Item 2

Volume 1

Report to the Minister of Conservation on the southeast marine reserves application

Assessment of application and analysis of views received

Department of Conservation
Te Papa Atawhai

Te Kāwanatanga o Aotearoa
New Zealand Government

Cover: Trumpeter and blue moki off the Sandfly Bay area. *Photo: © Michael Ellison*

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Executive Summary

Purpose of the report

1. The Director-General of Conservation has made an application under the Marine Reserves Act 1971 for the declaration of six new marine reserves in the southeast region of the South Island, Te Waipounamu (the Application).

2. You, as Minister of Conservation, are the decision-maker under the Marine Reserves Act in respect of the Application. Your role is to decide whether or not to uphold any objection to each proposed marine reserve and, if no objection is upheld, whether to recommend to the Governor-General to declare each proposed marine reserve either unconditionally or subject to conditions. You must also obtain the concurrence of the Minister for Oceans and Fisheries and the Minister of Transport in order to proceed with a recommendation.

3. This report provides you the Department of Conservation Te Papa Atawhai's advice and recommendations to support that decision-making.

Background and context on the Application

4. While there are some marine protection and management mechanisms in place in the southeast region of Te Waipounamu, currently there are no marine protected areas. This heightens the risk that important marine habitats and ecosystems will be degraded by cumulative pressures, including climate change. It also means that there is a reduced opportunity for scientific study in such important and representative marine areas, and that this region currently makes no contribution to a national network of marine protected areas.

5. In 2014, the Government appointed the Roopu Manaaki ki te Toka / South-East Marine Protection Forum (the Forum) to consider and recommend marine protection options for the southeast region of the South Island, for the area from Timaru to Waipapa Point (The Catlins), out to 12 nautical miles offshore, and consistent with the Marine Protected Areas Policy and Marine Protected Areas Guidelines.

6. Forum members represented Kāi Tahu, commercial and recreational fishing groups, conservation advocates, tourism interests, and local communities. The Forum was assisted and advised by Te Papa Atawhai and Fisheries New Zealand Tini a Tangaroa (the Agencies) and worked with iwi, the community, stakeholders and Government officials to present their recommendations for marine protection to Government for consideration.

7. The Forum could not agree on a single proposed network and so, in 2018, two proposed networks of marine protected areas were presented. In 2019, at the direction of then Ministers of Conservation and Fisheries, the Agencies proceeded with the statutory processes under existing legislation to consult on and progress one of the Forum's recommended networks.

8. The recommended network of marine protected areas (the Network) included the six proposed marine reserves that are part of the Application under the Marine Reserves Act. Under existing legislation, the status of marine reserves is the strongest legal protection available to the marine environment. The Network also includes five Type 2 marine protected areas and one kelp protection area, which are being progressed by Tini a Tangaroa, under the Fisheries Act 1996.

9. The proposed marine reserves and wider Network will significantly advance marine protection goals in Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020, as well as our commitment to the United Nations Convention on Biological Diversity. Both commitments recognise the importance of establishing an effective network of marine protected areas that protect a full range of biodiversity.

10. The six proposed marine reserves are mapped in Figure I.

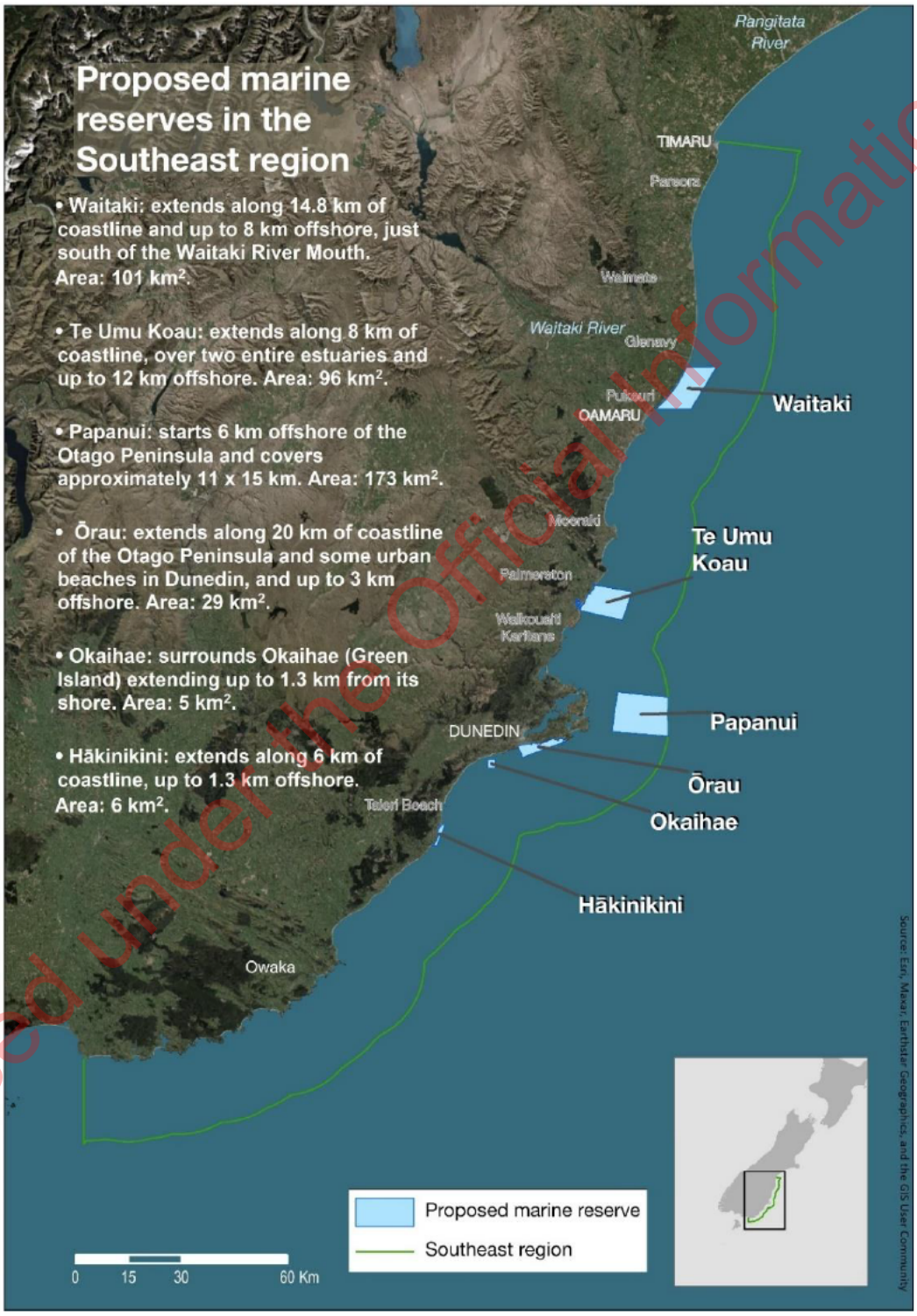

Figure I: Location and size of the proposed marine reserves in the Application

Statutory framework for your decision-making

11. An application for an Order in Council to establish a marine reserve must meet several statutory process requirements set out in sections 4 and 5 of the Marine Reserves Act. Additional statutory requirements are set out in the Marine and Coastal Area (Takutai Moana) Act 2011 (sections 47 and 48), the Ngāi Tahu Claims Settlement Act 1998 (in relation to 'statutory acknowledgements' and 'taonga species'), and the Conservation Act 1987 (section 4, giving effect to the principles of the Treaty of Waitangi).

12. Te Papa Atawhai reviewed its compliance with these requirements and considers these have been met in terms of the Application itself, public notification and consultation of the Application, Treaty partner engagement and development of advice on the Application.

13. Following is a summary of key elements of Te Papa Atawhai's assessments and recommendations.

Assessment of the benefits of the proposed marine reserves

14. You should assess the objections to each proposed marine reserve in light of the purpose of the Marine Reserves Act and the benefits of the proposed site in terms of achieving that purpose. You also need to assess the values of the proposed marine reserve and the 'overall public advantages' that would come from this area being declared a marine reserve.

15. The general purpose of the Marine Reserves Act (section 3(1)) is:

> '...preserving, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.'

16. Table I provides a summary of Te Papa Atawhai's assessment of the values and expected benefits for each of the proposed marine reserves.

17. Te Papa Atawhai considers the six proposed marine reserves collectively represent the majority of the *typical* habitats of the southeastern region, would contain *natural features* of *distinctive* quality by including the region's three biogenic habitats (kelp forest, bryozoan habitat and seagrass beds), and provide protection for the *unique* and *beautiful marine life* associated with the varied habitats. Te Papa Atawhai therefore considers the proposed marine reserves are consistent with section 3(1).

Table I: Te Papa Atawhai's summary assessment of the values and expected benefits of the proposed marine reserves

	Waitaki	Te Umu Koau	Papanui	Ōrau	Okaihae	Hākinikini
Natural features, habitats and marine life	• *Typical* boulder, gravel and mud habitats, high value biogenic habitats of kelp beds and likely rhodoliths • Freshwater and sediment input from the Waitaki River create *unique natural features*	• *Typical* kelp forests and deep reef, supporting many species • *Unique* volcanic rock reefs, reef shelves and sea caves create underwater scenery of *distinctive quality*	• *Unique* biogenic bryozoan habitat • *Typical* submarine canyon and deep-water soft sediment habitat • *Distinctive* marine communities associate with this high flow area	• *Beautiful* dive-through cave • Shorelines of volcanic rock with sandy and boulder beaches create *unique* marine habitats • Strong currents support sponges etc creating *beautiful* underwater scenery	• *Typical* rocky reef with bull kelp, algae understory and many reef fish and kōura • Contiguous land and sea protection (with existing Green Island Nature Reserve) • *Beautiful* underwater scenery	• *Typical* and *beautiful* wave-cut platforms of Otago Schist • Beds of green-lipped and blue mussels of *distinctive quality* • Rock pools, crevices and gutters create *unique* microhabitats
Opportunities for scientific study	• Proximity to a major river system • Rhodolith beds of particular interest for future research	• Diverse range of habitats in close proximity (from estuary to deep reef) • Study of kōura populations and their recovery (across shallow and deep reefs)	• Studies of deep habitat recovery after protection (bryozoan thickets and submarine canyon)	• Proximity to Dunedin and University of Otago make access for science and research straightforward • Studies of social element as site is very popular with visitors	• High value in scientific investigation into recovery of marine life following the establishment of the marine reserve • Studies of connections between terrestrial and marine ecosystems	• Opportunities for shore-based studies by researchers, school students and citizen scientists • Geology and associated marine life provide valuable opportunities for scientific study
Other values and advantages to the public	• Benefits to the region's protected species (e.g. hoiho) • Benefits to surrounding areas (including for fisheries) • Broader benefits for the public and ecotourism industry	• Increasing the productivity of species that humans harvest for food (e.g. kōura) by protecting habitat important for juvenile life stages (e.g. kelp forests) • Public access by road, walking track, estuaries	• Protection of foraging grounds of hoiho and rāpoka • Educational opportunities with features uncommon in inshore coastal waters • Improved ecosystem services and coastal health	• Likely to become iconic given its proximity to Dunedin • Excellent public access and educational values • Benefits to rāpoka and hoiho • Ecotourism enhancement	• Recreational experience (e.g. snorkelling, diving) • Easy access by boat or kayak • Ecotourism and educational opportunities	• Intertidal rock platforms and pools for public enjoyment • Easy public access for recreation at two locations
Notable contribution to the proposed Network	• Only proposed marine reserve protecting moderately exposed shallow gravel habitat	• Only proposed marine protected area protecting a viable example of deep reef habitat type • Only site with connectivity from estuaries, shallow and deep reef habitats	• Only proposed marine reserve to include submarine canyon, bryozoan and deep-water sand habitats	• Includes one of only two boulder beaches in the southeast region • Adequately represents shallow sand, rocky reef habitats	• Only proposed marine protected area connected with protected land • Includes exposed intertidal and shallow reefs	• Includes exposed shallow reef habitat linked to proposed Ōrau and Okaihae marine reserves • With adjacent estuary, proposed protection would provide benefits for estuary and coastal habitats and species (e.g. eel, whitebait)

Treaty Partner engagement and our advice

18. The region covered by the Forum is located entirely within the Kāi Tahu takiwā and overlaps the rohe moana of six papatipu rūnaka. Following the Forum process, Crown engagement with Kāi Tahu has continued through the process of preparing advice to Ministers on the Forum's recommendations and alongside the statutory public consultation process for the proposed marine reserves. The aim of engagement was to further understand Kāi Tahu rights, interests and views in relation to the establishment and management of the proposed Network, and to understand and work through the issues raised. Te Papa Atawhai considers this engagement process has fulfilled the obligations to give effect to the Treaty of Waitangi principles (in particular partnership and informed decision making) as required by section 4 of the Conservation Act.

19. Kāi Tahu expect the proposed Network, and resulting displacement of fishing effort, will impact on their commercial and customary non-commercial rights and interests. To mitigate this expected impact, Kāi Tahu proposed re-balancing and co-management measures. Agencies and Kāi Tahu formed 'the Rōpū' (working group) and worked through the proposed measures, some of which could not be progressed.

20. In late 2021, Kāi Tahu outlined to Ministers that while good progress had been made in addressing their concerns, points of disagreement remain. Kāi Tahu are looking for solutions mutually acceptable to them and the Crown and seek:

> 'a package of measures that addresses the displacement of recreational and commercial fishing effort (addressing the biological impacts of Marine Protected Area (MPA) establishment), provides opportunities for us to exercise our kaitiaki responsibilities and rangatiratanga, and to uphold our mana.'

21. Kāi Tahu confirmed they are seeking that you and the Minister for Oceans and Fisheries agree to the package of measures as part of your decision-making on the proposed Network or a commitment from you both that these matters will be addressed immediately after decisions.

22. Table II summarises all proposed measures discussed during engagement, and Te Papa Atawhai's recommended implementation for each. Te Papa Atawhai considers that to declare each of the proposed marine reserves on the basis of the recommendations made would fulfil the Crown's obligations in relation to the Treaty of Waitangi.

23. Some aspects of implementation remain uncertain and will need to be worked through once Ministerial decisions on the proposed marine protected areas are made (e.g. support by Agency resourcing, specific role of the co-management groups or Kāi Tahu rangers). Te Papa Atawhai does not consider this is problematic for your ability to progress the decisions on the proposed marine reserves.

Table II: Rebalancing and co-management measures proposed by Kāi Tahu to mitigate expected impacts on their customary and commercial rights and interests, and Te Papa Atawhai's recommendations on each

Key: ~ indicates proposed measure progressed by the Rōpū; * indicates measure that was not progressed by the Rōpū; # indicates new measure introduced by Kāi Tahu on 30 November 2021 during meeting with Ministers

Proposed measure	Kāi Tahu views	Te Papa Atawhai recommendations (apply to each marine reserve you approve, unless specified)
~ Formal co-management	Kāi Tahu want to co-manage the Network with Agencies. Co-management will reflect tino rangatiratanga (self-determination), enhance the retention and transfer of knowledge through generations and allow for the maintenance of Kāi Tahu connection to their takiwā.	• You direct that formal co-management arrangements are to be implemented, guided by the work undertaken to date by the Rōpū and the Rōpū co-management sub-committee. • Co-management means working jointly as much as possible on operational matters, 9(2)(g)(i) 9(2)(g)(i) It does not include joint decision making at the level of statutory decisions for the Director-General or Minister of Conservation.
~ Appointment of Kāi Tahu rangers	Kāi Tahu want to be directly involved in the active management of marine protected areas. Kāi Tahu have aspirations for Crown support (funding) and seek written Ministerial commitment to address before or immediately after establishment.	• You direct that Kāi Tahu ranger roles are provided for within the formal co-management arrangements implemented, guided by the work to date of the Rōpū sub-committee, noting that the details of the rangers' roles, and the resourcing and support from Agencies cannot be determined at this point.

~ Provisions for periodic and generational review	Kāi Tahu want data collected and 5-year review to respond to any impacts on their customary protected area, and a 25-year generational review so that future generations can assert tino rangatiratanga and exercise kaitiakitanga.	• You direct that periodic reviews are incorporated into the formal co-management arrangements implemented. (Periodic review will be largely an operational matter for the co-management groups to consider.)
		• A condition in the Order in Council to require generational reviews to be undertaken. The condition would provide for the following:
		  • The Minister of Conservation would undertake the generational review.
		  • The generational review would be undertaken within 25 years of the marine reserve being declared and at subsequent 25-year intervals.
		  • The Minister of Conservation would be required to consult with Ngāi Tahu Whānui as part of undertaking the generational review.
		  • Generational review of any marine reserve should be considered in the context of the proposed Network because that was how they were developed by the Forum (i.e. the value of each site was balanced and considered against the total components of the proposed Network).

~ Boundary amendment to the proposed Te Umu Koau marine reserve	The site extends over areas of offshore deep reef that are seasonally important for kōura. Prohibiting commercial fishing on these grounds would impact on their people.	• An amendment to the boundary of the proposed marine reserve to mitigate the interference with the commercial kōura fishery. We recommend the boundary be amended as per the D1-A proposal put forward initially by Kāi Tahu. • This conclusion is likely to differ from the perspective of Kāi Tahu in terms of what they consider as necessary to fulfil Treaty obligations, particularly to 'rebalance' the expected economic impacts of the proposed marine protected areas.

~ Provisions for continued enhancement of mātauraka Māori through wānaka	Kāi Tahu are concerned that the prohibition on taking marine life interferes with the inter-generational connection they have traditionally held with their rohe moana.	• A condition in the Order in Council that would provide for members of Ngāi Tahu Whānui to continue undertaking activities that would otherwise constitute an offence where:
		  • those activities are undertaken as part of organised wānaka
		  • the activities are for the purpose of enhancing mātauraka
		  • Te Papa Atawhai (or the rohe specific co-management group once established) is notified by the relevant papatipu rūnaka of the proposed wānaka in advance, and provided detail of the activities (e.g. the period when wānaka activities would be undertaken and where, details of activities to be carried out and species affected).
		• Mātauraka Māori/wānaka activities would be subject to any other legal requirements and must be consistent with the purpose of the Marine Reserves Act.

