IN THE HIGH COURT OF NEW ZEALAND **CIV-2019-485-752**
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

UNDER	the Judicial Review Procedures Act 2016 and Part 30 of the High Court Rules
IN THE MATTER OF	an application for judicial review under sections 13 and 20 of the Fisheries Act 1996
BETWEEN	**ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED** Applicant
AND	**MINISTER OF FISHERIES** Respondent
AND	**FISHERIES INSHORE NEW ZEALAND LIMITED** Second Respondent
AND	**TE OHU KAI MOANA TRUSTEE LIMITED** Third Respondent

SYNOPSIS OF SUBMISSIONS FOR TE OHU KAI MOANA TRUSTEE LIMITED

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INTRODUCTION

1. The Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**) seeks to review the decision of the Minister of Fisheries (the **Minister**) to reduce the total allowable catch (**TAC**) and the total allowable commercial catch (**TACC**) for tarakihi in the TAR 1, TAR 2, TAR 3 and TAR 7 quota management areas (**QMAs**) on the East Coast of New Zealand (**East Coast Tarakihi**) for the fishing year commencing 1 October 2019.

2. The Fisheries Act 1996 (the **Act**)[1] requires the Minister to set a TAC and, within that, a TACC for each fish stock managed under the quota management system.

3. In his September 2019 decision in respect of East Coast Tarakihi (the **2019 Decision**), the Minister:

   (a) decreased the TAC in East Coast Tarakihi from 5,561 to 5,205 tonnes; and

   (b) decreased the TACC in East Coast Tarakihi from 4,679 to 4,355 tonnes.

4. In the context of the 2019 Decision, the Minister also agreed to the implementation the East Coast Tarakihi Rebuild Plan (the **Rebuild Plan**), which was developed jointly by Te Ohu Kai Moana Trustee Limited (**Te Ohu**), Fisheries Inshore New Zealand Limited (**Fisheries Inshore**) and Southern Inshore Fisheries Management New Zealand Limited (**Southern Inshore**).[2]

5. As expanded on later in these submissions, in terms of the exercise of its responsibilities, Te Ohu has a significant interest in East Coast Tarakihi:[3]

   (a) as an owner of East Coast Tarakihi quota shares on trust for certain iwi;

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[1] Fisheries Act 1996 [**Forest & Bird Bundle of Authorities (F&B Auth): Tab 1**].

[2] Affidavit of Kim Lawrence Drummond for Te Ohu dated 29 May 2020 (**Drummond Affidavit**), at paragraph 37 [**Common Bundle (CB) Vol 2: 201.0134**].

[3] See also Drummond Affidavit, at paragraphs 22-23 [**CB Vol 2: 201.0129-0130**].

(b) as an owner of income shares in Aotearoa Fisheries Limited, which both directly and, through Sealord, indirectly owns East Coast Tarakihi quota shares;

(c) on behalf of mandated iwi organisations (**MIOs**) collectively in relation to their direct and, through Aotearoa Fisheries Limited, indirect interests in East Coast Tarakihi (in support of the Treaty partnership between iwi and the Crown); and

(d) as custodian, on behalf of iwi and Māori generally, in respect of maintaining the integrity of the Deed of Settlement between the Crown and Māori dated 23 September 1992 (the **Fisheries Settlement**).

6. It is in these capacities that Te Ohu:

(a) played an active role in the development of the Rebuild Plan;

(b) engaged with both Fisheries New Zealand (**Fisheries NZ**) and the Minister in the decision-making process which culminated in the 2019 Decision; and

(c) sought joinder as a respondent in this proceeding.

7. In this latter regard, when seeking joinder as a respondent, Te Ohu committed to working collaboratively with Fisheries Inshore and avoiding duplication in the proceeding and this qualification was expressly noted by Mallon J in Her Honour's decision granting joinder.[4]

8. To this end, these submissions do not seek to repeat matters that are addressed in the submissions on behalf of the Minister and Fisheries Inshore, which are substantively endorsed by Te Ohu. Instead, Te Ohu's submissions are intended to supplement the submissions of the Minister and Fisheries Inshore and focus on those matters which are unique to the position and interests of Te Ohu.

