SUBMISSION BY THE ROYAL FOREST & BIRD PROTECTION SOCIETY

OF NEW ZEALAND INC ON THE FAST-TRACK APPROVALS BILL

To: Committee Secretariat Environment Committee
Parliament Buildings
Wellington

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Introduction and summary

1. Forest & Bird strongly opposes the Fast-track Approvals Bill (the Bill) in its entirety.

2. New Zealand is a biodiversity hotspot. Plants and animals here evolved in isolation for millions of years, creating an astonishing number and diversity of endemic species including flightless birds and giant snails, found nowhere else on earth. Unfortunately, New Zealand has one of the worst extinction rates in the world, with many more plants and animals threatened with extinction than anywhere else.

3. New Zealand has the dubious distinction of having the highest proportion of threatened species in the world.[1] Of our terrestrial species that have been assessed, 76% of native freshwater fish, 25% of native freshwater invertebrates, 33% of native freshwater plants, 46% of vascular plants, 74% of terrestrial birds, 66% of native birds, and 94% of reptiles are either threatened or at risk of being threatened with extinction, as well as our bat species (two threatened, two at risk, one is unknown). In our marine environment, the largest in the OECD, where we have more species of breeding seabird than any country, 90% of those seabirds, and a quarter of our marine mammal species are threatened or at risk of extinction.[2]

4. When it comes to the unique ecosystems found here in Aotearoa, of the 71 ecosystems identified as rare, 45 are threatened with collapse, including 16 ecosystems in inland alpine areas.

5. Research shows that more than any other country, New Zealanders' concept of national identity is heavily tied to our connection to the land and to nature. This is despite us having a highly urbanised community (around 87% of us live in cities and towns).[3] Deeper analysis has demonstrated that New Zealanders consider our connection to nature as 'spiritual, almost soulful'. For Māori , this connection is one of whakapapa, to describe one's identity by the mountains, rivers, lakes and oceans that determine who you are.[4]

6. Protecting natural resources is fundamental to New Zealand's economy and 70% of our exports rely on the ecosystem services provided by our natural resources, according to the Sustainable Business Council of New Zealand.

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[1] Bradshaw CJA, Giam X, Sodhi NS (2010) Evaluating the Relative Environmental Impact of Countries. PLoS ONE 5(5): e10440. https://doi.org/10.1371/journal.pone.0010440.

[2] MfE & StatsNZ. (2022). New Zealand's Environmental Reporting Series: Environment Aotearoa 2022. Publication number: ME 1634.

[3] https://www.doc.govt.nz/globalassets/documents/conservation/biodiversity/anzbs-2020.pdf.

[4] Clifton, J. 2010: Choice, bro. The Listener, 3 July 2010.

7. Internationally renowned economist and author, Professor Tim Jackson, previously the Economics Commissioner for the UK Sustainable Development Commission, defines prosperity as "our ability to flourish as human beings – within the ecological limits of a finite planet".

8. Against this background, the Bill would give Ministers sweeping powers to approve any development they want, no matter how environmentally damaging. Ministers could override environmental protections such as those in the Conservation Act 1987, and ignore the advice of their own expert panel. Public participation would substantially reduced.

9. **Keep current environmental protections**: Our climate and our environment are at breaking point. To support a flourishing natural world, we need decision making to abide by our current conservation and environmental laws. The Bill does the opposite, prioritising economic development at any environmental cost.

10. **Remove ministerial override:** Decision making should be based on science and evidence, not politics. Ministers should be bound by the decisions of expert panels rather than which special interest groups lobby the hardest.

11. **Protect New Zealanders' rights:** People should have the right to have input into developments in their communities. The Bill removes these rights. This is unnecessary because the Government can already use existing fast-track procedures for infrastructure projects.

12. **Remove damaging projects:** The Bill provides for environmentally damaging projects to be fast-tracked. This includes coal mines on conservation land, huge dams that flood forests, and fish farms in already damaged oceans. These projects should not be able to bypass environmental laws, especially if they've already been turned down by the courts.

13. The Bill should be withdrawn. At a minimum, a responsible legislative proposal for a fast-track approvals scheme would:

    a. Have a statutory purpose that provides for development in a manner that also safeguards the environment.

    b. If projects must be listed in the legislation at all, provide environmentally responsible criteria for consideration of potential projects, and a fair process that enables input into list decisions by the public, rather than circumventing due legislative process by introducing the list only after public consultation on the legislation has closed.

c. Ensure that appropriate Ministers are involved in referral decisions (in particular by including the Minister for the Environment, the Minister for Climate Change and, where relevant, the Minister of Conservation).

d. Contain referral criteria that support achievement of the statutory purpose, through the provision of environmental impact thresholds that disqualify projects with significant adverse effects on the environment or which are contrary to regulations or water conservation orders from being referred, as well as excluding proposals that would be contrary to the achievement of New Zealand's emissions reduction targets. Exclude projects on conservation land, in particular, land described in Schedule 4 of the Crown Minerals Act 1991, especially access for mining.

e. Provide a fair and balanced approach to input on applications for approval, by giving persons who are entitled to comment on an application sufficient time to obtain expert advice on the proposal before making their submission. Also, widen the scope of persons who must be invited to comment, to include persons representing the public interest and the environment, consistent with the COVID-19 Recovery (Fast-track Consenting) Act 2020 (Covid Fast-track Act), and the existing fast-track interim regime carried over from the Natural and Built Environment Act 2023.[5]

f. Specify assessment criteria for approvals that:

    i. Prioritise protection of the life-supporting capacity of the environment, indigenous biodiversity and mitigation of climate change, rather than prioritising the delivery of development projects above all other considerations. This is essential to support the delivery of development projects that are environmentally sustainable.

    ii. Require due consideration and application of national and local planning documents when assessing and deciding applications for approval.

g. Provide for decisions to be made by an expert panel rather than joint Ministers.

h. Respect the conservation purpose for which land is held under the Conservation Act by retaining the safeguards for decisions on applications for concessions to undertake commercial activity on the conservation estate, limiting land exchange opportunities to stewardship areas only, and excluding consideration of money payments to DOC when assessing

[5] Part 2 of Schedule 10.

whether a land exchange provides a net benefit to conservation and should be granted.

i. Ensure that Wildlife Act 1953 approvals are consistent with the wildlife protection purpose of that Act.

j. For approvals under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act), retain prioritisation of the purposes and principles of the EEZ Act rather than making these subordinate to a purpose of delivering development. Where the effects of an activity in the EEZ will be felt in the coastal marine area, retain the requirement to consider and apply critical environmental protection principles and policies under the Resource Management Act 1991 (RMA) rather than deliberately excluding consideration of those matters.

k. Retain (or improve) the existing environmental protections in the Crown Minerals Act that apply to consideration of access arrangements for mining on Crown Land, and provide for public input into decisions on significant mining activities. Ensure that expert panels have a role in assessing and making recommendations on access arrangements.

