter B6 of the AUP(OP) is a very good attempt to see tikanga and mātauranga Māori in its broader relational context, whilst also providing sufficient specificity in assessing applications, such as this.[55]

2001, at [396].

[53] Law Commission *Pūrongo Rangahau: Study Paper 24 - He Poutama* (NZLC SP24, September 2023) [27].

[54] Law Commission *Pūrongo Rangahau: Study Paper 24 - He Poutama* (NZLC SP24, September 2023) [27].

[55] In our view there is little point having a significant Māori focussed policy document such as Chapter B6 and not fully engaging with it in a Māori way.

[169] As part of the necessary deep(er) dive into tikanga, it is important to work out the specific nature of any contests between the mana whenua groups, the engaged tikanga and what relationships are being affected and whether any of these contests require determination or not.

[170] In a Māori context, where relationships are vital, it is important that we only determine what is necessary, through a mana whenua/Māori lens, and not unduly disturb the delicate nature of existing relationships. Whatever the context, *Ngāti Maru* reminds us that any contests only need to be determined if it is for a resource management purpose.[56] Defining the nature of relationships mana whenua have with a resource, area or activity does not, in our view, cross the *Ngāti Maru* line.

[171] Finally, we feel that we must continue to be alert to areas of consensus as between the hapū and within the hapū. We must identify and where appropriate determine contests, but even within those contests, there may well be areas where consensus exists.[57] In Te Ao Māori, consensus is arguably the best way to achieve ea/state of balance and a tika/correct outcome.

Ngā hapū whai take me ō rātou ake whakapono – The hapū and their positions

[172] The first step to locating mana, to understanding the tikanga engaged, and how these bear on the claimed mana whenua effects, is to describe the mana whenua voices before us, as expressed by them and through other credible material before the Court.

[173] The expression of whakapapa/genealogy (even in a generic manner), tribal origins, areas of interest, tribal institutions such as marae/tribal meeting house and modern-day tribal entities, together, lay an important contextual whāriki/woven mat (metaphoric foundation), upon which we can start to assess the context, the contests,

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[56] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352, at [69].

[57] *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, at [383]. The High Court has previously accepted that consensus as to what tikanga is practiced and what mātauranga is utilised plays a significant role in the tikanga to be considered by the Court, which is evidenced by the ongoing practices of an iwi or hapū. In such instances where the tikanga of an iwi or hapū is sought to be applied the Courts will look to the iwi or hapū involved to provide evidence of their ongoing practices.

the areas of consensus and differences.

[174] There is no way we can do justice to the richness of all the evidence that was placed before us in this decision, but tikanga requires us to pause, and acknowledge all of the mana whenua kōrero/evidence and stories of the past laid down before us. We would like to extend a mihi/acknowledgment to the people of Ōmaha marae for hosting our only in person hearing, to those mana whenua and other residents of the embayment that facilitated our site visit and to those wāhine who consistently opened and closed our online hearings with karakia.

[175] With that, we now introduce the two hapū that laid their *take* before us.

Ngāti Manuhiri

[176] Ngāti Manuhiri trace descent from several tūpuna/ancestors, one being their early tūpuna and voyager Toi Te Huatahi, after whom Te Moana Nui ō Toi (Central and Northern Hauraki Gulf) is named. The ocean area, seaways, islands and coastal margins are also associated with the earliest ancestral origins of Ngāti Manuhiri, through descent from the ancestors Maui Pae, Manaia, and Tahuhunuiorangi. The seaway in which Ngāti Manuhiri have settled was associated with the arrival of the Tainui and Aotea waka, which carried renowned ancestors of Manuhuri, being Rakataura and Turi.[58]

[177] The eponymous tūpuna of Ngāti Manuhiri is Manuhiri. Manuhiri was the eldest son of the rangatira Maki, a descendant of Tainui waka with affiliations to the broader Te Kawerau confederation.[59] Maki, Manuhiri and their people settled in southern Kaipara, Waitākere, Whenua roa ō Kahu (North Shore), Albany and the Mahurangi districts, which includes Pākiri, Matakana, Puhinui (Warkworth) and the offshore islands; Hauturu ō Toi (Little Barrier Island) and Aotea (Great Barrier Island).

[178] Ngāti Manuhiri is a hapū with close connections to the Ngāti Wai and Ngāi

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[58] Evidence of Olivia Haddon, dated 20 April 2023, at [79].
[59] Ngāti Manuhiri and the Crown Deed of Settlement of Historical Claims, 21 May 2011, at [1.1].

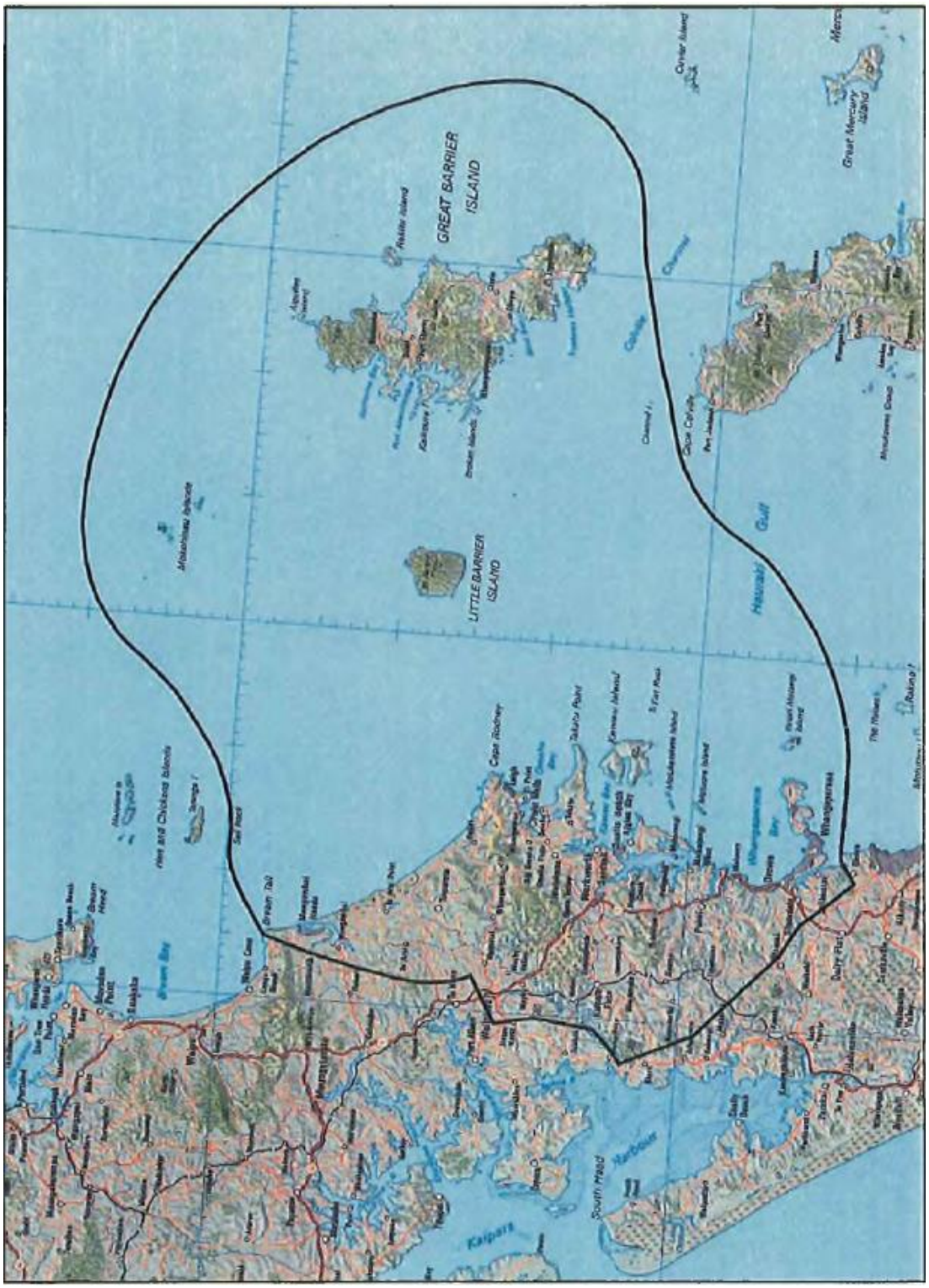
Tāhuhu iwi, but see themselves as a hapū with its own mana and identity. Through strategic marriages with iwi who maintained occupation alongside the eastern coastline and offshore islands, Ngāti Manuhiri strengthened their links with the whenua/land, moana/sea and motu/islands from Paepae ō Tū (Bream Tail) to Te Raki Paewhenua (Takapuna area) and the inland Kaipara area.[60]

Traditional area of interest

[179] The history of Ngāti Manuhiri's rohe varies according to Ngāti Manuhiri kōrero tuku iho/oral tradition, which acknowledges how Ngāti Manuhiri developed as a community. Their Deed of Settlement in 2011 captures Ngāti Manuhiri areas of interest and occupation.[61]

[60] *Te Runanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277, at [406].

[61] Ngāti Manuhiri and the Crown Deed of Settlement of Historical Claims, 21 May 2011, at Attachments – 1: Area of Interest. In describing the Ngāti Manuhiri area of interest we have utilised the map as confirmed in the Ngāti Manuhiri and the Crown Deed of Settlement. We acknowledge that other Ngāti Manuhiri may have a different perspective of the area of interest. However, as the map has been ratified as part of the Te Tiriti o Waitangi/Treaty of Waitangi settlement process, it therefore has some validity in terms of support by wider hapū. There was no obvious dispute as to the area of interest between the two hapū involved.



[180] Ngāti Manuhiri's Deed of Settlement acknowledges that Ngāti Manuhiri are the kaitiaki/guardians and caregivers of Te Hauturu ō Toi. It further recognises Ngāti Manuhiri's cultural, spiritual, historical and traditional association to areas in the

Hauraki Gulf region including Pākiri.[62]

Marae

[181] Ngāti Manuhiri affiliate to Ōmaha Marae.[63] The Ōmaha marae represents the whānau who have ahi kā/occupational fires (maintain occupation) to the area and live in the vicinity of the marae. It is the only operational Ngāti Manuhiri marae today.[64]

The Ngāti Manuhiri voices

[182] Throughout this appeal we heard from those of Ngāti Manuhiri who are living at Pākiri today and those who have moved away but continue to play a role in maintaining the hapū identity (culturally and commercially).

[183] Although these voices may not always agree about internal Ngāti Manuhiri issues their voices were collectively clear about their opposition to the ongoing sand mining in the embayment. We were struck by the strength of the wāhine/female voices in terms of lived experiences and the performative expression of tikanga in the embayment and wider Pākiri region.

[184] We heard from Sherie and Rawinia Wikaira who are uri/descendants of Rāhui Te Kiri.

[185] Under the umbrella of the Pākiri G Ahu Whenua Trust we heard from Annette Baines, Jacob Tahitahi, Wayne Greenwood, Robyn Greenwood, Wendy Brown,

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[62] Te Kāhui Māngai "Tāmaki – Ngāti Manuhiri" (August 2020) Te Puni Kōkiri <https://www.tkm.govt.nz/iwi/ngati-manuhiri/>

[63] Ngāti Manuhiri and the Crown Deed of Settlement of Historical Claims, 21 May 2011, at [1.1].

[64] The Ōmaha marae sits on the Ōmaha 1 block, which was set aside as a reservation in 1975 for the purposes of recreation, meeting, a bathing place and as a place of historical interests for the descendants of Rahui Te Kiri as established at 6 Auckland MB 31-36 (6 AT 31-36). Ōmaha Marae located on Ōmaha 1 is currently under the management and administration of the Ōmaha Marae Trust, which was constituted in 1997 by the Māori Land Court at 24 Auckland MB 246-250 (24 AT 246-250). The Ōmaha Marae Trust is currently managed by trustees John Chand, Jessie Chapman, Mona Nimmo, Robyn Greenwood, Kororia Dennis, Myra Aitken, Christine Naines, Te Ao Rosieyr, Moria Brown, Reuben Williams, Sammy Williams, Marama Gossage and Annie Baines at 184 Taitokerau MB 32-52 (184 TTK 32-52).

Grace Gossage Meyers, Veronica Bouchier, Tamati Stevens and Aperahama Edwards.

[186] We heard from Olivia Haddon, the daughter of the late Laly Haddon. Ms Haddon is the current chair of the Pākiri Te Whānau Community Group Incorporated – Te Whānau. This group is made up of people who whakapapa to both Ngāti Wai and Ngāti Manuhiri.[65]

[187] Kaumātua/elder voice came through Ringi Brown who is a trustee on the NMST and the MKCT as well as a former trustee of Ōmaha marae.

[188] Terrence (Mook) Hohneck is an uri of Rangihokaia and addressed us as the current Chairman of NMST and MKCT.[66]

Te Uri o Hau

[189] Te Uri o Hau trace their descent from Haumoewaarangi and the tribal groups of Te Uri o Hau, Ngāi Tāhuhu, Ngāti Tahinga, Ngāti Rangi, Ngāti Mauku, Ngāti Kauae, Ngāti Kaiwhare and Ngāti Kura.[67]

[190] Te Uri o Hau is a hapū of Ngāti Whātua iwi, with a Deed of Settlement with the Crown signed in 2002.[68] The Te Uri o Hau Settlement Trust was legally formalised in response to the Crowns recognition of the alienation of Te Uri o Hau from their ancestral lands and the loss of their natural resources.[69]

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[65] Evidence of Olivia Haddon, 20 April 2023, at [17].

[66] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [1.10], provides that the Ngāti Manuhiri Settlement Trust was established in 2012 in recognition of the Deed of Settlement, to receive, administer, manage and protect the assets of Ngāti Manuhiri to ensure the cultural, commercial and social development of the hapū for the benefit of the people. The Trust is the Post Settlement Governance Entity of Ngāti Manuhiri and was ratified and mandated by the Manuhiri people.

[67] Te Uri o Hau and Her Majesty the Queen Deed of Settlement to Settle Te Uri o Hau Historical Claims, 13 December 2000, at 1.2.2(a).

[68] Te Uri o Hau and Her Majesty the Queen Deed of Settlement to Settle Te Uri o Hau Historical Claims, 13 December 2000

[69] *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277, at [421]. The Te Uri o Hau rohe is northeast of Wellsford, east to Te Ārai Point taking in the Mangawhai Heads around Paepae ō Tū to Lang's Beach, out to twelve nautical miles distance from the coastline. Then northwest to Pikawahine (south of Whangārei), across to Mahuta Gap on the West Coast, south to Poutō and across the Kaipara Harbour entrance south to Ōkahukura and Taporapora. Te Uri o Hau rohe includes the Mangawhai and Kaipara Harbours and the

[191] As shown in the Te Uri o Hau Deed of Settlement, Te Uri o Hau whenua included land that was previously part of the Mahurangi State Forest north of Te Ārai Point, part of which was sold and then subsequently developed into the Tara Iti golf course. Other land north of Te Ārai Point was vested with the Crown as a reserve, and the remainder retained by the hapū.[70]

Marae

[192] Te Uri o Hau have 14 operational marae namely; Otamatea; Waikaretu; Oruawharo; Arapaoa; Waiotea; Parirau; Ripia; Te Kowhai; Nga Tai Whakarongorua; Oturei; Te Pounga; Naumai; Rawhitiora; and Waiohou.[71]

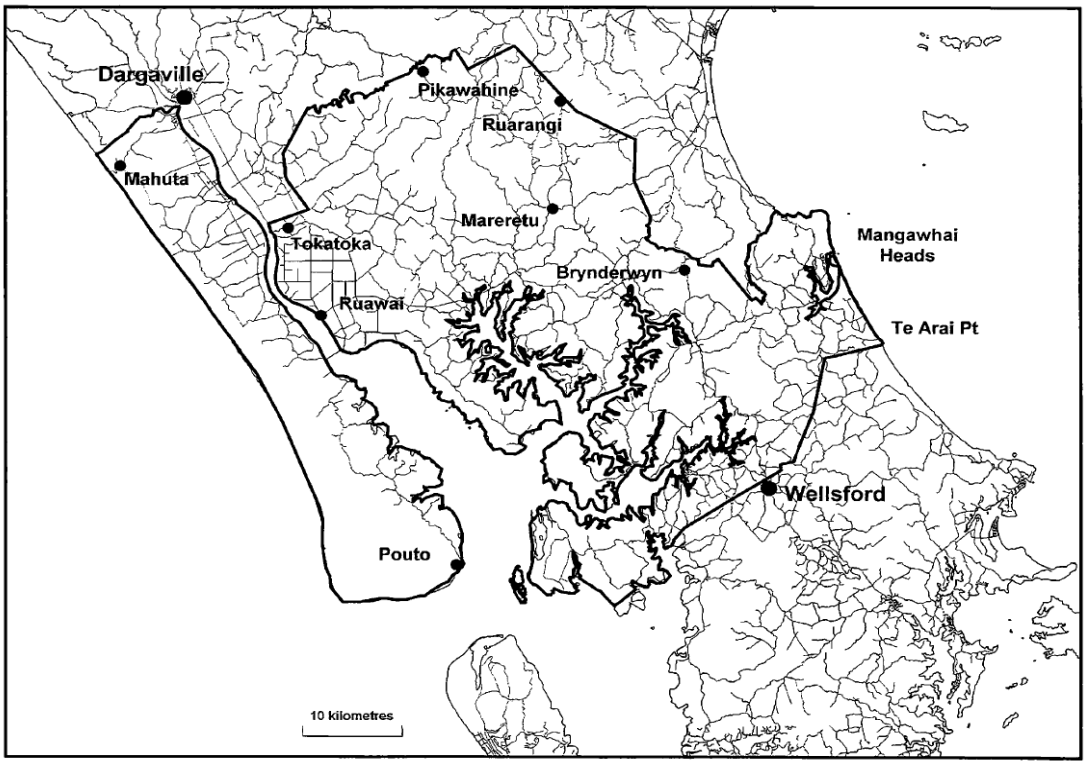
[193] The Te Uri o Hau rohe is depicted in Te Uri o Hau's deed of settlement as follows:[72]

marine and coastal areas extending to the outer limits of the Exclusive Economic Zone (as defined in the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977). It includes the upper reaches of the banks of Hōteo. Te Uri o Hau also used and traversed Hōteo to reach Kaipara as explained at *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277, at [422]

[70] Evidence of Tame Te Rangi, dated 23 December 2022, at [77]; Te Uri o Hau and Her Majesty the Queen Deed of Settlement to Settle Te Uri o Hau Historical Claims, 13 December 2000.

[71] Te Uri o Hau and Her Majesty the Queen Deed of Settlement to Settle Te Uri o Hau Historical Claims, 13 December 2000, at [1.2.1](a).

[72] In describing the Te Uri o Hau area of interest we have utilised the map as confirmed in their Deed of Settlement, as the map has been ratified as part of the Te Tiriti o Waitangi/Treaty of Waitangi settlement process. There is no dispute as to the area of interest of both hapū involved.



Te Uri o Hau voices

[194] The sole witness for Te Uri o Hau was Anthony Thompson who is an uri of Te Uri o Hau and Ngāti Whātua. Mr Thompson was the immediate past president of the Te Uri o Hau Settlement Trust.

Other Māori voices

[195] Tame Te Rangi, of Ngāti Whātua and Ngāpuhi descent was a witness called by McCallum Bros. He was not called by Te Uri o Hau or any specific mana whenua group but rather in his role as a relationship advisor for McCallum Bros.

[196] We reference Aperahama Edwards again, because he is the current Chairperson of the Ngāti Wai Trust Board and whilst Ngāti Wai was not a party to this appeal, we acknowledge the mana of Ngāti Wai as an iwi with its own identity.

What tikanga is engaged by reference to context?

Context

[197] Tikanga is situational and in that respect, this appeal takes us, principally, into the domains of Hinemoana/female Māori sea deity and Tangaroa/male Māori sea deity.[73] Domains within the embayment that have been subject to almost 80 years of continual sand mining. The longevity of this activity is a significant matter of context.

[198] As noted, only two hapū have chosen to formerly express their *take* during this appeal.[74] The nature and extent of the customary interests claimed by these two hapū is an important contextual starting point. In a geographical sense, Ngāti Manuhiri claim customary interests in the entire embayment versus approximately 50% interests claimed by Te Uri o Hau. Te Uri o Hau's claimed area of interest is limited to the part of the application area north of Te Ārai point as shown in their area of interest map above.

[199] The geographical difference between the interests of the two hapū is one thing, but in a Māori context, it is important to understand the nature of the relationship that each of these hapū have with the embayment, in tikanga terms. This helps define the tikanga that we must engage with, which in turn provides a better understanding of where the mana is located and ultimately the mana whenua effects claimed.

[200] Put simply, the relationship that Te Uri o Hau has with the embayment is different to that of Ngāti Manuhiri, which is not just because of the difference in the area claimed. There is no dispute that the respective interests are both whakapapa based, but the ahi kā relationships are considerably different.

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[73] NOE, at page 1715.

[74] That is not to say that other hapū may claim interests in the embayment, but for whatever reason they have not chosen to participate in the first instance or during this appeal.

[201] By their own admission, the embayment is not considered by Te Uri o Hau as within the core part of their rohe. They are a coastal hapū who consider the Kaipara Harbour as the coastal place that best defines their hapū identity. This is supported in geographical terms by the location of all their operating marae today. They are, in reality, a west coast orientated hapū.[75]

[202] For Te Uri o Hau, the relationship with the embayment has been defined as a place utilised as a seasonal food gathering area, as opposed to an area where their people resided permanently (then and now). Further, they accept that the area in which they have these rights, is shared with others, including Ngāti Manuhiri. This is supported by their own deed of settlement with the Crown and their iwi website.[76]

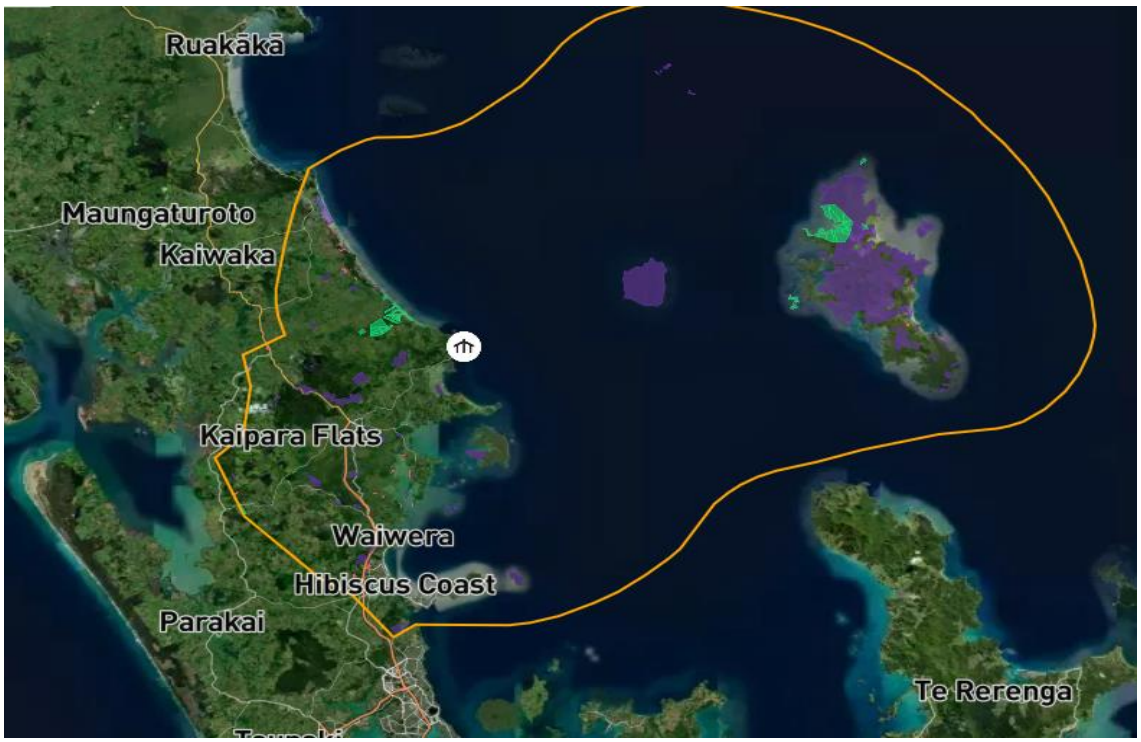
[203] In contrast, for Ngāti Manuhiri, the embayment is considered within their core rohe. They too are a coastal hapū, but their almost exclusive focus is on the east

[75] As shown by the map of Te Uri o Hau Marae present on the Te Uri o Hau website. See Te Uri o Hau Settlement Trust "The Hapū" Te Uri o Hau Settlement Trust < https://www.uriohau.com/our-hapu>

[76] Te Uri o Hau and Her Majesty the Queen Deed of Settlement to Settle Te Uri o Hau Historical Claims, 13 December 2000; and Te Uri o Hau Settlement Trust "About us" Te Uri o Hau Settlement Trust <https://www.uriohau.com/about>

coast.[77] The embayment is where their kāinga/homes have always been located. Their only operational marae, Ōmaha, is close to the embayment, with uri of Ngāti Manuhiri owning the last remnants of Māori land abutting the application area, as depicted in the map below. The name Pākiri, which is the accepted name of the embayment, derives from the Ngāti Manuhiri tūpuna Te Kiri. Te Kiri is also the name of the whare tūpuna at Ōmaha marae.[78]

[204] There was a general consensus on these matters.



[205] Although Ngāti Wai is not a direct party to this appeal, the examples given by Aperahama Edwards about the place of moana in their identity were powerful and add another important layer of context about the domain we are assessing. Mr Edwards explained their iwi motif and whakatauākī/proverb, , "Kia tūpato ka tangi a Tukaiaia ki te moana, ko Ngāti Wai kei te moana e haere ana", which translates to "beware when Tukaiaia calls at sea, Ngāti Wai are at sea." He describes this whakatauākī as a call to arms for Ngāti Wai, that when the sea needs Ngāti Wai, Ngāti

[77] Evidence of Olivia Haddon, dated 20 April 2023, at [55].
[78] The map attached shows Ōmaha Marae by use of the marae symbol on the map. The map is sourced from the Te Whata website; Te Whata "Te Rohe o Ngāti Manuhiri" Ngāti Manuhiri < https://tewhata.io/ngati-manuhiri/>

Wai come.[79] Mr Edwards also stated that this whakatauākī confirms the importance of manu/birds and the moana, going as far as stating that, for Ngāti Wai the moana symbolises their whakapapa and history, more so than whenua.[80] He also explains that Ngāti Wai are like the manu, above and on the moana and whenua.[81] The strong symbolism expressed was not lost on us.

