



Commissioners' Decision

To: Marlborough District Council

And to: The applicant and submitters

in the matter of

The Resource Management Act 1991

and

in the matter of

The Local Government Act 1974 and the Local Government Act 2002

and

in the matter of

Plan Change 21 to the Marlborough Sounds Resource Management Plan and the proposed Mooring Management Bylaw

Independent Commissioners: John Maassen (Chairperson)
Edward Ellison
Hamish Rennie

Hearing: 23, 24, 25, 29 and 30 November & 1 December 2010
Site Visit: 26 November 2010

Parties attending the hearing and their witnesses (see spreadsheet in **Appendix 1**)

Date of Decision: 6 May 2011.

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Terms	
MBMA	Means Marlborough Berth and Mooring Association.
MDC	Means Marlborough District Council.
MEA (A)	Means Marina Extension Area A in Waikawa Bay otherwise referred to as marina zone extension area northwest as shown in Figure 1 and which is a new part of the CMA proposed to have a Marina Zoning. The MEA (A) is approximately 8ha.
MEA (B)	Means that existing part of the CMA zoned 'Marina Zone' under the Plan but which is presently undeveloped also referred to as the northeast marina zone extension (see Figure 1). MEA (B) is approximately 7ha.
MMA	Means a mooring management area (including the Waka MMA) and refers to any or all of the mooring management areas in Waikawa Bay proposed by PC 21.
MMA (1)	Means the proposed mooring management area north of MEA (A) at approximate grid points 18 and 20 in Figure 1A .
MMA (2)	Means the proposed mooring management area closest to the existing MEA (B) or marina zone northeast and at approximate grid references 32 and 36 in Figure 1A .
MMA (3)	Means the proposed mooring management area extending from the breakwater on Waikawa Bay to Beeches Bay/Wharetukura Bay, and at approximate grid reference 33 in Figure 1A .
MMB	Means the proposed Mooring Management Bylaw.
PMNZ	Means Port Marlborough New Zealand Limited.
The Plan	Means the Marlborough Sounds Resource Management Plan which is a composite regional coastal plan, regional plan and district plan.
Waka MMA	Means the waka mooring management area adjacent to the Arapawa Boating Club as shown in Figure 1 .

Note: It may seem curious that that part of the CMA not zoned 'Marina Zone' referred to as Marina Zone extension area north west is called MEA (A) and the undeveloped but already zoned part of the CMA is called MEA (B). The reason for this is that PMNZ proposed sequential development with development occurring first in MEA (A). This is reflected in the rule stream in PC 21 and map notations.

Appendices, maps & figures

Appendix 1		List of parties and witnesses.
Appendix 2	Figure 1	Figure 1 from evidence of Bronwyn Faulkner showing key features of PC 21 superimposed on an aerial photograph of Waikawa Bay.
	Figure 1A	Grid references superimposed on Figure 1.
	Figure 1B	Customary resource notations by Te Atiawa superimposed on Figure 1A.
	Figure 1C	Sneddon report on distribution of shoreline substrates.
	Figure 2	Existing and proposed mooring locations.
	Figure 3	Leman's indicative proposed moorings accommodated within MMA's and marina extensions.
	Figure 4	Figure showing existing mooring locations within Waikawa Bay.

Appendix 3	Mr Solly's classification list of marina activity components under the Plan.
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Appendix 4	Proposed changes to the Plan as notified.
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Appendix 5	Proposed changes to the plan version 9 proposed in PMNZ's reply.
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Appendix 6	Plan change provisions approved by the commissioners' decision.
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Appendix 7	Bylaw made by commissioners (with and without tracked changes).
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Appendix 8**Decision on bulk moorings applications.**

General background

1. PC 21 is a plan change promoted by PMNZ to provide a 'bay wide' solution for Waikawa Bay in respect of the management of coastal water space including provision for future marina development and a new mooring management regime for swing moorings.
2. Waikawa Bay is one of a number of bays in Queen Charlotte Sound/Totaranui. The scenic qualities of Queen Charlotte Sound/Totaranui are well known nationally. Waikawa Bay is elongated. The headlands are Karaka Point on the eastern side of the Bay and The Snout on the western side of the Bay.
3. There is an existing marina in Waikawa Bay at the head of the bay. It covers approximately 17ha of the CMA. That marina is operated by PMNZ. PMNZ is a local authority (MDC) controlled private company responsible for port related operations in the Marlborough District. The Waikawa Bay marina provides marina enclosed mooring facilities for private recreational boat owners.
4. Waikawa Bay has the following non-exclusive list of qualities:
 - (a) It has a high degree of natural character particularly on its western flanks;
 - (b) It has a high degree of scenic beauty;
 - (c) It is very significant to Te Atiawa, the iwi that has status as tangata whenua with manawhenua for Queen Charlotte Sound/Totaranui and environs. That significance is multidimensional and arises from:
 - (i) Historical patterns of occupation since Māori settlement;
 - (ii) Historical events of tribal significance;

- (iii) Historical resources including kaimoana;
 - (iv) Patterns of habitation and settlement post European colonisation;
 - (v) Resting places of tupuna;
- (d) A highly valued residential location with patterns of residential development particularly evident on the eastern slopes taking advantage of magnificent views of the bay and Tory Channel as well as extensive patterns of habitation at the head of the bay;
- (e) An area popular with recreational boaters as is evident by the recreational data presented by Mr Greenaway for PMNZ that demonstrates the popularity of Waikawa Bay as a mooring and recreational boating area.
5. The independent commissioners were delegated authority by MDC to:
- (a) Hear and determine the application by PMNZ for changes to the Plan referred to as PC 21. Because that decision affects predominantly but not entirely the CMA, the independent commissioners' decision is a change to a regional coastal plan and therefore subject to the approval of the Minister of Conservation;
 - (b) Hear submissions on behalf of MDC, whether or not MMB should be made as a bylaw and, if appropriate, make decisions on the bylaw including the necessity for modifications.
6. In respect of PC 21 and MMB, the following general information is relevant:
- (a) PC 21 was lodged by PMNZ on 24 February 2010 and notified on 17 June 2010;
 - (b) MMB is proposed under s.684B LGA 1974. In accordance with LGA 2002, the proposal to make the bylaw was notified by MDC with submissions closing on 6 August 2010. Its rationale was explained in the statement of proposal.¹ Submissions were invited. The

¹ See <http://www.marlborough.govt.nz/your-council/plans-policies-documents/mooring-bylaw.aspx>.
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independent commissioners' delegation requires them to hear submissions and then make a decision as to whether or not the bylaw should be made.

7. PC 21 and MMB are linked because:
- (a) Existing swing moorings including some within MEA (A) and MEA (B) rely on resource consents (coastal permits). Approximately 180 of these have been the subject of a bulk renewal application to MDC which has not been determined by MDC because of concerns held by PMNZ (a submitter to the bulk applications) regarding:
 - (i) Navigational safety;
 - (ii) Conflicts between existing moorings;
 - (iii) Efficiency of use of space;
 - (iv) Potential conflict with the existing Marina Zone.

Discussions between PMNZ and mooring consent holders have been held over the last two years to explore solutions. The outcome is PC 21. The decision on those bulk applications is released contemporaneously with this decision and is attached as **Appendix 8**.

- (b) PC 21 provides for MMA's as a spatial tool for allocating space for existing moorings;
- (c) PC 21 relies on the MMB as the principal method for implementing management of the MMA's;
- (d) PC 21 limits the opportunities for other mooring consents outside MMA's to ensure sustainable management of the CMA within Waikawa Bay.

Analytical approach

8. This decision fulfils both parts of the independent commissioners' responsibilities. Namely a decision on PC 21 and a decision on MMB.
9. For the purposes of analysis of PC 21 it is convenient to treat the scope of our function as deciding two essentially discrete questions:
 - (a) To what extent should there be changes to the Plan (as proposed by PC 21, submissions, or such necessary modifications) to facilitate the future construction and operation of marinas in MEA (A) and MEA (B)?
 - (b) To what extent should there be changes to the Plan (as provided by PC 21, submissions or such necessary modifications) to implement the proposed new mooring management regime?
10. These two questions arise from the two largely distinct dimensions of the Plan Change even though the entire plan change is referred to as a 'bay wide' solution by PMNZ.
11. Some additional introductory comments on our analytical approach are appropriate at this stage concerning that dimension of PC 21 that facilitates the future construction and operation of marinas in MEA (A) and MEA (B).
12. Decisions on plan changes are different from a plan review process undertaken by a local authority. The range of options available is constrained by Schedule 2 RMA, the scope of submissions and case law. In this case we have only two options before us:
 - (a) The new provisions of the Plan proposed by PC 21 with such necessary modifications as we determine appropriate to meet the statutory tests and within scope;
 - (b) The existing provisions of the Plan.
13. Our analysis of the statutory tests including any requisite comparisons is based on those two options. A good understanding of the existing plan

provisions and the provisions of PC 21 is necessary to understand the planning goals of each and environmental outcomes they seek to deliver.

14. Analysis of the effects of a plan change is not like analysis of the effects of a resource consent for a specific activity where the metes and bounds of the activity are known from the resource consent application. In the case of a plan change, one can only consider anticipated effects of implementation of the plan change.
15. A common misconception in this case has been the idea that the real difference between PC 21 and the present Plan provisions in terms of their planning goals and intended environmental outcomes, is the enlargement of the Marina Zone to cover MEA (A). Consequently it follows from that misconception that the additional or further anticipated effects of implementing the plan change are those of marina development in MEA (A) alone. That is certainly how PMNZ focussed its technical evidence. On closer examination of both the existing Plan provisions and PC 21, it seems to us that that view is an over simplification.
16. The reason many people, including ourselves, shared that misconception was because MEA (B) was zoned Marina Zone. Like all zone nomenclature, we expected the usual situation where the name of the zone gave an accurate indication of the activities the Plan enables in the zone, subject only to site specific controls. One expected the Marina Zone objectives and policies to accord with that expectation. Thus land zoned residential and undeveloped should enable (and usually does) new residences and undeveloped industrial zoned land should enable (and usually does) new industry. That is the usual case with all activity-based zoning techniques in western jurisdictions. In the Australian context where planning maps are a key part of the planning tool kit, it is the same. Thus in the Australian text *Principles of Planning Law*² it is said:

It is the description of the zone and its objectives in the planning scheme text that perhaps give the greatest indication of the planning basis, and that the zone's nomenclature is a guide to its purpose and

² *Principles of Planning Law*, 2008 Oxford University Press, page 8.
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the objectives for that zone indicate in more detail what it is meant to accomplish.

17. In the case of the Marina Zone in the Plan, the usual expectation does not apply. Examination of its provisions shows that marina development in MEA (B) is not enabled by the policy framework.
18. Zoning under the RMA is a method that should efficiently and effectively achieve the planning goals contained in objectives and policies. The latter are the key elements of the Plan to get right applying the accepted 'top down' approach.³ The present plan provisions do not have goals enabling development in MEA (B) subject only to site specific controls. Rather, the zoning spatially defines an area where a discretion exists to grant those components that make up a marina activity with that discretion to be exercised against quite demanding assessment criteria including protection of tangata whenua interests and finally judged against Part 2 RMA.
19. This situation may be explained by the fact that MEA (B) was zoned Marina Zone in the plan review without a great deal of site specific consideration as to the appropriateness of the activity. That was to be left to be assessed at another day through the discretionary activity classification.
20. PC 21 however sets out new planning goals (objectives and policies) directed at not only enabling marina development in MEA (A) but also further enabling marina development in MEA (B). Additionally, it identifies those locations as the preferred locations in the Marlborough Sounds for marina development to avoid sporadic marina development elsewhere.
21. As Jackson ECJ said in *Long Bay-Okura Great Park Society Incorporated v. North Shore City Council*⁴ at paragraph 39, plan changes sit on a spectrum between those that fit within the existing plan objectives and policies (i.e.

³ See *Brownlee v. Christchurch City Council* [2001] NZRMA 539 where the Environment Court stated that the RMA: "Works from the most general to the most particular and each document along the way is required to reflect those above it in the hierarchy. It is a top down approach." That hierarchy also applies to the internal structure of plans and their essential elements. This position is not unique to New Zealand, it is a feature of contemporary planning theory. For example the hierarchy of objectives expressing desired outcomes proceeding to specific outcomes for each zone are part of the strategic framework in the Integrated Planning Act 1997 of Queensland, Australia.

⁴ *Long Bay-Okura Great Park Society Incorporated v. North Shore City Council* EnvC D no. A078/2008 dated 16 July 2008.

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planning goals) and plan changes "setting off in a direction of its own with different objectives and policies."⁵

22. In this case PC 21 is setting a new path with different objectives and policies with the result that the environmental outcomes intended for both MEA (A) and MEA (B) are different under PC 21 such that marina development under MEA (A) and MEA (B) is the desired outcome subject only to site specific controls.
23. This difference in planning goals can be seen by a table comparing the objectives and policies of the Plan and PC 21 in the Urban Environments Chapter 10.7.1.1 as set out below:

Present Plan Provisions	Plan Provisions in PC 21
Objective 1 Maintaining a standard of amenity in existing marinas which is compatible with marina activities while avoiding, remedying and mitigating adverse effects resulting from this activity on the environment.	Objective 3 Enable the efficient development and operation of marinas and associated infrastructure within the Marina Zone.
Policy 1.1 Avoid, as much as practicable, adverse effects on the natural character of the coast by enabling marina activity in existing marinas or in areas where natural character has been compromised.	Policy 3.1 Avoid the proliferation of development within the coastal marine area by focusing development within the Marina Zone as a first priority.
Objective 2 Avoidance and, where necessary, remediation and mitigation of adverse effects resulting from marina operations and associated land-based activities.	Policy 3.2 Enable the construction, maintenance and operation of marina activities within Marina Zones, whilst ensuring any adverse effects on the environment are avoided, remedied or mitigated.
Policy 2.1 Avoid the adverse effects of discharges from land within marina waters.	
Policy 2.2 Ensure that there is no discharge of untreated sewage from associated land-based activities to the waters within the marinas.	
Policy 2.3 Require the provision within marinas of facilities for the disposal of rubbish, sewage effluent, oil and other wastes from boats.	