14. Forest & Bird has found it significantly challenging to get sufficient information on the Bill. Most Official Information Act requests have been refused. It is particularly problematic that the Government is refusing to provide any information on what projects it is considering for inclusion in Schedule 2 of the Bill. We are getting more information from market disclosures than from the Government on what projects might get added to the Bill.

15. Official advice has largely not been made available and, even more remarkably, the only Official Information Act response we have received is from the Ministry of Foreign Affairs and Trade, which told us that no advice on the international implications, including trade implications, of the Bill had been provided to Ministers prior to the First Reading.

Purpose of the Bill

16. The purpose (clause 3) currently focuses entirely on facilitating the delivery of infrastructure and development projects with significant regional or national benefits, and ignores the environment. This is a particular issue because the purpose plays a role in several of the Bill's decision-making clauses (addressed below).

17. If the intention is for the approvals process to ensure that these projects do not have inappropriate impacts on the environment, people, communities and other built development, this should be captured in the Bill's purpose.

This could be done by including the words "while protecting indigenous biodiversity and the climate".

Eligible projects – referral decisions

Referral applications – cl 14

18. Referral applications must include a general assessment of the project in relation to national policy statements and national environmental standards, but not regional policy statements or regional or district plans. In most instances, national policy and standards provide generalised direction, whereas local plans provide specific guidance on whether and where development proposals are appropriate in that locality, taking into account local resource management issues. They may contain location-specific planning tools such as a structure plan for a locality. Regional and district plans therefore contain important information that should be assessed as part of a referral application.

19. Referral applications do not require an applicant to demonstrate that the applicant is capable of completing the project that the application relates to.

20. The consultation requirements for applicants seeking referral[6] are minimal. They do not include any groups representing the environment.[7]

Referral eligibility criteria – cls 17 and 18

21. The Bill would enable Ministers to refer any project they wish. It is not even necessary that the project has regional or national benefits; that is only a criterion that Ministers must *consider*. The cl 17(3) list of project types that would have significant regional or national benefits is open-ended and extremely broad.

22. Even prohibited activities under the RMA may be referred. Activities are only categorised as prohibited where that is the most appropriate activity status (determined by the analysis required under s 32 RMA). They include activities with effects on the environment or people that are completely unacceptable, but also for purposes such as establishing priority of access to limited resources[8] (and it is unclear how they are assessed in the subsequent expert panel recommendation).

23. The cl 18 list of ineligible projects is completely inadequate to avoid significant harm to the environment. The only environment-focused exclusions are activities (other than mining) on land referenced in Schedule 4 of the Crown

[6] Clause 16.
[7] They do not even include the land owner or occupier (who may not be the applicant).
[8] *Coromandel Watchdog of Hauraki Inc v CE of the Ministry of Economic Development* [2007] NZCA 473.

Minerals Act,[9] national reserves held under the Reserves Act 1977, and prohibited EEZ activities.[10]

24. It may also have been the intention to exclude mining on land referenced in Schedule 4 of the Crown Minerals Act, but that is not the effect of cl 18(f), which excludes "an activity that would require an access arrangement under section 61 or 61B of the Crown Minerals Act for an area for which a **permit** cannot be granted under that Act".[11] Permits can be granted on Schedule 4 areas. If the intention is to overturn Schedule 4 and allow mining in National Parks and the other highest-value conservation areas, this has not been communicated to the public and will be extremely unpopular, as it was in 2010. Even the mining industry claims not to support mining in national parks.[12] It should be made abundantly clear that there is no intention to change the prohibition on access arrangements for Schedule 4 land.

25. The limited list of exclusions in cl 18 would enable applications for activities in world heritage areas, waterbodies covered by water conservation orders, and in the vast majority of areas held for conservation purposes under the Conservation Act 1987. As cl 18(f) and Schedule 10, cl 3 are currently framed, the eligibility criteria would also enable mining in national parks and other Schedule 4 areas.

26. There are no environmental impact thresholds that disqualify a project from being referred – the Minister may decline an application that may have significant adverse effects on the environment but is not obliged to do so.[13] In other words, the Bill contemplates that projects with significant adverse environmental effects will be fast-tracked, and makes it much easier for those projects to be approved. There is no requirement for referred projects to demonstrate consistency with New Zealand's emissions reductions targets, as specified in the Climate Change Response Act 2002 and Emissions Reduction Plans. This shows a shocking level of disregard for the environment and future generations.

Referral decision – cls 19 - 24

27. Referral decisions are made by the Ministers for Infrastructure, Transport and Regional Development. The Minister of Conservation has a role on referrals involving the Wildlife Act, but must act jointly with those Ministers, and is not

[9] Except for items 12 and 13 of that list, which relate to the Coromandel – activities on this land are not ineligible.
[10] Clause 18(f) and (h) – (j).
[11] Schedule 10, cl 3 of the Bill uses the same language.
[12] https://straterra.co.nz/environment/caring-for-the-environment/conservation-land/#:~:text=Already%20mining%20on%20national%20parks%20is%20banned%20and,with%20strong%20environmental%20safeguards%20and%20conditions%20in%20place.
[13] Clause 21(2)(c).

involved in referral decisions that involve the Conservation Act or Reserves Act, despite being responsible for the implementation of those Acts. There is no role for the Minister for the Environment. This is strange, and not appropriate.

28. The reasons to decline a referral application under the Covid Fast-track Act included inconsistency with a relevant national policy statement, and the applicant's poor history of environmental compliance; this Bill does not include these reasons. National policy statements set out the policies for matters of national significance, such as provision of housing and protection of the coastal environment. Delivery of proposals that are not consistent with national policy should not be facilitated. Equally, applicants with a poor compliance record should not be able to use the fast-track.

29. There is no requirement to give public notice of a decision to refer a project to the fast-track,[14] which is problematic as people and communities may not even be aware that a development that will significantly impact them or the environment is about to be considered by a panel.

Schedule 2 – Listed projects

30. Schedule 2A projects are automatically referred to an expert panel with no referral decision required.[15]

31. Listed projects could occur on land in Schedule 4 of the Crown Minerals Act. This is the highest status of conservation land and includes national parks. It is not appropriate to allow fast-tracking of projects on such important land.

32. This problem is compounded by the fact, for access arrangements under the Crown Minerals Act, that there is no requirement for a panel process specified. This means that, despite cl 11, access arrangements for listed mining projects would appear to proceed directly to the joint Ministers for determination.

33. Currently no projects are listed. A list will be produced by a Fast-track Advisory Group. Developers have been invited to put forward their projects to the Group. The Group has a strong development bias. The members have expertise in development, but there is no expertise in environmental or Treaty of Waitangi matters. This is unacceptable for the consideration of projects that have such significant impacts.