[206] Both Ngāti Manuhiri and Te Uri o Hau have settled their historical Te Tiriti o Waitangi/Treaty of Waitangi claims and we have the benefit of their respective deeds of settlement and related settlement documentation. We accept that these settlement agreements are politicial compromises between the Crown and the settling hapū, but they are useful to assess the consistency of the positions as expressed by the witnesses.

[207] We agree with Mr Pou and Ms Urlich that the Ngāti Manuhiri evidence speaks to the dispossession that has been inflicted upon the hapū at the hands of others, leaving them virtually landless today.[82] The example of history repeating itself was particularly powerful, with respect to the exploitation of timber in the 1800's.[83] Leading Mr Pou and Ms Urlich to submit that if this consent is granted it will, from the Ngāti Manuhiri perspective, represent a sanctioned exploitation of 200 years.[84]

[208] Importantly, for Ngāti Manuhiri, their resistance to sand mining is in part due to their view that, at the hands of the Crown, they have already lost so much. Their relationship with the Crown led to their swift and early landlessness. This landlessness led to the significant migration of their people from their traditional lands. They retain a mere estimate of 1,300 arces of their orignial tribal estate and in their own words, question why they should be contributing any further to the development of Auckland, when they have already given so much.[85]

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[79] NOE, at page 3030, lines 15-20.
[80] NOE, at page 3031, lines 5-10.
[81] NOE, at page 3031, lines 10-15.
[82] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [2.5].
[83] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [2.8]; See also Ngāti Manuhiri Claims Settlement Act 2012, s 8(5).
[84] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [2.12].
[85] Evidence of Ringi Brown, dated 21 April 2023, at [4.3].

[209] We agree with Mr Pou and Ms Urlich that the evidence of Ngāti Manuhiri suggests they are resilient and generous people:[86]

> The Crown acknowledges that by around 1900 Ngāti Manuhiri were left virtually landless and that the Crown's failure to ensure that Ngāti Manuhiri retained sufficient land for their present and future needs was a breach of the Treaty of Waitangi and its principles. This hindered the social, economic, and cultural development of Ngāti Manuhiri as a tribe, undermined the ability of Ngāti Manuhiri to protect and manage their taonga, including te reo Māori, and their wāhi tapu, and to maintain spiritual connections to their ancestral lands. The Crown further acknowledges that this has severely impacted on the well-being of Ngāti Manuhiri today.

[210] Ngāti Manuhiri kaumātua Ringi Brown explained the shift from having 250,000 acres to the 1300 acres that remain as Māori land today. But it was more the loss of connection in a spiritual sense, as opposed to an economic one, that struck us most. Supporting the view that Ngāti Manuhiri have and continue to give, with little in return. Further, in true kaumātua fashion, Mr Brown turned his attention to the rangatahi/youth, by openly supporting their kōrero about the sense of sickness across the embayment.[87] This created, in our minds, an intergenerational consensus of views held by Ngāti Manuhiri.

[211] Relevantly, the Manuhiri Historical Account (as agreed by the Crown) references their protests about sand extraction from the embayment in the 1940s through to the 1990s, and signposts for us, the depth of mamae/feelings of distress on the issue.[88] And as we heard from Terrence (Mook) Hohneck, for Ngāti Manuhiri, the historical account and the related acknowledgements and apologies by the Crown are the most important aspects of their Te Tiriti o Waitangi/Treaty of Waitangi settlement.[89]

[212] Te Uri o Hau's Te Tiriti o Waitangi/Treaty of Waitangi settlement covers similar themes and impacts at the hands of the Crown, but understandably their focus is on Crown breaches west of the embayment.

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[86] Ngāti Manuhiri Settlement Act 2012, s 8(13).
[87] NOE, at pages 1891-1892.
[88] Ngāti Manuhiri and the Crown Deed of Settlement of Historical Claims, 21 May 2011, at 44.
[89] NOE, at page 1905, lines 25-34.

[213] Unsurprisingly, Te Tiriti o Waitangi/Treaty of Waitangi settlements are also at the heart of the AUP(OP), making them impossible to ignore in the context of an appeal such as this.[90] But we agree with Ms Katipo, that these are to be assessed in the context of their legal status and do not amount to a veto of any kind.[91]

[214] Finally, as suggested by Ms Katipo, we do not view the Te Uri o Hau Kaitiakitanga o te Taiao Plan narrowly and we accept that positions change over time, based on new information. Nonetheless, the changing position for Te Uri o Hau as it relates to seaward sand mining remains part of the overall context when assessing the tikanga engaged.

Tikanga engaged

[215] We now address the tikanga engaged by the context described.

[216] Expressing a tikanga based relationship with a geographical area, as many of the mana whenua witnesses have done, naturally gives rise to many of the core tikanga principles and concepts, that are central to the system of tikanga Māori, including (but not limited to); whakapapa, whanaungatanga,[92] kaitiakitanga, mauri/life force, mana, tino rangatiratanga,[93] and kawa such as rāhui/a ritual prohibition.[94]

[217] The starting point, is that all relationships expressed were sourced in whakapapa to the whenua, the moana and to the various taonga that live within the embayment. Whakapapa sets the scene for everything we are required to assess with respect to mana whenua effects. Whakapapa must be established in order for mana whenua

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[90] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.1.

[91] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [9.2(b)].

[92] Whanaungatanga can be described as a relationship, kinship, or sense of family connection – a relationship through shared experiences and working together, which provides people with a sense of belonging.

[93] Tino Rangatiratanga has been defined as self-determination, sovereignty, autonomy, self-government, domination, rule, control, power.

[94] Pa Ryan *The Raupo Dictionary of Modern Māori* (Penguin Group, Auckland, 2008).

groups to have any basis to be affected adversely or otherwise. Once whakapapa is established then naturally other tikanga principles arise.

[218] Sitting alongside whakapapa is the law of whanaungatanga, which manages rights on one hand and obligations on the other. Put another way, whilst your whakapapa defines your rights and responsibilities, the law of whanaungatanga manages them. Both whakapapa and whanaungatanga are considered structural tikanga norms in the system of tikanga.[95]

[219] The obligations that arise by virtue of whakapapa and whanaungatanga are codified in the reasonably well understood concept of kaitiakitanga. Kaitiakitanga has been described as a concept of responsibility and is also closely associated with mana.[96]

[220] Kaitiakitanga is inherent in mana, whereby, if you fulfil your kaitiaki responsibilities, mana grows.[97] The growth of mana, by keeping the embayment in a state of balance, gives those responsible for this balance, the right to use the resources provided. That is, those maintaining the mana of the embayment, have the right to use the resources for their survival and to thrive. In that sense, (and this point is critical), whakapapa alone does not cement resource use rights, it is cemented by fulfilling tikanga based responsibilities. Tikanga is performative.[98]

[221] The right of hapū to use the available resources is further fettered by tikanga, by ensuring that the resources are mainatined in such a state for those yet born, as well as upholding the mana of those who have gone to the spiritual world i.e., the

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[95] It is worth stating the obvious that in Te Ao Māori, these relationships are with people (living and those passed), places, tangible and intangible and in this context with te taiao/the natural environment.

[96] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023), at 86.

[97] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023), at 87.

[98] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023), at 9, Tā Edward Taihakurei Durie states that tikanga " is the set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori."

mana of ones tūpuna is also at stake.[99] This is where tikanga, as a system of law, differs from western law in some respects because kaitiaki must not only balance the now, but must also keep one eye on the past and one on the future. It is sometimes this trio of obligations that is misunderstood by non-Māori, who may focus only on the now and perhaps the future. In the Māori world, all are relevant if balance is to be achieved.

[222] Being kaitiaki of an area would naturally include an active and enduring obligation to protect the mauri of that area.[100]

[223] Mauri is described as a prescriptive tikanga concept that helps maintain balance. Mauri is a tikanga concept that has been raised by all mana whenua parties to some degree. There seems little contest as to what mauri is and means, as expressed by the various mana whenua witnesses, but there is some conjecture as to the ability to transform mauri, a matter we evaluate below.

[224] For Ngāti Manuhiri mauri is the life force or unique life essence that gives being and form to all things in the universe. They say that all elements of the natural environment, including people, possess mauri and all forms of life related. It follows for them that the interconnectedness of all things means that the wellbeing of any part of the environment will directly impact on the wellbeing of the people.[101]

[225] This connected view dovetails nicely to the point made in *He Poutama* that mauri reminds us "to look to the connections that bind us". And that if the connection that must be sustained is lost, mauri will be dormant or diminished, diminishing or altering one's existential being.[102]

[226] From the lens of Ngāti Manuhiri sustaining the mauri of taonga whether a resource, species or place, is central to the exercise of kaitiakitanga. The protection of

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[99] NOE, at page 1510, lines 5-19.
[100] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023).
[101] Cultural Values Assessment, Ngāti Manuhiri, dated March 2020, at 12.
[102] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023) at 63.

indigenous flora and fauna species as taonga species is also important to their role as kaitiaki.[103]

[227] Mana and tino rangatiratanga were also expressed by many witnesses. Mana is a combination of psychic, spiritual force and vitality, which in turn provides recognition of ones authority, influence, and ability to lead people and events. It also includes authority given by a collective to individuals to maintain order within their respective iwi, hapū and whānau.[104]

[228] Alongside notions of mana is the concept of tino rangatiratanga. A concept that the pūkenga involved in *He Poutama* did not consider as a core tikanga principle. It seems to us that the term has strong political connotations, given its prominence in Te Tiriti o Waitangi/Treaty of Waitangi.[105] Whatever, its true meaning and place in tikanga, it has been expressed as being central to the mana whenua effects claimed by Ngāti Manuhiri, and thus we must engage with it. In context, Olivia Haddon said that in order to exercise tino rangatiratanga, mana whenua see it as their responsibility and obligation to use, develop, protect and sustainably manage taonga.[106]

[229] There was no direct evidence about rāhui, but it became a focus of discussion with witnesses and counsel in the hearing in the context of a Te Ao Māori tool to restore balance. In *He Poutama* rāhui are categorised under kawa/processes and procedures but having strong links with prescriptive concepts such as mauri, utu/reciprocity, and ea. Rāhui also have strong connections to whanaungatanga and mana creating responsibilities.[107]

[230] In identifying the engaged tikanga arising from the context, we find that there are no obvious differences between the two hapū as to what the tikanga concepts are

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[103] Cultural Values Assessment, Ngāti Manuhiri, dated March 2020, at 12.
[104] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023) at 71.
[105] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [10.14].
[106] Evidence of Olivia Haddon, dated 20 April 2023, at [53]; and Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [4.11].
[107] Law Commission Pūrongo Rangahau: Study Paper 24 - He Poutama (NZLC SP24, September 2023) at 95.

and how they might generally be understood. The kōrero tuku iho presented by a number of witnesses, albeit from different perspectives, provided a relatively consistent picture of the engaged tikanga.[108]

[231] The Cultural Values Assessment (**CVA**) prepared by MKCT provides a list of values that underpin the kaitiaki role from a Ngāti Manuhiri perspective and they are in general terms consistent with the values expressed by other Ngāti Manuhiri witnesses.[109]

[232] The model introduced by Mr Tahitahi, but developed by Dr Henare Tate in 1992 "Dynamics of Whanaungatanga", described as a "system of Māori values" was equally consistent.[110]

[233] The evidence of Olivia Haddon was particulary helpful in highlighting the system of tikanga at a generic and specific level. Her evidence begins with whakapapa, connecting her whānau to the embayment.[111] She then connects this whakapapa to both rights and obligations and uses language such as "direct ancestral relationship" to describe the nature of the connection to the embayment.[112]

[234] Mr Thompson for Te Uri o Hau did not consider himself a pūkenga/specialist when it came to tikanga and mātauranga Māori,[113] but we suspect that there was a degree of modesty in making that statement, as his experience in this space was clear to us. There was however, little direct evidence presented by Mr Thompson about tikanga and its underlying values. That said, he was relying on the Cultural Values Assessment report that had been prepared by Te Uri o Hau (**the Te Uri o Hau CVA**).

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[108] In general terms we agree with Mr Pou and Ms Urlich that the role of this Court is to assess the values and traditions asserted by mana whenua and that as it relates to Ngāti Manuhiri witnesses the level of agreement on this point is stark. – Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023.
[109] NOE, at page 1957.
[110] Whilst there was some debate as to the model's status as evidence, given that it was not presented by Dr Tate himself, our interest was to check the consistency of the model, with the evidence and submissions before us. In that respect there is a degree of consistency.
[111] Evidence of Olivia Haddon, dated 20 April 2023, at [10]-[18].
[112] Evidence of Olivia Haddon, dated 20 April 2023, at [18].
[113] NOE, at page 923.

[235] Other than the Te Uri o Hau CVA, there was no other direct evidence that engaged with tikanga or mātauranga Māori. But nothing Mr Thompson said in response to questions, suggested that Te Uri o Hau held a fundamentally different view to Ngāti Manuhiri, other than perhaps the process of transformation of mauri in sand, which we address below.

[236] Whilst Ngāti Wai were not direct parties to this appeal, Aperahama Edwards evidence was also consistent with respect to the tikanga engaged.

[237] Tame Te Rangi was not a mana whenua witness per se, but he did comment on matters of tikanga. Whilst Mr Te Rangi has considerable knowledge, he appropriately acknowledged that he did not speak for Te Uri o Hau or Ngāti Manuhiri and we must assess his evidence in that light.[114] But other than how mauri might be redressed and restored, his evidence on tikanga was generally consistent.

What are the mana whenua effects?

[238] We accept that the terms "effect" and "environment" in the Act are broadly defined, and we agree that the evidence, particularly from Ngāti Manuhiri, spans the full spectrum of effects.[115] The Ngāti Manuhiri witnesses claim a range of adverse mana whenua effects including:

(a) the ongoing challenge to Ngāti Manuhiri's ability to fulfil their kaitiaki obligations, exercise tino rangatiratanga and express whanaungatanga;[116]

(b) diminishment of Ngāti Manuhiri mana, which impacts on their ability to undertake customary practices and uphold ancestral relationships;[117]

(c) negative impacts on the ecological health of kaimoana/food from the sea

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[114] Evidence of Tame Te Rangi, dated 23 December 2022.
[115] Submissions of Te Whānau o Pākiri, Ngā Tāpaepaetanga a Te Whānau o Pākiri, dated 22 August 2023, at [28].
[116] Legal Submissions on behalf of the Pākiri G Ahu Whenua Trust, dated 23 August 2023, at [19.9]; NOE, at page 1776, lines 14-18; NOE, at page 1510, lines 5-15.
[117] NOE, at page 1532, lines 32-31; NOE, at page 1533, lines 1-14; NOE, at page 1618, lines 11-18; NOE, at pages 1662-1663.

and food from the embayment area;[118]

(d) negative impacts on the mauri of the embayment and the inability to rejuvenate the mauri of the embayment;[119]

(e) threats to the sustained presence and existence of several taonga species including tara iti, Hururoa, tohorā, and other taonga species;[120]

(f) their identity as tangata whenua, with Nga One Haea ingrained into their cultural identity; and

(g) removing taonga onepū from their rohe.[121]

[239] In our assessment there are two general catergories of mana whenua effects. Firstly, the impact on mana whenua relationships and connections and more specifically, the impact on their kaitiaki obligations. Secondly, the ongoing depletion of mauri.

Findings on mana whenua effects

[240] We start our evalutaion of mana whenua effects by addressing the nature of any contests between the two hapū positions.

Mana whenua contests

[241] Neither hapū refute the nature and extent of each others customary interests in the embayment.[122] The contest or point of difference is really about two hapū identities, with different whakapapa and iwi affiliations, having a different tikanga

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[118] NOE, at page 1783, lines 7-13; and Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.21].
[119] NOE, at page 1532-1533.
[120] Evidence of Olivia Haddon, dated 20 April 2023; Evidence of Terrence (Mook) Hohneck, dated 21 April 2023; Evidence Tame Te Rangi, dated 23 December 2022.
[121] Submissions of Te Whānau o Pākiri, Ngā tāpaetanga a te whānau o Pākiri, dated 22 August 2023, at [1] and [41]; NOE, at page 1803, lines 23-30, and page 1820, lines 15-26.
[122] Evidence of Terrence (Mook) Hohneck, 21 April 2023, at [3.6]. There is no mana whenua contest in the sense of customary authority.

based relationship with the embayment and its taonga. We find that the different hapū positions about the impact of ongoing sand mining, are, primarily based on their different ahi kā relationships with the embayment.[123]

[242] We understand why Ngāti Manuhiri claim to be affected in a different manner to Te Uri o Hau. Their relationship with the embayment, in geographical, whakapapa and ahi kā terms, is far more intimate, than the one expressed in the evidence of Te Uri o Hau (and by their own admission).[124] This trilogy of connections naturally gives rise to a greater set of kaitiaki obligations for Ngāti Manuhiri. There in lies the distinction.

[243] The Ngāti Manuhiri relationship with the taonga species, such as tara iti, Hururoa, Whai, Tohorā and with the sand itself (i.e., for tangihanga purposes) support this more intimate relationship, when compared to the evidence of Te Uri o Hau. [125] The law of whanaungatanga dictates that Ngāti Manuhiri, have little choice but to respond to activities that may disturb their intimate connection. Their mana and mauri is sourced in this connection continuing and the fulfilment of obligations.

[244] Both hapū positions make sense based on the engaged tikanga. Neither Mr Thomspon or Mr Te Rangi suggested that the Ngāti Manuhiri position was outside the realms of a position that ahi kā could take on a *take* such as this.[126] In fact, Te Uri o Hau, were once opposed to seaward sand mining and would most likely oppose any moves for further sand mining in the Kaipara Harbour.[127]

[245] Based on his assessment of the evidence, Mr Te Rangi concluded that we cannot impeach the processes each hapū went through to land on their respective positions

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[123] NOE, at page 984, lines 10-20. Mr Te Rangi acknowledges that the values of hapū are shaped by their different histories, experiences and values, in this context, each hapū has a different relationship with the embayment in a holistic sense as well.
[124] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [11]; See also Evidence of Olivia Haddon, dated 20 April 2023, at [39]-[40].
[125] NOE, at page 1686.
[126] In this context we use the term ahi kā to denote a more intimate relationship with an area, in that the area forms part of the hapū's core area of interest as opposed to areas where there may be considerable overlapping use rights and/or areas where there was little occupation.
[127] Environs Holdings Trust *Te Uri o Hau Kaitiakitanga o te Taiao* (Environs Holdings Trust, Whangārei, 2011), at [43].

about the resource consent application.[128] We agree.

[246] For these reasons we locate the mana at the feet of Ngāti Manuhiri with respect to the embayment, not in an exclusive sense, but they clearly carry the greater obligation for its mana. We find that the use of the term "exclusivity" sits uncomfortably in a Māori context and Ngāti Manuhiri witnesses never argued this Pākehā notion.

[247] By locating the mana in this manner, we start to appreciate why Ngāti Manuhiri would argue the greater impact from any physical and metaphysical degradation of the embayment, as compared to Te Uri o Hau.

[248] This finding does not suggest that Te Uri o Hau's position is wrong or misplaced, nor does it reject their relationship with the embayment, it is just different with fewer tikanga based obligations on them. Their seasonal non-permanent relationship places the Te Uri o Hau position on the mana whenua effects into its proper tikanga context. We now understand why Te Uri o Hau believe that their mana in the embayment will be recognised and provided for, when their close hapū neigbours say it cannot, which to the outside observer may seem odd.[129]

[249] We now address the mana whenua effects.

Effects on mana whenua relationships/kaitiakitanga obligations

[250] The AUP(OP) records that a major issue for Māori in Tāmaki Makaurau is to enhance their relationship with the natural environment and the integration of mātauranga and tikanga in resource management processes.[130] At a policy level the AUP(OP) seeks to provide opportunities for mana whenua to actively participate in the sustainable management of the natural and physical resources in a way that

[128] NOE, at page 980, lines 19-30.
[129] Te Uri o Hau take the view that their mana whenua relationships can be addressed via a side agreement with McCallum Bros, albeit no agreement has been reached to date.
[130] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.1.

recognises the role of mana whenua as kaitiaki.[131]

[251] In order to properly understand what the AUP(OP) seeks to achieve in the kaitiakitanga space, we must not lose sight of the deliberate use of the term "enhance." That is enhancing the mana whenua relationship with the natural environment and the integration of mātauranga and tikanga in resource management processes, including enhancing their ability to exercise kaitiakitanga. The policy directive to enhance is also relevant to our assessment of mauri below.

[252] We received no direct submissions on how we should interpret the term "enhance". Perhaps because its meaning is quite obvious, but in line with the direction of the Superior Courts to focus closely on the words of the AUP(OP) in context, a brief analysis is required. The Blacks Law dictionary definition provides, that enhance is "synonymous with "increased," and comprehends any increase of value, however caused or arising."[132]

[253] In that sense, we must be satisfied that sand mining for the next 20 years, will allow for mana whenua relationships with the embayment to increase in value, and on their terms (physically and metaphysically). We say "on their terms", because we should apply the AUP(OP) mana whenua objectives and policies through a mana whenua lens, i.e., in context.

[254] We accept that in enhancing the value of these relationships we must consider and take into account the existing environment, but equally are entitled to consider both past and cumulative effects, including mana whenua effects. In that respect, we agree with the findings and reasonings of the Comissioners, that the past and cumulative effects that were identified by Ngāti Manuhiri aligned parties about their cultural landscape, seascape, taonga species and cultural wellbeing will be significant and adverse, and will continue if the offshore mining continues.[133]

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[131] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.2.2.

[132] Brian Garner (ed) *Blacks Law Dictionary* (9th ed, West, 2009,) at 609.

[133] Decision on behalf of Auckland Council on application number CST60343373 and

[255] Ms Katipo argues that Ngāti Manuhiri witnesses have not provided credible evidence to show that the offshore activity is the cause of physical and metaphysical effects.[134] These effects are expressed as coastal processes, marine ecology, avifauna and cultural landscape. Perhaps inadvertently, Ms Katipo did not list the metaphysical effects, which formed a large part of the case for the various Ngāti Manuhiri parties.[135] That said, metaphysical effects are dealt with separately, from paragraph [4.14] of her closing submissions. If Ms Katipo is arguing that Ngāti Manuhiri provided no credible evidence of this category of effects, then as we will highlight below, we disagree.

[256] Further, Ms Katipo argues that Ngāti Manuhiri do not assess the source factors that are the root cause of the mana whenua effects and further that the offshore activity has been or would be contributing to these effects.[136] Again, we assume that these submissions were focussed on non-metaphysical effects, because, as we will highlight below, there is ample evidence about how sand mining has impacted kaitiakitanga, mauri, Manuhiritanga and Ngāti Manuhiri relationships generally. But where we find that the Ngāti Manuhiri view that sand mining will result in significant adverse effects, and where this view is considered, consistent and genuine, we cannot substitute that with our view.

[257] Turning now to the facts. There is no dispute that Ngāti Manuhiri and Te Uri o Hau are kaitiaki of the embayment (in the areas where they claim customary interests and shaped by the nature of their ahi kaa relationship). There is a consensus on that issue.[137]

[258] There is also no dispute that Te Uri o Hau say that they can exercise their kaitiakitanga obligations and maintain their mana whenua relationships, if the offshore consent is granted (subject of course to entering into an appropriate agreement with

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DIS60371583 (offshore), dated 6 May 2022, at [234]-[243].

[134] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [5.3].

[135] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [4.2].

[136] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [10.3(a)].

[137] NOE, at page 1824.

McCallum Bros). Whilst some Ngāti Manuhiri witnesses were critical of their position, most accepted that Te Uri o Hau were entitled to hold this view. Again, there was a consensus.

[259] To place the concept of kaitiakitanga within a Ngāti Manuhiri context, we record the words of the late Laly Haddon as presented by his daughter Olivia Haddon:[138]

> Our traditional tribal domain of which we hold traditional ownership rights and mana whenua, mana moana and exercise tino rangatiratanga and kaitiakitanga includes the whole coastline of Pākiri…. and extends over the ocean of Pākiri and beyond to the offshore islands. All three elements, the land, the sea and offshore islands are collectively one tribal domain and cannot be separated.

[260] Te Tiriti o Waitangi/the Treaty of Waitangi guaranteed Ngāti Manuhiri tino rangatiratanga over their taonga. Implicit in that guarantee is the right to exercise kaitiakitanga over those same taonga.[139] There is no evidence that Ngāti Manuhiri individually or collectively gave up this protection and there is no evidence that they have ceased trying to exercise tino rangatiratanga and kaitiakitanga in the embayment. In fact, the evidence is that they have actively tried to stop sand mining for 80 years.[140]

[261] The evidence confirms that Ngāti Manuhiri have seen sand mining as inconsistent with their notion of tino rangatiratanga and interfering considerably with their right to exercise tino rangatiratanga.[141]

[262] The concerns of Ngāti Manuhiri in this respect, are many and include both physical impacts and those in the intangible realm, such as the breakdown in hapū and iwi relationships as a result of not being able to exercise an appropriate level of kaitiakitanga within the embayment.

[263] Other major concerns relate to their inability to prevent the extinction of tara iti as a result of food loss and other impacts to their habitat. Further there is the

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[138] Evidence of Olivia Haddon, dated 20 April 2023, at [53].
[139] NOE, at page 995, lines 23-25. Mr Te Rangi accepted that there is a connection between exercising kaitiakitanga and rangatiratanga.
[140] Legal submissions on behalf of the Pākiri G Ahu Whenua Trust, dated 23 August 2023, at [42].
[141] Evidence of Olivia Haddon, dated 20 April 2023, at [2].

inability of Hururoa to revive itself within the embayment and the loss of other traditional kaimoana.[142] We accept that there is contention as to whether sand mining is the major cause of this depletion.