[4] *Royal Forest and Bird Protection Society of New Zealand Incorporation v Minister of Fisheries* [2020] NZHC 741 at [40]-[41] [**CB Vol 1: 101.0060**].

SUMMARY

9. Te Ohu supports, and does not propose to duplicate, the key points advanced in the submissions for the Minister and Fisheries Inshore in opposition to Forest & Bird's application for review on the 2019 Decision. In particular, Te Ohu endorses:

   (a) the outline by Fisheries Inshore of the relevant legislative history which confirms, consistent with the *Orange Roughy* decision[5] and the United Nations Convention on the Law of the Sea (**UNCLOS**)[6], that economic and social considerations were intended to be a relevant consideration when determining the level of harvest that will be permitted as stocks are moved towards a level that can produce the maximum sustainable yield;

   (b) the position of the Minister and Fisheries Inshore on:

      (i) the nature and state of the East Coast Tarakihi fishery;

      (ii) the background to and purpose of the Harvest Strategy Standard (**HSS**) and related Operational Guidelines and their appropriate implementation;

      (iii) the interpretation and application of section 13 of the Act and its inter-relationship with other relevant legal obligations having regard to relevant decisions of the High Court and Court of Appeal;

      (iv) the applicable legal principles on review in respect of the causes of action advanced by Forest & Bird; and

      (v) the lawfulness of the Minister's 2019 Decision in the face of each of the causes of action.

10. These submissions supplement the position advanced by the Minister and Fisheries Inshore and address:

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[5] *Greenpeace NZ Inc v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995 [**F&B Auth: Tab 25**].

[6] UNCLOS, Art 61 [**Fisheries Inshore/Te Ohu Bundles of Authorities (Resp Auth): Tab 27**].

(a) the unique nature of Te Ohu's role and responsibilities and the interests that it represents;

(b) the corresponding responsibilities of the Crown with particular reference to the Treaty of Waitangi / Te Tiriti o Waitangi (the **Treaty**);

(c) Te Ohu's position in relation to:

(i) the Rebuild Plan; and

(ii) the HSS; and

(d) the relevance of the above matters to certain of the causes of action advanced by Forest and Bird.

ROLE AND RESPONSIBILITIES OF TE OHU

11. The Fisheries Settlement (and, in turn, the genesis of Te Ohu) stems from the guarantees under the Treaty and, in particular, the Crown's failure to recognise and protect Māori interests in fisheries, which reached a tipping point in 1986 when the Crown:[7]

(a) introduced the quota management system (**QMS**) as the framework for managing commercial fisheries in Aotearoa; and

(b) thereby, created perpetual property rights in commercial fisheries without providing for the interests of Māori, contrary to the protections and obligations under the Treaty.

12. Following claims and litigation before the Waitangi Tribunal and Courts, an interim settlement was entered into by the Crown and Māori in 1989 which was given legal effect through the Māori Fisheries Act 1989. That Act established the Māori Fisheries Commission and provided for the transfer to the Commission of 10% of the quota for each of the species already subject to the QMS and $10 million.[8]

13. Negotiations between the Crown and Māori continued and culminated in the signing of the Fisheries Settlement in September 1992 which was

[7] Drummond Affidavit, at paragraph 10 [**CB Vol 2: 201.0126**].

[8] Drummond Affidavit, at paragraph 11 [**CB Vol 2: 201.0126**]. See also the Preamble to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 [**Resp Auth: Tab 3**].

implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (**1992 Settlement Act**) which settled Māori claims to commercial fisheries.[9] The 1992 Settlement Act:[10]

(a) reconstituted the Māori Fisheries Commission as the Treaty of Waitangi Fisheries Commission (**TOWFC**);

(b) transferred to TOWFC 20% of the quota for stocks introduced to the QMS since 1992 together with $150 million which was to be used to acquire a 50% shareholding in Sealord; and

(c) tasked TOWFC with developing a model for the allocation to iwi of the settlement assets held by it including quota shares (**Settlement Quota**), shares in Aotearoa Fisheries Limited (which in turns owns 50% of Sealord) and cash.