⁵ Ibid at para 39.
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24. Despite the fact that the classification of the activity of marina (or in the case of the present plan provisions, a marina's constituent parts such as occupation, dredging and reclamation) remains discretionary under PC 21 as in the Plan, we consider that the planning goals in PC 21 have substantially changed from those in the Plan.
25. The practical effect of this is that if PC 21 was approved, then the most current and specific goals for MEA (A) and MEA (B) are marina development as the primary location for marina development to meet demand in Marlborough Sounds and that should be enabled subject only to site specific controls. This inclination towards development is so strong as to make the prospect of declining consent for marina development in either MEA (A) or MEA (B) very remote under a disciplined 104 assessment having regard to the appropriate weight to attach to the site specific planning objectives and policies.
26. Therefore the environmental outcomes anticipated by PC 21 are of marina development in MEA (A) and MEA (B). Yet the technical evidence on the anticipated effects of marina development that we received was largely focused on development in MEA (A) not MEA (B). We refer to this repeatedly in our later analysis of the anticipated effects. This unfortunate situation is not entirely unanticipated by the RMA. Section 32(4)(b) requires us to take into account in our s.32 evaluation:

The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.
27. In this case we have done the best we can to assess the environmental risks in evaluating PC 21 in the face of uncertain or insufficient information about the environmental effects of a policy stream that substantially increases the prospect of consent for marina development in MEA (B).
28. The change in planning framework brought about by PC 21 discussed above is consistent with the analysis by PMNZ's planners in the s.32 analysis attached as Appendix B to the PC 21 application.

29. In the analysis of options, one option considered was to rezone MEA (A) but retain the existing plan provisions. This is examined in section 8.4 of the s.32 analysis and the option is called Option 4. Under the heading 'risk of acting or not acting' at page 44, the authors state:

As the provisions of the Marina Zone currently stand, whilst the spatial area of the Marina Zone would provide for new marina development (under this option) the provisions do not encourage or definitively provide for such development. This could result in marina development being proposed outside the marina zone should applicants consider there are limited advantages to locating within the zone.

30. Also in the s.32 analysis in the tabular analysis in section 8.6, the authors note in respect of the new objective (Objective 3 s.10.7.1):

This objective better identifies that marinas are appropriate activities within the marina zone, and recognises the purpose for which the zone has been established at the outset. There is currently a perceived lack of sufficiently enabling provisions within the zone to best recognise that zoned areas should be preferred as places in which marina development should occur. The zone is important to preserving the economic wellbeing of the community... It is important that the MSRMP properly reflects upon the zone based approach to marina development and that a more balanced approach is taken to provide for such facilities within the zone.

31. In respect of s.10.7.1 Policy 3.1, the analysis of the authors is:

The new policy will be effective in achieving the objective as it will ensure that marina development will be the first priority in the marina zone. While other activities may also be appropriate, by giving marina activities priority within the zone, development will be enabled in the zone, thus achieving the objective. Shows a preference for in-zone development and dissuades proponents outside the zone.

32. There is one minor additional matter concerning our analysis we should mention at this stage. In our comparison of the two choices we note that the plan provisions (whether under PC 21 or the existing Plan provisions) use the

technique of assessment criteria. Assessment criteria are not referred to explicitly as matters that a regional plan may state or must state under s.67 RMA. They are often interpreted as policies although the term 'criteria' connotes a flavour that might be closer to performance requirements. In the end it is a matter of interpretation of the Plan. In this case we have approached the assessment criteria as policies. As a planning technique we are not supportive of assessment criteria for the following reasons:

- (a) They are not explicitly provided for by the RMA;
 - (b) Are unclear as to where they sit in the hierarchy. In the case of the Plan, they sit after rules which is not the place where policies should be. Policies should sit above the rules;
 - (c) Because their status is conceptually unclear it can lead to confusion when determining the intent of the Plan.
33. As will be seen in our examination of the Plan provisions, the assessment criteria can be both specific and extraordinarily general. The assessment criteria for example in 34.4.1.1.4 refers to the "requirements of section 104", thereby making the entire mosaic of relevant RMA matters an assessment criteria.

Waikawa Bay and its resources

34. Waikawa Bay is a U-shaped inlet. It is approximately 2km long and 1km wide. The head of the bay provides an example of a bay-head delta. The delta is on a sea margin of alluvial deposits from the Waikawa Stream.⁶
35. There is a small tidal range and this maintains well defined intertidal zonation.
36. The sea area is approximately 235ha with a shoreline length of approximately 6,800m. Waikawa Bay is sheltered and only partially exposed to winds from the north to north east.⁷

⁶ Stephenson *Intertidal Biological Survey for Marlborough Harbour Board* July 1977 para 1.4.

⁷ See Sneddon SOE para 5.1
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37. Shoreline benthic habitats include rocky intertidal and shallow sub tidal reefs, shell, gravel and sand substrates, cobble and boulder areas and sand flat/sea grass areas where fresh water is received from Waikawa Stream. Benthic areas away from the shoreline are predominantly comprised of uniform, soft sediments.⁸
38. The western side of the bay has slopes of regenerating native forest. There is no road access beyond the existing marina. There are a small number of houses dotted along the vegetated slopes. There is also a nine lot subdivision that has been consented on The Snout but not yet developed.
39. The eastern side of the bay has a significant amount of residential development. The eastern slopes are sunny and have good road access. More recent development in the higher slopes has been of mixed quality, affecting much of the visual integrity of slopes at these higher elevations. There is still however considerable regenerating native vegetation at various stages of successional maturation.
40. At the head of the bay is a highly developed environment involving both the marina and ancillary commercial industrial activities. Beyond that are close patterns of residential development in residentially zoned areas. Residential development on the valley floor and the head of the bay has occurred principally since the late 1960's. The natural shoreline at the west of Waikawa Stream has been lost through reclamation to establish the marina.
41. The water space at the head of the bay is densely occupied with marina jettys and moored vessels. Moored vessels are most concentrated toward the head of the bay with a more dispersed pattern as one travels further from the shore.
42. The distribution of Te Atiawa's kaimoana resources is illustrated by the plan in **Appendix 2** Figure 1B.

⁸ See Sneddon SOE para 5.3.
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Site visit

43. As part of the hearing we undertook an extensive site visit on 26 November 2010 covering the following elements:

(a) **Water-based:**

- Coast line Waikawa Bay Snout to NW Marina; Karaka Point to Inner Bay
- Proposed NW Marina Zone (Buoys x 3)
 - Northern shoreward extent / location for replacement beach / amenity area
 - Neighbouring properties
 - Nature of foreshore
 - Existing beach / amenity
- Existing rock/rubble breakwaters
- Swing mooring trial - 'Sea Flex' space efficient moorings (Four moorings in grid)
- NE Existing Marina Zone
- Marina entrance including refuelling area & ablution pump-out
- Breakwater constructions anticipated in 'indicative design' for NW Marina; also Northern NE Breakwater
- Existing moorings
- Stream delta
- Jorgensen's Boatyard
- Waikawa Wharf
- Recreation Area Waikawa Bay
- Arapawa Maori Rowing Club
- Proposed Waka Mooring Management Area
- Woledge Mooring
- Wharetekura Bay
- Sight Whatamonga Bay from North of Karaka Point

(b) **Land-based:**

- Southern end of boatsheds (extent of PMNZ back-up land)
- North Eastern mole adjacent launching ramp and beach delta
- Drove through hardstand area / new development area
- Western side of Waikawa Marine Centre (hardstand and support industries)
- Houses with views over Waikawa Bay where concerns had been raised in submissions
- North Western beach and coastal margin of southern half of proposed NW MZ
- Waikawa Marae
- Waikawa Urupa

We were accompanied by representatives from PMNZ, MBMA and Te Atiawa who identified on the ground/water the places that were discussed in evidence during the hearing.

Planning purpose behind PC 21

44. PC 21 was developed by PMNZ in response to increasing demand for boat storage and moorings in the Marlborough Sounds. PMNZ's prediction is that that demand will continue into the future.⁹ Waikawa Bay already provides for boat storage and swing moorings. PMNZ considers that this existing recreational boating node provides an appropriate location to expand marina berth capacity. In addition, PC 21 seeks to better organise swing moorings in Waikawa Bay.¹⁰
45. PMNZ considers that the existing planning regime for swing moorings is overly complex and clumsy. It has maintained this for some time. For that reason it opposed an application for bulk moorings by 180 existing mooring permit holders.
46. PC 21 promotes what PMNZ considers to be an efficient and appropriate use of finite coastal water in Waikawa Bay by proposing:

⁹ See Greenaway SOE.

¹⁰ See Robertson SOE para 1.
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- (a) An extension of the marina zone to the northwest (MEA (A)) to provide for 250 berths and associated access and infrastructure;
- (b) Create four MMA's via maps in the Plan within the Coastal Marine 1 zone which, together with changes to policies and rules, will enable management of moorings in MMA's using the MMB;
- (c) Associated amendments to the definition of 'marina' and to objectives, policies and rules in various sections of the plan.¹¹ Importantly, these changes will apply to both MEA (A) and MEA (B).

47. In paragraph 2.8 of his statement of evidence, Mr Kyle, the planner for PMNZ, said:

The plan change also proposes some refining of the Marina Zone objectives and policies to recognise the importance of marina development and better enable the expansion of marinas in a sustainable manner. These amendments are followed through to the Marina Zone Rules which are also proposed to be amended to clearly define the activity status of new and existing marina activities, and establish appropriate resource consenting processes for such applications.

48. That paragraph of Mr Kyle's evidence is important because it acknowledges a significant aspect of PC 21. That is that PC 21 intends to 'secure' in a planning sense the goal that marina development will be achieved in MEA (A) and MEA (B).

49. The objective of PC 21 is also made plain by the proposed italicised commentary to section 10.7.1.1 of the Plan set out in the PC 21 application and that states:

The development of marina facilities should be managed in a way that avoids, remedies or mitigates the potential adverse effects on the urban environment and the quality of the coastal environment, such as alienation of public space and loss of habitat. The Marina Zone provides suitable locations for marina activities and establishing such facilities in the zone is preferred over an approach where a

¹¹ See Roberston SOE para 4.
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proliferation of marina development occurs elsewhere in the coastal marine area.

The expansion of existing marinas within the Marina Zone provides opportunities for the provision of additional berthage capacity in a manner that can avoid, remedy or mitigate adverse effects of such development and use on the natural character of the Sounds. In particular, there is ability to provide additional capacity in a location contiguous with the Waikawa Marina in a manner that is compatible with the existing character and amenity values of Waikawa Bay. Further consolidation of marinas at Waikawa, within the Marina Zone, assists in the avoidance of development sprawl into other, as yet undeveloped, bays within the Sounds.

It should be recognised that marina development also gives rise to efficiencies in the use of the coastal marine area and in the face of considerable demand for vessel storage space, can assist in avoiding the sprawl of coastal occupation demand.

50. In spatial terms, this means PC 21 strongly enables additional marina development beyond what presently exists by a further 15ha. The table below illustrates the increments.

Existing marina	17ha
MEA (A)	8ha
MEA (B)	7ha

The 'bay-wide' solution behind PC 21 – the nature of intended marina development & allocation of moorings within MMA's

51. Mr Leman is a civil engineer specialising in marina development. His consultancy is called International Marina Consultants and he is based in Australia. He has a good understanding of Waikawa Bay, the existing marina and the mooring systems used by boat owners who moor in Waikawa Bay.

52. Mr Leman presented a Waikawa Bay indicative layout plan as Figure 7. That Figure is Figure 3 in Appendix 2 to this decision. It shows the intended layout and design of marina development in MEA (A) and MEA (B). The final engineering plans are far from certain but Figure 3 does give an indication of the likely development and utilises the entire spatial extent of MEA (A) and MEA (B).
53. Figure 3 also shows the MMA's. Within MMA's 1, 2 and 3 are circles with various diameters reflecting the allocation of space to particular mooring owners with existing mooring consents in Waikawa Bay. The variations in size reflect the depths of water (which affect the width of the swing circle) as well as the size of the boat. We understand that all existing mooring owners are able to be accommodated within the MMA's. That includes moorings presently held in MEA (A) and MEA (B).
54. The benefit of the MMA's is twofold for PMNZ:
- (a) It resolves problems with conflicts between mooring owners and the absence of boat corridors for ease of navigation;
 - (b) Takes those existing moorings within MEA (A) and MEA (B) and places them in spaces which are appropriate having regard to PMNZ's aspirations for marina development.
55. We were told by Mr Leman that the mooring management areas were configured against the following criteria:¹²
- (a) Toward the head of the Bay to best link with associated land access;
 - (b) Toward each side of the Bay to provide land access linkage and a clear essential corridor for navigation;
 - (c) Toward the head of the Bay for best all weather protection;
 - (d) Provide sufficient distance from the existing shoreline to ensure the moorings have sufficient all tide water depths;

¹² See Leman SOE para 5.1.
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- (e) Sufficient distance from the existing shoreline to provide a clear area around the immediate shoreline for public amenity;
 - (f) Ensure that the layout of moorings utilises efficient methods for maximising mooring numbers within a finite space.
56. Mr Leman told us that the design solution considerations encapsulated in Figure 3 as they relate to marina development, have the following features:¹³
- (a) Linkage to existing facilities and access;
 - (b) Minimise reclamation to provide access, amenities and parking;
 - (c) Minimise excavation to provide necessary water depths;
 - (d) A range of berth sizes;
 - (e) Orientation of berths to suit site exposure;
 - (f) Solid boat water protection in the shallow area changing to panel breakwater protection in the deep water along the most northern exposed limits;
 - (g) Floating attenuated protection on the less exposed limits;
 - (h) Provision of the northern public beach area, access, amenities and dinghy storage for adjacent swing moorings;
 - (i) Maintenance of a clear central navigation corridor to and from the existing marina facilities and swing mooring areas.
57. Figure 3 is therefore PMNZ's 'bay wide' solution to the allocation of space for recreational boating in the CMA of Waikawa Bay.

Matters in contention

58. Only a few individual submitters opposed those elements of PC 21 that:

¹³ See Leman SOE para 6.3.
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- (a) Provided for MMA's; and
 - (b) Limit the extent to which additional coastal water space would be allocated to swing moorings by giving them a non-complying status.
59. Te Atiawa's position on the MMA elements of PC 21 was one of opposition but opposition on that topic was perplexing because:
- (a) The opposition was not confirmed by all witnesses;
 - (b) The rationale for opposition was not clear except we assume it arises from a suspicion of PC 21 and the motivations behind it;
 - (c) There was definitive support from some Te Atiawa witnesses for the waka MMA.
60. MBMA is an incorporated society with over 340 fully subscribed members.¹⁴ Of the approximately 180 mooring owners in Waikawa Bay, 120 are members of MBMA.
61. MBMA supported the dimension of PC 21 that rationalised mooring management in Waikawa Bay.
62. The principal matter in contention related to those elements of PC 21 that through objectives, policies and methods, further and additionally enabled marina development in MEA (A) and MEA (B);
63. It is convenient to describe the matters in contention on marina development principally by reference to the positions of the parties that called expert, technical or evaluative evidence.
64. Te Atiawa contended that:
- (a) Waikawa Bay and its environs is ancestral land and water with which it has a longstanding, deep and abiding multidimensional relationships;
 - (b) Any extension of the existing constructed marina would:

¹⁴ See Williams SOE para 3.1.
Decision – Waikawa Bay PC 21

- (i) Significantly and adversely impact on its physical, cultural and spiritual relationships with Waikawa Bay;
 - (ii) Offend kaitiakitanga through an inappropriate reduction in natural character and natural resources;
 - (iii) Diminish the amenity values enjoyed and appreciated by the Te Atiawa wider community and manuhiri (visitors).
- (c) By reason of (a) and (b) above, the adverse effects outweigh the benefits contended for by PMNZ and therefore the RMA's overarching purpose confirmed by Part 2 matters is best achieved by declining PC 21.