~ Provisions for the retrieval of kōiwi tākata and archaeological artefacts, and access to cultural materials	Kāi Tahu want the retrieval of kōiwi tākata in line with the Kāi Tahu Kōiwi Tāngata (human remains) Policy, and access to cultural materials in line with the Ngāi Tahu Cultural Materials Policy, to be unaffected.	• A condition in the Order in Council that would allow for Kāi Tahu papatipu rūnaka with mana moana (or anyone authorised by said papatipu rūnaka) to retrieve kōiwi tākata and archaeological artefacts consistent with the Ngāi Tahu Kōiwi Tāngata (human remains) Policy. This activity would be subject to any other legal requirements. It does not apply to the proposed Papanui marine reserve, which does not border land.
		• With the exception of the proposed Papanui and Okaihae marine reserves, a condition in the Order in Council that provides for Kāi Tahu (Ngāi Tahu Whānui) to be able to take of all or part of dead marine mammals in accordance with the usual Marine Mammals Protection Act provisions. The condition should be drafted to cover the following aspects (which are similar to those in the Fiordland (Te Moana o Atawhenua) Marine Management Act):
		  • all or part of a marine mammal may be taken if it washes up dead, or strands and dies (permit required)
		  • bones, teeth, ivory or ambergris may be collected from a marine reserve if they have naturally separated from a marine mammal (no permit required, so long as Te Papa Atawhai is notified)
		• The recommended condition does not fully align with Kāi Tahu's preferred outcome, which is a general condition to provide for access to cultural materials.

~ Continued Kāi Tahu access to any approved SEMP marine reserve to utilise Kāi Tahu's MPI *Undaria* permit	*Undaria pinnatifida* is an invasive exotic seaweed which can only be harvested in accordance with permitting requirements under the Biosecurity Act 1993. Kāi Tahu have a permit to harvest *Undaria* in many areas within the Forum region.	• A condition in the Order in Council that would provide for the removal of *Undaria pinnatifida* (unattached or attached), as long as all other legal requirements relating to the removal are complied with (e.g. Biosecurity Act and Resource Management Act). • Te Papa Atawhai would require notice to the relevant Te Papa Atawhai Operations Team of the *Undaria* harvest.

Proposed measure	Kāi Tahu views	Te Papa Atawhai recommendations (apply to each marine reserve you approve, unless specified)
	Kāi Tahu want 9(2)(g)(i) rights to harvest in all proposed marine reserves except for Papanui, for the purpose of controlling *Undaria*.	
~ Naming and pou whenua for each new marine protected area	Preference that pou whenua should be in place for each of the approved marine protected areas. Papatipu rūnaka with mana moana provided 'placeholder' te reo Māori names for the proposed marine protected areas.	• You progress the use of te reo Māori names confirmed by papatipu rūnaka through the Rōpū hui, noting that the ultimate decision on the use of te reo names is subject to review by the New Zealand Geographic Board. • You direct the placement of pou whenua except for the proposed Papanui and Okaihae marine reserves.
# Changes to recreational take of pāua in PAU5D	Kāi Tahu want changes to the management of recreational pāua harvesting to address what they see will be the impacts of displaced recreational take on their commercial and non-commercial customary rights and interests. Measures sought are annual recreational allowance for pāua in PAU5D to be reduced from 22 tonnes to 10 tonnes along and a number of operational changes to support the management of recreational pāua take.	• The consideration and implementation of this proposed measure is a matter for Tini a Tangaroa and the Minister for Oceans and Fisheries. 9(2)(j)
# Commitment sought in relation to application for customary marine title	Ngāi Tahu Whānui have an application for customary marine title under te Takutai Moana Act. Kāi Tahu want a commitment from Ministers that the proposed marine protected areas will not 'pre-empt or negatively impact' their application.	• You record as part of your decision-making that a decision to declare one or more of the proposed marine reserves is *unlikely*, and not intended, to pre-empt or negatively impact on the Ngāi Tahu Whānui application for customary marine title.
* Financial compensation and ex gratia payments	Kāi Tahu suggested financial compensation (i.e. buy back of quota) and/or ex gratia payments as a means of achieving rebalancing the economic impacts of the proposed Network, to address the impact on established fisheries and loss of future opportunities to develop fisheries for species that have yet to be introduced into the quota management system.	• The Crown does not need to consider compensation or ex gratia payments. This is because the Marine Reserves Act builds in a test to prevent undue interference with commercial interests and because the recommended Te Umu Koau boundary and the 9(2)(j) gives effect to the principles of partnership and active protection, by achieving what is reasonably required to actively protect the relevant Treaty interest. This outcome would therefore be consistent with your obligations in terms of section 4. Paying compensation would set a significant precedent for future environmental protection processes
* Coordinated establishment of customary protected areas and marine protected areas	Kāi Tahu initially requested Agencies slow down the southeast marine protection process so that it could be considered alongside their aspirations for customary protected areas in the region. This relates to Kāi Tahu concerns regarding the impact of the proposed marine protected areas on their non-commercial customary fishing rights.	• The passing of proposed change to mātaitai and taiāpure regulations are matters that will need to be progressed by Tini a Tangaroa. Agencies can provide you with a further update on the progression of these changes prior to making your decisions on the proposed marine reserves if required.
* Preferential access to commercial development opportunities—eco-tourism	Kāi Tahu want Te Papa Atawhai to consider providing them with preferential access to eco-tourism opportunities once the marine protected areas are established.	• In the event that the marine protected areas are established, permission for eco-tourism would be addressed through alternative statutory processes such as the Marine Mammals Protection Regulations.
* Integrated management of marine protected areas and customary protected areas	Kāi Tahu view the proposed marine protected areas as ineffective in terms of managing land-based effects on the marine environment. Kāi Tahu seek an integrated approach to managing marine protected areas and customary protected areas within the context of the wider marine environment, in particular, through working with local authorities.	• It is anticipated that the co-management structures proposed by the Rōpū will provide avenues for engagement with other relevant agencies (in particular local authorities) within the region. This will support and enhance the opportunities for integrated management as sought by Kāi Tahu.

Public submissions received on the Application

24. Statutory public consultation ran from 3 June 2020 to 3 August 2020.

25. In total, submissions were received from 4,056 individuals or organisations through the public submission process. Each submitter could make a submission on the proposed Network overall (including all marine reserves), and/or on specific proposed marine reserves. Twenty-nine individuals or organisations identified as 'affected iwi, hapū, or whānau'. Fifteen individuals or organisations identified as Māori who do not whakapapa to the Kāi Tahu rohe (classified for this analysis as 'other Māori'). Direct engagement with Kāi Tahu as the Crown's Treaty Partner was analysed separately to these public submissions.

26. There were 3,908 submissions received on the Network overall (i.e. all components of the Network, including the six proposed marine reserves), with 90% in support, noting that 93% (3,271) of these used an online template provided by Forest & Bird.

27. Submissions from 'affected iwi, hapū, or whānau' indicated much lower levels of support for the proposed Network (15%) and each of the proposed marine reserve sites (between 12-29%). Lower levels of support were also reflected in submissions received from 'other Māori' (33% support for the proposed Network and between 9-33% for the proposed marine reserve sites).

28. While these numbers provide context, your decision-making is guided by the statutory framework outlined in this report.

Stage 1 assessment - objections received and Te Papa Atawhai's advice (section 5(6) of the Marine Reserves Act)

29. Te Papa Atawhai has considered all objections made in relation to the proposed marine reserves against the criteria of section 5(6) of the Marine Reserves Act. This includes objections to the proposed Network (these are relevant to your decision-making) and objections specifically to the proposed marine reserves.

30. Te Papa Atawhai's analysis was informed by the body of science and other information already developed through the Forum process and by our science, technical, policy and legal expertise. Published literature, case law, and information provided by other local and central government agencies also assisted analysis of issues raised in submissions (including the most up to date fisheries data available provided by Tini a Tangaroa at the time of writing).

31. Table III sets out the topics of objections received on the proposed Network and the six proposed marine reserves under section 5(6)(a) - 5(6)(e), including those '*views*' from submitters identified as 'affected iwi, hapū, or whānau', 'other Māori' or 'all other submitters', and our advice on those objections.

32. In some cases, Te Papa Atawhai considers that undue interference would be likely, and we make recommendations to mitigate the interference so that it is not undue (see green cells, Table III). In all other respects, Te Papa Atawhai concludes that, while there would be some interference with other existing uses and interests specified in section 5(6) of the Marine Reserves Act if the proposed marine reserves are established, the nature and magnitude of the interference would not be undue, nor contrary to the public interest (see blue cells, Table III). In reaching this conclusion Te Papa Atawhai has considered the values of the proposed marine reserves both individually and as part of the proposed Network, and the extent to which they are expected to fulfil the purpose of the Marine Reserves Act.

33. Te Papa Atawhai has also considered whether a decision to not uphold any objections made in relation to the proposed Network and each of the proposed marine reserves would fulfil the Crown's statutory obligations in relation to the Treaty of Waitangi, including under section 4 of the Conservation Act. This is considered in light of our assessment that to declare the proposed marine reserves with the recommendations resulting from the direct Kāi Tahu engagement to date would fulfil the Crown's obligation in relation to the Treaty of Waitangi (Table II). Te Papa Atawhai considers that no additional matters were raised in objections from submitters identified as 'affected iwi, hapū, or whānau' or 'other Māori' submitters that would change that assessment.

34. Te Papa Atawhai's overall assessment in relation to each of the proposed marine reserves, and subject to the recommended mitigation measures, is that no objection should be upheld for the purposes of section 5(6) Marine Reserves Act.

Table III: Summary of objections to the proposed Network and specific proposed marine reserves under each of the Marine Reserves Act section 5(6) tests, and Te Papa Atawhai's recommended actions

Key: **Objection + 'type' of objector**

- ○ Objection(s) received from 'affected iwi, hapū, or whānau'
- ^ Objection(s) received from 'other Māori'
- ≈ Objection(s) received from 'all other submitters'

Te Papa Atawhai recommended action

- No undue interference, or not contrary to the public interest, recommend objection is not upheld
- Likely undue interference or likely contrary to the public interest, recommend objection be mitigated by stated measure
- Recommend objection is upheld and marine reserve should not be declared

Marine Reserves Act section	Topic of objection	Network (all marine reserves)	Waitaki	Te Umu Koau	Papanui	Ōrau	Okaihae	Hākinikini	Recommended action
Estate or interest in land: 5(6)(a)	Impacts on adjoining property values and interests		≈	≈				≈	
	Interference with consented discharge from Waitaki irrigation scheme		≈						Condition to allow consented discharge and monitoring to continue
	Interference with provision of Dunedin City Council wastewater services					≈	≈		Conditions to allow municipal wastewater services
Navigation: 5(6)(b)	Impacts on vessel access and safety			≈		^ ≈		≈	Condition to allow vehicles on foreshore to launch/retrieve vessels
Commercial fishing: 5(6)(c)	Financial/economic impacts (on commercial fishers and associated industry/individuals)	○	≈	○ ^ ≈	≈	≈	≈	≈	Boundary amendment to exclude a key area of kōura commercial fishing habitat from the proposed marine reserve
	General impacts (cumulative restrictions, property rights, or generational loss)	≈	≈	≈	≈				
	Displacement of fishing effort (depletion of fish in other available fishing areas, spatial conflicts)	≈		^ ≈		≈	≈	≈	
	Safety for potting and fishing (concentration of effort in remaining areas)	≈		≈		≈			
	Oppose condition in Application to allow take of beach stones (interference with juvenile pāua habitat)	≈							
	Negative impacts on kōura/rock lobster recruitment			○		≈			
	Impacts on future aquaculture developments			≈	≈				
	Maritime safety risks (associated with needing to travel further from Taieri River mouth)							≈	
Recreational usage: 5(6)(d)	Impacts on recreational fishing and seafood harvesting	○ ^ ≈	≈	≈	≈	○ ^ ≈	○ ≈	≈	
	Increased safety risks (travel further offshore, other areas viewed as less safe)	^ ≈	≈	○ ≈	○ ≈	○ ^ ≈	≈	≈	
	Displacement of recreational fishing (more pressure on other available fishing areas)	^ ≈	≈	○ ≈	≈	≈	≈	≈	
	Impacts on gamebird hunting			^ ≈					
	Manage fishing activity rather than establish marine reserve			^ ≈		○			
	Other suitable fishing locations in Application (were not identified, not suitable, or not relevant to decisions)			≈	≈	^ ≈	≈		
	Loss of opportunity to gather shells and driftwood					○ ≈			
	Impacts on fishing competitions					≈			
Public interest: 5(6)(e)	Impacts on customary interests (customary harvest, breach of Treaty rights, etc.)	○ ^ ≈	○ ^	○ ^ ≈	○ ^	○ ^	○ ^	○ ^ ≈	
	Question the need or benefit of the proposal (no impact from fishing, poor sea conditions, no threat etc.)	○ ^ ≈	≈	^ ≈	○ ≈	^ ≈	≈	≈	
	Lack of comprehensive national marine protection plan	○							
	Need for a marine reserve in The Catlins	≈							
	Question the integrity of the Forum and/or statutory public consultation process	○ ≈	≈	≈	≈	≈	≈	≈	
	Amendment to the proposed marine reserve/s (site too small or more/different (better) site(s) are required etc.)	≈	≈	≈	≈	○ ≈	≈	≈	
	Question the validity of the marine reserve applications (conflict of interest, Marine Reserves Act outdated etc.)	≈							
	Impacts of the global COVID-19 pandemic (relates to economic impact)	≈		^ ≈		≈			
	Lack of management of non-fishing threats (land-based pollution, climate change not addressed etc.)	≈	≈	○ ≈	≈	≈	≈	≈	
	Public access is poor		≈				≈	≈	
	Benefits of kina harvesting			≈			≈		
	Stony Creek estuary is not a marine habitat			≈					
	Waterfowl management in estuaries			≈					Conditions to allow for firearm hunting
	Financial/economic impact (reduced number of recreational fishers visiting)			≈					
	Increased tourism-related threats to hoiho (yellow-eyed penguin)			≈					
	Loss of opportunity to take sand for the purpose of flood protection					≈			
	Alternative management options rather than establish marine reserve (fishing restrictions, education etc.)			^ ≈	^ ≈	^ ≈	^ ≈	^ ≈	

Stage 2 assessment – statutory considerations section 5(9) of the Marine Reserves Act

35. Section 5(9) of the Marine Reserves Act provides that a recommendation to the Governor General on each of the proposed marine reserves can be made unconditionally or subject to conditions.

36. Table IV outlines Te Papa Atawhai's advice recommending Order in Council conditions for activities that would be allowed to continue in each proposed marine reserve, and amendments to the proposed marine reserves. Table IV also provides our recommendations for other measures arising from Crown engagement with Kāi Tahu that are not Order in Council conditions but require your agreement or direction. In reaching our recommendations, Te Papa Atawhai has considered the relevant obligations under the Treaty of Waitangi.

37. Under section 5(9), you must also decide whether declaring each of the marine reserves will be in the best interests of scientific study, for the benefit of the public and expedient. Te Papa Atawhai's advice on these criteria used our analysis under our assessment of the benefits of the proposed marine reserves and have included reference to additional relevant information raised in submissions of support.

38. By protecting a range of representative habitats and unique features, Te Papa Atawhai considers the proposed marine reserves inclusion in a network of marine protected areas to be in the national interest. Each marine reserve would protect regionally or nationally important natural features and provide unique scientific opportunities. Implementing multiple marine reserves would also provide the opportunity for scientific study of responses to different management approaches (e.g. marine reserves, Type 2 marine protected areas, customary protected areas) across different habitat types in the region.

39. Implementing the six proposed marine reserves is expected to contribute to public wellbeing and enjoyment by creating opportunities for people to experience areas that are returning to a more natural state, including directly through recreational activities and indirectly through their intrinsic value as protected natural areas. Other benefits for the public include protecting habitat that is critical for certain life-stages of harvested species (benefits for fisheries) and for protected species, enhanced education and ecotourism opportunities, and contributing towards mitigating and adapting against the effects of climate change.

40. Making progress towards New Zealand's commitments to protect marine habitats and biodiversity under Te Mana o te Taiao: Aotearoa New Zealand Biodiversity Strategy 2020 is expedient. Establishing the proposed marine reserves as part of a regional network would represent a significant step towards realising the nationwide goals in this strategy. It is also consistent with the support for the proposed marine reserves indicated by 86%-90% of submitters in the public consultation process across the six proposed marine reserves.

41. While protected species conservation is not the primary reason for establishing marine reserves, the likely habitat and biodiversity benefits would also benefit these species. Many of these species are either Threatened or At Risk, so we consider any steps to aid their recovery is expedient.

42. Te Papa Atawhai's assessment in relation to each of the marine reserves is that to declare the areas as marine reserves will be in the best interests of scientific study, will be for the benefit of the public and will be expedient (in accordance with section 5(9) of the Marine

Reserves Act), including with our recommended conditions to be included in the Order in Council and our recommendations for other measures.

43. Your assessment as to whether or not to declare these proposed marine reserves should also consider whether declaration would be consistent with the relevant provisions of the Conservation General Policy and the Otago Conservation Management Strategy. Te Papa Atawhai conducted a full assessment of which provisions are relevant to your assessment, and how a decision to declare each of the proposed marine reserves with the recommendations would be consistent with those provisions.

44. Te Papa Atawhai considers a decision to declare the proposed marine reserves with the recommendations listed would be consistent with all relevant provisions of these statutory planning instruments.

