

**BEFORE THE INDEPENDENT HEARING PANEL**

**UNDER**

the Resource Management Act 1991

**IN THE MATTER OF**

the hearing of submissions on Proposed Plan  
Change 1 to the Regional Coastal Plan: Kermadec  
and Subantarctic Islands

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**Opening Legal Submissions on Behalf of the Minister of Conservation**

**Dated: 8 June 2026**

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**Department of Conservation | *Te Papa Atawhai***

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## **MAY IT PLEASE THE HEARING PANEL**

### **Introduction**

1. These legal submissions are made on behalf of the Minister of Conservation (the **Minister**), in relation to proposed Plan Change 1 to the Regional Coastal Plan: Kermadec and Subantarctic Islands (**PC1**). The Department of Conservation (**DOC**) has prepared PC1 on behalf of the Minister in accordance with the Minister's responsibilities, duties and powers with respect to the Kermadec and Subantarctic Islands (the **Islands**) under section 31A of the Resource Management Act 1991 (**RMA**).
2. The purpose of these submissions is to assist the Hearing Panel (the **Panel**) by setting out general matters relating to PC1 and the hearing process, and giving a high level overview of matters raised by submissions.
3. These submissions address:
  - a. Background and context for PC1, including the Minister's role under the RMA in relation to the Islands;
  - b. The section 42A report prepared at the request of the Minister including accompanying technical reports;
  - c. Statutory context for the Panel's assessment and decisions;
  - d. Scope issues relevant to Panel's assessment and decisions:
    - i. The scope of amendments that the Panel is entitled to make;
    - ii. Whether submissions are "on" the Plan change; and
    - iii. Analysis of submission points that may or may not be "on" the Plan change
  - e. Overview of matters raised by submissions in respect of each of the seven broad topics identified in the section 42A report.

## **Background and context for PC1, including the Minister of Conservation's role under the RMA in relation to the Kermadec and Subantarctic Islands**

### *Minister of Conservation role – Section 31A RMA*

4. The Islands comprise two important groups of New Zealand's offshore islands. Due primarily to their isolation, the Islands do not fall within a "region" or "district" of a local authority on mainland New Zealand.<sup>1</sup> Under section 31A(1)(a) RMA, however, the Minister has the same responsibilities, duties and powers in relation to the coastal marine area (**CMA**) of the Islands that a regional council would have under section 30(1)(d) of the RMA, if the CMA were within the region of that regional council.
5. The preparation of a regional coastal plan for the CMA of a region is a mandatory requirement under the RMA.<sup>2</sup> The Regional Coastal Plan: Subantarctic and Kermadec Islands (the **Operative Plan**) was notified in 2011. It became operative in September 2017 following a hearing and appeals process.

### *PC1 – a narrow plan change to address specific issues*

6. Section 64(4) RMA provides for a regional coastal plan to be changed in the manner set out in Schedule 1.
7. As described in the section 32 report, PC1 is a narrow in scope plan change that addresses specific issues.<sup>3</sup> It includes some matters that were identified to the (then) Minister of Conservation at the time that the Operative Plan was made operative, as well as other matters that have been identified through the implementation of the Operative Plan since 2011. Key drivers for progressing the plan change include:
  - a. Giving better effect to the New Zealand Coastal Policy Statement 2010 (**NZCPS**) by:
    - i. Improvements to the management of vessel biofouling by changes to the hull inspection requirements in line with up-to-date

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<sup>1</sup> As those terms are defined for the purposes of the RMA, by reference to the Local Government Act 2002.

<sup>2</sup> RMA, s 64(1).

<sup>3</sup> Section 32 report – Part 4: Drivers and proposals for change.

guidelines (IMO<sup>4</sup> 2023 Biofouling Guidelines) and standards (Craft Risk Management Standard - Vessels 2023) - relevant to Policy 12 NZCPS: Harmful aquatic organisms; and

- ii. Clarifying that all the CMA of the Islands is of outstanding natural character reflecting a terminology change from the NZCPS 1994 - relevant to Policy 13 NZCPS: Preservation of natural character.

b. Proposed changes to the access and anchoring rules to:

- i. Make provision for vessels longer than 125m (primarily cruise vessels) to access within Perseverance Harbour, Campbell Island as a discretionary activity;
- ii. include additional anchorages for vessels up to 42m in length (primarily the scampi fleet) as a permitted activity within Carnley Harbour, Auckland Islands, in response to an increase in the scampi fleet at the Subantarctic Islands;
- iii. Improve the management of ancillary craft use at the Islands, by restricting ancillary craft from travelling too far from the main vessel (or 'mother ship'); and
- iv. Improve the management of risks associated with increased numbers of tohorā / southern right whales at Port Ross, Auckland Islands by restricting vessel access to Port Ross over the winter months, and at the Auckland and Campbell Islands generally by introducing a new performance standard that applies over the winter months.

- 8. PC1 is not a full review of the Operative Plan,<sup>5</sup> noting that the Operative Plan has not yet been operative for 10 years.

*Exemption of PC1 from "plan stop" provisions – Part 5B RMA*

- 9. PC1 is specifically exempt from the "plan stop" provisions that were introduced under Part 5B of the RMA by the Resource Management (Consenting and Other System Changes) Amendment Act 2025. While

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<sup>4</sup> International Maritime Organisation.

