

**BEFORE THE WHANGĀREI DISTRICT COUNCIL AND NORTHLAND REGIONAL  
COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of a resource consent application by Northport  
Limited under section 88 of the Resource  
Management 1991 for a port expansion project  
at Marsden Point

**APPLICATION NO.** APP.005055.38.01

LU 2200107

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**STATEMENT OF EVIDENCE OF PHILIP HUNTER MITCHELL**

**(PLANNING)**

**24 August 2023**

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**Counsel instructed:**

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## 1. INTRODUCTION

### Qualifications and experience

- 1.1 My name is Philip Hunter Mitchell.
- 1.2 I am a Partner with Mitchell Daysh Limited, an environmental consulting practice with offices in seven locations around New Zealand. Mitchell Daysh Limited was formed through the merger of Mitchell Partnerships Limited, which I established in 1997, and Environmental Management Services Limited. Previously, I was the Managing Director of Kingett Mitchell & Associates Limited, a firm that I co-founded in 1987.
- 1.3 I hold the degrees of Bachelor of Engineering (Hons) and Doctor of Philosophy, both from the University of Canterbury.
- 1.4 I am a past president of the Resource Management Law Association and a full member of the New Zealand Planning Institute. I was a recipient of the New Zealand Planning Institute's Distinguished Service Award in 2015.
- 1.5 I have practised in the resource management field for over 35 years, and I have had a lead resource management role in many significant projects throughout New Zealand during that time. My specialist areas of practice include providing resource management advice to the private and public sectors, facilitating public consultation processes, undertaking planning analyses, managing resource consent acquisition projects, and developing resource consent conditions.
- 1.6 I am an accredited Hearings Commissioner (with a Chair's endorsement) and have acted as a Hearings Commissioner on numerous occasions, many in the role of Hearing Chair. I recently chaired the Independent Hearing Panel for the Proposed Waikato District Plan and am currently chairing an independent review panel charged with assessing the performance of Hawke's Bay Regional Council's flood management assets and management processes during Cyclone Gabrielle.
- 1.7 I have provided strategic advice and coordinated resource consent applications for numerous major infrastructure / development projects all around the country, including for several port developments, capital and maintenance dredging activities, a wide range of industrial activities, wastewater systems, water supplies, landfills and retirement villages. This has included providing advice with respect to the Northport Limited ("**Northport**") development subject to these applications.

## **My involvement in the project and preliminary matters**

- 1.8 I have been retained by Northport to provide planning evidence in respect of the proposed development of the Northport facility at Whangārei alongside that of Mr Hood.
- 1.9 I have read the application documents, the Northland Regional Council & Whangārei District Council Officer Report (“**section 42A Report**”), the draft consent conditions proposed by the Council officers and Mr Hood, and the evidence of Mr Hood, as well as the evidence of other Northport witnesses. I am also familiar with the Northport site. My evidence should be read in conjunction with the documents and evidence cited above, particularly the planning evidence of Mr Hood.
- 1.10 The scope of the Northport development, the resource consents sought and the activity status for those consents are set out in the above documents. I agree with Mr Hood that the applications can be bundled and considered overall as a discretionary activity under the relevant regional and district plans.

## **Code of Conduct**

- 1.11 I confirm that I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note (2023) and I agree to comply with it. In that regard, I confirm that this evidence is written within my expertise, except where I state that I am relying on the evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.

## **2. SCOPE OF EVIDENCE**

- 2.1 In my evidence I discuss the following matters that the section 42A Report describes as requiring further information with respect to achieving “*policy consistency*”:
- (a) The policy directives to enable development of port activities in the Marsden Point Port Zone (regional plan) and the Port Zone (district plan);
  - (b) The allocation of coastal space; and
  - (c) The proposed conditions advanced by Northport.
- 2.2 I have read Mr Hood’s detailed planning assessment contained in his evidence and, for the sake of completeness, note that I agree with it and adopt his analysis as my own.