[264] Tamati Stevens provided a powerful example of a physical impact creating a breakdown of relationships. He notes that coastal marae place a very strong emphasis on being able to sustain kaumātua with kaimoana, as this utilises the mauri of their relationship with the moana to manaaki/support their wairua/spirit.[143]

[265] He also noted that it is customary for whānau to serve kaimoana or local produce, whenever there is an event. This shows the continuing connection of whānau to the resources of the area for ahi kā, and to manaaki those coming to the event. He concludes that the absence of the kaimoana is considered embarrassing, and an apology is offered whenever the local delicacy is absent from the table. This remains a major concern for Ngāti Manuhiri, they fear that they will not have the ability to look after their kaumātua and their duties to manuhiri.[144] Like the Commissioners we agree that the relationship with the taonga species is to be assessed in a connected and holistic way.[145]

[266] Tara iti is considered a taonga of Ngāti Manuhiri. We have no basis to challenge that assertion. There was no evidence from Te Uri of Hau that gave us an impression that the tara iti were considered a taonga to them. We accept that the plight of tara iti has been created by a range of forces, but what is very clear, is that they are on the brink of extinction and whatever the cause, Ngāti Manuhiri's mana as kaitiaki for these manu is at stake and must be considered in that light from their perspective.

[267] The exercise of kaitiakitanga extends to the sand itself. Ngāti Manuhiri view sand as a taonga. It is an integral aspect of Manuhiritanga.[146] Again, there is no basis for us to reject how Ngāti Manuhiri view sand. It was also submitted that sand has

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[142] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.21].
[143] Evidence of Tamati Stevens, dated 20 April 2023, at [26].
[144] Evidence of Tamati Stevens, dated 20 April 2023, at [27]; and NOE, at page 1642.
[145] Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [224].
[146] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [11.1]

been used by the people of Ngāti Manuhiri for over a century and its status as such will never change.[147] The primary example is the use of sand for tangihanga, whereby, the white sands of Pākiri line the burial site, before burial takes place as well as taking the tūpāpaku/deceased to Pākiri and placing white sand on them as they leave to be buried in other parts of the country.[148] This tikanga continues today.

[268] Ngāti Manuhiri witnesses were clear that whilst sand is considered a taonga, it is only tapu when it is used for specific purposes as described above. They also generally accepted that its taonga status did not mean that it could be used or developed for other purposes, but of course this development needed to be balanced against what was best for te taiao and the embayment.[149]

[269] Kaitiakitanga is a practical and performative example of tikanga and it seems to us that a further 20 years of sand mining will continue to adversely affect the performance of this obligation, based on the mana whenua evidence of their experience to this point.

[270] We agree with the Commissioners that the effects on tino rangatiratanga and kaitiakitanga flow on to impact the mana and mauri of the environment, the people and also their ability to manaaki.[150] It is connected in that sense.

[271] Importantly, Ngāti Manuhiri's more intimate tikanga based relationship with the embayment and its taonga species, which places a greater level of duty on them, must be considered in assessing whether their kaitiakitanga and relationships with the embayment will be enhanced overall. Based on the Ngāti Manuhiri evidence and their world view, we find, as the Commissioners did, that their ability to exercise kaitiakitanga will be adversely affected if consent was granted.

[272] There is little evidence from a mana whenua/tikanga point of view that the intimate relationship Ngāti Manuhiri has with the embayment will be enhanced if sand

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147 NOE, at page 1928, lines 31-33, and at page 1929, lines 1-4.
148 NOE, at page 1687.
149 NOE, at page1716, lines 2-5.
150 Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [234].

mining was to continue. Put in a slightly different way, the Ngāti Manuhiri connection to their embayment and its connection to Ngāti Manuhiri will continue to be impacted adversely in tikanga terms if consent was granted.

Effects on mauri

[273] The impact on the mauri of the embayment is a key metaphysical impact claimed by Ngāti Manuhiri. But there were a number of other related metaphysical effects expressed in a variety of ways:

(a) the relationship with the tūpuna moana; Tangaroa, Hinemoana and Papatuānuku:[151]

(b) the intergenerational ability to pass on mātauranga Māori has been negatively affected;[152]

(c) identity as tangata whenua has been negatively impacted;[153] and

(d) there has been a breakdown in hapū and iwi relationships and a direct effect on whanaungatanga.[154]

[274] One of the objectives of the AUP(OP) is for decision makers to recognise mana whenua values and accord them with sufficient weight.[155]

[275] Mauri is specifically referenced as an objective in the following terms:[156]

> The mauri of, and relationship of Mana Whenua with, natural and physical

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[151] NOE, at page 1613, lines 29-20, and page 1614, lines 1-2.
[152] Evidence of Olivia Haddon, dated 20 April 2023, at [93].
[153] NOE, at page 1642.
[154] Evidence of Olivia Haddon, dated 20 April 2023, at [98].
[155] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.3.1.(1).
[156] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.3.1(2).

resources including freshwater, geothermal resources, land, air and coastal resources are enhanced overall.

[276] In terms of policies, mauri is front and centre:[157]

> ...
>
> (3) 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.
>
> (4) Provide opportunities for Mana Whenua to be involved in the integrated management of natural and physical resources in ways that do all of the following:
>
> (a) recognise the holistic nature of the Mana Whenua world view;
>
> ...
>
> (c) restore or enhance the mauri of freshwater and coastal ecosystems.
>
> ...
>
> (6) Require resource management decisions to have particular regard to potential impacts on all of the following:
>
> ...
>
> (b) mauri, particularly in relation to freshwater and coastal resources;

[277] There is no doubt that the ongoing sanding mining over 80 years has damaged the mauri of the embayment according to key Ngāti Manuhiri witnesses and we understand why, given the nature of their ahi kā relationship. There was no contrary position put by Te Uri o Hau, counsel for McCallum Bros, or Mr Te Rangi. There seemed to be a general consensus that the mauri of the embayment is currently depleted or at a low ebb.

[278] In AUP(OP) terms the development and expansion of Auckland has negatively affected Ngāti Manuhiri to this point, because this hapū has, since the signing of Te Tiriti o Waitangi/Treaty of Waitangi in 1840, supplied land, timber and sand, with little in return.[158]

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[157] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.3.2.

[158] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i

[279] We have already found that in granting the consent, it will have an adverse effect on the relationship and role Ngāti Manuhiri have as kaitiaki. This starting point has a flow on effect to mauri, because mauri is managed by the adequate exercise of kaitiakitanga. There is little scope to find against the view that there will be serious adverse effects on the mauri of the embayment going forward.

[280] There were different perspectives advanced about mauri and how it can be lost, managed and restored. For example, Mr Thompson argued that sand has mauri, which interacts with the environment and when it is taken and placed or used in another area there is a transformation of the mauri. For Te Uri o Hau when the transformation of mauri occurs with the blessing of the iwi/hapū, the tapu is lifted.[159]

[281] In referencing the evidence of Annie Baines, Ms Katipo argues that for Ngāti Manuhiri, when sand is taken, the mauri goes with it. Ms Katipo also references the evidence of Mr Tahitahi and Mr Stevens who stated that mauri can be restored.[160] In effect arguing that through the mana whenua panel and other agreements, mauri can be mitigated and remedied.

[282] As previously noted, we have little basis to question the various positions advanced by Te Uri o Hau and Ngāti Manuhiri about their views on mauri. They are according to their own tikanga in reality, not miles apart. What was missing from Ms Katipo's submission was a considered response to the contention made by most, if not all Ngāti Manuhiri witnesses that the embayment needed a rest in order to save the mauri.

[283] Further, it seems clear, that when Ngāti Manuhiri spoke of mauri, they were not only talking about the mauri of the sand, which was the sole focus of Ms Katipo's submission. Mauri as we understood it, covers the mauri of the embayment and

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Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at A1.1.

[159] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [4.16]

[160] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, [4.16].

within that, the taonga species themselves. In simple terms, we understood mauri to applying in a broader sense, and not just with respect to sand.[161]

[284] This is a good example of why we must always consider tikanga in context, and in a connected manner. Taking one strand of evidence from one witness and making a conclusive finding should be avoided.

[285] Ms Katipo advanced the view that if the biophysical effects are found to be minimal, then it must follow that the effects on the metaphysical, such as mauri, must also be minimal. We accept that there is a nexus between physical effects and intangible metaphysical effects, and one can have a knock on effect to the other. That is consistent with the interconnectedness of Te Ao Māori. Ms Katipo appropriately acknowledged that linking likelihood of effects on metaphysical values solely to perceived physical effects is not the only test.[162]

[286] The findings on the lack of information in terms of some of the physical effects in our decision, suggests that we cannot be conclusive that the phyiscal effects will be minimal.

[287] Despite the differing views about whether the mauri of sand is transformed and can be restored if taken, we find, that a further 20 years of sand mining will have an ongoing significant impact on the mauri of the wider embayment, Ngāti Manuhiri themselves, and those taonga species identified.

[288] It seems equally clear, that tikanga allows for restoration processes to address depleted mauri, but those processes will only adequately work, if the embayment is given a significant rest. We address this further below.

[289] In summary, we find that the Ngāti Manuhiri evidence about the mana whenua

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[161] Evidence of Tame Te Rangi, dated 23 December 2022, at [54]; Evidence of Olivia Haddon, dated 20 April 2023, at [55]; NOE, at pages 1502 – 1503. We heard evidence that the sand alongside the series of aquatic life, animals and people that live in and around the embayment are imbued with mauri.

[162] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [5.7].

effects is reliable, credible, consistent and genuine. We agree with Mr Pou and Ms Urlich that it is also corroborated by other evidence, Hauraki Gulf reports and Te Tiriti o Waitangi/Treaty of Waitangi settlement documents, with relevant statements of association capturing the significance of the glistening white sands, birds, shellfish, and marine mammals.[163]

[290] There is no basis for us to dismiss the views and positions of the two hapū about the mana whenua effects and how they have characterised those effects in their evidence and submissions before us, positive, neutral or adverse. Neither cancel out the other, because they are consistent with their own respective tikanga. We therefore agree with Ms Katipo that in applying the rule of reason, there is no contest that the beliefs held by Ngāti Manuhiri parties are as they are expressed.[164] We extend that to Te Uri o Hau as well.

[291] The question then becomes can these adverse effects be avoided, remedied or mitigated?

Can these mana whenua effects be avoided, remedied or mitgated?

[292] The Commissioners found that the adverse effects on mana whenua were significant, and that they could not be avoided, remedied or mitgated.

[293] We must now make our own assessment, based on different circumstances.

[294] At first blush, the Appellants revised consent proposal suggests that the overall impact for mana whenua may, at the very least, be reduced in scale and adverse effects potentially mitigated. We cannot see how these effects could be totally avoided. However, as noted, the AUP(OP) requires mauri and relationships to be enhanced overall.

[295] We accept that the exisiting environment includes mana whenua effects from

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[163] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [1].
[164] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [5.12].

the inshore, midshore and offshore parts of the embayment. We acknowledge that removing two of the three extraction areas going forward, may provide a reprieve for the embayment, which over time, may allow for enhancements of mauri and relationships, when coupled with bespoke mana whenua conditions of consent being offered. The fact that the extraction area is some distance from the beach, further supports this view.

[296] Yet we must place this possible reprieve into context, including the tikanga based context.

[297] The holistic and connected nature of the mana whenua world based on whakapapa and whanaungatanga coupled with the coastal marine situational context, makes it challenging to suggest that extraction in one part of the embayment will not effect mauri and relationships in other parts. Especially, when the activity will be continuous for a further 20 years, on the back of 80 years. The coastal marine area compared to dry land poses practical difficulties for mana whenua to monitor and address both physical and metaphyiscal damage and the extent of it.

[298] Ms Katipo argued that Ngāti Manuhiri provided no credible evidence, as to why (established) effects cannot be remedied or mitigated, other than by stopping all mining completely, which is the strong collective Ngāti Manuhiri view.[165] The better question is whether the view as expressed by Ngāti Manuhiri, has a legitimate basis in tikanga and if it does, is that the only response in these circumstances, or are there other tikanga based responses that may mitigate some of the adverse mana whenua effects.

[299] In Te Ao Māori, including for Ngāti Manuhiri, there is clear tikanga of using kawa processes such as rāhui to allow resources, including kaimoana to replenish themselves, if they have been plundered by humans, natural forces (weather events) or for some other reason. As noted, this regulator derives in part from mana, in declaring the rāhui to facilitate kaitiaki responsibilities to the people, the land, sea and

[165] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [5.4].

different species that reside in the area.[166] In that sense, the call by Ms Haddon and others to give the embayment a rest has a legitimate basis in Ngāti Manuhiri tikanga. In effect, Ngāti Manuhiri are seeking a rāhui.

[300] Aperahama Edwards of Ngāti Wai agreed that in order to restore the mauri of the embayment, the activity must stop.[167] Mr Edwards was very clear that mauri could not be restored, whilst continuing to do whatever was diminishing the mauri.[168] If only mana whenua can determine the cause of depleted mauri, it must follow, that they must also be the experts in assessing the best way to restore it and of course enhance it.

[301] The granting of consent would in effect ignore the call for such a rāhui, even if we accepted the *Augier* condition, requiring McCallum Bros to invite mana whenua to be on a panel. As submitted by Ms Morrison-Shaw, the proposed mātauranga Māori panel's role is limited to monitoring and making non-binding recommendations. It cannot stop the sand mining, if at any point, mana whenua current concerns are realised, which we say are likely.[169]

[302] We can nonetheless, appreciate how the mātauranga panel could provide a vehicle to provide for mana whenua values and a framework to address mana whenua effects. It is as Ms Katipo submits a pragmatic approach and it does in theory allow for values and kaitiakitanga to be recognised. But there remains a serious question as to whether these can be provided for, if the call of the hapū, with the more intimate relationship with the embayment, is for the sand mining to stop.

[303] When one stands back to assess the context to this point, it seems to us far too late for a monitoring panel of this nature to have any meaningful impact on avoiding the mana whenua effects claimed, and to enhance the overall mauri of the embayment

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166 Hirini Moko Mead, *Tikanga Māori – Living by Māori Values* (Revised edition, Huia Publishers, Wellington, 2016) at 209, 303-304.
167 NOE, at page 3029, lines 25-30.
168 NOE, at page 3030, lines 5-7.
169 Submissions of Te Whānau o Pākiri, Ngā Tāpaepaetanga a Te Whānau o Pākiri, dated 22 August 2023, at [52]. The conclusion by Ms Bouchier rings true in this regard, "the panel has no teeth, it's not mātauranga, it's not rangatiratanga."

and the strong Ngāti Manuhiri connection to it.

[304] When we say "too late" we are acknowledging that there has been 80 years of sand mining to this point, with limited mana whenua involvement or engagement, over that period. If we were at the genesis of the activity, then a panel of this nature would make sense, and potentially allow mana whenua values and issues to be provided for from its inception. But that is not the context here. That is not what mana whenua or tikanga are responding to.

[305] Mr Te Rangi agreed that mauri can be restored by rituals such as rāhui, but stated that these rituals will not work if the mauri has been completely lost.[170] We did not get the sense from the Ngāti Manuhiri witnesses that the mauri had been completely lost, because they were arguing that the embayment needed a rest.

[306] Given this, we agree with the Ngāti Manuhiri witnesses, that the only tikanga based way to restore and enhance mauri, and the kaitiaki relationships of the hapū with the more intimate relationship, is for sand mining to stop.

[307] We repeat that no mana whenua witnesses nor Mr Te Rangi argued that the Ngāti Manuhiri position about resting the embayment was inconsistent with tikanga.

[308] A mana whenua panel, a yet to be defined relationship agreement,[171] coupled with the unknowns of other environmental effects does not persuade us that the adverse mana whenua affects can be mitigated or remedied. Whilst the proposed conditions are not inconsistent with the engaged tikanga, for the reasons given, they do not match the reality of the Ngāti Manuhiri and tikanga contexts we have described. On the evidence produced by all mana whenua, there were no other tikanga consistent options placed before us that would adequately address the serious Ngāti Manuhiri concerns.

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[170] Evidence of Tame Te Rangi, dated 23 December 2022, at [53]-[55].
[171] We make little of the possible relationship agreement as introduced by McCallum Bros. In the absence of evidence of what this entails, it simply remains a possibility and can be given limited weight.

[309] For these reasons we find that the mana whenua effects are real, significantly adverse and in the context provided to us they cannot be avoided, mitigated or remedied.

Te Tiriti o Waitangi/Treaty of Waitangi lens

[310] For completeness we assess the principles of Te Tiriti o Waitangi/the Treaty of Waitangi. As noted above, the AUP(OP) places considerable focus on Te Tiriti o Waitangi/the Treaty of Waitangi and Te Tiriti o Waitangi/the Treaty of Waitangi settlements.[172] In that respect, we must carefully interpret the meaning of the AUP(OP) in light of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles when assessing the mana whenua effects claimed. Whilst having regard to Te Tiriti o Waitangi/the Treaty of Waitangi principles is a requirement, they do not trump other considerations. A balanced judgement has to be made, if a collision of considerations occurs.[173]

[311] In balancing these collisions, the strong directions of ss 6(e), 7(a) and 8 of the Act must, as *McGuire v Hastings Distirct Council* found, be borne in mind at every stage of the planning context. And that because of the reference to the Treaty, special regard to Māori interests and values is required.[174]

[312] Ms Katipo appropriately referenced the statements in *Ngāti Maru,*[175] *McGuire v Hastings District Council*[176] and the majority in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd,* when addressing the importance of Part 2 of the Act including s 8:[177]

> …Section 8 is a different type of provision again, in the sense that the

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[172] Auckland Council *Auckland Unitary Plan* (8 March 2024) Te Mahere Whakakotahi i Tāmaki Makaurau – Auckland Unitary Plan https://unitaryplan.aucklandcouncil.govt.nz/pages/plan/Book.aspx?exhibit=AucklandUnitaryPlan_Print, at B6.2.1.
[173] *Whangamata Marine Society Inc v Attorney-General* [2007] 1 NZLR 252 (HC).
[174] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).
[175] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, at [42].
[176] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).
[177] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [27]; and Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [8.1].

> principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. …

[313] Ms Katipo submits the principles of tino rangatiratanga, active protection, reciprocity, mutual benefit and partnership are relevant factors to take into account.[178] We agree with Ms Katipo that these principles are not binding, but they may be very persuasive, because like tikanga, their application is contextual.

[314] Ms Katipo argues that it is evident that McCallum Bros have attempted to work with mana whenua in accordance with these principles, and reflected on the desire of McCallum Bros to build relationships with mana whenua through the activity and the framework proposed.[179]

[315] In this context, Te Tiriti o Waitangi/the Treaty of Waitangi and its principles speak to the quality of the engagement, underpinned by the principles argued by Ms Katipo.

[316] Whilst the orthodox legal position is that consultation by an applicant for resource consent is not strictly required in a resource consent context, the Act and more specifically the AUP(OP) is crafted in such a way that it would be difficult to meet the objectives and policies without meaningful engagement with mana whenua.

[317] As to the level of engagement required, this will be, for the most, part determined by context.

[318] In this context we find that in general terms the engagement attempts by McCallum Bros were genuine, exercised in good faith and seemed to us as a considerable improvement on previous engagements by other consent holders for sand extraction in the embayment. Engaging Mr Te Rangi was necessary, allowing McCallum Bros to get their own tikanga advice and advice on the best ways to engage

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[178] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [5.1].
[179] Submissions of behalf of the Appellant in respect to cultural effects, dated 25 September 2023, at [11.2]-[11.4].

with hapū.

[319] The evidence is clear that some Ngāti Manuhiri parties decided that they would not engage any further with McCallum Bros, especially after the Commissioners' decision. This created immense frustration for the Appellant and was a central theme of cross-examination as to why these attempts to engage were, from their perspective, being ignored. It seemed there was an expectation that mana whenua were required to engage, and that perhaps their failure to would be fatal to their opposition.

[320] We acknowledge that managing mana whenua engagement by non-Māori can be challenging. But equally we acknowledge that for mana whenua the obligations to engage are considerable. The obligations imposed by the law of whanaungatanga make life very challenging for Māori, where their human and financial resources are stretched, if there are multiple *take* taking place at the same time, which is invariably the case.[180]

[321] We do not accept that the refusal of some Ngāti Manuhiri submitters to engage with McCallum Bros is somehow impacting on the credibility of their opposition. It simply becomes part of the overall context and a factor in exercising our discretion.

[322] We understand why, after 80 years of consistent opposition by Ngāti Manuhiri voices, there is a reluctance to engage further. If the position of the hapū is that the embayment needs a rest from sand extraction, then we understand that no amount of discussion, negotiation or new conditions would meet their concerns. Mr Pou and Ms Urlich made the point that McCallum Bros did attempt to engage at an operational level and confirm that their clients acknowledge the efforts of Mr McCallum and Mr Te Rangi. Unfortunately, they submit that there was nothing put into the proposal that would allow them to support the ongoing exploitation of their coastal whenua.[181]

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[180] We were aware that Ngāti Manuhiri were heavily involved in other proceedings before this Court relating to waste management resource consents. We are also aware, that the hapū and iwi do not always speak with the same voice on *take*, internal differences are always a reality, requiring energy to be placed on managing the maintenance of internal relationships, and decisions not to engage externally can sometimes be because they may impact on those internal whanaungatanga obligations.

[181] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [1.9].

[323] Ms Katipo diligently and appropriately tested Mr Hohneck about the refusal to engage with McCallum Bros and he was very clear, that the voices of Ngāti Manuhiri were strongly opposed to offshore sand mining and we can appreciate that it might be difficult for those in representative positions to use limited resources to cut across this opposition.[182]

[324] Any criticism of the Ngāti Manuhiri parties choosing not to engage directly, needs to now be seen in the context of the decision made by McCallum Bros to apply to strike out MKCT as a s 274 party at the back end of this appeal.

[325] If the law of whanaungatanga imposes obligations on mana whenua to ensure that their decisions are tika and pono/truthful, it must follow that the decisions of applicants should also be assessed in a similar light. Certainly that is how Ngāti Manuhiri might see it.

[326] It is the right of every party to make a strike out application, if they believe there are grounds. Just like it is the right of mana whenua or any party to say that they no longer wish to engage directly with an applicant about a resource consent application. Both positions have an impact on relationships, and it would be difficult to see how, from the Ngāti Manuhiri perspective, they could have a tikanga based relationship with McCallum Bros, given the basis upon which the strike out application was advanced. An application we dismissed.

[327] This raises a further point about the decision of Mr Te Rangi to provide a view on some of the specific mana whenua effects, when his role was to help build and manage relationships between McCallum Bros and mana whenua. Ms Morrison-Shaw submitted that Mr Te Rangi has overstepped by offering views on the legitimacy, scale and methods to mitigate the mana whenu effects on Ngāti Manuhiri.[183] This overstep did not sit well with other Ngāti Manuhiri parties. The Court also questioned why Mr Te Rangi decided to comment on the merits of the claimed mana whenua effects,

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[182] NOE, at page 1925, lines 20-24.
[183] Submissions of Te Whānau o Pākiri, Ngā Tāpaepaetanga a Te Whānau o Pākiri, dated 22 August 2023, at [47].

when he was not speaking for the mana whenua hapū before the Court.[184]

[328] These examples highlight the delicate nature of managing the law of whanaungatanga. Mr Te Rangi is an experienced person in the Māori resource management world and he was ultimately careful in answering the Court's questions about the tenor of his evidence and where the line was, with respect to his role. In any case we have given the appropriate weight to all evidence and when it comes to mana whenua effects, it is the credible and reliable views of mana whenua that was our focus.

[329] Finally, we cannot see how allowing the continuation of sand mining for a further 20 years, even in a reduced area, could be considered as actively protecting the taonga of Ngāti Manuhiri.

[330] The principle of active protection requires that protection must be active and not merely passive.

[331] Further, a response must match the context, including whether a taonga is at risk.[185] The vulnerable state of the taonga will impact on the steps required to protect that taonga.

[332] That said, the response requires only what is reasonably practicable in the circumstances. In achieving what is reasonably practicable, a balance needs to be struck between the public interests and those obligations to mana whenua, but as the Supreme Court noted, balancing cannot mean balancing away Te Tiriti o Waitangi/the Treaty of Waitangi principles.

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[184] NOE, at page 983. Mr Pou/Ms Urlich identify the criticism by the Commissioners of relying on Mr Te Rangi to contradict mana whenua has been replayed in this proceeding. Decision on behalf of Auckland Council on application number CST60343373 and DIS60371583 (offshore), dated 6 May 2022, at [274].

[185] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA), at 12. Mr Pou/Ms Urlich submit that because taonga are susceptible, losses could be irreversible and if right, then the Waitangi Tribunal has stated that there is a need for increased protection. – Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [11.18] and [11.20].

[333] In *Ngāi Tai ki Tāmaki Tribunal Trust v Minister of Conservation*, the court expressed concern about a Te Tiriti o Waitangi/the Treaty of Waitangi principles consideration as "merely" being part of an exercise "balancing it against the other relevant considerations".[186]

[334] Further, in some contexts, active protection may require preferential treatment of Māori interests, but it does not act as a general veto over other interests.[187]

[335] Here we have 80 years of sand mining in the same area. The tara iti, a taonga of Ngāti Manuhiri, are on the brink of extinction, other taonga species have disappeared or are depleted, and the mauri of the entire embayment is at a seriously low ebb. Further, we have a context where Ngāti Manuhiri are seeking to exercise their tikanga, and fundamentally the obligations that flow to mana whenua.[188] The context suggests the need for a reasonably high level of active protection, when considering future options for utilising the embayment for sand mining extraction or any other activity.

[336] In balancing the above interests of Ngāti Manuhiri on the one hand, with the concrete needs of the Auckland region, the commerical needs of McCallum Bros, the views of Te Uri o Hau, and the changes to the proposed activity, including the conditions of consent being offered, on the other, where does the swinging active protection pendulum point?

[337] In our view, and for the reasons we have set out above, active protection points to the need for time, to allow for the restoration of the Ngāti Manuhiri relationship with the emabyment and its taonga. In this context and based on the engaged tikanga, Te Tiriti o Waitangi/the Treaty of Waitangi requires a pause to sand mining.

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[186] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368, at [54]-[55].
[187] *Ngāi Tai ki Tāmaki Tribunal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.
[188] Tikanga may be considered a taonga, but Palmer J rather found that the Article 2 protection "extends to the exercise of tikanga, just as it extends to the exercise of rangatiratanga."