<sup>5</sup> As required by s 79 RMA.

section 80P RMA prevents a local authority from notifying a draft planning instrument (which includes a proposed plan) until 31 December 2027, section 80U(2)(g) RMA provides an exemption for: *a proposed planning instrument or draft planning instrument used by the Minister of Conservation to change or vary the regional coastal plan for the Kermadec and Subantarctic Islands.*

10. Accordingly, PC1 can proceed following the standard Schedule 1 process.

#### *Role of tangata whenua and engagement with iwi authorities on PC1*

11. The Operative Plan acknowledges and describes the role of Ngāi Tahu ki Murihiku in respect of the Subantarctic Islands and Ngāti Kuri and Te Aupōuri in respect of the Kermadec Islands.<sup>6</sup> No changes are proposed to these aspects of the Operative Plan under PC1.
12. Since the Operative Plan was proposed and notified in 2011, however, Ngāti Kuri and Te Aupōuri have settled with the Crown.<sup>7</sup> PC1 includes the Statutory Acknowledgements recorded in the settlement legislation.<sup>8</sup> This is a requirement of the settlement legislation and is not subject to the provisions of Schedule 1.
13. Throughout the preparation of PC1, DOC has engaged with the relevant iwi authorities in accordance with the requirements of Schedule 1, on behalf of the Minister. An overview of that engagement is provided in the s 32 report,<sup>9</sup> with appendices that provide further detail of engagement.<sup>10</sup>
14. As detailed in the s 42A report, Te Ao Marama Inc. has provided a submission on behalf of Te Runanga o Hokonui, Te Runanga o Oraka Aparima, Te Rūnanga o Awarua and Te Runanga o Waihopai (collectively – Ngā Rūnanga).<sup>11</sup> Ngāti Kuri and Te Aupōuri have not submitted on PC1.

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<sup>6</sup> See in particular Values of the Coastal Marine Area of the Islands and Issue 2: Kaitiakitanga of the coastal marine area.

<sup>7</sup> Ngāti Kuri Claims Settlement Act 2015; Te Aupōuri Claims Settlement Act 2015.

<sup>8</sup> Ngāti Kuri Claims Settlement Act 2015, s115; Te Aupōuri Claims Settlement Act 2015, s117.

<sup>9</sup> Section 32 report, Part 5.

<sup>10</sup> Section 32 report – appendices 2 – 4.

<sup>11</sup> Te Ao Marama Inc has subsequently confirmed that they do not wish to be heard and that they agree with the recommendations in the section 42A report to the effect that its submission with respect to providing for research based on mātauranga Māori is best addressed through a full plan review. This is addressed below at paragraphs 57 – 66.

## **Section 42A report prepared at the request of the Minister including accompanying technical reports**

15. A section 42A report has been prepared by DOC senior planner Jesse Gooding. The report summarises and evaluates submissions on the proposed plan for the Hearing Panel and recommends possible amendments to the proposed plan in response to those submissions.
16. To inform the recommendations contained in the s 42A report, Mr Gooding commissioned expert reports from several expert advisors. These reports are attached as appendices to the s 42A report as follows:
  - a. **Jim Dilley**, Environment Canterbury Harbourmaster's Office and expert advisor to the Department of Conservation on navigation safety matters relating to the Islands (Appendix D)
  - b. **Chloe Corne**, Technical Advisor, Department of Conservation, Marine Species Team (Appendix E)
  - c. **Kat Manno**, Technical Advisor, Department of Conservation, Marine Bycatch and Threats Team (Appendix F)
  - d. **Dr Daniel Kluza**, Principal Advisor, Ministry of Primary Industry (Appendix G)
  - e. **Greer Whiting**, Senior Advisor, Ministry of Primary Industry (Appendix H).
17. Mr Gooding's report also provides (as Appendix I) a statement of evidence of **Mr Gavin Lister**, landscape architect and urban designer. This evidence was commissioned by the Minister in 2016, in anticipation of an Environment Court hearing in relation to the Operative Plan (those appeals were subsequently resolved). Mr Lister's evidence concludes that the natural character values of the Islands and surrounding waters are 'outstanding'. As explained in the s 42A report,<sup>12</sup> the evidence is relevant to a point raised by Te Ao Marama Inc. in its submission, relating to the proposed terminology change from 'significant natural character' to 'outstanding natural character'.

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<sup>12</sup> Section 42A report, paragraphs 41 – 47, submission point 9.2.

18. Mr Gooding will provide a summary of his section 42A report, including the proposals he has suggested in his report to address issues raised in submissions. Mr Gooding will also update the Panel on key issues in light of evidence received from submitters.
19. Mr Dilley, Ms Corne and Dr Kluza will be present at the hearing to provide a summary of their reports and to speak to their reports if required. Ms Manno and Ms Whiting are not available for the hearing, but can provide written responses post hearing if required. Ms Whiting's manager at the Ministry for Primary Industries, Sina Wagnor, will attend the hearing on-line to assist with conveying any questions to Ms Whiting.
20. As required under Clause 5, Schedule 1, a section 32 report was prepared in relation to PC1. The section 32 report was prepared by Sarah Hucker, Senior National RMA Advisor. Ms Hucker will also be present at the hearing and will be available to answer any questions specific to the section 32 report if required.

### **Statutory context for the Panel's assessment and decisions**

#### *Resource Management Act 1991*

21. The Hearing Panel has been delegated the necessary powers under Clause 8B and Clause 10 of Part 1, Schedule 1, RMA to hear and decide the submissions on the proposed plan. Your hearing report must include a decision on the provisions and matters raised in submissions on PC1 and the reasons for accepting or rejecting submissions.<sup>13</sup>
22. In making those decisions, the statutory requirements for preparing a regional coastal plan apply. Regional coastal plans are considered a "regional plan" and the requirements for preparing and deciding them are set out in sections 30, 32, 32AA, 63, 64 and 66 – 71 of the RMA.
23. In summary, the statutory requirements for preparing regional coastal plans that are relevant to PC1 are as follows:

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<sup>13</sup> RMA, cl 10, Schedule 1.

- a. the purpose of the regional coastal plan is to assist the Minister to carry out his or her functions under section 30(1)(d) in order to achieve the purpose of the Act in relation to the CMA of the Islands;<sup>14</sup>
- b. the regional coastal plan must be prepared and changed in accordance with: the Council's functions; the provisions of Part 2; the obligations to prepare a section 32 evaluation report and to have particular regard to that report; and the New Zealand Coastal Policy Statement (**NZCPS**);<sup>15</sup>
- c. the Panel must have regard to any management plans and strategies prepared under other Acts<sup>16</sup> – in this case there are two conservation management strategies (CMS) relating to each of the island groups that have been prepared under the Conservation Act 1987, namely the:
  - i. Southland Murihiku Conservation Management Strategy September 2016; and
  - ii. the Auckland Conservation Management Strategy 2014.
- d. the Panel must take into account any relevant planning document recognised by an iwi authority<sup>17</sup> - the relevant iwi environmental management plans are:
  - i. Te Tangi a Taurira: The Cry of the People - Ngā Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008;
  - ii. Ngāti Kuri – Pou Taiao: Environmental Management Plan 2018;
  - iii. Ngā Tai e Rua o Te Aupōuri Environmental Management Plan 2018.
- e. the Panel must disregard trade competition effects.<sup>18</sup>

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<sup>14</sup> RMA, s63, s30(1)(d), s31A.