34. There is no mechanism for any person or group other than the applicant to provide input into the Group's recommendations, or any other aspect of the listing process. The Government's intention is to insert projects into Schedule 2A and Schedule 2B via an Amendment Paper once the Bill returns to the

[14] Clause 24.
[15] Clause 11.

House. This circumvents the legislative process by avoiding any public input into Schedules 2A and 2B. It appears that the Select Committee will have no opportunity to comment on the proposed lists.

35. This approach to legislating listed projects is entirely unsatisfactory given the far-reaching implications of projects being listed and thus automatically considered under the purpose, processes and assessment criteria in the Bill.

36. Several development projects have withdrawn mid-hearing from consenting processes under the RMA or the EEZ Act. This includes projects that were effectively unconsentable under both statutes because of their effects on the environment, such as Trans Tasman Resources' seabed mining proposal and the Te Kuha opencast coal mine.

37. On the TTR proposal, the Supreme Court said:[16]

> "Given the uncertainty of information relating to the effect of TTR's activities on these species, the EPA's Decision Making Committee simply could not be satisfied that the conditions it imposed were adequate to protect the environment from pollution."

38. Regarding the Te Kuha coal mine, the Environment Court held that the mine would destroy the "almost entirely natural" habitats at Te Kuha, including 400 – 500 year old native trees and habitat for birds like great spotted kiwi, cause three species not to persist in their habitat in the ecological district, cause measurable reductions in populations of various plant species, and destroy three wetlands.[17]

39. The obvious inference is that these projects will be included as listed projects in the Bill, where the Bill's environmentally negligent assessment criteria and processes do not allow for public input or proper testing of applicants' evidence, and will pave the way for approval of these destructive activities.

Schedule 3 – Expert panels

40. In principle, the concept of using expert panels to make recommendations on resource consent applications is acceptable, provided the panels have appropriate expertise and the processes by which panels make their recommendations are adequate. However, the Bill does not provide these safeguards.

41. A panel convener appoints the members of panels to make recommendations on consent applications, notices of requirement, and certificates of

[16] *Trans-Tasman resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, (2021) 23 ELRNZ 47, [2021] 1 NZLR 801.
[17] *Royal Forest and Bird Protection Society of New Zealand Inc v West Coast Regional Council* [2023] NZEnvC 68.

compliance for listed or referred projects,[18] yet panels also have recommendatory powers on other issues (e.g. concessions[19]). There is no express power to appoint panels with respect to those other issues.

42. Unlike the Covid Fast-track Act, there is no default requirement for panels to be chaired by an Environment Court judge,[20] and panels do not even need to be chaired by, or have as a member, a lawyer with experience in resource management law.[21] Judges and lawyers are skilled in interpreting the law and considering evidence. Enabling panels with no chair or members with relevant legal experience means panels may not be capable of ensuring good decision-making outcomes (even if the Bill did provide for good decision-making, which it does not).

43. The skills and experience required of panel members does not include environmental expertise,[22] which is similarly problematic for a process that is intended to provide for environmental impact assessment.

Schedule 4 – process for approvals under Resource Management Act 1991

Resource Consent and Notice of Requirement applications

44. The Bill has concerning omissions from the information requirements for resource consent applications.[23] There is no provision that parallels cl 6(1)(a) RMA[24] which requires, if it is likely that an activity will result in any significant adverse effect on the environment, inclusion in the applicant's Assessment of Environmental Effects of a description of any possible alternative locations or methods for undertaking the activity. Where a proposal could compromise the matters of national importance under section 6 RMA, it is critical that alternative locations or methods are considered.

45. The consideration of alternatives provides a safeguard against environmental degradation, and ensures that developers at least turn their mind to alternative sites in circumstances where the proposed development will have an adverse effect on significant environmental values. Consideration of alternatives will also drive innovation and more sustainable outcomes in the

[18] Schedule 3, cl 2(5).
[19] Schedule 5, cl 5.
[20] Under the Covid Fast-track Act, the default requirement was for panels to be chaired by a Judge or retired Judge. A suitably qualified lawyer with experience in resource management law could be appointed in place of a judge if the circumstances required: Schedule 5, cl 4.
[21] Schedule 3, clauses 3 and 4.
[22] Schedule 3, cl 7.
[23] RMA Schedule 4 cf Bill Schedule 4, clauses 12 – 17.
[24] RMA Schedule 4 cl 6(1)(a).

long term. It will assist in determining whether a proposal is truly nationally or regionally significant.

46. There is also no requirement to include any additional information that a regional policy statement or plan requires in an assessment of environmental effects.[25] There is no good reason to deliberately exclude these information requirements, which will have been specified, following the analysis required by s 32 RMA, in light of the region or district's circumstances and environmental issues.

47. The RMA requirement that information "must be specified in sufficient detail to satisfy the purpose for which it is required"[26] is reframed in the Bill to "correspond to the scale and significance of the effects that the activity is anticipated to have on the environment",[27] which is then qualified by the statement that the information threshold applies "taking into account any proposal by a consent applicant or requiring authority to manage the adverse effects of an activity through conditions, including conditions requiring the preparation of a management plan".[28]

48. This means that where an effect is significant, but where the applicant asserts the effect can be managed through conditions or a management plan, only limited information needs to be included in the application. That does not enable an expert panel to properly assess whether the conditions or management plan will be effective at managing the effect.

49. This was an issue in *Trans-Tasman Resources*, where the applicant asserted that its conditions and management plans would protect whales, but the applicant had no information to support its assertion. That is not a scenario that this Bill should be seeking to authorise.

50. The information requirements for consent applications does not include consideration of the principles of the Treaty of Waitangi.[29] While others will comment on that in more detail, Forest & Bird records its position that te Tiriti o Waitangi / the Treaty of Waitangi is a founding document and part of New Zealand's constitution, and that decisions should be based on information that includes consistency with Treaty principles.

[25] Bill Schedule 4, cl 13(2).
[26] RMA Schedule 4, cl 1.
[27] Bill Schedule 4, cl 17(1).
[28] Bill Schedule 4, cl 17(2).
[29] Bill Schedule 4, cl 12(1)(g), cf RMA Schedule 4, cl 2(1)(f).

Criteria for making recommendations and decisions

51. The directions and criteria for assessment and decision-making on resource consent applications are framed in a way that ensures every proposal that has regional or national benefit will be approved.

52. Expert panels must "generally take into account, giving weight to them (greater or lesser) in the order listed … the purpose of this Act [and then] … considerations under other relevant legislation".[30] Panels are separately directed to assess an application or Notice of Requirement and written comments, giving weight to the purpose of the Act above all other matters.[31] As a matter of law, no environmental impact, no matter how dire, can outweigh the regional or national benefit of the project.

53. There is no real benefit from even listing matters such as the purpose of the RMA and national direction in cl 32, because those matters must be de-prioritised below the purpose of the Fast-track Approvals Act in decision-making.