Bathymetric and coastal processes

Introduction

[338] Understanding the effects of sand extraction on the beach requires an evaluation of the coastal processes. We have been fortunate to have the opinions of seven experts all of whom have specialised qualifications and extensive experience in the ways of sand transport and beach formation in open coastal environments.

[339] The application and the evidence have morphed as the hearing progressed in response to the various views of the experts and the ongoing analysis of the sand transport processes and the more recent surveys. Initially there were three applications to extract sand from the embayment. One from the inshore, one from the midshore and one from the offshore. As expert opinion coalesced on the possible adverse effects on the beach processes of extracting sand from the inshore and midshore areas the Applicant withdrew applications in those areas. Only the application to extract sand from the offshore area was pursued.

[340] The timing of this change postdated the production of the written expert evidence and indeed the experts joint witness statement. Consequently, large parts of the evidence became redundant. Also, the concentration of the expert evidence was on those nearer shore areas because sand extraction from those areas was likely to have the greatest effect on the beach condition. Sand transport processes offshore have not received the same degree of analysis and scrutiny.

[341] Map 7 version 3.0 dated 13 July 2023 prepared by Bioresearches and titled "Proposed Sand Extraction Area and Control Areas, with previously approved extraction areas, draft intercept boundary points" (Exhibit 1) shows the area outlined in solid blue where sand extraction is now sought. It is reproduced at "**C**". The area is to be defined by coordinates in consent conditions.

The experts

[342] McCallum Bros relied on the work of Mr Derek Todd. He is a coastal geomorphologist with a B.Sc. and M.Sc. (Hons), a post graduate study of coastal and

fluvial processes, and 35 years' experience. He is an adjunct of the Griffith Centre, Australia and is a member of the New Zealand Coastal Society.

[343] For Auckland Council, Mr Samuel Morgan provided expert advice. He holds an M.Sc. (Hons), specialising in geosciences, and has 19 years of experience. He is the Technical Principal – Coastal Adaptation for WSP New Zealand Limited and is deputy chair of the New Zealand Coastal Society committee. He holds a General Environmental Practitioner Certification (coastal process and management) under the Environment Institute of Australia and New Zealand.

[344] Dr Edward Beetham was called by DOC. Dr Beetham holds science degrees in Physical Geography and Coastal Geomorphology and a Doctor of Philosophy in Coastal Geomorphology. He is a Senior Coastal Scientist at Tonkin and Taylor Limited.

[345] Ms Jennifer Hart provided expert evidence for FOPB. She holds a Bachelor of Civil Engineering from Canterbury University, a Master of Civil Engineering specialising in Coastal Engineering and Port Development from the IHE Delft Institute for Water Education in the Netherlands. Her experience spans 25 years with projects in New Zealand, the UK and in the Asia-Pacific Region.

[346] Te Whānau called two expert coastal process witnesses. Ms Sian John has a master's degree in Geomorphology (1st class hons) and has examined sea level rise effects on the Auckland coast and undertaken coastal survey work at Pākiri beach. Ms John is the Director of HaskoningDHV UK Environment Division. Professor Giovanni Coco is Professor of Environmental Science at The Auckland of University and holds a PhD in Physical Oceanography and B.Sc. (hons) in Hydraulic Engineering.

[347] Mr Damon Clapshaw called Dr Shaw Mead to give his expert testimony. Dr Mead is an Environmental Scientist and holds a B.Sc. in Biological Science, an M.Sc. (Hons) in Environmental and Marine Sciences and a PhD in earth Sciences. He has 25 years of experience in marine research and consulting and is the Managing Director of eCoast, a consulting and research organisation.

The expert advice

[348] All the coastal experts drew on The Sand Study (Hume et al., 1999) which was a comprehensive study of sand movement in the Pākiri Embayment undertaken by NIWA, the University of Waikato and the University of Auckland. Dr Mead said in that the study "*integrates large scale field data collection, geomorphology, data analysis, oceanography and numerical modelling, and represents one of the most thorough studies of physical oceanography and sediment transport ever undertaken in New Zealand.*"[189]

[349] Since that study carried out in 1996-7 and reported in 1999, some 24 years ago, further monitoring data of beach profiles and nearshore and some offshore bathymetry has been obtained. This was required by conditions on the previous consents for sand extraction. The record of the aerial photography analysis, beach profiles/survey and analysis, and bathymetric survey that the experts relied on is listed in their joint witness statement. We are grateful for the careful and objective evaluation of the coastal processes recorded in the joint witness statement including the supplementary statement from Dr Mead who was unable to attend the meeting of coastal experts.

[350] The applications for which the coastal expert evidence was prepared included sand extraction from the nearshore, midshore and offshore areas, and the joint witness statement was also based on that scope of the applications. Most of the differing views of the coastal experts related to the inshore and midshore areas and those areas were the focus of the Sand Study, the evidence of the experts and the joint witness statement.

[351] Late in the process, after Mr Todd abandoned his reliance on a controversial sand budget and after correcting a significant beach surveying error and after the Applicant secured a temporary consent to extract a limited quantity of sand from the offshore area, the Applicant amended its application to exclude sand extraction from the inshore and midshore areas and to limit its application to the extraction of sand from just the offshore area.

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[189] Evidence of Shaw Mead, dated 21 April 2023, at Footnote 1.

[352] Rather than rewriting their evidence and altering the joint witness statement some amendments were filed and we were asked to read the statements ignoring the sections that related solely to the inshore and midshore areas. A result of this amended application is to cause the focus of the case to change to the effects of sand extraction from the offshore area after all the evidence relating to all the applications had been prepared and submitted. This belated change of focus has been a significant issue for everyone involved. It removed controversial issues on which most statements had been focused and left less controversial issues that had not had the same scrutiny.

[353] The Sand Study explained the coastal processes occurring in the coastal stretch from Bream Tail to Cape Rodney, a distance of some 30km. It analysed sand movement from the outer depth of closure inshore to the beach. It did not describe the offshore processes or the transport of sand there. Of immediate interest is the 15km stretch of Pākiri beach where sand has been extracted for some 80 years.

[354] It was common ground among the coastal experts that during storms sand is removed from the beach and stored in a coastal longshore bar from whence it is subsequentially returned to the beach during normal coastal conditions. Onshore winds carry sand inland. There are littoral currents that distribute sand along the shore and contribute to offsetting the river and stream mouths.

[355] The familiar white sand, at Pākiri and throughout the Hauraki Gulf, originated from Waikato River which discharged into the Firth of Thames until 24,000 years ago when it diverted to its current course. It is known as Holocene sand and, while basically limited to its present volume, is added to through shell production, land erosion and coastal littoral drift. Beneath the white Holocene sand lies the iron-stained Pleistocene sand which is more compacted.

[356] There is some 92 to 552 million m^3 of inshore Holocene sand and some 82 to 142 million m^3 offshore in the embayment.[190] The offshore Holocene sand body is a wedge-shaped deposit, which reduces in depth with distance offshore. Beneath it lies some 1.7 to 3 billion m^3 of the Pleistocene sand deposit.

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[190] Evidence of Jennifer Hart, dated 21 April 2023, at [30].

[357] Mr Todd annotated a plan which was figure 27 in the Mangawhai – Pākiri Sand Study and showed the positions of vibracore sediment samples offshore from Te Ārai point southwards. It was produced as Exhibit 5. His annotations were of the depth of Holocene sand at each of the 18 core sites.

[358] In water deeper than 30m the average depth of the Holocene sand was 0.65m. In water depth of between 20m and 30m the average depth of Holocene sand was 0.8m. Nearer inshore in 5m water depth the Holocene sand was 2m deep. No similar measurements were provided for the sand deposits north of Te Ārai Point.

[359] In a typical cross section of the beach there is the backshore which includes the dunes, there is the foreshore which includes the swash zone between high and low tides, the inshore which includes the surf and breaker zone and then the shoreface which is seaward of the inshore zone.[191]

[360] The seaward boundary of the shoreface is defined as a water depth beyond which there is limited sediment interchange. It is known as the outer depth of closure. (Outer Hallermeier Limit).[192]

[361] It was agreed by the coastal experts that the 25-metre depth contour represents the outer depth of closure.[193]

[362] In answer to questions from the Court, Ms Hart advised that the reference level used for the Hallemeier estimate was the "mean lower sea level" which in today's terms would be mean low water spring (**MLWS**) tide level.[194] On Ms Hart's "tide ladder" for Marsden Point (Exhibit 30) MLWS is 0.42 and the chart datum is 0.00. Therefore, the outer closure depth when shown by the bathymetric 25-metre contour on the charts is actually 25.42 m depth and so a conservative (i.e., seaward) identification of the position of the depth of closure.

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[191] Evidence of Jennifer Hart, dated 21 April 2023, at Figure 2.
[192] Evidence of Jennifer Hart, dated 21 April 2023, at [34].
[193] Joint Witness Statement – Coastal processes, signed 26 May 2023, at Section 5.
[194] NOE, at page 2928, lines 25-30.

[363] Although at the outer depth of closure net sediment transport from the offshore to the inshore is minimal, there is still sediment movement across the contour. Dr Mead describes the conditions at the closure depth as "…*the offshore and nearshore systems are not basically separated; the depth of closure can be thought of as a depth at which sediment 'leaks' both onshore and offshore*."[195]

[364] The Sand Study estimated that sand transport in the whole embayment across the depth of closure was 176,000m^3/year shoreward and 164,000m^3/year seaward, a net shoreward sand transport of 12,000m^3/year.[196] The net movement was said to lie between 200 and 64,000 m^3/year. As the net sand movement is the small difference between two large numbers with significant error margins it must be viewed at best as small and approximate. Also, when considering it spread over the 27km of the embayment, the net sand transport to the shore is a minute contribution to the sand supply on the beach.

[365] The Sand Study was concerned mostly with the inshore and midshore sand transport processes. It is shown diagrammatically in Figure 3.4 of module 6 of the final report of the Mangawhai – Pākiri Sand Study, reproduced at "**D**".

[366] It shows that across the seabed contour of the depth of closure for the full length of the beach there is annually 164,000m^3 of sand transported seaward and 176,000m^3 of sand transported landward. It does not further explore or explain the sand transport processes in the offshore area. It simply deduces that there is a small net landward transport of sand.

[367] Because sand extraction had been undertaken, and initially was proposed to continue, in the inshore and midshore areas where active beach coastal processes are known to operate, studies had concentrated on the effects of that activity. Limited studies exist for the offshore area.

[368] Mr Todd in his evidence in reply, after adjusting his evidence to account for the

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[195] Evidence of Shaw Mead, dated 21 April 2023, at Footnote 13.
[196] Evidence of Shaw Mead, dated 21 April 2023, at [4.1].

survey datum error, the consequential beach volume errors, the abandoning of the sand budget method of analysis and removing the sections of evidence relating to the inshore and midshore applications, concluded:

(a) that all areas that could be affected by the long history of inshore extraction show a general trend of decadal scale dune advance and no evidence of widespread decadal erosion that can be attributed to sand extraction; and

(b) that sand extraction from the offshore area under the proposed conditions will not result in adverse effects on the bathymetry of the extraction area, the supply of sand to the midshore, or on erosion of the dune-beach environment.

[369] The survey datum error arose from a change in the reduced level of the survey datum point LINZ Trig A917 located on the top of Te Ārai Point.[197] It was changed by LINZ in July 2017 and the RL was lowered by 1.00m from 84.55 to 83.55. For ease of comparison with all previous topographic surveys going back to 2007 and the historical profiles back to 1978, Surveyworx decided to retain a control datum of 84.55.

[370] However calculated beach sand volumes included the change in datum and led, among other assumptions, to Mr Todd initially overestimating the net sand transport across the depth of closure. He corrected his evidence at paragraph [88] of his evidence in reply, accepting the Sand Study result of 12,000m^3 shoreward across the depth of closure.

[371] The sand budget methodology was also relied on by Mr Todd in his support for continued inshore and midshore sand extraction. After detailed analysis and criticism by the experts, he accepted that the assumptions about sources and sinks were unreliable and that there was not enough information to make the methodology useful.

[372] There was debate between the experts over the effects of multiple trenches in

[197] Evidence of Clinton Healy, dated 12 May 2023, at [36].

the offshore area parallel to the shore created by past dredging activity, some up to 2.5m deep and stretching for 3.4km.[198] Mr Todd estimates infilling has occurred at a rate of around 0.2m in six months with shallower trenches totally infilled in a year. He also acknowledges the trenches will interrupt the sand transport across the offshore area but because the trenches existed over only 15% of the embayment length, and by November 2022 only 10%, there would be just a temporary and small proportional effect on the sand transport. Future dredging practices, he said, would not allow the creation of new trenches.

[373] Mr Morgan considers the offshore area is mostly disconnected from the more active parts of the beach and there would be negligible risk to coastal processes from sand extraction in the offshore area. He considered trenches caused by past sand extraction would disrupt the small net amount of cross-shore sand transport until they were infilled.

[374] Dr Beetham similarly considered the extraction site is sufficiently offshore (i.e., beyond the depth of closure) that the effects on the shoreline are likely to be negligible over the consent duration of 20 years. He called for comprehensive monitoring of the beach topography and shore-face bathymetry.

[375] Ms Hart, when questioned by the Court, provided a brief explanation of the processes that she considered occur in the offshore area. The following is an excerpt that details her advice:[199]

> Q: Now, just thinking about the offshore, does the sand study say anything about the offshore conditions?
>
> A: It focused more on the midshore area but, as we've seen, there was some investigation of the offshore and certainly the numerical modelling looked at what was happening in terms of waves and currents and sediment transport in that offshore area as well. They didn't treat the 25-metre depth isobath as a cut-off. There was work done that extended beyond that.
>
> Q: And what did it tell us?
>
> A: Well, the outcomes that we see on this diagram before us are one of the things that tells us, so it estimated that there is material moving across that

[198] Evidence of Derek Todd, dated 15 May 2023, at [79].
[199] NOE, at page 2924, line 11 – page 2926, line 3.

depth of closure and it looked at the depth of sediment out, I think, to about the 35 or 40-metre isobath and took vibracores out to those depths as well, as we've just seen with Mr Todd's marked-up documentation. So, I think the practical difficulties of conducting some of the field work out in deep water were something that constrained the studies so there were underwater drifters, for example, that were released in the shore area and in the midshore area but not in the deepshore area and they were used to field test directions of sediment movement. But where the study was able to look at the offshore area it did so.

Q: And just looking at your diagram there again, and assuming some sand is extracted from the offshore, how does that extraction effect those figures?

A: So, this is where it depends on how the extraction is done and if the extraction removed all of the Holocene sediment from a portion of the offshore area, what would happen is that – and exposed the more consolidated Pleistocene material – what would then happen is that the coastal processes, the ripple-forming and movement of sediment in that area, obviously wouldn't happen because there's no sediment there. And the sediment in the adjacent areas that's being moved through crossshore processes would thin out to replace that lost sediment. And the area inshore of that depleted area would have a lesser contribution until that re-distribution of the offshore sediment had occurred. So we are, though, talking small changes to the amount of sediment moving onshore because it is a small volume of sediment moving onshore. So, if you can imagine, I think, 44 10-litre buckets of sand for every metre of beach, in the depleted area there might be no sand there to move onshore and so, for a period of time, there would be no 44 buckets of sand on the beach. But, you know, outside that depleted that process would still continue. I must say I am probably over-simplifying sort of quite complex processes, this is not a continual process, it's driven by storms and so on and so forth.

Q: So have you got any idea, then, of the quantity of sand that would need to be removed from offshore that would make much difference to the 176,000 contribution to the inshore? How much could be taken without upsetting the apple cart?

A: I don't think we have a clear understanding of that particular value other than to say that we need to leave a layer of mobile Holocene sediment in place. So, if there is sediment there to be moved, it will be moved by processes and that will assist in that 12,000 cubic metres slowly over time making its way landward. If that Holocene sediment is depleted down to the Pleistocene layer, and there is no mobile sediment on the seabed, then, clearly, that process of contribution stops. So that's where the concern about inactive Holocene layer of sediment, or sustaining a layer of Holocene sediment comes from.

Q: So it will be important if there's dredging going on offshore to maintain some Holocene sand on the seabed?

A: Yes, correct. From a coastal processes process, I couldn't speak for the other ecology side of things.

[376] Ms John considered it critical for the benefit of the beach, to maintain the integrity of the sand resource especially in light of the more frequent storm activity,

the rising sea level from climate change and her view that the coastal processes are not sufficiently understood. She considered the small cross shore sand transport from offshore onto the shore face is important and should not be disturbed by sand extraction.

[377] Professor Coco did not address specifically the effects of offshore sand extraction, but he considered better modelling (i.e., current modelling capability has advanced since the Sand Study over 20 years ago) of the coastal processes could and should be carried out before any further sand extraction is approved.

[378] Dr Mead considers the impacts of offshore sand extraction are unknown but will likely reduce the volume of onshore diabathic sediment transport, which will lead to a lowering of the shoreface and bar levels over time, further exacerbating the impacts of climate change, sea level rise and vertical land movement. He supports applying modern modelling analysis to understand and quantify the offshore sediment transport mechanism.

[379] Dr Mead estimates that a single shore-parallel trench 4.7km long and 2m deep has a volume of 75,200m^3 and there are several trenches in the offshore area. The persistent deep shore-parallel trenches, he says, will significantly interrupt cross shore sediment transport. He says the recent offshore seabed imaging indicates that the hundreds of dredge trenches caused by 'normal' dredging activity are persistent and require severe storm events to 'recover'.[200]

[380] The coastal experts in their joint witness statement agree the outer depth of closure lies at the 25-metre depth contour and therefore they conclude "*the risk is low of having any measurable influence on shoreline stability from continuing to extract* [sand] *from beyond the 25-metre closure depth for a period not more than 20-years, with appropriate management conditions.*"[201]

[381] Dr Mead expressed an additional concern about the poorly understood effects

[200] Evidence of Shaw Mead, dated 21 April 2023, at [8.18].
[201] Joint Witness Statement – Coastal processes, signed 26 May 2023, at Section 5.

and persistence of the large and small seabed trenches caused by sand extraction in the offshore area.

Evaluation

[382] There was expert agreement that the outer depth of closure was given by the 25m depth contour on the chart. This represented the position offshore where cross shore sand transport was limited. Inshore of this position sand moved on and off and along the beach during storms and when more settled conditions prevail. It is the region where sand extraction is more likely to disrupt the beach forming processes and is the region where the Applicant has decided not to pursue its applications for sand extraction. We accept this understanding.

[383] Offshore of the 25m depth contour the experts agree that sand extraction has a low risk of having a measurable influence on shoreline stability over a 20-year period if appropriately managed.

[384] This conclusion is based heavily on the agreement of the experts that there is a small, 12,000m^3 over the full length of the embayment, onshore transport of sand from the offshore area. We accept this view as far as it goes but we are concerned about the sand transport systems in the offshore area if sand is extracted from there.

[385] There is an annual cross-shelf (diabathic) sand transport from the shore face to the offshore area of 164,000m^3 over the full length of the embayment (cf Sand Study Fig 3.4), some 27km. This amounts to about 63,000m^3 into the offshore area over the proposed length of the offshore extraction area. So long as there is the Holocene sand seaward of the depth of closure it can return to the shore face as described in the Sand Study. However, if that sand in the offshore area is extracted then the return of the sand to the shore face may be reduced or interrupted. The annual rate of sand extraction applied for is 150,000m^3, so it is possible for the flow of sand across the depth of closure to reverse. Over time this process would reduce the small amount of sand being supplied to the shore face and beach system and even could lead to a significant loss of sand from the shore face into the offshore area.

[386] Ms Hart, when asked about the amount of sand that could be extracted from the offshore area without causing a depletion of the sand resource landward of the depth of closure, advised she did not have a clear idea of what that quantity is, but she said it would be important to ensure a layer of the mobile Holocene sand was retained seaward of the depth of closure.

[387] We were not provided with any analysis of the processes that would occur in the offshore area when sand was extracted from that area. Dr Mead also expressed concern about the poorly understood effects of the trenches in the offshore area.

[388] So, although the experts consider there would be a low risk of adverse effects on shore of sand extraction from offshore, we reach a conclusion, for that to be true, that it will be important to maintain a layer of Holocene sand seaward of the depth of closure and that a better understanding of the offshore processes is needed to be confident that onshore beach effects are not likely.

[389] A question about the availability of Holocene sand in the offshore area also arises. If the average depth of Holocene sand in the offshore area is 0.65m as deduced from Exhibit 5 and the area of offshore extraction is 10km by 2.2km as shown on Exhibit 1 then the volume of Holocene sand present in this area is 14.3M m^3. A total extraction of two million m^3 as proposed by the application represents some 14% of the resource.

[390] Ms Hart uses a rule of thumb that if a contribution or effect is heading up towards 10% then it is normally a significant effect.[202]

[391] We are not able to assess the significance of this effect. On application of Ms Hart's approach it is substantially more than significant. Whether or not maintaining a deposit of Holocene sand seaward of the depth of closure is sufficient to ensure offshore sand extraction does not interfere with beach processes is currently unknown. Proper analysis of the sand transport processes in the offshore area would be needed and all experts would need to have the opportunity to consider that analysis.

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[202] NOE, at page 2923, lines 1-2.

[392] As the Holocene sand layer in the offshore area is quite thin, care will be required if Pleistocene sand is not to be taken. However, we are unsure of any reasons for avoiding taking that sand as, apart from its colour, it does not seem to be unsuitable. Because of the level of significance of the volume of sand to be extracted from the offshore area, confirmation that the coastal processes of concern are not seriously impacted by taking Pleistocene sand should be made before Pleistocene sand is extracted.

The latest iteration of the application

[393] In closing McCallum Bros proffered a revised proposal. The main revised proposals are to stage sand extraction by delaying extraction in the periphery areas and excluding extraction near the depth of closure and from the deeper area. In general stage one follows the extent of the area permitted in the "temporary consent", stage two extends the area shoreward by 200 to 400m, and stage three extends the area seawards by 400m.

[394] The Applicant/Appellant provided a plan to illustrate the revised proposed extraction area, this is reproduced at "**E**".

[395] The area shoreward of the stage two area is referred to as the new western control zone. It is 200m wide and runs the full 10km length of the extraction area. Its purpose is said to enable better monitoring of any effects of sand extraction on the seabed, bathymetry, sediment characteristics, marine ecology, sediment transport, and depth of closure.

[396] This western control zone needs to be excluded from dredging and could perform the function of maintaining a sufficient layer of Holocene sand to ensure the coastal processes at the shoreface are not interrupted by sand extraction. That will require proper specification of the obligations for monitoring and corrective action if needed. A consensus of the expert opinion needs to be provided, especially as to the adequacy of the extent of the area, the monitoring required, any trigger levels and any corrective action. We conclude that a better understanding of the sand transport processes in the offshore area is required in order to assess the effectiveness of the

proposed western control area.

[397] The stage three area is seawards and in water deeper than can be dredged by the current equipment on the vessel.

[398] The seaward area beyond stage three that was within the area applied for is to be deleted from the application.

[399] Various other provisions, such as staging sand extraction from each of the three areas, controlling the sand extraction quantities, spreading the sand extraction and monitoring of activities and effects are proposed. Coastal process trigger points are proposed and support for further coastal process studies, including an offshore wave buoy, are offered.

[400] The total volume of sand to be extracted over a 20-year consent remains at 2M m^3 but the area from which it is to be obtained is substantially less than that originally applied for. The depth of Holocene sand in the area to be dredged is small and it is proposed that if it is penetrated then Council approval would be required to extract the Pleistocene sand.

[401] While the belated amendments now proposed by the Applicant might reduce the risk of onshore effects, they are not sufficiently detailed to enable us to reach factual conclusions as to their outcomes. They would need to be assessed by coastal experts and possibly supported by empirical studies.

Pākiri Sand

[402] In the Pākiri embayment from Bream Tail to Cape Rodney, a distance of some 25 km, the offshore Holocene white sand has been estimated to total between 82 – 142 million m^3.[203] Sand extraction from the embayment has occurred for 80+ years. Prior to 1999 when the Mangawhai – Pākiri Sand Study was published, 2 million m^3 is estimated to have been extracted. Since then, 3.45 million m^3 of sand has been extracted from inshore and offshore areas. The current application is for a further

[203] Evidence of Derek Todd, dated 23 December 2022, at [50].

2 million m³ to be extracted offshore over 20 years.[204] That is in total an extraction of five to nine percent of the total Holocene sand resource which, on Ms Hart's criteria[205] is at a significant level.

[403] That is further reinforced by the estimated loss in beach sand volume of 34,380m³ per year.[206]

[404] The Holocene sand is deeper near the beach but thins out offshore and from Exhibit 5 is about an average of 0.65m deep at the depth of closure of 25m. It appears somewhat shallower south of the Poutawa Stream, and it is noted that the exhibit is limited to south of Te Ārai Point. There was no evidence of the depth of Holocene sand north of Te Ārai Point even though half of the proposed dredging area is north of Te Ārai Point.

[405] If the Holocene sand depth over the proposed extraction area in stage one and stage three (as in the Applicant's amended proposals of 22 September 2023) is 0.65m then the volume of Holocene sand in that area is about 7.5 million m³. The area in stage two was not included as sand extraction from the further offshore stages is less likely to affect beach sand processes. Also extracting sand from further offshore is more likely to access the Pleistocene sand which does not take part in the beach sand processes.

[406] Beneath the Holocene sand is the more consolidated golden Pleistocene sand. Over the embayment, the volume of this sand is estimated to be 2 billion m³.[207] As it is more consolidated it has not been factored into the coastal beach processes that affect the Holocene sand, but it has been found to be suitable for suction dredging and for the manufacture of concrete including high strength concrete.

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[204] Evidence of Derek Todd, dated 23 December 2022 (as amended), at [29].
[205] NOE, at page 2922, line 34 – page 2923, lines 1-2.
[206] Reply evidence of Derek Todd, dated 15 May 2023, at Table 4.
[207] Evidence of Derek Todd, dated 23 December 2022, at [50].

Sand Quality

[407] Mr McCallum told us that the Pākiri sand had mineralogical properties, particle size distribution and freedom from silt and other impurities that made the offshore sand ideal for ready mix concrete and high strength concrete. It consists of mostly feldspathic particles which are non-reactive and do not contribute to alkali reactivity in the concrete.

