BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

IN THE MATTER:	of the Resource Management Act 1991
AND	
IN THE MATTER:	of appeals pursuant to clause 14 of the First Schedule to the Act
BETWEEN	**MOTITI ROHE MOANA TRUST**
	(ENV-2015-AKL-000134)
	NGATI MAKINO HERITAGE TRUST
	(ENV-2015-AKL-000140)
	NGATI RANGINUI IWI INCORPORATED SOCIETY
	(ENV-2015-AKL-000141)
	Appellants
AND	**BAY OF PLENTY REGIONAL COUNCIL**
	Respondent
AND	**VARIOUS**
	Section 274 Parties

OPENING SUBMISSIONS FOR BAY OF PLENTY REGIONAL COUNCIL

29 November 2017

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MAY IT PLEASE THE COURT:

INTRODUCTION

1. These proceedings involve the final appeal points for determination in relation to the Proposed Bay of Plenty Regional Coastal Environment Plan (**PRCEP**). All other appeal points are the subject of final or interim decisions of the Court.

2. The proceedings cover:

   (a) All appeal points relating to the appeal by Motiti Rohe Moana Trust (**MRMT**), which has been confined to the relief relating to the Motiti Natural Environment Area (**MNEA**);[1] and

   (b) The outstanding appeal topic relating to Marine Spatial Planning in the appeals by Ngati Makino Heritage Trust (**Ngati Makino**) and Ngati Ranginui Iwi Incorporation (**Ngati Ranginui**).

3. Each appeal has at its heart the relationship between tangata whenua and their taonga, culture and traditions, and how the PRCEP should recognise and provide for those matters. This issue has both a protection and an enablement facet, which might be summarised as:

   (a) Recognition, restoration, and protection of cultural taonga and values to enable the exercise of kaitiakitanga over the rohe moana (or parts of it); and

   (b) Enabling tangata whenua development aspirations to be achieved in a manner consistent with tikanga and utilising matauranga Maori.

4. The Appellants seek a collaborative or partnership approach between Council (and potentially other agencies), and tangata whenua.

5. All appeals have been the subject of various forms of ADR and hearings. In the case of MRMT the hearings have focussed on the jurisdictional parameters to inform the relief now proposed for determination in this merits hearing. That relief has continued to evolve, including through the evidence exchange, and the parties now wish to bring finality to the matter. The Respondent in particular has an interest in making the PRCEP operative to provide certainty for future planning decisions.

6. The parties have agreed to proceed with the merits hearing although the jurisdictional parameters are not finally resolved, on the understanding the Court will issue an

[1] Amended relief attached to memorandum of counsel for MRMT dated 1 July 2016.

interim decision which could be revisited as required following ultimate resolution of whether Council has jurisdiction to directly control fishing through rules in its coastal plan.

7. In the meantime the parties have assumed that it can, but on the limited basis outlined in the High Court's decision. Thus, the issue is whether it should, on the facts of this case.

RELIEF SOUGHT

8. Given the scope of the Court's jurisdiction is limited by the notice of appeal,[2] it is useful to consider the relief sought relevant to the marine spatial plan topic.

9. Ngati Ranginui seek:

> Development and integration of new innovative planning mechanisms into the RCEP that seeks to provide for Ngati Ranginui (and other tangata whenua) aspirations for the appropriate use and development of Te Awanui, balanced against the obligation for resource protection (sustainable management).[3]

10. Ngati Makino seek:

> New objective policy and method to provide for strategic spatial planning to support the use, activities, and development needs and aspirations of iwi Maori in the coastal environment.[4]

11. MRMT seeks relief giving effect to its primary submission, in particular:

> Marine spatial planning is required to implement a Customary and Biodiversity effects management area within the footprint of the Motiti Natural Environment Area.[5]

12. MRMT's relief was further particularised to seek new issues and objectives as well as specific policies and rules for what is referred to as the "Motiti Natural Environment Management Area" (**MNEMA**).[6]

13. The Respondent accepts that this Court has jurisdiction, founded on submissions and appeals, to provide for marine spatial planning within the PRECP at two levels:

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[2] Except through a s.293 process. See *Simons Hill Station Ltd v Royal Forest & Bird Society of New Zealand Inc* [2014] NZHC 1362 for a summary of the principles relating to jurisdiction.
[3] First appeal point on pp1-3, Notice of Appeal dated 15 October 2015.
[4] Appeal point (d)(vi),Notice of Appeal dated 28 October 2015.
[5] Notice of Appeal dated 13 October 2015, para 9.2.
[6] Amended Relief attached to Memorandum of Counsel for MRMT dated 1 July 2016.

(a) a general framework or "architecture", as a placeholder for future processes required to give effect to development aspirations as sought by Ngati Makino and Ngati Ranginui; and

(b) specific provisions for part of the rohe moana recognised by MRMT, which the Respondent accepts may be appropriately delineated by the existing high natural character area in the Regional Policy Statement (**RPS**) known as the "Motiti Natural Environment" area, as a means of identifying an area over which tangata whenua have a cultural relationship.

13.2 Whether there is jurisdiction to include rules in the plan controlling fishing is addressed separately in these submissions.

COUNCIL'S PROPOSAL

14. Council's proposal,[7] developed in response to the issues and outcomes expressed by the Appellants during mediation and further refined in evidence, would:

14.1 **Provide for future tangata whenua development zones by:**

(a) Two new "Integrated Resource Management" policies (IR1 and IR2) which would recognise the potential benefits and constraints arising from future use and development of the coastal environment and provide for activities that have a functional need to locate in the CMA including by use of zoning / spatial mechanisms;

(b) A new method (19AA) committing Council to consider proposals from tangata whenua to investigate the development of spatial mechanisms meeting suggested criteria including enabling the exercise of kaitiakitanga and providing for the well-being of tangata whenua. The investigation process would include consideration of other tangata whenua interests (eg. Treaty settlements and MACA[8] applications) and the level of community support. An advice note records that a Schedule 1 process will be required to incorporate investigation outcomes in a statutory framework;

(c) In addition, amendments agreed to by Council in relation to the Iwi Resource Management topic include new issue 20A recognising that tangata whenua aspirations for development of the coastal marine area are not well understood.

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[7] Attachment A to Ms Noble's evidence, summarised at para 160 of her evidence (pp806,808 Bundle).
[8] Marine and Coastal Area (Takutai Moana) Act 2011.

14.2 **Further recognise and provide for the s.6(e) relationship of Motiti tangata whenua with their rohe moana:**

(a) Extend the boundary of ASCV-25[9] to be consistent with the MENA boundary, including the waahi tapu areas to the extent these are found to be appropriate by the Court;[10]

(b) Amend the ASCV-25 description in Schedule 6 to reflect the areas of significant cultural value in the Motiti rohe moana by including the information on waahi tapu and waahi taonga provided by Mr Ranapia and providing a map showing the location of those areas, akin to the approach taken in the Motiti Island Natural Environment Plan for terrestrial sites;

14.3 **Better recognise and provide for the restoration aspirations of tangata whenua and kaitiakitanga:**

(a) Recognition of the MENA through:

(i) Amendment to Objective 4 to include restoration and rehabilitation of degraded cultural sites which tangata wish to restore for natural heritage and cultural reasons;

(ii) New policy (IWAA) recognising the restoration values, aspirations and relationship of tangata whenua with the MENA (taking into account the attributes, values and goals in new Schedule 6A) including protecting and (where practicable) restoring waahi tapu and waahi taonga and avoiding (or if not practicable remedying or mitigating) adverse effects on those waahi;

