IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

IN THE MATTER OF	an appeal against a decision of the Environmental Protection Authority
UNDER	Section 105 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and Part 20 of the High Court Rules 2016
BETWEEN	**THE TRUSTEES OF TE KAAHUI O RAURU** a trust having its office at 14 Fookes Street, Waverley and carrying on business as a post-settlement governance entity for the iwi of Ngaa Rauru Kiitahi Appellant
AND	**THE ENVIRONMENTAL PROTECTION AUTHORITY** Respondent

NOTICE OF APPEAL

Dated: 31 August 2017

DHS-000273-18-1-V1
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NOTICE OF APPEAL

The trustees of Te Kaahui o Rauru give notice that they are appealing, under s 105 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("the Act") against the whole of the decision of the Environmental Protection Agency (the "EPA") dated August 2017, in which it granted marine consents and marine discharge consents to Trans-Tasman Resources Limited ("TTRL") pursuant to ss 62(1) and 87F(1) of the Act to permit the extraction and processing of iron sand within the South Taranaki Bight.

Grounds of Appeal

1 The decision of the EPA majority misinterpreted and misapplied the provisions of the Act regulating when marine discharge permits can be granted, and the conditions that can be imposed, with respect to the requirement for adequate baseline information and an adequate impact assessment. In particular:

1.1 The application by TTRL did not provide an impact assessment meeting the requirements of s 39 of the Act, as it did not provide baseline information concerning the affected environment, as acknowledged by the majority decision (eg paras [36] and [441]). By itself this meant the application should have been declined.

1.2 The majority decision of the EPA sought to address the deficiency in the information provided with the application by granting the permits subject to conditions which required the gathering of baseline information and subsequent monitoring. By doing so the majority acted inconsistently with s 87F(4) of the Act, which excludes such adaptive management conditions being utilised for permits of this kind.

2 The decision of the EPA majority misinterpreted and misapplied the procedural requirements that were required to be satisfied by TTRL as a matter of law. In particular:

2.1 The application failed to address the information deficiencies identified in the earlier decision of the EPA dated 17 June 2014 declining TTRL's application. The majority erred by failing to consider the further application by reference to the deficiencies identified in its earlier decision, and by concluding that its earlier decision had no binding effect on the application and was accordingly not relevant (majority paras [114]-[116]).

2.2 The application did not meet the information requirements of s 39 and should have been returned to TTRL in accordance with s 41. The procedure followed by the EPA involving it seeking further information from TTRL and submitters during a lengthy inquiry process in order to obtain the information required by the Act was inconsistent with the Act.

2.3 The decision of the majority was not based on the best available information as required by s 61(1)(b) and 87E(1)(b) of the Act given the absence of baseline information, and the consequent inadequacy of the impact assessment. Such information could have been obtained, and it was essential to any decision to approve the application.

3 The majority misinterpreted and misapplied the principles and requirements of the Act which had to be satisfied in order that the application could be granted. In particular:

3.1 Given the limitations of the information made available, the majority's decision conflicts with ss 61(2) and 87E(2) of the Act, as the decision failed to favour caution and environmental protection.

3.2 The majority's decision is inconsistent with the purposes of the Act as it does not avoid or remedy any adverse effect of the environment (s 10(2)(c) or prohibit the discharge of harmful substances (s 10(1)(b)) which were principles that were required to be applied under s 10(3) and s 87F(1).

3.3 The majority's decision was inconsistent with, and did not address, s 107 of the Resource Management Act 1991 (in addition to the provisions of the New Zealand Coastal Policy Statement) which prevented a consent being granted if it would result in a conspicuous change in colour or visual clarity of water, or significant adverse effects on aquatic life.

3.4 The majority wrongly concluded that the issue of the effect on the benthic ecology depended on whether, when and how long a recovery would take (paras [407]-[411]). Proceeding on the basis that a significant adverse effect will occur, but with conditions regulating a potential recovery over time is contrary to the Act.

3.5 The majority wrongly assessed potential adverse effects on a generalised approach on the basis of modelling and/or averaging put forward by TTRL (see, eg paras [308], [383], [393] and [400]). Such an approach fails to address the potential adverse effects of the activities applied for as required by the Act.

4 The majority erred in assessing and applying the existing interests of Maori in accordance with s 60 of the Act. In particular:

4.1 The majority wrongly concluded that the interests of Maori could be addressed by listing those interests as factors to be taken into account. This approach fails to recognise the principles of kaitiakitanga, mauri moana, the importance of

rohe moana, the principles of informed consent (UNDRIP) and the principles of the Treaty of Waitangi.

4.2 The decision of the majority conflicts with the advice of Ngā Kaihautū Tikanga Taiao (established under s 18 of the Act) that there had not been any adequate cultural values assessment which it was obliged to take into account (s 59(3)(c)) and which the majority said it accepted (para [688]), but which it did not regard as significant on the basis of the limited engagement in consultation. Any question about the participation during consultation did not remove the need for an adequate cultural values assessment.

5 The majority of the EPA also erred in law for the reasons identified in the minority decision.

Relief Sought

The Appellant seeks the following relief:

(a) that the decision of the EPA granting the Consents be set aside; and

(b) costs.

Dated: 31 August 2017

F M R Cooke QC
Counsel for the Appellant

To: The Registrar of the Court

And to: The Environmental Protection Authority

And to: Trans-Tasman Resources Limited

And to: The Submitters on the application by Trans-Tasman Resources Limited

This document is filed by Damian Hohepa Stone, solicitor for the Appellant of Kahui Legal.

The address for service of the Appellant is Level 11, Intilecta Centre, 15 Murphy Street, Wellington

Documents for service on the Appellant may be left at the above address or:

(a) Posted to its solicitor at PO Box 1654, Wellington 6140; or

(b) Emailed to damian@kahuilegal.co.nz.