[408] He reviewed alternative sources of sand, and all had significant constraints of infrastructure, quality, quantity, and distance. He explained there were very few suitable options that have the required volume available, with the right mineralogy and within an economical range. He considered the various alternative sources referred to by Ms Grant would not suffice to replace sand from Pākiri, apart from Kaipara, and that resource had operational constraints and required reconsenting in 2027 with similar and possibly more opposition.

[409] Currently the Auckland market produces about 1.5 million m^3 of concrete per annum.[208] The natural sand portion in concrete in Auckland is about 25% of the combined aggregate and crushed rock fines and sand mix.[209] Also, when using natural coastal sand, the cement requirement is about 15% less than when using alluvial sand.

[410] The mineralogical properties, particle size distribution, durability and freedom from silt and other contaminants make the offshore sand ideal for ready-mix and high strength concrete manufacture. Inshore sand is also used for concrete manufacture and is fine and white while offshore sand is golden, coarser and has more shell content. Pākiri sand is predominantly made up of quartz feldspathic particles which are classed as non-reactive in concrete, an important feature in high strength concrete.[210] McCallum Bros supplies 40 – 45% of the sand used for concrete manufacture in Auckland. It supplies sand to other regions for the manufacture of high strength concrete. The cement content required for high strength concrete can be reduced when using Pākiri sand. Inland Pākiri sand, being windblown, is finer than

[208] Evidence of Paul Donoghue, dated 12 May 2023, at [32].
[209] Evidence of Bretton Beatson, dated 23 December 2022, at [20].
[210] Evidence of Callum McCallum, dated 23 December 2022, at [57] – [58].

coastal sand but it also can be used for concrete manufacture.

[411] The special quality of Pākiri sand was illustrated by Mr Officer, who until 2014 was the General Manager of Allied Concrete (AML Limited) which had 53 concrete plants throughout the country. He told us that of the four plants in Auckland one was using sand from a source other than Pākiri to preserve current supplies of Pākiri sand for critical projects. Mr Officer explained in some detail the favourable attributes of Pākiri sand for critical concrete mix designs. Their Silverdale concrete plant currently uses sand from the Kaipara, but he said "*the Pākiri sand is the most reliable and the best sand for concrete in the Auckland market for the type of work we do especially for our specialist mixes.*"[211] He also told us that in Auckland his company has between 2,500 and 3000 different concrete mixes for use in different applications. He estimated that currently 600,000 tonnes of sand are used for concrete manufacture in Auckland and that this will rise to 1.2 million tonnes in the next decade. (1m³ of sand weighs 1.3 tonnes dry and 1.8 tonnes wet.[212] So, 600,000 tonnes equal 462,000m³ dry sand).

[412] The quality of the Pleistocene sand was not specifically explained but that sand from the deep trenches created by dredging in the offshore was used in the same manner as the Holocene sand so it too must be suitable for concrete manufacture.

Economics

[413] Mr McIlrath is a director of Market Economics Limited and has had 20 years of experience assessing and evaluating the financial and market aspects of projects, policies, and investment programmes. He holds a BA et Sc (Planning) majoring in economics and a Master of Business Administration both from universities in South Africa.

[414] Mr McIlrath has estimated the demand for sand in Auckland, where it comes from and how it is related to population growth and to Auckland's growth. He then examined the economic effects of relying on the principal alternative to using sand from Pākiri.

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[211] Evidence of Robert Officer, dated 21 December 2022, at [7.1].
[212] NOE, at page 157, line 13.

[415] Demand in Auckland for sand for ready mix concrete in 2022 was 674,100 tonnes and this equates to 0.45 tonnes per capita. Including the other uses of sand (landscaping, industry, pre-cast concrete, turf activity) Mr McIlrath used, for his analysis, a range of 0.51 – 0.53 tonnes per capita. On the same ratio this equates to a total current demand for sand of between 764,000 – 794,000 tonnes.

[416] Sand supply to Auckland in 2021 was dominated by Pākiri sand and Kaipara sand; 346,600 tonnes and 393,367 tonnes respectively – a total of 739,967 tonnes.[213]

[417] The current consented sand quantity from Kaipara is 1,080,000 tonnes per annum, more than enough to meet current sand demand, but Mr McIlrath records that operational considerations limit the full use of this resource.[214]

[418] Then, when considering the effects of Auckland's growth, Mr McIlrath adopted two scenarios. The first used Auckland's medium population growth projections and the second incorporated infrastructure (backlog and new) projects and a constant ratio of GDP and population.

[419] Sand demand under the first scenario in 2048 reaches between 1.17 – 1.24 million tonnes per year.

[420] Sand demand under the second scenario is predicted to lie between 1.7 – 1.8 million tonnes per year by 2048.

[421] Current consent applications for offshore Pākiri sand are 150,000m³ per year (270,000 tonnes) with a total of two million m³ over a 20-year term. Current consents for the Kaipara sand total 600,000m³ per year (1,080,000 tonnes). Together they total 1,350,000 tonnes per year and would meet predicted demand for scenario one but still be short of the sand demand under scenario two.

[422] There are of course reservations about this supply and demand relationship:

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[213] Evidence of Lawrence McIlrath, dated 23 December 2022, at Table 1.
[214] Evidence of Lawrence McIlrath, dated 23 December 2022, at [39].

(a) offshore consents at Pākiri are required;

(b) renewal of the Kaipara consents in 2027 would be required;

(c) infrastructure investment would be required to fully utilise the Kaipara sand resource; and

(d) Auckland's growing demand for sand.

[423] Mr McIlrath, for his economic analysis, adopted the alternative sand supply from the Kaipara in the event Pākiri sand was not available. He estimated the additional costs associated with the alternative supply. There were five categories where he saw additional costs: transport (significant additional truck transport), social costs, emissions (transport and cement production), increased cement content when using alternative sand source, and increased emissions from greater cement use.

[424] Given that these costs would be avoided if Pākiri sand continued to be available they can be viewed as benefits of the use of Pākiri sand. Those benefits have a present value of $58 million.[215]

[425] He concluded that supplying sand from Pākiri to the Auckland market, when compared to the Kaipara alternative, is efficient, avoids significant road transport, minimises emissions, and avoids the risk of relying on a single source. He considers Auckland is facing a sand supply shortage with or without Pākiri sand.

[426] Professor Sharp, Emeritus Professor in the Department of Economics at the University of Auckland, who was called by MHRS, relied on the analysis and decision of the Commerce Commission in 2003, concluding that the sand market in Auckland was competitive. He expressed that the market was "not inelastic". He said that this was evident also from Table 1 of Mr McIlrath's evidence where the potential total availability of consented sand sources showed a theoretical spare capacity of a little over 1 million tonnes. He agreed though that he had not examined the suitability of the sand for specialised concrete mixes or the particular constraints of the various

[215] Evidence of Lawrence McIlrath, dated 23 December 2022 (as amended), at Table 2 and [140].

sand sources.

[427] He was critical that the environmental costs of extracting Pākiri sand had not been assessed, but agreed that to compare alternatives a similar assessment would be required for each sand source and that would be a very large, time-consuming, difficult, and expensive study.

[428] The three economists, Mr McIlrath, Professor Sharp and Ms Grant, agreed in a joint witness statement that there exists a wide range of alternative sources of sand and that the Kaipara source was the most probable alternative. It had issues of transport, quality, sustainability, availability, consent, and infrastructure. Professor Sharp considered the Auckland market for sand to be competitive and any price adjustment from the absence of sand from Pākiri is uncertain, while Mr McIlrath considered there is likely to be a price increase. They agreed externalities were a relevant issue for all the sand supply alternatives and assessing them was a challenge.

[429] McCallum Bros supplies sand to the concrete manufacturing plants in Auckland for between $35 and $45 per tonne depending on the distance from the wharf to the plant.[216]

[430] Clearly Auckland has a substantial and growing appetite for sand for the manufacture of concrete, and in particular high strength concrete for the construction of buildings, bridges, and infrastructure. The sand market in 2021 in Auckland was $33.3 million if the 739,967 tonnes were sold for $45 per tonne.

[431] There are major cost ($58 million present value) and emissions advantages in mining the sand from offshore at Pākiri and shipping it to Auckland. Additionally, the quality of the sand allows for reduced cement use in concrete mixes and is particularly suited for the manufacture of high strength concrete.

[216] NOE, at page 156, line 30.

Alternatives

[432] Mr Beatson is an Independent Concrete Plant Engineer; he holds a New Zealand Certificate of Engineering and has 40 years' experience in the concrete industry. He inspects concrete plants, evaluates raw materials for concrete manufacture, designs concrete mixes and prepares reports for the Concrete New Zealand Plant Audit Committee. He said the Auckland ready mixed concrete market is dominated by six main companies where approximately half use Kaipara sand and the other half Pākiri sand. Many high strength concrete products are manufactured using Pākiri sand.

[433] Mr Beatson described the nature of sands used for concrete manufacture from various parts of the country. South of the central plateau river sands are used; in the Waikato and Bay of Plenty sand is obtained from pits dug into old alluvial deposits and then blended with crusher rock fines; north of the Bombay Hills sand comes from marine sources or coastal dunes. He said the coastal sand is inert, clean, strong, durable and has consistent grading and a good particle shape, all being essential qualities for quality concrete manufacture.

[434] For the Auckland concrete sand supply, Mr Beatson considers there are few alternatives to marine sourced or coastal sand available. He said sand could be transported from the Waikato, but it is inferior to the coastal sands having an alkali-silica reaction with cement, reducing the durability of the concrete, and it requires about 15% more cement in the mix and the lighter volcanic materials require washing out. It would entail substantial trucking from the Waikato and present sand winning operations there are fully committed to the demands of that region. Sand mining pits in the Waikato are mostly on private land, require large areas of land, need rehabilitation afterwards and prove difficult to consent.

[435] If sand was not available from Pākiri, Mr Beatson considers the only realistic option is to increase sand won from the Kaipara. That, he says, has problems. The current operator there also manufactures concrete, so competition issues arise and although current consents allow for increased volumes of sand those volume increases are unproven and the consents have a limited time to run. He says serious long-term

planning and consenting would be required if Pākiri sand was not available.

[436] Mr Thomson considers major infrastructure involving a new wharf, road access and constant dredging would be required to enable expanded sand excavation from the Kaipara Harbour and even then, vessels would be limited in size, draft, and numbers. Additional barges present new risks of stranding in the remote shallows of the harbour. Trucking would be required from the unloading site to Auckland. He knows the harbour and the challenges of dredging there as he was for 11 years operating Kaipara Towboats Limited working on the Kaipara Harbour dredging, towing, and manning the barge *William George Winstone*. He also considers sea transport across the Kaipara bar and the Manukau bar impracticable and too risky.

[437] Mr Officer also addressed the issues he saw with the alternative sources of sand. Allied has over the years used sand from Tomarata, Waikato (Tuakau) and Kaipara, and processed recycled glass. The alternative sand sources all require substantial additional trucking, alkaline silica reaction is a risk with Waikato sand, Tomarata sand is fine graded and limited in quantity, recycled glass is poorly shaped, poses a health risk, is limited in quantity and is expensive, Kaipara sand is limited by supply, infrastructure, and current ownership. Manufactured sand is in limited supply and cannot replace natural sand but is used to blend with sand. Recycled concrete is used for aggregate in low specification concrete but is not used for the sand component.

[438] In his evidence in reply Mr Officer addressed, in some detail, the alternative sources of sand supply that Professor Sharp and Ms Grant canvassed. He acknowledged Allied had used many of those sources, agreed they can be used for ready mixed concrete but considered the quantities of sand available from them cannot meet their current demands plus any additional demand from the unavailability of Pākiri sand. Only Kaipara sand could be considered a viable alternative supply. That source is controlled by a competitive company, has consents which expire in 2027, will face similar issues as the Pākiri sand consents, and requires substantial extra trucking with the associated costs and emissions.

[439] FOPB called Ms Grant to give evidence on alternative sand sources. She is a

Principal at Beca Limited, leads the Industrial Sustainability consultancy service and holds the degree of Bachelor of Engineering (Hons) in Chemical and Materials Engineering. Her evidence consisted of summarising a report "Review of Alternative Sand Sources" prepared for FOPB by the consultancy and for which she was the co-reviewer.

[440] Ms Grant divided her identified sand sources into "probable" and "possible" and concluded between 8 million m^3 and 11 million m^3 of sand was probably available for extraction across Northland, Auckland, Waikato, and the Bay of Plenty from some 16 sites. The report concluded that the most probable alternative source would be from the Kaipara.

[441] Ms Grant confirmed that the report was a desktop study and did not take into account the availability of sand from each of the sites for the additional supply if Pākiri sand was not available, the additional costs of transport, the commercial feasibility for each source or the economics of the alternative sand supply.[217]

[442] Mr Donoghue provided evidence in reply relating to the evidence of Professor Sharp and Ms Grant. He is the manager Training and Certification for Concrete New Zealand and consults as a plant engineer and concrete consultant. He holds a New Zealand Certificate of Engineering, is a Registered Engineering Associate and has 36 years of experience in the concrete industry.

[443] Mr Donoghue confirmed the special nature of Pākiri sand for high strength concrete and in particular the lower concentration of cement required. Less cement and sea transport meant much reduced CO_2 emissions compared to all other sources of sand. He said the main alternative sand source would be from the Kaipara, however that entails increased trucking, increased sand dredging in the harbour and logistical issues over access. Other sources can make only minor additional contributions to the Auckland sand market, and many have sand quality impediments.

[217] NOE, at page 2622, lines 11-18.

Evaluation

[444] It is clear to us that sand for concrete manufacture in Auckland is an essential commodity for the benefit of all in the region. There are theoretically sufficient resources of sand in the region, apart from Pākiri, for predicted demand in the immediate future, but practical difficulties limit those options. Those difficulties include scale, access, existing commitments, transport, consents, cost, and quality and possible monopoly issues.

[445] Currently, sand from the Kaipara could be considered as an alternative source of sand but availability is by no means sure. It would require appropriate access, major infrastructure development, renewed consents, and would create a significant increase in road transport, emissions, congestion, and costs. Concentration of sand extraction on the Kaipara would not only increase costs and environmental effects but it would also lessen the resilience of sand supply for Auckland to the one source and supplier. In the future sand demand for Auckland is likely to grow to such an extent that all sand resources identified are likely to be needed.

[446] We also conclude that the white Holocene sand resource offshore at Pākiri is limited, being only a thin layer over the Pleistocene sand beyond the depth of closure. We conclude that surveys of beach profiles (after the survey error was corrected) have shown that the past extraction of inshore Holocene sand has resulted in annual beach volume losses. The proposed extraction combined with the past extraction totals a significant effect on the Holocene sand resource.

[447] There are major cost ($58 million present value) and emissions advantages in mining the sand from offshore at Pākiri and shipping it to Auckland. Additionally, the quality of the sand allows for reduced cement use in concrete mixes and is particularly suited for the manufacture of high strength concrete.

[448] We understand that the properties of the Pleistocene sand are suitable for the concrete mixes and that this sand being somewhat consolidated and overlain by Holocene sand does not play a role in the active coastal processes. That being the case, it could be considered as an appropriate sand resource to use.

[449] The thin Holocene sand layer in the offshore areas of stage one and three totals some 7.5 million m^3 in the amended proposal. The abstraction of two million m^3 of that sand as proposed by the Applicant is a very significant portion.

Ecology

Introduction

[450] The evidence on ecology addressed the initial applications for inshore, midshore and offshore sand extraction. Prior to the hearing the inshore and midshore applications were no longer pursued by McCallum Bros, and the evidence at the hearing focussed on the offshore application.

[451] In closing submissions McCallum Bros proposed an amended application. This included proposed staging of the sand extraction, amended marine ecological monitoring, and mechanisms for protection of tara iti. The amended proposal was addressed in legal submissions at a reconvened hearing in November 2023.

[452] The ecological witnesses approached their assessments generally from a technical science perspective, and the Joint Witness Statements on marine ecology and avifauna were also prepared solely from this perspective. Through the hearing there was kōrero regarding why a more holistic approach incorporating observations from mātauranga Māori perspective was not undertaken in the ecological assessments.

[453] Ngāti Manuhiri evidence identifies pakake/whale and manu/birds as taonga, and that tikanga requires protection of vulnerable species. Most, if not all the mana whenua parties are closely involved actively in efforts to protect tara iti and enhance their habitat, with nesting habitat at Pākiri on land owned by tangata whenua.[218] The observations of tangata whenua and from a mātauranga Māori lens are valuable to a holistic assessment of ecological issues.

[454] We consider that effects on mana whenua values must be assessed by those with

[218] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [10.1]; Legal submissions on behalf of the Director-General of Conservation, dated 31 July 2023, at [70] – [71].

the requisite knowledge to undertake that assessment.[219] The ecological evidence contributes to a holistic assessment of values and effects that must also include mana whenua values from a mātauranga lens.

[455] This assessment of the evidence is based primarily on the technical evidence provided by the ecological witnesses but also incorporates some information presented by tangata whenua and mātauranga Māori/tikanga witnesses.

Marine ecology

[456] Marine ecology evidence was provided by Mr West on behalf of McCallum Bros, Dr Sivaguru on behalf of Auckland Council, Professor Jeffs on behalf of Forest and Bird, and Dr Radford on behalf of Te Whānau. Dr Clement, a marine mammal expert, gave evidence on behalf of McCallum Bros. Mr Stevens, who is researching the whakapapa (essential ecosystem services) of the moana, provided mātauranga Māori evidence on behalf of Te Whānau. Dr Maseyk provided evidence on effects management (and also participated in the avifauna Joint Witness Statement) and did not specifically review the values and assessment of ecological effects.

State of Hauraki Gulf

[457] The Hauraki Gulf, Te Moana Nui ō Toi is of national importance, and it is generally accepted that the marine environment of the Gulf is in a degraded state from adverse effects such as fisheries, scallop dredging and sedimentation.[220] The State of Our Gulf 2020 report[221] provides an account of the state of its health and degradation. Ngāti Manuhiri consider the degraded state of Te Moana Nui ō Toi triggers the need for greater protection.[222]

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[219] *Te Rūnagna o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277.
[220] Although not addressed in ecological evidence. It was not accepted by McCallum Bros that it is in a degraded state in answer to questions at reconvened hearing in November (NOE (for 22 – 24 November 2023), at page 35) – McCallum Bros consider the Gulf is 'degraded in various degrees in various places'.
[221] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, Appendix C.
[222] Legal Submissions on behalf of Ngāti Manuhiri, Jason Pou and Troy Urlich, dated 28 August 2023, at [11.20].

Benthic ecology

[458] Pre extraction offshore studies of bathymetry, sediment grain size and benthic biota were undertaken for two areas, Area 1 (southern) in 2003 and Area 2 (northern) in 2006.[223] There was a lack of consistency with replicate baseline data for sediment grain size and benthic ecology with these surveys limiting analysis with future monitoring data.[224] The subsequent survey of the offshore extraction area undertaken in 2019 sampled the southern portion of the proposed application area (Area 1) only.[225]

[459] The various benthic studies undertaken at Pākiri confirm the presence of a patchwork of a variety of benthic communities, that are formed in response to the varying physical and biological environment in moving seaward from the foreshore, e.g., gradients in depth, light regime and sediment composition, and wave disturbance of sediments.[226]

[460] The offshore extraction area is described as likely having an ecology comprised of typical species, some sensitive bivalve species and stony corals which are protected under the Wildlife Act 1953.[227]

[461] The survey information provides limited spatial information on the benthic ecological community and how it may have changed over time as a result of the extraction activity.[228] The northern area (Area 2) was not surveyed in 2019. Only summary data from the earlier 2003 survey remains for Area 2. This data for Area 2 indicates a very biodiverse area, with over 180 species found including corals, and a very high biomass of organisms living on the seafloor (1-7kg of animals per m^2), very high for coastal soft sediment habitat (over 5000 animals in a m^2).[229] Pākiri is relatively protected from high levels of sediment, with little urban development and low levels

[223] Evidence of Simon West, dated 23 December 2022, at [3.2], Figure 3.1
[224] Evidence of Simon West, dated 23 December 2022, at [3.2]
[225] Location of Areas 1 and 2 shown in Evidence of Simon West, dated 23 December 2022, Figure 3.1.
[226] Evidence of Andrew Jeffs, dated 21 April 2023, at [27].
[227] Evidence of Kalayarasi Sivaguru, dated 10 March 2023, at [5.2.a].
[228] Evidence of Kalayarasi Sivaguru, dated 10 March 2023, at [5.1] and [5.2].
[229] NOE, at page 2487, line 33 – page 2488, line 12.

of farming in the catchment, with larger shellfish such as mussels more likely to survive despite other threats such as dredging.[230]

[462] Evidence at the hearing was that the whole area has been dredged and impacted by past dredging activities.[231]

[463] Changes in sediment grain size and seabed stability can influence the recolonisation of benthic fauna. There is an absence however of baseline data to compare the grain size results at Pākiri, and therefore difficult to draw any definitive conclusions.[232]

[464] Survey reports from McCallum Bros indicated no changes in grain size composition greater than seen in control areas and that long term changes in biota appear to have been natural.[233] Comparison between the dredged and un-dredged areas in 2017 indicated more crustacea in the dredge area, and no adverse effects in terms of loss of diversity or abundance for any taxonomic groupings.[234]

Adequacy of information

[465] The difficulty in undertaking a comprehensive marine ecology assessment due to the inadequacy and lack of survey data was highlighted.[235] This included the variability in methodologies used for data collection, lack of baseline data including for the offshore area, and limited number of survey samples. The difficulty of comprehensively sampling the marine environment was also acknowledged.

[466] There was a lack of complete sets of baseline data for grain size and benthic abundance and composition preventing meaningful statistical analysis with future monitoring data.[236]

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[230] NOE, at page 2460, line 9 – page 2461, line 7.
[231] NOE, at page 27965, line 29 – page 2796, line 9.
[232] Evidence of Kalayarasi Sivaguru, dated 10 March 2023, at [7.22] and [7.23].
[233] Evidence of Simon West, dated 23 December 2022, at [7.1].
[234] Evidence of Simon West, dated 23 December 2022, at [7.1].
[235] For example, Evidence of Kalayarasi Sivaguru, dated 10 March 2023, at [5.1]; Evidence of Simon West, evidence dated 23 December 2022, at [3.24], [3.49], [3.90], [7.1]; Joint Witness Statement – Marine ecology, signed 29 – 30 May 2023.
[236] Evidence of Simon West, dated 23 December 2022, at [3.3].

[467] There were also difficulties with the measurements of grain size with measures that are not directly comparable, potentially leading to misleading conclusions.[237]

[468] The marine ecology experts concluded the following:[238]

(a) there needs to be more statistical rigour in the proposed monitoring program to have greater clarity around the ability to detect ecological effects of a known magnitude;

(b) there needs to be a discussion on extending the threshold for large bivalves/sensitive benthic communities (Appendix 1 of Environmental Marine Management Plan (EMMP)). There needs to be a description of what species are ecologically and/or culturally sensitive;

(c) there needs to be monitoring that can also evaluate the recovery of benthic areas directly affected by sand extraction;

(d) there needs to be a quantification of the spatial and temporal effects of ground roll from extraction events; and

(e) there need to be contingency measures included in the suite of conditions where monitoring indicates adverse effects.

[469] Recovery rates from dredging activity for benthic species will be variable, and it is likely recovery rates for larger bivalves could be over ten years.[239] It was considered that the focus of monitoring should be on the species most likely to be impacted by the activity, the larger, longer lived benthic species.[240]

[470] It was suggested that a sampling programme is needed that is rigorous and going to detect effects and is representative of the environment it is sampling (the benthic

[237] Evidence of Andrew Jeffs, dated 21 April 2023, at [48].
[238] Joint Witness Statement – Marine ecology, signed 29 – 30 May 2023, at Section 8.
[239] Joint Witness Statement – Marine ecology, signed 29 – 30 May 2023, at Section 2.
[240] NOE, at page 2488, lines 4-23.

environment is not uniform but diverse and complex), and that targeted sampling is needed to detect whether specific populations are affected.[241] Concern was expressed that three samples per cell (200,000m^2)[242] is not representative of an area that large.[243]

Horse mussels and scallops

[471] The coastline extending between Whāngaparāoa Peninsula and Paepae ō Tū (Bream Tail) once provided a rich variety of food, including kōura, tuatua, pāua, kūtai, snapper, hururoa (horse mussels) and scallops.[244] Kaimoana stocks have been depleted.[245]

[472] The 1996 Mangawhai Pākiri Sand Study reported a shore parallel zone of horse mussel colonies in water depths of 10 - 20m in the central sector, extending to 30m at the northern and southern ends of the embayment, and described horse mussels blocking the dredge head during sand extraction.[246] Surveys described by Mr West show horse mussels were reported as present in low numbers in Area 1 in 2003 and with very few recorded in the dredge tows.[247]

[473] Large beds of hururoa used to be found throughout the embayment, and acted as a pou, or a boundary fence for the tipa (scallop) and other species,[248] providing a hydrological buffer in terms of current movement and so that sediments and other animals are protected.[249] The role of horse mussels in protecting sand movement and sediment transport was acknowledged by Mr Todd, coastal process expert for McCallum Bros.[250]

[474] Surveys show horse mussels used to be in significant numbers and loss of

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[241] NOE, at page 2489, lines 20-23.
[242] Increased to five samples in McCallum Bros revised proposal.
[243] Sample size the size of A4 sheet.
[244] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.19].
[245] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.21].
[246] Sand Study, Module 2, at [4.6].
[247] Evidence of Simon West, dated 23 December 2022, at [3.77] and [3.78].
[248] Evidence of Edward Watts, dated 20 April 2023, at [23].
[249] NOE, at page 390, lines 22-28.
[250] NOE, at page 270, lines 5-8.

mussel beds is likely to be due to dredging and scalloping over the years.[251] There are a number of other factors affecting horse mussels in the wider embayment and gulf such as storms, fishing pressures, or intermittent or reduced recruitment as a result of reduced adult spawning populations further north.[252]

[475] Scallops are present from 15-40m depth, most densely at 30m.[253] The Off-shore Assessment of Ecological Effects recorded a limited number of scallops within Area 1 and the control area during the 2017 Survey.[254] In depths of >30m scallops were found in Areas 1 and 2 in 2006, and Areas 1, 2 and control in 2017.[255]

[476] Horse mussel can take 15-30 years to re-establish mature populations.[256] Professor Jeffs described how he is currently working on restoration of horse mussels, a very difficult species to work with. There are currently no methods available, and the situation requires looking after areas where they remain or where they may re-establish or recover. Scallop restoration in the embayment may be possible.