(iii) A new Schedule 6A articulating the particular values, attributes and restoration goals for the MENA. This could also include a map showing the location of those areas;

15. These provisions need to be understood in the context of the PRCEP's scheme, including the majority of provisions which are now beyond challenge.[11] As explained by Ms Noble:[12]

- The PRCEP takes an integrated approach to managing the coastal environment by including directive policies which apply to resource consent processes both on

[9] Motiti Island and Associated Islands / Reefs and Shoals, Schedule 6, p375, (Map Sheet 43b).
[10] Ms Noble has reservations about the appropriateness of the 1 nm buffer, paras 78-79 primary evidence. Ms Lucas was unable to give a clear explanation for their rationale in cross-examination.
[11] Rules are deemed operative (s.86F, RMA). The provisions subject to appeal are highlighted in yellow in the "Appeals Version" of the PRCEP provided to the Court.
[12] Evidence of Joanna Noble, paras 16-29, Bundle pp775-778.

land and in the CMA. In general these address matters of national importance and require avoidance of effects or significant adverse effects in a manner which reflects the requirements of the NZCPS. These policies are triggered through overlays providing information on known attributes and values to be managed.[13]

- Generally activities in the CMA require a discretionary resource consent. The presence of an overlay may trigger a non-complying activity status. There are some permitted activities, although these "*provide for a relatively narrow range of activities that might be considered acceptable within the coastal marine area.*"[14]

- In the Interim Decision on Iwi Resource Management the Court proposed additional activity performance standards to ensure that cultural effects of permitted activities are taken into account where these occur in ASCVs. Council's proposal includes provisions to give effect to this decision.[15]

16. The PRCEP includes a very comprehensive suite of existing (beyond challenge) specific provisions which address tangata whenua values, relationships and aspirations including directive policies requiring:[16]

    - proposals which affect s.6(e) relationships to recognise and provide for customary practices, the role and mana of kaitiaki, matauranga maori, cultural and heritage values and sites of significance (Policy IW1);

    - Consultation with tangata whenua (Policy IW6);

    - Involvement of tangata whenua in establishing appropriate mitigation, remediation and offsetting including restoration of significant cultural and biodiversity values and habitat for flora and fauna, including contributing resources (financial or otherwise) to environmental, social or cultural enhancement (Policy IW9);

    - Avoiding restrictions on tangata whenua access to sites used for cultural practices (IW10);

    - Consideration to appointing commissioners with experience in tikanga, matauranga or kaitiakitanga (IW11);

    - Working with Maori land owners to facilitate appropriate development of Maori land in light of limited alternatives (Policy IW 13).

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[13] The overlays in the PRCEP address Outstanding Natural Features and Landscapes (ONFL), Areas of significant Indigenous Biodiversity (IBD A and B), and Areas of Significant Cultural Values (ASCV). Areas of outstanding, very high and high natural character are identified in the RPS.
[14] Interim Decision, Iwi Resource Management [2017] NZEnvC 072.
[15] These aspects of Council's proposal are subject to approval by the Court following a submissions hearing on 6 December 2017 and subject to issues of scope being resolved.
[16] Ms Noble's evidence addresses these provisions as well as the relevant provisions of the RPS at paras 42-46, Bundle pp 780-781.

17. Council's proposal also includes the amendments proposed in the Iwi Resource Management topic to better address cultural values and relationships,[17] including:

- Strengthened objectives and policies around recognition and rehabilitation of significant cultural landscape features, seascapes and culturally sensitive landforms (Objective 15 and Policy NH6);

- Greater policy recognition for the significance of the coast for cultural activities and giving preference to avoiding adverse effects on those activities including through design and location (Policy RA2);

- Strengthening references to the Treaty of Waitangi and promoting partnerships between tangata whenua and statutory agencies (Issue 14, Policy IW4(c), Policy IW 11A);

- Committing to consider the transfer and / or delegation of RMA functions / powers in relation to the management of characteristics of the CMA of special value to tangata whenua (Method 17B);

- Promoting better and early consultation with tangata whenua (Policies RA 3 & RA 7);

- Consenting in the CMA to:

  - consider the imposition of conditions to ensure kaitiakitanga, mauri and taonga species are maintained (Policy IW1A);

  - avoid adverse effects on culturally significant resources or areas unless avoidance is not practicable (otherwise remedy or mitigate) (Policy IW2);

  - include a review condition where necessary to address unforeseen adverse effects on significant or special areas or resources of value to tangata whenua (Policy 1W 9A);

- New assessment guidelines for ASCVs which have been supported by all parties. These would direct applicants and decision makers to have regard to a range of matters when considering an application for activities in an ASCV or other areas or sites of significance to tangata whenua.

- New or updated methods to work with tangata whenua to:

  - incorporate matauranga Maori in the assessment of Maori cultural values and attributes for ONFL, ONC, IBDAs and ASCVs and the classification and

[17] Shown in underlined text in Ms Noble's Attachment A, Bundle p.808.

assessment of coastal waters, and develop a framework for assessment of effects on Maori cultural values and attributes (Methods 2A and 18);

- review ASCVs and identify other areas of cultural significance and investigate planning mechanisms and other methods to provide for these and to support tangata whenua aspirations in the coastal environment. The method requires consideration to be given to the most appropriate provisions in the Plan for matters arising out of the review (Method 19A);

- identify areas of the coast which may need public access limited to protect significant cultural values (Method 21A);

- promote tangata whenua needs for development in the coastal environment and facilitate provision for these where appropriate (Method 15).

- Investigate the establishment of a tangata whenua specialist practitioners group to assist with implementation of the new tangata whenua focussed methods and development of the cultural health indicators (Method 1A).

COUNCIL'S CASE

18. Council's case, to be developed further in these submissions, can be summarised as:

Tangata whenua development zones

18.1 Council's proposal provides a framework for future tangata whenua development zones or spatially defined areas to be developed through a future Schedule 1 process once tangata aspirations have been sufficiently developed;

18.2 Council's proposed wording is the more appropriate because it recognises the existing approach of the PRCEP and avoids duplication and surplusage, whilst achieving the same outcomes as the Appellants, whose proposed wording acknowledges that additional management areas (other than for the MENA) require a first schedule process;

Marine spatial planning

18.3 Council's proposal provides for the exercise of kaitiakatanga by tangata whenua who have a s.6(e) relationship with the MNEA by:

(a) Spatially recognising the rohe moana / waahi taonga with which they have a cultural relationship (ASCV-25 and MENA restoration area);

(b) Identifying and describing the particular attributes, values, and waahi tapu within the identified area (wording to be developed further with tangata whenua);

(c) Identifying the particular restoration aspirations for the MNEA (wording to be developed further);

(d) Requiring resource consents for all but a limited range of permitted activities in the MENA,[18] which provide for a relatively narrow range of activities that might be considered acceptable within the coastal marine area;

(e) Protecting the identified attributes and values from adverse effects through consenting processes by requiring:

(i) Avoidance of adverse effects on the ONC, ONFL and IBD A areas within the MENA, including taxa meeting NZCPS Policy 11(a) (Policy NH 4);[19]

(ii) Avoidance of significant adverse effects, and avoidance remediation or mitigation of other effects on the values and attributes of other areas, including seascapes and cultural landscapes and features (Policies NH6 and 6A);

(iii) Avoidance, and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of cultural significance (Policy IW2) and on waahi tapu in the MENA (Policy IW 1AA);

(iv) Recognition and provision for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

- Avoiding significant adverse effects, and avoiding, remedying, mitigating or offsetting other effects, on

[18] Other than for fishing. That is because until now Council did not understand it could control fishing. Thus, coastal plans do not provide for this activity as permitted. It does not follow that harvesting of species would defaulting to a discretionary activity under s.87B, but rather a matter of concurrent jurisdiction and the Fisheries Act providing for this regulation rather than the RMA.