65. The Minister of Conservation:

- (a) Did not disagree with the technical assessments of the effects of PMNZ to the extent that it described the likely biophysical changes associated with development of MEA (A);
- (b) Acknowledged the evidence of Te Atiawa on its multidimensional relationships with Waikawa Bay and that these considerations triggered numerous Part 2 matters;
- (c) Considered that a significant weight should attach to Te Atiawa's evidence on its relationship with their ancestral lands and water and their concerns about the potential effects on those relationships.

66. The Waikawa Ratepayers and Residents Association was represented by Brian King. The Association opposed PC 21 and specifically opposed development of the northeast marina extension (MEA (B)) on grounds of impact on visual amenity especially of properties on land, foreshore and surrounds at the head of the Bay. On that basis, the Association was by necessary inference opposed to any changes to the objectives, policies, definitions and methods of the Plan that would further support applications for consents necessary to construct a marina in MEA (B). The Association was not opposed to marina development in MEA (A). It requested that the applicant relinquish its rights to MEA (B) and only develop in MEA (A). That is not an invitation that PMNZ

accepted and it is not within our power on this application to remove existing zone provisions.

67. While the official position was that the Association was not opposed to development in MEA (A) but strongly opposed to MEA (B), it is noteworthy that the Association conducted a survey of residents who had differing views. The population sample was 475 and of those, 30% were opposed to any extension, 40% were opposed to extension in MEA (A), 3% opposed to extension into MEA (B). There are other options available in the survey and in the end the survey questionnaire was not particularly robust but it can be said that there was significant opposition to any form of marina extension (150 respondents opposed only extension (option 1) and 28 respondents said marinas should go elsewhere (option 4).¹⁵
68. There were individual submitters. Those submitters that recognised a need to make further provision for marina expansion generally considered that only one area of expansion was appropriate. There was a diversity of opinions about whether that extension should be into MEA (A) or MEA (B). Those differences of opinion were often influenced by the subjective assessments of visual impacts of developments from the person's property.¹⁶
69. MBMA's primary interest was in the elements of PC 21 that introduced the legal mechanism to secure mooring interests of its representatives in Waikawa Bay. It therefore did not express an opinion in relation to the marina extension elements of PC 21 other than to note that there was some agreement amongst members that extension into both MEA (A) and MEA (B) may exceed what was appropriate. There were a variety of views as to which MEA was the most appropriate for marina development.
70. The principal matter in contention can therefore be distilled into a single question: should further marina development in Waikawa Bay and specifically in MEA (A) and MEA (B) be further and additionally enabled by PC 21 and such necessary modifications as are appropriate or should the existing provisions of the Plan remain?

¹⁵ See questionnaire results Stewart 18/06/2009.

¹⁶ See for example SOE by Culbert who lives at 360 Waikawa Road who opposed marina development MEA (A) but not in MEA (B).
Decision – Waikawa Bay PC 21

The existing plan provisions

71. In our assessment the existing plan provisions:
- (a) Provide a clear policy direction that outside the existing Marina Zones, further marina expansion is generally inappropriate and any marina development will be assessed as a full discretionary activity, or a plan change is required;¹⁷
 - (b) Provide a supportive planning environment for the continued operation of existing marina activity;
 - (c) Do not provide a clear policy direction that marina development (and its associated component activities) in MEA (B) is appropriate. Rather, any application will be assessed on its merits as a full discretionary activity assessed in the same way as non-Marina Zoned parts of the CMA. The assessment is not only against specific assessment criteria included within the rule stream, but also by reference to higher order planning instruments including the New Zealand Coastal Policy Statement.
72. Chapter 9 of the Plan deals with the coastal marine area (CMA). As the chapter explains, the CMA is divided spatially into zones. The principal zones are Coastal Marine 1 and 2. Ancillary zones include a Port Zone and Marina Zone. Zones are spatial tools for the delineation of the boundaries of areas where activities may be appropriate and for managing their effects. The degree of appropriateness and the degree to which discretion must be retained to manage effects is reflected in the activity classifications in the rule stream. In Chapter 9 it is reasonably plain that parts of the CMA zoned Marina Zone are locations where effects are to be managed. Objective 1 at 9.2.1 (Chapter 9) states:

The accommodation of appropriate activities in the coastal marine area whilst avoiding remedying or mitigating the adverse effects of those activities.

¹⁷ See Chapter 9 section 9.2.1 Policy 1.5 and Section 9.4.
Decision – Waikawa Bay PC 21

73. Policy 1.5 states:

Manage the effects of marina activity and future development by establishing a boundary around the marina areas at:

- Picton;
- Waikawa;
- Havelock.

74. Section 9.2.2 identifies zoning as a method of implementation.

75. We have already set out previously the objectives and policies in the Urban Environments chapter (Chapter 10) relevant to marina activities. These objectives and policies are primarily focused on sustaining existing marina activity. That is made plain also from the introduction to Chapter 10 and the comments in Chapter 10 to the effect that the recent marina expansion (in 1993) was expected to accommodate future demand for some time.

76. Chapter 34 contains the specific provisions relating to the Marina Zone. Permitted, controlled and restricted discretionary activity classifications support existing operations within established marinas and provide an envelope of permissible effects and a cascade of thresholds for which consent will be required. The Plan contains a definition of marina that is focused on existing marinas and does not include activities for new developments such as reclamations and disturbance of the foreshore and seabed.

77. New marina development involves at least:

- (a) Occupation of the coastal marine area;
- (b) Disturbance of the foreshore and seabed;
- (c) Structures which effectively impound or contain the CMA.

78. This bundle of activities that makes up the construction and operation of new marina development are classified in the Marina Zone as discretionary activities (see Rule 34.4). Mr Solly provided a useful analysis of the activities that make up a marina development and their classification under the Plan. That analysis is attached as **Appendix 3** to this decision. The matters of

assessment for the main components of marina development are listed in Rule 34.4.1. The assessment criteria are set out below:

General Assessment Criteria

In addition to any specific standards set out in Rule 34.4.2 the General Assessment Criteria set out below shall be applied to Discretionary and Restricted Coastal Activities.

Matters for Assessment

Any relevant objectives, policies and rules of any policy, statement or plan prepared under the Resource Management Act.

Any relevant objectives, policies and rules of the New Zealand Coastal Policy Statement.

Any relevant objectives, policies and rules of any other plan having jurisdiction over the Coastal Marine Area.

The requirements of section 104 of the Act.

The likely effects of the proposal on:

The locality and wider community and in particular:

- a) Whether the proposal will enhance or maintain the amenity values of the surrounding area;
- b) Whether the proposal creates any demand for services or infrastructure at a cost to the wider community;
- c) Whether the proposal contributes to the character of the surrounding area and helps maintain the cultural values of the community; and
- d) Whether the proposal has any adverse effects on roading, traffic movement or road safety.

The amenities of the area and in particular that any proposal does not have any significant adverse effects on:

- a) The visual qualities of the surrounding area;
- b) Any significant ridgeline or significant landscape; and
- c) Any view or vista which contribute to the aesthetic coherence of a locality.

Any significant environmental features and in particular that the proposal does not:

- a) Significantly adversely affect any habitat of any indigenous species; and
- b) Compromise the integrity of any terrestrial or marine ecosystem; and
- c) Whether the proposal will diminish the natural character of the locality, having regard to the natural character areas identified in Appendix Two, Volume One.

Natural and physical resources so that any proposal:

- a) Complements any building or other feature constructed by people in the locality which contributes to the character of the locality;
- b) Maintains the future use potential of any renewable resource;
- c) Should not have an adverse effect on the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga or any historic place or archaeological site;
- d) Does not reduce water quality beyond a zone of reasonable mixing; and
- e) Does not increase any risk from natural hazards.

In terms of the discharge of contaminants that any proposal:

- a) Does not generate noise, dust, fumes, smoke or odours which are likely to be noxious, dangerous, offensive or objectionable to any occupier of an adjoining property.

The physical and natural environment or community such that some form of financial contribution is necessary and should be imposed as a condition of consent. A financial contribution may be required in the following circumstances (except for a single dwelling house on one lot) or as otherwise required in the Plan where: *Chapter 34 - Marina Zone*

- a) Any activity will lead to increased pressure on or demand for the use of any public reserve, facilities or infrastructure including roads, walkways, refuse disposal systems;
- b) Any activity is likely to impact negatively upon the development capability of any adjoining land in terms of sewage servicing capacity;
- c) Any activity lends or will lend to a situation where off-site effects can be mitigated, but unless required by condition of consent be at the cost of the Council; and
- d) Where the proposal will create a need for public works, services, reserves, or capital expenditure.

[Emphasis added]

79. An examination of the assessment criteria demonstrates that new marina development has not been determined by the Plan to be appropriate. The Plan confers a wide discretion (that goes with the activity classification) and regard must be had to higher order instruments such as the New Zealand Coastal Policy Statement as well as the provisions of Part 2 through the express invocation of all s.104 matters. Section 104 is of course explicitly "subject to Part 2." In addition, the assessment criteria are quite demanding including:
- (a) The proposal should not have any adverse effects on Māori and their culture and traditions with ancestral land and water sites etc which is a policy of avoidance;
 - (b) Avoidance of any significant effects on visual qualities of the surrounding area;
 - (c) Avoidance of significant adverse effects on any habitat or marine ecosystem.
80. For reasons which are plain from our environmental risk assessment, meeting these assessment criteria by marina development in MEA (B) would be challenging.
81. It is also noteworthy that Volume 1 of the Plan contains robust provisions recognising the interests of tangata whenua. It contains the Sounds' specific recognition of Māori interests more generally expressed in the Marlborough Regional Policy Statement.¹⁸ Section 6 of the Plan identifies as significant issues the following:
- Recognition of the Maori holistic systems of values within resource management decision making. These values being:
 - Te Taha o Te Ao (environment);
 - Te Taha Hinengaro (way of life);
 - Te Taha Wairua (spiritual and customary values); and

¹⁸ See for example principle 3.2.1(b) which is the principle to "incorporate where appropriate, the aspirations, heritage and values of iwi of Marlborough and the resource management decision making." Decision – Waikawa Bay PC 21

- Te Taha Tinana (healthy body).
- Exclusion from the use, development and protection of traditional resources.

82. The objectives and policies of Chapter 6 include:

- | | |
|-------------|---|
| Objective 1 | Recognition and provision for the relationship of Marlborough's Maori to their culture and traditions with their ancestral lands, waters, sites, waahi tapu and other taonga. |
| Policy 1.1 | Recognise and protect sites of significance to tangata whenua, including waahi tapu, taiapure, maataitai, tauranga waka and areas of taonga raranga. |
| Policy 1.2 | Recognise values important to tangata whenua, including the concepts of mauri, effects on the mana of iwi or hapu, and the ability of tangata whenua to provide manaakitanga. |
| Policy 1.3 | Recognise the role of tangata whenua as kaitiaki in the coastal marine area. |
| Policy 1.4 | Recognise and provide for continued tangata whenua access to, and use, of traditional coastal resources such as maataitai, taiapure and taonga raranga. |
| Policy 1.5 | Maintain and facilitate communication with Iwi representatives which ensures that where appropriate, issues of importance to iwi are drawn to the Council's attention. |

Plan change provisions as applied for

83. PC 21 as applied for is in **Appendix 4**. For present purposes, all that is necessary is a summary of the key features.
84. The key features of PC 21 as notified concerning implementing a new mooring management regime includes:
- (a) A new definition of Waikawa Bay to provide spatial definition to the rules as well as a new Map 62 showing a line between the tip of The Snout and Karaka Point, delineating Waikawa Bay;
 - (b) A new policy 1.8 that reads: "Ensure that moorings within Waikawa Bay are allocated in an efficient and coordinated manner;"

- (c) A new policy 1.9 to avoid moorings outside MMA's except where those moorings are necessary to access adjoining properties or relate to renewal of existing mooring consents;
 - (d) Recognise in the methods of implementation that the MMA areas will be managed through a bylaw;
 - (e) Provide for moorings in Coastal Marine Zones 1 and 2 as permitted activities where they occur within an MMA.¹⁹ A condition of permitted activities is that there is a current bylaw and mooring licence under that bylaw granted to the person occupying space within the MMA;
 - (f) Renewal of existing resource consents for moorings is a discretionary activity under proposed changes to Rule 35.4;
 - (g) Rule 35.5 is proposed to be amended so that the placement and use of moorings within Waikawa Bay not previously consented before the rule became operative and located outside an MMA, are a non-complying activity.
85. Features of PC 21 notified relating to further and additional enablement of marina development in MEA (A) and MEA (B) include:
- (a) A new objective (objective 3) in section 10.7.1.1 that reads: "Enable the sustainable development and operation of marinas and associated infrastructure within the Marina Zone";
 - (b) A new policy 3.1 that reads: "Avoid the proliferation of development within the coastal marine area by focussing development within the Marina Zone as a first priority;"
 - (c) A new policy 3.2 that reads: "Enable the construction, maintenance and operation of marina activities within Marina Zones, whilst ensuring any adverse effects on the environment are avoided, remedied or mitigated;"

¹⁹ See proposed Rule 35.1 relating to moorings.
Decision – Waikawa Bay PC 21

- (d) Inclusion of some activities as permitted activities associated with marina development including removal and demolition of structures, refuelling and maintenance of ships and carparking.
86. Another feature which is important is that PC 21 as applied for provided for non-notification of discretionary activities listed in Rule 34.4. This was a somewhat extraordinary proposal as it effectively excluded public participation in any marina related applications. No doubt PMNZ's expectation was that appropriateness of marina development in MEA (A) and MEA (B) would be resolved by the plan change process without the need for another round of public debate but how that expectation could be reasonably held in the absence of an assessment of anticipated effects of marina development in MEA (B) is not clear to us.
87. In PC 21 as proposed, performance criteria 34.4.1.1.5.4(c) remained as in the Plan. That required no adverse effect on the relationship of Māori to their ancestral land, water etc. It is also not clear to us how that assessment criteria could be determined to have been satisfied by MDC with a non-notified application that potentially excluded input from tangata whenua.

