

Memo

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To: Akaroa Treated Wastewater Options Hearings Panel

Legal Context of the Ngāi Tahu parties' submission on the Discharge to Harbour Option

1. We are providing this short summary as the Panel are no doubt familiar with the requirements for decision making under the LGA, but perhaps less so under the RMA, and they may not be as familiar with obligations relating to Māori.

Introduction

2. The Ngāi Tahu parties' submission re discharge to harbour:

14. The discharge of human sewage (whether treated or untreated) directly into water is abhorrent to the values of Ngāi Tahu. The harbour has its own mauri (life force). When waste water is put directly into the harbour the mauri of the harbour is harmed and destroyed. Discharge of sewage into the harbour is inconsistent with Ngāi Tahu tikanga and incompatible with use of the harbour for food gathering.

3. Another parties' submission: that the Panel take a "scientific and evidence based approach".
4. The Ngāi Tahu position is "evidence". It does not need to be based on "science". We here briefly explain why. These comments are founded in a Court of Appeal decision from April this year: *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 (CA, 3 April 2020)¹.
5. The Court of Appeal noted that the Second Article of the Treaty guaranteed to the rangitira and hapu of New Zealand "rangatiratanga" (in te reo Māori) and "full exclusive and undisturbed possession" (in English) in relation to their lands, estates, forests, fisheries and "taonga katoa". In the Court's words, ...*the exercise of these rights and interests can fairly be described as the most long-standing lawfully established existing class of activities in New Zealand. Those rights were not affected by the acquisition of sovereignty by the British Crown in 1840....* Those rights are interests are existing law - tikanga - in New Zealand.

¹ Off shore mining of iron sand. Point of law appeal against High Court decision on appeal from the decision of the Panel. High Court rejected an appeal submission that the Panel had wrongly limited its assessment of effects on Māori interests to "physical matters".

6. The Court said that the existence, nature and scope of the customary rights and interests are not less deserving of recognition, merely because they do not conform with English concepts. It is not appropriate to attempt to shoe-horn customary rights and interests into an English legal framework. [169]
7. The Court said that it was therefore necessary for the Panel in that case to squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the proposal, and to consider the effect of the proposal on those existing interests. In particular, it was necessary for the Panel to address the impact of the proposal on the kaitiakitanga relationship between the relevant iwi and the marine environment. Kaitiakitanga is an integral component of the customary rights and interests of Māori in relation to the taonga referred to in the Treaty.[170]

[174] In this case the [Panel] needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right – as ancestors, gods, whanau – that iwi have an obligation to care for and protect.

LGA Context

8. The Ngāi Tahu parties' submission is:

33. In considering the four options through the lens of these requirements, it is clear that while all have been adjudged technically feasible, and therefore worthy of consideration under the LGA, one – the harbour outfall – is incapable of promoting the cultural well-being of the affected community. Rather, it would positively diminish that well-being for Ngāi Tahu. There are also good arguments that it would not promote other well-beings.

9. The requirements that the above submission refers to are various sections of the Local Government Act 2002 (LGA02), and these include some of the principles in section 14. (Sections 10, 14 and 77 are set out in the appendix to this memo.) The submission does not reference section 14(d), which along with other LGA02 provisions, contain express obligations requiring local authorities to establish ways for Māori to contribute to and participate in Council decision-making. While participation of Māori is not an issue in relation to this decision, these provisions in the LGA02 provide background context to the important role of Māori in decision making in this Act.
10. The immediately relevant provision in the LGA02 relating to Māori, for this decision, is section 77(1)(c) of the LGA02. That section states that if any options for a Council decision involve a significant^[1] decision in relation to land or a body of water, then Council must '*take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga*'.

^[1] Significance and significant are defined in the LGA02 as:

significance, in relation to any issue, proposal, decision, or other matter that concerns or is before a local authority, means the degree of importance of the issue, proposal, decision, or matter, as assessed by the local authority, in terms of its likely impact on, and likely consequences for, –

(a) the current and future social, economic, environmental, or cultural well-being of the district or region: (b) any persons who are likely to be particularly affected by, or interested in, the issue, proposal, decision, or matter: (c) the capacity of the local authority to perform its role, and the financial and other costs of doing so

significant, in relation to any issue, proposal, decision, or other matter, means that the issue, proposal, decision, or other matter has a high degree of significance

11. There is no case law specifically discussing section 77(1)(c) in this type of issue. However, the phrase “take into account” is used in other legislation and has previously been considered. In *Te Rūnanga o Raukawa Inc v Treaty of Waitangi Fisheries Commission*, unreported, High Court Wellington, 7/8/97, Gendall J decisions about the distribution of the leased fishing quota were judicially reviewed. At pages 28-29 of the decision the phrase ‘take into account’ is compared with ‘have regard to’:

“...The statutory criteria require the Commission to “have regard to” Māori custom, economic considerations and social considerations. Those matters may point in different directions. Provided the Commission genuinely has regard to those complex considerations which are shown to be often the matter of dispute amongst competing Iwi, the eventual decision does not need to accord precisely with the view or claim of one Iwi so as to mirror its contention of one or other of those considerations. As I have said, to “have regard to” does not automatically mean that considerations must be reflected in the final outcome. This is particularly the case where the considerations can compete as against themselves and, in this complex area, obviously compete in a comparative way as against the individual component of the group to which the lease quota are distributed. I adopt the remarks of Somers J in R v D [1976] 1 NZLR 436 at page 437.