[19] The **attached** map shows the various natural heritage overlays within the MENA. The IBDA A areas are listed in Ms Noble's evidence (para 49) and addressed in the evidence of Dr De Luca (paras 14-16). There are only limited IBDA B areas (Taumaihi Island (B133) and Motiti Islets (B132) recognising terrestrial values. None of the "taonga" fish species referred to in the RPS (Appendix j) and Mr Lawrence's Schedule 6 are Policy 11(a) species although there are some threatened bird species that breed within the MENA.

habitats of indigenous species that are important for traditional or cultural purposes; and on cultural and spiritual values associated with natural features and natural landscapes;

- Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;
- Assessing whether restoration of cultural landscape features can be enabled; and
- Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

(v) Consent applications to recognise and provide for the role of tangata whenua as kaitiaki, incorporating the use of matauranga Maori or cultural indicators, involving tangata whenua in establishing mitigation, remediation and offsetting options, and requiring review conditions for unforeseen effects on taonga (Policies IW1A, IW 1AA, IW7 and IW9A).

18.4 Council's proposal does not directly regulate the harvesting of indigenous flora and fauna or prohibit all structures or occupation or discharging or dumping waste the MENA as (initially) sought by MRMT. Rather, Council's proposal would:

(a) Permit navigation aids and require discretionary consent for other structures such as landing facilities for accessing Islands within the MENA in the same way as the rest of the CMA, recognising the wider community benefits of such structures;[20]

(b) Rely on RMA regulations, other Plan rules and s.15B of the RMA to regulate dumping and discharges, in a manner which would protect the values of the MENA;[21]

(c) Provide for aquaculture to be undertaken by any person (not limited to Motiti marae) as a controlled activity in the MENA for enhancing and restocking indigenous coastal species including for customary use pursuant to existing Rule AQ 2 of the PRCEP;[22]

(d) Rely on the complementary management regime under the Fisheries Act to manage the Region-wide impact on biodiversity values due to

[20] Refer Noble evidence, para 110-111, Bundle p 795.
[21] Refer Noble evidence, paras 115-123, Bundle pp 796-797.
[22] Refer Noble evidence, paras 112-114, Bundle p 795.

unsustainable fishing activity and to protect the relationship between tangata whenua and places of importance for customary food gathering;[23]

(e) Support the Crown in the development of a network of marine protected areas for the Region through implementation of the Marine Protected Areas Policy and the use of the Marine Reserves Act;[24]

(f) Join in a marine spatial planning exercise involving all relative stakeholders in a collaborative process (similar to Tai Timu Tai Pari) which could be implemented through a variety of means including new coastal plan provisions through a plan change;

(g) Support research and investigate options to manage fishing activities for the protection of indigenous biodiversity (existing Method 3A).

18.5 Council's proposal is the more appropriate way of achieving both the kaitiakitanga and enabling objectives sought by the Appellants, having regard to the s.32 principles of assisting Council to carry out its functions so as to achieve the purpose of the Act because it would:

(a) Involve consultation with all affected stakeholders consistent with the public participatory process envisaged by the RMA and Council's obligations under the Local Government Act;

(b) Provide for a process of education and enlightenment around the values of the MENA, rather than surprise, frustration and resentment at a regime imposed without community input;

(c) Better facilitate the "self-policing" enforcement regime anticipated by the Appellant's experts due to community buy in;

(d) Have greater prospects of obtaining funding and other resourcing over other competing issues due to a sound business case and community support;

(e) Not derogate from the rights of stakeholders such as applicants under the Marine and Coastal Area Act, or under Rohe Moana established under the Fisheries Act;[25]

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[23] Refer evidence of Andrew Hill for the Attorney-General, particularly paras 22-17. The Fisheries Act and regulations and related implementation strategies (such as the National Plan of Action – Seabirds 2013) also address the issue of seabird bycatch.

[24] Noting that Council made a submission on the recent review of this legislation, indicating a desire to be involved in a collaborative process around MPA proposals and support for *"removal of duplication and improved integrated management of the marine environment*". Comments on MFE Consultation Document - A New Marine Protected Areas Act, 11 March 2016.

(f) Not undermine the carefully calibrated balance of rights to utilise the fisheries resource under the Fisheries Act and regulations;

(g) Be more effective and sustainable due to time allowed for further information gathering, baseline monitoring, good design, and careful consideration of the effectiveness, efficiency and enforceability of any controls proposed to in relation to fishing activities.

18.6 Council's proposal achieves the purpose and principles of the Act and gives effect to the higher order documents (the RPS and NZCPS).

ISSUES

Limited Jurisdiction

19. The High Court's two decisions, properly construed, affirm a very limited ability for Regional Councils to control fishing, specifically, where it "*is demonstrably necessary to maintain indigenous biodiversity per se. Similarly, any rules imposed must be strictly confined to this object.*"[26]

20. Controls on the taking of species for the purpose of managing effects on outstanding natural features and landscapes and natural character are therefore caught by the injunction in s.30(2) RMA where they "*control the taking, allocation or enhancement of fisheries resources for the purpose of managing fisheries or fisheries resources controlled under the fisheries Act.*"

21. The High Court's judgment focuses on the indigenous biodiversity function of Council, and matters Maori, and does not directly address the issue of features and landscapes and natural character. In relation to indigenous biodiversity, this Court has emphasised the importance of defining the issue as one relating to indigenous biodiversity rather than fishing, if the Court is to be persuaded that the s.30(1)(ga) "exemption" applies. Thus, MRMT's evidence has sought to develop a relationship between overfishing, kina barrens and kelp. However, where this phenomenon cannot be established on the evidence, we are left with the taking of species per se.

22. Given none of the taonga species sought to be protected by MRMT are Policy 11(a) species, it is clearly questionable whether rules preventing the taking of species would fall within the exception for maintaining indigenous biodiversity, and whether they would be strictly or at least demonstrably necessary for that purpose.

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[25] It is understood this issue will be addressed in submissions for the Attorney-General, which are adopted by the Regional Council.
[26] [2017] NZHC 1429, at [129].

23. As the Judgment explains:

> This is not an issue of motive or purpose. It is a matter of proof. The need for separate additional RMA control of the effects of fishing on the aquatic environment as defined by the FA will need to be clearly demonstrated, give the very careful calibration undertaken by FA functionaries when setting sustainability measures ...

24. It is submitted this reasoning must also follow in relation to landscapes and natural character, but with the additional provision (not required in relation to indigenous biodiversity given the s.30(1)(ga) carveout) that it must be established the control is not for the purpose of managing fisheries or fisheries resources. This will be very difficult to establish in practice, given the tenuous link between removal of fish and landscape and natural character values. Ms Lucas' evidence was less than persuasive on this issue and the interrelationship between fishing and landscape and natural character values is not the subject of any landscape analysis or case law. Conversely, Ms Lucas conceded the taking of fish could form part of the experiential aspects of natural character. Similarly, it forms part of cultural practices and relationships discussed further in these submissions.

Rules not mandatory

25. As explained above (para 15) the PRCEP provides rules requiring consent for most activities in the CMA (with only very limited permitted activities). Where activities occur in overlay areas the status may upgrade to non-complying, and in all cases directive policies require the avoidance of adverse effects or the avoidance of significant adverse effects (or otherwise management) in accordance with the NZCPS policies.