Iterations in PC 21

88. The plan change process is iterative.²⁰ It is expected that there will be refinements in response to submissions and the assessment by the local authority. That is what has happened here. The Council's consultant planner and the planners for PMNZ discussed possible changes to the Plan. That was attached to their caucusing report. The final version promoted by PMNZ is attached to our decision as **Appendix 5** which is version 9 attached to Ms Robertson's and Mr Kyle's joint statement of evidence in reply. While not formally endorsed in all its dimensions by Mr Quickfall, the areas of difference between Mr Quickfall and Ms Robertson are very narrow.
89. Features of these changes are:

²⁰ See *Countdown Properties v. Dunedin City Council* [1994] NZRMA 145 where the High Court noted that the plan change process needs to be flexible and an unduly legalistic approach is not appropriate. Decision – Waikawa Bay PC 21

- (a) Abandonment of the non-notification provision;
 - (b) An extended definition of 'marina' so that all of the component elements of marina development are incorporated within that definition;
 - (c) Abandonment of new standards specifically relating to marinas (refer Rule 34.4.2.12.1 in version 9 attached to the caucus report);
 - (d) New assessment criteria specifically for marinas (refer Rule 34.4.2.12.4).
90. The additional assessment criteria deserves mention. The assessment criteria specifically apply to marinas in addition to the criteria applicable in Rule 34.4.1 and 34.4.2. They address such matters as:
- (a) The extent of vegetation clearance;
 - (b) Sufficiency of carparks;
 - (c) Provision of a public beach beyond the northern boundary of the northwest marina area A (MEA (A));
 - (d) Landscaping that achieves integration of the marina with the existing environment.
91. The further level of specific assessment criteria addressing site specific considerations in our opinion will be interpreted as a concise and more precise statement of the site specific matters to address by way of mitigation in response to an application. That reinforces that mitigation responses are considered by the Plan a sufficient response to the environmental risks and effects anticipated by the implementation of the Plan.
92. The changes in PC 21 through the hearing process did not substantially change the planning goals of PC 21.
93. Mr Quickfall in his s.42A report had considered the desirability of an outline plan that included Figure 7 from Mr Leman's report (see Figure 3 in **Appendix 2**). This is for the purpose of providing more detail as to the intended development that the Plan provides for. That is because he

understood that what the plan change was doing was specifically providing for marina development in MEA (A) and MEA (B) and site specific layout should be 'bedded down' in the plan change. We draw attention to this fact because that position by Mr Quickfall seems to us to be at odds with the other position that he adopted that there would remain a serious possibility for declining resource consent under the PC 21 regime if the effects on tangata whenua visual impact or on benthic ecology were individually or cumulatively significant. This view was also advanced by Ms Robertson.

94. To the extent that Mr Quickfall and Ms Robertson contended that PC 21 as modified by their caucusing was sufficient to:
- (a) Provide appropriate acknowledgement of, and provision for, the concerns expressed by Te Atiawa;
 - (b) Provide appropriate acknowledgement of, and provision for, the full range of potential effects and environmental risks that we find might arise from the marina development in MEA (A) and MEA (B);
 - (c) Provide a credible basis for declining on grounds (a) and (b) above in view of the strong policy bias in favour of marina development encapsulated in PC 21;

then we reject that view.

95. In our opinion, PC 21 as notified or as amended by planning caucusing is intended (and will) institute planning goals that makes consent for development of marinas in MEA (A) and MEA (B) almost certain under a s.104 assessment (properly undertaken) subject only to conditions that minimise the extent of effects to the degree feasible while achieving the zones overarching objective of enabling development because it is the most appropriate location to do so in the Marlborough Sounds. Could it be otherwise? The zone specific planning goals of PC 21, if approved, will be given greatest weight as the most contemporary planning blueprint for sustainable management in Waikawa Bay.²¹

²¹ Factors influencing weighting of planning provisions include currency (i.e. how contemporary they are) and specificity. This is true not only in New Zealand but also in Australian context. See for Decision – Waikawa Bay PC 21

General legal Matters

96. A leading case on the methodology for evaluation of plan changes is *Long Bay-Okura Great Park Society Incorporated v. North Shore City Council*.²² In paragraph 20 of the decision, Jackson ECJ summarises the nature of resource management inquiry in this type of case. That paragraph reads:

[20] The traditional fact/law/judgment division of civil cases inadequately describes the role of a local authority (or the Environment Court on appeal) in relation to a district or regional plan, a policy statement or a resource consent. We consider there are not three but four general steps in most proceedings under the RMA:

- (1) fact-finding;
- (2) the statement of the applicable law;
- (3) risk predictions: assessing the probabilities of adverse effects and their consequences;
- (4) the overall assessment as to what better achieves the purpose of the RMA.

We respectfully intend to follow those steps although not necessarily in that order or quite so logically. We note however that in step (3) Jackson ECJ only refers to risk predictions in the context of adverse effects. We consider that it is also necessary for us to consider environmental benefits and their probabilities and consequences and therefore respectfully suggest that Jackson ECJ's helpful methodology requires enlargement. Our view is supported by s.68(3) RMA that reads:

In making a rule, the regional council shall have regard to the actual and potential effect on the environment of activities, including in particular, any adverse effect.

While adverse effects are of particular concern, consideration of benefits is not excluded.

example *Terrace Tower Holding Pty Ltd v. Southern Shire Council* (2003) 129 LGER 195 (NSW Court of Appeal).

²² *Long Bay-Okura Great Park Society Incorporated v. North Shore City Council* EnvC Decision no. A078/2008 dated 16 July 2008.
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97. In addition, Jackson ECJ in the *Long Bay-Okura Great Park* decision refined the *Eldamos* tests²³ with a more comprehensive statement of the mandatory requirements for district plan changes. While that statement in paragraph 34 of the decision requires modification for a plan that is both a district plan and a regional coastal plan, the passage is still helpful. Paragraph 34 of the *Long Bay-Okura Great Park* decision reads:

[34] A relatively comprehensive summary of the mandatory requirements²⁴ for district plans or plan changes - with the different statutory tests emphasised for convenience is:

A. General requirements

1. A district plan (change) should be designed to **accord with**²⁵, and assist the territorial authority to **carry out** - its functions²⁶ so as to achieve, the purpose of the Act.²⁷
2. When preparing its district plan (change) the territorial authority **must give effect to** any national policy statement or New Zealand coastal Policy Statement.²⁸
3. When preparing its district plan (change) the territorial authority shall:
 - (a) **have regard to** any proposed regional policy statement;²⁹
 - (b) **not be inconsistent with**³⁰ any operative regional policy statement.³¹
4. In relation to regional plans:
 - (a) the district plan (change) must **not be inconsistent with** an operative regional plan for any matter specified in section 30(1)[or a water conservation order]³²; and
 - (b) **must have regard to** any proposed regional plan on any matter of regional significance etc;³³
5. When preparing its district plan (change) the territorial authority must also:

²³ See *Eldamos Investments Limited v. Gisborne District Council* W47/2005 at para 128.

²⁴ Noting again that this is under the pre-2005 Amendment version of the RMA.

²⁵ Section 74(1) of the Act.

²⁶ As described in section 31 of the Act.

²⁷ Sections 72 and 74(1) of the Act.

²⁸ Section 75(3)(a) and (b) of the Act.

²⁹ Section 74(2) of the Act.

³⁰ Note: under the Resource Management Amendment Act 2005 section 75(3)(c) now requires an operative RPS to be given effect to in a district plan.

³¹ Section 75(3)(c) of the Act.

³² Section 75(5) of the Act.

³³ Section 74(2)(a) of the Act.

Decision – Waikawa Bay PC 21

- **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations;³⁴ and to consistency with plans and proposed plans of adjacent territorial authorities;³⁵
 - **take into account** any relevant planning document recognised by an iwi authority; and
 - **not** have regard to trade competition;³⁶
6. The district plan (change) must be prepared **in accordance with** any regulation³⁷ (there are none at present);
 7. The formal requirement that a district plan (change) **must**³⁸ also state its objectives, policies and the rules (if any) and may³⁹ state other matters.
- B. Objectives [the section 32 test for objectives]
8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act.⁴⁰
- C. Policies and methods (including rules) [the section 32 test for policies and rules]
9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies.⁴¹
 10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method 'for achieving the objectives'⁴² of the district plan taking into account:
 - (a) the benefits and costs of the proposed policies and methods (including rules); and
 - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods,⁴³
- D. Rules

³⁴ Section 74(2)(b) of the Act.

³⁵ Section 74(2)(b) of the Act.

³⁶ Section 74(3) of the Act.

³⁷ Section 74(1) of the Act.

³⁸ Section 75(1) of the Act.

³⁹ Section 75(2) of the Act.

⁴⁰ Section 32(3)(a) of the Act.

⁴¹ Section 75(1)(b) and (c) of the Act (also section 76(1)).

⁴² Section 32(3)(a) of the Act.

⁴³ Section 32(4) of the Act.

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.⁴⁴
- E. Other statutes:
12. Finally territorial authorities may be required to comply with other statutes. Within the Auckland Region they are subject to:
- the Hauraki Gulf Maritime Park Act 2000;
 - the Local Government (Auckland) Amendment Act 2004.
98. Those components of the list above (also relevant to our enquiry) that have their source in s.32 RMA, call for a comparative analysis having regard to the choices available. No one in their submission asked for different objectives and policies than those proposed in PC 21. The options are therefore declining the plan change and retaining the status quo, or the provisions proposed by PC 21 with such modifications as are necessary.
99. It is also plain from the text above that effects (or more properly in the plan change context environmental risks and benefits) are an essential part of our enquiry into the appropriate policy framework having regard to the statutory tests.
100. The responsibility of providing information adequate to the potential scale and significance of effects arising from implementation of the plan change, lies with the applicant. Clause 22 of Schedule 1 RMA reads:

22 Form of request

- (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan and contain an evaluation under section 32 for any objectives, policies, rules, or other methods proposed.
- (2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential

⁴⁴ Section 76(3) of the Act.
Decision – Waikawa Bay PC 21

environmental effects anticipated from the implementation of the change, policy statement, or plan.

101. Goal based planning is the essence of modern planning. As Hammond J said in *TV3 Network v. Waikato District Council*:⁴⁵

The legislation also rests on the quite changed conception of what 'planning' is all about. In terms of actual function, land use planners were conventionally problem solvers within the parameters of set policies and traditions. But now, planning theory has come to recognise that 'goal formation is not only the most important, but also the most neglected part of the planning process...

(Chadwick A Systems of View of Planning (1978) 124)

102. Goals in the hierarchy of matters in a plan should be expressed most fully in objectives. Pursuant to s.32 RMA, these objectives must be the most appropriate means of achieving the purpose of the Act.
103. We are placed in the position of asking whether the existing goal in objective 1 section 10.7.1.1 of the Plan which reads: "maintain a standard of amenity in existing marinas which is compatible with marina activities while avoiding remedying and mitigating adverse effects resulting from this activity on the environment" should be replaced by the objective in PC 21 which reads: "enable the sustainable development and operation of marinas and associated infrastructure within the Marina Zone."
104. The objective proposed in PC 21 is to be read with the extension of the Marina Zone proposed in PC 21 to cover MEA (A). It is also noted that the words 'sustainable development' and 'enable' have a bias toward development as the planning goal.
105. As mentioned, Part 2 assumes significant importance in our overall assessment of the most appropriate objective. In that context we note the comments of Lord Cooke of Thorndon in *McGuire v. Hastings District Council*:⁴⁶

⁴⁵ *TV3 Network v. Waikato District Council* [1997] NZRMA 539 at 542.

⁴⁶ *McGuire v. Hastings District Council* [2001] NZRMA 557 at para 21.
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The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Māori issues.

Te Atiawa & Waikawa Bay

Ko au te Moana o Waikawa, ko te Moana o Waikawa ko au

I am Waikawa Bay, Waikawa Bay is me

Introduction to statement of evidence by Bentham Ohia

106. Te Atiawa is the manawhenua iwi at Waikawa and Waitohi (Picton). That has been recognised by the Crown as part of its engagement with Te Atiawa to resolve grievances held by Te Atiawa concerning the Crown's compliance with the Treaty of Waitangi/Te Tiriti o Waitangi.
107. Te Atiawa is an iwi with what may be described as a placental connection to the land and water of Tōtaranui/Queen Charlotte Sound. It is an iwi whose very sense of place, identity and mana derives from the fecundity of natural resources of Tōtaranui. The strength of feeling associated with that relationship is a product of the length of occupation as well as the collective memory of the joys and tribulations inevitably associated with the occupation, sustaining and defending of such a place.
108. The foreshore at the head of Waikawa Bay is a liminal space of special significance to Te Atiawa. It is a place of passage from land to sea and sea to land. Such spaces have the special character of the 'interface' treasured by all who recreate on shorelines. That interface was also the entrance of Waikawa River to the sea. Importantly, this place was also a source of kaimoana easily accessible to the community. The ecosystems at that interface had a very high level of ecological productivity.
109. Waikawa Bay has been the *locus* of Te Atiawa occupation of Tōtaranui/Queen Charlotte Sound in the 19th and 20th centuries. Through that period there has been a progressive physical alienation from the wider ancestral lands and water in Queen Charlotte Sound including the critical shoreline spaces.

Significant spaces are now occupied by PMNZ's operations. By way of example, Shakespeare Bay now has a significant port facility. Picton/Waitohi is also a major port and the gateway to the top of the South Island. The head of the bay at Picton/Waitohi is largely devoted to transportation and boating activities.

110. Picton/Waitohi was the historical seat of Te Atiawa occupation of Tootaranui/Queen Charlotte Sound. That changed with European settlement and as a result of negotiations with European authorities. That history is fully documented in a report by the Waitangi Tribunal called *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*.⁴⁷ It is unnecessary to set out that history here, other than to identify some key historical features that reinforce the conclusion that the relationship of Te Atiawa with the shoreline of Waikawa Bay, particularly at the head of the Bay, is an important remnant where Te Atiawa has an ongoing direct physical connection on a day to day basis and provides an important ongoing relationship with the physical environment of Tootaranui.
111. Key historical events since European settlement include:
- (a) Arrangements between Te Atiawa and the European settlers for the sale of land at Waitohi/Picton that would disadvantage Māori for a range of reasons;
 - (b) The effective exclusion from Waitohi/Picton as a consequence of negotiations and bargains arrived at;⁴⁸
 - (c) The promise by European authorities that Waikawa Bay would be a native town or reserve of a similar type to that established at Otaki;
 - (d) Failed promises and inadequate compensation in relation to the provision of cultivatable land in Waikawa Bay by European authorities.
112. The historical processes referred to in the Waitangi Tribunal report describe a process of marginalisation through exclusion from historical resources including valuable land and resources at Waitohi/Picton.

⁴⁷ Waitangi Tribunal Report 2008 Volume 1.