54. The hierarchy in cl 32 also inverts aspects of the RMA hierarchy, for example by placing s 7 RMA matters[32] above national direction, even where the national direction expands on a matter that must be recognised and provided for as a matter of national importance under s 6 RMA.

55. National direction and regional and district plan provisions are de-prioritised. There are three important reasons why policies and plans are written:

    a. First, they identify the key objectives that we, as a society, are seeking to achieve. This is important so that in trying to achieve one objective we do not jeopardise our ability to achieve another objective. For example, in seeking to build more houses we nonetheless need to protect the highly productive soils where food is grown. The area of highly productive land that was no longer available for agriculture increased 54 percent between 2002 and 2019.[33] The National Policy Statement on Highly Productive Land 2022 was produced to counter this loss.

    b. Second, to enable the management of cumulative effects. For example, if we do not set limits on the extent of pollution that can be assimilated in an airshed, we cannot assess on a case-by-case basis whether a discharge to air will be harmful or not.

[30] Bill Schedule 3, cl 1(2).
[31] Schedule 4, cl 32.
[32] The matters listed in s 7 are "other matters" that decision-makers must "have particular regard to".
[33] Environment Aotearoa 2022.

c. Third, planning enables people's aspirations for their communities, and the needs of nature (which does not have a voice) to be built into decision-making. There is very little point in engaging in planning processes, with all of the information-gathering, analysis, evidence testing, negotiation, and compromise that this entails, if the product of those processes is to be effectively disregarded. These are all good reasons to give significant weight to national direction and local plans, rather than subordinating them as this Bill does.

56. The scope of a panel's ability to recommend that an application is declined is uncertain, but undoubtedly very narrow. There does not appear to be any ability to decline on the basis of a proposal's impacts on the environment or communities (even if the decision-making criteria enabled this).

57. A panel may recommend decline if "any mandatory requirements that relate to the activity concerned are not able to be met".[34] It is unclear what constitutes a "mandatory requirement". For example, does this cover policies in the National Policy Statement for Freshwater Management 2020 (NPSFM) around setting limits on how much water can be taken from a waterbody to safeguard ecosystem health, and which specify that consent decisions must not over-allocate water beyond those take limits? And how does it apply to prohibited activities, for which consent must not be granted under the RMA, but which may be referred to a panel for determination under the Bill?

58. A panel may also recommend decline on the ground that the information provided by the applicant is inadequate to make any recommendation.[35]

59. However, it is not clear that a panel can recommend an application be declined because of its significant adverse effects, failure to provide for a matter of national importance, or because the proposal is contrary to New Zealand's emissions reduction targets, even if those matters were not outweighed by the Bill's development-focused purpose. Those are minimum standards that should be specified as mandatory grounds for recommending decline.

60. A panel is not required to apply s 104D, so they may recommend grant of activities that are "non-complying" even where the activity will have more than minor effects and be contrary to relevant provisions of the operative and proposed regional or district plans.[36]

61. Under the RMA, a resource consent may not be granted if it is contrary to regulations, an Order in Council, or to a restriction or prohibition in a water conservation order, and consent may not be granted for a prohibited

[34] Schedule 3, cl 1(3).
[35] Schedule 4, cl 34(4)(b).
[36] Schedule 4, cl 35(1).

activity.[37] The Bill does not include these safeguards. Again these are minimum requirements which should require a decline recommendation.

62. With respect to notices of requirements for designations, in the Bill consideration under cl 36 of the effects on the environment of allowing the requirement is subject to clause 32(1). As with resource consents, the greatest weight under cl 32(1) is to be given to the purpose of the Bill.[38] Our comments above in relation to this weighting, and the de-prioritisation of the environment, also apply to notices of requirement.

63. The directions and criteria for assessment and decision-making on resource consent applications are inconsistent with international law. In particular:

    a. The Kunming-Montreal Global Biodiversity Framework, developed under the Convention on Biological Diversity. New Zealand adopted the Framework in 2022 and committed to set national targets to implement it. For reasons already outlined above, the Bill's assessment criteria for resource consents are inconsistent with Target 1 (ensure that all areas are under participatory, integrated, and biodiversity inclusive spatial planning), Target 4 (Halt species extinctions), Target 14 (integrate biodiversity in decision making at every level), and Target 22 (ensure participation in decision-making).

    b. The Ramsar Convention on Wetlands. New Zealand is a Contracting Party to the Ramsar Convention. Contracting Parties have committed to work towards the wise use of all the wetlands and water resources in their territory, through national plans, policies and legislation, management actions and public education. The Convention defines wise use of wetlands as "the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development". The Bill makes any consideration of RMA and NPSFM provisions providing for protection of wetlands subordinate to achieving the Bill's development-focused purpose, and as such will not provide for, and is contrary to, the Convention obligation to maintain the ecological character of wetlands.

    c. The Convention on Migratory Species of Wild Animals (discussed further below in relation to Schedule 6 of the Bill.

Expert panel process

64. The Bill excludes public or limited notification of resource consent applications and notices of requirement.[39] The list of persons that must or may be invited

[37] Sections 104, 217 and 87A.
[38] In comparison the consideration of effects under s 171(1) RMA is subject to Part 2 RMA.
[39] Schedule 4, cl 20.

to comment on a listed or referred project[40] excludes the Minister for the Environment, and does not include any entities representing the public interest, such as environmental NGOs. This is a significant change from both the RMA and the Covid Fast-track Act.

65. The range of interests that will be represented, and the nature of the information that will be presented as part of an expert panel's consideration of a resource consent application or notice of requirement, is heavily weighted against the environment. Environmental NGOs have an important role in resource management processes, not only as advocates for the environment but by bringing expert evidence to the process that would not otherwise be available to decision-makers. Their exclusion will result in poorer quality decisions.

66. The Bill's exclusion of public consultation is also inconsistent with the New Zealand-EU Fair Trade Agreement (FTA), which requires public consultation on environmental impact assessment prior to decisions to allow hydro dams, mines, quarries, wind farms and other major development projects to go ahead.

67. Article 13.8 of the FTA contains a requirement for an environmental impact assessment for the production of energy goods[41] and raw materials[42]. As part of this assessment there is a further requirement that all interested persons, including non-governmental organisations, have an early and effective opportunity, and an appropriate time period, to participate in the environmental impact assessment as well as an appropriate time period to provide comments on the environmental impact assessment report. There is no process in the Bill to require consultation that would comply with the FTA.

68. The period provided for invited parties to comment (10 days)[43] is completely inadequate for proposals of national or regional significance, which are likely to be large scale, complex and with significant impacts. Applicants are likely to have worked on their applications and supporting documents for many months, or even years.