“ ... the words ‘shall have regard to’ [are not] synonymous with ‘shall take into account’ if the appropriate matters had to be taken into account they must necessarily in my view affect the discretion. ... the Court has a complete discretion but that the seven matters, or as many as are appropriate, are to be considered. In any particular case, all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable.”

What the Commission is bound to “take into account” is contained in s 8(aa) [of the Maori Fisheries Act 1989], namely to consult with representatives of tribes and to take into account the views expressed in such consultations. That is a different requirement to “having regard to”. There is abundant evidence of an extensive consultation process.... The evidence clearly establishes that the Commission consulted and took into account the views expressed in such consultation. It has, so far, fulfilled its obligations under s8(aa) ...”

12. The matters to be taken into account in section 77(1)(c) are clearly a relevant consideration for the decision-maker but the weight to be given to those matters is a judgement for the decision-maker.
13. The section 14 statements of principle, in accordance with which local authorities must act, are not quantifiable requirements. They indicate the spirit and intent of the legislation, and can be useful in interpreting and applying other parts of the Act. No principle carries any greater weight than any other principle.
14. Section 14(2) makes it clear that there can be conflicts between the principles, but that Council decision-makers need to be transparent where there are conflicts. The Council’s own strategic framework may assist in reaching a decision where there are conflicts; the three principles in that framework that appear most relevant to this matter are:

- Taking an inter-generational approach to sustainable development, prioritising the social, economic and cultural wellbeing of people and communities and the quality of the environment, now and into the future;
 - Building on the relationship with Te Rūnanga o Ngāi Tahu and the Te Hononga–Council Papatipu Rūnanga partnership, reflecting mutual understanding and respect
 - Ensuring the diversity and interests of our communities across the city and the district are reflected in decision-making
15. In respect of matters raised by Ngāi Tahu with any of the options, there is an enhanced obligation through section 77(1)(c) to show that Ngāi Tahu relationships, culture and traditions have been taken into account by the decision-maker. The weight to be put on these matters is for the decision-makers to consider alongside all other views expressed and relevant information provided.

RMA context – within which an application for discharge to the harbour would again be assessed

16. RMA Section 6 matters of national importance

*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall **recognise and provide for** the following matters of national importance:*

...

- (e) *The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*

...

17. The requirement that decision-makers recognise and provide for matters of national importance implies that these values have a significant priority and cannot be merely an equal part of a general balancing exercise: *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).
18. In *Ngāti Kahungunu Iwi Inc v Hawkes Bay RC* [2015] NZEnvC 50 the Court noted that this encompasses the physical and metaphysical elements of the environment. These elements are viewed as inseparable and give rise to the status of the environment as taonga for Māori. In that case the Court acknowledged that culture and traditions are to the fore in the Māori relationship with the environment, especially in relation to water.

RMA Section 7: Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (a) *Kaitiakitanga:*

[(aa) The ethic of stewardship:]

- (b) *The efficient use and development of natural and physical resources:*

- [(ba) *the efficiency of the end use of energy;*]
- (c) *The maintenance and enhancement of amenity values:*
- (d) *Intrinsic values of ecosystems:*
- (e) *Repealed.*
- (f) *Maintenance and enhancement of the quality of the environment:*
- (g) *Any finite characteristics of natural and physical resources:*
- (h) *The protection of the habitat of trout and salmon:*
- (i) *the effects of climate change;]*
- (j) *the benefits to be derived from the use and development of renewable energy.]*

RMA Section 8: Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the [Treaty of Waitangi](#) (Te Tiriti o Waitangi).

19. Those sections – and the protection of tikanga Māori (= Māori law) by the Treaty – are why there is **section 105(1)** of the RMA:
 - 105 Matters relevant to certain applications**
 - (1) *If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section [104\(1\)](#), have regard to—*
 - (a) *the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
 - (b) *the applicant's reasons for the proposed choice; and*
 - (c) *any possible alternative methods of discharge, including discharge into any other receiving environment.*
 - (2)...
20. In considering the sensitivity of the receiving environment to adverse effects, consideration is not limited to the physical environment. It includes people and communities: *Schmuck v Northland RC* [2019] NZEnvC125. It includes abhorrence to tikanga Māori.
21. That is the context within which the Commissioners who declined resource consent for the harbour outfall in 2015 stated that the Council had not adequately considered alternatives.