Corals

[477] Solitary stony corals (*Scleractinia*), inhabit the seabed of Pākiri at around 35 m depth. Two samples of stony coral were detected in 2017, one sample on the eastern side near the southern end of sand extraction Area 1 and one sample in the control area.[257]

Effects of sand mining on benthic ecology

[478] There was disagreement amongst the marine ecologists as to whether there is sufficient ecological information available to determine if there would be adverse effects from sand extraction on marine ecology, and whether the survey methodology and sampling programme was adequate and rigorous enough to capture any effects of

[251] NOE, at page 399, line 26 – page 400, line 20.
[252] Evidence of Simon West, dated 23 December 2022, at [5.14].
[253] Evidence of Simon West, dated 23 December 2022, at [3.86].
[254] Evidence of Kalayarasi Sivaguru, dated 10 March 2023, at [7.69].
[255] Evidence of Simon West, dated 23 December 2022, at [3.88].
[256] Evidence of Tāmati Stevens, Statement of evidence dated 20 April 2023, at [54].
[257] Evidence of Simon West, dated 23 December 2022, at [3.55].

sand extraction.

[479] Mr West and Dr Sivaguru agreed based on the ecological information that is currently available that the effects on the benthic ecology are likely to be 'minor', while other witnesses considered there is insufficient information available to make a judgement.[258]

What is known beyond 30m depth?

[480] Beyond 32 metres depth the seabed at Pākiri has been less intensively dredged and beyond approximately 36 metres depth it has not been previously dredged.[259]

[481] McCallum Bros proposed stage three would be in deeper water from approximately 35-36m out to approximately 40m. This will be in areas where sand extraction has not been undertaken previously and where there is little or no existing benthic survey information.

[482] Benthic ecology surveys undertaken for McCallum Bros, using seabed photos, were undertaken in 2020 along transects from 5m to 30m to sample larger benthic fauna.[260] There is a lack of benthic ecology survey information beyond 35m depth.[261] Beyond 35m depth is also the area more likely to contain protected species such as stony corals.

[483] Evidence suggests that in waters deeper than 35m there is a change in the seabed with increased rockiness and increasingly finer sediment, with biodiversity changes in terms of abundance.[262] However there is a lack of information to confirm what species and habitats exist here.[263]

[484] Increased marine ecological monitoring is proposed as part of McCallum Bros

[258] Joint Witness Statement – Marine ecology, signed 29 – 30 May 2023, at Section 2.
[259] NOE, at page 119, lines 7-10.
[260] Evidence of Simon West, dated 23 December 2022, at [3.9].
[261] NOE, at page 402, lines 27-28; NOE, at page 2231, lines 29-32.
[262] NOE, at page 2489, lines 24-27; NOE, at page 1692, lines 19-22.
[263] For example, NOE, at page 2231, lines 29-32.

revised proposal.[264] Concern remains however with the low likelihood of finding stony corals with the detection methods proposed,[265] and the lack of baseline survey information.

Tara iti - avifauna

[485] Ecological evidence on avifauna was provided by Dr Thompson on behalf of McCallum Bros, Dr Baber, on behalf of Auckland Council, Dr Beauchamp and Ms Wiles on behalf of DOC and Mr Southey on behalf of Te Whānau.

Background

[486] The Mangawhai – Pākiri embayment is critically important habitat for tara iti (*Sterna nereis davisae)* (threat status - nationally critical) and it is used by many 'threatened' and 'at risk' bird species.[266] The extent of their use and importance is unclear and/or unknown for many species.[267]

[487] Dr Thompson concluded that:[268] [269]

> Based on data available at eBird, the assemblage of 'Threatened' or 'At Risk' shorebirds utilising the coast to the west of the area of interest includes or is likely to include: Australasian bittern *Botaurus poiciloptilus* ('Threatened – Nationally Critical'), reef heron *Egretta sacra* ('Threatened – Nationally Endangered'), wrybill *Anarhynchus frontalis* and northern New Zealand dotterel (both 'Threatened – Nationally Increasing'), banded dotterel *Charadrius bicinctus*, eastern bar-tailed godwit *Limosa lapponica baueri*, lesser knot *Calidris canutus rogersi* and South Island pied oystercatcher *Haematopus finschi* (all 'At Risk – Declining'), and variable oystercatcher ('At Risk – Recovering'). …

[488] He noted that this list is unlikely to be comprehensive and other taxa of shorebirds could occur along the coast of the area of interest from time to time.

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[264] Each cell being 20ha, with five camera drops, five grab samples and macrofauna two sample, per cell, with second tier monitoring if sensitive benthic species detected (as set out in Proposal and NOE for 22 – 24 November 2023, at page 5, lines 12-19.)
[265] NOE, at page 310, line 12 – page 311, line 34; Legal submissions on behalf of the Director-General of Conservation, dated 31 July 2023, at [92] and [100].
[266] Joint Witness Statement – Avifauna, signed 30 May 2023, at Section 1.
[267] Joint Witness Statement – Avifauna, signed 30 May 2023, at Section 1.
[268] Evidence of David Thompson, dated 23 December 2022, at [21].
[269] All conservation status classifications are provided in Robertson et al. (2021).

[489] Most concern was expressed by the ecologists about potential adverse effects on tara iti, due to its critical status.

[490] Tara iti are a taonga and kaitiaki species of Ngāti Manuhiri.[270] Ngāti Manuhiri evidence identifies the relationship that they have with pakake and manu, and that tikanga requires protection of vulnerable species. Most, if not all the mana whenua parties are closely involved in active efforts to protect tara iti and enhance their habitat. The tara iti nesting location at Pākiri is on land owned by Pākiri G Ahu Whenua Trust. The views and practices of tangata whenua are integral to the protection and recovery of tara iti.[271]

[491] Tara iti is an endemic subspecies and the most endangered bird in New Zealand. The Mangawhai – Pākiri dune system is a key breeding habitat for the species.[272] There are less than 35 adult birds remaining in the world. The current status of tara iti was assessed in autumn 2023, after Cyclone Gabrielle, when the population lost five adults and two young. In 2023 there are a total of 31 adults and one bird less than a year old, with 11 females of breeding age.[273] Tara iti habitat is currently limited to sheltered estuaries and harbours north of Auckland and south of Whangārei. Successful breeding is limited to five sites: Waipū sandspit, Mangawhai sandspit, Te Ārai River mouth, Pākiri River mouth and Papakānui sandspit (Kaipara).[274] The Poutawa Stream mouth is an alternative breeding site that has been used in the past and has potential to support the future expansion of the population.[275] Concern was expressed about unknown stress related issues with adult birds abandoning nests at Pākiri and Te Ārai.[276]

[492] Survival of tara iti is highly dependent on Mangawhai – Pākiri breeding sites

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[270] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.13] – [8.15]; Evidence of Olivia Haddon, evidence dated 20 April 2023, at [73] and [75].
[271] Legal submissions on behalf of the Director-General of Conservation, dated 31 July 2023, at [71] and [73].
[272] Evidence of Antony Beauchamp, dated 21 April 2023, at [3.3].
[273] NOE, at page 1260, lines 24-31.
[274] Evidence of Ayla Wiles, dated 21 April 2023, at [3.5].
[275] Evidence of Ayla Wiles, dated 21 April 2023, at [3.5]; Evidence of Antony Beauchamp, dated 21 April 2023, at [4.7]
[276] Evidence of Antony Beauchamp, dated 21 April 2023, at [6.20]; NOE, at page 1846, line 27 – page 1847, line 6.

being suitable and providing estuary and near shore waters for foraging. Tara iti naturally nest in subaerial beach berm zone and pairs return to same sites to breed.[277] The extent of oceanic foraging is incompletely understood, but the avifauna experts agree that potential foraging extends out to include the proposed offshore extraction area.[278] Tara iti are surface forages with visual acuity so when offshore they will be harvesting fish very close to the surface.[279] Tara iti face multiple threats, many, including human disturbance, dogs, and predation, are largely independent and unrelated to sand extraction.

[493] During the hearing we were informed about the review undertaken in 2017 by DOC to determine the reasons for continued critical state of the tara iti population. As a result of a decision-making process with iwi and stakeholders, a comprehensive structured decision-making approach aligned with mātauranga Māori for the recovery of tara iti was developed in 2021. It included increased funding,[280] operational staff and dedicated full time project role,[281] pest control, feeding and included refinement of a captive breeding component.

Potential effects of sand mining

[494] The focus of assessment of effects has been on tara iti, given its critical conservation status.

[495] Potential adverse effects of sand extraction activity on tara iti assessed included:

(a) loss of tara iti nesting habitat due to adverse effect of coastal erosion; and

(b) effects on foraging areas/ oceanic foraging ability.[282]

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[277] Evidence of Antony Beauchamp, dated 21 April 2023, at [4.4].
[278] Joint Witness Statement – Avifauna, signed 30 May 2023, at Section 3; Legal submissions on behalf of the Director-General of Conservation, dated 31 July 2023, at [35].
[279] NOE, at page 2277.
[280] $550,000 invested annually for on ground management (Evidence of Ayla Wiles, dated 21 April 2023, at [6.4]).
[281] Close to 13 operational staff not including technical advisors, with Ms Wiles in a full time project specific role (NOE, at page 1349, lines 1-5).
[282] Closing submissions on behalf of McCallum Bros Limited, dated 25 September 2023, at

[496] It was agreed by the experts that the offshore sand extraction activity will likely result in a low effect on tara iti, however there is a degree of uncertainty regarding effects on coastal processes.[283] [284] The potential foraging area for tara iti includes all extraction areas, including offshore.[285]

[497] If the extraction is operating at night, it was considered that there is no or limited impact on foraging.[286] However, it is unknown how far out to sea tara iti travel or forage or feed, where they catch their fish, and there is a lack of knowledge as to the effects of sand extraction activity on finfish and marine food webs. Drs Beauchamp, Baber and Thompson agreed that the further out, the less important the foraging area is for tara iti.[287]

[498] The number of tara iti is restricted by the lack of adult breeding females. The males defend foraging territories and nest sites in estuaries and stream mouths.[288] They use the estuaries and the sea to source food for their young. However, the extent of oceanic foraging by tara iti when nesting at Te Ārai, Poutawa or Pākiri is unknown. Studies at Mangawhai show that some tara iti forage up to 4.5km in the estuary from their nest sites.[289]

[499] Due to this uncertainty, the critical status of tara iti, and the importance of the embayment for survival and nesting, there was general agreement from all witnesses

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[5.97], based on Joint Witness Statement – Avifauna, signed 30 May 2023, at Sections 2 and 3; and Legal submissions on behalf of the Director-General of Conservation, dated 31 July 2023, at [36].

[283] Evidence of Matthew Baber, dated 10 March 2023, at [9.30].

[284] "The *existing beach environment is demonstrating volume loss and erosion. This is likely contributed to by inshore sand extraction, … The evidence indicates that ongoing sand extraction beyond the depth of closure, is "low risk" of any measurable influence on shoreline stability… However, low risk does not mean no risk…with tara iti, it is submitted that there is no room for error. The species cannot sustain additional pressures."* (Legal submissions on behalf of the Director-General of Conservation, dated 31 July 2023, at [43] – [45].)

[285] Joint Witness Statement – Avifauna, signed 30 May 2023, at Section 3.

[286] NOE, at page 1262, lines 2-5; NOE, at page 1273, lines 22-25; NOE, at page 1304, line 5 – page 1306, line 2; NOE, at page 131, line 33 – page 1312, line 7; NOE, at page 1871, line 29 – page 1872, line 11.

[287] Legal submissions on behalf of Auckland Council, dated 28 August 2023, at [6.20] (summarising evidence of Beauchamp, Baber, Thompson).

[288] Evidence of Antony Beauchamp, dated 21 April 2023, at [8.21]

[289] Evidence of Antony Beauchamp, dated 21 April 2023, at [6.12], [6.13]

at the hearing that the more protection measures for tara iti the better.

[500] A blanket two-kilometre set back from offshore sand mining operations was proposed by Dr Baber to provide comfort that risks would be negligible to tara iti. He did not have confidence there will not be adverse effects on the birds without further measures such as this in place.[290] [291] A two-kilometre setback from nesting sites during daylight hours was also supported by Dr Thompson. Dr Beauchamp did not support it as he had no information about how far out to sea the birds are foraging and no basis to support it. Mr Southey also considered tara iti forage further out.

[501] The risk of oil spill was assessed as being a low probability, with high impact.[292]

[502] Dr Baber proposed the use of a tara iti management plan to address potential effects of erosion on nesting habitat. However, this was not supported by DOC and other experts as it is considered that tara iti are already managed intensively by DOC and community efforts through the tara iti recovery group.[293] It was uncertain what additional benefits it would provide above those already being undertaken by DOC, tangata whenua, Fairy Tern Trust and other stakeholders.

[503] Through the hearing various protection measures for tara iti were discussed and supported by the experts, including:

(a) improvements to nesting sites;

(b) installation of predator fencing;

(c) increase in ranger presence;

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[290] Legal submissions on behalf of the Royal Forest and Bird Protection Society Inc, dated 30 August 2023, at [66(g)]; NOE, at page 2279, line 21 – page 2280, line 3; NOE, at page 2282, lines 26-32; NOE, at page 2294, line 25 – page 2295, line 6.

[291] In the absence of information for NZ fairy tern, Dr Barber based the two-kilometre exclusion on the foraging distances of a sub species, the Australian fairy tern (NOE, at page 2279).

[292] Evidence of Antony Beauchamp, dated 21 April 2023, at [8.16].

[293] Joint Witness Statement – Avifauna, signed 30 May 2023, at Section 4.

(d) work to improve tara iti monitoring and reporting; and

(e) work to improve knowledge of tara iti foraging habits.

[504] Support was expressed from experts for funding of research on foraging; wider predator control (over and above the well-funded intensely managed current programme); dune and riparian restoration; and nest rebuilding. Enhancement of nest sites needs support of mana whenua and landholders.

Marine mammals

[505] The Hauraki Gulf, including the Mangawhai - Pākiri embayment contains a high diversity of marine mammals. Tohorā are taonga to Ngāti Manuhiri, with the annual whale migrations through Te Moana Nui-ō-Toi were of major significance and remain so.[294]

[506] Effects on marine mammals assessed were direct effects from the sand extraction operation including underwater noise, attraction to lighting, entanglement, contaminants, behavioural effects, and vessel strike.[295] Conditions of consent require implementation of a Marine Mammal Management Plan.

[507] Dr Clement considers there will be very low effects on marine mammals in the context of the Gulf as a whole. Based on in situ recorded noise levels it was concluded that there are unlikely to be effects on hearing damage but that there are likely to be behavioral effects and that the significance of this is uncertain.[296] The evidence of Ngāti Manuhiri was that the use of the embayment by tohorā has been impacted by sand extraction, and it is a sign that the rich biodiversity and mauri of Te Moana Nui-ō-Toi has been degraded.[297]

[508] Dr Clement considers behavioural effects can differ per species and will depend on how often they are at the surface or diving, changing socialising and resting

[294] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.1] – [8.8].
[295] Evidence of Deanna Clement, dated 23 December 2022, at Table 1.
[296] Joint Witness Statement – Marine ecology, signed 29 and 30 May 2023, at Section 5.
[297] Evidence of Terrence (Mook) Hohneck, dated 21 April 2023, at [8.1] – [8.8].

behaviour. There are thresholds for noise impacts, modelled by Dr Pine, considered to be low or very low level.

[509] The transit route of the sand extraction vessel goes through important resting and feeding habitat for Bryde's whale, but this is not considered to have much noise effect due to container ships and other shipping in the area.

Climate change

[510] The beach is dynamic and experiences periods of erosion and accretion across different timescales, including in response to storms, seasons, and interannual climate oscillations. The coastal process experts agree that climate change will exacerbate shoreline instability.[298]

[511] While the depth of closure prevents transport of sediment due to sea level rise and climate change,[299] if over time storm periods or wave heights change that could affect the depth of closure. Mr Morgan explained the beach is experiencing a strong phase of erosion at the moment and as sea level rise and climate change kick in the beaches are going to be harder to maintain.[300] Wave climate or storm surge are not changing, but the wave angle does and can affect circulation.[301]

[512] The amount to be extracted in the offshore however is not considered to affect movement across the depth of closure.[302]

[513] One of the more sensitive parts of the system is the bar and the area immediately seaward of the bar and which has been substantially dredged for a number of years and the buffering capacity of the system has been reduced. It is a system under stress and more fragile than 20-40 years ago. Sea level rise means waves operate further up the beach and cause the reshaping of the beach face and loss of the high tide beach.

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[298] Joint Witness Statement – Coastal processes, signed 26 May 2023, at Section 7.
[299] NOE, at page 213, lines 27-32.
[300] NOE, at page 1462, line 30 – page 1463, line 12; NOE, at page 1480, lines 3-12.
[301] NOE, at page 625, lines 15-22.
[302] NOE, at page 1480, lines 13-24.

Extratropical cyclones are complex to model and understand with climate change.[303]

[514] Increased water temperatures and ocean acidification will reduce the quantity of carbonate sand produced by marine organisms, as well as increasing the rate of dissolution of the existing standing stock of carbonate sand at Pākiri.[304] Dr Conwell, the Applicants water quality scientist, explains that "*ocean acidification is just one part of the puzzle. We're also dealing with temperature changes such as marine heat waves, differences in runoff from land-based activities which is probably one of the significant component of the impacts to nearshore coastal waters across New Zealand."*[305]

McCallum Bros proposal

[515] McCallum Bros in their amended proposal, in closing submissions, incorporated a number of the recommendations contributed by witnesses during the hearing. These include funding for protection of tara iti, increased marine ecological monitoring, and horse mussel and scallop reseeding breeding programme. Resources would come from an Environmental Protection Fund[306] for proposed dune stabilisation and planting programme, warden/ranger, scientist/research on tara iti feeding and foraging, and horse mussel/scallop breeding programme. If insufficient sand is extracted the fund would need to be reduced.

[516] Overall, the amended proposal has picked up a number of recommendations discussed at the hearing including: staging the activity; additional marine ecology monitoring; additional control area; reseeding/breeding shellfish; measures to assist the tara iti programme such as research on foraging, beach and dune restoration. Some measures proposed were not supported by all parties at the hearing, such as provision of sand or shell for rebuilding nest areas; the need for an additional ranger.

[517] There is concern that the funds proposed are small. They are also dependent on the Environmental Protection Fund and are based on the amount of sand extracted

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[303] NOE, at page 2921, lines 10-17.
[304] Evidence of Andrew Jeffs, dated 21 April 2023, at [76].
[305] NOE, at page 453, line 31 – page 454, line 3.
[306] Resourced from $1.50 m^3 sand extracted.

so could be significantly reduced from what is proposed.

[518] There is also concern that the proposal lacks appropriate triggers identifying when extraction should stop if sensitive species are found or if there are adverse effects on marine ecology or avifauna.

Staging

[519] The proposal includes staging of the sand extraction with stage one generally following the temporary consent extraction area; stage two shoreward of the 25km line from mean high water mark (**MHWM**); stage three is deeper and beyond current dredging capability.

[520] Stage two will include areas inside the two-kilometre set back from MHWM, for tara iti, which was established as part of the temporary offshore consent. It was clarified at the reconvened hearing that a significant proportion of proposed stage two is shoreward of this two-kilometre set back.

[521] The ecological evidence was that the further out the less potential effect on foraging. The approach of Dr Baber was to limit extraction to outside two-kilometres to ensure negligible effects on tara iti. The further out the extraction is from the depth of closure would also reduce any potential impacts on the beach and effects exacerbated by climate change.[307]

Summary comments

[522] There is a lack of baseline marine benthic ecological information, and a lack of information to show if the sampling programme is targeted adequately to detect changes from the sand extraction activity on benthic organisms. The benthic seabed is diverse in character with a patchwork of a variety of organisms that are not

[307] DOC in legal submissions advised that the Court must first conclude, having heard all the evidence, that conditions robust enough to ensure that there will not be any adverse effects on tara iti, are able to be imposed. And that any adverse effect on this species or its habitat is likely to be 'more than minor'. DOC also concluded that "*if the Court were minded to grant consent, the area beyond 36 metres depth should be excluded from the consent area*." (at [92]).

uniformly distributed. There is a lack of data for benthic ecology deeper than 35m, where protected stony corals have been detected and are likely to occur. There is a lack of information to determine if the monitoring methodologies are robust enough to ensure detection of stony corals. If stony corals are damaged/destroyed by the activity this would be a significant adverse effect.

[523] There is a lack of information for Area 2 (northern offshore extraction area), with no survey data for this area from the 2019 Bioresearches report. Baseline data from 2003 for Area 2 indicates high diversity and biomass of benthic organisms present. While it is also reported that the whole area has since been dredged and already impacted.

[524] The ecological evidence was that the further out the less potential effect on foraging of tara iti and less potential impacts of beach erosion on nesting habitat. There was discussion at the hearing on reducing impacts on tara iti by moving the activity at least two-kilometres from shore. However, evidence was that this two-kilometre setback distance has not been based on any research data on the oceanic foraging distances or behaviour of tara iti. Information from Mangawhai is that tara iti can forage up to 4.5km in the estuary from nest sites, but there is a lack of research information on how far out the birds are foraging at sea to support the setback. McCallum Bros offered to fund research on oceanic foraging and feeding of tara iti as part of its amended proposal however this would be undertaken while extraction continues. A two-kilometre setback would be a minimum to have confidence that effects on tara iti would be negligible.

Assessment of discretionary activity in light of findings

[525] This is an application for a discretionary activity. Having taken into account all matters required under s 104 of the Act, the Court must still be satisfied that the grant of consent will achieve the purposes of the Act, the superior documents and the relevant Coastal Policy Statement and Regional Coastal Plan. On the Court's interpretation of the Supreme Court' decision in *Sustain Our Sounds*,[308] the Court must

[308] *Sustain Our Sounds Incorporated v The New Zealand Kind Salmon Company Limited* [2014] NZSC 40.

be satisfied that it has sufficient information to make an appropriate decision.

[526] As we understand the law, we cannot grant a consent which cannot be utilised, such as the grant of the consent which is then subject to preconditions which could preclude it from operating at all. There must be sufficient detail for the Court to properly consider the issues under the Act and relevant documents.

[527] This was certainly the concern of the Commissioners at first instance, and it remains a primary concern of this Court having heard the evidence more fully, cross-examination, joint witness statements, and full submissions.

[528] We still have significant concerns about the bathymetric state of the harbour, whether it is a closed or open system. Although there was discussion about the sand not moving over the 25-metre contour, it is clear that sand can move for short periods both onshore in heavy storms and offshore in strong offshore conditions, but is in equilibrium over a reasonable period (the term of which was not settled). Its net position on an annual basis is virtually nil. What we do not know is whether the continued lowering of the bathymetric contour will lead to a change in closure depth or other unexpected or untoward effects.

[529] We acknowledge that the extraction of a small amount of less than 100mm over the entire area would be barely noticeable in hydrological terms. Nevertheless, the Applicant has demonstrated a clear preference to utilise sand further inshore. The reasons for this are not clear but appear to relate to the fact that this sand is more mobile and easily dredged than sand further out to sea. The final proposition for the Applicant still seeks that stage two allows it to move shoreward rather than offshore as a preference.

[530] The last sand study was done in 1996 and there has since been continued extraction in inshore, midshore and the offshore areas. Development of trenches due to repeated mining close to the 25-metre contours means that we are still not satisfied whether that sand is caught in the trenches and then dredged. If this is so, then this sand is not available to the entire system.

[531] Nor are we satisfied that there is clear evidence this is an open system. When we are talking of volumes in the order of 20,000 to 60,000 cubic metres sand a year over a 30-kilometre distance, it can be seen this adds almost imperceptible levels of sand over the entire reach. There is evidence that some parts of the beach, the southern end and other particular areas, may be more susceptible to shoreward erosion than others.

[532] The Court is not satisfied we have sufficient information to reach a firm conclusion that there is sufficient sand available within the system to avoid any adverse effect on shore. While we recognise that there is likely to be less erosion or other effects if dredging is further offshore, there are ecological and other constraints in those areas which lead to different concerns.

Ecological information

[533] Again, the area that would have less ecological impact from an ecological point of view is the same or similar to that identified by the Court in its temporary consent. This would require control over volume of sand and some clear evidence that this amount of sand could be withdrawn on an annual basis without causing either coastal process or ecological effects.

[534] Evidence was given about horse mussel which still appears to be growing in the bay, although not in quantities that can create detectable reefs. Nevertheless, in ecological terms, there might an area similar to the area already consented that may tolerate reasonable volume of sand, something less than 100,000 cubic metres per year, until further studies can identify exactly the effects. This leads us to problems with the suggested sampling rates because we accept that there are real difficulties in undertaking a full assessment of the seabed in this area.

[535] We are satisfied that the evidence indicates that the current colonisation by various benthic populations is patchy. It is likely to be concentrated around particular areas or on substrate that is suitable. We have no idea where those are, and none have been identified to us in the studies.

[536] We do not think we can simply assume that these areas are appropriate for further dredging because they have been dredged in the past.

Mana Whenua effects

[537] While there might be an area within stage one that may tolerate some abstraction at least until full studies have been undertaken, we are faced with the significant adverse effects on Ngāti Manuhiri identified in their evidence.

Overall conclusion

[538] There are clear benefits from the continued extraction of sand from the Mangawhai – Pākiri embayment. Sand is utilised widely within the Auckland area and Mangawhai – Pākiri has provided a cheap and plentiful source of sand over a number of decades.

[539] These economic benefits to Auckland and to McCallum Bros and others have occurred at direct cost to mana whenua and the embayment itself. While the extraction of sand further to the north was refused consents in the early 2000s thus, reducing the impact upon Te Uri o Hau, dredging and its impact has continued unabated on Ngāti Manuhiri and south of Te Ārai Point.

[540] In considering how these interests should be best balanced, we remind ourselves that we must first be satisfied that the grant of consent will achieve the sustainable management purpose of the Act and seek to control and minimise effects where it is possible.