⁴⁸ See for example Waitangi Tribunal Report 2008 Volume 1 at page 367.
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113. It is evident from the Waitangi Tribunal report that Te Atiawa preferred to sell Waikawa Bay to Europeans and retain Waitohi/Picton, but this was not an option subsequently explored in negotiations. The flavour of the Waitangi Tribunal report is that Māori received the 'rump end of the deal', made worse by the fact that there was no 'tenths' provision for Māori at Waitohi effectively excluding them from the benefits that were intended to derive from European settlement.
114. Despite the history described above, Te Atiawa describe life in the 20th century in Waikawa Bay as idyllic. Historical land tenure records show large land holdings allocated to various families. Over time these were subdivided into smaller parcels of land. While these represent a formal land record, the arrangements amongst members of Te Atiawa were more fluid and community focussed and it was that atmosphere and the freedom that it provided that was an abiding memory of many of the witnesses from Te Atiawa that we heard. In many ways it is the protection of the accessibility of public resources such as coastal space in Waikawa Bay that is the focus of Te Atiawa's approach for the benefit of the entire community. Historical photographs and other visual material suggest that the predominance of Māori in Waikawa Bay persisted into the 1970's. After that increased residential settlement by Europeans became evident.
115. Sharon Gemmell's evidence provided a good historical perspective on Te Atiawa's concerns at the progressive reclamation and development of the Waikawa Bay delta. We rely on that evidence.
116. Reclamation of Waikawa Bay started in 1943 when the Crown reclaimed an acre at the head of the Bay as part of increased spending on defence and infrastructure. It was abandoned following the Battle of Midway. In 1950 the Lands and Survey Department insisted that the reclamation be regularised with the consequence that there were modest further reclamations to establish Waikawa Bay wharf and a car park.
117. In 1977 Robert Stephenson from the Department of Zoology in the University of Canterbury, undertook an intertidal biological survey of Waikawa Bay.⁴⁹ That report was prepared as part of an environmental impact assessment

⁴⁹ Stephenson *Intertidal Biological Survey for the Marlborough Harbour Board*, July 1977.
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that Marlborough Harbour Board was preparing in order to undertake marina development. The conclusion of the Stephenson report is as follows:

The water quality survey (Marlborough Catchment and Regional Water Board 1977) shows that even during summer recreational use, the water of Waikawa Bay remains for the most part at a 'class A' natural state and level. Coliform bacterial counts were moderately low in sand, water and shellfish.

The present study shows that the intertidal area of Waikawa Bay supports a varied (43 species) and often dense (up to 5575gms dry wt/m² biomass) biotic community. Low to moderate natural heavy metal levels tend to support the high water quality classification given to the Bay.

At present the intertidal community is in a natural state as distribution and heavy metal content appear uninfluenced by human presence.

118. This provides a useful scientific baseline against which to assess the cumulative impacts of subsequent marina development. It also scientifically demonstrates what Te Atiawa already knows as part of its tribal memory which is that the Waikawa Bay delta was a rich source of kaimoana.
119. The Crown authorised the excavation of significant sections of these intertidal fisheries by a two stage construction of the Waikawa marina. As Ms Gemmell noted, a walk along the breakwaters at low tide would now reveal water depths far deeper than anything in which the former shellfisheries could re-establish – the depth outside the entrance is given as seven metres.⁵⁰
120. The first stage marina development was authorised by Order in Council in the New Zealand Gazette of 1978 number 92 of 26 October 1978 at page 2900. The area involved was 2.9647ha shown on MD Plan 15886. Stage One was constructed in 1983. There were subsequent Orders in Council on 28 May 1987 vesting another 1260m² in the Board as well as additional orders validating the reclamation at Waikawa Bay of another 1180m². On 21 July 1988, an area of 347m² was validated and vested in the Picton Borough Council although this was finally revoked on 15 December 1988, apparently

⁵⁰ See Gemmell SOE para 28.
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there was a final vesting of 185m² in the Picton Borough Council and 2.9818ha in the Harbour Board the same day.⁵¹

121. Crown records obtained by Te Atiawa under the Official Information Act confirm that in July 1992 a further extension was granted by the Minister of Conservation to PMNZ for an extension of the Waikawa marina to create an additional 140 berths. Those works involved the construction of the northern breakwater of 225m and associated car parks. This extension is referred to by Ms Gemmell as a 'Marina extension stage 2'.
122. The report of the committee on the Waikawa Bay Marina Extension (stage 2) said according to Ms Gemmell (although we haven't seen the source document):

It is also recommended although not as a condition of this consent, that PMNZL continues to work closely with Te Atiawa Whanau to resolve the Whanau's concerns regarding the marina extension.
123. The letter was signed for Marlborough District Council by L J Moffatt, strategic planner.
124. The Minister of Conservation granted the necessary coastal permit for stage 2 on 30 July 1992.
125. The Waikawa marina reclamation/excavations as well as associated intensification of residential development necessitated major works in relation to the Waikawa Stream – Waikawa Te Awa. The lower channel and mouth have been moved to the East and the river bed for a significant distance has been artificially armoured.
126. A third and final reclamation occurred around 1998. MDC granted consent to 25m extension to the existing 225m northern breakwater, to reduce the effects of swell and wave action on jettys 8W & 9W and the fuel jetty.⁵²
127. The Minister of Conservation granted a coastal permit on 2 March 1999. A lease was granted by the Crown for the occupation. A transfer of fee simple

⁵¹ See Gemmell SOE para 23.

⁵² See Gemmell SOE para 57.

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was not given because of controversies over customary title to the foreshore by 'top of the south' iwi.

128. Te Atiawa highlighted in its submissions to MDC on its planning instruments developed under the RMA:

The destruction of the cockle beds within Waikawa is evident with the construction of the marina. This particular bed is one of the largest of its kind within the Queen Charlotte Sounds and is relied on by local Māori as a food source. It is hoped that this instance of disregard for Māori values will not be repeated.⁵³

129. In 1993 MDC declined resource consent to The Moorings Waikawa Limited which wished to add two T-shaped floating jettys at the end of an existing piled wharf extending from what is locally known as Jorgenson's boat yard. The decision of the Council noted that:

The granting of this consent would be contrary to section 6(e) of the Resource Management Act 1991. The committee recognised that a traditional Māori food gathering area was located nearby and that the proposal could affect the food gathering to a significant extent.⁵⁴

130. The following are quotes from the Waitangi Tribunal report (Volume 3) Chapter 11 quoted in Ms Gemmell's statement of evidence at paragraph 75:

- c. More recently, in the 1970's, the drastic modification of the Waikawa Stream and the construction of a marina at Waikawa Bay described as once the largest and most productive estuary in Queen Charlotte Sounds, destroyed at least two-thirds of the active kaimoana beds and estuary area.
- d. Te Atiawa made representations to the Port Authorities in the 1990's when an extension to the marina was being planned, but were not satisfied with the outcome.
- e. They were pleased, however, that a proposal to add floating jetties to an existing wharf was denied resource consent in

⁵³ See Gemmell SOE para 62.

⁵⁴ See Gemmell SOE para 65.
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1993 on the ground that it would affect traditional food - gathering activities.

- f. Witnesses explained that the loss of a single, vital site like Waikawa Bay could have a huge impact on their ability to maintain ahi kaa and live in the area.
- g. In the situation the loss of such a critical shellfishery as Waikawa Bay, so close to their main centre of population, had a significant impact on the Waikawa community...

131. The statement of evidence of Ms Gemmell also outlines dialogue between the Crown and Te Atiawa as part of settlement of Treaty of Waitangi claims. The relevant aspect of those negotiations (not contradicted by the representations of the Minister of Conservation) is that there is recognition of the grievance of Te Atiawa at the degradation without their consent of that part of the CMA at the head of the bay of Waikawa and the modifications to the Waikawa Bay stream particularly at its confluence with the intertidal zone.
132. This degradation in the environment is significant for Te Atiawa for a range of obvious reasons. A perhaps less obvious reason but one that was nevertheless important was that it impacted on the mana of the tribe to manaaki manuhiri. That hospitality is a proud history of Te Atiawa reflected in the whakatauki: "Ko to Te Ati Awa ko Tahuaroa."

Arapawa Māori Rowing Club

133. The Arapawa Māori Rowing Club is a historic rowing club at the southern end of the Waikawa Bay Foreshore Reserve. The Reserve is used to launch craft although this is sometimes made difficult by use of the public car park and trailer parking on the Foreshore Reserve blocking access to the clubrooms. The club provides for both waka ama and masters rowing. It was formed in 1919. Races are held on the lower Waiao River. Waikawa Bay is used for training only. Rowers generally head to Karaka Point of Whakamango Bay to avoid the wakes of the ferry and other boats.

134. The Arapawa Māori Rowing Club is supporting a Te Atiawa Waitangi Tribunal claim to the club site and the foreshore extending from the clubrooms to Jorgenson's Wharf.⁵⁵

Deficiencies in the application and evidence of PMNZ

135. We note that:
- (a) Central to our inquiry is an assessment of anticipated effects of implementation of PC 21;
 - (b) The RMA requires the applicant to present an adequate AEE of the potential effects of implementation of PC 21;
 - (c) There is an obligation on the applicant for a private plan change to provide an evidential basis to enable an integrated assessment of potential effects of implementation of the plan change;
136. The application and evidence of PMNZ relating to that dimension of PC 21 that further and additionally facilitates marina development in MEA (A) and (B) was, in our opinion, deficient in respects set out in the following paragraphs.
137. An anticipated effect of marina development is changes in seawater hydrology and littoral flows. This in turn may have effects on patterns of sediment disposition and intertidal habitat characteristics in areas beyond MEA (A) and (B). There is no adequate examination by a suitably qualified person of these potential effects.
138. Most of PMNZ's technical experts only examine the potential effects of marina development in MEA (A) on the assumption that development of MEA (B) is an intended and inevitable outcome of the Plan. We do not consider that that assumption is correct for reasons given earlier and wasn't even PMNZ's view in its s.32 analysis. A consequence of PC 21 is the further and additional planning and facilitation of development in MEA (B) through a

⁵⁵ See Buna Riwaka SOE and Greenaway SOE para 7.9.
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change to the policy and rule framework that makes marina development in MEA (B) an almost inevitable but certainly probable consequence of any 104 assessment. That is not the case at present. We consider the anticipated effects of implementation of PC 21 must include the effects of marina development in MEA (B) as well as the effects of marina development in MEA (A) and their combined cumulative effects. In addition, as Mr Solly noted, the proposed changes would affect the other marina zones in the Plan and if some iterations of the proposed wording were accepted, would also affect areas adjacent to other marinas. No technical evidence was produced by the applicant to address the appropriateness of the changes proposed with regard to those other locations. An example of the limited focus of technical evidence is the evidence of the ecologist for PMNZ, Mr Sneddon, who at paragraph 8.1 of his evidence stated:

The existing marina facility covers approximately 17ha of the current 24ha Marina Zone, which could be increased to approximately 32ha by the proposed Plan Change. Keeping in mind the potential total size of the marina facility, the focus for my assessment is the proposed 8ha expansion of the Marina Zone.

139. Mr Sneddon did say at paragraph 8.11 of his SOE that:

The installation of any large structure will have an effect on hydrodynamic conditions; at least in immediately adjacent areas. However since further development of the Marina in the proposed Marina Zone extension area would be effectively limited to the western side of Waikawa Bay, such development is considered unlikely to significantly obstruct wave energy and water movement in the areas further east and south.

140. Our analysis of paragraph 8.11 of Mr Sneddon's statement is as follows:

- (a) We doubt that he has the necessary expertise to form conclusions about effects on hydrodynamic conditions generally and particularly without appropriate modelling; and
- (b) The qualification in the second sentence is not correct if one also considers the anticipated effects of development in MEA (B) which we say should have been done as development in MEA (B) is within the

central section of the head of the Bay and may well have impacts further east and south. Indeed development based on Mr Leman's indicative plan (**Appendix 2** Figure 3) will further throttle littoral flows to the cockle beds and mouth of the Waikawa Stream.

141. Had our deliberations and overall judgment been finely balanced, then remediation of the evidential deficiency regarding potential changes in seawater hydrology may have been overcome by requesting further information. In the end we did not consider that necessary as we are more than satisfied that other environmental risks are sufficiently grave for us to reach robust conclusions on that dimension of the plan change that further and additionally enables marina development in MEA (A) and (B). Even if the seawater hydrology changes were small environmental risks, we would have reached the same result.
142. Many of the technical experts in this case had a dichotomic effects metric of 'minor' and 'significant'. Our approach is to have a five category system of effects assessment to give a better indication of our assessment of significance. The categories are:
- (a) Severe;
 - (b) Serious;
 - (c) High;
 - (d) Moderate;
 - (e) Minor.
143. The proposed plan provisions in PC 21 and in particular Objective 3 and Policies 3.1 - 3.2, have implications beyond simply enabling additional marina development in Waikawa Bay. The effect of the proposed policies, in particular, is to identify only Marina Zones as areas appropriate for marina development. By implication, no other places in the Marlborough Sounds are appropriate for marina development other than those identified in PC 21 and the existing provisions of the Plan. Therefore, PC 21 has wider implications for the management of the Marlborough Sounds. However, we had virtually no evidence on which to reach conclusions concerning whether there are

other appropriate locations for marinas in the Marlborough Sounds. Mr Boffa's evidence provided an overview that suggested that protecting natural character justified concentrating marinas in existing locations, however that evidence was on a broad canvas and provides little detail that would provide an evidential basis for what would be a significantly new policy framework. PMNZ claimed that it had engineering reports showing few other locations in the Sounds where marinas could be located, but despite our request that information was not provided. Such a significant change in district wide policy is unusual in the private plan change context and, if proposed by a local authority, would normally be accompanied by extensive consultation and investigation. Limited consultation occurred in this case focussed on Waikawa Bay. We do not consider that we have any evidence on which to reach conclusions that these new policies are justified. Therefore, in our effects assessment and assessment of other statutory matters we have not considered the aspects of the policy framework of PC 21 because we simply cannot do so in a reasoned fashion.

Assessment of environmental risks & benefits of MMA's in that dimension of PC 21 that allocates limits to the use of CMA for boat moorings

144. We consider that the MMA's pose few environmental risks compared with the current situation in the patterns and locations of moorings that presently exist. Having considered the visual simulations of Ms Faulkner, we are satisfied that the more orderly management of moorings within MMA's does not alter the picturesque elements of the water space associated with individual boats dotted around the head of the Bay.
145. We consider that PC 21 in relation to MMA's has the following environmental benefits:
- (a) The waka MMA appropriately allocates space for the launching of waka from the Arapawa Boating Club. In addition, the waka would have a clear navigation corridor to travel through into the open Bay;

- (b) Managing moorings and conflicts between mooring owners will be more effective through a licensing system in a bylaw than could be possible under the RMA and this is supported by MBMA;
 - (c) The spatial extent of Waikawa Bay is appropriately delineated for the purpose of setting policies and rules governing allocation of open space;
 - (d) PC 21 recognises the sustainable limits of allocation of mooring space for boats and introduces a framework that ensures those sustainable limits are not exceeded;
 - (e) Provides a wider buffer between moored boats and the foreshore, better providing for public amenity. This is particularly important in that section of Waikawa Bay between Jorgenson's jetty and the breakwater immediately south of the boat sheds at grid reference 37 in Figure 1A;
 - (f) Well defined navigational fairways into the Waikawa Bay boat ramp and jetty and also the Waikawa Bay marina.⁵⁶
146. Our conclusions on the above environmental benefits and risks is based on largely un-contradicted evidence. Certainly un-contradicted expert evidence. There are one or two submitters such as Mr Rothwell with private moorings outside MMA's opposed to MMA's because of a wider suspicion that that may impact on their interests. That of course is not the case because existing mooring owners do have a pathway for re-consenting under PC 21 and it is not intended to prevent moorings being allocated to people to provide access to properties.