### 3. POLICY DIRECTIVES

- 3.1 The section 42A Report and Mr Hood's evidence describe the various statutory documents applicable to the project and the status of those documents, including the Proposed Regional Plan for Northland (incorporating the Coastal Plan) ("**PRPN**") and the Whangārei District Plan ("**WDP**"). I adopt their assessments for the purpose of determining the status of the various plans and provisions.
- 3.2 As described in the section 42A Report and in Mr Hood's evidence, the New Zealand Coastal Policy Statement ("**NZCPS**"), the PRPN and the WDP all contain "directive" objectives and policies. In particular, those provisions include extensive use of the term "enable" (in the context of relevant activities / development) in addition to policies seeking "avoidance" of certain effects.
- 3.3 Similarly, the operative Coastal Plan for Northland (which will be superseded by the PRPN) also recognises the need to provide for commercial port operations within the Marine 5 (Port Facilities) Management Area, which encompasses the existing and proposed expanded port area.
- 3.4 The term "enable" was determined to be "directive" in the *Southern Cross* High Court decision<sup>1</sup> and in my opinion, objectives and policies that "enable" should be seen in a manner that enables an activity to occur, rather than as a matter for consideration, and should therefore be afforded significant weight in the overall consideration of objectives and policies under Section 104(1)(b) of the RMA. In my opinion, "enabling" objectives and policies in the context of this application should be seen as similarly directive as any "avoidance" objective or policy.
- 3.5 Paragraph 559 in the section 42A Report states:
- Recognition of the role infrastructure provides for community wellbeing is reflected in a number of policy provisions through the hierarchy of relevant documents. This ranges from Infrastructure generally, to Regionally Significant Infrastructure which the Port is identified as in the RPS, to specific and strong policy support for Ports in the NZCPS and via the Port zones in the PRP-AV and WDP-OP.
- 3.6 While I generally agree with this statement in the context that there is recognition across the three documents referred to for the role that regionally significant infrastructure plays,

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<sup>1</sup> *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948.

I consider that the consistency across the three documents goes further than simply “recognition” - in that each seeks to enable such infrastructure in appropriate locations.

3.7 Objective 6 in the NZCPS is:

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;

3.8 Clearly, a berthing facility for ships (forming part of a port facility) must be located in the coastal marine area; and a facility that enables the export and import of goods is important to the social and economic wellbeing of people and communities. The proposed Northport development is, in my opinion, within an appropriate area, being adjacent to existing port facilities and within an area that has been identified for port activities for many years (the existing Regional Coastal Plan identified the area as appropriate for port facilities at least as early as 2004 when it was made operative).

3.9 I consider that the NZCPS “directive” as expressed in Objective 6 is therefore to “enable” people and communities to provide for such a facility as the port in this location, as described by Mr Hood.

3.10 Policy D.5.8 “*Coastal Commercial Zone and Marsden Point Port Zone Purpose*” in the PRPN is to:

Recognise that the purpose of the Coastal Commercial Zone and Marsden Point Port Zone is to enable the development and operation of existing and authorised maritime-related commercial enterprises or industrial activities located within these zones.

3.11 The proposed Northport development within the coastal marine area is within the Marsden Point Port zone. In my opinion, the directive in the PRPN is to enable the development of

the existing facilities within this zone. I interpret this as providing direct support to the proposed development (including expansion), and operation, of Northport.

3.12 Policy PORTZ-P1 “Regional Significance” in the WDP is:

To recognise the regional significance of the Port by providing for a wide range of existing and future port operations and port activities within the Port Zone.

3.13 In my opinion, the directive in the WDP is to provide for a wide range of existing and future port operations within the Port Zone. Again, I interpret this as providing direct support to the proposed expansion of Northport.

3.14 Clearly there are significant directives in the policy documents for development of port facilities in the manner and location proposed by Northport.

3.15 Counter to this, the section 42A Report refers to several policies that seek to “avoid” various effects. For example, paragraph 284 refers to “*NZCPS Policy 15, which directs avoidance of effects...*” on outstanding natural landscapes; paragraph 421 states that “*Policy 11 directs avoidance of effects on vulnerable species, taxa and habitats, and then avoidance of significant adverse effects on less vulnerable but still important habitats and ecosystems*”. In several places, the section 42A report states that some activities do “*not sit comfortably*” with the avoidance policies or that further evidence is needed to show that effects are avoided.