<sup>15</sup> RMA, s 66(1).

<sup>16</sup> RMA, s66(2)(c)(i).

<sup>17</sup> RMA, s66(2A)(a).

<sup>18</sup> RMA, s 66(3).

- f. the regional coastal plan must state objectives for the region<sup>19</sup> (noting no changes are proposed to objectives via PC1), policies to implement the objectives for the region,<sup>20</sup> and rules that implement policies;<sup>21</sup>
  - g. the Panel must examine whether the policies and rules are the most appropriate way to achieve the objectives of the plan<sup>22</sup> by:
    - i. identifying other reasonably practicable options; and
    - ii. assessing the efficiency and effectiveness in achieving the objectives.
  - h. in assessing efficiency and effectiveness, the Panel must assess:<sup>23</sup>
    - i. the benefits and costs of the proposed policies and rules, and quantify them if practicable; and
    - ii. the risk of acting if there is uncertain or insufficient information about the subject matter.
  - i. in relation to rules, the Panel must have regard to the actual and potential effects on the environment, including, in particular, any adverse effect;<sup>24</sup>
  - j. the regional coastal plan must give effect to the NZCPS:<sup>25</sup>
24. Other matters that are specified in the RMA as relevant to regional coastal plans are generally not relevant to the changes proposed under PC1, including for example section 64A (which requires a regional council to consider whether or not a coastal occupation charging regime applying to persons who occupy any part of the common marine and coastal area should

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<sup>19</sup> RMA, s67(1)(a).

<sup>20</sup> RMA, s 66(1)(b).

<sup>21</sup> RMA, s 66(1)(c).

<sup>22</sup> RMA, s 32(1)(b).

<sup>23</sup> RMA, s32(2).

<sup>24</sup> RMA, 68(3).

<sup>25</sup> RMA s 67(3). Note that s67(3)(ba) requires a regional coastal plan to give effect to a national planning standard. The first set of National Planning Standards became operative in November 2019, however the Implementation standard (17) allows ten years for a regional council to comply with the standards relevant to regional plans or through notification of a proposed regional plan (excluding a proposed plan change or variation). The Minister in his role for the Islands is specifically exempt from the requirements in Standard 16 for ePlans.

be included), and provisions relating to aquaculture activities,<sup>26</sup> dumping of waste<sup>27</sup> and water quality.<sup>28</sup>

25. It is also of note that in the context of the Islands, there is no regional policy statement and no other regional or district plans that apply.
26. Your decision report must also include a further evaluation of any changes to the proposed plan in accordance with section 32AA,<sup>29</sup> but only for any changes that have been made, or are proposed for, the proposal since the section 32 evaluation report for the proposal was completed. This further evaluation must be undertaken in accordance with section 32. The section 42A report contains a section 32AA assessment of relevant changes being proposed in the report (see Appendix C).

*National Policy Statements – the New Zealand Coastal Policy Statement*

27. As noted above, a regional coastal plan must give effect to the NZCPS.
28. Since the notification of PC1, the NZCPS has been amended. These changes came into force from 15 January 2026. The changes relate to Policy 6 (Activities in the coastal environment) and Policy 8 (Aquaculture) and are not directly relevant to the changes proposed by PC1.
29. The section 32 report<sup>30</sup> and section 42A report<sup>31</sup> record that the plan provisions were assessed against the provisions of the NZCPS prior to notification in 2011 and again before seeking the Minister’s approval of the Operative Plan in 2017. Both assessments concluded that the Plan gave effect to the NZCPS. The 2017 assessment nevertheless recommended a plan change to ensure consistency with the language in the NZCPS. That is the change now being proposed via PC1, i.e. the proposed terminology changes in the Proposed Plan to clarify that all the CMA of the Islands is of outstanding natural character.

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<sup>26</sup> RMA, s 68(4).

<sup>27</sup> RMA, s 68(10).

<sup>28</sup> RMA, s 69(1).

<sup>29</sup> RMA, Schedule 1, Clause 10.

<sup>30</sup> Section 32 report, pages 28 – 30.

<sup>31</sup> Section 42A report, section 4.2.

30. Likewise, the proposed changes to the vessel hull inspection requirements are characterised as giving “better” effect to the NZCPS (Policy 12 – Harmful aquatic organisms).
31. The section 32 report also records the proposals to introduce restrictions to ancillary craft use are necessary to give effect to the NZCPS.<sup>32</sup> This is due to concerns that have arisen since the Plan became operative about the risks to both the environment and personal safety of long distance ancillary craft use, particularly associated with the potential for larger cruise ships, which are restricted from accessing certain areas, deploying ancillary craft over long distances to gain such access.<sup>33</sup>

#### *Wider reform of the RMA*

32. The Panel will also be aware that wider reform to replace the RMA is being progressed by the Government, and Bills have been introduced in the form of the Natural Environment Bill and the Planning Bill.<sup>34</sup>
33. For the purposes of the preparation of and decisions on PC1, the Minister and the Hearing Panel are required to follow the law as it currently stands, i.e. the RMA, including national policy statements (**NPS**). Neither the Minister nor the Panel can anticipate the outcome of what the legislative reform processes will be, and nor should the Plan attempt to anticipate any future changes.
34. Subject to that general statement, and as noted in the s 42A report, the two Bills as currently formulated propose the retention of the Minister’s role in relation to the Islands.<sup>35</sup>

#### *Amendment to Maritime Transport Act 1994 now in force*

35. For completeness, it is noted that the s 42A report and Mr Dilley’s expert report provided refer to an ‘anticipated’ change to the Maritime Transport Act

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<sup>32</sup> Relevant policies of the NZCPS include Policy 3 (Precautionary approach), Policy 5 (Land or waters managed or held under other Acts), Policy 11 (Indigenous biological diversity), Policy 15 (Natural features and natural landscapes) and Policy 18 (Public open space).