Assessment of environmental risks and benefits of that dimension of PC 21 that facilitates marina development in MEA (A) and MEA (B)

147. We will analyse the environmental risks and benefits according to the subjects addressed in evidence by expert witnesses but where appropriate

⁵⁶ See Paul Williams SOE para 4.5.
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informed by assessments of local and lay witnesses where their evidence can be appropriately given weight. Subheadings will be used below to identify the various types of environmental risks and benefits. We start with the easier and less controversial effects.

Acoustic environmental risks

148. Malcolm Hunt, an acoustic engineer, provided a statement of evidence on behalf of PMNZ. His overall conclusion is that day to day mooring and marina activities authorised by private plan change 21 will result in the emission of modest levels of noise. These noise emissions could not be considered to result in significant adverse effects in open land or on persons living or visiting within the vicinity of the site. Mr Hunt considered that offsite noise can be adequately controlled with the existing Plan noise limits.
149. We accept Mr Hunt's evidence.

Transportation environmental risks

150. Transportation assessment of the effects of PC 21 was undertaken by Harriet Fraser on behalf of PMNZ. She is a civil engineer with expertise in transportation planning. Her conclusions were that:
- (a) The existing road infrastructure is well able to support the proposed extension to the Marina Zone to accommodate an additional 250 wet berths in addition to the further 250 berths that could be accommodated within the existing Marina Zone;
 - (b) The existing level of parking required by the Marlborough Sounds Resource Management Plan for the Marina Zone is entirely appropriate to meet the projected future demands of Marina berth holders;
 - (c) The consolidation of the existing swing moorings in the specific locations proposed cannot be expected to have any effect on parking; and
 - (d) Any temporary construction traffic is readily able to be accommodated and managed across the existing road infrastructure without more than minor temporary inconvenience, and should any mitigation

measures be required, these can be imposed through the resource consenting process.

151. Mr Rhys Chesterman on behalf of MDC peer reviewed the work of Ms Fraser and together they reached a common position that the effects of the implementation of PC 21 would be minor and that any parking issues would be addressed by an assessment criteria as part of the criteria for evaluation of an application for consent for a marina.
152. The only witness to contradict traffic engineering evidence was Mr Culbert who is a retired engineer living in Waikawa Bay who provided a detailed submission. On the topic of transportation, Mr Culbert's two principal concerns were an access road to the marina called Beach Road was of sufficient width to accommodate additional traffic and he challenged some of the assumed road widths used by the traffic engineers. Mr Culbert was also concerned about the likely demand for parking and how that would be accommodated.
153. We are satisfied that the transportation effects of PC 21 are minor. The discretionary activity status and assessment criteria relating to parking are sufficient to ensure that capacity issues in the network and their effects can be adequately addressed in the consent process. Development of the marinas would, in any event, be an organic process and sequential. It would be unrealistic to make an assessment on the basis of a prediction that any network improvements necessary to accommodate the future development will not be made either prior to or as part of resolution of a resource consent application. Particularly, since MDC is the shareholder of PMNZ. Thus, the sole shareholder of PMNZ also has the statutory responsibility for the roading network and the power to upgrade it where necessary.

Recreational risks and benefits of PC 21

154. Mr Greenaway a recreational planner for PMNZ provided a substantial statement of evidence on the recreational implications of PC 21 particularly for boaters and existing and potential berth holders. He undertook a survey of current marina berth holders and those on the PMNZ waiting list. That

survey was completed in 2009 and attached as Appendix C to the plan change application. Key findings of that report were:

- (a) The mean number of full or part days a recreational vessel was used in the 2008/09 main boating season (October 2008 to April 2009 inclusive) was 33. The mean number of full or part days a recreational vessel was used in the 2008 calendar year was 43. Approximately 77% of recreational use occurred during the seven main cruising months (60% of the year). Those in the Havelock Marina used their vessels on fewer days than those who leased their berth in Waikawa (35 days versus 48 days in 2008).
- (b) Roughly a third of all berth holders generally took day trips, a third took short overnight cruises (1 or 2 nights) and a third preferred long overnight cruises (3 nights or more). Havelock Marina berth holders were more likely to take short overnight cruises in preference to day trips, and those who leased a berth in Waikawa were more likely to take day trips in preference to long overnight cruises.
- (c) A lack of leisure time for berth holders was the key limitation to boating activity (42% of all respondents) followed by the cost of boating (18%) and family commitments (11%). Lack of leisure time limited 27% of those on the waiting list, and lack of easy boat storage or marina berthage affected 23%.
- (d) Almost half of berth holders considered boating to be their most important recreation activity, while just over 40% considered it to be 'just one of the many things I do in my spare time'. Only 5% considered boating to be 'the most important thing in my life', and 3% had had enough of boating.
- (e) The average spend in 2008 on 'looking after a boat' for berth holders (including storage or berthage, repairs and maintenance, slipping and hardstand services and new equipment) was almost \$11,500, although the average 'typical spend' was only almost \$7,800. Ninety-two percent of this money was spent in the Marlborough District and 81% was spent in the township immediately around each marina.

- (f) The average spend in 2008 on boat trips for berth holders (including car running, off-boat accommodation, boat fuel and oil, groceries and provisions, restaurants and bars and other shopping) was almost \$3,900. Ninety percent of this money was spent in the Marlborough District and 69% was spent in the township immediately around each marina.
- (g) In general terms, survey respondents were price-sensitive in relation to marina berthage costs. There were a variety of opinions about marina extension options (generally supportive or provisionally supportive) and the need for and effects of ancillary service development. The latter is not of direct relevance to the Plan Change option, but will advise future service development options, such as maintenance and fuelling services.
155. Mr Greenaway pointed out that the growth of large boat owners is roughly twice that of population growth. He also noted that the interests of large boat owners can be met by other moorings, hard stands or marinas with the latter providing the best boat accommodation based on convenience and security.
156. Based on the existing waiting list of 330 individuals, Mr Greenaway concluded that a first stage development (of MEA (A)) would be fully taken up after completion. Unmet demand beyond stage 1 is a matter of prediction. Mr Greenaway gave us several scenarios. On a high growth scenario, stage 2 would be full in 11 years, on a medium growth scenario, 30 years.⁵⁷
157. Mr Greenaway calculated that the current 28 ha of Queen Charlotte Sound and Tory Channel waterway per locally berthed large vessel would reduce to 19 ha if both MEA (A) and (B) were approved and fully occupied, but compared this with the 15 ha per large vessel available in the relatively busier Auckland waterways⁵⁸. The growth in recreation demand was population driven and restricting the number of marina berths would not reduce demand but lead to greater use of alternatives such as trailer craft⁵⁹. He noted that the increase in marina area would increase the amount of vessels using the

⁵⁷ See Greenaway SOE para 5.2.

⁵⁸ See Greenaway SOE para 8.18

⁵⁹ See Greenaway SOE para 10.3

Waikawa Bay and consequently increase the need for attention to marine regulations by boat owners. Current levels of use perhaps do not put as many demands on the vessel operator than would exist with a more intensive boating environment. That however is not regarded as an adverse effect by us.

158. We are satisfied that PC 21 will meet a demand for marina berths and provide recreational benefits for those individuals and families who recreate through the use of boats to access the beauty of Marlborough Sounds. Conversely, failure to provide marina berths will frustrate that need. However, some of that need may be able to be met by moorings, trailer craft and greater use of hard stand areas.

Economic benefits of PC 21

159. The economic evidence for PMNZ was presented by Mr Copeland, a consulting economist from Wellington.
160. Unlike other technical experts, Mr Copeland's assessment of economic effects was not limited to the construction and operation of MEA (A) but also MEA (B). It was the cumulative benefits of marina development within these zones that he calculated.
161. Mr Copeland gave evidence that within the 18 months of construction for each of the proposed expansions of the Waikawa marina, the Marlborough regional economy will benefit from additional expenditure between \$7.8 million and \$17.5 million per annum. That translates into additional employment numbers of 40 to 91 and general total household income increases of \$1.7 million to \$5.3 million per annum.
162. Mr Copeland assessed the additional ongoing expenditure associated with the expansions as \$2.1 million per annum, 10 additional jobs, and a total of \$0.4 million per annum across Marlborough. Mr Copeland stated that these figures were conservative and that if marina expansion operated as a catalyst to achieve a bigger boat serving industry with greater 'critical mass' then the economic benefits could be greater.
163. Other benefits that Mr Copeland identified include:

- (a) Efficient use of limited available water space in Waikawa Bay;
- (b) More orderly and safer boat movements within Waikawa Bay;
- (c) PMNZ land and other assets in Waikawa Bay being used more efficiently with consequential benefits in Marlborough district ratepayers;
- (d) Cost savings for both applicants in Marlborough District Council and a reduction in transactional costs associated with mooring resource consent applications.

164. We have concluded that the economic benefits identified by Mr Copeland are a reasonable prediction of the economic benefits associated with the marina expansion. They are limited to monetary benefits associated with new and additional economic activity and do not account for opportunity costs or the environmental externalities.

Potential risks to terrestrial ecology of PC 21

165. Assessment of potential environmental risks relating to terrestrial ecology was undertaken by Matiu Park for PMNZ.
166. Mr Park noted that pre-European vegetation would have comprised a littoral fringe of low coastal vegetation with hard beech forest dominant on most slopes, black beech on headlands and spurs and hardwood forest dominated by kohekohe-tawa and puketea and hinau in valleys with minor podocarp elements elsewhere.⁶⁰ Mr Park noted that most of the original native forest cover has disappeared and the landscapes are now almost entirely covered in secondary native broadleaf scrub, low forest and areas of mixed gorse. He noted some small remnants of black beech and a smaller coastal broadleaf remnant in one gully above the batches north of the existing marina.
167. Mr Park noted that the study area had not been previously listed in wildlife inventories and was not known to contain threatened native species.⁶¹ Populations assumed to exist in these habitats were: Kingfisher, Morepork,

⁶⁰ See Park SOE para 5.2 based on McEwen 1987 *Ecological Regions and Districts of New Zealand*, third revised edition in 41-500,000 maps, Department of Conservation.

⁶¹ See Park SOE para 5.8
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Shining Cuckoo, Kereru and Weka. Mr Park did not see any blue penguin burrows during his site visit.

168. Mr Park did not consider that there were any lizards or invertebrate species of any special significance in the coastal fringe but a specific survey was not undertaken.
169. Mr Park concluded that the coastal fringe vegetation of the coastline within the proposed extension to the marina zone (MEA (A)) has low ecological significance. He considered any vegetation likely to be affected by construction and operation of a marina would be relatively young, low stature coastal scrub.
170. The most significant potential effect he identified was a loss of roosting or breeding habitat for coastal bird species but considered that this effect could be mitigated by conditions on short term construction activities as it is these activities that are most likely to cause temporary disturbance.
171. Mr Park considered that the assessment criteria proposed for the assessment of applications for marina development were sufficient to impose conditions warranted by terrestrial ecological effects. He also considered mitigation was a sufficient response and that a higher level of protection was not warranted.
172. We accept Mr Park's evidence and assessments of terrestrial ecological significance and consider that the effects of marina development on terrestrial ecology and associated ecosystems are likely to be minor and could be adequately managed by conditions.

Visual impact risks of PC 21

173. The principal evidence for PMNZ on visual impact was from Bronwyn Faulkner. Ms Faulkner is a registered NZILA landscape architect.
174. To assist her assessment, Ms Faulkner undertook visual simulations. Points at which panoramas were undertaken to construct simulations are shown in Figure 1. There were five viewpoints as follows:
 - (a) Limbert's jetty viewpoint;

- (b) Lloyd's house viewpoint;
 - (c) Waikawa Road viewpoint;
 - (d) Marina viewpoint;
 - (e) Cooks Ridge viewpoint.
175. Simulations are a recognised tool to evaluate visual impact assessments. They are not a substitute for expert analysis and they can flatten and thereby understate the potential visual impacts. We accept:
- (a) The visual simulations are a useful tool;
 - (b) The locations selected for simulations are representative of many key viewing locations within Waikawa Bay;
 - (c) We were greatly assisted in understanding the character, scale and intensity of visual impacts by detailed site inspection on land and water around the head of the Bay. The site visit on water was assisted by the location of buoys that showed the spatial extent of MEA (A) and MEA (B).
176. There are several aspects of Ms Faulkner's assessment that we wish to emphasise:
- (a) Ms Faulkner stated in answer to questions from the hearing panel that her evidence was not a visual impact assessment but a natural character assessment. That explained the lack of any reference to associational values including Māori cultural values that are essential to inform an assessment of the significance of visual impact;
 - (b) Ms Faulkner accepted that an assessment of whether or not visual change by prospective development falls within the absorption capacity of the wider landscape is a subjective assessment albeit in her case informed by years of experience.
177. We also note that most of the simulations are taken from high vantage points. These give a good representation of visual impacts of residents in elevated positions, privileged to have an 'eagles nest' view of Waikawa Bay.

However, that lends itself to a somewhat Cartesian assessment of the scale of impact because of the wider panorama views against which the scale of intended marina development is measured.

178. Te Atiawa (and no doubt many other members of the public) have an interaction with Waikawa Bay at a more horizontal (i.e. less vertical) level. It is their experience walking along existing natural shorelines on both the east and west coast of the bay. The only simulation of Ms Faulkner that represents that experience to any degree is the simulation from Waikawa Road (Figure 6). The proposed day view shows the simulated breakwater with relief landscape vegetation and toilet block (see Figure 7) where presently the view is one of open water with individually moored boats and the marina in the left field. The scale of visual impact is most dramatic at the head of the Bay around the shorelines and we consider that Te Atiawa's and the ordinary persons perspective of the scale of the change that would be caused by the intended development is understated by that simulation.
179. For example in respect of Figure 6, paragraph 7.10 of her SOE, Ms Faulkner said "developing a marina in the existing Marina Zone introduces development closer to this viewpoint". That seems to us to be an inadequate statement of the magnitude of change. Part of the reason for this may be that like many other witnesses, development in MEA (B) was not identified as a component to be included in the visual impact assessment either individually or cumulatively and therefore suffers from a set of false assumptions about what are the effects of implementation of PC 21. These incorrect assumptions are evident from paragraph 5.1 of Ms Faulkner's SOE which states: "A full description of the Plan Change has been detailed in the evidence of others. However, in terms of potential landscape and visual effects, the key landscape/seascape changes that would result from the extension of the Marina Zone and establishment of mooring management areas are set out below." [emphasis added]
180. Note that it is only the effects of the extension of the Marina Zone as opposed to the effects of further enabling marina development in MEA (B) that has been considered in Ms Faulkner's assessment. We consider the effects of implementation of PC 21 are also the visual effects of marina

development in MEA (B) by virtue of the significant facilitation of marina development PC 21 brings about compared with the present plan provisions.