69. Ten days does not allow time to review an application, obtain specialist advice, and bring that advice together into a submission. This would be the case for any party wishing to comment, but it is particularly concerning in relation to

[40] Schedule 4, cl 20(3) and (5).
[41] Electricity, coal, oil and gas, biogas and oil products.
[42] Salt, sulphur, earths and stone, ores, slag and ash, mineral fuels and oils and the products of their distillation, organic and inorganic compounds of precious metals, rare earth metals, and radioactive isotopes, fertilizers, all precious and semi-precious gems and items made from them, except greenstone, all precious metals, iron, steel, copper, aluminium, lead, zinc, tin, other base metals and articles made from them.
[43] Schedule 4, cl 21.

the Minister of Conservation, Director-General of Conservation, and local authorities, who have responsibilities around key environmental issues such as maintenance of biodiversity and water quality. Given many of these development proposals will be in place for decades, and may permanently alter New Zealand's environment, how can such a short period of time for other parties to review the applicant's information and comment be justified?

70. There is no ability to seek a waiver of the time limit, regardless of the circumstances that prevent a person commenting within the 10 working day period.[44] This contrasts with the consent applicant's ability to seek that processing of the application is suspended,[45] which effectively enables the consent applicant to take the time it needs to comply with any step, rather than the time specified in the Bill.

71. There is no requirement to hold a hearing,[46] so no likelihood of evidence being properly tested. In environmental decision-making, where predicted future effects are being assessed on the basis of expert witnesses' opinions, rather than decisions being based on existing facts, the ability to test evidence is an important ingredient of good decision-making.

72. The timeframe for panels to consider applications is very short,[47] and could be shortened further by ministerial direction under clause 23(1)(e). This does not enable considered decision-making.

73. Taken together, the processes outlined above will not enable quality decision-making, and carry huge risks for the environment, our children, and future generations.

Joint Ministers' decisions

74. Expert panel recommendations are not binding, and final decisions are made by the joint Ministers.[48] The joint Ministers for resource consent and designation decisions are the Ministers for Infrastructure, Transport and Regional Development. These Ministers do not have functions that relate to safeguarding the environment, so this choice of decision-makers further de-prioritises consideration of environmental effects in fast-track consent decisions.

75. Joint Ministers can grant approvals that panels have recommended should be declined, and can remove conditions that panels recommended should be imposed. So, to the limited extent that a panel might seek to ensure a resource

[44] Clause 21(7).
[45] Schedule 4, cl 26.
[46] Schedule 4, cl 23.
[47] Schedule 4, cl 39.
[48] Clause 25 and Schedule 4, cl 40.

consent or NOR decision will protect the environment or communities, this can be overridden by the joint Ministers.

76. The only limitation on the joint Ministers' discretion to deviate from a panel's recommendations is that they must have undertaken analysis of the recommendations and any conditions included in accordance with "the relevant assessment criteria".[49] It is unclear:

    a. Whether the joint Ministers' decisions must be made in accordance with the relevant assessment criteria, or if this is a purely procedural requirement for the prior analysis to be in accordance with the criteria.

    b. What the "relevant assessment criteria" are. This phrase is not defined, and while some provisions applicable to some approvals have the nature of assessment criteria and could be assumed to be what is referred to here, other approvals do not have obvious "assessment criteria" (e.g. EEZ Act approvals).

77. The joint Ministers may seek further comments from any affected parties[50] but are not required to do so. For example, if the Ministers decide not to include a condition that has been recommended to address an issue raised by a particular submitter, the Ministers need not ask that person to comment before deleting the condition. This is obviously deficient both in terms of natural justice and good quality decision-making.

78. Appeals are limited to questions of law. The list of parties who may appeal is narrow.[51] It includes a person with an interest greater than the public generally, which is uncertain and may not enable appeals by those representing the public interest, including environmental interests. The list of parties who may join an appeal as an interested party is even narrower, covering only the applicant or requiring authority and persons or groups invited to provide comments to the panel.[52]

79. Placing resource consent decisions into the hands of development-focused Ministers, along with the inadequate and unclear criteria for those decisions and narrow scope of appeals (and potential appellants), will result in bad decisions. There are no safeguards to minimise the potential for politically influenced decision-making.

[49] Clause 25(4).
[50] Clause 25(6)(c).
[51] Clause 26.
[52] Clause 27(4).

Schedule 5 – Process relating to Conservation Act 1987 and Reserves Act 1977

80. The Conservation Act 1987 has been described by the Court of Appeal as "a milestone in New Zealand's legislative history, marking a distinct shift in society's attitude away from a "pioneer mentality" which treated our natural resources as being of infinite availability".[53] The Court went on to comment on the significance of the Conservation Act's enactment:[54]

> In reflecting a clear consensus arising from a comprehensive process of consultation, Parliament introduced a novel regime for the purposes of preserving and protecting vital areas of the country's landscape and providing for the voice of conservation to be heard as part of a balanced system of administration.

81. Despite it being even more apparent now than in 1987 that our natural resources are not infinite, the Bill takes a step backwards towards that pioneer mentality by removing many of the safeguards that apply when concessions for commercial activities on conservation land are being considered, and enabling specially protected areas to be exchanged.

Referral decisions

82. The Minister of Conservation has no role in deciding referral applications that involve a concession or land exchange. That is unacceptable given the Minister administers the land in question.

Concessions

83. Concessions authorise commercial activities on conservation land. The Bill's provisions for concessions remove important environmental safeguards that are part of the existing Conservation Act regime:[55]

    a. A fast-track concession could be granted even where it is inconsistent with a Conservation Management Strategy or Conservation Management Plan.[56]

    b. A fast-track concession can be granted even if the proposed activity is contrary to the provisions of the Conservation Act or the purposes for which the land is held.[57]

[53] *Royal Forest and Bird Protection Society of New Zealand Incorporated v Minister of Conservation* [2016] NZCA 411 at [1].
[54] Ibid.
[55] Schedule 5, cl 4.
[56] Cf s 17W Conservation Act.
[57] Cf s 17U(3) Conservation Act.

c. A fast-track concession can be granted to build a structure or facility even where the activity could reasonably be undertaken off conservation land or in an area where its effects would be significantly less.[58]

84. The expert panel that assesses an application for a fast-track concession only needs to consider three limited matters[59], which do not cover many of the considerations that are inherently relevant, such as the effects of the activity on conservation values.

85. When it comes to conservation management strategies or conservation management plans, these only need to be considered by a panel where they have been co-authored, authored or approved by a Treaty settlement entity.[60] That approach:

a. Is completely unfair to non-Māori and Māori who are not part of a Treaty settlement entity.

b. Is likely to make conservation planning documents unintelligible (e.g. where provisions that the panel must consider cross-reference or rely on provisions that the panel is not directed to consider).

c. Is likely to remove consideration of many environmentally focused provisions.

86. Under the Conservation Act, many concessions must be publicly notified, particularly where the concession would confer an interest in land with long-term effect (e.g. a lease).[61] The Bill removes this requirement for public consultation. This is wholly inappropriate for decisions relating to the conservation estate, which all New Zealanders have an interest in.