26. The reason we are here is that the Plan, like all others in New Zealand, does not include rules prohibiting the taking or damage of aquatic flora and fauna.[27]

27. It is submitted that rules are not required in order to carry out Council's function of these proceeding is "The establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity" (s.30(1)(ga)).

28. It is well settled that Council has discretion as to how it exercises the IBD function,[28] and while it may decide to do so through the inclusion of rules,[29] it is not obliged to use this particular method.[30] Further, "methods" include non-regulatory methods such as

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[27] Marlborough District has proposed rules prohibiting certain invasive fishing methods in its ecologically significant areas (IBDA equivalents).
[28] *Property Rights in New Zealand Inc v Manawatu-Wanganui RC* [2012] NZHC 1272 at [30] – [33].
[29] *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at para [129], [132] and [134]. See also *Property Rights (supra)* at [31] and *Yachting New Zealand v Tasman DC* [2004] NZRMA 373.
[30] *Property Rights (ibid., n26)* at [1], [4], [8]–[10] and [30]–[32].

those proposed by Council in this case (commitments to advocacy, research and options analysis).

29. Other methods may also involve the use of more appropriate mechanisms under other legislation.[31]

30. Moreover, just because the PRCEP identifies unsustainable fishing as an issue in the Region, it is not required to impose to rules to manage this issue.

> A plan rule does not drive what can be assessed in a discussion of issues of importance to a region. Nor does a rule constrain the context of objectives and policies. It is an executive tool that may be used to address some aspect of matters identified in a preceding discussion of issues and statement of objectives and policies. Neither s67 and s68 (which govern regional plan rules) require objectives and policies to be validated by a plan rule. The relationship is in reverse. Under s68(1) it is objectives and policies that provide the basis for a plan rule. It does not follow that there must be a plan rule for every objective and policy of the plan. **A method other than a plan rule may be considered more appropriate or effective for achieving the objective or policy. In this case it is the navigation bylaw, which as Mr Jackson for the council recognises, is familiar to the boating fraternity and provided for in law.**[32] [emphasis added]

31. Council has taken a similar approach in this case. It considers that reliance on existing legislation carefully calibrated to sustain the fisheries resource and well understood by the community is the more appropriate method for addressing the effects of unsustainable fishing on indigenous biodiversity in the Region. This is a Region wide issue requiring a region wide response and community support.

32. The management of indigenous biodiversity is a large and diverse responsibility and for that reason is shared by multiple agencies under various legislation, for example, regional and territorial authorities have dual responsibilities under the RMA, Reserves Act, and Biosecurity Act, and the Crown under the multiple statutes including the RMA, Conservation Act, Reserves Act, Marine Reserves Act, and Wildlife Act.[33]

Protection requirements

33. Council has certain mandatory requirements as a functionary under the RMA, to:

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[31] See *Yachting New Zealand (ibid.*n26) - use of navigational bylaws under the LGA 1974 (held to be appropriate). Cf *Royal Forest and Bird Protection Society v Northland RC* (1998) 4 ELRNZ 200 – Pest Management Strategies under the Biosecurity Act 1993 found insufficient on their own leading to endorsement of controls under both BA and RMA.

[32] *Yachting NZ, Ibid*, n26 at [41].

[33] Also the National Parks Act, Marine Mammals Protection Act, Wild Animal Control Act and Native Plants Protection Act.

(a) "*recognise and provide for … The* ***protection*** *of areas of significant indigenous vegetation and significant habitats of indigenous fauna*". (s.6(c) RMA); and

(a) "***protect*** *indigenous biological diversity in the coastal environment"* by requiring avoidance of adverse effects on certain threatened, at risk or rare indigenous taxa, ecosystems and vegetation types (Policy 11(a) NZCPS) and the avoidance of significant adverse effects (and avoid, remedy or mitigate other effects) on the ecosystems and habitat types in Policy 11(b)). [emphasis added]

34. Protect in this context means "*to keep safe from harm, injury or damage*".[34]

35. The PRCEP does this by scheduling IBDA A and B areas to give effect to the 11(a) and (b) policies respectively, and in so doing also recognises and provides for s.6(c) matters. As noted, policies NH4, NH6 and NH6A require avoidance or other management of adverse effects to reflect the requirements of Policy 11.

36. The taonga species in the MENA are not Policy 11(a) species to which an absolute avoidance obligation attaches. Thus, the taking or damage to a fish per se does not require direct regulation under the PRCEP.

37. The Environment Court has held that:

> Notwithstanding the directive and obligatory nature of s6(c), we do not consider that a territorial authority is necessarily obliged to achieve the protection sought by incorporating rules in its district plan. The nature of the protection required to meet a territorial authority's duty in any given instance is one to be determined by that authority when preparing or reviewing its district plan.[35]

38. Thus, in relation to those IBDA A areas within the MENA, or the IBDA B areas, it is submitted that a requirement to avoid effects, or significant effects, does not necessitate a prohibition on taking species through rules in the PRCEP.

39. This is supported by the NZCPS, which does not direct that the Policy 11 requirements be given effect to though rules (it does not refer to plan provisions at all). Notably, this can be contrasted with the other "protection" policies, which all require plans to identify and include objectives, polices and rules where required to achieve the policy.[36]

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[34] *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219 at [63].
[35] *RF&B v New Plymouth DC, Supra* at [65].
[36] Refer Policy 13(a)(d) (Preservation of Natural Character), Policy 14(b) (Restoration of Natural Character), Policy 15(d) (Natural Features and Landscapes), Policy 17(f) (Historic Heritage).

40. It is submitted that the expression of this Policy must be given meaning, in accordance with the Supreme Court's reasoning in *King Salmon* that the words used by the policy framers matter. The Supreme Court also acknowledged that the NZCPS is intended to reflect the discretion generally reserved to Councils under the RMA as to how best to achieve the purpose of the Act in their plans:

> We acknowledge that the scheme of the RMA does give subordinate decision-makers considerable flexibility and scope for choice. This is reflected in the NZCPS, which is formulated in a way that **allows regional councils flexibility in implementing its objectives and policies in their regional coastal policy statements and plans**. Many of the policies are framed in terms that provide flexibility and, apart from that, **the specific methods and rules to implement the objectives and policies of the NZCPS in particular regions must be determined by regional councils**. But the fact that the RMA and the NZCPS allow regional and district councils scope for choice does not mean, of course, that the scope is infinite. The requirement to "give effect to" the NZCPS is intended to constrain decision-makers.[37] [emphasis added]

41. It is submitted that the NZCPS provides support for Council's approach of relying on methods other than rules, and other complementary legislation regimes, to address the adverse effects of unsustainable fishing in the Region, in particular:

(a) Policy 4(b) relating to "Integration" acknowledges that integrated management requires "*working collaboratively with other bodies and agencies with responsibilities and functions relevant to resource management, such as where land or waters are held or managed for conservation purposes*;

(b) Policy 2(f)(3) relating to opportunities for exercising kaitiakitanga over cultural waters and fisheries refers to "*measures such as ... having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaitai or other non commercial Maori customary fishing.*"

(c) When discussing Policy 11 (then Policy 31), the Board of Inquiry working paper[38] states that:

> We do not agree that the policy cuts across the value of having an MPA network, **particularly when the statutory protection mechanisms for marine reserves for example deal with matters like fishing that are outside the control of the RMA. We agree**

[37] Refer *Environmental Defence Society Inc v New Zealand v King Salmon Company Limited* [2014] 1 NZLR 593 (SC).
[38] Proposed New Zealand Coastal Policy Statement (2008) Board of Inquiry Report and recommendations Volume 2: Working Papers July 2009 pp 192-193.