Table IV: *Summary of recommended Order in Council conditions and other measures for each of the proposed marine reserves*

Key: **Source of recommended Order in Council condition or other measure**

- ○ Treaty partner engagement
- △ Objections received via the statutory consultation process or matters raised during consultation with submitters (section 5(6) of the Marine Reserves Act)
- × Proposed to be provided for in the Application for the proposed marine reserve
- □ Engagement with the Ministry of Transport

Te Papa Atawhai recommendation for action

- ✓ Measure is applicable to the proposed marine reserve

	Proposed measures to mitigate potential impacts of marine reserves	Waitaki	Te Umu Koau	Papanui	Ōrau	Okaihae	Hākinikini
Order in Council conditions	For members of Ngāi Tahu Whānui, continued enhancement of mātauraka Māori and wānaka ○	✓	✓	✓	✓	✓	✓
	For Kāi Tahu papatipu rūnaka with mana moana, retrieval of kōiwi tākata and archaeological artefacts ○	✓	✓		✓	✓	✓
	For members of Ngāi Tahu Whānui, retrieval of dead marine mammals and marine mammal parts ○	✓	✓		✓		✓
	Removal of *Undaria pinnatifida* ○	✓	✓		✓	✓	✓
	Require generational reviews ○	✓	✓	✓	✓	✓	✓
	Fossicking of beach materials △ ×	✓	✓		✓		✓
	Existing discharge of contaminants and associated monitoring △ ×	✓			✓	✓	
	Vehicle access over the foreshore for launching or retrieving a vessel △ ×		✓		✓		
	Vehicle access over the foreshore for lifeguard duties ×				✓		

	Proposed measures to mitigate potential impacts of marine reserves	Waitaki	Te Umu Koau	Papanui	Ōrau	Okaihae	Hākinikini
	Existing structures, replacement of existing structures and associated maintenance ✕				✓		
	Future structures at Oceans Beach, specifically sand sausages and Reno mattresses, including maintenance and replacement by 'like for like' structures ✕				✓		
	Existing remedial activities associated with the historic landfill at Kettle Park, including any associated monitoring ✕				✓		
	Existing deposition of sand at Oceans Beach ✕				✓		
	Disturbance of the foreshore at the Tomahawk Creek river mouth for the purposes of flood protection ✕				✓		
	Specific infrequent discharges for a finite period △				✓		
	Future stormwater discharges and associated structures △				✓		
	Future erosion protection measures at St Clair and St Kilda beaches △				✓		
	Gamebird and unprotected waterfowl hunting △		✓				
	Pollution response □	✓	✓	✓	✓	✓	✓
Other measures	Amend the boundary to exclude key kōura fishing habitat ○ △		✓				
	Amend the boundary to allow for flood protection activities ✕				✓		
	You direct that formal co-management arrangements with Kāi Tahu are to be implemented ○	✓	✓	✓	✓	✓	✓
	You direct that Kāi Tahu ranger roles are provided for (noting that details of roles, resourcing and support from Agencies cannot be determined at this point) ○	✓	✓	✓	✓	✓	✓
	You direct that periodic reviews are incorporated into the formal co-management arrangements implemented ○	✓	✓	✓	✓	✓	✓
	You progress the use of te reo Māori names confirmed by papatipu rūnaka (subject to review by the New Zealand Geographic Board) ○	✓	✓	✓	✓	✓	✓
	You direct the placement of pou whenua for any new marine reserves ○	✓	✓		✓	✓	✓
	You record as part of your decision-making that a decision to declare one or more of the proposed marine reserves is unlikely, and not intended, to pre-empt or negatively impact on the Ngāi Tahu Whānui application for customary marine title ○	✓	✓	✓	✓	✓	✓

Conclusion and recommendations to support your decision-making

45. Based on the Crown engagement with Kāi Tahu and consideration of views received from 'affected iwi, hapū, or whānau' and 'other Māori' submitters, Te Papa Atawhai considers that the declaration of the proposed marine reserves on the basis of the recommendations made would be consistent with the Crown's obligations in respect of the Treaty of Waitangi.

46. Te Papa Atawhai's overall assessment in relation to the proposed marine reserves is that:

- the procedural requirements of section 4 and section 5 of the Marine Reserves Act have been met
- subject to the recommended mitigation measures, we do not recommend upholding any objections received under section 5(6) of the Marine Reserves Act
- to declare the areas as marine reserves will be in the best interests of scientific study, will be for the benefit of the public and will be expedient (in accordance with section 5(9) of the Marine Reserves Act), including with our recommended boundary amendments, recommended conditions to be included in the Order in Council, and our recommendations for other measures arising from Treaty partner engagement
- to declare the proposed marine reserve on the basis of the recommendations listed above would fulfil the Crown's obligations in relation to the Treaty of Waitangi.

47. Te Papa Atawhai's recommendation, therefore, is that you proceed to seek the concurrence of the Minster for Oceans and Fisheries and the Minister of Transport to recommend to the Governor-General the making of Orders in Council to declare each of the six proposed areas, subject to boundary amendments, conditions and measures, as marine reserves.

1 Purpose

48. The Director-General of Conservation has made an application under the Marine Reserves Act 1971 for the declaration of six new marine reserves in the southeast region of the South Island, Te Waipounamu (the Application – Appendix 1). The Application is part of a wider project using existing legislation to establish a network of marine protection measures in the region. Other marine protection measures are being progressed by Fisheries New Zealand Tini a Tangaroa, under the Fisheries Act 1996.

49. You, as Minister of Conservation, are the decision-maker under the Marine Reserves Act in respect of the Application. Your role is to decide whether or not to uphold any objection to each proposed marine reserve and, if not, whether to recommend to the Governor-General to declare each proposed marine reserve either unconditionally or subject to conditions. You must also obtain the concurrence of the Minister for Oceans and Fisheries and the Minister of Transport in order to proceed with a recommendation.

50. This document provides you advice to support that decision-making. It has been informed by statutory public consultation and Treaty partner engagement and should be read in conjunction with decision briefing 23-B-0199.

51. The Marine Reserves Act also provides for an independent report to be sought by the Minister of Conservation where an applicant is the Director-General of Conservation (as is the case for this Application). An independent report has been commissioned in respect of the Application and will be provided to you for consideration alongside this advice.

2 Background

2.1 The need for marine protected areas in the southeast of Te Waipounamu

52. The *Our Marine Environment 2022* report[1] outlines the decline in Aotearoa New Zealand's marine biodiversity, and condition and extent, because of activities on land and at sea. This decline is intensified by the impacts of global contributors such as climate change.

53. Marine protected areas can help address some of the pressures facing the marine environment by providing specific areas where single and cumulative human activities are managed, allowing for the protection and restoration of ecosystems and habitats.

54. Protecting an ecologically representative range of habitats and ecosystems is one way to mitigate the risk associated with making management decisions when we don't fully understand our impacts, how they interact and the effects of other threats (e.g. climate change).

55. Because marine protected areas have reduced pressures compared to the surrounding environment, they are important scientific reference areas for study. Marine protected areas provide opportunities to learn about how marine ecosystems recover when some human impacts are removed, and to monitor and study large-scale, long-term patterns or changes in the environment over time (e.g. El Niño or climate change). Learning from these reference areas can increase our ability to understand and effectively manage the pressures on the marine environment.

56. While there are some marine protection and management mechanisms in place in the southeast region of Te Waipounamu, currently there are no marine protected areas.[2] This heightens the risk that important marine habitats and ecosystems will be degraded as they are affected by cumulative pressures, including climate change. It also means that there is a reduced opportunity for scientific study in such important and representative marine areas. Further, and as discussed below, the lack of marine protected areas means this region currently makes no contribution to a national network of marine protected areas or to New Zealand's international commitments for conservation of biodiversity through the establishment of marine protected areas.

[1] Ministry for the Environment, Stats NZ, 2022. New Zealand's Environmental Reporting Series: Our marine environment 2022. 29 p.

[2] As defined in: Department of Conservation; Ministry of Fisheries 2008: Marine Protected Areas: Classification, Protection Standard and Implementation Guidelines, Wellington. 54 p at paragraph 14 – 15.

2.2 Marine protected areas policy context

2.2.1 International context

57. As a signatory to the United Nations Convention on Biological Diversity, in December 2022 New Zealand joined nearly 200 countries to agree to the Kunming-Montreal Global Biodiversity Framework[3], to protect a third of the planet for nature by 2030 including the following (abbreviated) targets:

- Target 1: Ensure that all areas are under participatory, integrated and biodiversity inclusive spatial planning and/or effective management processes addressing land and sea use change.
- Target 2: Ensure that by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are under effective restoration, in order to enhance biodiversity and ecosystem functions and services, ecological integrity and connectivity.
- Target 3: Ensure and enable that by 2030 at least 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognising indigenous and traditional territories, where applicable, and integrated into wider landscapes, seascapes and the ocean.

58. The United Nations Sustainable Development Goals, which New Zealand is also committed to, includes a target of conserving at least 10 per cent of coastal and marine areas.

59. Currently, New Zealand has 17,697 km^2 or 0.4% of its marine and coastal area[4] in marine protected areas that meet the strictest definition of the International Union for the Conservation of Nature protected area categories[5] (those areas protected as marine reserves under the Marine Reserves Act). The status of marine reserve is the strongest legal protection available to the New Zealand marine environment under current legislation. A range of activities, including all forms of fishing, are generally prohibited.

60. In addition to marine reserves, New Zealand protects a further 1,268,369 km^2 under a variety of lesser protection measures:

- 27.4% of the marine and coastal area is protected from fishing impacts on the benthic marine environment and a further 2.6% are seamounts protected from trawl impacts.
- 0.7% of the marine and coastal area is in marine mammal sanctuaries that are spatial conservation measures applied to manage risks to marine mammals.
- 0.1% of the marine and coastal area is in 'Type 2' marine protected areas. Type 2 marine protected areas are management tools that meet New Zealand's domestic protection standard (discussed further below) for marine protected areas. The

[3] https://www.cbd.int/article/cop15-final-text-kunming-montreal-gbf-221222.

[4] The marine and coastal area is comprised of the Territorial Sea (an area of water not exceeding 12 nautical miles in width, measured seaward from the territorial sea baseline. https://www.linz.govt.nz/sea/nautical-information/maritime-boundaries/maritime-boundary-definitions#ts.) and the Exclusive Economic Zone. 9.8% of New Zealand's territorial sea and 0% of the Exclusive Economic Zone is currently in marine protected areas.

[5] Dudley, N. 2013. Guidelines for applying protected area management categories including IUCN WCPA best practice guidance on recognising protected areas and assigning management categories and governance types. International Union for Conservation of Nature, 86p.

minimum level of protection required for an area to be a Type 2 marine protected area is the prohibition of bottom trawling, Danish seining and dredging (commercial and amateur).

61. The distribution of marine protection is uneven across the 14 coastal marine biogeographic regions[6] that New Zealand's territorial sea is divided into. A large proportion (96.5%) of marine reserve coverage is located around offshore islands in the northern (the Kermadec Islands) and southern (the Subantarctic Islands) extremes of the territorial sea.

62. The remaining 3.5% of marine reserves and other marine protection measures in the mainland territorial sea are not well spread across the biogeographic regions. Consequently, our current coastal marine protection network does not yet protect a fully representative range of habitats, with significant gaps in protection within mainland biogeographic regions. Filling of these gaps is required to reach New Zealand's commitment to the global goal for marine protected areas under the Convention on Biological Diversity.

63. The New Zealand government announced its support for the UN Declaration on the Rights of Indigenous Peoples in 2010. This Declaration is generally said to reinforce the principles of the Treaty of Waitangi, which Te Papa Atawhai has given effect to in the development of this report.

2.2.2 Domestic context

2.2.2.1 Biodiversity strategy and marine protected areas policy

64. Each country that is party to the Convention on Biological Diversity is required to have a national biodiversity strategy and action plan. New Zealand's previous national strategy *New Zealand Biodiversity Strategy 2000* and action plan *New Zealand Biodiversity Action Plan 2016-2020* expired in 2020. *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Te Mana o te Taiao) sets a new strategic direction for the protection, restoration and sustainable use of biodiversity, particularly indigenous biodiversity.[7]

65. In April 2022, the *Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy Implementation Plan* was released.[8] Objective 10 of this plan includes the action "Implementation of a proposed network of marine protected areas is progressed in the southeastern South Island coastal marine area" by the end of 2022. This action aims to meet goal 10.4.1 of the plan (Significant progress has been made in identifying, mapping and protecting coastal ecosystems and identifying and mapping marine ecosystems of high biodiversity value) by 2025.

66. In terms of marine protection, the relevant goals in Te Mana o te Taiao are:

> '10.6.2 Significant progress made in establishing an effective network of marine protected areas and other protection tools.' (by 2030)
>
> '10.6.3 An effective network of marine protected areas and other tools, including marine and coastal ecosystems of high biodiversity value is established and is meeting the agreed protection standard.' (by 2035)

[6] Coastal marine biogeographic regions are shown in Figure 1, pg 8: https://www.doc.govt.nz/globalassets/documents/conservation/marine-and-coastal/marine-protected-areas/mpa-classification-protection-standard.pdf.

[7] The Application for marine reserves in the southeast of Te Waipounamu referenced the earlier New Zealand Biodiversity Strategy 2000 because *Te Mana o te Taiao – The Aotearoa New Zealand Biodiversity Strategy 2020* was not complete at the time the Application was publicly notified.

[8] https://www.doc.govt.nz/globalassets/documents/conservation/biodiversity/anzbs-implementation-plan-2022.pdf.

67. Department of Conservation Te Papa Atawhai and Tini a Tangaroa are joint leads for New Zealand's *Marine Protected Areas Policy and Implementation Plan 2005*[9] (MPA Policy) and accompanying *Marine Protected Areas: Classification, Protection Standard and Implementation Guidelines*[10] (MPA Guidelines). These were developed in accordance with the *New Zealand Biodiversity Strategy 2000*, specifically to:

> 'Protect marine biodiversity by establishing a network of MPAs that is comprehensive and representative of New Zealand's marine habitats and ecosystems.'[11]

68. The MPA Guidelines outline a classification approach which divides New Zealand's coastal marine area into broad-scale habitat types based on physical characteristics. These habitat types are derived firstly by whether an area is estuarine or marine, and secondly by which depth, exposure and substrate type category occur. This classification system allows marine protected area planning initiatives to assess how proposals would contribute to representation of habitats and therefore the above goal.

69. Protecting ecologically 'representative' areas would ensure samples of the full range of New Zealand's habitats, and the ecosystems they support, are safeguarded. This can mitigate risks associated with impacts on the marine environment that are not fully understood and provide opportunities to increase our understanding by creating reference areas. The Marine Reserves Act recognises this concept in relation to scientific study opportunities. Its purpose in section 3(1), in part, is to preserve areas that are 'typical', or in other words representative.

70. The MPA Policy provides for three types of management tools for its implementation: marine reserves (Type 1 marine protected areas), other marine protected areas that meet the 'protection standard' (Type 2 marine protected areas) and other marine protection tools. The protection standard requires that the management tools enable a site's biological diversity to be maintained or to recover to a healthy functioning state. Only Type 1 and 2 are considered 'marine protected areas' for the purpose of the MPA Policy. Type 1 marine protected areas are created via the Marine Reserves Act (or bespoke legislation) while Type 2 marine protected areas can be created through regulations under the Fisheries Act or other tools where this is sufficient protection to meet the 'protection standard'[12].

71. The MPA Policy sets out implementation principles to guide the establishment of new marine protected areas. These principles are designed to firstly guide the design of the marine protected area network, and secondly to guide the planning process and management of new marine protected areas.

72. The MPA Policy does not in itself provide a statutory mechanism for establishment of new marine protected areas. Instead, to date, the primary pieces of legislation available to establish areas to meet the objectives in the MPA Policy are the Fisheries Act and the Marine Reserves Act. Additionally, bespoke legislation has been used to establish marine protected areas for one region of New Zealand (the Subantarctic Islands)[13] that went through a planning process under the MPA Policy. Additional marine protected areas have also been established outside the MPA Policy planning process. For example, at Kaikōura

[9] Department of Conservation; Ministry of Fisheries 2005: Marine Protected Areas: Policy and Implementation plan. Department of Conservation and Ministry of Fisheries, Wellington. 25 p.

[10] Department of Conservation; Ministry of Fisheries 2008: Marine Protected Areas: Classification, Protection Standard and Implementation Guidelines, Wellington. 54 p.

[11] Department of Conservation; Ministry of Fisheries 2005: Marine Protected Areas: Policy and Implementation plan. Department of Conservation and Ministry of Fisheries, Wellington. 25 p, pg 6.

[12] Ibid, pg 18.

[13] Subantarctic Islands Marine Reserves Act 2014.

(through the Kaikōura (Te Tai o Marokura) Marine Management Act 2014), where a community forum planning process took place but with a broader purpose than the establishment of marine protected areas as under the MPA Policy. Other examples are where single marine reserves have been applied for and established without a regional planning process, such as the Akaroa Marine Reserve and Taputeranga Marine Reserve. Currently Te Papa Atawhai is processing an external application under the Marine Reserves Act to establish the Hākaimangō-Matiatia (North-west Waiheke) marine reserve.

73. As noted in the MPA Policy, marine protected areas are just one of a wide range of management initiatives available to protect marine biodiversity. Marine protected areas affect, and are affected by, activities outside their boundaries so they cannot manage all the pressures in an area. They work best when aligned and coordinated with other key system-wide efforts such as the management of land-based effects and sustainable fisheries management. Other mechanisms for protecting biodiversity include the management of effects under the Resource Management Act 1991, Fisheries Act and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and protection of marine species under the Wildlife Act 1953 and Marine Mammals Protection Act 1978. In addition, non-statutory tools such as threat management plans for specific species help to contribute to protection of New Zealand's marine biodiversity. The MPA Policy states that integration of the available tools, including marine protected areas, and coordination across management authorities, are important for achieving marine biodiversity conservation in an effective and efficient way.

74. The Government has several other work programmes underway that contribute to marine biodiversity protection including:

- initiatives to improve the information base for marine protection planning and management (e.g. agency-initiated research and the Sustainable Seas National Science Challenge)
- improving management of the risks of fishing to marine biodiversity and ecosystems (e.g. work underway to strengthen and modernise New Zealand's fisheries management system and ongoing work on protected species bycatch mitigation)
- improving outcomes across the land-sea interface through resource management reform
- Revitalising the Gulf: Government action on the Sea Change Plan: to implement an integrated marine management plan for the Hauraki Gulf including marine protection, restoration, and fisheries management measures in response to the *Sea Change Tai Timu Tai Pari Marine Spatial Plan*.

2.2.2.2 Marine protected areas and climate change

75. New Zealand's first national climate change risk assessment[14] describes the impacts on the coastal and marine environment as significant, with more than half of the most significant and priority risks identified for the natural environment concerning this domain. Under the Climate Change Response Act 2002 (the CCRA) as amended by the Climate Change Response (Zero Carbon) Amendment Act 2019, New Zealand is committed to prepare for, and adapt to, the effects of climate change. New Zealand's first national adaptation plan[15]

[14] Ministry for the Environment. 2020. National Climate Change Risk Assessment for Aotearoa New Zealand: Main report – Arotakenga Tūraru mō te Huringa Āhuarangi o Āotearoa: Pūrongo whakatōpū. Wellington: Ministry for the Environment.

[15] Ministry for the Environment, 2022. Aotearoa New Zealand's first national adaptation plan. Ministry for the Environment, Wellington. 196 p.

was published in August 2022. It includes actions to address the 10 most significant risks, and help to address all 43 risks, identified in the national climate change risk assessment.