87. The process for considering concession applications under the Bill is not well suited to conservation decision-making in other ways. Clause 2 provides that the fast-track approval process applies instead of the process for obtaining a concession under the Conservation Act or Reserves Act. That appears to require that panels invite comments from persons who must or may be invited, yet many of the persons listed as "must invite" do not have any functions that would give them an interest in how a concession application is determined.

Conservation Act and Reserves Act land exchanges

88. The Bill authorises the exchange of:

[58] Cf s 17U(4) Conservation Act.
[59] Schedule 5, cl 5.
[60] Schedule 5, cl 5(c).
[61] Section 17SC.

a. All conservation areas except those listed in Schedule 4 of the Crown Minerals Act.

b. All Crown-owned scenic reserves, recreation reserves, historic reserves, government purpose reserves, and local purpose reserves.

c. Wildlife management reserves.

89. Under the Conservation Act, land is classified as stewardship area or designated "specially protected". The Conservation Act only allows land exchanges for stewardship areas, and not for specially protected areas. The Bill allows the exchange of a much larger portion of the conservation estate than could lawfully be exchanged under the existing legislation.[62]

90. The Conservation Act does not allow specially protected areas to be exchanged because their defining feature is their permanent protection:[63]

> Specially protected areas attract that designation because they merit elevation from the holding-pen status of stewardship to the permanent preservation and protection of their natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public and safeguarding the options of future generations.

91. The whole concept of conservation is predicated upon permanent protection of areas that meet the statutory requirements.[64] The purpose of special protection is:[65]

> … to permanently maintain its intrinsic values, provide for its appreciation and recreational enjoyment by the public, and safeguard the options of future generations.

92. This Bill enables special protection to be removed by a land exchange, which undermines the whole concept of conservation.

93. Under the Conservation General Policy, even stewardship land may not be disposed of (including by exchange) unless the land has "no, or very low, conservation values"[66] and conservation land should also not be disposed of where it:[67]

- has international, national or regional significance;
- is important for the survival of any threatened indigenous species;

[62] Schedule 2, cl 18.
[63] *Royal Forest and Bird Protection Society v Minister of Conservation* [2016] NZCA 411 at [55] – [56].
[64] At [57].
[65] At [70].
[66] Policy 6(c).
[67] Policy 6(d).

- represents a habitat or ecosystem that is under-represented in public conservation lands or has the potential to be restored to improve the representation of habitats or ecosystems that are under-represented in public conservation lands;
- improves the natural functioning or integrity of places;
- improves the amenity or utility of places; improves the natural linkages between places; or
- secures practical walking access to public conservation lands and waters, rivers, lakes or the coast.

94. The Bill does not respect any of the limits on land exchanges established in the Conservation General Policy.

95. The key decision-making criterion for a land exchange is that the Minister of Conservation must "be satisfied that the land exchange (including any money that may be received under subclause (5)) will enhance the conservation values of land managed by the Department of Conservation".[68] This is deeply problematic:

a. It encourages New Zealand's conservation estate to be traded away for money. This provision enables the Minister to offset the loss of conservation values of land that is given away against short-term gains in conservation values that may be achieved by spending money on the remainder of the conservation estate.

b. There is no requirement for any degree of "like-for-like" exchange of values, meaning that a loss of a biodiversity value could be exchanged for a gain in historic values, resulting in a net loss for biodiversity.

c. Land with conservation values that is received by the Department will be protected, but land that is privatised will be developed with the likely result that its conservation values are lost. The net result to New Zealand is a loss of conservation values.

d. The provision references "land", whereas the conservation estate includes freshwater and other non-land values.

e. As already discussed, it extends the land exchange provisions to specially protected areas and enables them to be exchanged based on a "net gain" test.

96. At a time when the Department of Conservation is being required to make significant cuts to its operating budget that will impact front line work protecting conservation values (such as predator control), encouraging the

[68] Schedule 5, cl 18(2)(b).

sale of parts of the conservation estate is deeply cynical and will lead to long-term loss.

97. The Department administers the conservation estate on behalf of the Crown, effectively for all New Zealanders. However, the Bill does not include any requirement for public consultation on land exchange proposals, so there is no ability for any public input into the assessment of whether the land exchange will achieve a net gain.

98. An exchange under s 16A of the Conservation Act is a disposition which triggers the reservation of marginal strips adjoining streams of three metres or more in width.[69] However, the Bill disapplies this requirement.[70] It also disapplies s 24F, which provides that, where the Crown owns part of the bed of a non-navigable river or stream adjoining any land (being a bed of not less than 3 metres in width) and disposes of that land, the bed of that river or stream shall remain owned by the Crown. The Bill thus gives away conservation land for no reason.

Conservation covenants

99. The Bill enables change or revocation of conservation covenants. A conservation covenant protects biodiversity or other conservation value on private property, and can only be created by a landowner voluntarily entering into the covenant (for example, to ensure the values are preserved after their death or sale of the land). The Bill enables the Minsiter to amend or revoke a covenant after having regard to specified matters, with no prioritisation of the landowner's intentions in entering into the covenant, or the values that the covenant protects.

Schedule 6 – Process for approvals under Wildlife Act 1953

100. Section 53 of the Wildlife Act empowers the Director-General of Conservation to authorise the catching alive or killing of wildlife. The Supreme Court has confirmed that "the power to authorise is constrained by the purpose of the Act, wildlife protection."[71] Therefore, any grant of any authority under section 53 of the Wildlife Act can only be given on the basis that the catching alive or killing promotes the Wildlife Act's wider purpose of protection.

101. The decision-making criteria under the Bill[72] for Wildlife Act approvals turn this concept on its head, by enabling the joint Ministers to authorise killing of wildlife for much broader purposes. The joint Ministers or panel only need to "take into account" the Wildlife Act purpose, so could authorise killing even

[69] *Hawke's Bay Regional Investment Company Ltd v Royal Forest and Bird* [2017] NZSC 106 at [161].
[70] Schedule 5, cl 19(a).
[71] *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, fn 72.
[72] Schedule 6, cl 1.

where it is not for the purpose of wildlife protection. The weak direction to "take into account" the Wildlife Act's protective purpose and impacts on threatened and at-risk species, and "have particulate regard" to any relevant wildlife reports, enables decision-makers to consider but set aside wildlife protection when considering whether authority should be granted. Given New Zealand's high proportion of threatened species, more directive terms are necessary to ensure threatened and at-risk wildlife are not put at further risk of decline or extinction.

102. The joint Ministers must have particular regard to a report by the Director-General on risks to wildlife, but only need to take into account impacts on "threatened, data deficient and at-risk" wildlife species. The Wildlife Act protects all species, so the narrowing of this consideration to only those most endangered species is not warranted.