[541] The immediate difficulty for the Commissioners at Council level and this Court on appeal is the lack of proper information. The earlier consents had conditions requiring information on the environment and the effects of dredging, but that produced to us was patchy, inconclusive, and as to shore effect incorrect. The correction of the height error had a clear impact on the shore erosion calculations. It also meant the sand budget moved from a large surplus to indeterminant. The 1996 sand study seems to be the most pertinent but did not consider deeper sand extraction, effects on Holocene sands or the rate of sea level rise.

[542] Similarly, dredging of sand in deeper waters may affect different benthic species (stony coral is an example). In the absence of ecological information, the Applicant relies on grab samples over a small proportion of the total area and studies to be undertaken prior to extraction commencing. We cannot form any view as to the level of risks involved in the absence of sufficient information. More fundamentally, the Court is not satisfied that the effects can be appropriately managed. This is deep water with limited prospects of avoidance of damage if species or biological communities exist.

[543] We are not satisfied that the past consents granted have mediated the mana whenua effects. It is clear that these consents still deeply affect Ngāti Manuhiri including those mana whenua residents of the area as well as non-mana whenua residents. As witnesses for Ngāti Manuhiri have said, in their tikanga, the cultural offence must first cease and then the relationship must be restored by apology.

[544] Overall, we conclude that the need for high quality sand in Auckland cannot outweigh the lack of information on both coastal process and ecological matters, and the clear evidence of the impact of the continued extraction on mana whenua and the relationship with their taonga including the Great Sea of Toi.

[545] We recognise that the Great Sea of Toi is part of the wider Hauraki Gulf. Recent actions have demonstrated the deep concerns held by scientists and others for the continued degradation of the Gulf area and we conclude that the Mangawhai – Pākiri embayment shows the same signs of degradation.

[546] We cannot be sure as to what has caused this, and it may be a combination of factors, which may or may not include the activities of McCallum Bros and other earlier extractions.

[547] What we can say is that we cannot be satisfied that McCallum Bros can undertake extraction without causing new or further effects. Further work will need to be conducted to demonstrate that sand could be extracted safely from the embayment and how.

[548] However, our overall view is that the imposition upon Ngāti Manuhiri in this area has been ongoing long enough. Previous concerns have been dismissed on the basis that the Te Tiriti o Waitangi/Treaty of Waitangi claims needed to be resolved by separate process. Those have now been resolved and it has been acknowledged by the Crown that their lands were taken in breach of Te Tiriti o Waitangi/Treaty of Waitangi principles and have deprived them of full access to their resources. Ngāti Manuhiri have claims before the Court in relation to the Marine and Coastal Area (Takutai Moana) Act 2011, and those that are yet to be determined.

Outcome

[549] We refuse the application for consent and confirm the decline of consent. We endorse the position and overall reasoning of the Commissioners.

[550] In doing so, we have also considered what our answer would be if the evidence for MKCT was excluded. For the reasons we have already explained, this will make very little difference to our conclusions which are based on the full range of evidence but in particular upon other witnesses who claim their relationship with the embayment through Ngāti Manuhiri whakapapa including: Pākiri G and Te Whānau. We consider that Ms Haddon who gave evidence for the Ōmaha Marae and Te Whānau group, and others for these groups, gave evidence that was clear, concise and compelling.

[551] Although the evidence from MKCT is generally supportive and is entirely consistent with the other evidence, this decision does not turn upon MKCT evidence.

[552] The evidence for landscaping and planning was not overall substantive in reaching a conclusion. Dr Maseyk's view was held by others and highlighted the uncertainties also referred to by DOC and Forest and Bird witnesses.

Costs

[553] The Applicant having been unsuccessful both in the first instance and on appeal and might be subject to orders for costs.

[554] The Court has also reserved costs in respect of the strike out application and in respect of the withdrawal and temporary consent.

[555] Any applications for costs are to be filed within 40 working days. Any reply is to be filed within a further 20 working days. Final reply submissions, if any, are to be filed 10 working days thereafter.

[556] Any applications for costs should include within the elements addressed each of the matters before the Court i.e.:

(a) the appeal;

(b) the application for strike out;

(c) withdrawal of application for midshore consent; and

(d) inshore surrender/temporary offshore consent.

Different considerations may apply to each.

For the Court:

JA Smith
Environment Judge

AHC Warren
Alternate Environment Judge

Section 274 parties

D CLAPSHAW

DIRECTOR GENERAL OF CONSERVATION

ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

FRIENDS OF PĀKIRI BEACH INCORPORATED

R GREENWOOD

MANGAWHAI HARBOUR RESTORATION SOCIETY INCORPORATED

MANUHIRI KAITIAKI CHARITABLE TRUST

PĀKIRI TE WHĀNAU COMMUNITY GROUP INCORPORATED ("TE WHĀNAU O PĀKIRI")

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

TARA ITI GOLF CLUB LIMITED

TE ĀRAI LINKS

TE ĀRAI NORTH LIMITED

TE ĀRAI RESIDENTS' ASSOCIATION INCORPORATED

TE ĀRAI SOUTH HOLDINGS LIMITED

S WIKAIRA

"A"

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 138

IN THE MATTER OF	appeal under s 120 of the Resource Management Act 1991
BETWEEN	MCCALLUM BROS LIMITED
	(ENV-2022-AKL-121)
	(ENV-2022-AKL-220)
	Appellant/Applicant
AND	AUCKLAND COUNCIL
	Respondent
AND	PAKIRI G AHU WHENUA TRUST (and others set out in Annexure C)
	Section 274 parties

Court: Judge J A Smith
Judge A H C Warren
Commissioner S Myers
Commissioner K Prime
Special Advisor R Howie

Hearing: 19 – 21 June 2023, 27 June 2023, 30 June 2023
Last case event: 30 June 2023

Appearances: J MacRae and N Hopkins for McCallum Bros Limited
L E Bielby, K A Fraser and L M Leyland for Auckland Council
L Black for Pakiri G Ahu Whenua Trust, S Wikaira, and R Greenwood
J M Pou and T M Urlich for Manuhiri Kaitiaki Charitable Trust
L Sutherland and D V van Mierlo for the Director-General of Conservation
L Muldowney and S Thomas for Environmental Defence Society
J C Campbell and N R Williams for Friends of Pakiri Beach Incorporated
K R M Littlejohn and S Hiew for Mangawhai Harbour Restoration Society Incorporated
M Downing and P A Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated

Pakiri Sands

V N Morrison-Shaw for Te Whanau o Pakiri
C T Patterson for New Zealand Fairy Tern Charitable Trust
D E Clapshaw
L Barton for Kaipara District Council
H Atkins and A Scharting for Te Arai Group

Date of Decision: 4 July 2023

Date of Issue: 4 July 2023

DECISION OF THE ENVIRONMENT COURT

Mahia i runga i te rangimarie me te ngākau māhaki.[1]

A: The Environment Court grants an interim/temporary consent for the identified activities within parts of the offshore areas as marked in Appendix 5 to Annexure B, this being a sub-area of the application area. The Resource Consent authorises the Consent holder to:

(1) Remove sand from and disturb the seabed of the common marine area by way of dredging under section 12(1), 12(2)(b) and 12(3) of the Resource Management Act 1991 (RMA); and

(2) Discharge excess seawater, shell and sand from dredging activities into coastal water under section 15 of the RMA.

B: The Court records:

(1) this is a temporary/interim consent pending the determination of appeals, based upon that before the Environment Court (ENV-2022-AKL-000121);

(2) it has granted the interim/temporary consent on the basis of agreement by all parties to the appeal. This is without prejudice to the position of any party on the appeal itself;

(3) simultaneous with the grant of this consent, the applicant abandons an appeal in respect of the inshore area (ENV-2022-AKL-000220) and

[1] With a peaceful mind and respectful heart, we will always get the best results.

acknowledges that the inshore consent is now at an end;

(4) that this consent is interim/temporary and will expire on the earlier of

(a) determination of the appeals relating to the offshore consent (ENV-2022-AKL-000121), and this may include determination of the appeal/s from the Environment Court decision;

(b) three years from the date of either notification of the utilisation of the current offshore consent or 30 July 2023 whichever comes first;

(c) the removal of 230,000m³ in total, at a maximum rate of 76,000m³ in any 12-month period, and 7,500m³ in any month;

(5) it is explicitly acknowledged that this interim consent has no rights of renewal attached and it has expressly been granted pending determination of the applicants' appeal for offshore consent, with the consent of all parties.

(6) by consent and pursuant to section 108 and 108AA of the RMA, this Resource Consent includes and is subject to the further conditions annexed hereto in Annexure B, Schedule 1.

C: The Court records the applicant has offered the following Augier conditions in addition to those already noted:

(1) neither MBL or any associated entity will seek to utilise or obtain consent for inshore sand removal until determination of the offshore appeal (if at all);

(2) neither MBL or any associated entity will seek to vary or extend this interim/temporary offshore consent beyond the terms on which it is granted;

(3) MBL or any associated entity acknowledges that it will not exercise any rights, if such exist, under s 124 RMA in respect of this interim/temporary offshore consent.

D: Orders are made accordingly, and terms of this order shall attach to the conditions of consent and this decision shall be attached to the conditions of consent and form part of those conditions to both give background to the granting of the consent and the constraints upon it.

E: The question of costs is adjourned for resolution after the substantive offshore appeal has been heard and determined.

F: The Court records that the application for adjournment by MBL and applications for strike out by both Ngati Manuhiri and Friends of Pakiri Beach are accordingly resolved and therefore formally withdrawn before the Court. Costs on those issues may form part of any substantive application for costs in due course.

REASONS

Introduction

[1] These proceedings originally concerned six appeals filed in relation to applications by McCallum Bros Limited (**MBL**) relating to applications for consents authorising sand extraction and associated discharges in the coastal marine area in the Mangawhai-Pakiri Embayment. We refer to these as the **offshore, midshore**, and **inshore** applications.

[2] Hearing of the appeals was set to commence on 19 June 2023. Prior to commencement of the hearing, on 7 June 2023, MBL filed:

(a) a memorandum to advise the Court that it **intended** to withdraw its midshore application; and

(b) an application for adjournment of its inshore application.

[3] These were considered in the week commencing 19 June 2023.

Midshore application

[4] The midshore application has been the subject of an Environment Court decision issued 22 June 2023.[2] The midshore application was formally recorded as withdrawn.

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[2] *McCallum Bros Limited v Auckland Council* [2023] NZEnvC 130.

The appeals by Manuhiri Kaitiaki Charitable Trust,[3] Friends of Parkiri Beach Incorporated[4] and Director-General of Conservation[5] were allowed. The appeals by MBL regarding the midshore consent conditions was refused.[6]

Outstanding appeals

[5] This leaves two outstanding appeals both from MBL, one regarding the offshore application[7] the other regarding the inshore application.[8] Both appeals are by MBL against refusal of consent.

[6] The inshore consent has expired but continues to be utilised by MBL relying on s 124 of the Act. This permits extraction up to 76,000m^3 per annum.

[7] The offshore consent expires in 2023 but is subject to a cumulative maximum take of 2,000,000m^3. That maximum will be exhausted within the next few weeks. Given the volumetric limit, s 124 RMA does not give rights to take further volume and a new consent is required.

[8] Both consent applications were refused at first instance and MBL appealed both refusals. There are a number of s274 parties and the Auckland Council who oppose the Appeal.

Application for adjournment of Inshore application

[9] MBL's application for an adjournment of its Inshore appeal[9] was made on the basis that the application for consent will be withdrawn following a final determination of its Offshore appeal[10] regardless of the outcome of the Offshore appeal. At that point MBL would lose or surrender its rights to continue to extract

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[3] ENV-2022-AKL-000218.
[4] ENV-2022-AKL-000232.
[5] ENV-2022-AKL-000234.
[6] ENV-2022-AKL-000219.
[7] ENV-2022-AKL-000121.
[8] ENV-2022-AKL-000220.
[9] ENV-2022-AKL-000220.
[10] ENV-2022-AKL-000121.

sand from the inshore under s 124 RMA.

[10] The parties were asked to respond by 9 June 2023. Parties responded, with the majority opposed to the adjournment of the Inshore appeal, suggesting instead that the appeal be struck out or withdrawn. The Court received formal applications for strike out from Manuhiri Kaitiaki Charitable Trust and Friends of Pakiri Beach Incorporated.

[11] On 12 June 2023, a follow-up memorandum was filed by MBL, consolidating its position regarding the application for adjournment and responding to various concerns raised by the parties. We conclude the memorandum was unclear in a number of respects and this was a theme of the opposition parties' submissions.

[12] The interlocutory applications were set down for hearing in the week of 19 June 2023.

Hearing 19 – 20 June 2023

[13] The week of 19 June 2023 was used to discuss the adjournment and strike out applications and to address other matters. There were relatively robust conversations between the Court and the parties as to how to move forward. Multiple proposals were put forward and discussed.

[14] On 20 June 2023, MBL introduced a new proposal for discussion. This was based on discussions with Mr Patterson for the Fairy Tern (Tara Iti) Trust. MBL proposed a temporary consent regime in part of the proposed offshore extraction area. The proposal is essentially to shift the ability to take 76,000 cubic metres annually under the Inshore consent, operating under s 124 RMA, to the offshore, and to limit it to areas that have been subject to extraction in the past.

[15] Mr Patterson was clear that his clients focus is on reducing risk to Tara Iti one of the world's rarest bird species (less than 40 birds and less than 10 pairs). They saw benefits in moving the activity to at least 2km from shore as significantly reducing the prospects of Tara Iti disturbance, particularly in breeding and fledging periods.

[16] MBL had circulated the proposal to other parties who were able to comment in general terms.

Proposed interim/temporary Offshore consent

[17] On 20 June 2023 MBL filed a memorandum setting out details of its proposal for temporary Offshore consent.

[18] The intention of the grant of a temporary consent is that it would enable MBL to, immediately after the grant of the temporary consent and upon reaching its maximum volume under the existing offshore consent, surrender its existing inshore consent and withdraw its inshore appeal and commence extraction of sand under the interim/temporary consent.

[19] The key elements of the proposal were:

(a) the interim consent is without prejudice to the position of parties on appeal and is subsumed within the full appeal when finally determined. It thus has no life as a consent subject to s 124 RMA for example;

(b) an interim extraction volume of 76,000m^3 annually. This volume is to be calculated from the date on which MBL exhausts the total volume limit for its existing Offshore consent. MBL's remaining allowance of sand under its existing Offshore consent was approximately 20,000m^3 at the beginning of June 2023. This amount will have reduced to approximately 12,000m^3 by the end of June 2023 and if the rate of extraction is temporarily increased, could be exhausted, allowing for some poor weather conditions, by the end of the end of July 2023. Commencement of extraction under the temporary consent would then occur;

(c) MBL's existing inshore consent would be surrendered, and its inshore appeal withdrawn contemporaneously with the interim/temporary consent being granted. No further extraction would occur or consent be sought for the inshore area by MBL until the appeals are finally determined;

(d) extraction is to be limited to the two extraction areas approved under the existing offshore consent referred to as Area 1 and 2 respectively in the existing consent. The amended map attached as appendix 5 to the Interim/Temporary consent shows the location of the approved areas shaded in grey by reference to GPS points. As these areas are already subject to extraction and have been for many years, they would not require pre-approval by the Council under the conditions of consent proposed for a permanent offshore consent. This is subject to ensuring at least 2km separation to shore and more than 25m depth as well as frequency of extraction;

(e) the proposed temporary extraction area be at least 2km from the shore for its entire length;

(f) volumes extracted under the temporary consent are to be deducted from the 2,000,000m^3 total volume limit proposed in the Offshore application, if that is granted;

(g) the temporary consent is to terminate on the final determination of all appeals in relation to MBL's substantive Offshore application i.e., on the same basis as applies to existing consents under s 124(3) RMA; and

(h) conditions on the temporary consent are to be based on the conditions currently proposed for the permanent offshore consent with appropriate amendments.

[20] The proposal is advanced on the basis that it would result in the early termination of all extraction from the inshore and would bring MBL's inshore s 124 RMA rights to an early end.

Hearing 21 June 2023

[21] On 21 June 2023 the Court and the parties undertook a discussion of the proposal. The parties were then given time to discuss amongst themselves the conditions of the interim/temporary consent.

[22] It was agreed by all parties:

(a) that they would agree to such an arrangement given the risk to inshore areas and Tara Iti even though tangata whenua, and some other s 274 parties remain opposed to any consents within the embayment at all

(b) that the final wording of the interim/temporary consent and its conditions need to be settled;

(c) the parties wished to see if these could be agreed by consent in the first instance; and

(d) in the event they could not resolve all issues, they acceded to the Court determining any disputed wording.

[23] This agreement gave the Court confidence that issues could be reduced to a hearing on the offshore consent, provided the terms of the agreement were resolved promptly.

[24] The parties sought a short period to advance consideration of the interim/temporary consent and condition wording and the hearing was adjourned to 27 June 2023.

Hearing 27 June 2023

[25] MBL filed a memorandum on 27 June 2023 to update the Court on the progress the parties had made in agreeing conditions of consent on the interim/temporary offshore consent intended to replace MBL's continuing rights of sand extraction pursuant to its existing Inshore consent under s 124(3).

[26] MBL advised that feedback and/or suggested amendments had been received from:

(a) Friends of Pakiri Beach Incorporated;

(b) Damon Claphsaw;

(c) Auckland Council;

(d) Te Whanau o Pakiri Incorporated;

(e) Manuhiri Kaitiaki Charitable Trust;

(f) Royal Forest and Bird Protection Society of New Zealand Incorporated;

(g) Mangawhai Harbour Restoration Society Incorporated;

(h) Department of Conservation;

(i) Environmental Defence Society;

(j) Te Uri o Hau Settlement Trust; and

(k) Pakiri G Whenua Trust and Sherie Wikaira.

[27] MBL provided the Court with a clean version of the amended conditions reflecting amendments suggested by Auckland Council, Department of Conservation and Friends of Pakiri Beach Inc.

[28] MBL advised that it had received a significant number of amendments by other parties, but they had been unable to respond fully to the requests in the time available. A number of the requests overlapped with points previously agreed by MBL. MBL had provided the 27 June 2023 version of conditions so the Court and parties could work off a common version for further discussions.

[29] MBL was of the view that most significant issues raised by the parties had been largely resolved. The matters which remained unresolved were generally matters of detail. The exception was the membership, role and primary functions of the proposed supervisory committee.

[30] Other parties had been advancing matters in the interim and a further set of conditions was filed that had been approved by Ngāti Manuhiri and Te Whanau o Pakiri. A number of other parties either approved of this set or were working through them.

[31] The Court reconvened on 27 June 2023 to discuss progress with the conditions. It was clear from this discussion that some matters remained outstanding between the parties and further time was needed to continue discussions. The main concerns appeared to be around wording of conditions for the 2km distance, calibration, and the supervisory group.

[32] The Court granted a request by the parties to see if matters could be fully resolved and issued a Minute annexed hereto and marked **Annexure A**.

Hearing 30 June 2023

[33] A joint memorandum of counsel was filed on 29 June 2023. The memorandum advised that the parties had undertaken extensive discussions on various amendments proposed to the conditions of the consent. As a result of those discussions, significant areas of further agreement had been reached. There were relatively few issues remaining to be finally agreed.

[34] On 30 June 2023, MBL filed a version of the conditions with amendments made after business hours overnight. Not all of the parties had seen these conditions.

[35] Also on 30 June 2023, Friends of Pakiri Beach identified three matters requiring attention; Appendix four – extraction reporting cells and monitoring cells, Appendix five – extraction area, and conditions 34 and 35. These were supported by the Fairy Tern Charitable Trust.

[36] The Court reconvened on 30 June 2023. The Court made some suggestions and heard from the parties. This included Augier conditions being offered and agreement of all parties to a consent order being made.

[37] The consent to this approach is unanimous and we resolve wording issues and area of extraction later in this decision.

Legal framework

[38] Section 116(1) RMA states:

> Except as provided in subsections (1A), (2), (4) and (5), or section 116A and 116B, every resource consent that has been granted commences–
>
> (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
>
> (b) when the Environment Court determines the appeals or all appellants withdraw their appeals–
>
> unless the resource consent states a later date or a determination of the Environment Court states otherwise.

[39] Section 116 RMA cannot apply on its terms given that no consent was granted to the offshore application.

[40] Section 279 RMA states:

> (1) An Environment Judge sitting alone may make any of the following orders:
>
> (b) an order that is not opposed:

[41] This is a broad unfettered power which must be exercised for the purposes of the Act as stated and expanded on in Part 2. Clearly all parties must also agree to any interim order. This provides flexibility to deal with particular issues and outcomes not only by the Judge but by the Court as a whole. No party took a different view to our interpretation of our powers per s 279 RMA.

[42] Here all parties agree there is less risk to the foreshore and Tara Iti with an offshore consent. This Court has had a number of hearings relating to pressures on this nearly extinct species; land based,[11] harbour based,[12] freshwater based,[13] and also broader planning changes. The focus on removing this ongoing risk from inshore extraction motivates the court and parties, including MBL.

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[11] *Te Arai Coastal Lands Ltd v Auckland Council* [2014] NZEnvC 98.
[12] *Mangawhai Harbour Restoration Society Inc v Northland Regional Council* [2012] NZEnvC 232.
[13] *New Zealand Fairy Tern Charitable Trust v Auckland Council* [2019] NZEnvC 172.

[43] The interim/temporary consent is generally within the scope of the application filed.

Other factors

[44] While some form of interim/temporarily consent would operate as a lesser extent than the application applied for, it nevertheless represents grant of consent, albeit on a temporary/interim basis, than that which was refused at first instance.

[45] Normally the Court would be reluctant to consider such an event but there are a number of exceptional circumstances which encourage us beyond those relating to the environmental matters raised.

[46] The first of these is that the applicant, at the request of the Court, has offered two Augier conditions to the grant of consent. Firstly, that neither MBL or any associated entity will seek to utilise or obtain a consent for the inshore area until the determination of the offshore appeals (if at all). The second is that the applicant nor any associated entity will not seek to vary or extend the interim temporary offshore consent beyond the terms on which it is granted in this decision. Furthermore, MBL acknowledges that the applicants and associated entities will not seek to exercise any rights if such exist under s 124 of the Act. This gives us an increased level of assurance that there is some finality to this matter.

[47] Furthermore, the applicant has offered that the court may record MBL to simultaneously withdraw its appeal in respect of the inshore area and acknowledges that in doing so all s 124 RMA rights are lost, that the appeals are thereby finally determined. The Court is satisfied that it is essentially moving the activity, currently preserved by s 124 RMA, into a less intrusive area where all parties agreed there are less effects.

[48] Nevertheless, this has been a difficult decision for many groups, particularly the tangata whenua groups who oppose any form of sand mining within the embayment. In doing so there has been a considerable level of cooperation between the parties and seeking the best environmental outcome while the substantive offshore hearing

is proceeding. Nevertheless, it would be a pre-condition of the temporary/interim consent that, in addition to the Augier conditions and the surrender of the inshore appeal, it is granted with the consent of all the parties, which has been confirmed several times to this Court.

[49] Furthermore, the authority is an interim or a temporary one only and will expire on the earlier of the following events:

(a) on determination of the appeals relating to the offshore consent (ENV-2022-AKL-000121). The parties acknowledge that this includes any determination of appeal(s) from the Environment Court decision subject to the upcoming hearing;

(b) three years from the date on which the applicant notifies full utilisation of its current offshore consent or 30 July 2023 whichever is earlier; or

(c) the removal of a maximum of 230,000m³ of sand, at a maximum rate of 70,000m³ in any 12-month period and 7,500m³ in any one-month period.

[50] Further in particular it is agreed that the interim consent has no rights of renewal.

[51] The parties also agreed that the interim/temporary consent will be further subject to a set of conditions which are annexed hereto as **Annexure B**.

[52] We conclude that jurisdiction exists to make an interim order by consent notwithstanding no original further consent was granted.

[53] In this case, evidence is largely that there would be less effects in the offshore. The interim/temporary consent is acceptable with conditions applied. Most concerns raised by the witnesses are cultural concerns. Parties have anticipated tangata whenua have involvement in this interim/temporary consent. While this does not answer the cultural concerns, it ensures those issues are front and centre during the operation of this interim/temporary consent. Other concerns such as the distance and closure

depth have been addressed through conditions of consent.

Court's comments

[54] This matter has been discussed broadly between the Court and the parties. The Court sets out some of the key points that arose during discussions below.

[55] All parties have consented to such an arrangement. The interim arrangement is agreed to without prejudice to any parties' position on hearing the substantive offshore appeal.

[56] The temporary consent is being granted to allow progress of the substantive offshore appeal and to reduce any potential effects from the continuation of the inshore consent under s 124 RMA, including effects on Tara iti (fairy tern), amenity effects (such as having a vessel close to shore), and potential effects on the foreshore.

[57] This temporary consent will entirely dispose of any question of s 124 RMA rights in the inshore. On granting the temporary consent, MBL will surrender the inshore application and withdraw their inshore appeal, and MBL will relinquish its rights under s 124 RMA such that all rights to extract in the inshore are gone. It is agreed that s 124 RMA will not apply to the temporary consent.

[58] This temporary consent is not a consent that can be refreshed by a new application. It is only for the purpose of the resolution of these appeals.

[59] One of the features of this application is that it involves an area beyond two kilometres of the foreshore (MHWS) including Te Arai Point and in depths greater than 25 metres. The area of the consent is a sub-area of the full area of consents sought. It has now been identified by GPS coordinates. Furthermore, the applicant has agreed that it will enter this area from the seaward side and is finalising conditions with the parties for such a course.

[60] Issues relating to how volume of sand were weighed was subject to some discussion, and a default position suggested by the Court whereby a full load for each

trip would be assumed unless the applicant produced evidence to the contrary. This matter is covered in conditions 33 - 35.

[61] By the same token, there were concerns relating to the potential take of sand beyond the consent area. This is a major issue for the substantive hearing and there are assertions by s 274 parties which were opposed by the applicant and by the Council. Nevertheless, the Court suggested that it may be possible for the vessels to operate after they have entered the consent area, only within that area. Mr MacRae raised practical difficulties with doing this given the length of the vessel and its trailing dredge arm. He suggested instead that there is now a sensor system which will detect when the dredge is lifted from the ocean floor. This could be utilised to provide regular reports indicating that the dredges operated within the consent area. The parties agreed that they would finalise a condition. The matter is now included within condition 34(e).