<sup>33</sup> Section 32 report, pages 43 - 46.

<sup>34</sup> Both Bills were introduced on 9 December 2025.

<sup>35</sup> Planning Bill, cl. 183; Natural Environment Bill, cl 220.

1994 (the **MTA**).<sup>36</sup> That change has now come into force via the Regulatory Systems (Transport) Amendment Act 2026, which introduced section 33Y to the MTA.<sup>37</sup> Section 33Y confers on the Minister the powers, duties and responsibilities in respect of the Islands and surrounding waters that a regional council would have under Part 3A of the MTA. This includes the power to appoint a harbourmaster<sup>38</sup> (who would have the corresponding powers of a harbourmaster)<sup>39</sup> and to make navigation bylaws.<sup>40</sup>

36. This legislative change has some contextual relevance to the proposed changes to the access and anchoring rules, in particular the proposed discretionary activity rule for Perseverance Harbour (proposed rule 47A). As explained in the s 32 report<sup>41</sup> and s42A report<sup>42</sup> the operating environment for navigation safety at the Subantarctic Islands has changed compared to 2017 when the Operative Plan became operative. This (in the Minister's view) is one of the factor's that contributes to the appropriateness of a shift from the current prohibited rule at Perseverance Harbour. If measures such as the appointment of a harbourmaster or promulgation of bylaws are introduced under the MTA, as they now can be now that the amendment is in force, this would provide additional mechanisms for managing navigation safety risk at the Islands, that would be complimentary to the framework provided by the Plan. Given the recency of the legislative changes, no such measures have yet been implemented and would require formal processes under the MTA before becoming operational.

### **Scope issues relevant to Panel's assessment and decisions**

#### *The scope of amendments that the Panel is entitled to make*

37. Clause 10(1) of Schedule 1, RMA requires a local authority (or as here, the Panel under delegation from the Minister) to: *give a decision on the provisions and matters raised in submissions.*

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<sup>36</sup> Section 42A report, paragraphs 20 and 91; Jim Dilley report (Appendix D) paragraphs 49 – 50 and 115.

<sup>37</sup> The Amendment Act received Royal Assent on 18 May 2026 and came into force the following day.

<sup>38</sup> Section 33D, MTA.

<sup>39</sup> Section 33F, MTA.

<sup>40</sup> Section 33M MTA

<sup>41</sup> Section 32 report, pages 31 – 34.

<sup>42</sup> Above n. 36.

38. Any amendments made to the proposed plan must be within the scope of an original submission. The case law is clear, however, that the scope of the local authority's decision-making under clause 10 is not limited to simply accepting or rejecting a submission.<sup>43</sup> In the case of *Countdown Properties (Northlands) Ltd v Dunedin City Council*,<sup>44</sup> the full High Court observed that Councils need scope to deal with the realities of the situation, where there may be multiple and often conflicting submissions by persons without professional help. In such circumstances, to take a legalistic view that a council could only accept or reject the relief sought would be unreal.
39. The key principles for considering whether an amendment is within the scope of submissions are summarised by the High Court in *Albany North Landowners v Auckland Council*<sup>45</sup> as follows:
- a. A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is **reasonably and fairly raised in submissions** on the proposed plan or plan change<sup>46</sup> (this is referred to in the *Countdown* case as being the 'paramount test');
  - b. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution;<sup>47</sup>
  - c. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic and workable fashion rather than from the perspective of legal nicety;<sup>48</sup>
  - d. The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions;<sup>49</sup>

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<sup>43</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Albany North Landowners v Auckland City Council* [2017] NZHC 138.

<sup>46</sup> *Albany North* at [115], referring to *Countdown Properties*.

<sup>47</sup> *Albany North* at [115].

<sup>48</sup> *Albany North* at [115], referring to *Royal Forest and Bird Protection Society of New Zealand v Buller Coal Ltd* [2012] NZRMA 552.

<sup>49</sup> *Albany North* at [115], referring to *Shaw v Selwyn District Council* [2001] 2 NZLR 277.

- e. It is sufficient if the change made can fairly be said to be a foreseeable consequence of any changes directly proposed in the submission.<sup>50</sup>
40. It is also well accepted law that a local authority/Panel is entitled to grant any relief within the general scope of:
- a. An original submission;
  - b. The proposed change as notified; or
  - c. Somewhere in between.<sup>51</sup>
41. Overall, therefore, for any submissions that are “on” the Plan change (as discussed in the following section), the Panel has a relatively broad scope to make amendments to the proposed plan provided it is confident that they are a logical consequence of the matters raised in the full range of submissions, such that any change would not prejudice a potential further submitter who had elected not to make a further submission. Amendments may be made that accept the specific relief sought by submitters, or alternative amendments may be made that address the issues raised in submissions, regardless of whether the submissions specifically requested alternative relief or not.

*Whether submissions are “on” the Plan Change*

42. Clause 6 of Schedule 1 provides that once a proposed plan is publicly notified, submissions may be made “on” the plan. The question of whether a submission is “on” a plan arises frequently in the context of plan changes and variations, where the scope of changes being made to the plan are constrained, in contrast to a full plan review where the entire planning framework is being reconsidered.
43. The leading case is the High Court decision of Justice Kós in *Palmerston North CC v Motor Machinists Ltd*.<sup>52</sup> The case itself related to a plan change to the Palmerston North District Plan which involved an extensive review of the inner business zone (IBZ) and outer business zone (OBZ) provisions of

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<sup>50</sup> *Albany North* at [115], referring to *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA.

<sup>51</sup> *Re Vivid Holdings Ltd* (1999) 5 ELRNZ 264 at [19].