76. The CCRA establishes a 'net zero' greenhouse gas emissions target by 2050 (other than biogenic methane). The CCRA also provides that decision-makers exercising or performing a public function, power or duty may take into account the 2050 target, or an emissions budget or emissions reduction plan.[16] Marine protected areas are seen as a crucial part of the ocean-based climate action toolbox, for mitigation (e.g. protection or restoration of important carbon-sequestering ecosystems) and for adaptation (e.g. enhancing ecosystem resilience to climate change impacts).[17] Marine protected areas can help achieve several of the climate change goals of *Te Mana o te Taiao*:

> '13.1.2 Carbon storage from the restoration of indigenous ecosystems, including wetlands, forests, and coastal and marine ecosystems (blue carbon), contributes to our net emissions targets.' (by 2030)
>
> '13.1.3 Carbon storage from the restoration of indigenous ecosystems, including wetlands, forests, and coastal and marine ecosystems (blue carbon), is a key contributor to achieving net-zero emissions for Aotearoa New Zealand.' (by 2050)
>
> '13.2.2 The restoration of indigenous ecosystems is increasingly being used to improve our resilience to the effects of climate change, including coastal protection against rising sea levels.' (by 2030)
>
> '13.2.3 The restoration of indigenous ecosystems is mitigating the effects of climate change and natural hazards (e.g. flooding).' (by 2050)
>
> '13.3.2 Risks to biodiversity from climate change, including cascading effects (e.g. increases in introduced invasive species, water abstraction, fire risk, sedimentation) have been identified and assessed, and indigenous ecosystems, habitats and species are being managed to build resilience where possible.' (by 2030)

2.3 South-East Marine Protection Forum process

77. In 2014, the Government appointed the Roopu Manaaki ki te Toka / South-East Marine Protection Forum (the Forum) to consider and recommend marine protection options for the southeast region of the South Island. The Forum's terms of reference included the principal objective to:

> 'Provide a report for Ministers recommending levels of marine protection for the Otago sub region of the Southern South Island biogeographic region, consistent with the MPA Policy and MPA Guidelines.'

78. The Forum was directed to recommend marine protection proposals throughout the area from Timaru to Waipapa Point, out to 12 nautical miles offshore (the Forum region[18]). Forum members represented Kāi Tahu[19], commercial and recreational fishing groups, conservation

[16] Climate Change Response Act 2002, section 5ZN.

[17] IPBES-IPCC Co-sponsored workshop 2021: Biodiversity and Climate Change – Scientific Outcome https://www.ipbes.net/sites/default/files/2021-06/2021_IPCC-IPBES_scientific_outcome_20210612.pdf.

[18] The term used by the Forum to describe the area within which the Forum was tasked with providing recommendations for marine protection. Specifically: "...the marine coastal area (mean high water spring out to 12 nautical miles (NM) from Timaru in South Canterbury to Waipapa Point in Southland." Page 17, Forum Recommendations Report.

[19] For the purposes of this advice, "Kāi Tahu" refers to Te Rūnanga o Ngāi Tahu (TRoNT) and local papatipu rūnanga collectively. TRoNT is the governance entity of the Ngāi Tahu Whānui established under the Te Runanga o Ngai Tahu Act 1996. As relevant to

advocates, tourism interests, and local communities. The Forum was assisted and advised by Te Papa Atawhai and Tini a Tangaroa.

79. The following principles guided the Forum's work in progressing towards the development of a network of marine protected areas:

- Representation: includes elements of biodiversity (from genes to ecosystems) and associated environments that are characteristic of the larger marine area.
- Replication: an example of a given feature is protected at more than one site within a given biogeographic area.
- Connectivity: allows for larvae, juveniles and species to move from one protected site to another and to benefit one another.
- Adequacy: each site is suitably placed and sufficiently large to protect the species, populations, and ecology within it.
- Viability: each site can be self-sustaining even in the face of natural and human-induced variations.

80. Encouraging input from iwi and the community was an important focus for the Forum. This was enabled by:

- holding public information sessions throughout the southeast of the South Island
- making the online mapping and collaboration tool SeaSketch[20] open to the public
- setting up an online questionnaire, a Facebook page, and an 0800 number to receive comments about the value of the marine environment and people's concerns
- Forum members attending numerous hui, events, and stakeholder and public meetings throughout the process
- Forum members participating in two science workshops.

81. This engagement allowed the Forum to gather information about locations important to the local community, hear a range of views and discuss options for a proposed network of marine protected areas.

82. In October 2016, after two years of deliberations, the Forum released a consultation document[21]. The consultation document sought feedback on the 20 proposed sites for marine protected areas as well as seeking general comments from submitters on potential networks and possible additional sites. 2,803 submissions were received. In arriving at the 20 proposed sites for public consultation, the Forum's Recommendations Report[22] notes that:

> '... more than 100 sites and site variations were proposed by various sectors and considered by the Forum. Sites such as Matakaea (Shag Point), Kaimata (Cape Saunders), Papanui Inlet and Tokatā (The Nuggets) were eliminated as part of the 'gifts and gains' approach to decision-making in recognition of their significance to customary

the proposals, the local papatipu rūnaka are Te Rūnanga o Arowhenua, Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnanga ki Puketeraki, Te Rūnanga o Ōtākou and Awarua Rūnanga (see below at 2.6.2).

[20] www.seasketch.org/#projecthomepage/5331eff529d8f11a2ed3dd04/about.

[21] https://www.doc.govt.nz/our-work/south-eastern-south-island-marine-protection/south-east-marine-protection-forum/.

[22] South-East Marine Protection Forum 2018: Recommendations to the Minister of Conservation and the Minister of Fisheries: recommendations towards implementation of the Marine Protected Areas Policy on the South Island's south-east coast of New Zealand. Department of Conservation, Wellington. 314 p. https://www.doc.govt.nz/our-work/south-eastern-south-island-marine-protection/south-east-marine-protection-forum/.

owners. Reasonable concessions were also made to commercial fishing interests in an attempt to minimise the adverse impact on fisheries. Concessions were similarly made to avoid sites that are of recreational importance.'

83. The Forum was unable to reach consensus following the public consultation, and as a result proposed two alternative networks to the Ministers of Conservation and Fisheries in their Recommendations Report in 2018:

- 'Network 1', which would cover 14.2% (1,267 km²) of the region with six marine reserves (4.5%) and five Type 2 marine protected areas (9.7%), and an additional kelp protection area. Network 1 was supported by the environment, tourism, community and science representatives and one of two recreational fishing representatives.
- 'Network 2', which would cover 4.1% (366 km²) of the region and include three marine reserves (2.4%) and two Type 2 marine protected areas (1.7%). Network 2 was supported by the commercial fishing representatives and one of two recreational fishing representatives.

84. The Forum's Recommendations Report noted that Kāi Tahu did not oppose either network but that their position on either network was conditional on provisions being made for generational review and co-management between the Crown and Kāi Tahu for the proposed marine protected areas.

2.4 Ministers' decision to proceed with statutory process for 'Network 1'

85. In May 2019, after receiving joint advice from Te Papa Atawhai and Tini a Tangaroa (the Agencies), the Ministers of Conservation and Fisheries jointly announced their agreement to consult on a network of marine protected areas (the proposed Network) that was consistent with the Forum's 'Network 1' recommendation. The Ministers agreed that consultation would proceed on the basis of the legislative tools available under the Marine Reserves Act and the Fisheries Act (i.e. the proposal would be for the Network to be established using existing legislation rather than bespoke legislation). In doing so, the Ministers indicated they wished to respect the integrity of the Forum process and agreed that 'Network 1' would best meet the objectives for protecting biodiversity under the MPA Policy. The Ministers' decision included making minor changes to the Forum's 'Network 1' recommendation. Specifically:

- seismic surveying and bottom disturbance are not proposed to be restricted as recommended by the Forum (other than as managed under proposed Fisheries Act restrictions), as these activities are generally managed by legislation other than the Marine Reserves Act and the Fisheries Act
- fishing for whitebait in the Whakatorea (L1) and Tahakopa (Q1) Type 2 marine protected areas is not proposed to be restricted as recommended by the Forum, again as this activity is not managed under the Marine Reserves Act or Fisheries Act
- the boundary of the proposed Te Umu Koau marine reserve was extended in the Application to include the entirety of the Pleasant River estuary, as this was the intent of the Forum.

2.5 Director-General of Conservation's application for marine reserves and joint agency consultation on the proposed Network

86. As described further in chapter 3, the statutory process for establishing a marine reserve requires an application to be made to the Director-General of Conservation. The Director-General themself may also make the application.

87. On 3 June 2020, the Director-General formally notified the Application under the Marine Reserves Act for Orders in Council declaring as marine reserves six areas of sea and foreshore in the localities of the Waitaki River, Bobby's Head (Te Umu Koau), Sandfly Bay (Ōrau), Papanui Canyon, Green Island (Okaihae) and Quoin Point (Hākinikini). The Application was guided by the Forum's recommendations. It includes descriptions of the locations and extents of the proposed marine reserves, the background to the Application, and an assessment of the effects that marine reserve status may have on existing interests. The Application is included at Appendix 1.

88. In addition to the Director-General's Application, the Agencies developed a joint consultation document (the Consultation Document – Appendix 1). The purpose of the Consultation Document was to seek public views on the proposed Network as agreed to by Ministers (i.e. the Director-General's Application for marine reserves, and the proposals for Type 2 marine protected areas and a kelp protection area under the Fisheries Act). The Consultation Document was consistent with the statutory requirements under the Marine Reserves Act and Fisheries Act respectively. The Director-General's Application for marine reserves was included as an appendix to the Consultation Document.

89. For each proposed site, the Consultation Document provided an ecological summary, initial cost/benefit analysis and an outline of the activities that would/would not be affected should the proposed protection be put in place. A set of optional questions was also provided for each site that were consistent with the Treasury's Regulatory Impact Assessment Quality Assurance criteria for effective consultation. These questions were intended to stimulate discussion and guide submissions.

90. The joint public consultation process started on 3 June 2020 and ran for 2 months to 3 August 2020. This followed COVID-19-related delays[23] as discussed further in 4.7 and 4.7.1.

2.6 Statutory public consultation and Treaty partner engagement with Kāi Tahu

2.6.1 Statutory consultation

91. In total, submissions (including objections) were received from 4,056 individuals or organisations through the public submission process. The public was invited to make submissions online, by email or in writing to the Agencies.

92. Te Papa Atawhai commissioned PublicVoice, an independent public research and engagement company, to manage incoming submissions and produce a high-level factual summary of all submissions received. The *Proposed southeast marine protected areas Summary of submissions* report was completed in September 2020 and covers public

[23] Public notification first occurred on 17 February 2020 but was withdrawn on 9 April 2020 due to the restrictions imposed by the Alert Level 4 response to the COVID-19 pandemic. Public notification was recommenced on 3 June 2020 and continued for the full two-month period required by s 5(1) Marine Reserves Act.

feedback on the proposed Network (Appendix 2). It is structured around the questions posed in the Consultation Document.

93. The number of submissions received on the proposed Network and proposed marine reserves, and the views in those submissions, are described in the corresponding chapters for the proposed Network and each proposed marine reserve (chapters 6–12). The statutory framework for considering these submissions is described in chapter 3.

2.6.2 Treaty partner engagement with Kāi Tahu

94. The region covered by the Forum and therefore each of the marine protected areas that comprise the proposed Network are located within the Kāi Tahu takiwā and specifically the rohe moana of six papatipu rūnanga[24].

95. As recorded in the Forum's Recommendations Report (page 103), this coastal area was historically, and still remains, 'an important source of kaimoana and fishery for Kāi Tahu customary, recreational and commercial fishers'. Te Papa Atawhai acknowledges, therefore, that the establishment of any marine protected areas within the Kāi Tahu takiwā has the potential to impact on a range of interests, rights and values held by Kāi Tahu. Given the restrictive nature of marine reserves (as discussed further in 3.2.1, the starting point is that the declaration of a marine reserve prohibits a range of activities, including extractive activities), their establishment in particular has the potential (by way of example) to impact on the role of Kāi Tahu as kaitiaki, to restrict customary practices (including but not limited to customary fishing) and to limit the transfer of mātauraka Māori, coupled with the economic impacts that restrictions on fishing activities may entail, including effects of displaced fishing effort. In light of these factors, the Crown has obligations to Kāi Tahu to ensure their interests, rights and values are appropriately considered when establishing any marine protected areas in their takiwā. In terms of the current legislative proposals, these obligations apply both in terms of the engagement process undertaken and the substantive decisions on the proposals.

96. The following paragraphs describe the engagement that has been undertaken with Kāi Tahu in parallel to the statutory consultation process. Chapter 3 describes how the statutory framework applies to the views received via this engagement, including the Crown's obligations in relation to the Treaty of Waitangi. The substantive discussion and advice in relation to the views received from Kāi Tahu through engagement is covered in subsequent chapters.

97. Following the conclusion of the Forum, Crown engagement with Kāi Tahu has continued through the process of preparing advice to Ministers on the Forum's recommendations (above in 2.4) and alongside the statutory public consultation process on the Application. The purpose of this engagement has been to further understand Kāi Tahu rights and interests and views (including concerns) in relation to the establishment and management of the proposed southeast marine protected areas and to understand and work through the issues raised.

98. Up to July 2020, the key hui/meetings held with agency officials were:

- 31 July 2018 – Dunedin airport, representatives of some papatipu rūnanga and Te Rūnanga o Ngāi Tahu (TRoNT).
- 23 September 2019 – Puketeraki Marae – all local papatipu rūnanga and TRoNT.

[24] Te Rūnanga o Arowhenua, Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnanga ki Puketeraki, Te Rūnanga o Ōtākou and Awarua Rūnanga.

- 25 October 2019 – 9(2)(a) then Acting General Manager - Strategy and Influence for TRoNT.
- 11 February 2020 – Ministers of Conservation and Fisheries, and representatives from TRoNT and papatipu rūnanga.

99. As set out above, statutory consultation ran from 3 June 2020 to 3 August 2020. The Agencies worked with Kāi Tahu in developing the text for the Application and Consultation Document to ensure that these documents represented the views of Kāi Tahu on the proposals to that point. These views are recorded at sections 2.4 and 2.5 of the Consultation Document. Kāi Tahu identified as a key concern the potential for fishing effort from the proposed marine protected areas to be displaced into other areas, thereby impacting on their commercial and non-commercial customary fishing interests, including the ability to establish customary fishing areas (taiāpure and mātaitai) as provided for under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (hereafter referred to as the Fisheries Settlement Act). Kāi Tahu emphasised the negative impact this would have on the economic well-being of coastal fishing communities. A specific concern was identified in relation to the proposed marine reserve at Te Umu Koau, given the perceived impacts on commercial kōura (rock lobster) fishing. The Application and Consultation Document recorded as follows:

> 'Engagement with Kāi Tahu during and after the forum process has indicated that the proposed network of MPAs will be opposed unless the following matters are satisfactorily addressed:
>
> - rebalancing for any impacts the MPA network may have on Kāi Tahu rights and interests;
> - co-management of the MPA network by Kāi Tahu and the Crown; and
> - generational review of the MPA network.'

100. As the engagement progressed, Kāi Tahu further refined and outlined the proposed measures they considered would help address their concerns. These measures were the focus of subsequent hui and broadly fall under what Kāi Tahu consider are the categories of 'rebalancing' of the impacts of marine protected areas and co-management of marine protected areas. The views of Kāi Tahu received through engagement, including the proposed measures, are discussed fully in 6.3.

101. Agencies continued their engagement with Kāi Tahu at a hui on Ōtākou Marae, 29 July 2020. The hui took place the week before the public statutory consultation period closed. The hui was attended by Deputy Director-Generals from both Agencies. The focus of the hui was to work through the proposed rebalancing and co-management measures and agree a way of progressing the work together. At this hui, Kāi Tahu outlined their preference for their views to be heard via direct engagement with the Agencies. Kāi Tahu confirmed they would not make a submission under the statutory consultation process. Instead, it was agreed that the agreed record from the hui (and subsequent hui) would contribute to agency advice to Ministers. This decision did not preclude individuals or rūnanga from making a submission through the statutory consultation process.

102. Agency officials and Kāi Tahu representatives met several times subsequently, as the Southeast Marine Protection mahi ā-rōpū (a working group), (the Rōpū), to develop and progress a work programme aimed at working through each of the rebalancing measures and other matters. The Rōpū hui were held on:

- 20 January 2021 at Ōtākou Marae

- 4 March 2021 via Zoom
- 20 April 2021 at Ōtākou Marae
- 23 July 2021 at Puketeraki Marae.

103. As described further in 6.3, the progress made and outcomes reached via these hui have been recorded in a 'Rōpū Report'. The Rōpū Report was drafted by Agencies based on hui records.[25] To the extent relevant, we have prepared our advice on the proposed Network and individual proposed marine reserves (chapters 6–12) on the basis that the Rōpū Report records the outcomes of agency engagement with Kāi Tahu undertaken to date. Agencies made clear to all participants that the outcomes reached through the Rōpū engagement would inform Agencies' recommendations to the Ministers, but that final decision-making would sit with Ministers.

104. This advice also considers the views expressed and outcomes of a subsequent hui between the then Minister of Conservation (Hon Kiritapu Allan), the former Minister for Oceans and Fisheries (Hon David Parker) and Kāi Tahu, held on 30 November 2021. Kāi Tahu followed this hui by sending these Ministers a letter, of 15 December 2021, which sets out the measures Kāi Tahu see as necessary to address the impacts on their commercial and customary non-commercial rights and interests.

105. Note that Kāi Tahu was offered the opportunity to review the Rōpū Report but did not take up that opportunity. Te Papa Atawhai provided relevant excerpts of its draft advice to Kāi Tahu for review prior to it being provided to you for consideration and final decision-making. The relevant excerpts were those parts of the advice related to agency engagement with Kāi Tahu throughout the process, the views of Kāi Tahu, and obligations under the Treaty of Waitangi, as well as all draft recommendations to the Minister of Conservation and all of chapters 1-5.

2.7 Process for establishing other marine protected areas

106. As set out above, in addition to the proposed marine reserves, the proposed Network includes five Type 2 marine protected areas and a kelp protection area. It is intended for these protection measures to be established through the Fisheries Act.

107. The Minister for Oceans and Fisheries is the decision-maker on the proposed Type 2 marine protected areas and kelp protection area and will be advised on these by Tini a Tangaroa. The Minister for Oceans and Fisheries will make his decision on the Type 2 marine protected areas and kelp protection area after you have made your decisions on the proposed marine reserves.

108. The Agencies have worked jointly with the Treasury to ensure that the dual legislative processes are consistent with the Treasury's requirements from a regulatory impact assessment perspective.

[25] All hui records during this time, except that from the 23 July 2021 hui, were agreed to by Kāi Tahu, Te Papa Atawhai and Tini a Tangaroa. The 23 July 2021 hui record was not confirmed at the time and, due to personnel changes since then, remains an unconfirmed record.

3 Statutory framework for decision-making

3.1 Introduction

109. Your decisions on the six proposed marine reserves must be made in accordance with the Marine Reserves Act and your obligations in relation to the Treaty of Waitangi. Detail on these requirements is described in this chapter.