103. Clause 2(e) of Schedule 6 directs offsets and compensation to be considered. The risks of offsets and compensation are best expressed by Corkery and others in a recent paper *"Poorly designed biodiversity loss-gain models facilitate biodiversity loss in New Zealand"*:[73]

> Biodiversity offsetting is a high-risk tool for managing biodiversity because it involves trading guaranteed biodiversity losses in the present for estimated future gains resulting from targeted management interventions. Very little evidence concerning the efficacy of offsets or compensation has been published within the Aotearoa/New Zealand context because many of the consented projects that require offsets or compensation have not yet begun or been completed preventing the evaluation of whether biodiversity gains achieved from offset or compensation actions were in fact sufficient to balance losses. Further where projects have commenced, compliance monitoring and enforcement of consent conditions pertaining to effects management have been inadequate (Brown et al. 2013). Recent international reviews on the effectiveness of biodiversity offsetting have ranged from scathing to neutral.

104. Biodiversity offsets and compensation should not be available to enable authorisation of impacts on threatened, data deficient and at-risk species, because the risks associated with the uncertain future success of the offset activity (in exchange for the certain loss caused by the impact activity) are too high. Fundamentally, to allow adverse effects to occur on wildlife in exchange for compensatory mechanisms does not align with the protective purpose of the Wildlife Act. It is also inconsistent with longstanding principles of offsetting and compensation contained in government-developed guidance.[74] These principles have been codified in both the National Policy Statement for

[73] Corkery and others "Poorly designed biodiversity loss-gain models facilitate biodiversity loss in New Zealand" (2023) Vol 47(1) New Zealand Journal of Ecology, at 3.
[74] New Zealand Government et al. "Guidance on Good Practice Biodiversity Offsetting in New Zealand" (August 2014), at page 4.

Indigenous Biodiversity (NPSIB) and the National Policy Statement for Freshwater Management 2020 (NPSFM). The former says:[75]

> When biodiversity offsetting is not appropriate:
> Biodiversity offsets are not appropriate in situations where indigenous biodiversity values cannot be offset to achieve a net gain. Examples of an offset not being appropriate include where:
> (a) residual adverse effects cannot be offset because of the irreplaceability or vulnerability of the indigenous biodiversity affected: …

105. Wildlife permits should not be available in those circumstances, even where offsets or compensation are offered.

106. Domestic legislation concerning the management of New Zealand's wildlife must implement and be consistent with New Zealand's international obligations, including in relation to migratory species. New Zealand is a signatory to the Convention on Migratory Species of Wild Animals. Various migratory species which are protected under the Wildlife Act are also listed on the Convention's appendices:[76]

a. Appendix 1 lists threatened migratory species, and includes, inter alia, aquatic birds such as the Antipodean albatross, sharks such as the oceanic white-tip shark.[77]

b. Migratory species requiring international cooperation under Appendix 2 include, inter alia, various aquatic birds such as the double-banded plover, seabirds such as the royal albatross, sharks, and rays.

107. Article 3(5) of the Convention requires parties that are Range States[78] of a migratory species listed in Appendix 1 to prohibit the taking of animals belonging to such species, except in a narrow range of circumstances that do

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[75] NPSIB Appendix 3, cl 2. Parallel provisions in Appendix 4 cl 2 of the NPSIB, and Appendix 6(2) and Appendix 7(2) of the NPSFM.

[76] https://www.doc.govt.nz/about-us/international-agreements/species/migratory-species/nzs-migratory-species/#:~:text=While%20in%20New%20Zealand's%20jurisdiction,appendices%20and%20other%20migratory%20species. "Wildlife" is defined under the Wildlife Act as "any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority under this Act or otherwise, but does not include any animals of any species specified in Schedule 6 (being animals that are wild animals subject to the Wild Animals Control Act 1977). "Animal" is defined as "any mammal (not being a domestic animal or a rabbit or a hare or a seal or other marine mammal), any bird (not being a domestic bird), any reptile, or any amphibian; and includes any terrestrial or freshwater invertebrate declared to be an animal under section 7B and any marine species declared to be an animal under section 7BA; and also includes the dead body or any part of the dead body of any animal".

[77] Schedule 7A of the Wildlife Act declares the Whale shark, manta ray, spinetail devil ray to be animals under the Wildlife Act 1953.

[78] In relation to a particular migratory species means "any State (and where appropriate any other Party referred to under subparagraph (k) of this paragraph) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species".

not operate to disadvantage a species.[79] There is a wide discretion under the Bill[80] to grant authority "to do anything in respect of wildlife", which could include the killing or disturbance that may cause further decline of the species. Accordingly, any authorities granted in relation to Appendix 1 migratory species would be highly likely to contravene Article 3(5).

108. Article 4(3) directs Parties that are Range States of a migratory species listed in Appendix 2 to "endeavour to conclude agreements where these should benefit the species and should give priority to those species in an unfavourable conservation status". The ability to further compromise Appendix 2 species through decisions under the Bill will impede efforts to work with other states whose jurisdictions are also habitat to Appendix 2 species.

109. The Convention on Migratory Species of Wild Animals is one of many others concerning wildlife (for example, the Convention on Biological Diversity and Ramsar Convention on Wetlands). The proposed approach to wildlife authorisations under the Bill is inconsistent with these international obligations. Inconsistency with international obligations places New Zealand's international reputation at risk.

Schedule 9 – Process for marine consents under Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

110. Referral of EEZ Act marine consents is by the joint Ministers, after consulting the Minister for the Environment and, if relevant, the Minister of Conservation.[81] While the Minister for the Environment at least has a role in the process, it is entirely inadequate that the role is one of consultation only, rather than the Minister for the Environment being the decision-maker. It is unclear whether the Minister of Oceans and Fisheries must be consulted as a "relevant portfolio Minister".

111. The assessment criteria and weighting are, as for resource consent and NOR applications, skewed towards the purpose of the Bill, with the purposes and principles of the EEZ Act and policy made under the EEZ Act as subordinate considerations.[82] Those principles include section 11 which provides that the

[79] "Exceptions may be made to this prohibition only if:
a) the taking is for scientific purposes;
b) the taking is for the purpose of enhancing the propagation or survival of the affected species;
c) the taking is to accommodate the needs of traditional subsistence users of such species; or
d) extraordinary circumstances so require;
provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species."

[80] Schedule 6, cl 2(1).

[81] Schedule 9, cl 5.

[82] Schedule 9, cl 9.

EEZ Act enables the implementation of New Zealand's obligations under international conventions relating to the marine environment, including the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity 1992.[83]

112. UNCLOS places obligations on signatory States (including New Zealand) relating to protection and preservation of the marine environment. There is a general obligation in Art 192 "to protect and preserve the marine environment". Under Art 194, States have obligations to prevent, reduce and control pollution of the marine environment. Under Art 194(1), States are required to take:

> … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

113. Art 194(3) provides that the measures taken need to deal with all sources of pollution of the marine environment. The measures are to include, amongst other things, "those designed to minimize to the fullest possible extent" pollution from various sources, including pollution from activities such as seabed mining.