<sup>52</sup> *Palmerston North CC v Motor Machinists Ltd* [2013] NZHC 1290.

the Plan. The Plan Change proposed that 7.63 hectares of residentially zoned land be rezoned to OBZ. Most of this land was along the ring road. The relevant submitter (Motor Machinists Ltd - **MML**) owned land that was ten lots away from the ring road. MML lodged a submission that its land should be rezoned to OBZ as well. The Environment Court decided that the relief sought was 'on' the Plan change. The Council appealed to the High Court.

44. In the High Court, Justice Kós Court explicitly endorsed the approach in the earlier High Court decision of *Clearwater Resort Ltd v Christchurch City Council*.<sup>53</sup> In *Clearwater*, William Young J said the general approach to determining whether a submission was "on" a plan change should be one: "*which focuses on the extent to which the variation alters the proposed plan*".<sup>54</sup> In summary,<sup>55</sup> His Honour said this involved a two stage (bipartite) test:

- first, whether the submission addresses the change to the status quo advanced by the proposed plan change; and,
- secondly, whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process. If the effect of the submission "came out of left field" there might be little or no real scope for public participation.

45. The Court in *Palmerston North CC v Motor Machinists* elaborated on this test, and said:<sup>56</sup>

*(d) The first limb of the Clearwater test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime*

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<sup>53</sup> *Clearwater Resort Ltd v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003.

<sup>54</sup> *Ibid.* at [59]. Note that the *Clearwater* case involved a variation, but the same principles apply to a plan change.

<sup>55</sup> As summarised in *Environmental Defence Society Inc v Otorohanga District council* [2014] ELHNZ 83, Judge Kirkpatrick, at [20].

<sup>56</sup> Above n. 52 at [91].

*for that resource is unlikely to be “on” the plan change, unless the change is merely incidental or consequential.*

*(e) The second limb of the Clearwater test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.*

46. Ultimately, in the *Motor Machinists* case, Justice Kós concluded that the MML submission was not on the plan change. In reaching that conclusion, His Honour noted the following considerations:<sup>57</sup>

- The plan change proposed limited zoning changes. All but a ‘handful’ were on the ring road, and even those were still on main roads.
- The plan change was the subject of an extensive section 32 report which included site-specific analysis. The change sought would reasonably require a similar level of analysis and involved more than ‘incidental or consequential extension’ of the rezoning proposed in the plan change.
- MML had other options, including applying for resource consent, another Council plan change or a private plan change.
- In terms of the second limb of the *Clearwater* test, the Judge was left with a real concern that people affected by the proposed additional rezoning would have been ‘left outside in the cold’ and that the inclusion of the two isolated lots in a side street could indeed be said to “come from left field”.

47. In respect of PC1, the section 42A report identifies three submissions that raise an issue as to whether submission points are “on” the plan change. These are:

- a. Request by Ponant to include Carnley Harbour within the scope of proposed Rule 47A (submission point 4.2);
- b. Request by Te Ao Marama Inc. for amendments to Performance Standard 5 in Table 2 (submission point 9.4); and

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<sup>57</sup> Above n.52 at [85] and following.

- c. Request by Sanford Ltd (submission point 5.6), Seaeagle Fishing Ltd (submission point 8.11) and Barine Developments Ltd (submission point 10.12) and Seafood New Zealand / Deepwater Council for inclusion of “Lookout/Tucker Point” within Port Ross as an additional anchorage in Rule 42.
48. An assessment of these submission points in light of the case law described above is set out in the subsequent section.
49. If the Panel determines that a submission is not “on” the plan change, the Panel can decline to consider the submission or part of it. It is an option for the Panel to “strike out” a submission as defective.<sup>58</sup> Striking out a submission, however, has significant procedural ramifications insofar as it removes the right of a submitter to appeal the decision. A submitter can also object to a strike out decision.<sup>59</sup> It is therefore submitted that the Panel should exercise caution in striking out a submission based on scope, and that it may be more appropriate to decline to consider the submission.

*Analysis of whether identified submissions are “on” the Plan change*

50. The Panel will need to make an assessment as to whether submission points are “on” the plan change. The following analysis is provided to assist the Panel in its consideration.

Request by Ponant to include Carnley Harbour within the scope of proposed Rule 47A (submission point 4.2)<sup>60</sup>

51. PC1 proposes introducing a new discretionary activity rule (Rule 47A). The proposed rule applies specifically to Perseverance Harbour and would allow vessels longer than 125m to access and anchor within Perseverance Harbour, up to 300m from mean high water springs (**MHWS**). Under the Operative Plan, this activity is prohibited by the operation of Rule 47, which prevents vessels longer than 125m accessing within 600m of MHWS. Because the entrance to Perseverance Harbour is narrow, Rule 47 operates to make entry into Perseverance Harbour a prohibited activity. This is also the case for Carnley Harbour.

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<sup>58</sup> RMA, s 41D.

<sup>59</sup> RMA, s 357.

<sup>60</sup> See section 42A report, section 6.2.5.

52. In its submission, Ponant supports the proposed rule 47A, but seeks the addition of Carnley Harbour, Auckland Islands.<sup>61</sup>

53. The section 32 report explains the context for proposed Rule 47A.<sup>62</sup> Importantly, the section 32 report is framed entirely in terms of a proposed change in relation to Perseverance Harbour. The only reference to Carnley Harbour in this section of the report is in a footnote on page 34, where the report summarises previous technical advice received on the appropriateness of a change to Rule 47. The footnote states:

*52. Note the advice from ECan related to **both Carnley Harbour and Perseverance Harbour**, however, after considering the morphology, water depths and lack of landing site options for larger cruise ships with more passengers in Carnley Harbour, only increased access to Perseverance Harbour is being progressed in this Plan Change.*

54. The analysis provided in the assessment of benefits and costs (Table 5) is provided solely in relation to Perseverance Harbour. There is no assessment in terms of Carnley Harbour.

