# Supreme Court Judgment
# 30 September 2021

## Introduction

Trans-Tasman Resources Limited (**TTR**) plans to mine iron sands in the South Taranaki Bight (**STB**). TTR has been granted a 66km$^2$ Minerals Mining Permit, MP55581 issued under the Crown Minerals Act (1991), over the JORC defined 1 billion tonne titanomagnetite deposit located within New Zealand's exclusive economic zone (**EEZ**).

To operate, TTR requires marine and discharge environmental consents granted under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**). In August 2017 the Environmental Protection Agency's (**EPA**) decision making committee (**DMC**), by a majority decision, granted the consents with conditions.

The consents, valid for 35 years, authorise TTR to extract up to 50 million tonnes (**Mt**) of seabed sands a year for 20 years and process the sands on an integrated mining vessel. About 10% of the sands would be processed into a titanomagnetite iron ore concentrate and the remaining ±45Mt de-ored sand returned to rehabilitate the seafloor via a continuous and controlled discharge backfilling the extracted area.

A range of submitters, including Greenpeace and other local groups (**first respondents**), lodged an appeal in the High Court (**HC**) opposing the consents because of the effects of the proposed activity on the environment and other interests including those of iwi claiming mana moana[1] and kaitiaki[2] responsibilities in the area affected by the proposed mining.

In the HC the first respondents challenged the DMC's decision on 29 points as wrong in law. The first respondents were successful in having one point of law, the use of adaptive management in the discharge consent, upheld with the remainder being dismissed. In 2018 TTR was granted leave to appeal the HC decision to the Court of Appeal (**CoA**). In April 2020 the CoA upheld TTR's appeal on adaptive management, dismissed a further eight cross appeals by the first respondents but upheld six cross appeals. TTR was granted leave to appeal these six points of law by the Supreme Court (**SC**) with the hearing taking place in November 2020 and the judgment delivered on 30 September 2021.

## Supreme Court Appeal Judgment

The judgment deals with around 12 main points of law (TTR's six points appealed and the first respondents' six cross appeals granted leave) concerning the proper interpretation and application of the EEZ Act.

The headline reporting was that TTR was unsuccessful in the SC judgment insofar as the SC held that the DMC had made some errors of law in granting the consents, so dismissed TTR's appeal.

Fortunately for TTR, however, those errors of law were not the points that would have been fatal to TTR's application: the majority decisions of the SC on adaptive management and casting vote, were in TTR's favour.

[1] A New Zealand Māori term used for the concept of authority over lakes and parts of the sea.
[2] A New Zealand Māori term used for the concept of guardianship, for the sky, the sea, and the land.

The SC referred the consents back to the DMC for reconsideration in light of the SC decision. The Court judgment stated [229] "Given the complex and evolving nature of the issues involved, it would not be appropriate to deny TTR the opportunity to have the application(s) reconsidered" and "TTR should be able to remedy matters if it can."

Importantly, the SC judgment provided a summary of the legal deficiencies of the original consent grants and the legal framework to address these when the grants are reconsidered by the DMC.

The five key rulings in the SC judgment remaining at issue for reconsideration by the DMC are:

- **The statutory purpose section 10 of the EEZ Act**

  Here the SC held that in order to achieve to the environmental bottom line imposed by s10 of the EEZ Act the DMC is required to follow a three-step test when assessing applications for marine and discharge consents as set out in para [5] of the judgment.

  Further, the SC agreed with TTR that s10 says the purpose of protection does not preclude consent being granted in a marine discharge and dumping consent where the discharge will cause material harm, if the harm can be mitigated or remediated and furthermore other interests including economic benefit and efficient use and development of natural resources are assessed as justifying that harm.

  They agreed that the CoA was wrong to apply an absolute prohibition on harm to the environment.

- **The lawfulness of conditions relating to seabirds, marine mammals and public participation rights**

  Here the Court ruled that if there is uncertainty of information relating to the effect of TTR's activities on seabirds and marine mammals the requirement is to favour caution and environmental protection and the DMC needs to be satisfied the conditions it imposed were adequate to protect the environment from pollution.