3.2 Marine Reserves Act 1971

3.2.1 Purpose of Marine Reserves Act

110. The general purpose of the Marine Reserves Act is set out in section 3(1) as follows:

> 'It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.'

111. Further guidance is provided in section 3(2), which confirms that having regard to the general purpose in section 3(1), marine reserves shall be administered and maintained under the Marine Reserves Act so that:

> '(a) they shall be preserved as far as possible in their natural state:
>
> (b) the marine life in the reserves shall as far as possible be protected and preserved:
>
> (c) the value of marine reserves as the natural habitat of marine life shall as far as possible be maintained:
>
> (d) subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the marine life or for the welfare in general of the reserves, the public shall have freedom of access and entry to the reserves, so that they may enjoy in full measure the opportunity to study, observe, and record marine life in its natural habitat.'

112. Under existing legislation, the status of marine reserves is the strongest legal protection available to the marine environment. The scheme of the Marine Reserves Act is that once a marine reserve is declared, the extensive list of activities set out in sections 18I and 21 automatically become an offence or an infringement offence in that area. This list includes activities such as depositing toxic substances or pollutants, introducing any living organism, erecting any structures and taking or removing any marine life, minerals or other natural things.

3.2.2 Overview of statutory process for establishment of marine reserves

113. Marine reserves are created by way of an Order in Council made by the Governor-General, on the recommendation of the Minister of Conservation.

114. The process which must be followed is set out in sections 4 and 5 of the Marine Reserves Act. A high-level overview of that process is as follows:

1. An application is made by (or to) the Director-General of Conservation. In this case, the applicant is the Director-General. **[Section 5(1)(a)]**

2. Public notification is given of the intention to apply for an Order in Council to declare the area a marine reserve, including a request for any 'objections'. [Section 5(1)(b) and (c)]

3. Specific written notification is given to anyone owning an estate or interest in land adjoining the proposed marine reserve (including Māori land owners), any regional council that acts as a harbour board with jurisdiction over the area, any local authority that has control of the foreshore in the area, and the Secretary of Transport and the Director-General of Fisheries. [Section 5(1)(d)]

4. A two-month deadline from the first day of public notification is set for the receipt of any objections. [Section 5(3)]

5. A three-month deadline is established from the first day of public notification for the applicant (in this case the Director-General) to respond to these objections if they so wish. [Section 5(4)]

6. The Director-General refers the application, objections and any answer to those objections to the Minister of Conservation. [Section 5(5)] Te Papa Atawhai may also be requested, by the Minister of Conservation, to provide advice and recommendations to support the Minister with their decision-making.

7. When (as in this case) the Director-General is the applicant, the Minister may decide to also obtain and consider an independent report on the objection(s) and the application. [Section 5(6)]

8. The Minister of Conservation decides whether or not to uphold any objections, having regard to the statutory criteria in section 5(6) (discussed further below). If objections are upheld, the application does not proceed. [Section 5(6)]

9. If no objections are upheld, the Minister of Conservation considers the application and whether declaring the area a marine reserve, either unconditionally or subject to any conditions, will be in the best interests of scientific study, will be for the benefit of the public, and is expedient. [Section 5(9)]

10. If the Minister of Conservation is satisfied that the application meets the section 5(9) requirements, the concurrence (agreement) of the Ministers of Fisheries and Transport is sought. If concurrence is withheld, the application does not proceed. [Section 5(9)]

11. If concurrence of the Ministers of Fisheries and Transport is obtained, Te Papa Atawhai seeks the review of the name of the proposed marine reserve from the New Zealand Geographic Board (under section 27(2) of the New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008). [Section 5(7A)]

12. The Minister of Conservation then recommends that the Governor-General makes an Order in Council to establish the marine reserve. [Section 5(9)]

13. An Order in Council is made and notified in the New Zealand Gazette. The order declaring the marine reserve comes into force 28 days after it is notified.

115. An analysis of Te Papa Atawhai's compliance with the procedural requirements of sections 4 and 5 of the Marine Reserves Act is set out in chapter 4.

3.2.3 Consideration of objections and your decision on marine reserves

116. Central to your decision-making on each of the proposed marine reserves are sections 5(6) and 5(9) of the Marine Reserves Act. These sections set out a two-stage process.

117. First, pursuant to section 5(6) you must decide whether to uphold any 'objections' to the proposed marine reserves. If an objection is upheld, the area shall not be declared a marine

reserve. Te Papa Atawhai's approach to the identification of 'objections' for this purpose is discussed further below in chapter 5. You must uphold an objection if satisfied that declaring the area as a marine reserve would:

> '(a) interfere unduly with any estate or interest in land in or adjoining the proposed reserve:
>
> (b) interfere unduly with any existing right of navigation:
>
> (c) interfere unduly with commercial fishing:
>
> (d) interfere unduly with or adversely affect any existing usage of the area for recreational purposes:
>
> (e) otherwise be contrary to the public interest.'

118. You may also consider whether the imposition of a condition in the Order in Council or other mitigation would be appropriate to respond to any objection raised, so that the objection does not need to be upheld.

119. Section 5(6) confirms that in deciding whether to uphold an objection, you must take into consideration:

- any answer made to the objection by the applicant; and
- any report on the objection and the application you as the Minister may have obtained from an independent source.

120. As discussed further below, the Director-General has decided not to answer objections. However, Te Papa Atawhai's advice contained in this report is provided to assist your decision-making, along with the independent report commissioned by a former Minister of Conservation[26].

121. Second, pursuant to section 5(9), if you decide not to uphold any of the objections, you then must make a broader assessment, and decide whether declaring the area a marine reserve will:

> '... be in the best interests of scientific study and will be for the benefit of the public, and it is expedient that the area should be declared a marine reserve, either unconditionally or subject to any conditions...'

122. As discussed in 2.6.2, Kāi Tahu confirmed that they would not make a submission through the statutory process on the basis that their preference was for their views to be heard via direct engagement with the Agencies. On that basis, the views provided by Kāi Tahu as set out in the subsequent chapters should not be considered an objection for the purposes of section 5(6). In accordance with your obligations in relation to the Treaty of Waitangi, you must, however, consider these views as part of your decision-making under section 5(9). This is discussed further below.

3.2.4 Section 5(6)(a)–(d) – approach to assessment of 'interfere unduly'

123. The interference with the interests identified in sections 5(6)(a)–(d) is qualified by the use of the word 'unduly' – an objection must only be upheld if the Minister is satisfied that the marine reserve would 'unduly' interfere with the relevant interest.

[26] Hon Eugenie Sage commissioned an independent review, and Hon Kiritapu Allan approved EnviroStrat and the provider of the review.

124. Several judicial decisions have provided guidance on the correct approach to this assessment. In summary, you should approach your assessment as to whether any issue raised amounts to 'undue' interference on the following basis:

- 'Unduly' implies 'Without due cause or justification...more than is warranted'.[27] In order to assess whether interference is 'more than what is warranted' or 'undue', the overall public advantages that will flow from the proposed marine reserve need to be considered[28].
- The test is not whether the interference is 'significant' but whether it is 'undue'. 'The test implied by the word 'undue' requires a balancing of the effect against the other values involved'.[29]
- 'Undue' means not only excessive (i.e. in a quantitative sense) but means unjustified or unwarranted in a qualitative sense. Interference may not be warranted, even though the effect is small, if gains are likely to be small or speculative. Conversely, interference may be warranted even though severe in its effects, if the need is high – a value judgment is therefore required.[30]
- 'Undue' must be interpreted in light of the purpose of the Marine Reserves Act – i.e. whether the interference is justified in light of the Marine Reserves Act's purpose. This does not require a final scientific conclusion about the benefits of the proposed marine reserve, but you must consider the extent to which the proposed marine reserve is likely to serve the statutory purpose, and then weigh that against the implications for the existing use or right in sections 5(6)(a)–(d).[31]
- The use of the word 'would' requires you to be satisfied with some certainty that there will be undue interference. It is not 'could' or 'might'.
- Note that the wording in section 5(6)(d) (recreational purposes) is slightly different to the other categories, in that it states: 'Interfere unduly with or adversely affect any existing usage of the area for recreational purposes'.
- The High Court has confirmed that the 'adversely affect' threshold in section 5(6)(d) does not establish a lower threshold for impacts on recreation interests and 'should be applied consistently with the 'interfere unduly' test'.[32]

3.2.5 Section 5(6)(e) – approach to assessment of 'contrary to the public interest'

125. An objection may be upheld under section 5(6)(e) where declaring a marine reserve would 'otherwise be contrary to the public interest'.

126. 'The term "public interest" is notoriously difficult to define', but its meaning when found in a statute 'must be determined from the context in which it is used'.[33] In this case, it appears to be used as a residual basis for upholding objections that raise issues falling outside the scope of section 5(6)(a)–(d).

127. Accordingly, Te Papa Atawhai has applied this provision to assess objections regarding matters including the integrity of the Forum, statutory process, adequacy of the marine

[27] *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA) at [30].

[28] *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000, at [36].

[29] *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA) at [30].

[30] *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000, at [23] and [35].

[31] *Akaroa Marine Protection Society Incorporated v Minister of Conservation* [2012] NZHC 933, at [53].

[32] Ibid. at [58].

[33] *Northern Action Group Incorporated v The Local Government Commission* [2015] NZHC 805 (23 April 2015) at [65] per Collins J.

protection proposed, inadequacy of justification or information base, and impacts on matters other than those covered by section 5(6)(a)–(d), including customary interests.

128. While there is no specific discussion of the section 5(6)(e) provision in the case law cited above, the High Court's reasoning in the approach to the 'undue interference' test under section 5(6)(a)–(d) remains relevant to the assessment of whether a proposal is contrary to the public interest. Section 5(6)(e) is one of the threshold tests for considering objections and should take into account the overall advantages of the proposed marine reserve.

3.2.6 Section 5(6) - Network implications for 'interfere unduly' and 'public interest'

129. The six proposed marine reserves are proposed as part of a wider network of marine protected areas. This network approach has implications for your consideration of 'undue interference' and 'public interest' under section 5(6)(a)-(e). This is because values or interests may be cumulatively impacted, either positively or negatively, by not only the establishment of one marine reserve, but multiple marine reserves and other marine protected areas. This is addressed in the advice where relevant.

3.2.7 Section 5(6) - Obligations in relation to the Treaty of Waitangi

130. The Crown's obligations in respect of these proposals and the Treaty of Waitangi are set out in 3.3. Of particular relevance to your assessment of objections under section 5(6)(a)–(e) are your obligations to have particular regard to the views of 'affected iwi, hapū, or whānau' under section 49 of the Marine and Coastal Area (Takutai Moana) Act 2011 (te Takutai Moana Act) and your obligation to give effect to the principles of the Treaty of Waitangi under section 4 of the Conservation Act 1987. This is addressed in the advice where relevant.

3.2.8 Section 5(9) – second stage of assessment

131. Section 5(9) sets out the matters you must be satisfied of in order to recommend the declaration of a marine reserve if no objections are upheld. These matters are assessed (as relevant) in the subsequent chapters dealing with the proposed Network and individual sites (chapters 6–12).

132. The following four matters are also relevant to your decisions under section 5(9).

133. First, the Marine Reserves Act allows your decision on a proposed marine reserve to be made 'unconditionally' or subject to conditions. The ability to declare a marine reserve conditionally allows certain impacts of the declaration of a marine reserve (such as the prohibitions set out in sections 18I and 21) to be mitigated, provided that to do so would be consistent with the purpose of the Marine Reserves Act. The way this is done is by including conditions in the Order in Council to expressly authorise the relevant conduct. For example, clause 5 of the Marine Reserve (Taputeranga) Order 2008 includes a condition allowing for structures existing prior to the establishment of the marine reserve to remain and be maintained, provided this is in accordance with the Resource Management Act and all other legal requirements. Clause 7 of the Marine Reserve (Kahurangi) Order 2014 includes a condition to allow for removal of pounamu by Te Rūnanga o Ngāi Tahu or members of Ngāi Tahu Whānui acting with the permission of Te Rūnanga o Ngāi Tahu. As noted above, you may consider whether the imposition of a condition under section 5(9) is appropriate to respond to an objection when making your decisions under section 5(6).

134. Secondly as part of your section 5(9) assessment, you must consider whether declaring the marine reserve would be in the best interests of scientific study, in the public interest and expedient, in light of the Crown's obligations in relation to the Treaty of Waitangi. These obligations are discussed in the following section (3.3), and include the obligation to interpret and administer the Marine Reserves Act to give effect to the principles of the Treaty of Waitangi pursuant to section 4 of the Conservation Act. As discussed further

below in 3.3, the relevant principles include the principles of partnership, informed decision-making, active protection, and redress. The application of section 4 means that although the Kāi Tahu views provided via direct engagement with Agencies rather than through submissions under the statutory process are not an 'objection' for the purposes of section 5(6), you must consider these views as part of your decision-making under section 5(9). Your consideration of these views must be in light of your obligations under the Treaty of Waitangi as set out in 3.3 of this advice, including but not limited to section 4 of the Conservation Act. You must also consider any other views received through the statutory consultation process that are relevant to your decision-making in relation to the Treaty of Waitangi for this step of the process. This is addressed in the advice where relevant.

135. Thirdly, relevant to your assessment under section 5(9) is whether the declaration of each of the proposed marine reserves would be consistent with the relevant provisions of any relevant statutory planning instruments. The relevant statutory planning instruments are the Conservation General Policy[34] (in accordance with section 6 of the Marine Reserves Act) and the Otago Conservation Management Strategy[35] (in accordance with section 7 of the Marine Reserves Act). Our assessment of which provisions are relevant and the consistency of our recommendations with these provisions is set out in the section 5(9) assessment of the Network and site chapters (chapters 6–12).

136. Finally, as above for your assessment under section 5(6), your assessment under section 5(9) should take into account that the six marine reserves are proposed as part of a network of marine protected areas. Your assessment of whether the proposed marine reserves 'will be in the best interests of scientific study, will be for the benefit of the public, and will be expedient', should consider the proposed marine reserves individually and also as part of the wider proposed Network.

3.3 Obligations in relation to the Treaty of Waitangi

137. For the purposes of this advice, references to the Crown's or your obligations in relation to the Treaty of Waitangi are the obligations identified in this section.

138. As relevant to your decisions under the Marine Reserves Act, the Crown's obligations in relation to the Treaty of Waitangi are given statutory expression through various sources.

139. When making your decisions on the proposed marine reserves you must 'give effect to the principles of the Treaty of Waitangi' in accordance with section 4 of the Conservation Act. You also have obligations under te Takutai Moana Act, including the obligation to have particular regard to the views of 'affected iwi, hapū, or whānau' in considering the application or proposal (see Part 3 of te Takutai Moana Act, and specifically section 49).

140. As wider context for your decisions on the proposed marine reserves, the Crown has acknowledged Kāi Tahu rights under the Treaty of Waitangi over the southeast region of Te Waipounamu through the Ngāi Tahu Claims Settlement Act 1998.

141. The Crown also enacted the Fisheries Settlement Act, which gives effect to the settlement of claims relating to Māori fishing rights, makes provision for Māori non-commercial traditional and customary fishing rights and interests, and provides for Māori participation in the management and conservation of New Zealand's fisheries.

[34] Department of Conservation, 2005. Conservation General Policy. Revised edition published 2019, 70 p.

[35] Department of Conservation, 2016. Conservation Management Strategy: Otago 2016. 312 p.

142. These obligations are discussed in further detail below. As discussed in subsequent chapters, Te ma.

3.3.1 Section 4 of the Conservation Act

143. The Marine Reserves Act must be interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4 of the Conservation Act[36]).

144. The following principles are most relevant to your decisions on the proposed marine reserves:

- **Partnership** – Mutual good faith and reasonableness: The Crown and Māori must act towards each other reasonably and in good faith.
- **Informed decision-making** – Both the Crown and Māori need to be well informed of the other's interests and views. When exercising the right to govern, Crown decision-makers need to be fully informed. For Māori, full information needs to be provided in order to contribute to the decision-making process.
- **Active protection** – The Crown must actively protect Māori interests retained under the Treaty as part of the promises made in the Treaty for the Crown's right to govern. This includes the promise to actively protect tino rangatiratanga and taonga. Active protection requires informed decision-making and judgement by the Crown as to what is reasonable in the circumstances.
- **Redress** – The Treaty relationship should include processes to address differences of view between the Crown and Māori. The Crown must preserve capacity to provide redress for agreed grievances from not upholding the promises made in the Treaty. Māori and the Crown should demonstrate reconciliation as grievances are addressed.

145. In the decision of *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*[37], the Supreme Court confirmed that 'section 4 is a "powerful" Treaty clause because it requires the decision-maker to give effect to the principles of the Treaty'.[38] The Court noted that section 4 requires more than procedural steps and substantive outcomes for iwi may be necessary in particular cases.[39] The Supreme Court recognised that other factors must be taken into account (in that case, in the context of a concession decision) but confirmed that: 'What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles'.[40] The decision does not, however, represent any 'ground shift' in the law. Rather, it confirms and builds on previous jurisprudence regarding in particular the allocation of commercial opportunities on public conservation lands and waters, including the Court of Appeal's 1995 *Whales* decision.[41, 42] The judgment also emphasises the fundamental importance of the principles of the Treaty in the statutory scheme of the

[36] Section 4 of the Conservation Act requires that Act be interpreted and administered as to give effect to the principles of the Treaty of Waitangi. This also applies to Acts in the First Schedule, as confirmed in the Whales case - *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533.

[37] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

[38] Ibid. at [52].

[39] Ibid. at [52].

[40] Ibid. at [54].

[41] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 (CA).

[42] Cabinet Paper – Responding to the Ngāi Tai Ki Tāmaki Supreme Court decision and giving effect to Treaty principles in conservation. https://www.doc.govt.nz/globalassets/documents/about-doc/cabinet-papers/cabinet-paper-ngai-tai-ki-tamaki-supreme-court-decision-response.pdf.

Conservation Act (and therefore by virtue of schedule 1 of the Conservation Act, the Marine Reserves Act) and highlights a need for Te Papa Atawhai to consider more actively the role that partnerships with iwi/Māori can occupy in the delivery of conservation outcomes.[43]

146. In the following chapters, our advice will describe the manner in which Te Papa Atawhai has acted in accordance with section 4 by giving effect to the principles of the Treaty, both through its process to date and in terms of the recommendations reached. This advice will guide your substantive decisions on each of the proposed marine reserves.