114. Art 208(1) provides for coastal states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction". Under Art 208(3), national legislation and regulations in this respect are to be "no less effective" than international rules.

115. Considering those provisions of UNCLOS in *Trans-Tasman Resources*, the Supreme Court said:[84]

> The case law and commentary on arts 192—194 of the LOSC suggest that what is envisaged is a balance between environmental protection and preservation (art 192) and the economic development of resources (art 193), **but that the balance is tilted towards environmental protection**. **That environmental protection has priority over economic development is apparent in the wording of art 193 which provides that states can exploit resources "in accordance with" their duty to protect and preserve the environment**.
>
> Our emphasis

116. The Bill's express prioritisation of development over environmental protection is contrary to UNCLOS.

[83] For completeness, the other relevant international laws are MARPOL and the London Convention.
[84] *Trans-Tasman Resources* at [187].

117. The Bill's provisions for the EEZ are also inconsistent with the Convention on Biological Diversity, in particular the obligation under Art 6(a) to "develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity". The Bill does not provide for conservation and sustainable use of biological diversity.

118. A panel is prevented from considering sections 6 and 7 of the RMA and any national policy statements under the RMA, even if the effects of the activity would be felt in the coastal marine area, where the RMA and the NZCPS apply. This overrides the Supreme Court's decision in *Trans-Tasman Resources*[85] and prevents a panel from considering whether, for example, significant habitats of indigenous fauna are protected[86] or whether significant adverse effects on habitats of indigenous species that are important for recreational, commercial or cultural purposes (such as snapper spawning grounds) are avoided.[87] The exclusion of these fundamental environmental considerations when making decisions about applications to undertake activities that may have significant environmental effects is outrageous.

Schedule 10 – Process under Crown Minerals Act 1991

119. The Crown Minerals Act access arrangement provisions already provide a more lenient regime for mining on Crown land than the regime applicable to other activities under the Conservation Act concession provisions. The Bill's proposed changes further weaken the Crown Minerals Act decision-making criteria and processes in respect of mining on Crown land (including conservation land in the marine and coastal area). This is environmentally irresponsible and does not provide for transparent or considered decision-making.

120. As set out above, the Bill would enable mining on Schedule 4 conservation areas including national parks.[88]

121. In terms of process, it appears that there is no provision for an expert panel to make recommendations on an application for an access arrangement under the Bill. Instead, the assessment is undertaken solely by the joint Ministers, which in this case also includes the Minister of Energy and Resources. The process of expert panels considering an application and making a recommendation to Ministers has been presented by the Government as one of the features of the Bill that is similar to previous fast-tracks, and which enables good decision-making. Under Schedule 10, there is no such process, instead, any mining proposal referred to the fast-track simply

[85] *Trans-Tasman Resources* at [187].
[86] Section 6(c) RMA.
[87] NZCPS Policy 11(b)(iv).
[88] Due to the framing of cl 18(f) and Schedule 10, cl 3.

gets the benefit of a veto on public consultation and a more lenient assessment by Ministers.

122. This is even more of a concern if a mining proposal is a listed project. In that case, Minister Bishop has said that listed projects "will automatically be referred to an Expert Panel which will apply relevant consent and permit conditions before referring each project and its conditions back to the Ministers".[89] However, the Bill does not provide for this process for access arrangements relating to listed projects.

123. By disapplying sections 61(2) and 61B(2) of the Crown Minerals Act, which requires decision-makers to "have regard to any policy statement or management plan of the Crown in relation to the land"[90] and diluting this to merely a matter that Ministers "may consider",[91] policies that uphold protection of conservation values can be disregarded by the joint Ministers. The process for the development of management plans under the Conservation Act provides for public input and significant work by the Department, affected Conservation Boards and mana whenua. It is objectionable that such documents, the result of a full consultative process, can be put to one side as matter that "may" be considered.

124. Clause 6(1) effectively removes the requirement for public notification of applications, including applications for "significant mining activities" which must be publicly notified under the Crown Minerals Act. Whether a mining activity is significant is assessed by considering the effects of the mining on conservation values and other matters.[92] Enabling public input when deciding whether to allow significant mining activities on Crown land is consistent with the public interest in Crown land (which is administered on behalf of all New Zealanders). Enabling public input would only extend the time required to assess an access arrangement by approximately two months. Removal of any opportunity for public input is completely unjustified.

125. Removing the need for public notification and input is also inconsistent with the Cabinet-endorsed "Legislation Guidelines".[93] There is no compelling reason to oust the consultation process already provided for under the existing law, as promoted by the Legislation Guidelines, which relevantly state that a legislative requirement to consult may be necessary to:[94]

> Provide additional assurance and certainty to people affected by a decision that their views can be presented. This may be important in securing support for the

[89] Beehive "*Project applications for Fast Track open today*", 3 April 2024.
[90] CMA 1991 ss 61(2)(c) and 61B(2)(c).
[91] Bill Schedule 10, clauses 4(2)(c) and 5(2)(c).
[92] Sections 61C(2) and (3) Crown Minerals Act.
[93] Legislation Design and Advisory Committee.
[94] https://www.ldac.org.nz/assets/Guidelines/LDAC-Legislation-Guidelines-2021-edition.pdf at [19.1].

legislation or in addressing concerns about the delegation of decision-making powers. If there are conflicting perspectives, it may be important to ensure that they are given a clear opportunity to be included.

126. The Legislation Guidelines also promote legislative requirements to consult to "ensure consistency of consultation practice for similar decisions (particularly where there are multiple decision-makers and consistency of expectations and practice is important)".[95] Ignoring the views of the wider public will reduce the legitimacy of ministerial decision-making, reduce the quality of decisions, and compromise public understanding and acceptance of decisions.

127. The public expectation of an ability to comment on an application for a significant mining activity is heightened where coal extraction is concerned, given:

a. The need for immediate decarbonisation of the energy sector, which is central to all climate mitigation pathways that keep the Earth's climate within safe operating limits.

b. The reduction of carbon emissions can only be achieved if the use of coal is phased out.

c. The groups of potentially affected people are wide, including young people, future generations, and other vulnerable communities who will be disproportionately affected by the effects of climate change.

128. There is no requirement for access arrangements to be consistent with New Zealand's emission reduction targets in the Climate Change Response Act, or an emissions reduction plan. Given the long-lasting impact on carbon emissions of any decision authorising a new coal mine, this omission all but guarantees that those targets will not be achieved.

129. Exclusion of consultation is also inconsistent with Article 13.8 of the NZ-EU FTA, as discussed above.

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[95] https://www.ldac.org.nz/assets/Guidelines/LDAC-Legislation-Guidelines-2021-edition.pdf at [19.1].