3.16 The section 42A Report states that there are five areas where “*better definition of effects, additional mitigation effort or agreement on proposed mitigation is necessary to address areas to a level that achieves policy consistency*”, being marine ecology accumulative effects, avifauna cumulative effects, recreational mitigation, landscape effects on the closest outstanding natural landscape and cultural effects.

3.17 In my opinion, the strong “enabling” provisions in the relevant statutory documents - which I traverse above - mean that “avoidance” of such effects or “*policy consistency*” is not necessary in terms of a development within the areas identified for port development. Rather they are matters that should be considered but in my opinion they do not “trump” other provisions.

3.18 Just because, in the hypothetical, there may be an effect on a specific landscape (that was identified recognising that the port zones existed) or coastal species (the port zones were identified recognising that such species existed in that location) does not of itself

mean that consents should not be granted for the project or that one policy should take precedence over another.

- 3.19 Having said that, it is clear to me that Northport's technical witnesses have comprehensively assessed the effects of this proposal, including effects on those species, habitats, attributes and characteristics to which the directive "avoid" provisions apply - and that, with the mitigation proposed / secured via conditions, the effects are avoided by being no more than minor or transitory.<sup>2</sup>
- 3.20 Given the above, I disagree with the section 42A Report, where they identify several matters they consider need to "achieve policy consistency", and instead I consider that those matters can and have been addressed by way of consent conditions as proposed by the applicant and discussed later in my evidence.
- 3.21 Activities such as dredging to provide depth for ships to berth and to provide port working space are, in my opinion, inevitable requirements for a port development. Northport (and indeed, New Zealand) does not set the size of shipping servicing New Zealand ports; rather, New Zealand ports must be designed to accommodate the size of shipping that is likely to be required to transport goods in and out of the port and New Zealand. The inherent difficulties in projecting future demand and growth, and therefore how to plan infrastructure around that growth, are evident in the evidence of Mr Jagger, Mr Moore, Mr Akehurst, and Mahim Khanna. That is why, in my opinion, enabling provisions are included in statutory documents such as the NZCPS, PRPN and WDP. The existence of the port area and adjacent activities at the Channel Infrastructure site mean that port infrastructure and associated activities are already well-established in the area.
- 3.22 In my opinion, enabling development (including expansion) of existing activities, including as provided for in the Northport proposal, is exactly what the policy framework is intended to provide.
- 3.23 I also observe that the PRPN has been developed taking into account the requirements of the NZCPS that it is required to give effect to.
- 3.24 As I note above, the purpose of the Marsden Point Port Zone (PRPN) and the Port Zone (WDP) is to enable the development and operation of existing and authorised maritime-related commercial enterprises or industrial activities located within these zones. If those activities cannot be carried out in this location, then it begs the question of where else would it occur in the Northland Region? In my opinion, the directive "enabling" objectives

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<sup>2</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38.

and policies strongly support the grant of consent, subject to appropriate conditions to mitigate the effects of the activities, as I discuss later in my evidence.

3.25 As I am finalising my evidence, I am aware that the Supreme Court has today released its decision on *Port Otago Limited v Environmental Defence Society Inc* [2023] NZSC 112. I understand that this decision broadly supports my analysis above. In particular, the Court notes:<sup>3</sup>

Where there is a potential conflict between the avoidance policies and the ports policy [in the NZCPS] with regard to a particular project, the decision-maker would have to be satisfied that:

- (i) the work is required (and not merely desirable) for the safe and efficient operation of the ports;
- (ii) if the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;
- (iii) where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

3.26 Given the very recent timing of this decision and its relevance, I will address this point in greater detail later in the process.