55. In terms of the *Clearwater* test, the following considerations are relevant:

- a. The s 32 report is very clear that Carnley Harbour is not included in the Plan Change and there is no s 32 analysis of that location;
- b. The proposed change relates to Perseverance Harbour, Campbell Island. The submission requests inclusion of Carnley Harbour, Auckland Islands – i.e, a completely different geographic location. From a s 32 analysis perspective, there would be material differences between these two locations. This is confirmed by the expert report provided by Mr Dilley.<sup>63</sup> Mr Dilley identifies a range of differences between Perseverance Harbour and Carnley Harbour, including geographic and usage, which mean there are additional navigation safety risks at Carnley Harbour.<sup>64</sup>
- c. Introducing Carnley Harbour to Rule 47A would introduce a new management regime for a resource (Carnley Harbour) that is not proposed by PC1 as notified.

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<sup>61</sup> Submission point 4.2.

<sup>62</sup> Section 32 Report, pages 31 – 34.

<sup>63</sup> Appendix D, section 42A report.

<sup>64</sup> Jim Dilley report (Appendix D s 42A report), paragraphs 93 – 96.

d. In terms of the second limb of the *Clearwater* test, it is acknowledged that there is a relatively small pool of interested parties, namely the cruise industry with a presence in the Subantarctic Islands, all of which are aware of the plan change. One operator (Heritage Expeditions (2018) Ltd) has made a further submission in opposition to Ponant's request. However, it remains possible that other parties may have submitted if PC1 had proposed the inclusion of Carnley Harbour, given the differences that are present from a navigation safety and/or environmental impact perspective.

56. In light of the relevant legal principles set out above, the Minister considers that Ponant's submission seeking that Carnley Harbour is added to proposed Rule 47A is not on the plan change. If the Panel reaches a different conclusion, the s 42A report has considered the submission point on its merits and recommends the request to include Carnley Harbour is declined.

Request by Te Ao Marama Inc. for amendments to Performance Standards 5 in Table 2 (submission point 9.4)<sup>65</sup>

57. PC1 proposes additional restrictions on vessel access to Port Ross, Auckland Island, over the winter months when tohorā / southern right whale are present in increasing numbers.

58. As explained in the s 32 report,<sup>66</sup> the Operative Plan places some restrictions on access to Port Ross in winter – only vessels up to 75m in length may enter Port Ross during winter (as a permitted activity) and only subject to conditions such as maintaining a bow watch. These requirements are imposed via a condition in the relevant permitted activity rules<sup>67</sup> which requires vessels to comply with Performance Standard 5 in Table 2. Under the Operative Plan, Performance Standard 5 in Table 2 does not apply to vessels undertaking research and management work (as provided for as a permitted activity in Rules 38 and 39).

59. The section 32 report summarises the changes that are introduced by PC1 to tighten the restrictions on access to Port Ross over the winter months.<sup>68</sup>

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<sup>65</sup> See s42A report, section 7.2.3.

<sup>66</sup> Section 32 report, pages 38 - 40.

<sup>67</sup> Operative Plan Rules 34, 37, 40, 41, 42, 43 and 46.

<sup>68</sup> Above n. 66.

These are not repeated in full here. In summary, other than in reliance on Rule 1, the proposed changes would mean:

- only vessels undertaking research and management activities within the scope of Rules 38 or 39 would be able to access Port Ross as a permitted activity over the winter months; and
- any access for research and management pursuant to Rules 38 or 39 undertaken within Port Ross during the winter months will now be subject to performance standards (new Performance Standard 5 in Table 2) which places conditions to minimise risk to tohorā / southern right whales.

60. PC1 also proposes a new Performance Standard (Performance Standard 6) that will apply to all vessels operating under the permitted activity rules over the winter months at Campbell and Auckland Islands generally.

61. In its submission, Te Ao Marama Inc. seeks amendments to Performance Standard 5. Those changes are:

- An amendment to the chapeau of Performance Standard 5 so that it reads:

*Access by vessels to Port Ross in the winter months of 1 April to October 31 under Rules 38 and 39 (research and management work and Ngāi Tahu exercising their rights and interests to tino rangatiratanga, kaitiakitanga through Mātauranga Māori) must meet the following requirements at all times...*

- An exception for vessels owned and/or operated by Ngāi Tahu from operating at night.<sup>69</sup>

62. Te Ao Marama Inc. provides the context for these requested changes in paragraphs 17 and 18 of its submission:

*17. Ngāi tahu seeks the same access and opportunities to the Subantarctic Islands, as afforded by the Crown. This is considered appropriate to reflect an authentic partnership relationship between iwi and the Crown.*

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<sup>69</sup> Performance Standard 5(a). Te Ao Marama Inc. also seeks this exemption from Performance Standard 6(a), which requires avoidance, as far as practicable, of transiting Auckland Islands and Campbell Island generally at night or in reduced visibility, between 1 April to 31 October.

18. *The following amendments are sought to the performance standards 5 and 6 to reflect the request outlined in paragraph 17 above making it clear that research and management work should specifically include Ngāi Tahu exercising their rights and interests to tino rangatiratanga, kaitiakitanga through the implementation of Mātauranga Māori.*

63. The section 42A report considers the Te Ao Marama Inc. submission point 9.4 at paragraphs 164 – 174. The s 42A report writer concludes that the changes sought would require a substantive change to the scope of Rule 39 (research activities) and that such changes are not ‘on’ PC1.<sup>70</sup> The s 42A officer recommends that the changes sought by Te Ao Marama Inc. in relation to Performance Standard 5 are not accepted. The s 42A officer notes, however, that broader changes to address the exercise of rangatiratanga, kaitiakitanga and mātauranga could be more appropriately explored as part of a full plan review, and that this should include consideration of the current scope of Rules 38 and 39 and the appropriateness of the current research strategy (as incorporated in Rule 39) from an iwi perspective.
64. In light of the legal principles outlined above, the Minister agrees that the changes sought by submission point 9.4 do not appear to be “on” the Plan change. The changes requested to the chapeau of Performance Standard 5 imply an additional category of activity is provided for by Rules 38 and 39 – i.e. that *in addition* to research and management activities, Rules 38 and/or 39 provide a permitted activity pathway for Ngāi Tahu exercising their rights and interests to tino rangatiratanga, kaitiakitanga through mātauranga Māori. As explained in the s 42A report, there may well be many instances where Ngāi Tahu activities conducted for the purposes of furthering mātauranga *will* fall within the current scope of Rules 38 and/or 39, however that would be fact specific. Given that PC1 proposes changes specifically in relation to access to Port Ross over a specified period, a wholesale change to the scope of activities to which Rules 38 and 39 apply would be a significantly different proposition. That proposal has not been considered in the s 32 analysis and there is a real risk that other parties would have a view on that proposal.