14. The Māori Fisheries Act 2004 (**2004 Act**)[11] was subsequently enacted to implement the allocation model developed by TOWFC. Te Ohu Kai Moana, a trust established as the successor to TOWFC, was established by deed of trust under section 31 of the 2004 Act. Te Ohu is the trustee of Te Ohu Kai Moana.[12]

15. The purpose of Te Ohu Kai Moana is to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities, in order to:[13]

(a) ultimately benefit the members of iwi and Māori generally;

(b) further the agreements made in the Fisheries Settlement;

(c) assist the Crown to discharge its obligations under the Fisheries Settlement and the Treaty; and

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[9] Drummond Affidavit, at paragraph 12 [**CB Vol 2: 201.0126**]. See also the Preamble to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 [**Resp Auth: Tab 3**] and the Preamble to the Māori Fisheries Act 2004 [**Resp Auth: Tab 2**].

[10] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 [**Resp Auth: Tab 3**].

[11] Māori Fisheries Act 2004 [**Resp Auth: Tab 2**].

[12] Māori Fisheries Act 2004, section 33 [**Resp Auth: Tab 2**].

[13] Māori Fisheries Act 2004, section 32 [**Resp Auth: Tab 2**].

(d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Fisheries Settlement.

16. As a means of furthering its statutory purpose, the functions of Te Ohu include:[14]

(a) fostering, promoting, commissioning, or funding research into the sustainable management of fisheries; and

(b) in relation to fisheries, fishing, and fisheries-related activities, acting to protect and enhance the interests of iwi and Māori in those activities.

17. In addition, in relation to the assets received under the Fisheries Settlement, Te Ohu is required under the 2004 Act:[15]

(a) to allocate and transfer the Settlement Quota (and other settlement assets) to iwi; and

(b) pending such allocation and transfer, to hold and manage those settlement assets.

18. As Mr Drummond notes, in fulfilling these statutory and trustee roles on behalf of iwi and Māori, Te Ohu:[16]

(a) works with 58 MIOs, who represent iwi throughout Aotearoa;

(b) engages actively with the officials from the Ministry for Primary Industries, industry organisations, commercial seafood interests and representatives of iwi;

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[14] Māori Fisheries Act 2004, sections 35(1)(a) and (b) [**Resp Auth: Tab 2**].

[15] Māori Fisheries Act, sections 34(c) and (d) and 130 [**Resp Auth: Tab 2**]. The 2004 Act requires the Settlement Quota for each inshore fish stock and 25% of the Settlement Quota for each deepwater fish stock to be allocated by Te Ohu to iwi on the basis of each iwi's relative coastline length. Iwi are required to reach agreements with neighbouring iwi regarding their respective coastlines and any disputes are able to be referred to the Māori Land Court for resolution. The balance of the Settlement Quota is allocated on the basis of relative iwi populations. In areas where iwi coastlines have yet to be determined, Te Ohu continues to hold relevant Settlement Quota on trust for the benefit of the iwi who claim coastline interests in those areas. See: Drummond Affidavit, at paragraphs 17-18 [**CB Vol 2: 201.0128**].

[16] Drummond Affidavit, at paragraphs 19-21 [**CB Vol 2: 201.0128-0129**].

(c) has developed a Māori Fisheries Strategy and three-year strategic plan (both of which have been approved by MIOs) which has as its goal that MIOs collectively lead the development of Aotearoa's marine and environmental policy affecting fisheries management through Te Ohu Kai Moana as their mandated agent;

(d) plays a key role to achieve this goal and protect the Fisheries Settlement by providing MIOs with policy advice and by making submissions to both Ministers and government agencies on fisheries-related issues; and

(e) engages actively in the review of sustainability measures by Fisheries NZ which forms part of the Minister's decision-making process in relation to setting the TAC and TACC for each fish stock every fishing year; and

(f) makes submissions to the Minister on those matters.

CROWN RESPONSIBILITIES AND THE TREATY

19. Correspondingly, and in recognition of the role and responsibilities of Te Ohu, in respect of decision-making under the Fisheries Act, the Minister, among other things:

(a) consults with Te Ohu as a body representative of Māori interests in the relevant fish stocks or the effects of fishing on the aquatic environment in the areas concerned (in accordance with section 12(1)(a) of the Fisheries Act[17]); and

(b) must act in a manner consistent with the provisions of the 1992 Settlement Act (in accordance with section 5 of the Fisheries Act[18]).