  TTR believes it provided sufficient information and expert evidence required on seabirds and marine mammals in the STB to the DMC for it to meet the legal test.

  Para [135] of the judgment states "The view that *sufficient information had been received* [TTR's emphasis] to enable a decision to be made was the unanimous decision of the DMC." However, the SC judgment required the DMC to explain the reasoning on which it based the imposition of the conditions relating to seabirds and marine mammals, something the DMC did not do.

  On public participation rights the majority of the SC required TTR's management plans to disclose clear operational and effects parameters.

- **Considerations of existing interests of Māori in regard to the principles of the Treaty of Waitangi**

  The SC judgment provides clear guidance and the legal framework for the DMC to give effect to Treaty principles and existing interests.

  The Court clarified the approach to the Treaty of Waitangi clause in s12 of the EEZ Act holding that a broad and generous construction was required. The DMC was to take into account the Crown's

obligations to give effect to Treaty principles including tikanga[3]-based customary rights and interests including kaitiakitanga[4]. The Court found the DMC made various errors in its decision in relation to explaining how it reached its conclusions with respect to these issues and provided the guidance and legal framework necessary to comply.

Para [161] states "the DMC (then) needed to explain, albeit briefly, why these existing interests were outweighed by other s59 factors, or sufficiently accommodated in other ways."

- **Requirement to lodge a bond**

  The DMC had decided that TTR did not need to post a bond, requiring only insurance. TTR's mineral recovery operation, by continuously returning the de-ored sediment to the sea floor with rehabilitation of the benthic communities commencing almost immediately, and likely fully recovered within a two year time frame, will not have any long term adverse legacy effects.

  The Court agreed with TTR that the DMC was entitled to treat a bond and public liability insurance as alternative ways of achieving similar outcomes, although accepting they operated differently. Whether the DMC adopted either, both or neither was a matter for the DMC's discretion [216]. However, the DMC was required to explain (briefly) why it considered it was not necessary to impose a bond in addition to the insurance offered by TTR [221].

- **Lawfulness of pre-commencement monitoring conditions**

  The SC judgment [11] stated that an attempt to rectify information deficits by imposing conditions requiring pre-commencement monitoring which would subsequently inform the creation of management plans would inappropriately deprive the public of the right to be heard on a fundamental aspect of the application.

  TTR accepts that pre-commencement monitoring cannot be used to rectify an information deficit. However TTR notes that the purpose of pre-commencement monitoring conditions in the consent was to update existing background information already provided to the DMC in the application and on which the DMC based the consent parameters and also to gather reference information on the DMC specified monitoring sites that were identified during the hearing process and which were unknown when the application was lodged.

The majority of the SC confirmed TTR's position on the remaining seven issues of law, the subject of the SC appeal and cross appeals. Those issues of law can no longer be challenged by our opponents. For completeness these are:

- Application information principles favouring caution and environmental protection;
- Consideration of the Resource Management Act 1991 and NZ Coastal Policy Statement;
- Adaptive management;
- Casting vote;
- Economic benefit;
- International law; and
- Best available information.

[3] General behaviour guidelines for daily life and interaction in Maori culture.
[4] Guardianship & protection.

## Summary

The SC's judgment delivered rulings on twelve points of law raised by TTR in its appeal and the submitters in their cross-appeals.

Whilst the SC judgment, as summarised in their media release, dismissed TTR's appeal it has referred the consents back to the EPA's DMC to be reconsidered and says TTR should be able to remedy matters if it can to have the consents regranted.

TTR, for the reasons provided, is pleased the SC has provided the legal guidance and explanations it has in the judgment. It believes the legal issues are now very narrowly defined, that the information and expert evidence TTR previously provided to the DMC enables it to satisfy the SC's requirements; and accordingly there are no aspects of the judgment that are an impediment to TTR having the consents re-approved by the reconstituted DMC.

The Company has notified the EPA that it requires the DMC to reconsider the marine and discharge consents (EPA reference EEZ000011), in light of the SC judgment, to extract and process iron sand in the STB.

**Alan J Eggers**
**Executive Chairman**
**November 2021**