#### **4. ALLOCATION OF COASTAL SPACE**

4.1 Paragraphs 468 and 469 of the section 42A Report state:

[468] ..... Policy 4.8.1 [in the Regional Policy Statement] is titled “*Demonstrate the need to occupy space in the common marine and coastal area*”. Sub clauses (1)(a)-(d) are gateway tests and I agree with the applicant that (a)-(c) are met. Sub clause (d) requires consideration of the necessity of the occupation for the intended use and the explanation to the policy indicates that it is relevant to consider the efficiency of allocation of this coastal space to the proposal (activity).

[469] The applicant is seeking an exclusive occupation permit and via the reclamation to extinguish this space as common marine area and is doing so on a ‘first come first serve basis’. The rationale is to avoid ‘just in time’ planning of major infrastructure.

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<sup>3</sup> At [83].



4.2 Policy 4.8.1(d) is:

The area occupied is necessary to provide for or undertake the intended use.

4.3 As explained by others, particularly Mr Blomfield and Mahim Khanna, the proposed area is needed to enable the construction of a two-berth container terminal, capable of handling future trade of 500,000 TEU and enabling organic growth over the transition period leading up to this full development capacity. This position appears to be accepted by the Council reviewer, but who also concludes that “*no demand for this area has been established*” and that “*it has not been established that there is demand for a terminal of that scale at Northport*”.

4.4 The section 42A Report then concludes that “*the policy intent explained above could be satisfied by a short consent duration, thus allowing other competing users access to this space if the consents are unimplemented*”.

4.5 In paragraph 561, the section 42A Report states:

The policy tests for using the method of reclamation to provide for the activity have been satisfied. With no immediate need and in the absence of demand for the activity to occupy coastal space, a lack of national direction and commitment to Northlands role in the upper north island freight task and supporting freight infrastructure (road, rail, coastal shipping), and customary marine title claims to this space, there is uncertainty that the Northport expansion satisfies the policy tests for allocation of this scarce coastal space.

4.6 As I have stated above, the purpose of the Marsden Point Port Zone is to “*...enable the development and operation of existing and authorised maritime-related commercial enterprises...*” which is what Northport is seeking to do.

4.7 In my opinion, Northport has sufficiently established the projected demand for the proposed expansion to its facility, noting the long lead times in consenting, designing, and constructing port infrastructure as discussed in the evidence of Mr Jagger, Mr Moore, Mahim Khanna, Mr Akehurst and others. Conversely, in my view (and based on my broad experience of a range of infrastructure projects) the failure to obtain the necessary resource consents authorising expansion may even serve to restrict future demand.

4.8 Rather than a “short consent duration” as suggested in the section 42A Report which, in my opinion and experience, is completely inappropriate for significant infrastructure projects of the type proposed by Northport, such matters are generally addressed by way of specifying a lapse period for the reclamation. However, in this instance, given the

significance of the infrastructure proposed, the detailed engineering planning required to give effect to the consents and in recognition of the planning provisions already in place (such as the Marsden Point Port Zone (PRPN) and the Port Zone (WDP) and the existing activities that will be included in the consents sought), I support the lapse period coinciding with the consent expiry date, as contained in the proposed consent conditions.

- 4.9 The conditions proposed by Northport also require that regular (at least annual) updates on progress toward progressing commencement of the consents are provided, and the consent holder's expected timeframe for commencement is communicated to the public via a dedicated website.

## **5. CONSENT CONDITIONS**

- 5.1 I have reviewed the consent conditions proposed by Northport, which I understand incorporate conditions proposed by the Council reporting officers with appropriate amendments. It is very important to record that certain key aspects of Northport's proposed conditions post-date the analysis in the section 42A Report, meaning that those conditions were not available<sup>4</sup> to the section 42A Report authors in reaching their recommendations. Conditions which have been subsequently added to the suite now proposed by Northport include those relating to: capital dredging turbidity monitoring and management; cultural matters; integrated marine planning; and potential effects on Channel Infrastructure NZ Ltd.
- 5.2 In my opinion, the proposed conditions are extensive and comprehensive and appropriately recognise the relevant requirements and establish appropriate limits and management controls for the Northport development.
- 5.3 In addition to the broad range of consent limits, management plan requirements, certification requirements and review provisions included in the consent conditions, I discuss the proposed conditions relating to the five matters that the section 42A Report identifies as requiring further information to achieve "*policy consistency*" below.