181. Ms Faulkner's conclusions are essentially threefold:
- (a) An extension of the Marina Zone would be viewed most commonly from locations on the eastern shore.⁶² Locations are approximately at a 1km distance. They would not be viewed as incongruous and are seen as an extension of the existing marina infrastructure. The extension would be a small scale change;
 - (b) From the immediate environs on the western slope effects on natural character and visual amenity will be significant. However, viewed in the context of the whole bay, such change would not compromise the overall natural character of the bay;
 - (c) While marina development would be appropriate as proposed in PC 21, there are landscape and visual sensitivities that need to be accommodated and therefore assessment criteria should be applied at the resource consenting stage to ensure site specific landscape and visual sensitivities associated with proposed marina zone extension areas are addressed.⁶³
182. Ms Elizabeth Kidson, a landscape architect, was instructed by MDC to peer review the analysis by PMNZ's landscape architects. Ms Kidson's analysis suffers from the same fatal flaw as Ms Faulkner's which is an impact assessment based on the only change being an extension of the marina zone rather than the individual and cumulative impacts of marina development in MEA (A) and MEA (B). On that erroneous basis she concurred with the landscape analysis of PMNZ that a new extension in mooring management areas be able to be absorbed within Waikawa Bay, subject only to additional planning measures to mitigate potential adverse effects.⁶⁴
183. Ms Kidson however did critique the quality of information supplied by PMNZ and the following paragraphs are relevant:

⁶² See Faulkner SOE para 1.3.

⁶³ See Faulkner SOE para 1.5.

⁶⁴ See Kidson s42A report para 34.

- (a) She considered that PMNZ's assessment failed to take into account the effects of the proposal from the main recreational areas and that this should have been included in the visibility 'section';⁶⁵
- (b) There was an inadequate assessment of the loss of natural character on the foreshore along the west of the Waikawa Bay;⁶⁶
- (c) There was a lack of visual impact assessment and any discussion of shared or recognised values or cultural values.⁶⁷

184. We agree with Ms Kidson that these deficiencies existed in PMNZ's assessment.

185. Mr Frank Boffa, also a landscape architect giving evidence on PMNZ's behalf, similarly concluded that the proposed marina development and mooring management areas could be visually accommodated within Waikawa Bay with minimal intrusion or undue visual prominence. In response to questions he confirmed that PC 21 would "make more readable" the unnatural components of the bay and noted that he had not carried out his assessment in terms of the Natural Character Policy 1.3 of the MSRMP. That policy specifically includes cultural heritage values as key qualities, elements and features contributing to natural character. It is surprising that an expert witness giving evidence on natural character would ignore aspects of the relevant policy.

186. A point of emphasis in the comments by landscape architects is the proposition that extensions of marinas will not be an incongruous element because of what is there already. Incongruity does not only arise because of differences in the type of development but also differences in scale and degree. What is proposed in PC 21 is the transformation of a modest but still significant marina into a much larger facility of the scale closer to Westhaven in Auckland. Changes in scale of that magnitude can create incongruity for people who are intimately familiar with the place.

187. In light of the incorrect assumptions and evidential gaps outlined above, we are left in the position of having to assess visual impacts enabling

⁶⁵ See Kidson s42A report para 6.

⁶⁶ See Kidson s42A report para 7.

⁶⁷ See Kidson s42A report para 10.

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development in MEA (B) individually and cumulatively with MEA (A) based on the expert evidence we have (including simulations), our site inspections and the evidence of people who presented submissions in writing or orally. The latter provided a rich resource and greatly assisted our understanding of the associational values of the existing landscape/seascape held by residents and tangata whenua.

188. We consider that the potential visual impacts of marina development of MEA (A) are as follows:

- (a) Serious adverse impacts at a local scale for an approximate distance of half a kilometre in an area with a high degree of natural character and valued by tangata whenua for walking and collecting kopa kopa;
- (b) High adverse visual impacts at a Bay scale and from Eastern viewpoints with a more extensive incursion into the existing natural character of The Snout;
- (c) Moderate visual impacts when viewed from Waikawa Bay foreshore at the head of the Bay and when viewed from residences at the head of the Bay.

189. We consider the potential visual impacts of marina development of MEA (B) are as follows:

- (a) Seriously adverse visual impacts at a local scale when viewed from the mouth of Waikawa Stream around to approximately Marina Viewpoint where the existing character and open space water and foreshore are highly valued by tangata whenua and many residents;
- (b) Moderate impact from the eastern slopes at higher elevations;
- (c) Moderate impact at a Waikawa Bay scale.

Effects of PC 21 on benthic ecology

190. The sole expert on benthic ecology was Mr Sneddon. Mr Sneddon is employed by the Cawthron Institute in Nelson and his expertise is in

assessing ecological effects of developments and activities in the CMA. Mr Sneddon's evidence contained two components as follows:

- (a) The physical nature and ecology of the benthic environment in the vicinity of the expanded Marina and Mooring Management Areas;
- (b) The likely effects on benthic habitats and associated flora and fauna expected to occur as a result of the future utilisation of the expanded Marina and Mooring Management Areas.⁶⁸

191. It will be seen from the scope of analysis above that analysis was not undertaken of the effects on benthic habitats and associated flora and fauna of marina development in MEA (B).

192. Mr Sneddon in presenting his evidence relied on benthic survey data from Waikawa Bay collected and compiled by Cawthron Institute over the period 2007-2009. Mr Sneddon explained that these surveys were comprehensive and included the following elements:

- (a) Collection of sediment and biological samples by divers at 20 sub-tidal sea bed stations;
- (b) Intertidal surveys of the shoreline within the proposed Marina Zone extension, the existing marina breakwater and the sand flat adjacent to the Waikawa Stream mouth;
- (c) Sub-tidal video transects fringing reef and breakwater habitats;
- (d) Remote photo-quadrant (drop images) compiled of the sea bed within the current and proposed Marina Zones and proposed areas for swing mooring fields;
- (e) Side scan sonar imaging of the sea bed throughout the current and proposed Marina Zone and swing mooring fields.⁶⁹

193. In respect of MEA (A), Mr Sneddon described the benthic habitat as follows:

⁶⁸ See Sneddon SOE para 4.1.

⁶⁹ See Sneddon SOE para 6.1.

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- (a) 430m of shoreline principally comprising mixed sandstone rocky reefs, cobble habitats and sandstone and gravel beaches;
- (b) A narrow intertidal zone with the width of reef areas ranging between 5-15m;⁷⁰
- (c) A spatial extent of fringing reef of approximately 0.4ha;
- (d) Healthy reef communities typical of those found in the wider mid-Sounds area dominated by sessile invertebrates in the intertidal zone and macro algae in the immediate sub-tidal;⁷¹
- (e) Array of assemblages including 52 invertebrates taxa including barnacles, limpets, grazing and predatory snails, mussels, starfish, urchins, ascidians and anemones;
- (f) A habitat shoreline with moderately high ecological value is affected but is not limited in extent either within Waikawa Bay or in central Marlborough Sounds.⁷²

194. In his analysis of effects of the extension into MEA (A), Mr Sneddon concluded:

- (a) That the effect was a minor ecological effect given the small benthic areas affected relative to the wider area;
- (b) MMA's have minimal ecological impacts;
- (c) That marina construction impacts and potential impacts related to biosecurity and contamination from anti-fouling agents could be managed by appropriate management distance.

195. Mr Sneddon noted that breakwaters represent artificial reefs and have been shown to sustain populations similar to reef systems. Hence, in terms of overall ecological productivity, Mr Sneddon considered there would not be a significant decline. He did however acknowledge that population distribution was not equivalent in terms of cultural harvesting needs.

⁷⁰ See Sneddon SOE para 7.2.

⁷¹ See Sneddon SOE para 7.3.

⁷² See Sneddon SOE para 8.3.

196. As a result of questioning, the hearing panel asked Mr Sneddon to undertake some further site inspections so that we could have more information on the extent of impact on harvestable species. That information was provided in an email dated 26 November 2010.⁷³ Mr Sneddon explained that there were three basic types of shoreline within Waikawa Bay:
- (a) Bedrock reef: fixed fringing reef as either steep rocky outcrops or narrow shelf;
 - (b) Cobble reef: relatively fixed imbedded cobble and boulder substrate at and below low tide;
 - (c) Beach: relatively mobile substrated mixed sand, gravel, shell and pebble.

That distribution was shown pictorially in Figure 1C in Appendix 2.

197. The two reef habitats referred to above had essentially similar intertidal species but had different accessibility characteristics. There were three edible mussels which form the greatest food resource in terms of biomass and these were: *Mytilus Edulis Galloprovincialis* (Blue mussel), *Perna canaliculus* (Greenshell mussel) and *Aulacomya atra maoriana* (ribbed mussel, kopa kopa). Other species such as turbo smaragdus (Catseye snail, pupu) and limpets occurred across both reef categories.
198. Mr Sneddon confirmed that Te Atiawa's map showing customary resources correlated with his foot survey.
199. Mr Sneddon noted that he did not survey the stream delta areas itself as it represented a separate category of habitat of approximately 1ha of soft sediment habitat.
200. The tidal area surveyed was 5.2km and included the north western shoreline from the current marina to the tip of The Snout (1.66km) and the south eastern shoreline from the jetty adjacent to the stream delta to Karaka Point (3.56km).

⁷³ See email Sneddon to Prenderville dated 26 November 2010: 17:13.
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201. Mr Sneddon noted that the north western extension (MEA (A)) proposed is approximately 350m of bedrock reef habitat with the remaining 80m being beach free of hard substrates. The 350m of reef that would be lost to reclamation in the event a marina was extended to the limit of the proposed zone extension represented 22% of the bedrock reef habitat on the north western shoreline, 11% of the bedrock reef habitat in the Bay and 9% of the total reef habitat in the Bay.
202. In reply, Mr Sneddon also provided information on the current distribution of the ribbed mussel (kopa kopa) in Marlborough Sounds. He noted that they were common throughout New Zealand and also said to have a wide distribution throughout Marlborough Sounds.⁷⁴
203. As stated, Mr Sneddon in his SOE did not assess effects of development in MEA (B). His focus, like other experts, was on the effects of rezoning areas in Waikawa Bay (namely MEA (A)) and that fitted in with how PMNZ approached the case. This was erroneous because we consider the further planning policy enablement of marina development in MEA (B) caused by PC 21 than what exists at present in the Plan means effects on benthic ecology in MEA (B) from marina development are effects of implementation of PC 21 we must consider in our analysis of PC 21.
204. We do however have some information about the benthic habitat in MEA (B) from the Cawthron report number 1615 to PMNZ.⁷⁵
205. MEA (B) part of the south western head of the Bay receives freshwater inflow from Waikawa Stream. During dry weather flows are slow but there can be significant flows in high rainfall events. The stream outflow runs along the marina's Eastern Mole reclamation, it has an extended sand flap delta area which extends up to 150m southeast of the stream channel. The delta represents a broad gentle shelving and flat area of approximately 2ha with sea grass (*Zoster sp.*) representing the dominant macrophyte cover. Cockle beds are also a feature of this area.⁷⁶

⁷⁴ See letter Cawthron Institute to PMNZ dated 15 December 2010.

⁷⁵ See Sneddon *Assessment of Potential Effects on Benthic Ecology from Proposed Rezoning of Areas in Waikawa Bay*, report number 1615, January 2010, Cawthron Institute.

⁷⁶ Ibid page 3.

206. Our conclusion on the environmental risks of implementing PC 21 benthic habitat of marina development in MEA (A) are:
- (a) Severe impact on the most accessible (i.e. at the head of the Bay and within walking distance) reef assemblages including kopa kopa along the shoreline length of MEA (A);
 - (b) Moderate impact on benthic environment generally within the 8ha extent of MEA (A) through loss of light and therefore energy to the system;
 - (c) High impact on reef assemblages including kopa kopa for an unspecified length to accommodate an intended replacement beach north of MEA (A).
207. Our conclusions on the likely environmental risks of implementing PC 21 to benthic habitat in MEA (B) are:
- (a) Severe impact on the delta habitat that remains;
 - (b) Serious impact on the remaining cockle beds in the delta associated with further declines in density and overall health.
208. Our conclusions on the risks to MEA (B) were not to any great degree assisted by expert evidence but are based on:
- (a) Present habitat conditions and the health of the cockle bed compared with the baseline data obtained by Robert Stephenson in 1977 demonstrating the effects of earlier reclamations on delta habitat;
 - (b) Acknowledged effects of marina development made by Mr Sneddon in respect of MEA (A).

Cultural effects on tangata whenua of implementation of PC 21

209. Evidence on cultural impacts came from two sources:
- (a) The evidence for or connected with Te Atiawa;

- (b) The evidence of Mr Mikaere who undertook a cultural impact assessment for PMNZ in 2008, the conclusions of which were reflected in his statement of evidence to the hearing panel.

210. These two sources of evidence reached very different conclusions:

- (a) On the one hand, Te Atiawa considered that the cultural impacts of enabling marina development were severe;
- (b) On the other hand, Mr Mikaere considered that cultural effects defined by Te Atiawa were overstated and reflexively irrational based on past grievances and injustices.

211. This 'head to head' debate on cultural impacts often centred on debates about the quality of consultation and the nature and relationship between PMNZ and Te Atiawa. Conflict arising from different world views and different aspirations is an inevitable part of the human condition and we did not consider it of assistance in achieving our task to analyse and allocate blame in relation to the causes of perceived ineffective consultation and ineffective relationships. We therefore did not find the first two paragraphs of Mr Mikaere's conclusions at paragraph 7.1 and 7.2 were examples sound, correct or helpful. These paragraphs read:

7.1. My view is that the cultural issues and concerns raised in opposing submissions are largely matters capable of resolution but for proper resolution the intransigent approach taken by the submitters is a major hurdle to overcome.

7.2. On the other hand I can understand the reasons why that is the case given the perception that tangata whenua historical issues have, in the past, been ignored or handled badly in a way that has created injustice and grievance. I suspect that intransigence in this instance is in fact a coping mechanism.

212. We consider that our task in the assessment of cultural impacts is to focus on:

- (a) The breadth of meaning of kaitiakitanga as tangata whenua understand it in that place affected by the proposal;
- (b) The breadth of relationship of tangata whenua to the particular resources and how that relationship may be affected.