3.3.2 Marine and Coastal Area (Takutai Moana) Act 2011

147. Te Takutai Moana Act acknowledges the importance of the marine and coastal area to all New Zealanders and provides for the exercise of the customary interests of iwi, hapū, and whānau in the common marine and coastal area. It provides for participation of 'affected iwi, hapū, or whānau' in specified conservation processes relating to the common marine and coastal area.[44]

148. Under section 47 of te Takutai Moana Act, the proposed marine reserves application process is a 'conservation process', in which 'affected iwi, hapū, or whānau' have the right to participate. Section 48 sets out the specific notification requirements.

149. 'Affected iwi, hapū, or whānau' are defined in section 47 as the iwi, hapū or whānau that exercise kaitiakitanga in a part of the common marine and coastal area where a conservation process is being considered. Kaitiakitanga is defined by cross-reference to the definition in the Resource Management Act. Section 2(1) of the Resource Management Act provides that kaitiakitanga means:

> '...the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship'.

150. This definition includes the terms 'tangata whenua' which in turn requires people to hold 'mana whenua'. These terms are defined in the Resource Management Act as follows:

> '**Tangata whenua** in relation to a particular area, means the iwi, or hapu, that holds mana whenua over that area'
>
> '**Mana whenua** means customary authority exercised by an iwi or hapu in an identified area.'

151. As discussed further in chapter 5, in terms of these definitions Te Papa Atawhai has proceeded on the basis that any views received (either through the public consultation process or direct engagement) from persons affiliated to Kāi Tahu have been considered as being from 'affected iwi, hapū, or whānau' under te Takutai Moana Act for the purpose of this advice.

152. Pursuant to section 49 of te Takutai Moana Act, in considering the Application for the proposed marine reserves, you must have **particular regard** to the views of affected iwi, hapū or whānau where those views have been provided to the Director-General as part of the conservation process and the Director-General has accepted those views as being from affected iwi, hapū or whānau.

153. The direction to have particular regard to does not amount to 'give effect to', but it is a stronger direction than 'consider'. You must fully inform yourself of the views of affected iwi,

[43] Ibid.

[44] Te Takutai Moana Act 2011 - Subpart 1 of Part 3 (Customary interests) – '*Participation in conservation processes in common marine and coastal area*'.

hapū and whānau and recognise those views as important in considering the Application for each of the proposed marine reserves.

154. Note that there are three pending applications for customary marine title in areas that are adjacent to or over the proposed marine reserves.[45] Those applications are yet to be determined. At this time, therefore, the participation rights of the applicants are those described above.

155. An analysis of Te Papa Atawhai's compliance with the procedural requirements of sections 47 and 48 is set out in chapter 4. Further detail of our approach to identifying 'affected iwi, hapū, or whānau' is set out in chapter 5.

3.3.3 Treaty settlements – Ngāi Tahu Claims Settlement Act 1998

156. As noted in 2.6.2, the southeast region of Te Waipounamu falls within the Takiwā o Ngāi Tahu. The Ngāi Tahu Claims Settlement Act acknowledges the status of Kāi Tahu as tāngata whenua over the Takiwā o Ngāi Tahu.[46]

3.3.3.1 Statutory acknowledgements

157. The statutory acknowledgements made in the Ngāi Tahu Claims Settlement Act are each an acknowledgement by the Crown of a statement of the particular cultural, spiritual, historical and traditional associations of Kāi Tahu with a specified area. The statutory acknowledgements relevant to the areas of the proposed marine reserves include:

- Te Tai o Arai Te Uru (the Otago Coastal Marine Area; Schedule 103)
- the Waitaki River, including the river mouth (Schedule 72)
- Matakaea (Shag Point) (Schedule 41)

158. The statutory obligations deriving from the statutory acknowledgements relate primarily to Resource Management Act processes and cannot be taken into account in your decision-making under the Marine Reserves Act.[47] As such, in this context the statutory acknowledgements confirm the importance of these specific areas to Kāi Tahu.

3.3.3.2 Taonga species

159. The Ngāi Tahu Claims Settlement Act lists taonga bird, plant and animal species (Schedule 97) and taonga fish species (Part A, Schedule 98). As relevant to the current proposals, these schedules list a number of seabirds, marine mammals, and fish species, as well as one species of kelp (rimurapa/bull kelp). The marine, coastal and estuarine species listed in Schedules 97 and 98 that are likely to occur within the region of the proposed marine protected areas are listed in Appendix 5 of the Consultation Document[48].

160. The inclusion of species within Schedules 97 and Part A of Schedule 98 gives rise to specific obligations on the Crown that are relevant to your decision-making on the proposed marine reserves.

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[45] Te Rūnanga o Ngāi Tahu on behalf of Ngāi Tahu Whānui over all of the proposed marine reserves; Te Maiharoa Whānau adjacent to and over the proposed Waitaki Marine Reserve; Paul and Natalie Karaitiana adjacent to and over the proposed Papanui Marine Reserve.

[46] Part 1 of the Ngāi Tahu Claims Settlement Act 1998 – Apology by the Crown to Ngāi Tahu.

[47] Section 217, Ngāi Tahu Claims Settlement Act 1998.

[48] We note that shellfish species are listed as taonga species in Appendix 5 of the Consultation Document in error. The Ngāi Tahu Claims Settlement Act does not list these as 'taonga species' or 'taonga fish species'. They are 'shellfish species' and therefore do not trigger customary fisheries management obligations for the Crown under sections 303 or 304. Instead, section 307 sets out a right of first refusal to purchase quota for commercial catch of shellfish species, which is not a material consideration here.

161. In terms of the taonga species in Schedule 97, section 288 acknowledges the special cultural, spiritual, historic, and traditional association of Ngāi Tahu with these species. Section 293 sets out that the Minister of Conservation must:

- advise Te Rūnanga o Ngāi Tahu in advance of any relevant conservation management strategy reviews or the preparation of any statutory or non-statutory plans, policies, or documents (including any amendments or reviews) relating to a taonga species, including those subject to recovery plans or species recovery groups
- consult with, and have particular regard to the views of, Te Rūnanga o Ngāi Tahu when the Minister makes policy decisions concerning the protection, management, or conservation of a taonga species, including those subject to recovery plans or species recovery groups.

162. Section 294 sets out the Director-General's obligations in relation to taonga species that are or become the subject of a species recovery plan or group. The Director-General must consult with and have particular regard to the views of Te Rūnanga o Ngāi Tahu when the Director-General makes policy decisions concerning the protection, management or conservation of all taonga species subject to a species recovery group or recovery plan.

163. In relation to the proposed marine reserves, these obligations arise when the Minister or Director-General makes policy decisions concerning the protection, management or conservation of a taonga species, including recommendations to the Minister of Conservation (by the Director-General) or the Governor-General in Council (by the Minister of Conservation) for the promulgation of any regulations under any enactment. This includes the Orders in Council for the proposed marine reserves.

164. In terms of the taonga fish species (Part A, schedule 98), section 298 acknowledges the cultural, spiritual, historic, and traditional association of Ngāi Tahu with the taonga fish species. Section 304 sets out that the Minister of Conservation must, in all matters concerning the management and conservation by the Department of Conservation of taonga fish species within the Ngāi Tahu claim area, consult with, and have particular regard to the advice of, Te Rūnanga o Ngāi Tahu in its capacity as an advisory committee appointed pursuant to clause 12.14.9 of the Deed of Settlement.

165. Other obligations apply to the Minister for Oceans and Fisheries in relation to taonga fish species pursuant to section 303.

3.3.4 Treaty Settlements – Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 (the Fisheries Settlement Act)

166. Following the introduction of the quota management system, Māori litigants claimed the quota management system was unlawful and in breach of the principles of the Treaty of Waitangi.

167. An interim settlement was reached in 1989, which broadly required the Crown to provide Māori with 10% of existing commercial quota or its cash equivalent.

168. A final (pan-Māori) settlement of the claims was reached on 23 September 1992. The Crown and Māori signed a Deed of Settlement settling Māori interests in commercial fishing and making provision for statutory recognition of Māori non-commercial fishing rights.

169. The Deed was given effect by the Fisheries Settlement Act.

3.3.4.1 Commercial fishing

170. Under the Fisheries Settlement Act, the obligations of the Crown to Māori in respect of commercial fishing were discharged in return for the benefits provided by the settlement: $150 million to purchase a half share in Sealord Products Limited; and an agreement to transfer 20% of quota for all stocks in the quota management system (current and future, with the exception of those stocks covered by the interim settlement).

171. Section 9 of the Fisheries Settlement Act provides that all claims by Māori, including current and future claims in respect of, or directly or indirectly based on, rights and interests of Māori in commercial fishing, have been settled. No court or tribunal has jurisdiction to inquire into the validity of such claims.

3.3.4.2 Non-commercial fishing rights

172. Section 10 of the Fisheries Settlement Act recognises ongoing customary non-commercial fishing rights. The section places obligations on the Crown, including to develop policies to recognise the use and management practices of Māori in the exercise of these rights and to recommend to the Governor-General the making of regulations to recognise and provide for customary food gathering by Māori[49]. Section 10 makes clear these rights continue to give rise to Treaty obligations on the Crown. However, the rights or interests of Māori in non-commercial fishing giving rise to claims have no legal effect so are not enforceable in civil proceedings, and do not provide a defence to any proceeding except to the extent such rights or interests are provided for in fisheries regulations.

3.3.4.3 Relevance to decision-making under the Marine Reserves Act

173. Despite the settlement and the limitations on bringing claims in the Fisheries Settlement Act, non-commercial fishing rights continue to give rise to Treaty obligations on the Crown and upholding settlement provisions (both commercial and non-commercial) is a statutory requirement in accordance with the principles of redress and active protection. The impacts of the proposed marine reserves on the provisions of the settlement and customary non-commercial fishing rights are therefore highly relevant to your decision-making (particularly the exercise of your obligation under section 4 of the Conservation Act to give effect to the principles of the Treaty of Waitangi).

174. Further advice on the relevance of these matters to the objections and Treaty partner views received and to your decisions is provided in the subsequent chapters.

[49] As relevant to the areas in question, this obligation has been implemented through the Fisheries (South Island Customary Fishing) Regulations 1999. These regulations govern matters including the appointment of Tāngata Tiaki/Kaitiaki for customary food gathering area/rohe and the process for the establishment of mātaitai reserves.

4 Assessment of compliance with statutory process requirements prior to decision-making

4.1 Introduction

175. As described in chapter 3, an application for an Order in Council to establish a marine reserve must meet a number of process requirements under sections 4 and 5 of the Marine Reserves Act, prior to the decision-making stage in sections 5(6) and 5(9).

176. In addition, as set out in 3.3, you have obligations in relation to the Treaty of Waitangi. Regarding what these obligations require *prior* to the decision-making stage:

- You should be satisfied that the process leading to this point gives effect to the principles of the Treaty of Waitangi as required by section 4 of the Conservation Act.
- Te Takutai Moana Act places requirements on you and the Director-General of Conservation in terms of how a conservation process is to be carried out, and how customary interests are to be considered (see part 3 of te Takutai Moana Act and specifically, sections 47 and 48).
- The Ngāi Tahu Claims Settlement Act also requires you to advise, consult with and have particular regard to the views of Kāi Tahu[50] in relation to taonga species and taonga fish species (as they are defined in that Act).

177. Note that while the Fisheries Settlement Act provides relevant context, it does not impose any relevant obligations prior to decision-making.

178. You should be satisfied that these requirements have been met, before proceeding to the next stage of the decision-making process – the consideration of objections received and decisions on the marine reserve proposals (section 5(6) and 5(9)).

179. Sections 4.2 – 4.13 below outline Te Papa Atawhai's assessment of the Applicant's compliance with these requirements for all six proposed marine reserves.

4.2 Summary – assessment of compliance with statutory process requirements prior to decision-making

180. Te Papa Atawhai considers that the Application, the steps taken in publicly notifying the Application, and Te Papa Atawhai's development of advice to you:

- meets the statutory process requirements of sections 4 and 5 of the Marine Reserves Act
- meets the requirements set out in sections 47 and 48 of te Takutai Moana Act
- meets the requirements set out in the Ngāi Tahu Claim Settlement Act

[50] Sections 293, 294 and 304.

- gives effect to the principles of the Treaty of Waitangi (in accordance with section 4 of the Conservation Act).

181. On that basis, Te Papa Atawhai considers you can proceed to consider the objections to the proposed marine reserves in accordance with section 5(6), and if no objections are upheld consider the proposed marine reserves in accordance with section 5(9) of the Marine Reserves Act. Detailed analysis on the rationale for this follows in the rest of this chapter.

182. Note also that, under the direction of former Ministers of Conservation, an independent reviewer has been engaged (as provided for in section 5(6) of the Marine Reserves Act) to separately assess the Director-General's compliance with the statutory process requirements outlined above.

4.3 Marine farms: Marine Reserves Act section 4(1)

183. Section 4(1) of the Marine Reserves Act states:

> 'Subject to section 5 of this Act, the Governor-General may from time to time, by Order in Council, declare that any area described in the Order shall be a marine reserve subject to this Act...; but no area in respect of which any lease or licence under the Marine Farming Act 1971 is for the time being in force shall be declared a marine reserve.'

184. The Marine Farming Act was repealed and replaced by the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004. Under section 10 of this Act, leases and licenses created under the previous Marine Farming Act are deemed to be coastal permits under the Resource Management Act.

185. Otago Regional Council has confirmed, as of May 2023, that no coastal permits for marine farming activities have been issued or are being processed for any areas falling within the six proposed marine reserves[51].

4.4 Harbour board: Marine Reserves Act section 4(2)

186. Section 4(2) of the Marine Reserves Act states:

> 'No area within the jurisdiction of any harbour board shall be declared a marine reserve without the consent of the harbour board.'

187. The Otago Regional Council now holds the role of harbour board for the region within which the six proposed marine reserves fall. The Director-General wrote to Otago Regional Council on 15 August 2019, advising of the upcoming process to carry out statutory consultation on the six proposed marine reserves, and that consent would be needed before any marine reserves are established. If you decide to recommend the establishment of one or more of the six proposed marine reserves, this formal consent will be sought from Otago Regional Council at that time. Otago Regional Council were also contacted as a part of notification for the public two-month statutory consultation period.

[51] The Otago Regional Council is processing a marine farming application for open ocean salmon farming offshore of the proposed Te Umu Koau and Papanui marine reserves, as discussed in 8.6.4.7 and 9.6.4.2.

4.5 Mining interests: Marine Reserves Act section 4(4)-(6)

188. Sections 4(4)–(6) deal with mining interests (both existing and future). The Application refers to one active petroleum exploration permit overlapping a section of the proposed Papanui marine reserve (0.1% of the area covered by the exploration permit).[52] As discussed in 9.6.2, further investigation demonstrated that the boundary of this permit had been amended so there was no area of overlap. The permit has since been surrendered entirely. There are currently no active permits or applications relating to mining interests in the area of any of the proposed marine reserves.

4.6 Who may be an applicant: Marine Reserves Act section 5(1)(a)

189. Section 5(1)(a) of the Marine Reserves Act states:

> '(1) No Order in Council shall be made under section 4 unless—
>
> (a) application for the Order in Council is made to the Director-General by 1 or more of the following:
>
> (i) any university within the meaning of the Universities Act 1961:
>
> (ii) any body appointed to administer land subject to the Reserves Act 1977 if such land has frontage to the seacoast:
>
> (iii) any body corporate or other organisation engaged in or having as one of its objects the scientific study of marine life or natural history:
>
> (iv) Maori iwi or hapu who have tangata whenua status over the area:
>
> (v) the Director-General:'

190. For these proposed six marine reserves, the Applicant is the Director-General of Conservation. The Director-General approved the Application and Consultation Document (Appendix 1) and published a notice of this intention (see 4.7 below).

4.7 Publication of notice: Marine Reserves Act section 5(1)(b) and (c)

191. Section 5(1)(b) of the Marine Reserves Act states:

> '(1) No Order in Council shall be made under section 4 unless—
>
> ...
>
> (b) notice of intention to apply for an Order in Council declaring the area a marine reserve has, after consultation with the Director-General, been published by the applicant for the order at least twice, with an interval of not less than 5 nor more than 10 days between each publication, in some newspaper circulating at or nearest to the place where the area is situated, and at least once in each of 4 daily newspapers, one of which shall be published in Auckland, one in Wellington, one in Christchurch, and one in Dunedin:'

192. Further, section 5(1)(c) of the Marine Reserves Act requires:

[52] Application, pages 71 and 95.

'every notice published pursuant to paragraph (b) [of this subsection]—

(i) states the date of first publication of that notice:

(ii) states that place where the plan referred to in subsection (2) [of this section] may be inspected:

(iii) gives a general description of the area proposed to be declared a marine reserve:

(iiia) states the proposed name of the proposed marine reserve:

(iv) gives an address for service:

(v) calls upon all persons wishing to object to the making of the order to send their objections in writing, specifying the grounds thereof, to the Director-General within 2 months from the date of first publication of the notice ...'

193. Due to disruption caused by COVID-19, the original public consultation period (which began on 17 February 2020) had to be withdrawn. A new public consultation period began on 3 June 2020 (see 4.10 for further details). Notices meeting the requirements of section 5(1)(b) and (c) were published as outlined in Table 4-1. A record of all public notices can be found in Appendix 3.

Table 4-1: Newspapers and dates where notice of intention to apply for an Order in Council were published

Newspaper	17 February 2020 (first) date of publication	3 June 2020 (first) date of publication	10 June 2020 (second) date of publication
Southland Times	Yes	Yes	Yes
NZ Herald	Yes	Yes	Not required
Dominion Post	Yes	Yes	Not required
The Press	Yes	Yes	Not required
Otago Daily Times	Yes	Yes	Yes
Timaru Herald	Yes	Yes	Yes
Oamaru Mail[53]	21 February 2020	5 June 2020	12 June 2020

194. The consultation process was also advertised on Te Papa Atawhai and Tini a Tangaroa social media and web pages. Media releases were published for both the first and second rounds of consultation on 17 February 2020 and 3 June 2020, as well as a media release published for the withdrawal of the first round of consultation in April 2020.

195. As an additional measure, extra non-statutory newspaper notices were published in the Southland Times, The Press, Otago Daily Times, Timaru Herald and Oamaru Mail on 3, 17 and 31 July 2020 (Appendix 3). These notices invited the public to submit their views on the proposed marine protected areas, outlined where further information could be found and how to make a submission, and stated the deadline for submissions.

[53] Notices meeting the requirements of section 5(1)(b) and (c) were also published in the Oamaru Mail (a paper printed each Friday) on the Friday immediately following both commencement dates (i.e. on 21 February 2020 and 5 June 2020).