20. These express requirements are also consistent with the Crown's obligations as Treaty partner in relation to both the Fisheries Settlement and the Crown's ongoing contemporary Treaty responsibilities to iwi.

21. As Mr Drummond notes, this Treaty relationship, and the responsibilities that Te Ohu also has in respect of the Fisheries Settlement and as a

[17] Fisheries Act 1996, section 12(1)(a) [**F&B Auth: Tab 1**].

[18] Fisheries Act 1996, section 5 [**Resp Auth: Tab 1**].

collective representative of and advocate for iwi on fisheries issues, are fundamental drivers for the role played by Te Ohu in connection with:[19]

(a) fisheries management and the development of fisheries policy; and

(b) in particular, engaging in the biannual sustainability decision-making processes of Fisheries NZ and the Minister.

22. It is recognised that the Treaty is a part of the fabric of New Zealand society.[20] This is particularly so when considering issues pertaining to the environment - land , fisheries and other natural resources – as the history of events leading to the Fisheries Settlement makes clear.

23. The influence of, and jurisprudence regarding, the Treaty (and also tikanga Māori) in Aotearoa continues to grow, with the Courts increasingly, and appropriately, engaging with the place of the principles of the Treaty and tikanga within the fabric of the New Zealand legal system, including:

(a) the use of the Treaty as an extrinsic aid to statutory interpretation, even where it not expressly mentioned;[21];

(b) relevance in judicial review;[22]

(c) recognition of the obligations of good faith, reasonableness, trust, openness and consultation which arise from the nature of the Treaty relationship between Māori and the Crown;[23]

(d) recognition that rangatiratanga (full exclusive and undisturbed possession) in fisheries is one of the "most long-standing lawfully established existing class of activities in New Zealand" with such

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[19] Drummond Affidavit, at paragraph 31 [**CB Vol 2: 201.0132**].

[20] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210 [**Resp Auth: Tab 10**].

[21] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, at 223 [**Resp Auth: Tab 10**]; *Barton-Prescot v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184 [**Resp Auth: Tab 6**].

[22] *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 (CA) [**Resp Auth: Tab 13**]; *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129 (CA).

[23] *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 (CA), at [81] [**Resp Auth: Tab 13**].

rights and interests not derived from Treaty settlements, but rather pre-existing interests recognised by the Treaty settlements;[24]

(e) recognition of the Crown's duty of active protection under the Treaty;[25] and

(f) recognition of the Treaty right of development by the Court.[26]

24. This broader context and related principles must reasonably and necessarily resonate when considering the decision-making processes of the Minister in the area of fisheries, particularly given:

(a) the express statutory obligations in the Act relating to the Fisheries Settlement, engagement with Māori and cultural considerations; and

(b) the unique statutory role and mandate of Te Ohu.

THE REBUILD PLAN

25. In his affidavit Mr Drummond describes Te Ohu's principle of Te Hā o Tangaroa kia ora ai tāua which underpins Te Ohu's approach to contemporary fisheries policy:[27]

> 24. Iwi and Māori have a unique and lasting connection with the environment. Te Hā o Tangaroa kia ora ai tāua ('the breath of Tangaroa sustains us') (**Te Hā o Tangaroa**) is an expression of this connection. For Te Ohu, Te Hā o Tangaroa encapsulates the basis and principles upon which Māori manage their relationship with the marine environment and its resources consistent with the rights guaranteed under the Treaty of Waitangi and the Fisheries Settlement.
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> 25. In this context, the concept of Te Hā o Tangaroa focusses on the interdependent relationship between Māori and Tangaroa to ensure their mutual health and wellbeing. Tangaroa is not valued solely for his own sake, but as part of a web of active relationships based on whakapapa. By caring for Tangaroa, Māori gain the right to benefit from the resources he provides. This worldview is shared by numerous indigenous peoples around the world. It is a view which is interwoven with the rights and responsibilities of rangatiratanga, under Article Two of the Treaty in respect of fisheries as a taonga.

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[24] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZRMA 248, [2020] NZCA 86, at [166] - [167] [**Resp Auth: Tab 20**].

[25] *Ririnui v Landcorp Farming Limited* [2016] NZSC 62, [2016] 1 NZLR 1056 [**Resp Auth: Tab 19**].