### ***Marine Ecology Effects***

- 5.4 The proposed consent conditions include a range of requirements, including establishment of a sandbank renourishment area, a contribution to indigenous duneland vegetation via the Bream Bay Coastal Care Trust, preparation of an integrated marine planning initiative and providing Steering Committee funding to pursue that initiative, and

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<sup>4</sup> For various reasons, including that those conditions were subject of ongoing discussions with submitters.

comprehensive pre-, during- and post-construction monitoring of beach and inter-tidal areas and sub-tidal biota, sediments and seagrass, together with appropriate reporting of results.

- 5.5 The conditions also require establishment of a Marine Mammal Observation Zone before any dredging or pile driving activity commences, to enable observation of marine mammals as far as reasonably practicable before works start and during works. If a marine mammal (which may include dolphins, seals, whales or orca) is observed within specified distances of an operating dredge or pile driving activity, then dredging or pile-driving must not commence or must immediately cease; and must only commence or recommence once all marine mammals have been visually confirmed as having left the relevant location, or 30 minutes have elapsed since the last marine mammal sighting.
- 5.6 Given the relevant statutory documents I refer to above, I consider that port development activities will be enabled in the Marsden Point Port Zone while marine ecology effects associated with the project are mitigated. In my opinion, the proposed conditions appropriately address the relevant policy directions while mitigating marine ecology effects.

#### ***Avifauna Effects***

- 5.7 The conditions require consideration of avifauna in all management plans prepared for the project and also specifically include requirements for undertaking surveys by a suitably qualified and experienced coastal ornithologist and a certified penguin detector dog to determine the presence or absence of kororā (little penguin) within the existing eastern boundary riprap revetment and set out requirements if these are located (including no rock removal or piling activities within 10 m of an active burrow or moulting penguin and no other construction activity in proximity to an active burrow or moulting penguin unless that activity can achieve a specified maximum sound level).
- 5.8 Likewise, if reclamation construction works are to occur during September to March inclusive (being the Tōrea pango (variable oystercatcher) breeding season), surveys must be undertaken by a suitably qualified and experienced coastal ornithologist to determine potential Tōrea pango nesting habitat within the proposed works footprint(s), a suitably qualified and experienced coastal ornithologist must survey for the presence of active nests and if an active nest is detected, a 20m exclusion zone must be implemented for all reclamation construction machinery and personnel.

- 5.9 In addition, the proposed sandbank renourishment area will provide additional avifauna roosting habitat, with a 'design-led' approach focusing on all-tide roosting habitat, free of predators, and proximate to suitable feeding areas.
- 5.10 Given the relevant statutory documents I refer to above, I consider that the grant of resource consents for the proposal will enable port development activities in the Marsden Point Port Zone while appropriately mitigating avifauna effects. In my opinion, the proposed conditions appropriately address the relevant policy directions and mitigate avifauna effects associated with the project.

### ***Recreational Mitigation***

- 5.11 The proposed conditions provide for design, construction, management and maintenance of a range of recreational features associated with the project, including appropriate public access where practicable (recognising that the proposal involves an operating port facility). While I acknowledge that there is some uncertainty around exactly where and how offsite recreation mitigation is to occur, Northport is willing to propose a condition, on an *Augier* basis, requiring that it identify and promote such mitigation in order that further recreation benefits are secured for the community.
- 5.12 Given the expectation in the relevant statutory documents I refer to above that port development activities will be enabled in the Marsden Point Port Zone and the Port Zone while mitigating recreation effects, I consider that the proposed conditions appropriately address the policy directions and recreation effects associated with the project.

### ***Landscape Effects***

- 5.13 The proposed conditions limit the size and height of structures on the proposed reclamation area to mitigate landscape effects and for preparation and implementation of a landscape plan. I acknowledge that these steps will not "hide" the port infrastructure and that the proposed development will still be seen or viewed in the context of its surrounding environment, which includes adjacent (existing) port infrastructure, other activities within and adjacent to the Whangārei Harbour and the outstanding natural landscape referred to in the section 42A Report. The visual and landscape effects associated with the proposal are thoroughly described by Mr Brown in his evidence. Mr Brown contextualises views of the area against the existing port (and adjacent) developments, existing harbour uses and activities, and the zone provisions seeking to enable further development within the Marsden Point Port Zone and the Port Zone. I concur with Mr Brown's analysis.