4.7.1 Public consultation and impacts of COVID-19 restrictions

196. Te Papa Atawhai and Tini a Tangaroa initially launched the joint public consultation on the proposed marine protected areas on 17 February 2020. Statutory public consultation was set to end two months later on 17 April 2020.

197. On 18 February 2020, correspondence was sent directly to the Ministers of Conservation and Fisheries on behalf of the Otago Rock Lobster Industry Association asking for the consultation process to be delayed because COVID-19 had resulted in the closure of markets for kōura/rock lobster in China. On 10 March 2020, the Deputy Director-General of Conservation responded to the request acknowledging the pressures to this industry, offering a meeting with agency officials, and stating that late submissions could be made and would be considered on a case-by-case basis.

198. On 11 March 2020, the World Health Organisation declared COVID-19 a pandemic, triggering governmental responses worldwide. On 21 March 2020, the New Zealand Government announced four COVID-19 Alert Levels and placed New Zealand at Alert Level 2 'Reduce'. By midnight on 25 March 2020 New Zealand was placed at Alert Level 4 'Eliminate', effecting a nationwide lockdown for at least four weeks. A National State of Emergency was also declared and subsequently extended.

199. Entering Alert Level 4 had significant implications for the statutory public consultation process:

- Section 5(2) of the Marine Reserves Act requires the plan of the proposed marine reserves to be available during office hours at the appropriate Te Papa Atawhai offices. Te Papa Atawhai could no longer fulfil that requirement.
- The restriction of non-essential travel and closures of libraries inhibited people's potential ability to participate in the consultation process in a normal manner.
- Te Papa Atawhai staff could no longer access any written submissions posted to the Te Papa Atawhai national office.

200. A hui planned for 24 March 2020 with Kāi Tahu at Ōtākou Marae was postponed, with no future date or process for engagement agreed at that time.

201. On 31 March 2020, following advice from officials, the Director-General decided to withdraw the statutory consultation process, with a view to reinitiating a new two-month statutory public consultation period at a later date. On 8 April 2020, the Director-General informed the Minister of Conservation of this decision. Concurrently, the Minister of Fisheries also reached this decision relating to the other proposed marine protected areas. These decisions were communicated with Kāi Tahu, and stakeholders on 9 April 2020 and subsequently a joint media release was made.

202. On 13 May 2020, Agencies were granted approval to recommence the consultation process under Alert Level 2 restrictions. A re-engagement plan was finalised and on 18 May 2020 notification was given to Kāi Tahu and stakeholders to alert them to the planned public consultation recommencement. Public consultation began on 3 June 2020 and ran for two consecutive months ending on 3 August 2020.

4.8 Written notification to be given to certain parties: Marine Reserves Act section 5(1)(d)

203. Section 5(1)(d) of the Marine Reserves Act states:

'(1) No Order in Council shall be made under section 4 unless

...

(d) notice in writing of the proposed marine reserve is given by the applicant to—

(i) all persons owning any estate or interest in land in or adjoining the proposed reserve. For the purpose of this subparagraph, land shall be deemed to adjoin a proposed marine reserve notwithstanding that it is separated from it by the foreshore or by any road, or that is at a distance of not more than 100 metres from the proposed marine reserve if separated from it by any other reserve of any kind whatsoever or any marginal strip within the meaning of the Conservation Act 1987:

(ii) any harbour board if the area or any part of the area proposed as a marine reserve is within the jurisdiction of that harbour board:

(iii) any local authority or public body in which the foreshore or the control of the foreshore is vested if that foreshore or any part of it is within the area proposed as a marine reserve:

(iv) the Secretary of Transport:

(v) the Director-General of Agriculture and Fisheries [Primary Industries].'

204. The lists of parties contacted under section 5(1)(d) of the Marine Reserves Act are provided in Appendix 4.

205. Under section 5(1)(d)(i), notice was given in writing to the adjoining landowners. Adjoining landowners were identified using a combination of Quickmap (a Geographic Information System-enabled New Zealand property database) and LandOnline (Land Information New Zealand's online property database). Each identified landowner was sent a letter advising of the application for the proposed marine reserves on 3 February 2020 for the first round of consultation, and a second letter on 3 June 2020 (template letter, Appendix 5).

206. Under section 5(1)(d)(ii), notice in writing was given to the Canterbury Regional Council and Otago Regional Council as the regional harbourmasters of the area that the proposed marine reserves fall within (Appendix 5).

207. Under section 5(1)(d)(i) and (iii), notice in writing was given to the Canterbury Regional Council and Otago Regional Council, as the local authorities with control over the areas the proposed marine reserves fall within (Appendix 5).

208. Under section 5(1)(d)(iv), notice in writing was given to the Chief Executive for the Ministry of Transport (Appendix 6).

209. Under section 5(1)(d)(v), notice in writing was given to the Director-General of Agriculture and Fisheries [Ministry for Primary Industries] (Appendix 7).

210. In addition to the list of those who statutorily needed to be notified in writing, the following groups received an email one week prior to the commencement of consultation, and an email on the date of notification for both the first and second rounds of consultation:

- all Forum members
- non-governmental organisations and science groups
- Southeast Marine Protection 'VIP mailing list' members
- Kāi Tahu and te Takutai Moana Act applicants.

211. All those listed above were also sent an email notice about the withdrawal of public consultation on 9 April 2020, a two-week notice via email of the closure of the second round of consultation, and a notification on the closing date on 3 August 2020.

4.9 Published plan available of area: Marine Reserves Act section 5(2)

212. Section 5(2) of the Marine Reserves Act states:

> 'The Director-General [of Conservation] shall cause a plan to be prepared on a suitable scale showing all tidal waters coloured blue, and the boundaries and extent of the area sought to be declared a marine reserve. The plan shall be open for inspection free of charge during ordinary office hours by any person at the office of the Department nearest to the proposed reserve.'

213. Plans of the six proposed marine reserves were included in Figures 2 – 7 (pages 22, 24, 27, 30, 33, 35) of the Consultation Document, and again in the Application (Appendix 1 of the Consultation Document). The tidal waters were coloured blue and the boundaries and extent of the area sought were marked with dimensions and latitude/longitude positions.

214. The plans, as part of the Consultation Document, were available for inspection free of charge during ordinary office hours at Te Papa Atawhai offices in Christchurch, Dunedin, and Invercargill, at Te Papa Atawhai visitor centres in Wellington, Geraldine, and Dunedin, and at public libraries in Waimate, Oamaru, and Balclutha. In the case that any member of the public was not able to access the online version of the Consultation Document or were not able to reach any of the locations described above, the public was invited to contact Te Papa Atawhai and request a hard copy of the Consultation Document be sent to them.

215. In addition to the plans contained in the Consultation Document and Application, an A3 plan was prepared showing all of the 12 proposed marine protection measures (including the six proposed marine reserves). This plan was either displayed or available for viewing with the consultation material at each of the locations described above, including displaying these on external noticeboards where possible.

4.10 Process for receiving submissions: Marine Reserves Act sections 5(3)-(5)

216. Sections 5(3) - 5(5) of the Marine Reserves Act state:

> '(3) All persons wishing to object to the making of the order shall, within 2 months from the date of first publication of the notice published pursuant to paragraph (b) of subsection (1), send their objections in writing, specifying the grounds thereof, to the Director-General and shall serve a copy of their objections, specifying the grounds thereof, on the applicant within the same time.
>
> (4) The applicant may, on receiving any copy of objections under subsection (3), answer those objections in writing to the Director-General within 3 months from the date of first publication of the notice published pursuant to paragraph (b) of subsection (1), and the Director-General shall send any such answer he may receive within that time to the Minister for consideration.

(5) The Director-General shall refer to the Minister all such objections received within the said period of 2 months, and any answer received within the said period of 3 months.'

217. As required by section 5(3), the consultation period ran for 2 months from 3 June 2020 to 3 August 2020.

218. In accordance with the notifications described above, the public was invited to make submissions online, by email or in writing to the Agencies. The online survey was managed by the independent public research and engagement company PublicVoice.

219. Submitters who had already made a submission during the first period of consultation were notified that they could choose to either withdraw their submission or to have it carry over as a submission under the new public consultation period, including the chance to modify it.

220. Five submissions were received just after the notified consultation period closed on 3 August 2020. The Director-General made the decision to accept these five submissions as they were all received within a week of the consultation period closing.

221. Four late submissions were then received on 3 September 2020, one month following the close of public consultation. The Director-General decided not to accept these submissions under the Marine Reserves Act process. Tini a Tangaroa did accept them for their separate statutory process.

222. Under section 5(4), the applicant *may* provide an answer to objections (within three months of notification) – not to the objector, but to the Director-General. The Director-General must then forward all objections, and any answers to objections, to the Minister of Conservation. An anomaly arises when the Director-General is the applicant because, on a strict interpretation of the Marine Reserves Act, it would mean the Director-General provides answers to themself, on their own application. This step was deemed unnecessary in this case because:

- it would have been an artificial exercise
- Te Papa Atawhai has developed this report, which assesses and advises the Minister of Conservation on the views received via submissions (including objections) and from Kāi Tahu (see chapters 6–12 of this report).

223. In accordance with section 5(5), the Director-General provided the then Minister of Conservation with an electronic copy of all submissions received (those in objection and support) on 3 September 2020. An electronic copy of all submissions will be provided to your office alongside this report.

4.11 Affected iwi, hapū or whānau participation in conservation processes: Marine and Coastal Area (Takutai Moana) Act sections 47 and 48

224. As set out in 3.3.2, the Application for the proposed marine reserves is a 'conservation process' for the purposes of te Takutai Moana Act (as defined in section 47 of that Act). Affected iwi, hapū and whānau have the right to participate, and the notification requirements set out in section 48 apply.

225. As set out in 5.2, in terms of the statutory definitions under te Takutai Moana Act, Te Papa Atawhai has proceeded on the basis that any persons or groups affiliated to Kāi Tahu have been considered as being 'affected iwi, hapū, or whānau' for the purpose of te Takutai Moana

Act. Further detail on Te Papa Atawhai's approach to identifying 'affected iwi, hapū, or whānau' for the purposes of the Application is set out in chapter 5.

226. Section 48 of te Takutai Moana Act, 'Notification of conservation process', states that:

'(1) If an application or a proposal is made for a conservation process, notice must be given as provided for in subsection (2), by—

(a) the Director-General, in the case of those referred to in section 47(3)(a) to (d); and

(b) the applicant, in the case of an application referred to in section 47(3)(e).

(2) Notice must be given as soon as is reasonably practicable after the application or proposal is received by the Director-General and may be given—

(a) as part of any public notice given to members of the public generally of the matter to which it relates; or

(b) in a case where the Director-General is not otherwise required to give public notice, to the affected iwi, hapū, or whānau in particular in any publication circulating in the locality to which the proposal relates.

(3) A notice given under this section must—

(a) include advice that any iwi, hapū, or whānau that consider they are affected iwi, hapū, or whānau may provide that advice to the Director-General; and

(b) state the day by which any iwi, hapū, or whānau who may be affected must provide their views; and

(c) provide sufficient information about the subject matter and scope of the application or proposal—

(i) to inform iwi, hapū, or whānau who may be affected, of the obligations on the Director-General under this subpart; and

(ii) to assist affected iwi, hapū, or whānau to decide whether they wish to make a submission on the application or proposal; and

(iii) to advise where further information on an application or proposal may be viewed.

(4) In the event of a dispute as to whether, or which, iwi, hapū, or whānau are affected by an application or proposal, the Director-General must—

(a) seek, and may rely on, any evidence that in his or her opinion is of sufficient authority to resolve the dispute; and

(b) advise iwi, hapū, or whānau without delay of the decision made under this subsection, with reasons.

(5) A decision of the Director-General as to whether iwi, hapū, or whānau are affected is final.'

227. The Director-General satisfied the requirements of section 48 by the notices published as described in 4.7–4.9. All local rūnanga offices in the regions of the proposed marine reserves were also directly contacted by email.

4.12 Ngāi Tahu Claims Settlement Act 1998

228. As described in 3.3.3, both the Minister of Conservation and the Director-General have obligations in relation to taonga species under the Ngāi Tahu Claims Settlement Act (sections 293 and 294) and the Minister of Conservation has obligations in relation to taonga fish species (section 304). Some of these obligations are process requirements which apply prior to decision-making.

4.12.1 Taonga species

229. Pursuant to section 293, the Minister must:

- advise Te Rūnanga o Ngāi Tahu in advance of any relevant conservation management strategy reviews or the preparation of any statutory or non-statutory plans, policies, or documents (including any amendments or reviews) relating to a taonga species, including those subject to recovery plans or species recovery groups
- consult with, and have particular regard to the views of, Te Rūnanga o Ngāi Tahu when the Minister makes policy decisions concerning the protection, management, or conservation of a taonga species, including those subject to recovery plans or species recovery groups.

230. Pursuant to section 294, the Director General must:

- consult with and have particular regard to the views of Te Rūnanga o Ngāi Tahu when the Director-General makes policy decisions concerning the protection, management or conservation of all taonga species subject to a species recovery group or recovery plan.

231. Appendix 5 of the Consultation Document included a description of the taonga species (as agreed in the Ngāi Tahu Claims Settlement Act) that are considered likely to occur within each of the proposed marine reserves.

232. In terms of the obligations in section 293 that apply prior to decision-making, Agencies worked with and consulted Kāi Tahu in the development and finalisation of both the Application and Consultation document (see 2.6.2). Kāi Tahu were invited to submit via the Consultation process (see 4.7) on the proposed marine reserves. In addition, Agencies facilitated extensive direct engagement with Kāi Tahu (see 2.6.2 and further in 6.3).

233. In terms of the obligations in section 294, of the species listed in the Application and Consultation Document, hoiho/yellow-eyed penguin are currently the only taonga species in the proposal area with an active species recovery group and recovery plan. The identification of hoiho in the Application and Consultation Document and the subsequent engagement with Kāi Tahu fulfil the Director-General's consultation obligations in section 294 that apply prior to decision-making.

4.12.2 Taonga fish species

234. Pursuant to section 304, the Minister must:

> in all matters concerning the management and conservation by the Department of Conservation of taonga fish species within the Ngāi Tahu claim area, consult with, and have particular regard to the advice of, Te Rūnanga o Ngāi Tahu in its capacity as an advisory committee appointed pursuant to clause 12.14.9 of the Deed of Settlement.

235. Appendix 5 of the Consultation Document also contains the taonga fish species present within each of the proposed marine reserves. The identification of these species and

subsequent engagement with Kāi Tahu fulfil the Minister's consultation obligations in section 304 that apply prior to decision-making.

4.13 Giving effect to the principles of the Treaty of Waitangi (section 4 Conservation Act)

236. In addition to the specific requirements in te Takutai Moana Act, section 4 of the Conservation Act requires that the Marine Reserves Act must be interpreted and administered as to give effect to the principles of the Treaty of Waitangi (see 3.3.1).

237. As recorded in 2.6.2, the region covered by the Forum and therefore each of the marine protected areas that comprise the proposed Network are located within the Kāi Tahu takiwā and specifically the rohe moana of six papatipu rūnanga[54].The obligations in section 4 therefore apply to the Crown's engagement with those affiliated with Kāi Tahu both in terms of the statutory consultation process and direct engagement. In addition, the Crown's obligations under section 4 of the Conservation Act may still be relevant to engagement with 'other Māori submitters' (i.e. those Māori individuals and groups representing Māori interests but not affiliated with Kāi Tahu). The classification of submissions and views received from Māori is described further in chapter 5. The following section describes how Te Papa Atawhai has given effect to the principles of the Treaty throughout its engagement process in progressing the Application, in terms of the statutory process, parallel Treaty partner engagement and development of advice. Note that detail and analysis of the views provided by Māori submitters (including those affiliated with Kāi Tahu) through the statutory consultation process and from Kāi Tahu through direct engagement, together with Te Papa Atawhai's advice as to how its recommendations in respect of each of the proposed marine reserves gives effect to the principles of the Treaty, is discussed in the Network and individual site chapters that follow (chapters 6-12).

238. **Partnership** – mutual good faith and reasonableness: The Crown and Māori must act towards each other reasonably and in good faith.

> Throughout engagement, both during the Forum process and during the subsequent statutory process, Te Papa Atawhai has engaged reasonably and in good faith in the spirit of partnership towards its Treaty partner.
>
> Adherence to the principle of partnership is demonstrated in multiple ways.
>
> In terms of the statutory consultation process, Te Papa Atawhai has given effect to the principle of partnership by taking active steps to facilitate Kāi Tahu participation, and this was considered carefully at all stages. Specific notice of the process was sent to the six papatipu rūnanga whose rohe moana are within the proposed marine protected areas (including the proposed marine reserves) including specific consideration of the timing and logistical impacts of the interruption to the process as a result of New Zealand's response to COVID-19. Other Māori submitters were also able to participate through the statutory consultation process, and steps were taken to ensure any views received could be appropriately identified as Māori views (see further chapter 5).
>
> In addition to the statutory process, ongoing direct engagement between Te Papa Atawhai, Tini a Tangaroa, and Kāi Tahu since the conclusion of the Forum process in 2018 has occurred via an extensive series of hui and the establishment of a specific working group (the Rōpū) (see 2.6.2 and 6.3 for more detail). As noted in 2.6.2, Agencies

[54] Te Rūnanga o Arowhenua, Te Rūnanga o Waihao, Te Rūnanga o Moeraki, Kāti Huirapa Rūnanga ki Puketeraki, Te Rūnanga o Ōtākou and Awarua Rūnanga.

have facilitated the preference of Kāi Tahu for their views to be shared via direct engagement rather than through the statutory consultation process. The direct engagement has also allowed for sharing of knowledge and ideas, with the view to discussing, understanding and (where possible) identifying proposed solutions to issues raised by Kāi Tahu. As discussed in detail in 6.3, through this engagement process, Agencies have worked through each of the proposed measures that Kāi Tahu have put forward as a means of mitigating what they consider to be the effects and impacts of the proposals on their rights and interests. The decision to undertake and facilitate direct engagement with Kāi Tahu did not preclude individuals or rūnanga from making a submission through the statutory consultation process.

239. **Informed decision-making** – Both the Crown and Māori need to be well informed of the other's interests and views. When exercising the right to govern, Crown decision-makers need to be fully informed. For Māori, full information needs to be provided in order to contribute to the decision-making process.

The statutory consultation process and ongoing direct engagement with Kāi Tahu have been conducted with a high degree of openness and sharing of information.

In terms of the statutory consultation process, views received from Kāi Tahu, as well as submissions from other Māori submitters, have been identified and analysed in the advice that follows in the subsequent chapters (see chapter 5 for further detail on the classification of submissions and views received from Māori submitters). The purpose of this is to ensure that you are able to make an informed decision in light of those views expressed.