> **that there needs to be integration of management under the RMA and other statutory mechanisms.** We therefore consider that there needs to be recognition of the MPA network and other statutory mechanisms that set aside areas for full or partial protection of indigenous biological diversity. We recommend an addition to part (a) of the policy so that adverse effects of activities on these areas are avoided.

42. Even if avoidance of effects does require rules, these do not need to require absolute avoidance through prohibition. A different division of the Environment Court has recently observed in the context of the PRCEP (in relation to Policy 15) that:

> ... As the Supreme Court has noted, these policies "provide something in the nature of a bottom line" consistent with the definition of sustainable management in s 5(2) RMA which contemplates protection as well as use and development. **We apprehend that the Supreme Court's careful wording indicates that the policies do not in fact state a bottom line in any absolute sense**. It is important to bear in mind that the NZCPS, like regional policy statements under the RMA, does not have direct regulatory effect: its role in the statutory scheme, as noted above, is to be given effect to through lower order policy statements and plans. As well, the NZCPS also must be had regard to in considering applications for resource consent.
>
> Of course, if the ... plan provisions ... do no more than repeat Policy 15(a), then it would follow that all adverse effects ought to be avoided in outstanding coastal landscapes and consequently no activities could be provided for: not even navigation aids otherwise consistent with Policy 9(b) NZCPS. Effectively, on that approach, **any human activity might be regarded as necessarily causing adverse effects on the environment.**[39]

43. The Court also emphasised (citing the Court of Appeal in *Man of War Station*) that much turns on what is sought to be protected.[40]

44. It is submitted that, particularly when considering a wider regional planning framework (as opposed to a site specific activity such as in *King Salmon*) it is important to understand the interplay between the various provisions in the Proposed Plan and, in this case, the wider non regulatory methods sitting outside of the Plan. For example, navigation aids are proposed to be permitted under Council's proposal in the MENA, for the reasons noted above. Aquaculture is proposed to be controlled under both Council's and MRMT's proposal. These examples show that absolute avoidance of all effects is not required. Rather the particular effects will need to be well understood, as well as the particular attributes and values sought to be protected.

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[39] *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 at [124]-[125].
[40] *Man o'War Station Ltd v Auckland Council* [2017] NZCA 24 at [63]- [65].

45. In this case the causal relationship between over-fishing and effects on ecosystems is not clearly understood in relation to the MENA. As Dr De Luca notes:

> MRMT are seeking intervention based on a relatively simple relationship (i.e. that fish eat kina, and kina eat kelp). However, ecological relationships are more complex than that relationship and enhancing marine ecological values or indigenous biodiversity requires an ecosystem approach (para 44).

46. The experts are agreed that the kina barren issue is principally around Motiti Island[41] and not a feature of Astrolabe, which is in relatively good ecological health.[42] Further, there have been no attempts to quantify kina barrens as a measure of ecological health or the impacts of fishing.[43]

47. The only issue identified in relation to Otaiti was the fostering of species,[44] including for potential future take from spill-over into areas outside of the "no-take" area,[45] an issue which sits uncomfortably within the Fisheries Act domain.

48. Thus, requiring a prohibition on fishing in not a justifiable response to the ecological issue, particularly at Otaiti where kina barrens are not occurring and the reef is in a relative state of good health, and the taonga species sought to be "fostered" are not Policy 11(a) species to which an avoidance requirement applies.

49. Similarly, the relationship between bird foraging behaviour and fish school activity is relatively unknown and there is there a paucity of accurate data for seabird populations in New Zealand and only very limited monitoring.[46] There is very little direct evidence or information of this occurring in the MENA. The issue of seabird bycatch is squarely addressed by the Fisheries Act management regime[47] and the National Plan of Action – Seabirds 2013, a combined stakeholder initiative including MPI, tangata whenua and the commercial fishing sector.[48] This is implemented through integration into MPI's annual and five year plans.

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[41] Primary evidence of Vincent Kerr, para 36, and Dr Ross at para 20.
[42] Primary evidence Dr Ross, paras 22-13.
[43] Primary evidence Dr Ross, para 20.
[44] Primary evidence of Dr Grace at para 71, confirmed in cross-examination.
[45] Refer primary evidence of Dr Grace at paras 52 and 71. Dr Shears confirmed in cross-examination that "spill-over" effects from no-take areas can produce benefits in the way of increased take outside of these areas.
[46] Gaskin 2017 study presentation put to Stirnemann in cross-examination.
[47] Fisheries (Seabird Mitigation Measures - Surface Longlines) Circular 2014 (imposed under s 58A of the Fisheries (Commercial Fishing) Regs 2001). Seabirds are included in the definition of "aquatic life" under the Fisheries Act. There are indirect forms of regulation such as reporting bycatch species, requirements for bird scaring devices, and net sizes. These issues will be addressed in more detail by the Crown.
[48] MPI, 2013, para s 83-93.

50. Thus, it is superficial to simply rely on the "avoidance" language of the NZCPS in this case without further inquiry.

Policy 2 – Treaty, tangata whenua and Maori

51. The cultural values of the MENA, including the taonga species as a traditional food source, are acknowledged. However, Policy 2 NZCPS does not include a directive avoidance requirement like the natural heritage policies (11, 13 and 15). This is likely to be because cultural values are often intangible, and creating a rules framework directing effects on such values to be understood, quantified and then avoided is unrealistic.

52. This policy has recently been considered by the High Court, which held:[49]

> The Supreme Court has held in [*King Salmon*], in the context of the NZCPS, that the words "give effect to" mean implement, and that this is a strong directive, creating a firm obligation on the part of planning authorities. There was, however, a caveat noted by the Court. The implementation of any directive is affected by what it relates to. A requirement to give effect to a policy which is framed in a specific and unqualified way may be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.
>
> [Referring to Policy 2 among others] In my judgment, the objectives and policies in the NZCPS relied on by the IMSB are not particularly directive. Broadly, they relate to historic heritage, consultation, tangata whenua and mana whenua values, and the protection of both heritage and values through consultation and other non-statutory methods. The policies are framed at a high level of abstraction. They are not directed specifically to decision-makers; they do not require decision-makers to "avoid" certain matters. I do not consider that the policies are particularly directive. The requirements impugned by ss 6, 7 and 8 of the Resource Management Act are, however, more forcefully expressed – "shall recognise and provide for", "should have particular regard to", and "shall take into account". These imperatives are directed to all persons exercising functions and powers under the Act.

53. Particularly relevant to this case, the High Court held that:

> ...it is necessary to consider the overall policy framework and all of the various provisions seeking to protect Māori cultural heritage in the proposed Unitary Plan. In my judgment, it would be misleading to single out the SVMW overlay provisions and assert that because they have been deleted, the plan as a whole fails to comply with the various statutory directives I have noted. There are a very large number of

[49] *Independent Maori Statutory Board v Auckland Council* [2017] NZHC 356, [2017] NZRMA 195 at [74]-[78]

provisions in the proposed Unitary Plan which refer to mana whenua values, and to cultural heritage.