[26] *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553; *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

[27] Drummond Affidavit, at paragraphs 24-28 [**CB Vol 2: 201.0130-0131**].

> 26. Māori rights in fisheries comprise an interest in the productive potential of all aquatic life in New Zealand waters. Māori rights are not just a right to harvest, but also to use the resource in a way that provides for their social, cultural and economic wellbeing. Te Hā o Tangaroa does not mean that Māori have an exclusive right to use fisheries resources, whether through commercial or customary fishing. Rather, rights are an extension of responsibility and Te Hā o Tangaroa speaks to striking an appropriate balance between people and the environment.
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> 27. In accordance with this view, "conservation" is part of "sustainable use", that is, it is carried out in order to sustainably use resources for the benefit of current and future generations. The purpose of the Fisheries Act 1996 (Fisheries Act) is to "to provide for the utilisation of fisheries resources while ensuring sustainability". As such, the purpose and principles of the Act echo Te Hā o Tangaroa. Accordingly, Te Hā o Tangaroa contains the principles that Te Ohu uses to analyse and develop its views on fisheries policy, and other policies that may affect the rights of iwi under the Fisheries Settlement.
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> 28. This articulation of Te Hā o Tangaroa was developed by Te Ohu and has been endorsed by MIOs and their asset-holding companies (AHCs).

26. It was with this principle firmly in focus, and in furtherance of Te Ohu's unique statutory and related roles, that Te Ohu worked alongside Fisheries Inshore and Southern Inshore in the development of the Rebuild Plan.[28]

27. The underlying Treaty-based context of the Fisheries Settlement and the Crown's obligations to iwi, was also of significance in Te Ohu's involvement in the Rebuild Plan.[29]

28. As Mr Drummond states:[30]

> For Te Ohu, the Rebuild Plan represents a holistic approach to the rebuild of East Coast Tarakihi. The Rebuild Plan incorporated scientific, Māori, social and economic information into its development to provide a comprehensive analysis of the nature and state of the East Coast Tarakihi fishery. The Rebuild Plan provides for multiple factors that allow the biomass to be rebuilt while mitigating unnecessary impacts on participants and quota owners.

29. In developing the Rebuild Plan, Te Ohu (on behalf of the MIOs and their asset holding companies) worked closely with the Industry Partners to develop options and implement measures for the continued rebuild of East Coast Tarakihi. The expectation of Te Ohu was to ensure that iwi rights

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[28] Drummond Affidavit, at paragraph 38 [**CB Vol 2: 201.0134**].

[29] Drummond Affidavit, at paragraph 32 [**CB Vol 2: 201.0132**].

[30] Drummond Affidavit, at paragraph 58 [**CB Vol 2: 201.0139**].

and responsibilities were upheld.[31] In Te Ohu's view the Rebuild Plan mitigates the impacts on fishing communities while still ensuring the rebuild of the East Coast Tarakihi fishery, consistent with the dual purposes of the Act.[32]

30. As Mr Drummond notes, the Rebuild Plan was endorsed by both the industry and iwi because it:[33]

(a) reflected the best available information;

(b) was an innovative and proactive approach to the management of East Coast Tarakihi;

(c) provided a mechanism to split the eastern and western catch; and

(d) provided a comprehensive "reduce, research and reassess" approach to sustain the stock, the fishers and the associated economy.

31. The Rebuild Plan calls upon a range of measures that work cumulatively to improve stock status over a timeframe that provides for the sustainability of both the fishery and the people that rely on it.[34] As Mr Drummond notes the Rebuild Plan provides an avenue for the East Coast Tarakihi fishery to be rebuilt in a conscious manner with buy-in from nearly all quota owners and demonstrates how quota owners in East Coast Tarakihi can work together to deliver real time management with the sustainable utilisation of the resource in mind.[35]

32. The Rebuild Plan also enables the implementation of additional innovative fishing practices can further assist with the rebuild of East Coast Tarakihi. As Mr Drummond records, many of these measures are currently being

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[31] Drummond Affidavit, at paragraph 43 [**CB Vol 2: 201.0135**].

[32] Drummond Affidavit, at paragraphs 46 and 60 [**CB Vol 2: 201.0136 and 0140**].