That is only the way to fulfil our obligation to be 'sensitive' to Māori issues as directed by Part 2 and as explained in the judgment of Lord Cooke of Thorndon in *McGuire v. Hastings District Council*.⁷⁷

213. There are a number of features of Mr Mikaere's evidence that left us to conclude that it should be accorded little weight. These are:

- (a) Mr Mikaere noted that good resource management practice in the Māori world (Te Ao Māori) focuses on managing effects of activities and therefore has an effects focus as exists in the RMA. The problem is that Mr Mikaere, in his effects assessment has assumed the evidence for PMNZ on PC 21 was complete and based on correct assumptions. For reasons that we have already explained in this decision, that is an incorrect assumption on Mr Mikaere's part;
- (b) Mr Mikaere's evidence lacked a depth of understanding of the story of Te Atiawa and why Waikawa Bay and specifically the head of the Waikawa Bay is important. Some of that story has arisen through breaches of the Treaty of Waitangi as recorded in the Waitangi Tribunal report.
- (c) Mr Mikaere's analysis of the relevance of section 8 on our decision making was also inadequate. He was of the understanding that because the applicant is not the Crown, the full range of Treaty principles is not applicable.⁷⁸ Our view however, for reasons explained in our overall assessment at the end of this decision, is that as the resource we are addressing is principally the CMA which is administered by the Crown on behalf of all New Zealand as part of its 'commons', the full dimensions of the Treaty principles can be brought to our consideration (with such weighting as we consider appropriate) in a way that would not be the case in respect of developments on land or of other resources in private ownership;
- (d) Mr Mikaere's evidence lacked detail of the nature of the relationship of tangata whenua with the natural and physical resources affected by

⁷⁷ *McGuire v. Hastings District Council* [2001] NZRMA 557 at para 21.

⁷⁸ See Mikaere SOE para 5.19.

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PC 21. Detailed and accurate information on that relationship was able to be conveyed to us by Te Atiawa;

- (e) Mr Mikaere in his evidence in reply stated that Te Atiawa had not done anything practical to express guardianship or kaitiakitanga in Waikawa Bay. We do not accept that to be true. During Te Atiawa's history and occupation of Waikawa Bay, maintenance of the quality of the environment has been achieved. There is also a record of Te Atiawa Whanau expressing concern regarding the marina and especially any extension to the north west⁷⁹. More importantly, Te Atiawa have engaged with the Crown with a view to obtain resourcing through the Treaty settlement process to improve the coastal marine environment, particularly at the head of the Bay. That is a practical expression of guardianship.
- (f) Mr Mikaere took a reductionist approach to the concept of mauri that focussed on the practical expression of ways to mitigate the loss of or restore aspects of mauri. With all due respect to Mr Mikaere, we consider this fails to capture the holistic nature of the concept of mauri.

214. We have already outlined Te Atiawa's history in Waikawa Bay. In short, Waikawa Bay is Te Atiawa's home. It is also its mahinga kai (source of food). The dimensions of the relationship between Te Atiawa and Waikawa Bay were powerfully expressed to us through poetry, song and evidence in accordance with Te Atiawa tikanga. The crucial importance of the head of the Bay both as a source of kaimoana accessible to tangata whenua and the importance of the natural character of the space was very evident and understandable to us.

215. There is a strong sense of urgency amongst Te Atiawa for the protection of those natural and physical resources at the head of the Bay that remain. As it was explained by Bentham Ohia in his statement of evidence at paragraph 6.6:

⁷⁹ Letters of 3 January 1991, and 30 July 1990 Quickfall supplementary information to the s 42A report Decision – Waikawa Bay PC 21

6.6 At the head of the bay at Waikawa are the remnants of what was once the largest and most productive tidal estuary in Totaranui (Queen Charlotte Sounds). For generations, Te Ati Awa engaged in numerous customary practices in this area, which was a rich source of eels, kopakopa, cockles and bird life. It also provided the mud (obtained from the creek that ran through the old Waikawa camping ground) that was suitable for drying harakete. The development of the marina facilities within the bay in the late 1970's destroyed at least two thirds of the active kaimoana beds and estuary area, and compromised customary use rights irreversibly. The Waikawa Stream, once comprising a meandering stream delta, became constricted into a fixed channel system, confined by rock overlaid banks.

7.1 Ka tu tonu nga awangawanga o Te Ati Awa o nga whanau o Waikawa ano hoki. He take kei te haere, kaore ano tetahi take e mutu ana. Mau tonu nga whakaaro nei me nga nawe, kare e ngaro ana, mau tonu ra.

216. We assess the environmental risks associated with further and additional enablement of marina development in MEA (A) and MEA (B) as follows:
- (a) Marina extensions will create serious synergetic cumulative impacts on tangata whenua's relationship with the remaining natural character of the CMA at the head of Waikawa Bay;
 - (b) Marina extensions will cause serious synergetic cumulative effects on remaining kaimoana resources in the Waikawa Bay delta and associated shoreline with consequential social and cultural disablement;
 - (c) The marina extensions will severely deprive Te Atiawa of effective agency in decision making concerning the management of their significant natural resources, thereby depriving them of practical expression of:
 - (i) Māori values in resource management in Waikawa Bay;
 - (ii) Meeting their obligations to tupuna and mokopuna;

(iii) Improvements in the marine environment at the head of Waikawa Bay which has been a long held aspiration;

and consequential high levels of disablement of Te Atiawa's culture and traditions.

New Zealand Coastal Policy Statement 2010

217. At the time of our hearing the New Zealand Coastal Policy Statement 2010 had been approved by the Board of Inquiry established under the RMA to enquire into its contents but had not yet been approved by the Minister of Conservation. The Minister confirmed through her representative that the 2010 New Zealand Coastal Policy Statement is a more specific policy statement than the 1994 statement.

218. The New Zealand Coastal Policy Statement 2010 would likely be approved by the Minister of Conservation by the time the hearing panel came to deliberate. That is what has come to pass. At the hearing we invited comment as to whether or not the New Zealand Coastal Policy Statement 2010 was the policy statement that we should apply should it be approved by the Minister. The consensus was that we should and we agree.

219. We are required to give effect to the NZCPS 2010 in our deliberations (ss 67(3)(b), 75(3)(b) refer).

220. The following provisions seem to us particularly relevant:

- (a) Objective 1;
- (b) Objective 3;
- (c) Policy 2;
- (d) Policy 6.

221. These provisions provide:

Objective 1

To safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems, including marine and intertidal areas, estuaries, dunes and land, by:

- maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;
- protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and
- maintaining coastal water quality, and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

Objective 3

To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
- incorporating matauranga Maori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

Policy 2 - The Treaty of Waitangi, tangata whenua and Maori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment;

- (a) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
- (b) involve iwi authorities or hapu on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Maori;
- (c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Maori, incorporate matauranga Maori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;
- (d) provide opportunities in appropriate circumstances for Maori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance,

- and Maori experts, including pukenga, may have knowledge not otherwise available;
- (e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapu and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and
 - (i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; and
 - (ii) consider providing practical assistance to iwi or hapu who have indicated a wish to develop iwi resource management plans;
 - (f) provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
 - (i) bringing cultural understanding to monitoring of natural resources;
 - (ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
 - (iii) having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiapure, mahinga mataitai or other non-commercial Maori customary fishing;
 - (g) in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Maori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:
 - (i) recognise the importance of Maori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and
 - (ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Maori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Maori heritage, for example coastal pa or fishing villages.

Policy 6 Activities in the coastal environment

- (1) In relation to the coastal environment;
 - (a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to

- the social, economic and cultural well-being of people and communities;
- (b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;
 - (c) encourage the consolidation of existing coastal settlements and urban areas where this will contribute to the avoidance or mitigation of sprawling or sporadic patterns of settlement and urban growth;
 - (d) recognise tangata whenua needs for papakainga, marae and associated developments and make appropriate provision for them;
 - (e) consider where and how built development on land should be controlled so that it does not compromise activities of national or regional importance that have a functional need to locate and operate in the coastal marine area;
 - (f) consider where development that maintains the character of the existing built environment should be encouraged, and where development resulting in a change in character would be acceptable;
 - (g) take into account the potential of renewable resources in the coastal environment, such as energy from wind, waves, currents and tides, to meet the reasonably foreseeable needs of future generations;
 - (h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;
 - (i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment; and
 - (j) where appropriate, buffer areas and sites of significant indigenous biological diversity, or historic heritage value.

222. It is noteworthy that the Treaty of Waitangi is mentioned specifically in the New Zealand Coastal Policy Statement. This makes it plain that in district and regional plan formulation including private plan changes, the principles of the Treaty are relevant. This is because coastal resources in question are held as 'commons' as opposed to private interests and in respect of those resources it is possible to achieve administration that better reflects the principles of the

Treaty of Waitangi than is appropriate or feasible in respect of private resources.

223. We are required to give effect to the New Zealand Coastal Policy Statement. The term 'give effect to' in the context of delivering the outcomes of a higher order instrument is essentially a matter of judgement. Those words 'give effect to' were considered in the Town and Country Planning Act 1977 context by Judge Skelton in *International Motor Inn v. Waimairi District*⁸⁰ where at page 91 he said:

It is the duty of a District Council or the local planning authority to adhere to and to give effect to the provisions of an approved regional scheme. But this duty, as with most matters of land use planning, will often involve the exercise of a judgment. Consequently, whether the duty has been fulfilled in any particular case will itself be a matter of judgment. It has to be borne in mind that, as well as fulfilling its duty in respect of a regional scheme, a District Council in the course of doing so has also to fulfil the statutory obligations set out in ss 3, 4 and 36 of the Second Schedule.

Overall assessment of that dimension of PC 21 instituting a new mooring management regime

224. Our overall assessment is that the new mooring management regime dimension of PC 21 is an effective means of achieving sustainable management of open water space in the CMA in Waikawa Bay. The entire body of technical and evaluative evidence that we heard on that topic was in support of the new mooring management regime. We are satisfied also that the policies, rules and methods are an efficient and effective means of achieving the overarching settled objectives for the coastal marine 1 and 2 zones. We consider that use of a bylaw is a more effective method for management within MMA's than performance conditions or rules contained within the regional coastal plan.
225. The *raison d'être* of the new mooring management regime is to:

⁸⁰ *International Motor Inn v. Waimairi District Council* (1988) 13 NZPTA 82.
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- (a) Provide an efficient allocation of open water space;
 - (b) Effectively manage the use of moorings for the benefit of all mooring holders through a licencing system;
 - (c) Provide navigable boating corridors;
 - (d) Protect foreshore spaces for recreation and amenity;
 - (e) Provide an exclusive mooring area for Arapawa Boating Club.
226. Nevertheless, there are linkages to the marina extension dimension of PC 21 and this is reflected in the location of the MMA's and the size of the MMA's to accommodate existing mooring owners.
227. The question we had to ask ourselves is whether granting consent to all of the MMA's was appropriate if we decided not to approve that dimension of PC 21 that further or additionally enabled marina extension in MEA (A) and MEA (B). Our conclusion was that it was appropriate to approve all MMA's because even if existing mooring owners with moorings in locations within MEA (A) and MEA (B) did not relinquish their moorings but chose to continue to obtain resource consents, then MMA 1 would still be able to accommodate additional boats moored that would partially meet future demand for moorings in Waikawa Bay. The evidence of Ms Faulkner was plain that occupation of MMA 1 by moored boats was within the visual absorption capacity of Waikawa Bay.

Overall assessment of that dimension of PC 21 enabling marina development in MEA (A) and MEA (B)

228. As stated earlier in this decision, the question (and principal matter in contention) is: should further marina development in Waikawa Bay in MEA (A) and MEA (B) be further or additionally enabled as proposed in PC 21 with such necessary modifications as is appropriate, or should the existing provisions of the plan remain?
229. The options are (and we refer to them as option A and option B):

- (a) Option A - PC 21 with appropriate tweaking as appropriate; or
- (b) Option B – the existing provisions of the Plan.

230. As this is a private plan change, our analysis is a comparison between the two available choices as this is not a review of the Plan where we consider afresh what Plan provisions meet the necessary statutory tests.

231. Analysis of option A and option B against the key statutory tests can be presented in tabular form. The table is set out below. We also provide a greater analysis below of our reasoning process.

Statutory tests	Option A (PC 21)	Option B (status Quo)
Does it accord with the purpose of the RMA?	No	Yes compared with A
Does it assist MDC to carry out its functions?	No	Yes compared with A
Does it give effect to the NZ Coastal Policy Statement?	No	Yes compared with A
Is the objective the most appropriate way to achieve the purpose of the RMA?	No	Yes compared with A

232. Option A enables marina development by weighting the scales (in a policy sense) so heavily in favour of marina development of MEA (A) and MEA (B) such that issues raised by Te Atiawa especially but also the Waikawa Bay Residents Association individual submitters will face inordinate if not insuperable difficulties in preventing development. Any discretion exercised under s104 must in the end accord significant weight on the various outcomes intended by the Plan.

233. Option B on the other hand is a framework where a discretion is available to consent marina development in MEA (A) and MEA (B) with such discretion to be informed by Part 2 RMA, the New Zealand Coastal Policy Statement 2010

and with an assessment criteria that provides for the protection of interests of tangata whenua.

234. Section 6, 7 and 8 in Part 2 RMA inform but do not determine the judgment of how best to achieve sustainable management⁸¹ but in the weighing exercise, s.6 matters must be given due emphasis.⁸²
235. We consider that in certain cases (and this is one), certain directions in Part 2 have a collective magnetic power as to have a major influence on the weighing process and therefore the overall determination of what option best achieves the purpose of the Act. These are s.6(e), 7(a) and 8. We discuss these individual elements in ascending order of importance having regard to the statutory hierarchy in Part 2 reflected in the different directional phraseology of those respective sections.
236. Section 8 refers to the principles of the Treaty of Waitangi. Discussion of those principles is of course found in the well-known judgment of *New Zealand Māori Council v. Attorney General*.⁸³ That decision emphasises two core principles *partnership* and *active protection*. Subsequent judgments have elaborated on the core principles and what they entail and these principles include:
- Duty to act in good faith;
 - Duty to make informed decision through consultation;
 - Principle of redress and in a duty not to create new grievances;
 - Principle of reciprocity;
 - Principle of mutual benefit.
237. Te Atiawa’s history can be seen through the prism of the achievement of obligations of the Crown and Māori based on the spirit (or underlying principles) of the Treaty. It is an essential perspective in determining the weight to be attached to other Part 2 matters including s.7(a) and 6(e) in

⁸¹ *Watercare Services Limited v. Minhinnick* [1998] 1 NZLR 294 (CA).

⁸² *Harrison v. Tasman District Council* W42/93 (PT) and *EDS v. Mangonui County* [1989] 3 NZLR 257 (CA).

⁸³ *New Zealand Māori Council v. Attorney General* [1987] 1 NZLR 641 (CA).

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