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<sup>70</sup> Section 42A report, paragraph 172.

65. As noted above,<sup>71</sup> Te Ao Marama Inc. have now confirmed that they do not wish to be heard at the hearing. Te Ao Marama Inc. have noted the s 42A report and made the following comments:<sup>72</sup>
- a. *We agree The New Zealand Subantarctic Islands Research Strategy is out of date and would benefit from being reviewed and updated so that it goes beyond just ensuring research follows tikanga in practice but provides for research that is based on Mātauranga Māori. This would support Ngāi Tahu meeting the requirements of Rule 39; and*
  - b. *We agree, a full review of the plan is required to fully ensure recognition of the relationship of Ngā tahu with their ancestral waters and land.*
66. On the basis, therefore, that Te Ao Marama Inc. accept that the matters raised would be better addressed through a full plan review, there may not necessarily be a need for the Panel to make a determination on the question of scope.

Request by Sanford Ltd (submission point 5.6), Seaeagle Fishing Ltd (submission point 8.11) and Barine Developments Ltd (submission point 10.12) and Seafood New Zealand / Deepwater Council for inclusion of “Lookout/Tucker Point” within Port Ross as an additional anchorage in Rule 42<sup>73</sup>

67. PC1 proposes to change permitted activity Rule 42, by adding two new (additional) anchorages for vessels up to 42m in length. Both anchorages (Round Point and Crab Bay) are within Carnley Harbour, which is situated at the southern end of Auckland Island.
68. A number of the fishing and seafood industry submitters support the new anchorages, but seek the addition of a further anchorage. The additional anchorage sought is referred to interchangeably as “Tucker Point” or “Lookout Point”. It is situated at the northern end of Auckland Island, within Port Ross.<sup>74</sup>
69. The s 42A report considers the request by submitters and notes that because the additional anchorages proposed by PC1 are all within Carnley Harbour, whereas Tucker Point is not, there is a question as to whether the request is “on” the Plan change.

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<sup>71</sup> Above n. 11.

<sup>72</sup> Email from Te Ao Marama Inc, 28 May 2026.

<sup>73</sup> See section 42A report, section 8

<sup>74</sup> See s42A report, Figure 3, paragraph 178.

70. The s 32 report sets out the context and drivers for the inclusion of additional anchorages within Carnley Harbour as part of PC1.<sup>75</sup> The changes are the result of engagement with the fishing industry which began in 2020, and respond to advice received from the fishing industry that there were insufficient anchorages in Carnley Harbour due to increases in the number of scampi vessels since the Plan became operative in 2017. The s 32 report records that the scampi fleet proposed three new anchorages within Carnley Harbour and Tucker/Lookout Point. Two of those anchorages (Crab Bay and Round Point) are included within PC1.

71. At page 43, the s32 report records the reason for not including Lookout Point within PC1:<sup>76</sup>

*It is not proposed to add the anchorage at Lookout Point/Tucker Point, Port Ross. The fishing industry did not provide any rationale for requesting this anchorage. Sheltering by the scampi fleet generally takes place in Carnley Harbour, closest to the fishing ground. Sheltering by the scampi fleet is also generally in the winter months. As noted above, it is proposed to close Port Ross to most vessels in the winter months to reduce risks to both the tohorā / southern right whale and to vessels and crew. Although a vessel may seek shelter due to poor conditions at the fishing grounds, it is not necessarily the case that poor conditions exist at the Auckland Islands or internal waters.*

72. In the assessment of benefits and costs (Table 7)<sup>77</sup>, the s 32 analysis assesses the cost to resource users as “low” and the benefits as “high”, and records:

*The request from the scampi fleet included two other locations as anchorages that have not been accepted in the plan change, for the following reasons.*

- Fleming Bay of Adams Island is unlikely to be useful to shelter from a north-easterly wind. Adams Island has never had an introduced mammal become established and is one of the largest near-pristine islands in the world outside of the Antarctic and Arctic.*
- No rationale was provided for the inclusion of an anchorage at Tucker Point, Port Ross. To add an anchorage there would be contrary to the proposed changes to close Port Ross to most vessels in the winter months to reduce risks to tohorā / southern right whales and to vessels and crew.*

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<sup>75</sup> Section 32 report, pages 40 – 41.

<sup>76</sup> Flemming Bay was also proposed and the s32 analysis sets out the reasons why this proposal has not been included in the plan change.

<sup>77</sup> Section 32 report - pg 72 and 73.

73. In light of the legal principles set out above, the arguments as to whether or not the requested change to include Tucker/Lookout Point as an additional anchorage is “on” the plan change’ is finely balanced. On the one hand, the proposal does not come “out of left” field in the sense the additional location has always been proposed by the scampi industry and addresses the broad overall issue of provision of sufficient anchorages for the scampi industry at Auckland Islands. The s 32 report also provides some (albeit limited) analysis as to why this anchorage has not been progressed. On the other hand, the s 32 report is clear that Tucker/Lookout Point is not included, and that the additional anchorages are all ‘within Carnley Harbour’. Tucker/Lookout Point is at the opposite end of Auckland Island and very different considerations apply – specifically, the presence of tohorā / southern right whale. From a natural justice perspective (limb two of the *Clearwater* test) potential submitters may well have relied on the deliberate exclusion of Tucker/Lookout Point as a reason for not engaging, although that is reduced by the fact that the s 32 report acknowledged the scampi fleet had previously sought Tucker/Lookout Point.
74. On balance, the Minister considers there is scope for the Panel to consider the request by the identified submitters and for a decision to be made on the merits, but this will require a determination from the Panel.