54. The same can be said in relation to the PRCEP. The suggestion that fishing must be prohibited within the MENMA (or at least within the waahi tapu areas) in order to give effect to Council's requirements under Policy 2 of the NZCPS, or indeed its obligations under s.6, 7 and 8 of the RMA, is a step too far. If that was correct, then it must also follow that Councils must prohibit fishing in any area of the CMA which with tangata whenua have a s.6(e) relationship, or a relationship entitling them to exercise kaitiakitanga.[50] This would be a very large proportion (if not all) of the CMA, and cannot be correct.

55. The detailed and carefully considered suite of provisions referred to above to address issues of importance to tangata whenua in a very comprehensive manner. Many of them have practical application and "teeth". They are not just words. For example, the obligation to include tangata whenua in developing off-sets and including review conditions on consents to address latent cultural issues.

56. Mindful of the provisions in the PRCEP acknowledging that only tangata whenua should define their cultural values, and consistent with Policy 2 NZCPS, Council envisages that the particular wording of the attributes and values in ASCV-25 and the Schedule 6A restoration aspirations should be developed further with tangata whenua if willing. Apart from Mr Reaburn (for Forest and Bird) and to a limited extent Mr Lawrence through his s.3AA analysis, the Appellants (including Ngati Makino and Ngati Ranginui) have not engaged with Council's proposal.

57. Responsibility for cultural matters is not a "function" of Council under the Act per se. Rather, it infuses decision making under the Act and the PRCEP. As observed by the High Court in the fisheries declaration proceedings, it is business as usual for Council in this area, unless it offends against specific provisions for tangata whenua under the Fisheries Act, in which case those prevail. Mr Hill's evidence is that there is the potential for this to occur (paras 68-71).

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[50] The purpose of the Court's examination of mana whenua / moana in the Rena decision was to assist it in providing for kaitiakitanga under s.7. Its examination was focussed on Otaiti not the wider MENMA. It determined there were various different forms of kaitaikitanga for the purposes of establishing a cultural reference group. The descendants of Ngai Te Hapu and Te Whanau o Tauwhao have ahi ka and therefore kaitiakitanga responsibilities and customary use rights over Otaiti. Although Te Arawa no longer claim ahi ka, they have kaitiakitanga responsibilities for Otaiti through their ancestral connections. Ngai Te Rangi, Ngati Pukenga, and Ngati Ranginui and their hapu have legislative recognition of their tangata whenua status, giving them the right to exercise kaitiaki responsibilities for the fisheries. *Ngāi Te Hapu Inc v BOPRC* [2017] NzenvC7 at [62]-[89].

"Maintenance" of indigenous biodiversity

58. The s.30(1)(ga) function is one of maintenance not protection. Section 30 uses various standards when describing Council's functions, including "conservation", "maintenance and enhancement", "avoidance or mitigation". It is submitted that Parliament's choice of the word "maintaining" in relation to the indigenous biodiversity function was purposeful. It reflects the dynamic, diverse and complex nature of ecosystems described by the experts, which are not static over time nor common across all parts of the Region.

59. The function has Region-wide application and applies to terrestrial, freshwater and marine environments, all requiring different management approaches.

60. The meaning of "maintenance" in the s.30(1)(ga) context does not appear to have been considered by the courts, however it has been considered in the fresh water context, where the requirement is "maintenance and enhancement" (30(1)(c)(ii)).

61. In that context the Environment Court observed that, while maintaining water quality may be something of a moving target, the requirement is to strive for management practices that will prevent degradation, and to strive to ensure that quality is, at a minimum, maintained.[51] The Court cautioned against an "unders and overs" approach allowing quality to be degraded in one area if there was a matching improvement elsewhere.

62. It is submitted that there is a real risk of an unders and overs approach being applied here. As noted in Council's submission on the proposed new Marine Protected Areas Act, a proposal that Councils should take into account, when considering consent applications, whether a species or ecosystem is otherwise protected as part of the representative network of MPA sought to be established under the legislation, "potentially allows for 'trade-offs' where the effect on a protected species or ecosystem can be allowed in one area if the overall integrity of the species or ecosystem is maintained across its range. This requires an assessment of effects at a national level rather than a regional level."[52]

63. By selecting the MENA as a "good place to start" to try to arrest the slow decline that has been occurring over many decades,[53] in order to give the appellant's some relief through rules as the Court is being urged to do, the Court is being asked to pick winners without clear evidence of species or ecosystem viability across the board.

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[51] *Ngati Kahungunu Iwi Inc v The Hawkes Bay Regional Council* [2015] NZEnvC 50 at [69].
[52] Council's submission, *ibid*, n 24.
[53] Cross-examination of Dr Grace.

64. The evidence does not establish that the MENA is significantly more impacted by the effects of over-fishing than other parts of the Region or indeed the country. There is also variability within the MENA. As noted, the evidence of Drs Ross and Freeman is that the impact of fishing is worse around Motiti Island than Otaiti (a large proposed prohibition area), which is considered to be in good ecological health.

65. While the majority of experts agree that over-fishing is causing significant effects on the wider marine environment in the Bay of Plenty, including the MENA,[54] all experts agree that the habitats and ecological values of the MENA, particularly the rocky reef environment, are replicated elsewhere in the Region. No expert has pointed to anything particularly "unique" or distinguishing about the MENA, in ecological terms.[55]

66. It is submitted that Council's function of maintaining indigenous biodiversity, including marine biodiversity, is appropriately directed at the bigger Regional picture. There is superficial appeal in the argument that starting somewhere must help, but it is submitted that such an approach is not required in order to fulfil Council's function of maintaining indigenous biodiversity throughout the Region.

67. If it must follow that Council must prohibit fishing in order to fulfil its function of maintaining indigenous biodiversity in the MENA then it must follow that it must also prohibit fishing throughout the entire CMA, or at least in those parts where fishing is occurring (a very large portion of the CMA), in order to maintain those values. Further, all other Councils in New Zealand must follow suit.

68. Prohibiting fishing in the MENA purely because an opportunity has arisen through this appeal, based on the very recently affirmed (and yet to be confirmed) jurisdictional ability, would have potentially wide ranging precedent implications for the Council and in other regions. That is because the ecological values of the MENA have not been demonstrated to be sufficiently exceptional to be distinguished from other parts of the Region and the country.[56] Indeed, it is the very similarity of the MENA to Northland's marine environment which enables Dr Shears to apply his research to the MENA.

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[54] Dr De Luca refers to "*a significant reduction in the abundance of key predators and flow-on effects from that*" noting that *"some parts of the MNEMA and the wider Bay of Plenty remain in a relatively healthy ecological state (e.g. more distant islands and reefs, such as Otaiti).*" Dr Freeman is of the opinion that "*The MNEMA and wider Bay of Plenty marine environment have been affected by fishing. The spatial distribution and degree of impact both within the MNEMA and across the wider Bay of Plenty varies.*" Joint Witness Statement, issue 2.

[55] When asked by the Court to identify unique features of Motiti relative to other offshore Islands in the Region Mr Guccione was only able to identify features arising due to its location, size and elevation, depth, and the fact it is inhabited. Perhaps with the exception of the latter (at least in this region) all other features simply reflect the fact that no two islands (unlike people) will ever be identical.

[56] With the exception of the acknowledged significant ecological, natural character and landscape values within the MENA (refer **attached** overlay map) which have been identified in the PRCEP and are not the subject of this appeal.

69. It is not Council's case that the cultural and ecological values of the MENA are not very significant to the cultural relationship of tangata whenua with their taonga. However that special connection will also be held by other tangata whenua with their rohe, and may also be held by other groups of tangata whenua having customary associations with and exercising kaitiakitanga in relation to the MENA, which may involve customary food gathering. For example, the 18 other applicant groups applying for customary marine title and protected customary rights over the MENA.