[62] There were earlier concerns relating to extraction monitoring conditions and the temporary/interim consent. Beyond the concerns raised by the Court, the parties have provided conditions that will apply to the temporary consent. Officially, there have been concerns about calibration issue which now appears to have been addressed by the discussion that the Court have addressed above. Those are now incorporated in conditions 33 - 35. The issues relating to the supervisory group that would operate in the interim appear to have been resolved and the wording of that has been the subject of considerable discussion between the parties. It is now encapsulated as a mātauranga Māori expert panel and is covered by conditions 51 to 57. There is also a provision for a community liaison group. Although this is somewhat less stringent than this Court might normally impose for final conditions, we accept the temporary nature of this interim consent and the need for a practical approach while matters in dispute are being resolved/while the appeals are being determined.

[63] To that end, parties have engaged in a cooperative way seeking to have pragmatic provisions which are workable in the short term. There has been a high level of cooperation between all parties in achieving this and we consider that the outcome of this has been a considered and balanced approach.

[64] Accordingly, it appears to us that we should grant an interim/temporary consent with a clear statement of the consent that is granted and its limitations. Beyond that there are further conditions which relate to the operation itself which are set out in **Annexure B, Schedule 1**. To the extent some of the conditions repeat provisions of the grant, it is clear that such conditions in **Annexure B, Schedule 1** are subservient to the grant itself. Accordingly, we do not consider it necessary to make further changes to those conditions given the urgency of the matter and the amount of negotiation which has already been engaged.

Grant of an interim/temporary consent

[65] The Environment Court grants an interim/temporary consent for the identified activities within parts of the offshore areas as marked in Appendix 5 to Annexure B, this being a sub-area of the application area. The Resource Consent authorises the Consent holder to:

(a) Remove sand from and disturb the seabed of the common marine area by way of dredging under section 12(1), 12(2)(b) and 12(3) of the Resource Management Act 1991 (RMA); and

(b) Discharge excess seawater, shell and sand from dredging activities into coastal water under section 15 of the RMA.

[66] The Court records:

(a) this is a temporary/interim consent pending the determination of appeals, based upon that before the Environment Court (ENV-2022-AKL-000121);

(b) it has granted the interim/temporary consent on the basis of agreement by all parties to the appeal. This is without prejudice to the position of any party on the Appeal itself;

(c) simultaneous with the grant of this consent, the applicant abandons an appeal in respect of the inshore area (ENV-2022-AKL-000220) and acknowledges that the inshore consent is now at an end;

(d) that this consent is interim/temporary and will expire on the earlier of:

(i) determination of the appeals relating to the offshore consent (ENV-2022-AKL-000121), and this may include determination of the appeal/s from the Environment Court decision;

(ii) three years from the date of either notification of the utilisation of the current offshore consent or 30 July 2023 whichever comes first;

(iii) the removal of 230,000m³ in total, at a maximum rate of 76,000m³ in any 12-month period, and 7,500m³ in any month;

(e) it is explicitly acknowledged that this interim consent has no rights of renewal attached and it has expressly been granted pending determination of the applicants' appeal for offshore consent, with the consent of all parties.

(f) by consent and pursuant to section 108 and 108AA of the RMA, this Resource Consent includes and is subject to the further conditions annexed hereto in Annexure B, Schedule 1.

[67] The Court records the applicant has offered the following Augier conditions in addition to those already noted:

(a) neither MBL or any associated entity will seek to utilise or obtain consent for inshore sand removal until determination of the offshore appeal (if at all);

(b) neither MBL or any associated entity will seek to vary or extend this interim/temporary offshore consent beyond the terms on which it is granted;

(c) MBL or any associated entity acknowledges that it will not exercise any rights, if such exist, under s 124 RMA in respect of this interim/temporary offshore consent.

[68] Orders are made accordingly, and terms of this order shall attach to the conditions of consent and this decision shall be attached to the conditions of consent and form part of those conditions to both give background to the granting of the consent and the constraints upon it.

Costs

[69] The question of cost is adjourned for resolution after the substantive offshore appeal has been heard and determined.

[70] The Court records that the application for adjournment by MBL and applications for strike out by both Ngati Manuhiri and Friends of Pakiri Beach are accordingly resolved and therefore formally withdrawn before the Court. Costs on those issues may form part of any substantive application for costs in due course.

Final comment

[71] Mahia i runga i te rangimarie me te ngākau māhaki.[14] This Court has been impressed by the level of cooperation of the parties given the number of parties and the complexity of the issues involved. Many of these issues have been longstanding and parties hold very strong views in respect of them. Nevertheless, the parties have been able to put aside these differences and focus on the environmental issues at large to achieve a better result for tara iti and the environment as a whole, pending the decision of the Court.

[72] I note that the offshore consent is identified as having less effects generally than the inshore or midshore consent. Accordingly, the closure of the inshore area in the interim ensures that effects are minimised pending the substantive hearing of this matter and the decision of the Court.

[73] The substantive hearing is now to progress from 17 July 2023. We attach as **Annexure A** a copy of the earlier minute of this Court issued in relation to the resolution of this issue and also directions for the substantive hearing.

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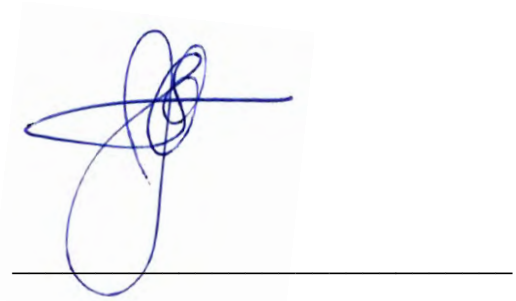
[14] With a peaceful mind and respectful heart, we will always get the best results.

[74] The only appeal still continuing before the Court is ENV-2022-AKL-000121. The other five may be regarded as resolved.

For the Court:



J A Smith
Environment Judge

B6. Mana Whenua

Ngā take matua a ngā ahikā-roa mai i tawhiti

The original inhabitants from afar

B6.1. Issues

The development of Māori Land and Treaty Settlement Land needs to be enabled to ensure that these lands and associated resources contribute to lifting Māori social, cultural and economic well-being significantly.

Development and expansion of Auckland has negatively affected Mana Whenua taonga and the customary rights and practices of Mana Whenua within their ancestral rohe. Mana Whenua participation in resource management decision-making and the integration of mātauranga Māori and tikanga into resource management are of paramount importance to ensure a sustainable future for Mana Whenua and for Auckland as a whole.

Issues of significance to Māori and to iwi authorities in the region include:

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

(2) protecting Mana Whenua culture, landscapes and historic heritage;

(3) enabling Mana Whenua economic, social and cultural development on Māori Land and Treaty Settlement Land;

(4) 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;

(5) increasing opportunities for Mana Whenua to play a role in environmental decision-making, governance and partnerships; and

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

B6.2. Recognition of Treaty of Waitangi/Te Tiriti o Waitangi partnerships and participation

B6.2.1. Objectives

(1) The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are recognised and provided for in the sustainable management of natural and physical resources including ancestral lands, water, air, coastal sites, wāhi tapu and other taonga.

(2) The principles of the Treaty of Waitangi/Te Tiriti o Waitangi are recognised through Mana Whenua participation in resource management processes.

(3) The relationship of Mana Whenua with Treaty Settlement Land is provided for, recognising all of the following:

(a) Treaty settlements provide redress for the grievances arising from the breaches of the principles of Te Tiriti o Waitangi by the Crown;

(b) the historical circumstances associated with the loss of land by Mana Whenua and resulting inability to provide for Mana Whenua well-being;

(c) the importance of cultural redress lands and interests to Mana Whenua identity, integrity, and rangatiratanga; and

(d) the limited extent of commercial redress land available to provide for the economic well-being of Mana Whenua.

(4) The development and use of Treaty Settlement Land is enabled in ways that give effect to the outcomes of Treaty settlements recognising that:

(a) cultural redress is intended to meet the cultural interests of Mana Whenua; and

(b) commercial redress is intended to contribute to the social and economic development of Mana Whenua.

B6.2.2. Policies

(1) Provide opportunities for Mana Whenua to actively participate in the sustainable management of natural and physical resources including ancestral lands, water, sites, wāhi tapu and other taonga in a way that does all of the following:

(a) recognises the role of Mana Whenua as kaitiaki and provides for the practical expression of kaitiakitanga;

(b) builds and maintains partnerships and relationships with iwi authorities;

(c) provides for timely, effective and meaningful engagement with Mana Whenua at appropriate stages in the resource management process, including development of resource management policies and plans;

(d) recognises the role of kaumātua and pūkenga;

(e) recognises Mana Whenua as specialists in the tikanga of their hapū or iwi and as being best placed to convey their relationship with their ancestral lands, water, sites, wāhi tapu and other taonga;

(f) acknowledges historical circumstances and impacts on resource needs;

(g) recognises and provides for mātauranga and tikanga; and

(h) recognises the role and rights of whānau and hapū to speak and act on matters that affect them.

(2) Recognise and provide for all of the following matters in resource management processes, where a proposal affects land or resources subject to Treaty settlement legislation:

(a) the historical association of the claimant group with the area, and any historical, cultural or spiritual values associated with the site or area;

(b) any relevant memorandum of understanding between the Council and the claimant group;

(c) any joint management and co-governance arrangements established under Treaty settlement legislation; and

(d) any other specific requirements of Treaty settlement legislation.

(3) Where Mana Whenua propose an activity on Treaty Settlement Land, the benefits for the wider community and environment provided by any property-specific protection mechanism, such as a covenant, shall be taken into account when considering the effects of the proposal.

(4) Enable the subdivision, use and development of land acquired as commercial redress for social and economic development.

(5) Enable Mana Whenua to access, manage, use and develop cultural redress lands and interests for cultural activities and accessory activities.

B6.3. Recognising Mana Whenua values

B6.3.1. Objectives

(1) Mana Whenua values, mātauranga and tikanga are properly reflected and accorded sufficient weight in resource management decision-making.

(2) The mauri of, and the relationship of Mana Whenua with, natural and physical resources including freshwater, geothermal resources, land, air and coastal resources are enhanced overall.

(3) The relationship of Mana Whenua and their customs and traditions with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, natural resources or historic heritage values is recognised and provided for.

B6.3.2. Policies

(1) Enable Mana Whenua to identify their values associated with all of the following:

(a) ancestral lands, water, air, sites, wāhi tapu, and other taonga;

(b) freshwater, including rivers, streams, aquifers, lakes, wetlands, and associated values;

(c) biodiversity;

(d) historic heritage places and areas; and

(e) air, geothermal and coastal resources.

(2) Integrate Mana Whenua values, mātauranga and tikanga:

(a) in the management of natural and physical resources within the ancestral rohe of Mana Whenua, including:

(i) ancestral lands, water, sites, wāhi tapu and other taonga;

(ii) biodiversity; and

(iii) historic heritage places and areas.

(b) in the management of freshwater and coastal resources, such as the use of rāhui to enhance ecosystem health;

(c) in the development of innovative solutions to remedy the long-term adverse effects on historical, cultural and spiritual values from discharges to freshwater and coastal water; and

(d) in resource management processes and decisions relating to freshwater, geothermal, land, air and coastal resources.

(3) 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.

(4) Provide opportunities for Mana Whenua to be involved in the integrated management of natural and physical resources in ways that do all of the following:

(a) recognise the holistic nature of the Mana Whenua world view;

(b) recognise any protected customary right in accordance with the Marine and Coastal Area (Takutai Moana) Act 2011; and

(c) restore or enhance the mauri of freshwater and coastal ecosystems.

(5) Integrate Mana Whenua values, mātauranga and tikanga when giving effect to the National Policy Statement on Freshwater Management 2014 in establishing all of the following:

(a) water quality limits for freshwater, including groundwater;

(b) the allocation and use of freshwater resources, including groundwater; and

(c) integrated management of the effects of the use and development of land and freshwater on coastal water and the coastal environment.

(6) Require resource management decisions to have particular regard to potential impacts on all of the following:

(a) the holistic nature of the Mana Whenua world view;

(b) the exercise of kaitiakitanga;

(c) mauri, particularly in relation to freshwater and coastal resources;

(d) customary activities, including mahinga kai;

(e) sites and areas with significant spiritual or cultural heritage value to Mana Whenua; and

(f) any protected customary right in accordance with the Marine and Coastal Area (Takutai Moana) Act 2011.

B6.4. Māori economic, social and cultural development

B6.4.1. Objectives

(1) Māori economic, social and cultural well-being is supported.

(2) Mana Whenua occupy, develop and use their land within their ancestral rohe.

B6.4.2. Policies

(1) Provide for papakāinga, marae, Māori customary activities and commercial activities across urban and rural Auckland to support Māori economic, social and cultural well-being.

(2) Enable the integration of mātauranga and tikanga Māori in design and development.

(3) Enable the occupation, development and use of Māori land for the benefit of its owners, their whānau and their hapū.

(4) Enable Mana Whenua to occupy, develop and use Māori Land (including for papakāinga, marae and associated developments) with natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, natural resources, coastal environment, historic heritage and special character, provided that adverse effects on those resources are avoided, remedied or mitigated.

B6.5. Protection of Mana Whenua cultural heritage

B6.5.1. Objectives

(1) The tangible and intangible values of Mana Whenua cultural heritage are identified, protected and enhanced.

(2) The relationship of Mana Whenua with their cultural heritage is provided for.

(3) The association of Mana Whenua cultural, spiritual and historical values with local history and whakapapa is recognised, protected and enhanced.

(4) The knowledge base of Mana Whenua cultural heritage in Auckland continues to be developed, primarily through partnerships between Mana Whenua and the Auckland Council, giving priority to areas where there is a higher level of threat to the loss or degradation of Mana Whenua cultural heritage.

(5) Mana Whenua cultural heritage and related sensitive information and resource management approaches are recognised and provided for in resource management processes.

B6.5.2. Policies

(1) Protect Mana Whenua cultural and historic heritage sites and areas which are of significance to Mana Whenua.

(2) Identify and evaluate Mana Whenua cultural and historic heritage sites, places and areas considering the following factors:

(a) Mauri: ko te mauri me te mana o te wāhi, te taonga rānei, e ngākaunuitia ana e te Mana Whenua. The mauri (life force and life-supporting capacity) and mana (integrity) of the place or resource holds special significance to Mana Whenua;

(b) Wāhi tapu: ko tērā wāhi, taonga rānei he wāhi tapu, arā, he tino whakahirahira ki ngā tikanga, ki ngā puri mahara, o ngā wairua a te Mana Whenua. The place or resource is a wāhi tapu of special, cultural, historic, metaphysical and or spiritual importance to Mana Whenua;

(c) Kōrero Tūturu/historical: ko tērā wāhi e ngākaunuitia ana e te Mana Whenua ki roto i ōna kōrero tūturu. The place has special historical and cultural significance to Mana Whenua;

(d) Rawa Tūturu/customary resources: he wāhi tērā e kawea ai ngā rawa tūturu a te Mana Whenua. The place provides important customary resources for Mana Whenua;

(e) Hiahiatanga Tūturu/customary needs: he wāhi tērā e eke ai ngā hiahia hinengaro tūturu a te Mana Whenua. The place or resource is a repository for Mana Whenua cultural and spiritual values; and

(f) Whakaaronui o te Wa/contemporary esteem: he wāhi rongonui tērā ki ngā Mana Whenua, arā, he whakaahuru, he whakawaihanga, me te tuku mātauranga. The place has special amenity, architectural or educational significance to Mana Whenua.

(3) Include cultural and historic heritage places and areas identified as significant to Mana Whenua in Schedule 12 Sites and Places of Significance to Mana Whenua Schedule.

(4) Protect the places and areas listed in Schedule 12 Sites and Places of Significance to Mana Whenua Schedule from adverse effects of subdivision, use and development by avoiding all of the following:

(a) the destruction in whole or in part of the site or place and its extent;

(b) adverse cumulative effects on the site or place;

(c) adverse effects on the location and context of the site or place; and

(d) significant adverse effects on the values and associations Mana Whenua have with the site or place;

taking into account in such circumstances whether or not any structures, buildings or infrastructure are present and the adverse effects are temporary.

(5) Protect places and areas in the Schedule 12 Sites and Places of Significance to Mana Whenua Schedule from the adverse effects of subdivision, use and development by all of the following:

(a) avoiding where practicable, or otherwise remedying or mitigating adverse effects on the values and associations of Mana Whenua with the site, place or area;

(b) requiring a protocol to be followed in the event of accidental discovery of kōiwi, archaeology or artefacts of Māori origin; and

(c) undertaking appropriate actions in accordance with mātauranga and tikanga Māori.

(6) Protect Mana Whenua cultural heritage that is uncovered during subdivision, use and development by all of the following:

(a) requiring a protocol to be followed in the event of accidental discovery of kōiwi, archaeology or artefacts of Māori origin;

(b) undertaking appropriate actions in accordance with mātauranga and tikanga Māori; and

(c) requiring appropriate measures to avoid, remedy or mitigate further adverse effects.

(7) Include a Māori cultural assessment in structure planning and plan change process to do all of the following:

(a) identify Mana Whenua values associated with the landscape;

(b) identify sites, places and areas that are appropriate for inclusion in the Schedule 12 Sites and Places of Significance to Mana Whenua Schedule for their Mana Whenua cultural heritage values as part of a future plan change; and

(c) reflect Mana Whenua values.

(8) Encourage appropriate design, materials and techniques for infrastructure in areas of known historic settlement and occupation by the tūpuna of Mana Whenua.

(9) Protect sensitive information about the values and associations of Mana Whenua in relation to their cultural heritage where disclosure of such information may put a site, place or area at risk of destruction or degradation.

B6.6. Explanation and principal reasons for adoption

In the Plan, tangata whenua are called Mana Whenua to be consistent with the particular meaning of 'mana whenua group' as defined in the Local Government (Auckland Council) Act 2009.

In making and implementing the 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:

- have particular regard to kaitiakitanga;
- take into account the principles of Treaty of Waitangi/Te Tiriti o Waitangi; and
- 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 acknowledges the importance of the Treaty and Treaty settlements to Mana Whenua and recognises 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 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:

- establishing and extending papakāinga and marae and associated services;
- developing commercial activities, sports and recreation facilities and community gardens;
- 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.

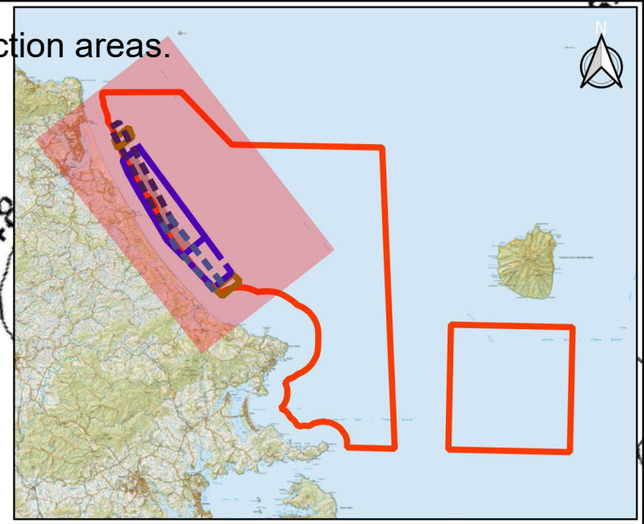
The policy approach to Mana Whenua cultural heritage addresses the multiple levels of Mana Whenua cultural heritage. Sites and places where a value of significance has been identified are protected through the D21 Sites and Places of Significance to Mana Whenua Overlay. Assessments of effects on the 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, 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 land owners 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.

“C”

2023-07-16, MBL, Map of Beach with Proposed Sand Extraction Area and Control Areas, with previously approved extraction areas.
Supplementary to Appendix 1 of EIC of Callum McCallum



Current Consented Offshore Area

Northern Control Area

Revised Proposed Offshore Sand Extraction Area

Original Proposed Offshore Sand Extraction Area

Southern Control Area

a
b
c
d
e
f
g
h

Current Approved Sand Extraction Area 2

Current Approved Sand Extraction Area 1

McGregor Rock

Sentinel Rock

Fl.5s4M

Te Ara Point

Sandhills 40 to 50m high

Pakiri River

Harbour

Heads

1 0 1 2 3 km

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McCallum Bros. Ltd.

MAP REVISIONS
Drawing Date: 13/07/2023 Version 3.0.1 by SW.

MAP FILE NAME

Map 7: Proposed Sand Extraction Area and Control Areas, with previously approved extraction areas, draft intercept boundary points

Bioresearches

"D"

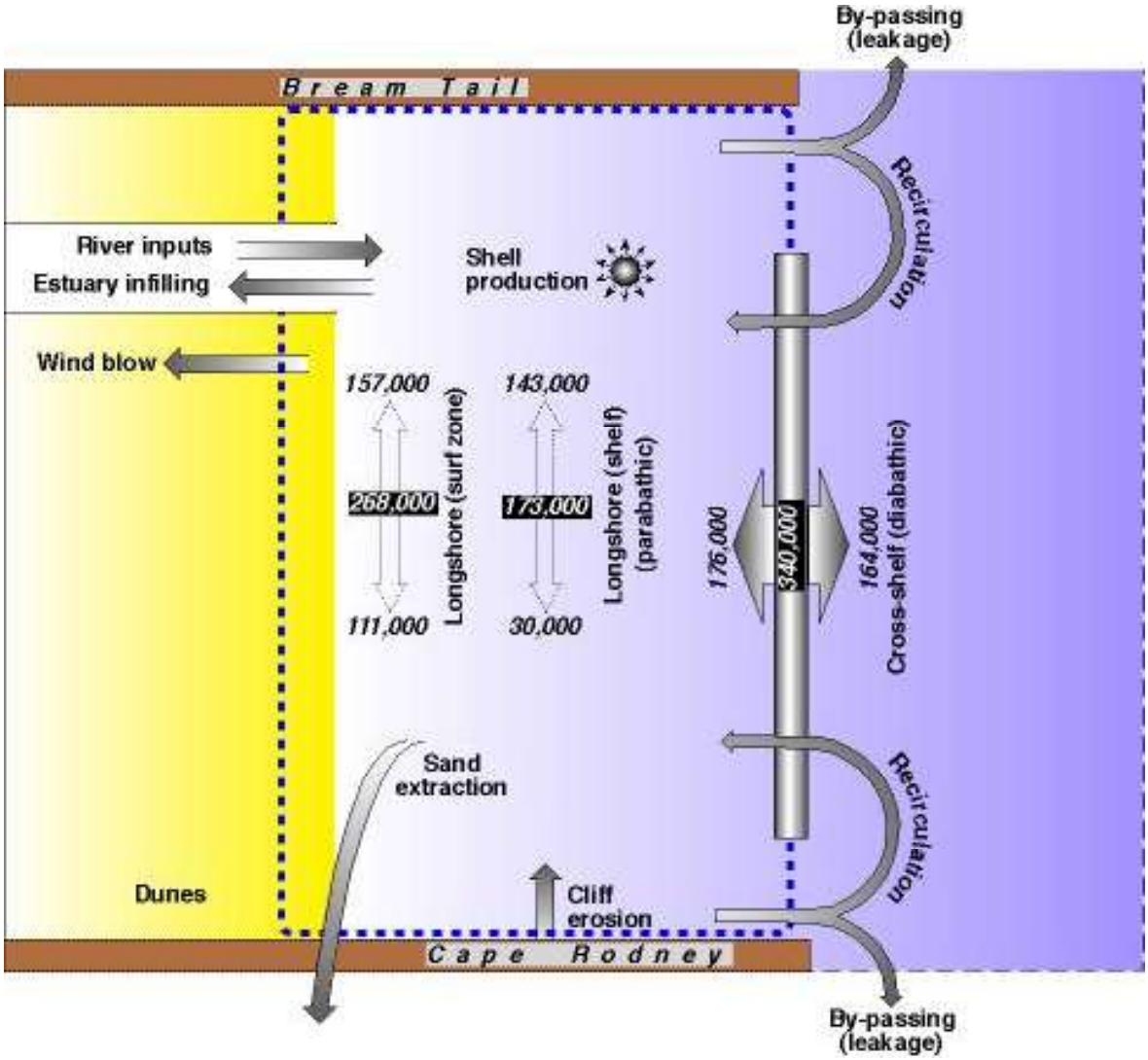

Figure 3.4 Annual directional sediment transport and gross sediment transport (numbers in black boxes) in the Mangawhai–Pakiri embayment. Units are m^3/yr.

Exclusion Area

- Navigation waypoint
- Extraction Exclusion Area Nov 2022
- Auckland Council Region
- 2km offshore from NZ Coastline MHWM

Chart Datum Contours

- DML survey 20m depth below CD, (Marsden Point)
- DML survey 25m depth below CD, (Marsden Point)
- DML survey 30m depth below CD, (Marsden Point)

Temporay Consented Extarction Area

- Temporary Consent Extraction Area limited to >2km from MHWM NZ Coastline

Offshore Sand Extraction Area

- Offshore Area Boundary
- Deleted Monitoring Cells

Staged Extraction Areas

- Stage 1
- Stage 2
- Stage 3

Control Areas

- Control monitoring cells
- Deleted monitoring cells to become Western Control Area
- Deleted Control monitoring cells

"E"

N

Auckland

Monitoring Cells

Offshore Sand Extraction Area

OFF01 OFF02 OFF03 OFF04 OFF05 OFF06 OFF07 OFF08

NI NH NG NF NE ND NC NB NA

SK SJ SI SH SG SF SE SD SC SB SA

Navigation waypoint

EEA 2 EEA 3 EEA 4 EEA 5 EEA 6 EEA 7

Northern Control Area

Western Control Area

Southern Control Area

Eyres Point Te Arai Point Te Araroa Trail

1 0 1 2 3 km

CLIENT / PROJECT McCallum Bros. Ltd.	CD – Chart Datum as measured at Marsden Point (LINZ code DJM9)	MAP REVISIONS Drawing Date: 12/09/2023 Version 4.1.5 by SW.
MAP FILE NAME	**ILLUSTRATIVE ONLY** **Offshore Sand Extraction Area showing Staged Areas with Monitoring Cells, Control Areas with Monitoring Cells, and the Temporary Consent Area**	Bioresearches