[33] Drummond Affidavit, at paragraph 53 [**CB Vol 2: 201.0138**].

[34] Mr Drummond notes that through Te Ohu's engagement with iwi quota owners it became clear that the negative impacts of a large TAC and TACC decrease would be disproportionately felt by smaller operators and quota owners. For example, Ngāti Porou Seafoods anticipated that a decrease of 600 tonnes of ACE (in considering options one or two as proposed in the 2019 Discussion Document) would result in multiple vessels being removed from its fleet and at least 12 staff being made redundant. See Drummond Affidavit, at paragraph 64 [**CB Vol 2: 201.0141**].

[35] Drummond Affidavit, at paragraph 65 [**CB Vol 2: 201.0141**].

implemented voluntarily through regional agreements to increase the rate of the East Coast Tarakihi rebuild.[36]

HARVEST STRATEGY STANDARD

33. The HSS is a government policy document published in 2008 with accompanying Operational Guidelines. It was intended that the HSS would be reviewed every five years, and that the Operational Guidelines would be reviewed and updated more frequently, but only the Guidelines have been revised, in 2011.[37] That, in itself, should be a matter warranting caution in the face of any claim that a fastidiously literal and exclusive application of the HSS alone.

34. Mr Drummond agrees with the view of Dr Mace[38] (also shared by Mr Lawson[39]) that the HSS and associated Operational Guidelines at best take only limited account of social, economic and cultural considerations.[40] More particularly, as is clear from the context of the relevant advice from Fisheries NZ to the Minister, the HSS does not provide any regard whatsoever to the particular socio-economic and cultural circumstances pertaining to the East Coast Tarakihi fishery.

35. Mr Drummond, for Te Ohu, is clear in his view of the HSS in the context of East Coast Tarakihi:[41]

> In my opinion, it is not appropriate to apply the HSS as the sole basis for fisheries management decision-making purposes. The HSS provides a guide to management only and fails to consider the full range of social, cultural and economic considerations that are required to be considered by the Minister under section 13 of the Fisheries Act when determining target stock levels or rebuild way and rates. In its focus on the TAC alone, the HSS also does not provide or account for the full range of sustainability measures that can be implemented to assist a rebuild. In my view, in the case of East Coast Tarakihi, application of the HSS default settings would lack the sophistication, dynamism and attentiveness of the Rebuild Plan.

36. Te Ohu and the Industry Partners were therefore seeking, through the Rebuild Plan, to develop a workable alternative measure to what they saw

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[36] Drummond Affidavit, at paragraphs 68-73 [**CB Vol 2: 201.0142-0143**].

[37] Affidavit of Dr Pamela Mace for the Minister dated 14 April 2020 (**Mace Affidavit**) at paragraph 18 [**CB Vol 2: 201.0098**].

[38] Mace Affidavit at paragraph 36 [**CB Vol 2: 201.0102**].

[39] Affidavit of Craig Lawson for Fisheries Inshore dated 27 May 2020 at paragraphs 42-46 [**CB Vol 2: 201.0177-0178**]

[40] Drummond Affidavit, at paragraph 63 [**CB Vol 2: 201.0140-0141**].

[41] Drummond Affidavit, at paragraph 62 [**CB Vol 2: 201.0140**].

as the blunt application of the default parameters of the HSS and, informed by the social, economic and cultural considerations associated with the East Coast Tarakihi fishery, support the sustainable utilisation of fisheries in New Zealand.[42]

GROUNDS OF REVIEW

37. As noted, Te Ohu supports the submissions of the Minister and Fisheries Inshore in respect of each of the six causes of action advanced by Forest and Bird and it does not seek to reiterate points that have already been made by those parties.

38. However, there are certain matters relating to the third, fourth and fifth causes of action that warrant further development having regard to Te Ohu's unique interests and responsibilities.

Third Cause of Action – Mistake of Fact

39. The third cause of action includes the claim that the Minister made a material mistake of fact in relying on the Fisheries NZ advice that the HSS does not take into account social, cultural and economic factors.