In terms of the direct engagement with Kāi Tahu, the engagement process has included listening, discussing and documenting the matters Kāi Tahu have identified as important in the context of the proposed marine protected areas, including at the regional and individual rūnanga levels. As discussed in further detail in 2.6.2 and 6.3, a specific rōpū was established following July 2020 to work through the measures proposed by Kāi Tahu to mitigate what they consider to be the impacts of the marine protected areas on their rights and interests. All relevant hui minutes from the full course of engagement are provided to you as appendices to this advice.[55] In addition, Agencies used the hui minutes from the Rōpū engagement to draft the Rōpū Report (described in 2.6.2) which is provided to you with this advice as a record of the outcomes of the engagement undertaken.[56] This information forms a key part of Te Papa Atawhai's advice to you in 6.3.

In addition, Te Papa Atawhai provided relevant excerpts of its draft advice to Kāi Tahu for review prior to it being provided to you for consideration and decision-making (see 2.6.2). This transparent approach further enabled Kāi Tahu and Te Papa Atawhai to be well informed of each other's interests and views and present these to you as decision-maker. Agencies have also facilitated direct hui between Kāi Tahu and Ministers.

240. **Active protection** – The Crown must actively protect Māori interests retained under the Treaty as part of the promises made in the Treaty for the Crown's right to govern. This includes the promise to protect tino rangatiratanga and taonga. Active protection requires informed decision-making and judgement as to what is reasonable in the circumstances.

[55] Minutes from hui between 31 July 2018 to 23 July 2021 (Appendix 9), minutes from 30 November 2021 (Appendix 10).

[56] All hui records during this time, except that from the 23 July 2021 hui, were agreed to by Kāi Tahu, Te Papa Atawhai and Tini a Tangaroa. The 23 July 2021 hui record was not confirmed at the time and, due to personnel changes since then, remains an unconfirmed record.

The rights, interests and concerns identified both by Kāi Tahu through direct engagement and submitters through the statutory consultation process are described and analysed in subsequent chapters.

Prior to decision-making on the proposed marine reserves, the key consideration in terms of the principle of active protection is to ensure that the process undertaken facilitates informed decision-making – ensuring that the relevant rights, interests and concerns are able to be effectively communicated and understood in order to then be received and analysed will mean that the substantive decisions that follow can appropriately give effect to the principle of active protection in respect of those rights and interests. Te Papa Atawhai considers that the statutory process and ongoing direct engagement with Kāi Tahu has been carried in a manner which ensures that the principle of active protection can be given effect to in your substantive decision-making. Specific consideration of this principle in relation to the six proposed marine reserves and matters raised by Kāi Tahu regarding alleviating impacts of these proposals, are discussed for each site in chapters 6–12.

241. Finally, Te Papa Atawhai considers that the principle of redress is not directly engaged for the purposes of this assessment. The relevance of the principle of redress to your substantive decision-making is discussed later in this advice (in 6.3).

5 Method of analysis of Kāi Tahu and public views

5.1 Classification of submissions received through statutory consultation

242. Submissions were received through the PublicVoice online survey interface, by email or in hardcopy. PublicVoice were responsible for storing and logging all submissions in a database and assigning an individual identifier to each submitter. Each submitter could make up to seven submissions relevant to marine reserves: one for the proposed Network as a whole and one for each of the six proposed marine reserves.

243. Submissions made with the online survey could tick a preferred option out of a set of options for the proposed Network, and/or each individual marine reserve.[57] Most written submissions received via email or in hardcopy did not follow the PublicVoice online survey format. Therefore, PublicVoice conducted an analysis of the written content of each of these submissions to assign a position as per the online interface preference choices. If the written submission explicitly stated a position, this was used; if it was not explicitly stated, PublicVoice inferred the most relevant position based on the content.

244. The options on the online form, from which submitters could choose to indicate their preference for the proposed Network, were:

- 'The status quo (do not implement any of the proposed marine protection measures)'
- 'Another option'
- 'The network (implement the full network of proposed marine protection measures)'
- Did not give a preference

And for each proposed marine reserve:

- 'I object to the proposal being implemented (support the status quo and do not implement the marine reserve)'
- 'I partially support the proposal (I want the marine reserve implemented with changes)'
- 'I fully support the proposal (I want the marine reserve implemented)'
- Did not give a preference

245. The first two preference options for both the proposed Network and marine reserves classified the submission as an 'objection'. Any issues raised in these submissions therefore needed to be summarised and assessed under section 5(6) of the Marine Reserves Act as part of this advice. The third preference option for both the proposed Network and marine reserves classified the submission as being 'in support'. The fourth option meant the submitter did not indicate a position but comments, if any, were read and incorporated in the advice, if relevant.

[57] Regulatory Impact Assessment of the Consultation Document resulted in the inclusion of a set of optional questions for the proposed Network and each proposed marine protected area. These questions were used by PublicVoice in the online survey (see 2.5).

246. Views included in submissions in support, but that suggested or recommended changes to the proposed Network or marine reserve(s), were considered as 'qualified support'. While these submissions are not objections per se for the purposes of the Marine Reserves Act, the particular issues raised are relevant to the advice and are therefore described in the section 5(6) assessments.

247. Quality checks were conducted by PublicVoice and Te Papa Atawhai throughout this classification process. A quality assurance team reviewed and assessed the accuracy and consistency of how written submissions were classified. PublicVoice produced a Summary of Submissions report in September 2020 (Appendix 2). Subsequent analysis of submissions during Te Papa Atawhai's process to develop this advice led to the reclassification of a small number of submissions (either to which site(s) a submission related, or to which support category was most appropriate), leading to small differences in the numbers presented in the following chapters when compared to the Summary of Submissions report.

5.2 Submissions and views received from Māori

5.2.1 Statutory consultation process

248. As set out in 3.3.2, te Takutai Moana Act requires you, in your decision for this 'conservation process', to have particular regard to the views of 'affected iwi, hapū, or whānau'. In addition to the categorisation of submissions described above, Te Papa Atawhai undertook a process to determine which submissions received through the statutory consultation process were from affected iwi, hapū or whanau.

249. In terms of the statutory definitions under te Takutai Moana Act, Te Papa Atawhai proceeded on the basis that any submissions received through the public consultation process from submitters affiliated to Kāi Tahu were considered as being from 'affected iwi, hapū, or whānau' for the purpose of te Takutai Moana Act.

250. To determine if submitters were affiliated with Kāi Tahu, Te Papa Atawhai used information provided in the submission where possible. Those using the online survey form were able to answer 'Yes' or 'No' to the question 'Do you identify as tangata whenua?', and if answering 'Yes' were prompted to provide more details. In some cases, this information allowed determination of whether the submitter was affiliated with Kāi Tahu. In other cases, Te Papa Atawhai contacted submitters to ask for clarification on this point. If no response was received to the subsequent request for information, that submitter was determined not to be 'affected iwi, hapū, or whānau'. The Forest & Bird template submission did not provide a prompt for submitters to identify as tangata whenua, however the three fishing club templates did provide a space to answer this question. For other written submissions, that is, those not using any of the forms discussed above, information submitters provided in their submission was used to determine if they were 'affected iwi, hapū, or whānau'.

251. This process was applied to those submissions received from organisations in addition to individuals. Four submissions were made on behalf of organisations affiliated with Kāi Tahu.

252. Te Papa Atawhai determined that the submission made by Te Ohu Kaimoana should not be classified as being from 'affected iwi, hapū, or whānau'. As this is a national organisation, Te Papa Atawhai determined that the general views raised in the submission should not be considered as being from 'affected iwi, hapū, or whānau' (noting in particular the centrality of the concept of mana whenua and tangata whenua of the particular area in question to the definition of 'affected iwi, hapū, or whānau' under te Takutai Moana Act). Their objection was therefore classified as being a view from a Māori submitter who is not 'affected iwi, hapū, or whānau'. Some of the views expressed in Te Ohu Kaimoana's submission, however,

were stated as being those raised by Kāi Tahu. Since Kāi Tahu explicitly chose not to raise their views as an objection under the Marine Reserves Act (see 2.6.2), these issues have been considered as part of Te Papa Atawhai's advice on the Kāi Tahu views expressed through the Treaty partner engagement. Therefore, these particular views in Te Ohu Kaimoana's submission are not treated as objections for the purposes of section 5(6) of the Marine Reserves Act.

253. The other three organisations were Waitaha Taiwhenua o Waitaki Trust, Ezifish Charters Ltd and Te Rūnanga o Ōtākou. Applying the classification process described above, Te Papa Atawhai determined these submissions to be from 'affected iwi, hapū, or whānau'.

254. As described in 3.2.7, the other obligations in relation to the Treaty (as described in 3.3), in particular section 4 of the Conservation Act, also apply to the consideration of those submissions received through the public process from affected iwi, hapū, or whānau (i.e. submissions made through the public process from submitters affiliated with Kāi Tahu). This is addressed through our advice in the subsequent chapters as relevant.

255. Submissions received through the public consultation process from other Māori submitters (i.e. Māori individuals and groups representing Māori interests not affiliated with Kāi Tahu) were not considered to be from be 'affected iwi, hapū, or whānau' for the purposes of te Takutai Moana Act. Therefore, the obligation to have 'particular regard' to these views does not apply. However, the Crown's obligations under section 4 of the Conservation Act may still be relevant to your consideration of these views. The submissions from these submitters have therefore been identified and discussed at the relevant points of the advice.

256. Where the numbers of submissions received are presented in each of the site chapters, the number of submissions made by Māori (either 'affected iwi, hapū, or whānau' or not) is stipulated.

5.2.2 Direct engagement with Kāi Tahu

257. As set out in 2.6.2, through the Treaty partner engagement Kāi Tahu confirmed their position that they wanted their views to be heard via direct engagement with the Agencies.[58] Te Papa Atawhai has proceeded on the basis, that the obligation under section 49 of te Takutai Moana Act to have particular regard applies to these views received through direct engagement. As set out in 3.2.8, these views must also be considered in light of the Crown's obligations in relation to the Treaty, including the obligation under section 4 of the Conservation Act to give effect to the principles of the Treaty of Waitangi. The position of Kāi Tahu as communicated to Agencies, and Te Papa Atawhai's advice relating to this, is set out in 6.3.

5.3 Other matters relating to submissions and advice generally

5.3.1 General process

258. Objections raised in submissions on individual proposed marine reserves and the proposed Network were summarised and grouped under the relevant section 5(6) criteria. Where there was ambiguity as to which section 5(6) criteria an issue applied to, the criteria that most closely aligned with the issue was chosen. For example, some submitters raised that establishment of a proposed marine reserve could compromise the safety of recreational boat-based fishers, which could be taken to be an objection against section 5(6)(b) 'existing

[58] As noted in 2.6.2, the decision of Kāi Tahu did not preclude individuals or rūnanga from making a submission through the statutory consultation process.

right of navigation', or against section 5(6)(d) 'usage of the area for recreational purposes'. For this example, the matter was assessed under section 5(6)(d).

259. Where issues were raised by submitters relating to Māori customary interests (either by Māori or non-Māori submitters), these were described and assessed under section 5(6)(e) 'public interest', as this was deemed the most appropriate of the five criteria available. In developing our advice on these issues, we also took into account our obligations under section 4 of the Conservation Act.

260. Te Papa Atawhai's analysis of issues raised in submissions was informed by the body of science and other information already developed through the Forum process and by our science, technical, policy and legal expertise. Published literature, case law, and information provided by other local and central government agencies also assisted analysis of issues raised in submissions.

5.3.2 Information used to support an assessment of interference with recreational and commercial fishing

261. As set out in 3.2.4–3.2.6, section 5(6)(c) and (d) require an assessment of whether a proposed marine reserve would interfere unduly with commercial fishing and recreational usage. When considering whether the interference is undue, it must be balanced against the overall public advantages that would flow from the proposed marine reserve. Te Papa Atawhai has used the best available information to inform our assessment (in chapters 6–12) of this level of interference. This section describes the information available regarding commercial and recreational fishing and its limitations.

5.3.2.1 Commercial fishing

262. To assess the level of interference on commercial fishing, Te Papa Atawhai has considered estimates of how much catch (weight and value) would be displaced by the proposed marine protected areas. This provides an indication of the relative potential for effects the proposals could have on the commercial fishery overall, as well as for individual commercial fishers. We note however that displacement of catch does not equate to the same level of loss to the fishery, as the catch may be taken from elsewhere (in some cases albeit with a higher operating cost and/or with lower market value).

263. The most up to date data available were provided by Tini a Tangaroa in May 2023. These data are more recent than that presented in the Consultation Document and therefore contain some differences. Unless otherwise stated, our assessment in chapters 6–12 is based on these updated data. Te Papa Atawhai sought confirmation from Tini a Tangaroa that our interpretation and application of those data in this advice was accurate.

264. Appendix 8 summarises the commercial fisheries data with estimates of:

- the amount and value of catch of each fishery that would be affected by the proposed marine reserves, individually and collectively
- the amount and value of catch of each fishery that would be affected by the three proposed coastal Type 2 marine protected areas, individually and collectively
- the amount of individual fisher's catch that would be affected by the proposed marine reserves
- the amount of individual fisher's catch that would be affected by the three proposed coastal Type 2 marine protected areas collectively.

265. The above estimates are presented from:

- electronic reporting data from 1 April 2020 to 31 March 2023 (three fishing years) for kōura/rock lobster, toheroa/surf clam, and rori/sea cucumber, and 1 October 2019 to 30 September 2022 (three fishing years) for all other species.
- Additional information on catch estimates between the 2007/08 to 2018/19 fishing years are also provided in Appendix 8, based on CatchMapper[59] annual average catch estimates.

266. Appendix 8 also contains information on the data's spatial accuracy, its limitations and the confidence ranking it is given by Tini a Tangaroa.

267. As explained in 3.2.4, the test of 'interfere unduly' to be applied under section 5(6)(b) means that it is not possible to determine a simple threshold for when interference becomes undue based on the level of potentially affected catch. A site-specific assessment of the expected benefits and those benefits to the relevant habitat will always be required. Moreover (as noted above) it is important to remember that displacement cannot be directly equated to loss. A number of factors play into the assessment of the extent of interference. This means the assessment for undue interference on commercial fishing could vary both within the boundary of a single proposed marine reserve or across numerous proposed marine reserves.

5.3.2.2 Recreational fishing

268. For recreational fishing, there is less information available on the locations and level of fishing activity. The limited information on recreational fishing was also noted in the Forum's Recommendations Report. It highlighted that the lack of a recreational catch reporting requirement and the small samples sizes involved in the surveys that have been carried out contributed to uncertainty about the nature and level of recreational fishing activity.

269. To inform our assessment in relation to recreational fishing objections, we have used the following:

- information described in the Forum's Recommendations Report on locations used for recreational fishing and the importance of these to the recreational fishing community sourced from interviews and meetings with Fisheries Officers and recreational fishers
- information provided by submitters during the statutory consultation for this Application under the Marine Reserves Act
- information included in annual fishery stock assessment reports published by Tini a Tangaroa where estimates of recreational harvest levels are generated from fishers through on-site surveys (e.g. boat ramp surveys) or off-site surveys (e.g. interviews or catch diaries). The most recent report we analysed is dated May 2021.

270. Te Papa Atawhai considers that this information, while it has limitations, is sufficient for the purpose of assessing the relative impact on recreational fishing. The starting point for administrative law purposes is that all decision-makers must have sufficient, reliable information to make a decision.[60] However, what will amount to 'sufficient' information will depend on the context. When the Courts are assessing the sufficiency of information on judicial review, it falls under the assessment of the 'reasonableness' of the decision, that is, in the context of the decision being made, whether the information, objectively assessed,

[59] CatchMapper is software used by Fisheries New Zealand which provides heat maps and spatial estimates of catch and effort anywhere in the Exclusive Economic Zone for all types of commercial fishing except eel fishing.

[60] *McGrath v Accident Compensation Corporation* [2011] NZSC 77 at [31].

reasonably supported the decision, not just whether there was information on which the decision-maker could act.[61]

271. Te Papa Atawhai considers that while this recreational fisheries information has its limitations, it is the best available information at this time and sufficient in the context to reasonably support your decision under the Marine Reserves Act as to whether the interference with recreational fishing would be undue.

5.3.3 Submissions made on the proposed Network

272. The online survey[62] allowed submitters to provide a preference and comment on the proposed Network of marine protected areas and/or on specific proposed marine reserves. Equally, submissions received by post or email may have commented only on the proposed Network or on individual sites or a combination of both.

273. To enable you to adequately take account of these views in your decision-making on the six proposed marine reserves, Te Papa Atawhai has proceeded on the basis that a submission made in relation to the proposed Network that has been classified as an objection will need to be considered as an objection for each proposed marine reserve and be considered against the criteria in section 5(6) of the Marine Reserves Act. If an objection received in respect of the proposed Network is upheld, this would apply across all of the sites, meaning none of the proposed marine reserves would be declared. In chapter 6, Te Papa Atawhai has therefore:

- classified these submissions in accordance with the classification process set out above
- described and assessed the issues raised on the proposed Network against the criteria in section 5(6) and section 5(9) of the Marine Reserves Act.

274. You will need to consider the advice given in relation to the Network submissions (chapter 6) when making your decisions in respect of individual marine reserves (chapters 7–12).

275. Any issues raised in an objection on the proposed Network that did not generally apply across the proposed Network but were instead clearly site-specific (for one or more proposed marine reserves) were included and assessed in the advice relating to the relevant marine reserve (see chapters 7–12).

5.3.4 Submissions made on the proposed Type 2 marine protected areas and kelp protection area

276. Submissions made on the five proposed Type 2 marine protected areas and the kelp protection area were not analysed as part of developing this advice under the Marine Reserves Act process. These submissions are being analysed by Tini a Tangaroa and will inform their advice to the Minister for Oceans and Fisheries for establishment of these areas under the Fisheries Act. However, where submitters raised issues on the proposed Network or one or more of the proposed marine reserves that related to the cumulative impacts or benefits of the other marine protected areas, these issues were described and considered in the development of our advice.

277. In terms of any assessment of cumulative effects, the advice in this report has been developed on the basis that the Type 2 marine protected areas and kelp protection area *will* be established. As the two processes are running concurrently and decisions on the other marine protected areas have not been made yet, we consider this is the most precautionary

[61] Ibid.

[62] The questions on the online survey interface are listed at section 10.2 (pg 190) of Appendix 2.

and conservative approach to providing you advice, in terms of any assessment of cumulative impacts.