The planning documents referred to in the 2015 decision to decline the consent application to discharge wastewater to Akaroa Harbour

The New Zealand Coastal Policy Statement:

Policy 23(2): do not allow:

- a) *discharge of human sewage directly to water in the coastal environment without treatment; and*
- b) *the discharge of treated human sewage to water in the coastal environment, unless:*
 - i) *there has been adequate consideration of alternative methods, sites and route for undertaking the discharge; and*
 - ii) *informed by an understanding of tangata whenua values and the effects on them.*

257. This is a clear direction that discharge of human waste into the CMA is appropriate only where there has been adequate consideration of alternatives, and by implication there are reasons for those alternatives being rejected. As discussed above under the heading of Consideration of Alternatives, we are not satisfied that the alternative of land disposal has been adequately assessed, so we consider the proposal is contrary to this policy.

Canterbury Regional Coastal Policy Statement 2013

Policy 8.3.9:

'To ensure that human sewage is not discharged directly into the coastal marine area without treatment and where:

- (1) *alternative methods, sites and route for undertaking the discharges have been considered; and*
- (2) *There has been consultation with Ngāi Tahu as tāngata whenua and particular regard had for their value and the effect of discharges on those values;*

The human sewage is treated in a manner appropriate to the receiving environment.

266. In our assessment the outfall proposal is in direct conflict with this objective and parts of these policies. The coastal water concerned would not be protected from a significant adverse effect. Again, there is a clear directive to properly investigate alternatives to disposing of effluent into coastal water.

Regional Coastal Environment Plan

Objective 7.1 Enable present and future generations to gain cultural, social, recreational, economic, health and other benefits from the quality of the water in the Coastal Marine Area, while:

- (a) *Maintaining the overall existing high natural water quality of coastal waters;*
- (b) *Safeguarding the life-supporting capacity of the water, including its associated: aquatic ecosystems, significant habitats of indigenous fauna and areas of significant*

indigenous vegetation;

- (c) Safeguarding, and where appropriate, enhancing its value for providing mahinga kai for Tangata Whenua;*
- (d) Protecting wāhi tapu and wāhi taonga of value to Tangata Whenua;*
- (e) preserving natural character and protecting outstanding natural features and landscapes, where water quality is an aspect of their value, from reductions in water quality;*
- (f) maintaining, and where appropriate enhancing, amenity values, and*
- (g) Recognising the intrinsic values of ecosystems and any finite characteristics of the coastal environment.'*

270. *The outfall proposal would be in direct conflict with (c) and (d) above.*

2015 Commissioners' Conclusion

288. *There is a strong policy theme running through all these statutory documents that disposal of even highly treated human effluent into the Coastal Marine Area is no longer to be regarded as a good option. Rather it is to be regarded as an option that may be necessary in some circumstances after other options have been thoroughly investigated. This theme is firmly based on the imperatives in section 6(e), section 7(a), section 7(aa) and section 8 of the Act, which give specific statutory recognition of Māori cultural concerns.*

292. *In our assessment the fourth component of the application, the Outfall to Akaroa Harbour would not meet the purpose of the Act. As discussed above, the stumbling block for this component is the inadequate consideration of alternatives, which brings it into conflict with several Part 2 of the Act matters, section 105(1)(c) of the Act, and numerous objectives and policies in relevant statutory policy statements and plans.*

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Appendix- Sections 10, 14 and 77 of the Local Government Act 2002

10 Purpose of local government

- (1) *The purpose of local government is—*
- (a) *to enable democratic local decision-making and action by, and on behalf of, communities; and*
 - (b) *to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.*

14 Principles relating to local authorities

- (1) *In performing its role, a local authority must act in accordance with the following principles:*
- (a) *a local authority should—*
 - (i) *conduct its business in an open, transparent, and democratically accountable manner; and*
 - (ii) *give effect to its identified priorities and desired outcomes in an efficient and effective manner:*
 - (b) *a local authority should make itself aware of, and should have regard to, the views of all of its communities; and*
 - (c) *when making a decision, a local authority should take account of—*
 - (i) *the diversity of the community, and the community's interests, within its district or region; and*
 - (ii) *the interests of future as well as current communities; and*
 - (iii) *the likely impact of any decision on each aspect of well-being referred to in section 10:*
 - (d) *a local authority should provide opportunities for Māori to contribute to its decision-making processes:*
 - (e) ...
 - (f) ...
 - (fa) ...[These subsections are not relevant to this matter]
 - (g) *a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and*
 - (h) *in taking a sustainable development approach, a local authority should take into account—*
 - (i) *the social, economic, and cultural well-being of people and communities; and*
 - (ii) *the need to maintain and enhance the quality of the environment; and*
 - (iii) *the reasonably foreseeable needs of future generations.*
- (2) *If any of these principles, or any aspects of well-being referred to in section 10, are in conflict in any particular case, the local authority should resolve the conflict in accordance with the principle in subsection (1)(a)(i).*

77 Requirements in relation to decisions

- (1) *A local authority must, in the course of the decision-making process,—*
- (a) *seek to identify all reasonably practicable options for the achievement of the objective of a decision; and*
 - (b) *assess the options in terms of their advantages and disadvantages; and*
 - (c) *if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wahi tapu, valued flora and fauna, and other taonga.*