40. It is trite law that a mistake of fact can only amount to an error of law where a conclusion that is insupportable or untenable is reached.[43]

41. In addition to and support of the submissions made by the Minister and Fisheries Inshore, Te Ohu:

    (a) agrees that Fisheries NZ, in its advice, was referring to the fact that the specific social, economic and cultural factors relating to the East Coast Tarakihi fishery which were reflected in Options 3 and 4 before the Minister, were not matters taken into account by the HSS;

    (b) the extremely limited reference to social, economic or cultural factors in the HSS cannot reasonably, without wider inquiry and consideration, satisfy the requirements of section 13(3) of the Act;

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[42] Drummond Affidavit, at paragraph 47 [**CB Vol 2: 201.0136**].

[43] *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 [**F&B Auth: Tab 10**]; *New Zealand Fishing Industry Assoc Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 [**F&B Auth: Tab 15**].

(c) in particular, in circumstances where the HSS and Operational Guidelines:

(i) concern matter within the ambit of the guarantees and protections of Article 2 of the Treaty (ie, fisheries); and

(ii) make no express reference to iwi, Māori, the Fisheries Settlement or the Treaty,

it cannot reasonably be suggested, in contemporary Aotearoa, that the HSS and Guidelines:

(iii) incorporate cultural considerations in any material way; and/or

(iv) constitute policy documents that discharge the Minister's obligations in respect of considering cultural matters and acting consistently with the Fisheries Settlement and the principles of the Treaty.

Fourth Cause of Action – the Rebuild Plan

42. In the fourth cause of action, Forest & Bird alleges that the Rebuild Plan was an irrelevant consideration for the Minister to take into account in making the 2019 Decision.[44]

43. It is accepted that:

(a) a statutory power is subject to limits even if it is conferred in unqualified terms;[45]

(b) ascertaining the purpose for which a power was given is an exercise in statutory interpretation that is concerned with identifying the legal limits of that power;[46]

[44] Synopsis of submissions of Forest & Bird dated 25 June 2020, at [100].

[45] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [53] [**Resp Auth: Tab 21**].

[46] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [54] [**Resp Auth: Tab 21**]. See also *B v Waitemata District Health Board* [2016] NZCA 184 ; [2016] 3 NZLR 569 [**Resp Auth: Tab 5**].

(c) discretionary powers must be used to promote the policy and objects of the empowering enactment;[47] and

(d) in terms of the discretionary power of a decision maker, considerations may be either relevant or irrelevant.

44. There are two classes of 'relevant' considerations:[48]

(a) mandatory – those required by the decision maker to be taken into account; and

(b) permissible – those that the decision maker may, but are not required to, take into account, according to the judgment of the decision maker.

45. An irrelevant consideration is a matter that a decision maker is not permitted (whether expressly or impliedly) to take into account when exercising their discretion[49] or one that would be legally improper or illegitimate for the decision maker to have regard to.[50]

46. Te Ohu endorses the submissions for the Minister and Fisheries Inshore that the Rebuild Plan is a permissible relevant consideration in the exercise of the Minister's discretion under the Act on the basis that:

(i) doing so aligns with the purpose of the Act;

(ii) it is purpose-built for the rebuild of the East Coast Tarakihi stocks; and

(iii) it takes into account economic, cultural and social factors.

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[47] *New Zealand Society of Physiotherapists v Accident Compensation Corporation* [1988] 1 NZLR 346 at 353 [**Resp Auth: Tab 14**].

[48] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) [**F&B Auth: Tab 16**]..

[49] *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC) at [113] [**Resp Auth: Tab 7**].

[50] *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 352 [**Resp Auth: Tab 8**].

47. In this latter respect, Te Ohu emphasises that the Rebuild Plan:

(a) comprises a holistic approach to the rebuild of East Coast Tarakihi and enables social, economic and cultural factors (including considerations of particular importance to iwi) to be addressed;[51]

(b) embraces the unique nature of the East Coast Tarakihi and takes scientific, economic, social and Māori information into account to provide an approach appropriate to the nature and state of East Coast Tarakihi where the continual gathering and improvement of knowledge will guide targeted and adaptive management measures as they are required without putting undue negative impacts on fishing communities;[52]

(c) through Te Ohu's involvement and related engagement, enabled the interests and views of iwi and Māori to be uniquely considered and appropriately weighed, alongside other relevant matters, in the Minister's decision-making;[53]