70. Mr Ranapia confirmed that groups other than those represented by MRMT, such as Te Whanau a Tauwhao which the Court recognised in the Rena decision and having an ahi ka relationship with Otaiti, would have a customary relationship with the area which may involve taking kaimoana. Mr Ranapia also gave evidence that the concept of tapu had different levels and is still lifted for access to resources today, such as on Motanau.

71. Those groups are likely to share a common interest in restoring the ecological values of the MENA, however they may wish to go about it differently. This matter is unknown because those interests have not been consulted and, with the exception of Ngati Whakaue ki Maketu, Ngati Makino and Ngati Ranginui, are not parties to these proceedings. Ngati Whakaue has expressly raised a concern to ensure that its rights under its MACA application (which include customary fishing and gathering of kaimoana) are not affected.[57] The degree to which a protected customary right can include species harvesting is yet to be determined.[58]

72. Thus, Council's approach of relying on other agencies to conserve marine life and manage fisheries resources is both understandable and conventional. There are no other Regional Councils in the country which seek to control fishing in regional plans, with the exception of Marlborough District Council which is the first to propose rules in its plan regulating certain fishing techniques, although those are limited to identified areas of significant ecological value (the equivalent of the PRCEP's IBDA areas).[59]

73. A key difference between Marlborough's situation and the current proceedings is that the Marlborough provisions arose out of significant community consultation during the plan review process and the proposal was included in the proposed plan as notified in response to the community feedback. A fundamental concern of Council's in this case, and a key reason why it is not in a position to support the inclusion of rules controlling fishing in the PRCEP, is because the community has not been consulted.

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[57] Memorandum from Te Rūnanga o Ngāti Whakaue ki Maketu Inc dated 8 November 2017 and Amended Application for Recognition Orders for Protected Customary Rights and Customary Maine Title dated 30 November 2016.

[58] Section 51(2) MACA provides "A protected customary right does not include an activity (a) that is regulated under the Fisheries Act 1996".

[59] These sites address "rare, unique or threatened species". *Ecologically Significant Marine Sites, Marlborough NZ* prepared for Marlborough DC September 2011.

Nor are the community generally aware of the issue, or the jurisdictional ability of Council to control fishing.

74. This is likely to be because it has never been done before, and because Council has responded to submissions on the basis it does not have this jurisdiction.

Scope

75. In the strikeout decision,[60] in response to a concern raised by the Council and MAL that MRMT's submission made no reference to "rahui" (prohibition) the Court acknowledged "a court assessment would need to be made in the context of the evidence and with a close consideration as to the actual remedy sought in relation to each of the grounds of appeal and submission." [72].

76. The Court considered that:

> A form of restriction or rahui is a significant outcome, and generally there would have to be clear reasons and both objectives and policies to support it. It may or may not amount to a prohibition under the Act, depending on the context. Questions then arise as to the spatial extent of any such rahui, any periods for which it might apply, and any conditions that might then apply. Clear, any form of blanket prohibition is beyond the appeal and submission, and unlikely to be supported by the proposed Regional Coastal Plan provisions that are not under appeal. [emphasis added]

77. It is submitted the Court's finding that a blanket prohibition is out of scope is correct. The submission and original appeal (which reflects the submission) makes no reference to rahui, or indeed to any rules or controls. Rather, the submission refers to "implementation methods" such as "Provide implementation methods for Mataitai or Taiapure reserves" or "policies to establish ecological bottom lines" and to support "an expanded network of marine protected areas."[61]

78. Council's response to the submission sheds light on its scope. Council's decision on the submission amended the PRCEP to recognise unsustainable fishing as an additional reason for biodiversity loss (Issue 4); to promote the sustainable management of the Region's coastal fisheries (Objective 1(f)); and to provide for a workstream to assess whether management of fisheries is necessary and appropriate under the RMA for the protection of indigenous biodiversity in the region (Method 3A). These approaches directly respond to the submission points.

79. Ms Noble explains that this relief was considered appropriate to recognise unsustainable fishing as an emerging issue in the Region (highlighted due to the temporary restriction following the Rena grounding at Otaiti) but still a novel and

[60] Decision [2016] NZEnvC190
[61] Refer MRMT submission dated 21 August 2014.

evolving jurisdictional issue regarding whether, and to what extent, Councils can control fishing for certain purposes as noted in Ms Noble's evidence (para 52).

80. Thus, the response of the PRCEP is focussed on non-regulatory methods to support other agencies and explore the jurisdictional issue and appropriate responses further. It is submitted that this approach is justifiable, in light of Council's understanding of its role and functions, and reflects the approach of other Councils.

81. It is submitted that the low level of awareness and participation on this issue is not because no one is interested or concerned. Rather, people are unaware of the potential for Council to regulate fishing given the way in which the relief has evolved through the process.

82. Given the PRCEP describes the Ministry for Primary industries (MPI) as being responsible for "Conserving and managing all marine fisheries on a sustainable basis" (Part One, section 6.4), it would not be envisaged that a submission seeking marine spatial planning for this area might involve a prohibition on fishing. Rather, that the RMA would continue to provide a complimentary regime which does not duplicate the functions of the Fisheries Act.

83. This is evident by the fact that Ngati Whakaue ki Maketu, a party to the related appeals by Ngati Makino and Ngati Ranginui, was unaware of the nature of the relief being proposed until it was recently sent the evidence in the proceedings. Ngati Whakaue has raised a concern about the impact of the relief on its MACA application, although it "*do[es] not wish to interfere in these proceedings as they are nearing a conclusion, and it would be unfair for all parties concerned.*"[62]

84. The suggestion that because parties were served with the declaration proceedings they were aware of or able to participate in these proceedings does not follow. The Crown was a party to the declaration proceedings but was not aware of the particular relief proposed (only provided to parties on a without prejudice basis at mediation) until it sought to join these proceedings out of time, which was opposed by MRMT. It is submitted that parties following the declaration proceedings with any degree of interest could reasonably expect the merits decision to await the final resolution of the jurisdictional issue (slowing making its way to the Court of Appeal) before the merits issue would be considered. Only parties to these proceedings have participated in the decision (by consent) to proceed now on an interim basis.

85. The lack of involvement of clearly affected parties to these proceedings, which have far reaching implications (including potentially significant financial implications) to other sectors of the community who are not present, cannot be ignored. The essential

[62] Memorandum of Maria Horne for Ngati Whakaue Ki Maketu dated 8 November 2017.

purpose of rules around scope, and the Court's role in applying them, "is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated, resulting in potential unfairness."[63] This is squarely such a case.

86. It is submitted that Council's proposal responds to and reasonably addresses all of MRMT's original submission points (Refer attached table).

Consultation and Affected Rights

Consultation

87. Notwithstanding scope, Council has a fundamental concern that it has been unable to consult with its community regarding this significant proposal which will undoubtedly affect a range of communities of interest, including legal rights. Ms Noble's evidence outlines the parties she considers to be affected, the majority of whom are not party to these proceedings.

88. During preparation of a plan change (prior to notification) Council is required to consult with the Minister for the Environment, other affected Ministers (in this case Conservation), other local authorities, and tangata whenua of the area who may be affected. Such consultation must be undertaken in accordance with the principles in s.82 of the LGA.[64]

89. The s.82 principles require "persons who will or may be affected by, or have an interest in, the decision or matter" to be provided by Council with reasonable access to relevant information, encouraged to present their views to Council and be given clear information concerning the purpose of the consultation and the scope of the decisions.