**Overview of matters raised by submissions in respect of each of the seven broad topics identified in the s42A report**

75. Finally, the following section provides a high-level overview of the matters raised by submissions in respect of each of the seven topics identified in the s 42A report. Note that Mr Gooding’s s 42A summary will outline the proposals he has suggested in his s 42A report to address issues raised in submissions, and will also update the Panel on key issues in light of evidence received from submitters.

*Topic 1: General submissions on PC1*

76. Only one submission point is considered under this topic. That is the submission from Heritage Expeditions (2018) Ltd, requesting that PC1 is withdrawn on the basis that it is inefficient for PC1 to proceed in light of the impending replacement of the RMA.

*Topic 2: Natural Character – Change from “significant natural character” to “outstanding natural character”*

77. PC1 proposes changes to replace the term ‘significant natural character’ with ‘outstanding natural character’ where that term is used in the Operative Plan. This change will align the terminology of the Plan with the NZCPS.
78. Te Ao Marama Inc neither support or oppose the proposed change, but seek further information on the evidential basis for the proposed change and an explanation of the practical implications of the proposed change. They also note that any contribution to the identified ‘landscape’ values of the area would need to include mana whenua values.
79. Heritage Expeditions (2018) Ltd lodged a further submission in support of the Te Ao Marama Inc. submission (in its entirety).

*Topic 3: Access and Anchoring – Ancillary craft*

80. Under the Operative Plan, Rule 40 (Ancillary craft) provides for unrestricted access by ancillary craft anywhere in the CMA of the Islands as a permitted activity (subject to there being no scientific research being undertaken, and to compliance with Performance Standards 2, 4 and 5 in Table 2).
81. PC1 recognises that there are risks associated with long distance ancillary craft use at the Islands and proposes a change to Policy 13 and the related Rule 40. The changes proposed by PC1 would introduce restrictions on the use of ancillary craft, by providing that ancillary craft must not be:
  - a. More than 1000m from where the ‘mothership’ is authorised to access without reliance on Rule 1; and/or
  - b. More than 3,000m from the mother ship at any time.
82. The proposals have attracted a range of submissions, both in opposition and in partial support. Cruise operators in opposition have raised concerns that the proposals will restrict current use of ‘zodiacs’, including the ability to land at specified landing sites. Various submitters have suggested other measures such as audited safety plans and requiring use of ancillary craft to operate in pairs, would be more appropriate to manage the identified risks.

*Topic 4: Access and Anchoring - New Rule 47A and minor change to Rule 47*

83. As outlined above at paragraph 51, PC1 proposes a narrow exemption to current Rule 47, which would provide for access to Perseverance Harbour by vessels longer than 125m as a discretionary activity (proposed Rule 47A).
84. Submissions in opposition have been received from cruise operator Heritage Expeditions (2018) Ltd and Rodney Russ, as well as from the New Zealand Sea Lion Trust and the Southland Conservation Board. These submissions raise concerns relating to navigation safety for larger vessels within Perseverance Harbour and risks to marine mammals and other wildlife. Cruise operator Ponant has submitted in support of the proposal but (as described above) seeks that the proposal is extended to Carnley Harbour, Auckland Islands.

*Topic 5: Access and anchoring – Port Ross Access*

85. The changes relating to vessel access to Port Ross over the winter months and at the Auckland Islands and Campbell Island in the winter months generally as proposed by PC1 are described above at paragraphs 57 – 60 and are not repeated here.
86. In addition to the submission from Te Ao Marama Inc, a number of fishing and seafood industry submitters have also opposed the proposed changes. Broadly speaking, they seek the retention of the ability for vessels to ‘shelter’ within Port Ross over the winter months. The New Zealand Sealion Trust supports the proposed changes.

*Topic 6: Access and Anchoring – Additional anchorages in Carnley Harbour*

87. The changes in relation to additional anchorages in Carnley Harbour as proposed by PC1 are described above at paragraph 67.
88. The fishing and sea food industry submitters generally support the inclusion of the two new anchorages but seek the addition of further anchorages, at Tucker/Lookout Point (as described above) or within Carnley Harbour. The New Zealand Sea Lion Trust supports the new anchorages in part, but seeks restrictions on their use and exclusion of the area surrounding Figure of Eight Island.

### *Topic 7: Vessel hull and niche area biofouling*

89. There are three key components to the changes proposed by PC1 in relation to vessel hull biofouling:
- a. Changes to the minimum evidence requirements to be collected during the required hull and niche area inspections. This is reflected in changes to Appendix 4: Vessel hull and niche area inspections – requirements, method and forms;
  - b. Removing the restrictions on who can undertake hull inspections – i.e. removing the requirement for approved inspection providers. This is reflected by the deletion of Appendix 5.
  - c. Minor changes to the threshold of allowable biofouling in between inspections. This is reflected by changes to Table 1, Performance Standard 1.2.
90. Heritage Expedition (2018) Ltd and a number of the fishing and seafood industry submitters have opposed the proposals relating to hull inspections. Various points are raised, including that the requirements are too onerous for domestic vessels and/or that the biofouling requirements should be replaced with a requirement that vessels comply with MPI's regulation for 'long stay vessels' in the Craft Risk Management Standard for Vessels 2023. The New Zealand Defence Force has opposed the proposals in part, and has sought a clarification as to whether 'representative' photographs can be provided.<sup>78</sup> The New Zealand Sea Lion Trust supports the proposed changes as notified.
91. Various submitters have also opposed the removal of approved inspectors, citing the relationships that operators have built with approved inspectors.

#### **Further assistance**

92. Counsel will attend the hearing for both days and can assist the Panel with any legal issues, either as they arise or to be addressed following the hearing.

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<sup>78</sup> The New Zealand Defence Force has advised it no longer wishes to be heard at the hearing.

93. It is anticipated that at the end of the scheduled hearing, the Panel will confirm what further information is required from DOC, including a reply from the s42A officer and any specific questions or matters that have arisen during the hearing.



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8 June 2025