5.14 Given the expectation in the relevant statutory documents I refer to above that port development activities will be enabled in the Marsden Point Port Zone and the Port Zone, I consider that the proposed conditions appropriately address the policy directions while mitigating landscape effects associated with the project.

### ***Cultural Effects***

5.15 The proposed conditions include a range of measures to mitigate cultural effects associated with the project. These include (amongst other matters) requirements for:

1. Establishing and maintaining a Kaitiaki Group with functions and roles that include to:
  - (a) Recognise and provide for the importance of Poupouwhenua and Whangārei Te Rerenga Parāoa as a taonga to tangata whenua;
  - (b) Recognise and provide for the kaitiakitanga of Māori who have a kaitiaki relationship with Poupouwhenua and Whangārei Te Rerenga Parāoa;
  - (c) Facilitate the involvement of Māori who have a kaitiaki relationship with Poupouwhenua and Whangārei Te Rerenga Parāoa in the exercise of the resource consents;
  - (d) Facilitate the incorporation of kaitiaki responsibilities and values in the exercise of the resource consents;
  - (e) Provide a forum for engagement between Māori who have a kaitiaki relationship with Poupouwhenua and Whangārei Te Rerenga Parāoa, the Consent Holder and the council regarding the exercise of the resource consents;
  - (f) Identify initiatives to develop expertise and capacity building for mana whenua;
  - (g) Name roads and areas within the reclamation area and operating port;
  - (h) Provide design input to the construction authorised by these consents;
  - (i) Design the proposed “pocket park”;
  - (j) Train people with knowledge of mātauranga Māori as marine mammal observers and field technicians for collection of samples;

- (k) Review and comment, as necessary, on the draft monitoring reports;
  - (l) Provide advice on enhancing access to mahinga kai sites;
  - (m) Undertake appropriate cultural ceremonies; and
  - (n) Identify, develop, establish and/or approve suitable studies or projects designed to improve water quality, coastal processes, environmental, ecological, and cultural health of the Whangārei Harbour entrance (including its shores) and northern Bream Bay.
2. Establishment of a Cultural Indicators Hub, including development of appropriate cultural indicators.
  3. Establishing a Cultural Monitoring Framework.
  4. Providing funding for the Kaitiaki Group, including for:
    - (a) Cultural and community recreation projects; and
    - (b) Cultural ecological restoration and enhancement.
- 5.16 In my opinion, these conditions provide a range of opportunities for tangata whenua to participate in the port development as kaitiaki and to have an ongoing role in mitigating cultural effects associated with the project. I consider that the proposed conditions appropriately address the requisite policy directions while recognising and providing for cultural matters relating to the project.
- 5.17 Notwithstanding the above, I anticipate that the conditions will be able to be refined following witness conferencing and receipt of the evidence from mana whenua.

## 6. CONCLUSION

- 6.1 I consider that the objectives and policies in the NZCPS, PRPN and WDP are “directive” to the extent that port facilities should be enabled in the Marsden Point Port Zone (PRPN) and the Port Zone (WDP). In my opinion, “enabling” objectives and policies in the context of this application should be seen as similarly directive as any “avoidance” objective or policy. Those enabling provisions should not be “trumped” by objectives or policies that place a higher threshold for activities in these zones. In my opinion, the proposal does not need to achieve the “*policy consistency*” the section 42A Report implies is required.

- 6.2 I consider that resource consents can be granted for the project and that the proposed conditions appropriately address the relevant policy directions while mitigating the effects of the project.
- 6.3 In my opinion, the proposed conditions are extensive and comprehensive, and appropriately recognise the relevant policy requirements. The conditions establish appropriate limits and management controls for the Northport development.

**Dr Philip Mitchell**

24 August 2023