90. Such consultation then assists in informing the s.32 analysis that Council is required to undertake once the proposal has been notified. As noted by Ms Barns, the purpose of this analysis is to provide robust and transparent decision making (para 21).

91. Council is not in a position to support a proposal that it regulates fishing in the coastal marine area, let alone an area having such high recreational use, without following proper process.

92. Mr Reaburn (although acknowledging scope is a legal issue) appears to suggest that significant ecological effects should trump consultation and engagement and a careful s.32 analysis, and allow for a process of education after the fact. This is not the process envisaged by the Act, which anticipates a Council may review a plan earlier than the default 10 year cycle, including if "the restoration or enhancement of any

[63] *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC).
[64] First Schedule, Clause 3.

natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration" (s.76(3)(f)). This recognises that environmental changes are seldom rapid, as reflected in the evidence in this case. It is far from clear that we are at some crisis or tipping point from which the fisheries resource, or the ecological impacts of overfishing, will not recover.

93. As the High Court has observed, in response to an argument that consulting would give rise to a rush of consent applications to preserve existing rights, the obligation to consult about proposed plans:

> ... is an important principle, protected by the RMA. Its purpose is to facilitate good faith discussions which might influence the drafting of such plans. To hold that a Council can bypass the consultation requirement because of its potential effect on the effectiveness of a proposed plan would run contrary to that purpose.[65]

Affected rights

94. The evidence of Andrew Hill explains the interface between the proposed regulation under the MENA and rights areas established under the Fisheries Act, such as the Tauranga Rohe Moana and Treaty settlements.

95. There are also 18 applications under the MACA legislation that intersect (and for some, substantially cover) the MENA (see attached map).[66] Those rights have not been affirmed by the Court67, but they reflect a high number of tangata whenua asserting customary relationships with the area. Some of those parties have joined MRMT's MACA application in opposition to it.[68]

96. The Court is correct that the MACA regime is designed to work in with the RMA. For example:

- Council must not grant a resource consent[69] (including for a controlled activity) if the activity will, or is likely to, have more than minor adverse effects on the exercise of the Protected Customary Right (PCR);

- Council cannot include permitted activity rules in plans or proposed plans if the activity will, or is likely to have, a more than minor adverse effect on the PCR;[70]

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[65] *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285, para [73].
[66] This map is a clearer version of the map annexed to Ms Noble's evidence (Attachment C).
[67] An undetermined application does have some legal rights per se. An applicant for resource consent affecting a MACA application needs to notify and seek the views of the MACA group (s62(2)-(3) MACA). There is no similar provision for plan changes.
[68] Ngati Awa's notice of appearance challenges MRMT's mandate to represent Te Patuwai Hapu. Notice of Appearance by Ngati Awa dated 26 January 2017.
[69] Section 55(2) MACA and s104(3)(c) RMA.
[70] Section 85A RMA. There is no similar provision for prohibited activities.

- Council must not grant a resource consent contrary to wahi tapu conditions included in a Customary Marine Title (CMT) order;[71]

- A CMT group has the right to prepare a planning document in accordance with its tikanga in order to identify issues relevant to regulation and management of the CMT area, and set out regulatory and management objectives and policies. These documents cannot include rules.[72]

- Council must initiate a process to decide whether and how to alter its Plans (and RPS) in order to recognise and provide for matters in the planning document. Decisions on alterations need to follow the Schedule 1 RMA process.[73]

- Council can decide not to make alterations, but only on limited grounds.[74]

97. Given MRMT has is own application for both CMT and PCR orders, which seeks provision for its waahi tapu areas, this provides an alternative remedy for what MRMT now seeks over it rohe moana. It would require the coastal plan to recognise and provide for any Plan developed by the CMT holders for the Rohe Moana, in accordance with tikanga in order to recognise kaitiakitanga, through a first schedule process. This option has the benefit of the High Court first determining competing interests over the area.

98. Mr Matehaere makes it clear that Motiti tangata whenua claim the right to make "*Decisions as to aquaculture, fisheries, resource management, and anything relating to Motiti and its Rohe Moana*".[75] In cross examination he confirmed his view that no other group (including Tauwhao) should have this right. The Council expresses no view on this, but makes the point that Maori cultural dynamics are multifaceted, and care needs to taken to frame the MENA and any Plan provisions attaching so it is not perceived as an exclusive declaration of mana moana by a particular group. It was for this reason that the Court was not prepared to recognise an "area of influence" for Ngati Makino in the PRECP.

Consenting and enforcement

99. Notwithstanding MRMT has now moved away from the previous regime which contemplated Council having a consenting function in the Waahi Taonga area of the

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[71] Section 104(3)(c)(iv) RMA.
[72] Section 85 MACA. These documents are also to be taken into account in consenting under s.104 RMA.
[73] Section 93 MACA.
[74] The matter is already provided for, it wouldn't achieve the purpose of the RMA, or it would be more effectively and efficiently addressed in another way (Section 93(10) MACA).
[75] Matehaere primary evidence, para 32.

MENMA, the efficiency of the proposed provisions and their ability to assist Council in carrying out its functions are in considerable doubt. Mr Fraser's evidence sets out those challenges, which relate to resourcing, practical issues around monitoring compliance, and the inability to bring a successful prosecution without catching someone in the act of fishing within the relevant part of the MENMA.

100. Council is not in a position to "allocate" consenting rights to particular fishing sectors (such as preferring recreational or customary takes over commercial) as this could render the provisions unenforceable pursuant to s.6(1) of the Fisheries Act. It is trite that the RMA is not a licensing regime.[76]

101. The appellant has suggested the regime could be self policing, however this does not address the issue of how Council will respond to complaints. Council is also rightly uncomfortable with the proposition that it should have rules in its plan which are not intended to be enforced.

THE RESPONDENT'S DECISION

102. The Court is required to have regard to Council's decision.[77] In this case the Respondent has provided an updated proposal in response to the more specific relief articulated in the appeals and therefore the decision may be of limited assistance. For completeness, and to assist the Court, a summary document of the Hearing Committee's decision on each relevant submission point is attached to these submissions.

CONCLUSION

103. Council is sympathetic to the position MRMT has found itself in. Its mandate has not been recognised by the Crown in order to pursue a Treaty claim or require a temporary closure under the Fisheries Act.

104. It has invested significant time and effort on behalf of its beneficiaries to restore the values of the rohe moana and better enable kaitiakitanga over its waahi tapu and waahi taonga, including through the Rena effort.

105. An opportunity has now presented itself through the coastal plan review to obtain statutory recognition of the rohe moana and provisions which better support the exercise of kaitiakitanga within it.

106. Council wishes to support this endeavour to the extent possible, but within the bounds of due process, fairness, and critical thought.

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[76] *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council* (1993) 2 NZRMA 574
[77] Section 290A RMA.

107. Plugging a perceived "gap" due to inaction of other agencies or less nimble processes is not good planning and may ultimately do a disservice to tangata whenua if it does not prove effective.

108. Failed enterprises lose credibility and are difficult to resurrect.

109. An outcome which recognises the attributes, values, waahi tapu and restoration objectives of the MNEA in the Coastal Plan is a laudable one, recognising the substantial efforts of MRMT.

110. A suite of substantially enhanced provisions addressing tangata whenua values, tikanga, and matauranga, and providing for partnerships with Council, lays the foundation for a credible future planning process to provide for tangata whenua aspirations in the coastal environment, underpinned by the architecture provisions.

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29 November 2017