(d) necessarily reflects the importance of the Treaty relationship between iwi and the Crown (and Te Ohu's role collectively on behalf of iwi in upholding that partnership) and the specific role of Te Ohu as the custodian of the Fisheries Settlement; and

(e) comprises advice from Te Ohu to the Minister in fulfilment of:

(i) Te Ohu Kai Moana's statutory purpose of advancing the interests of iwi in the development of fisheries, fishing and fisheries-related activities in order to (among other things) assist the Crown to discharge its obligations under the Fisheries Settlement and the Treaty;[54] and

(ii) Te Ohu's statutory function of fostering, promoting, commissioning, or funding research into the sustainable

[51] Drummond Affidavit, at paragraph 58 [**CB Vol 2: 201.0139**].
[52] Drummond Affidavit, at paragraphs 60-67 [**CB Vol 2: 201.0139-0141**].
[53] Drummond Affidavit, at paragraph 32 [**CB Vol 2: 201.0132**].
[54] Māori Fisheries Act 2004, sections 32 [**Resp Auth: Tab 2**].

> management of fisheries and acting to protect and enhance the interests of iwi and Māori in those activities.[55]

48. In these circumstances, to suggest, as Forest & Bird appear to do, that a submission or proposal that is advanced in whole or in part by Te Ohu, such as the Rebuild Plan, is an irrelevant consideration for the Minister when making the 2019 Decision defies both logic and law.

49. In fact, had the Minister determined to have no regard whatsoever to the Rebuild Plan in his decision-making process, the Minister would have quite reasonably found himself under review by Te Ohu.

Fifth Cause of Action - Unreasonableness

50. In the fifth cause of action, Forest & Bird allege that no reasonable decision maker in the position of the Minister could have made the 2019 Decision.

51. To the contrary, Te Ohu supports the submissions of the Minister and Fisheries Inshore and considers that the Minister's decision was perfectly reasonable and open to him in the circumstances.

52. The Minister has acted consistently with the dual purpose of the Act in terms of seeking to secure the long-term sustainability of East Coast Tarakihi stocks within a timeframe considered appropriate by the Minister having regard to all relevant matters, including the socio-economic and cultural rights and interests of iwi. Importantly, like the Rebuild Plan itself, the Minister's 2019 Decision is also not a case of "set and forget", but rather the approach is one of "reduce, research and reassess" in order to sustain the stock, the fishers and the associated economy.

53. Far from being unreasonable, as Mr Drummond aptly states:[56]

> Te Ohu views the co-development and co-management approach undertaken in the development and implementation of the Rebuild Plan as reflecting a meaningful, productive and Treaty-consistent relationship between Te Ohu, the industry and the Crown for the benefit of New Zealand's fisheries and, ultimately, all New Zealand.

[55] Māori Fisheries Act 2004, sections 35(1)(a) and (b) [**Resp Auth: Tab 2**].
[56] Drummond Affidavit, at paragraph 88 [**CB Vol 2: 201.0147**].

CONCLUSION

54. For the reasons set out in these submissions, Te Ohu considers that there is no basis for Forest & Bird's application for review and it should be dismissed.

55. Te Ohu seeks costs, including in respect of Te Ohu's successful application for joinder as a respondent which was opposed by Forest & Bird.

J P Ferguson / T H Hullena
Counsel for the Te Ohu Kai Moana Trustee Limited

Appendix: A list of the authorities referred to in this synopsis is **annexed**.

LIST OF AUTHORITIES

Legislation

1. Fisheries Act 1996
2. Māori Fisheries Act 2004
3. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

Cases

4. *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).
5. *B v Waitemata District Health Board* [2016] NZCA 184 ; [2016] 3 NZLR 569.
6. *Barton-Prescot v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.
7. *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC).
8. *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC).
9. *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721.
10. *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).
11. *Greenpeace NZ Inc v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995
12. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.
13. *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 (CA).
14. *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129 (CA).
15. *New Zealand Society of Physiotherapists v Accident Compensation Corporation* [1988] 1 NZLR 346.
16. *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.
17. *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122
18. *Ririnui v Landcorp Farming Limited* [2016] NZSC 62, [2016] 1 NZLR 1056.
19. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZRMA 248, [2020] NZCA 86.
20. *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC).