IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-000012
[2022] NZHC 2810

UNDER	Clause 44 of Schedule 6 of the COVID-19 Recovery (Fast-Track Consenting) Act 2020 (the Act).
IN THE MATTER	Of an appeal against the final decision of an Expert Consenting Panel under the Act to approve resource consents for the Kapuni Green Hydrogen Project.
BETWEEN	TE KOROWAI O NGĀRUAHINE TRUST Appellant
AND	HIRINGA ENERGY LIMITED AND BALANCE AGRI-NUTRIENTS LIMITED Respondents

(Continued next page)

Hearing:	16-17 May 2022
Appearances:	T H Bennion, L L Black for the Appellant L P Wallace, R E Eaton for the Respondent C M Hockly for the First Interested Party D A C Bullock, J L Beverwijk for the Second Interested Party
Judgment:	31 October 2022

JUDGMENT OF GRICE J (Appeal)

AND

ŌKAHU-INUAWAI ME ĒTEHI ATU HAPŪ, NGĀTI TU HAPŪ, NGĀTI TAMAAHUROA-TITAHI HAPŪ, NGĀTI HAUA HAPŪ AND KANIHI UMUTAHI ME ĒTEHI ATU HAPŪ
First Interested Parties

GREENPEACE AOTEAROA INCORPORATED
Second Interested Party

TARANAKI MĀORI TRUST BOARD
Third Interested Party

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Abbreviations

COVID-19 Recovery (Fast-track Consenting) Act 2020	FTCA
Cultural Impact Assessment	CIA
Cultural and Spiritual Values	CSV
Environmental Protection Agency	EPA
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	EEZ Act
Expert Consenting Panel	the Panel
Hiringa Energy Ltd	Hiringa
Natural Features and Landscapes policy	NFL
National Policy Statement Freshwater Management	NPS-FM
National Policy Statement Renewable Energy Generation	NPS-REG
New Zealand Coastal Policy Statement	NZCPS
Outstanding Natural Features and Landscapes	ONFL
Parininihi ki Waitōtara Incorporation Māori Trust	PKW
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Record of Understanding	ROU
Regional Coastal Environment Plan	RCEP
Resource Management Act 1991	RMA
Stream Health Monitoring Assessment Kit Test	SHMAK
South Taranaki District Council	STDC
Te Korowai o Ngāruahine Trust	Te Korowai

Introduction

[1] The usual process for obtaining resource consent is under the Resource Management Act 1991 (the RMA). The COVID-19 Recovery (Fast-track Consenting) Act 2020 (the FTCA) was intended to provide a fast, simplified and shortened process for decision-making on resource consents to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19, while continuing to promote the sustainable management of natural and physical resources.[1] The relevant consents the subject of this appeal were granted following a referral by the Minister for the Environment (the Minister) under the FTCA and determined by a four-member Expert Consenting Panel (the Panel).[2] A resource consent granted under the FTCA is the same as if it were granted under the RMA.[3]

[2] Under the FTCA, the public notifications and hearing process is replaced by a streamlined notice process and comments process. There is no requirement for an oral hearing. Certain parties are, however, required to be notified.

[3] Of particular relevance to this appeal is that s 8 of the RMA, requiring persons exercising functions and powers under the RMA to "take into account" the principles of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty), is replaced by s 6 of the FTCA, which requires these persons to act in a manner that is "consistent with" the principles of the Treaty and Treaty settlements.

[4] This is an appeal against the "fast-track" decision of a Panel approving with conditions resource consents for a "green" project to be undertaken by Hiringa Energy Ltd and Ballance Agri-Nutrients Ltd (collectively referred to as Hiringa).[4]

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1 See s 4 of the COVID-19 Recovery (Fast-track Consenting) Act 2020 [the FTCA].

2 Under s 16 of the FTCA, the Minister is the Minister for the Environment. Under s 21, the Minister, upon receiving an application for referral, is required to invite written comments from 13 other Ministers, including those holding the portfolios of Local Government, Māori Crown Relations—Te Arawhiti, and Treaty of Waitangi Negotiations, as well as any other Ministers holding relevant portfolios.

3 Section 12(2)(b).

4 Record of decision of the Expert Consenting Panel under clause 37, schedule 6 of the COVID-19 Recovery (Fast-track Consenting) Act 2020, concerning a green hydrogen hub in Kapuni, South Taranaki, 1 December 2021 [the Panel Report].

[5] The project involves the development of a renewable ("green") hydrogen hub at Kapuni in South Taranaki. In simple terms, electricity is to be generated from four large wind turbines to provide baseload power to the nearby Ballance Agri-Nutrients Kapuni Ammonia-Urea Manufacturing Plant. The resulting hydrogen produced will initially be used to produce ammonia and urea, before transitioning over a five-year period to supply hydrogen fuel for commercial and heavy transport (the Project).

[6] The scope of the Project is described in the consent application as to construct, install and operate a renewable hydrogen hub which will comprise: four wind turbines and associated infrastructure; an electrolysis plant; hydrogen production infrastructure; hydrogen storage, loadout, and refuelling facilities; and underground electricity cables and associated buildings and structures.[5]

[7] In this case, the parties required to be notified included Te Korowai o Ngāruahine Trust (Te Korowai), the mandated post-settlement governance entity and representative body for Ngāruahine iwi, including the two hapū who have uncontested mana whenua over the land on which the proposed Project is sited, namely Ngāti Manuhiakai and Ngāti Tu.

[8] The Minister was satisfied the application met the purpose of the FTCA and referred the application to the Panel accordingly. On 1 December 2021, the Panel released its decision in a report (the Report) approving the application and granting consents to the Project, subject to conditions, for a term of 35 years.

[9] Te Korowai appeals the decision. Ngāti Tu is a party supporting the appeal. Greenpeace Aotearoa Inc (Greenpeace) was also a notified party and supports the appeal. While these three parties took carriage of the arguments. Other parties appeared in support of the appellant.

[10] The issues on appeal fall into two main areas: first, Treaty and cultural issues; and secondly, environmental issues.

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5 Hiringa Energy Ltd and Ballance Agri-Nutrients Ltd *Resource Consent Application and Assessment of Environmental Effects: Kapuni Green Hydrogen Project* (18 August 2021) at 29.

[11] In relation to the Treaty and cultural issues, the focus is on the alleged failure by the Panel to properly take into account tikanga and cultural issues as well as the individual positions of hapū and iwi and their issues of concern, and thus its failure to perform its functions in a manner "consistent with" the principles of the Treaty.

[12] Greenpeace (which is an entity which must be notified of applications for a referred project under the FTCA)[6] took primary carriage of the arguments in relation to environmental issues. It says that the Panel failed to properly assess the environmental effects, including down-stream effects, of the urea fertiliser produced and so ultimate emissions caused by livestock on the fertilised pasture. It also submits that the stated environmental benefits said to flow from the project based on the transition over five years from use of the production of urea for fertiliser to the provision of hydrogen fuel for transport may not be realised because the conditions in the Report were inadequate in a number of respects.

Grounds of appeal

[13] Te Korowai brings its appeal on the grounds that the Panel made the following errors of law:

(a) finding that the proposal was "entirely consistent" with pt 2 of the Resource Management Act 1991, and in particular ss 6(e) and 7(a);

(b) failing to consider the cultural landscape of Ngāruahine as a whole;

(c) failing to consider the precedent effect of the proposal to be an adverse effect over the life of the project that could not be mitigated;

(d) concluding that the project has no impact on two cultural redress properties;

(e) determining that a hearing was not required on any issue without giving reasons; and

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6 Schedule 6 cl 6(o) of the FTCA.

(f) finding that a critical reason for approving the project was 100 per cent transition to use of "green hydrogen" for transport.

[14] The ground at (d) above was not pursued.[7] I do not deal with that further.

[15] The relief sought on appeal is the overturning of the grant of the consents.

New points raised on appeal

[16] The grounds above were expanded on in the Particularised Points on Appeal. Additional points were also raised in written submissions by the appellant and interested parties. Hiringa by agreement was given further time to respond and file extra submissions. Ms Wallace, for Hiringa, objects to additional questions of law and new evidence raised by Greenpeace and Ngāti Tu since the appeal was filed and not covered by the above grounds of appeal.

[17] Ms Wallace said it was not procedurally appropriate, nor in the interests of justice, for Greenpeace and Ngāti Tu as interested parties to raise these additional grounds of appeal. She noted that these new matters had been raised three months after the date the appeal was filed and less than two weeks before the respondents' submissions were due, with no prior notice having been given. They are:

(a) the application of the wrong Treaty test;[8]

(b) failing to properly take into account the environmental effects of the end users of the urea fertiliser produced by the Project;[9]

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7 In the appellant's Particularised Points of Law on Appeal, dated 8 March 2022, a point of appeal was that the Panel did not assess any cultural impacts on the two cultural redress properties located near the Project site in reaching the conclusion (at [188] of the Panel Report, above n 4) that they were not affected: at [19]. However, by the time the parties filed their written submissions, Te Korowai opted not to pursue this point on appeal.

8 Section 8 of the Resource Management Act 1991 [the RMA] instead of s 6 of the FTCA.

9 The urea fertiliser is produced by the Ballance plant and will use hydrogen and energy from the project.

(c) failing to take into account the environmental consequences of the Project failing to transition from producing urea fertiliser to hydrogen fuel, or that transition being delayed;

(d) taking into account irrelevant considerations, being the benefits of transition to hydrogen fuel production without that transition being guaranteed or required to ever occur; and

(e) unlawfully delegating decision-making relating to the transition to the South Taranaki District Council under the RMA.

[18] Ms Wallace pointed to r 20.9(1)(c) of the High Court Rules 2016, which requires a notice of appeal to specify the grounds of appeal in sufficient detail to fully inform the Court, or other parties to the appeal. Leave to amend a notice of appeal may be given at any time with the leave of the Judge. No such leave had been sought or granted in this case.[10]

[19] Additional parties to proceedings must keep within the scope of the appeal, in furtherance of the well-established policy that a person should not be able to change or expand the scope of appeal by becoming a party.[11] The addition of new points on appeal is a matter of discretion for the appellate court. The Court must ensure that the conduct of proceedings is procedurally fair.[12] Courts tend to permit new points to be argued where they concern matters of law only and there is no material prejudice to the other parties.[13]

[20] The additional points raised effectively expand the grounds of appeal to include reference to s 6 of the FTCA, which is the replacement Treaty clause, and to cover points concerning the environment effects of the end product use and the transition to use of the hydrogen for fuel transport.

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10 High Court Rules 2016, r 20.9(4).

11 *Robert Street Action Group Inc v Taupō District Council* [2021] NZEnvC 129 at [23].

12 *McCollum v Thompson* [2017] NZCA 269, [2017] NZAR 1106 at [52]–[54].

13 See for example *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] UKPC 25, [2004] 1 NZLR 145 at [9]. If an appellant succeeds only on a new point, this may justify a refusal to award costs: see for example *Pioneer Insurance Co Ltd v White Heron Motor Lodge Ltd* [2008] NZCA 450, (2008) 19 PRNZ 286 at [57]–[58].

[21] I deal first with the point at additional point (a) above concerning the application of 6 of the FTCA (the Treaty clause).

[22] The original grounds of appeal would have required consideration of the s 6 Treaty clause. The RMA provisions in s 6(e) (relationship of Māori and their culture and traditions with their ancestral lands and taonga) and s 7(a) (having particular regard to kaitiakitanga) of the RMA, which are directly in play in this appeal, can only be considered in the context of the applicable Treaty clause. In addition, the Particularised Points on Appeal, dated 8 March 2022, also referred to the displacement of s 8 of the RMA by s 6 of the FTCA in a quote taken from the Panel's decision. The grounds of appeal alleged a general failure by the Panel to consider the cultural landscape of Ngāruahine as a whole. This would necessarily require the consideration of the Treaty clause and in particular the difference between the wording of s 6 of FTCA and s 8 of the RMA. In my view, the grounds of appeal are sufficiently wide to include consideration of the s 6 FTCA Treaty clause.

[23] I now turn to the proposed added points relating to the end product use of the green energy at additional point (b) above. The environmental effects of the end uses of the urea fertiliser were not discretely raised in the grounds of appeal and are not mentioned in the appellants' particularised points of law on appeal.[14] The argument on this point is outside the grounds of appeal. The limitation on what interested parties may argue enables an effective focus for all concerned on the points on appeal and the appeal time limits are designed to ensure that all parties have a fair time to consider and prepare their arguments. In this case, Hiringa was given further time and the opportunity (which it took) to file additional submissions to address the point. In those circumstances there is no or little prejudice to Hiringa. Leave is granted to argue that point.

[24] In relation to the transition from producing urea for fertiliser to hydrogen fuel, ground (f) of the grounds of appeal refers to the fact that the 100 per cent transition to use of "green hydrogen" for transport was a "critical reason" the Panel gave for approving the project but had not been properly captured in the consent conditions. I

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[14] Particularised Points of Law on Appeal, above n 7.

consider the point concerning the failure to guarantee transition of use to hydrogen fuel is able to be argued within this ground.

[25] The unlawful delegation point falls naturally within the point regarding the adequacy of the transition conditions.

[26] Accordingly, I am of the view it is in the interests of justice to treat the points to which Hiringa has objected to, as set out at [17] above, as within the scope of the appeal. Leave is granted for those points to be argued on appeal.

Principles on appeal

[27] Under cl 44(1) of sch 6 of the FTCA, a party may appeal the decision of a panel to the High Court. The appeal is limited to a question of law.[15] The parties to an appeal are the appellant and any person who gives a notice of intention to appear.[16]

[28] The Supreme Court in *Bryson v Three Foot Six Ltd* said an error of law may occur if the decision-maker:[17]

(a) applied the wrong legal test;[18]

(b) reached a factual finding that was "so insupportable – so clearly untenable – as to amount to an error of law";[19]

(c) came to a conclusion that it could not reasonably have reached on the evidence before it;[20] or

(d) took into account irrelevant matters; or failed to take into account matters that it should have considered.

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15 Schedule 6 cl 44(2) of the FTCA.
16 Schedule 6 cl 45(8).
17 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
18 At [24].
19 At [26].
20 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 45, (1994) 18 ELRNZ 150 (HC) at 153; and *May v May* [1982] 1 NZFLR 165 (CA).

[29] Procedural errors such as, for instance, a breach of natural justice under common law or statute, may amount to a point of law in an appeal.[21]

[30] That a Court would have reached a different conclusion does not of itself allow interference on appeal if the decision on appeal was a permissible option. This presents a very high hurdle.[22] However, a question about facts and the evidence or the inferences and conclusions drawn by a decision-maker may sometimes amount to a question of law. Not every allegation of a lack of factual basis or wrong inferences or conclusions from the evidence, however, will turn such an issue of fact into a question of law.[23] As the Court of Appeal has noted, in the absence of a general appeal, it is not the role of the Court in an appeal on a question of law "to undertake a broad reappraisal of the … factual findings or the exercise of its evaluative judgments".[24]

[31] In particular, the nature and statutory functions of the decision-maker should be considered. Important factors, including whether it has particular expertise or wide policy considerations, are to be taken into account in the exercise of its decision-making.[25]

[32] Deference to expertise where appropriate must be accorded to the Environment Court as a specialist Court and the expert tribunal.[26] As the High Court stated in *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the Environment Court's decisions "will often depend on planning, logic and experience, and not necessarily evidence".[27] There the High Court noted that no question of law arose from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and that the weight to be attached to the particular planning policy will generally be for the Environment Court.[28]

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21 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345 at [55]; and *Kawerau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2353 at [45].

22 *Bryson v Three Foot Six Ltd*, above n 17, at [27].

23 *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 (HC) at [127].

24 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [112].

25 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

26 At [42].

27 At [33].

28 At [33].

[33] The High Court has recognised that a Judge of this Court is not equipped to revisit the merits of a determination made by a specialist Court on a subject within its sphere of expertise.[29] In *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, Kós J cited with approval the statement of Harrison J in *McGregor v Rodney District Council* that:[30]

> … [t]o succeed on appeal an aggrieved party must prove that the Court erred in law – never an easy burden where the presiding Judge has unique familiarity with the statute governing the Court's jurisdiction.

[34] Although the decision in this case was made by an appointed Expert Panel, not the Environment Court, the authorities as stated above in relation to decision-making by expert tribunals are applicable.

Statutory framework for resource consent applications under the FTCA

[35] In this case, the Minister determined that this application should be a referred project to be dealt with under the FTCA, as opposed to the usual process under the RMA.

The Fast-track Consenting Act

[36] The FTCA came into force on 9 July 2020 and has a sunset clause which sees the legislation repealed on 8 July 2023.[31] The purpose of the legislation is described in s 4 as follows:

> **4 Purpose**
>
> The purpose of this Act is to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

[37] The fast-track consenting process applies to "listed projects", which are itemised in a schedule to the Act, as well as referred projects. This is a referred project. The Project requires land use consents, a water permit and a discharge consent. The

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29 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, (2013) 17 ELRNZ 652 at [28].

30 At [28], citing *McGregor v Rodney District Council* [2004] NZRMA 481 (HC) at [1].

31 Section 3(1) of the FTCA.

applications for consent do not include consents for the existing fertiliser plant except for the consideration of the infrastructure allowing the plant to be fuelled by the green energy hydrogen.

[38] A project may be referred to an Expert Consenting Panel for determination under the FTCA if the Minister is satisfied that a referred project will help to achieve the purposes of the Act.[32] The Minister may have regard to a number of matters, including: the project's economic benefits and costs for people or industries affected by COVID-19; the project's effect on the social and cultural well-being of current and future generations; whether the project would be likely to progress faster by using the processes provided by the FTCA than would otherwise be the case; and whether the project may result in a public benefit, which includes by, for example, contributing to New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy.

[39] The application to the Minister for referral must include a list of all the persons affected or likely to be affected, including relevant local authorities, relevant iwi authorities, and relevant Treaty settlement entities; as well as a summary of any consultation already undertaken on the project with those persons; and a list of Treaty settlements that apply to the geographical location of the project.[33]

[40] The Minister must then obtain written comments on the referral application from relevant local authorities as well as relevant ministers, including the Minister of Māori Crown Relations—Te Arawhiti, the Minister for Climate Change, and the Minister of Treaty Negotiations; and a report on the application for referral must be prepared by the Ministry in consultation with the Office for Māori Crown Relations—Te Arawhiti, identifying including, among other things, the relevant iwi authorities and Treaty settlement entities, and any Treaty settlements that relate to the project area.[34]

[41] If the Minister decides to accept the application for referral,[35] they must give notice of their decision and reasons for the referral to, among others, the relevant iwi

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32 Section 18(2).
33 Section 20(3)(h), (i) and (j).
34 Sections 17(1)–(2) and 21(6).
35 Section 24.

authorities and Treaty settlement entities identified, and any other iwi authorities or Treaty settlement entities that the Minister considers have an interest in the matter.[36]

[42] Once a project is referred on the recommendation of the Minister, the application is sent to the Environmental Protection Agency (EPA) with all information received that relates to the matter.[37] The project is then considered by the Panel.[38]

[43] The information required in a consent application is set out at sch 6 cl 9 of the FTCA and includes: an assessment of the proposed activity against pt 2 of the RMA, the purpose of the FTCA and whether the project would help to achieve the purpose of the FTCA;[39] information about any Treaty settlements that apply in the project area;[40] and the conditions the applicant proposes for the resource consent.[41]

[44] The application must also include an assessment of the proposed activity against any relevant objectives, policies, rules, requirements, conditions or permissions in the following planning and policy documents:[42] a national environment standard; other regulations made under the RMA; a national policy statement; a New Zealand coastal policy statement; a regional policy statement or proposed regional policy statement; a plan or proposed plan; and a planning document recognised by a relevant iwi authority and lodged with a local authority.

[45] An application must also include a cultural impact assessment (CIA) prepared by or on behalf of the relevant iwi authority, or a statement of any reasons given by the relevant iwi authority for not providing a CIA.[43]

[46] No public notification of the application is permitted.[44] However, the panel must invite written comments on the application before it from persons or groups listed in the FTCA, including the relevant iwi authorities and Greenpeace.[45]

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36 Section 25(2)(c) and (d).
37 Section 26(2).
38 Section 27.
39 Schedule 6 cl 9(1)(g).
40 Schedule 6 cl 9(1)(h).
41 Schedule 6 cl 9(1)(j).
42 Schedule 6 cl 9(1)(h) and (2)–(3).
43 Schedule 6 cl 9(5).
44 Schedule 6 cl 17(1).
45 Schedule 6 cl 17(6)(b) and (o).

[47] Any iwi authority invited to comment may share the consent application with hapū whose rohe is in the project area and may include those of hapū in its comments to the panel.[46] Comments must be made within 10 working days after the date on which the invitation for written comments is made.[47] The panel is not required to receive late comments but may, in its discretion, receive comments after the notice specified in the invitation.[48] The applicant for consent must then provide its response or comments not later than five working days after the date the comments were to be received from the invited parties.[49]

[48] In determining an application for consent under the FTCA, the provisions of sch 6 of the FTCA apply instead of the usual process under the RMA.[50] The provisions of the RMA continue to otherwise apply, to the extent relevant and with necessary modifications,[51] including the duty to "avoid, remedy, or mitigate adverse effects".[52] A resource consent granted under the FTCA has the same force and effect for its duration "and according to its terms and conditions", as if it were granted under the RMA.[53] The duration of consents is generally 35 years.[54]

[49] The consent process timeline is tight and is usefully represented as follows:[55]

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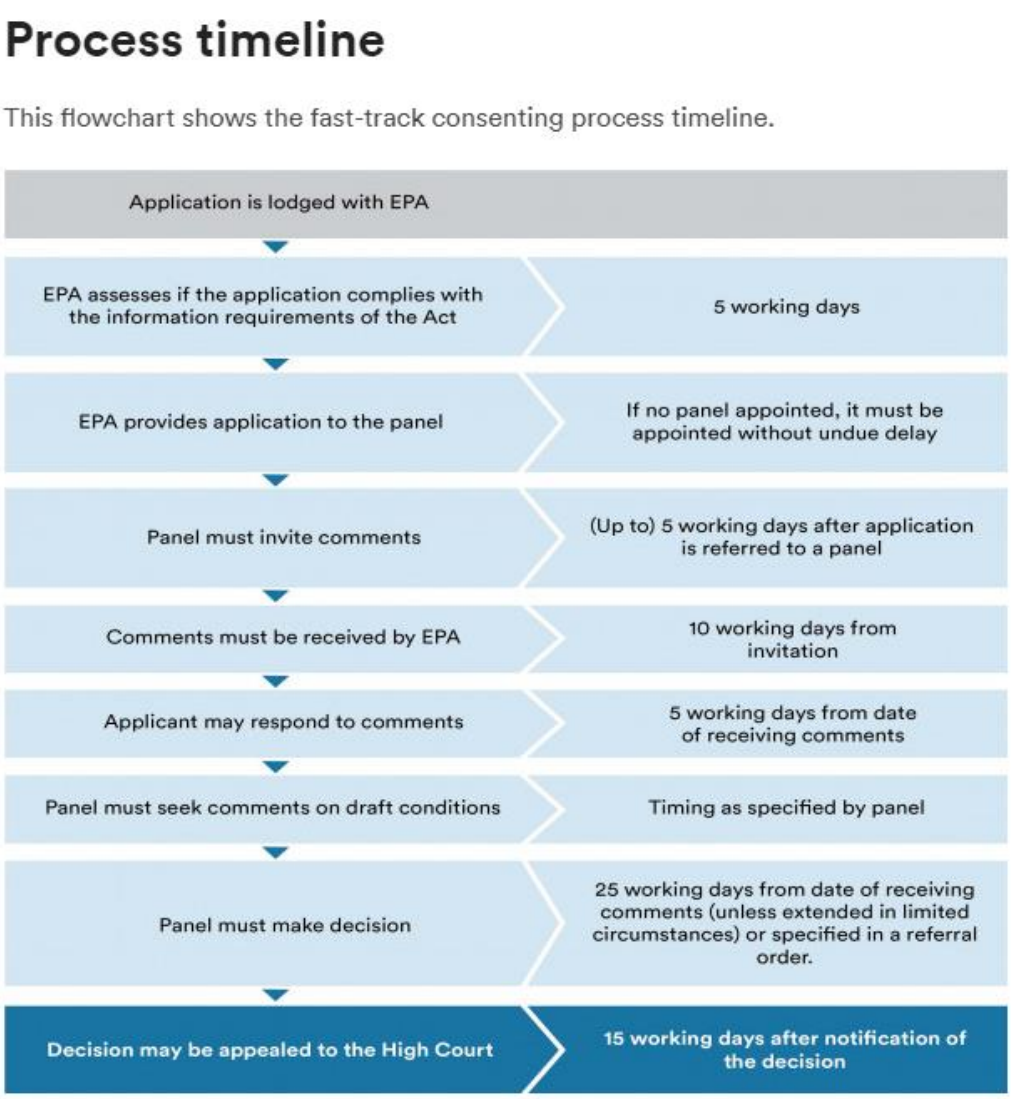
46 Schedule 6 cl 18(3).
47 Schedule 6 cl 18(1).
48 Schedule 6 cl 18(6).
49 Schedule 6 cl 19.
50 Section 12(2)(a).
51 Section 12(10).
52 Section 12(9); and s 17 of the RMA.
53 Section 12(2)(b).
54 Schedule 6 cl 36(4); and s 123 of the RMA.
55 Te Mana Rauhī Taiao | Environmental Protection Authority "Fast-track consenting" <www.epa.govt.nz>.



[50] In considering consent applications on referred projects, the panel must have regard to a number of matters, including any actual and potential effects on the environment, any measures agreed to by the applicant to offset or compensate for any adverse effects, any relevant provisions of the planning and policy documents listed above, and any other relevant matter reasonably necessary to determine the application.[56] The panel must not have regard to any effect on a person who has given written approval to the application,[57] unless the person withdraws their approval.[58] A panel must comply with any obligation on a local authority or other decision-maker

[56] Schedule 6 cl 31(1) of the FTCA.
[57] Schedule 6 cl 31(5)(a)(ii).
[58] Schedule 6 cl 31(6).

under a Treaty settlement as if it were that local authority or decision-maker.[59] A panel may decline a consent application if the information is inadequate to determine the application,[60] and must decline an application if that is necessary to comply with the s 6 Treaty clause under the FTCA.[61]

[51] A panel may grant a resource consent subject to such conditions it considers appropriate.[62] Before it does so, the panel must provide copies of the draft conditions to the applicant and every person or group that provided comments.[63] Before making its final decision on a consent application, the panel must have regard to all comments received on the draft conditions.[64]

[52] Once the resource consent has been granted, the local authority has all the functions, duties and powers in relation to that consent as if it had been granted by the local authority.[65] Those functions, duties and powers include the determination of any application to extend a lapsed period,[66] and the determination of any application for change or cancellation of a condition of a resource consent.[67]

The Expert Panel

[53] The Panel convenor makes the final decision who from the panel is appointed to an expert panel to determine resource consents for a particular referred project.[68] The panel must include a person nominated by the relevant local authority and a person nominated by the relevant Iwi authorities.[69] The panel chairperson is appointed by the convenor and must be suitably qualified.[70]

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59 Schedule 6 cl 31(10). The example given is the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, which requires the consent authority to have particular regard to the vision and strategy set out in the settlement Act.
60 Schedule 6 cl 31(8).
61 Schedule 6 cl 31(12).
62 Schedule 6 cl 35(2).
63 Schedule 6 cl 36(1).
64 Schedule 6 cl 36(5).
65 Schedule 6 cl 42(2)(a).
66 Schedule 6 cl 42(5)(a), referring to ss 125(1A) and 184 of the RMA.
67 Schedule 6 cl 42(5)(b), referring to s 127 of the RMA.
68 Schedule 5 cls 2(5) and 3(4)–(5).
69 Schedule 5 cl 3(2).
70 Schedule 5 cl 4(3).

[54] Collectively, each panel must have knowledge, skills and expertise relevant to resource management issues, technical expertise relevant to the project, and expertise in tikanga Māori and mātauranga Māori.[71]

[55] The Panel may hold a hearing if, in its discretion, it "considers it is appropriate".[72] If it does hold a hearing, the panel may receive as evidence any statement, document, information, or matter that may assist it to deal effectively with an application, whether or not it would be admissible in court.[73]

[56] The hearing must be completed within the statutory timeframe. The panel's decision and report must be delivered as soon as practicable after a panel has completed its consideration of an application and in any case no later than 25 working days after the date specified for receiving the initial comments.[74] However, a panel may extend that period by up to a further 25 working days, or any other number of working days, "if the scale or nature of the proposal … is such that the panel is unable to complete its decision within the time specified", that is 25 days.[75] The Minister may delay the processing of the consent application in limited circumstances, and the applicant may also request such delay.[76]

[57] The FTCA emphasises speed and efficiency in dealing with an application. Section 10 provides:

> **10 Procedural principles**
>
> (1) Every person performing functions and exercising powers under this Act must take all practicable steps to use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions, duties, or powers being performed or exercised.
>
> …

[58] Though the FTCA will be repealed on 8 July 2023, the panel continues in office until it has completed the performance of its functions and duties,[77] and the powers,

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71 Schedule 5 cl 7(1).
72 Schedule 6 cl 21(1).
73 Schedule 6 cl 21(9).
74 Schedule 6 cl 37(1) and (2)(b).
75 Schedule 6 cl 37(3)(b).
76 Schedule 6 cls 22–23.
77 Schedule 1 cl 1(5).

functions and duties conferred by the FTCA on local authorities and iwi authorities continue to be exercised or performed after the repeal of the FTCA for any purpose connected with the monitoring of activities authorised under the FTCA.[78]

First major issue — the Treaty and cultural issues

[59] In considering this appeal, I first turn to the issues arising in respect of the Panel's consideration of the Treaty, as it is expressly required to do under s 6 of the FTCA (the Treaty clause), and related cultural issues.

Treaty and cultural issues — background

Crown and Ngāruahine Treaty settlement

[60] The Crown and Ngāruahine signed a deed of settlement in August 2014.[79] In it, Ngāruahine and the Crown acknowledged that Tupuna Koro o Taranaki (Mt Taranaki) "is of great traditional, cultural, historical and spiritual importance to iwi of Taranaki".[80] A guarantee of negotiations between the Crown and mandated representatives of Taranaki Iwi to develop an apology and cultural redress in relation to those claims, at a later point, was the form of redress to conditionally settle the historical claims of Ngāruahine relating to Mt Taranaki.[81]

[61] The Ngāruahine Claims Settlement Act (the Settlement Act) was enacted in 2016. Te Korowai is recognised in the Settlement Act as the mandated iwi entity.[82]

[62] In the Settlement Act, the Crown acknowledged breaches of the Treaty and its principles during the 19th and 20th centuries and that these significantly undermined the traditional systems of authority and economic capacity of the Ngāruahine Iwi and its people.[83] The Crown acknowledged that it had "failed to protect the rangatiratanga

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78 Schedule 1 cl 5(a).

79 Ngāruahine and the trustees of Te Korowai o Ngāruahine Trust and the Crown "Deed of Settlement of Historical Claims" (1 August 2014) [Deed of Settlement].

80 At [5.1].

81 At [5.3]; and see Manatū Mō Te Taiao | Ministry for the Environment *Report prepared in accordance with Section 17 Covid-19 (Fast-track Consenting) Act 2020: Application 2020.028 Kapuni Green Hydrogen Project (Hiringa Energy Ltd & Ballance Agri-Nutrients Ltd)* at [32]–[33].

82 Ngāruahine Claims Settlement Act 2016 [the Settlement Act], s 132.

83 Section 9(16).

of Ngāruahine, in breach of its obligations under Article Two of the Treaty of Waitangi".[84]

[63] The Settlement Act provides for the involvement of the iwi in decisions relating to the conservation estate. To that end, there are ongoing discussions towards the recognition of the significance of Taranaki Maunga to Taranaki iwi, including Ngāruahine, with a view to recognition of Te Maunga as a separate legal personality.

[64] The statute recognises Ngāruahine as the kaitiaki of the general area in which the turbines are located. It provides for the lodging of a kaitiaki plan with the relevant local authority.[85] The purpose of the kaitiaki plan is to identify the values and principles of Ngāruahine, and the resource management issues of significance to Ngāruahine, in relation to the kaitiaki area.[86]

[65] When a relevant local authority is preparing or reviewing a policy statement or a plan under the Resource Management Act, it must take into account any kaitiaki plan lodged with it, to the extent that the plan's content has a bearing on the resource management issues of the kaitiaki area within its jurisdiction.[87]

[66] In this case the relevant kaitiaki plan (the draft kaitiaki plan) is in draft and has not been lodged, although the draft kaitiaki plan was used by Te Korowai in its Cultural Impact Assessment prepared in respect of the present project.[88]

[67] The Settlement Act also provides for three nominees from the iwi to sit on the local authority's policy and planning committee and regulatory committee.[89] Those nominees must act in the interests of the committee while also presenting the perspectives of the iwi of Taranaki to the committee.[90]

[68] In this case Te Korowai was requested to nominate a member of the panel.

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84 Section 9(16).
85 Section 78.
86 Section 77.
87 Section 79(2).
88 See further discussion of the consideration of the draft kaitiaki plan at [83], [107], [128] and [234].
89 Section 87(1) and (3) of the Settlement Act.
90 Section 88.

[69] The settlement also provides for the return of lands of cultural importance. No cultural redress land lies within the project site. The land on which the four wind turbines will be located is raupatu land (confiscated land) and is now owned by a Māori incorporated trust, Parininihi Ki Waitōtara (PKW). It has agreed to lease the land to Hiringa, but that remains subject to PKW's consent in writing.[91] PKW said in its comments to the Panel that it supported the Project and relevant resource consent subject to the ongoing support of iwi and hapū and the final conditions.[92] Many shareholders in PKW are members of the hapū and iwi involved in these proceedings.

Various positions of iwi and hapū in respect of the Project

[70] Te Rūnanga o Ngāti Ruanui Trust, the mandated representative body of Ngāti Ruanui, commented in its submission that while it supported developments to generate sustainable energy to replace fossil fuels, it was concerned about the fast-tracking legislation and whether the process would achieve a consenting outcome at the expense of good environmental outcomes and the upholding of Treaty partnership responsibilities. In particular, the Trust expressed concerns about the dominance of the turbines on the landscape, namely their size and visual impact, which, if approved, could set a new benchmark for what could be approved for more to come.

[71] A map showing in general terms the kaitiaki area (outer blue lines) and the position of the seven marae of relevant hapū, as well as the location of the turbines and the plant (in yellow), is annexed as Attachment 1 to this decision.[93] Of the seven Ngāruahine marae in the vicinity of the Project, four are within seven kilometres of the turbines at the southern end of the Ngāruahine rohe. These are:

(a) Mawhitiwhiti (Kanihi-Umatahi hapū);

(b) Aotearoa (Okahu-Inuawai hapū);

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91 The details of the agreement to lease and conditions were not made available.

92 The relevant agreement to lease or lease document between Hiringa and PKW was not before the Panel, nor was it produced at this hearing despite some discussion by counsel about the contents of the lease. Counsel for Te Korowai indicated that the consent of PKW was subject to the support of hapū and iwi. Hiringa denied this was a condition of the lease or agreement to lease.

93 Hiringa Energy Ltd *Kapuni Green Hydrogen Project: Direct line of sight area* (6 May 2022).

(c) Te Aroha (Ngāti Manuhiakai hapū); and

(d) Waiokura (Ngāti Tu hapū).

[72] Three marae are over 10 kilometres away from the turbines at the northern end of the Ngāruahine rohe:

(a) Okare ki Uta (Ngāti Haua hapū);

(b) Tawhitinui (Ngāti Haua hapū); and

(c) Oeo Pa (Ngāti Tamaahuroa me Titahi hapū).

[73] Te Aroha, a marae of Ngāti Manuhiakai hapū, is the most affected by the visual impact of the turbines.

[74] In respect of the Project, the various hapū took different positions.

[75] As identified by Te Korowai early in the project, the two hapū holding mana whenua over the project site land are Ngāti Tu and Ngāti Manuhiakai. Mr Hockly submitted that Ngāti Tu was ahikāroa[94] in this rohe, as was demonstrated by their ongoing presence at Waiokura Marae, which lies directly south of the turbine project area, and their maunga koro Taranaki. The awa (river) near the marae, certain tributaries of which cross the PKW land, connotes an area of kaitiakitanga to Ngāti Tu. This was explicitly recognised in the form of a statutory acknowledgement for Ngāti Tu and Ngāruahine in the Deed of Settlement and was noted in the CIA.[95]

[76] Ngāti Tu initially supported the Project subject to conditions, which it said were not then met by Hiringa, so it subsequently has withdrawn its support for the Project.

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94 "Ahikāroa" refers to the "burning fires of occupation" and denotes "continuous occupation": Te Aka Māori Dictionary "ahikāroa" <www.maoridictionary.co.nz>.

95 Deed of Settlement, above n 79, at [5.31.1]; and Hiringa Energy Ltd and Ngāti Tu Hapū *Cultural Impact Assessment* (July 2021) [Ngāti Tu CIA] at 7 and 9–12.

[77] Ngāti Manuhiakai hapū also has mana whenua over the area. It has approved the Project and its unconditional support remains in place.

[78] Early in the project in late May 2020, Te Korowai had told Hiringa that it should engage only with Ngāti Tu and Ngāti Manuhiakai as the proposals would directly affect those hapū as mana whenua.[96] Te Korowai recorded that Ōkahu-Inuāwai hapū wished to be involved in any future decisions should the Project be scaled up in the future, given concerns that the Waingongoro River, an important river to the hapū, would be increasingly abstracted from should that occur.[97]

[79] As more project detail became known to Te Korowai, however, it took the view that the impacts were likely to affect all six hapū, based on the potential impacts of the wind turbine component of the project.[98]

Te Korowai Cultural Impact Assessment (CIA)

[80] The most valued site of significance to Ngāruahine, Taranaki Maunga, lies within the Ngāruahine kaitiaki area. Te Korowai, being the post-settlement governance entity for Ngāruahine iwi, produced a detailed CIA, dated 16 August 2021, prepared in view of the Project, noting it had a responsibility to ensure that the cultural and environmental values and interests of Ngāruahine were safeguarded.[99]

[81] Te Korowai said its CIA was designed to inform the Panel of the "issues and potential impacts of the Project on Ngāruahine cultural values and interests".[100] The two streams (and tributaries) related to the Project were both statutory acknowledgement areas under the Settlement Act.[101]

[82] Te Korowai noted that the permanent placement of the turbines had the potential to have a considerable impact on the highly valued relationship of

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96 Te Korowai o Ngāruahine Trust *Cultural Impact Assessment: Kapuni Green Hydrogen Project* (16 August 2021) [Te Korowai CIA] at 2.
97 At 2.
98 At 2.
99 At ii.
100 At ii.
101 At 2.

Ngāruahine uri to Taranaki Maunga.[102] However, it conditionally supported the proposal if there was a clear commitment from the applicant to remove the wind turbines from the site at the end of their useful life or after 35 years, whichever was the earlier.[103]

[83] The Te Korowai CIA noted the tukanga, or methodology, of the assessment had the potential to ensure the resource management processes were Treaty-compliant and so enable the exercise of tino rangatiratanga by iwi and hapū in their traditional territories, the prioritisation of kaitiaki interests and the expression of effective tangata whenua influence in decision-making.[104] It looked to its draft kaitiaki plan, hapū statements and responses, its five-year strategy and the Settlement Act as sources of the cultural values used to develop the CIA.[105] A copy of the Ngāruahine draft kaitiaki plan was annexed to the CIA.

[84] Appendix 3 recorded the positions of the six hapū of Ngāruahine in relation to the Project, which I now outline in summary.

[85] In respect of Ngāti Tu, Te Korowai commented that it supported the contents of and expression of rangatiratanga in the CIA developed by Ngāti Tu with support from Hiringa.[106] I discuss the CIA of Ngāti Tu in greater detail below.

[86] Kānihi-Umutahi hapū gave no official feedback but commented that they work with Ōkahu-Inuāwai in a "mutually respectful and beneficial relationship based on common whakapapa and objectives."[107]

[87] Ngāti Haua said the short timeframe had given it no time to come together in a productive way to consider and discuss the impacts that the application had on it as a hapū.[108] It requested that in future engagement, it be given more time and opportunity to have the mahi explained so they could give meaningful feedback. They

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102 At ii.
103 At ii.
104 At 2.
105 At 4.
106 At 38.
107 At 38.
108 At 38.

expressed a sense of disempowerment and loss. As they recorded, "as tangata whenua we again are asked to find a work around of our cultural beliefs and connections to the environment/taiao (Tupuna Maunga)".[109] It said that it felt like they were "too late" and the decisions had been made. It felt like a "minority voice who are just part of the consultation tick box process".[110] The hapū was concerned about the inability to mitigate against harm that disturbs the essence of "wairua – the spiritual pathway from a person to Tupuna Maunga and the Taiao".[111] It sought to see a focus on Maunga Tupuna as a legal person in the CIA as an important feature".[112] The hapū insisted that when looking at the cultural impacts on hapū and iwi, the application do so from a "holistic, whole of Maunga approach".[113] The hapū commented that while each hapū has mana whenua for the location their marae resides in and some hapū may be impacted more, many uri belong to many of the marae in the South Taranaki location and wider, and not just to one marae. As the hapū said:[114]

> Thus we as a people are not restricted by Marae, rohe, area to carry out cultural practices. Rituals can be practi[s]ed anywhere in Taranaki ... regardless which Pā you are from, **Tupuna Maunga will be your kaitiaki** as you carry out cultural practices in your day to day activity.

[88] Referring to "this offensive use of our maunga, waterways and whenua", the hapū stated:[115]

> Looking out towards our Tupuna Maunga, all we will see is a reminder that we continue to be colonised to the point that we may now have a physical obstruction between us and our Tupuna Maunga.

[89] The hapū said it was crucial to the psychological being of the hapū to consistently maintain its identity without seeing the man-made physical obstructions intruding across its path.[116] It noted the importance of the following values from the Te Anga Pūtakerongo record of understanding between Ngā Maunga o Taranaki (the mandated entity for negotiation of Tūpuna Maunga) and the Crown:[117]

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109 At 38.
110 At 39.
111 At 39.
112 At 39.
113 At 39.
114 At 39 (emphasis in original).
115 At 40.
116 At 40.
117 At 40.

(a) the status of Ngā Maunga as an indivisible whole and as Tupuna;

(b) preserving and protecting the natural environment and features of Ngā Maunga and the relationship of Ngā Iwi o Taranaki and all people with Ngā Maunga; and

(c) upholding the ancestral, historical, spiritual, and cultural relationships of Ngā Iwi o Taranaki with our Tupuna.

[90] Ōkahu-Inuāwai hapū recorded that at a hapū hui on 28 February 2021, there was general consensus that they: did not support wind turbines as part of the Project; did not support any fast-tracking of the project, which they said will leave hapū behind; and had formally withdrawn from future discussions with the Project.[118]

[91] Tamaahuroa Titahi hapū, following a hui of the hapū held on 15 May 2021, recorded that they supported Hiringa's work "to reduce emissions and that they support[ed] any decisions made by Ngāti Manuhiakai and Ngāti Tu regarding the project".[119]

[92] Ngāti Manuhiakai hapū commented that they had met and assessed the proposal. By letter to the Minister dated 15 February 2021, the hapū confirmed their constructive relationship with Hiringa and that it was satisfied with the consultation with the hapū to date in respect of the Project.[120] It noted that an offer to finance a CIA had been made but the hapū was satisfied that the potential impacts had been identified and "can and will" be appropriately mitigated, and that the interests of the hapū had been taken into account. The hapū concluded by confirming that they supported the project "in principle" and were "look[ing] forward to working with [Hiringa] in the delivery and operation of this exciting project."

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118 At 40.

119 At 40.

120 Letter from Ferinica Hawe-Foreman (Tiamana o te Ngāti Manuhiakai hapū) to David Parker (Minister for the Environment) regarding the support of the hapū for the project (15 February 2021).

Ngāti Tu Cultural Impact Assessment (CIA)

[93] Ngāti Tu prepared a CIA in respect of the Project, dated July 2021.[121]

[94] The CIA provided a brief history of Ngāti Tu and the connection to and importance of the Kaupokonui River.[122] The hapū noted the mauri of the awa and the importance to Ngāti Tu of a healthy waterway. The CIA also noted the importance of trees and requested a "Fresh Water Ecology Report" from within the last 12 months and/or a Stream Health Monitoring Assessment Kit Test (SHMAK) as to the ecological health status of the waterways within their boundaries.[123] The hapū also supported more trees and riparian planting to be done along the waterways, and not just in a single row.[124] The assessment also noted the importance to Ngāti Tu of mauri whenua (healthy land) and its support for the use of more natural/organic-based fertilisers.[125]

[95] While the hapū recognised the benefits of wind turbines, particularly as a clean fuel source, it noted challenges including the impact on local wildlife and of disposing of aging turbine blades.[126] The assessment recorded that Ngāti Tu looked forward to working closely with Hiringa in developing a strategy around the decomposing/disposal of the wind turbine propeller and further consideration to the future planting of trees.[127] The report noted that Hiringa had made a good effort to satisfy many of the issues raised in relation to the wind turbines thus far.[128]

[96] Ngāti Tu then set out the offer they had received from Hiringa and their response to that offer.[129] In essence Hiringa stated it was seeking support from Ngāti Tu to ensure cultural elements had been identified and mitigated, as well as formal recognition that cultural elements had been addressed. In return Hiringa was offering a contribution to an environmental restoration project of importance to

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121 Ngāti Tu CIA, above n 95.
122 At 4. Ngāti Tu Hapū is named after a tipuna, Tuhaereao. The boundary of Ngāti Tu is south of the Otakeho River to south of the Kapuni Stream — from the mountain to the sea. The boundaries are shared with Ngāti Haua and Ngāti Manuhiakai.
123 At 13.
124 At 13.
125 At 14.
126 At 16.
127 At 16–17.
128 At 19.
129 At 21.

Ngāti Tu, remunerated cultural monitoring and opportunities for employment with contractors during the earthworks stage, installation of a new solar energy system at the marae to fully cover electricity costs, and the development and implementation of a landscape plan/native planning scheme for the marae. Hiringa also offered to support development of an aquaculture project.

[97] In its response to the offer, Ngāti Tu acknowledged Hiringa sought to establish a relationship with them.[130] They stated that after much discussion, as kaitiaki of the rohe they would require an annual royalty to fund immediate needs of the hapū in order to fully support the Project.[131] However, they noted they were happy with the general direction in which Hiringa was heading.[132]

[98] The hapū said the goal of targeting zero carbon emissions was in line with a sustainable future. It concluded:[133]

> Compared to many other provinces around Aotearoa, Taranaki is very lucky. There is an opportunity to make changes while we can, to look after the whenua and awa and it means being proactive and informative but also looking at more collaboration and changing the way we do things.

Treaty and cultural issues — the expert report

[99] I now turn to the Panel's assessment of the Treaty and cultural issues.

Iwi concerns with the Project

[100] Counsel for the parties accepted that the general concerns of the hapū were accurately summarised by the Panel. Its report acknowledged the wide variety of views and responses by the different hapū as well as the concerns based on the whole of the Ngāruahine cultural landscape and its relationship with Taranaki Maunga, as set out above.[134]

[101] The Panel recorded the concerns of Te Korowai that the FTCA process:[135]

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130 At 22.
131 At 22.
132 At 22.
133 At 23.
134 The Panel Report, above n 4, at [130].
135 At [131].

(a) removed the ability for Ngāruahine to participate in RMA decision-making processes as provided for in the Settlement Act;

(b) failed to account for the ongoing Taranaki Maunga Treaty Settlement and the relationship between all iwi of the region and Taranaki Maunga; and

(c) undermined the positive relationship Te Korowai had built with the South Taranaki District Council, which would otherwise under the standard resource consent processes have been crucial to decision-making.

[102] The Panel recognised concerns that had been expressed about the effect of the project on the Ngāruahine cultural landscape in general terms. It acknowledged that to the iwi, the Ngāruahine cultural landscape described both the physical area and the relationship and interaction between Ngāruahine and the environment.[136] It noted the values within the landscape went beyond the visual aesthetics or concern for the natural involvement but included "the sense of space that underpins Ngāruahine identity", a "cultural relationship … with the land, coastal and freshwaters, indigenous biodiversity, and Taranaki Maunga."[137]

[103] The Panel further noted that Te Korowai had made its expectations around the protection of the Ngāruahine cultural landscape and significant relationship of Ngāruahine uri to Taranaki Maunga clear to Hiringa, and that its position regarding the wind turbines and occupation of the Ngāruahine cultural landscape was "based on protecting the rights and interests of all uri, whānau and hapū of Ngāruahine."[138]

[104] The Panel recognised that the Te Korowai CIA had concluded the impact of the turbines was not de minimis but would be high and potentially lead to cumulative adverse cultural effects.[139]

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136 At [153].
137 At [153].
138 At [154].
139 At [156].

[105] The Panel went on to note comments by Ngāti Ruanui about the dominance of the turbines on the landscape "with an adverse visual landscape impact that cannot be diminished or compensated."[140]

[106] Due to the impossibility of offsetting any visual landscape impacts, the adverse impact of the turbines on the landscape could not be diminished or compensated by any other action.[141]

[107] The Panel recorded that the relationship of Ngāruahine to Taranaki Maunga, "their most significant wāhi tapu", was "ancestral, spiritual and physical" and had a "direct effect on their wellbeing, sense of place and identity as Ngāruahine."[142] The Panel acknowledged that Te Korowai considered the turbines would obstruct and/or modify a space which is "crucial" to the sense of identity as Ngāruahine.[143] The Panel went on to note, the Te Korowai CIA had acknowledged the turbines would be arranged in a way that best ensured the views to Tupuna Maunga from all marae and kura kaupapa within the rohe of Ngāruahine were maintained, in accordance with respective preferences expressed by hapū and in accordance with Policy 6.4 of the Ngāruahine draft kaitiaki plan.[144]

[108] The Panel also recorded the concerns expressed in the Te Korowai CIA as to what might occur if the project and technology was scaled up and extended.[145] Hiringa had agreed to the conditions recommended by Te Korowai in its CIA[146] as a result of these concerns.[147]

[109] Similarly, in relation to concerns expressed by Te Korowai and Ngāti Tu on the impact on freshwater resources, the Panel noted a freshwater ecological assessment had been undertaken and concluded that, subject to adherence to the mitigation

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140 At [157].
141 At [157].
142 At [158].
143 At [158].
144 At [160].
145 At [163].
146 Namely the development with Ngāti Manuhiakai and Ngāti Tu of a turbine decommissioning plan to remove all of the turbines at the end of their useful life or 35 years and the development of an alternative site plan for replacement turbines on a site or sites coastward of State Highway 45.
147 At [163].

measures, any adverse effects on freshwater ecology would be appropriately avoided and/or mitigated.[148]

[110] The Panel had also accepted in its report, in relation to ecological effects, expert evidence that, contrary to earlier concerns raised by Ngāti Tu, the turbines did not pose a risk of collision to bats or migrating birds.[149] The Panel noted that the position regarding the possible presence of lizards was "rather different" but that Hiringa had accepted a lizard management plan for rescue and relocation to be included as a condition.[150]

Assessment by the Panel of Māori and cultural values issues

[111] The Panel noted the site of the proposal was within the rohe of Ngāruahine and Ruahine as well as the rohe of the Te Rūnanga o Ngāti Ruanui Trust as the mandated iwi representing the 80,000 uri, 16 hapū and 10 marae affiliated to Ngāti Ruanui.[151]

[112] The engagement of the applicant with Te Korowai had begun in July 2019 and the advice from Te Korowai that the applicant should engage directly with the two hapū who had mana whenua in respect of the project site, being Ngāti Tu and Ngāti Manuhiakai.[152] The Panel went on to note that Hiringa had engaged with both hapū since mid-2020 and had sought to address concerns with a view to establishing constructive long-term relationships. These resulted in the Ngāti Tu CIA and the letter of support from Ngāti Manuhiakai.

[113] The Panel recorded that Te Korowai had subsequently advised that all hapū of Ngāruahine should be considered potentially affected by the proposal, and that Te Korowai had been invited to nominate a member for the Panel in accordance with the Act.[153]

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148 At [164]–[166].
149 At [82].
150 At [84].
151 At [110]–[114].
152 At [116].
153 At [118].

[114] The Panel noted it had sought comments from Te Korowai or Ngāruahine hapū, Ngāti Ruanui and the Taranaki Māori Trust Board.[154] It noted the Te Korowai concern that the impacts of the project "are likely to affect all six hapū of Ngāruahine", and acknowledged that hapū responses to the project varied widely, "ranging from total support, to a neutral stance, to opposition."[155]

[115] The Panel recorded that Te Korowai had expressed its concern that the fast-track process had removed its ability to participate in the usual RMA decision-making process, failed to account for the ongoing Taranaki Maunga Treaty settlement and the relationship between all iwi of the region in Taranaki Maunga and had undermined the positive relationship that Te Korowai had built with the South Taranaki District Council which would otherwise have been crucial to decision-making under the standard resource consent processes.[156] The Panel recorded the hapū responses as set out above.[157]

[116] The Panel noted that Te Korowai had conditionally supported the proposal as long as there was a clear commitment from the applicants to remove the wind turbines from the proposed site at the end of their useful life or a maximum of 35 years operation (whichever occurred earliest) based on their concerns regarding the protection of the unique Ngāruahine cultural landscape.[158]

[117] The Panel went on to look at the measures proposed by Hiringa for which Te Korowai indicated conditional support, including the provision of material support for STEM education pathways for Māori children such as a possible education van resource, and assessment of wind potential siting and development of monitoring with hapū.[159]

[118] The Panel then recorded the further conditions Te Korowai had recommended dealing with the end-of-life phase of the turbines, namely development with the mana whenua hapū of a decommissioning plan for the four turbines at the end of their useful

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154 At [122].
155 At [130].
156 At [130]–[131].
157 At [133]–[136].
158 At [152].
159 At [138].

life or 35 years and an alternative site plan for any new replacement turbines on a site or sites coastward of SH45, which conditions Hiringa accepted.[160]

[119] The Panel also recorded that Te Korowai had sought a number of other conditions of consent, such as support for solar and renewable energy projects for the remaining marae, not increasing the water take under the existing resource consents and allowing for stream monitoring.[161]

[120] The Panel said that in its CIA Te Korowai had acknowledged that a relationship agreement had been developed with the applicants, but that the constraints of the fast-track process had not allowed for this agreement to be finalised and signed.[162]

[121] The Panel then went on to review the CIA of Ngāti Tu, noting that the hapū had acknowledged the effort made by Hiringa to satisfy its concerns[163] and recorded the various measures that Hiringa had agreed to.

[122] The Panel noted that the core cultural principles of Ngāti Tu centred in mana whenua, mana awa and mana tangata, and the CIA had discussed each principle as they related to the application, recording the conclusions as follows:[164]

> (a) With a request for a Fresh Water Ecology Report and/or Stream Health Monitoring Assessment Kit Test (SHMAK) as to the ecological health of waterways in their takiwā, noting they would support more trees/riparian planting along waterways, and acknowledging the applicants will replace any riparian plant removed on farm, to enable culverts for site access, at a 2:1 ratio and are giving consideration to go beyond single row planting.
>
> (b) The advantages of the wind turbines cancel out the disadvantages, noting the applicants' commitment to develop a decommissioning strategy to avoid disposal of the turbines in landfill.
>
> (c) In terms of the effects on migrating birds, consideration should be given to future planting of trees and potential for increased activity of birdlife, in response to which the applicants offered to plant additional trees at locations around the site including in an area Ngāti Tu Hapū approves.

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160 At [139]–[140].
161 At [141].
162 At [142].
163 At [145].
164 At [144].

[123] The Panel noted that Hiringa said that the project had considered "multiple factors to enable project viability while managing and minimising the impacts of the turbines and that site selected is the only identified viable site for the proposed project."[165]

[124] The Panel specifically referred to comments from Te Korowai expressing their "fundamental concerns related to the fast-track process and the impact of the Project on their cultural landscape and relationship with the Maunga", which Te Korowai considered were not addressed by the Project or draft conditions.[166]

[125] The Panel however took the view that many of the issues (including those related to wind turbine location and landscape) had already been addressed in the conditions which had been volunteered by Hiringa.[167] It acknowledged the groundwork done by iwi and hapū in the application to address those concerns.[168]

[126] In the detailed feedback on the proposed conditions considered by the Panel in November 2021, Te Korowai recommended amendments to the conditions to ensure the provision of information to Te Korowai, Ngāti Tu and Ngāti Manuhiakai in relation to culverts and the lizard survey and sought a condition providing the opportunity for a representative from each of those hapū to be present during earthworks. The conditions were to be amended accordingly to cover these issues.[169]

[127] Other concerns expressed by Te Korowai related to air traffic safety and ongoing concern for the potential for the increased water abstraction. Conditions were imposed in relation to the former and the Panel noted any future abstraction would be the subject of a separate consenting process.[170]

[128] The Panel recorded that it had also considered, in addition to the CIAs, correspondence and comments received from iwi and hapū, iwi/hapū management

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165 At [170].
166 At [171].
167 At [172].
168 At [172].
169 At [173].
170 At [174]–[175].

plans, Treaty settlements and the Treaty.[171] The Panel recorded its satisfaction that the Te Korowai draft kaitiaki plan had "been appropriately taken into account and utilised by Te Korowai to develop their CIA, to which the applicants and the Panel have given significant consideration."[172]

[129] With regard to the Ngāti Ruanui Environmental Management Plan, the Panel noted that the project in question was not in the takiwā of Ngāti Ruanui and the wind turbines had been designed and situated to minimise noise and negative visual impacts, with various forms of mitigation being agreed to and draft consent conditions providing for noise monitoring and reporting.[173] Overall, the Panel said:

> 182. The applicants have acknowledged the cultural significance of Taranaki Maunga and the visual effects of the turbines and have sought to minimise as far as practicable the cultural and visual impacts and proposed a number of mitigation measures. These measures included relocating the turbines south of the Ballance Kapuni plant to PKW land, orientating the turbines in a north south configuration, and reducing the spacing between the turbines to reduce the visual impact on Maunga views from sensitive sites and the Manaia town.

Findings as to the impacts of the Project

[130] The Panel made a number of specific findings as to the effects of the turbines, including, in summary, the following:

(a) In terms of visual amenity,[174] the effects on relevant marae were largely (in the case of five of the seven marae) assessed as "very low to low".[175] The visual effects on Te Aroha Marae (Ngāti Manuhiakai) were assessed as "high", but that hapū had provided a letter of support for the project.[176] The visual effects on Mawhitiwhiti Marae were assessed as "moderate", but no official feedback was received from the relevant hapū, Kanihi Umutahi.[177] The Panel had recorded that while the turbines were prominent when viewed from various places, the nature

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171 At [177].
172 At [178].
173 At [179]–[181].
174 At [147]–[152].
175 At [150].
176 At [151].
177 At [152].

and scale of the landscape was such that the turbines could be successfully accommodated without significant adverse landscape and visual effects, subject to appropriate planting for the benefit of the small number of properties more directly adversely affected.[178] A mechanism for offering and completing agreements in that regard was set out in the conditions.[179]

(b) Ecological effects were appropriately mitigated, as were the effects on freshwater ecology.[180] These were the subject of conditions.

(c) Noise and related effects were negligible.[181]

(d) Effects on historic cultural values were not significant and the likelihood of recovering in situ archaeological evidence was assessed as low. An archaeological discovery protocol was put in place to some assurance to all parties in that respect.[182]

(e) There were no current Treaty negotiations directly relevant to the project site, though the Crown was in collective negotiations with Ngā Iwi o Taranaki to provide an apology and cultural redress in relation to Mt Taranaki, the Pouākai and Kaitake ranges (Ngā Maunga), which formed part of the settlements in respect of each iwi.[183] The only relevant Treaty settlement of direct relevance to the project area was that in place with Ngāruahine and recorded in deeds of settlement.[184]

(f) There were no activities on land returned under a Treaty settlement,[185] nor were there any cultural redress properties on which the Project impacted.[186]

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178 At [73].
179 At [69].
180 At [79] and [87].
181 At [94].
182 At [215].
183 At [185].
184 At [183].
185 At [186].
186 At [187]–[188].

[131] The Panel recognised that its comments on the effects on the landscape generally did not address the adverse effects on the cultural landscape for iwi. This was, as noted, due to their connection with the Maunga and its influence on the wider landscape which held special value.[187] To that extent, those effects overlapped with adverse cultural effects which the Panel addressed later.

Findings in relation to cultural issues

[132] In relation to cultural issues in play here, the Panel found that:

(a) It was satisfied the applicants had consulted all iwi and hapū with an interest in the project and a desire to determine how kaitiakitanga could be integrated into the project, to mitigate the cultural effects of the project and to find partnership opportunities that will benefit tangata whenua.[188]

(b) The applicants had resourced and supported the development of CIAs by iwi and hapū and genuinely sought to address the adverse issues of concern. These were largely supported by Te Korowai and Te Korowai's recommendations and requested consent conditions had been adopted by the applicant.[189]

(c) The applicants had sought to minimise the impact on the cultural landscape of Ngāruahine and its hapū as far as possible. This included relocating and re-orientating the turbines so reducing the spacing between turbines.[190]

(d) Kaitiakitanga had been implemented in relation to practices such as site walkovers and karakia.[191]

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187 At [153].
188 At [203].
189 At [204].
190 At [205].
191 At [206].

(e) There were no known archaeological sites on the application site and the proposal avoided sites and areas of cultural and spiritual significance with hapū observation of earthworks and ongoing environmental monitoring and discovery protocol in place.[192]

(f) The turbines would have an impact on the cultural landscape and special relationship Ngāruahine and their hapū had with Taranaki Maunga for the duration the projects were in place.[193]

[133] The Panel addressed the s 6 Treaty Clause and explained how that applied to the application. I deal with that in more detail below. Then it concluded:[194]

> 208. Whilst we acknowledge those concerns we are cognisant of the mitigation measures undertaken by the applicants and the conditions of consent which to a large extent have satisfied Te Korowai, Ngāti Tu and Ngāti Manuhiakai, to ensure that this development is constrained to its present intensity.
>
> 209. With the number of wind turbines to be erected at the PKW site limited to four, the removal of the turbines after the expiry of their useful life or after a maximum of 35 years of operation subject to a Decommissioning Plan prepared in collaboration with Te Korowai, Ngāti Tu and Ngāti Manuhiakai, including an Alternative Site Plan if necessary to identify an alternative site/s coastward of SH45, we are satisfied the concerns of the Iwi and Hapū regarding the protection of their cultural landscape have been addressed, while also recognising the importance of the Government's commitment to renewable energy, including as contained in the NPS-REG.
>
> 210. While we acknowledge the concerns raised by iwi in relation to the fast-track consenting process, those are not matters the Panel has any jurisdiction over.
>
> 211. We acknowledge the applicants' intention to continue to work closely with Te Korowai and the mana whenua hapū Ngāti Manuhiakai and Ngāti Tu, to ensure the cultural impacts of the Project are understood and respected, and to build a relationship that results in positive outcomes for the Hapū, Te Korowai, the broader community, and the environment. We also acknowledge the sincerity in the applicants' response that they have developed a relationship agreement with Te Korowai and signed the agreement though the matter currently sits before Te Korowai's Board to complete. Whether or not their Board or delegated authority agrees and executes that relationship agreement has no bearing on the decision we have reached.

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192 At [206].
193 At [207].
194 At [208]–[211].

[134] The Panel went on to assess the Project against the relevant policy statements in planning instruments.

[135] It first noted that the National Policy Statement Renewable Energy Generation (NPS-REG) recognised the national significance of renewable energy generation and acknowledged the practical implications of achieving New Zealand's target for electricity generation from renewable resources.[195] It noted Policy C2 directed decision-makers that when considering any residual environmental effects of renewable energy generation activities that cannot be "avoided, remedied or mitigated, to have regard to offsetting measures."[196]

[136] The Panel then noted the National Policy Statement-Freshwater Management (NPS-FM) entrenched the importance of freshwater management and the Project appeared to be consistent with those policies as any actual or potential effects were limited to the construction period.[197] These were to be managed in accordance with best practice control and settlement control measures under the conditions, including those directed to maintaining fish passage and stream function, with riparian planting mitigation.[198]

[137] The Panel noted the New Zealand Coastal Policy Statement (NZCPS) was generally irrelevant to the Project, apart from erosion and sediment control plans, which had been provided for in effective conditions.[199]

[138] With respect to the Regional Policy Statement (RPS), the Panel concluded that the Project was consistent with Chapters 4 (Use and Development of Resources), 7 (Air and Climate Change), 14 (Energy) and 15 (The Built Environment). The Panel considered that conditions would ensure the Project conformed with Chapters 5 (Land and Soil), 11 (Natural Hazards), 6 (Freshwater) and 9 (Indigenous Bio-Diversity).

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195 At [220].
196 At [220].
197 At [221].
198 At [221].
199 At [222].

[139] However, the Panel said it had reached the "unavoidable conclusion" that the Project was "not fully consistent" with all the objectives and policies of the RPS insofar as it related in particular to the Māori cultural and spiritual values associated with Taranaki Maunga.[200] It specifically referred in this respect to the possible inconsistencies arising in relation to Chapter 10 (Natural Features and Landscapes, Historical Heritage and Amenity Value) and Chapter 16 (Statement of Resource Management of Significant to Iwi Authorities).[201]

[140] In particular, the Panel referred to the Natural Features and Landscapes (NFL) Policy 1, noting the "special scenic, recreational, scientific and Māori cultural and spiritual values associated with Taranaki Maunga" and NFL Policy 3, which concerned the protection of outstanding natural features and landscapes.[202] The Panel also referred in this respect to the RPS as it related to issues of significance to iwi authorities.[203] In particular the Relationship of Māori with Ancestral Lands, Water, Sites, Wāhi Tapu and other Taonga (REL) Objective 1, which is "to recognise and provide for the cultural and traditional relationship of Māori with their ancestral lands … and other sites and taonga within the Taranaki Region" as well as REL Policy 3, relating to protecting wāhi tapu and other sites or features of historical and cultural significance from adverse effects of activities as far as practicable, REL Policy 5, recognising and providing for the cultural perspectives of iwi in relation to identifying and protecting outstanding natural features and landscapes, and REL Policy 7, providing for the maintenance and enhancement of water bodies which have special significance to iwi in a manner respectful of tikanga Māori. Finally, the Panel pointed to inconsistency with the provisions in the Cultural and Spiritual Values (CSV) relating to recognising cultural and spiritual values of tangata whenua and resource management processes,[204] which it saw as "envisaging the importance of the Maunga to iwi given its cultural and spiritual significance."[205] In particular, CSV Objective 1 is to carry out management of natural and physical resources in the Taranaki region in a manner that takes into account the cultural and spiritual values of Taranaki iwi in a

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200 At [225].
201 At [224].
202 At [224].
203 Taranaki Regional Council *Regional Policy Statement for Taranaki* (January 2010) at 127.
204 At 135.
205 The Panel Report, above n 4, at [224].

manner which respects and accommodates tikanga Māori, while CSV Policy 1 requires that the special relationship Taranaki tangata whenua have with Te Taiao (the environment) will be given particular consideration in the promotion of the sustainable management of the region's resources.

[141] The Panel concluded:

> 225. The Panel considers that it is an unavoidable conclusion that the project is not fully consistent with all the objectives and policies of these two chapters of the RPS. However, for the reasons set out in effects on the cultural and heritage values the Panel does not consider such inconsistency as problematic.

[142] Having dealt with the other categories of effects, it said:

> 233. Once again, the only objectives and policies that would appear on their face to contain policies that might be inconsistent with the project are those relating to tangata whenua. To the extent that those policies require engagement and consultation, they appear to have been met. But again the real issue devolves to the substantive recognition and provision for the relationship of tangata whenua and their culture and traditions (including mauri) with their sites and areas of cultural and spiritual significance – namely the Maunga. The Panel accepts that a potential inconsistency arises in that regard and makes the same observation made in respect in of the RPS polices on those topics.
>
> 234. With the exception of the cultural significance of the Maunga to Iwi, the project is consistent with the objectives and policies of historic heritage in that there are no known features of significance, but that if any are discovered in the course of the project, appropriate steps can be taken to investigate and conserve as per conditions that have been to some extent reshaped by the Panel."

[143] The Panel noted that in terms of the planning instruments it needed to be remembered that the required consents were at worst classified as discretionary activity and a number were controlled or restricted discretionary activities where the ambit of exercising a discretion to decline was limited.[206]

[144] The Panel concluded that the consent was justified under cl 31(1) considerations (actual and potential effects on the environment) and that with the appropriate conditions there were no disenabling effects in terms of the legislative requirements.[207]

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206 At [244].
207 At [242].

[145] The Panel said the effects on Māori had been specifically addressed earlier and in terms of sch 6 cl 31(2) of the FTCA, the Panel had reached the view that granting consent with the appropriate conditions was "consistent with Te Tiriti and with relevant Te Tiriti settlements."[208]

[146] It recorded that in reaching its conclusions, the Panel had disregarded the adverse effect of any activity permitted by planning instruments and any effect on persons who had given written approvals to the application, as it was required to do.[209]

[147] Ultimately, the Panel was satisfied that it was appropriate to grant consent on the application for a term of 35 years from the date of grant on the conditions attached.[210]

Conditions related to cultural issues

[148] The conditions imposed relevant to cultural matters included the following:

(a) *Condition 1 — Consent granted generally in accordance with application:*

The project was to be undertaken in "general accordance" with the information in the consent application and assessment and documentation relevant to it. The consent conditions were determinative if any inconsistency.

(b) *Condition 8 — Limitation on turbine development:*

The number of turbines was limited to four.

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208 At [246]. Schedule 6 cl 32(1) of the FTCA refers to the provisions of the RMA relating to the nature of the consent decisions required depending on the nature of the application. For example, for a controlled activity, under s 104A of the RMA the consent must be granted, but for discretionary activities, under s 104B of the RMA the decision-maker may grant or refuse it and may impose conditions under s 108.

209 At [247]. See sch 6 cl 31(5)(a)(ii) of the FTCA.

210 At [248].

(c) *Condition 36 — Information on culvert freshwater flows and fish and species:*

Reports containing detailed information on the culvert, including a report on likely impediments on the passage of fish and species information, were to be reported to the Taranaki Regional Council and to Te Korowai, Ngāti Tu and Ngāti Manuhiakai.

(d) *Condition 45 — A maintenance and monitoring plan of culvert:*

A plan covering points including steps to take to ensure fish passage was to be provided to the Taranaki Regional Council.

(e) *Condition 73 — Ecological monitoring:*

Expert lizard survey to be completed and provided to the Department of Conservation, the Group Manager – Environmental Services, South Taranaki District Council, the Chief Executive, Taranaki Regional Council and Te Korowai, Ngāti Tu and Ngāti Manuhiakai.

(f) *Condition 88 — Archaeological discovery protocol:*

An archaeological discovery protocol would apply to the unexpected discovery of artefacts or archaeological material.

(g) *Conditions 89–91 — Cultural issues:*

Any site inductions to include cultural component providing detail of mana whenua iwi and hapū for the project area, the cultural significance of the project area to mana whenua and the protocols in place related to earthworks monitoring and archaeological discovery. Opportunities to be extended to Ngāti Tu and Ngāti Manuhiakai to perform karakia to bless the project sites prior to works commencing and to have representatives present during any earthworks involved in the project.

(h) *Conditions 99–106 — Ongoing consultation:*

A representative each from Ngāti Tu and Ngāti Manuhiakai to be invited to participate in a consultative group which would meet at least 6-monthly during construction and over the first 2 years of operation of the Project and thereafter as determined by the group. The group would facilitate information flow between the consent holder and the community and to relay concerns about the construction and ongoing operation to the project management team and developing means to address and manage those concerns and reviewing the implementation of measures to resolve and managed them. The chair of the Consultative Group to be appointed by the Group Manager – Environmental Services, South Taranaki District Council. Hiringa must fund the direct costs of the establishment and operation of the meetings and is responsible for minutes and distribution.

(i) *Conditions 105–106 — Complaints register:*

A register of complaints is to be kept recording complaints received by the consent holder in relation to traffic, noise, dust, television or radio reception interference, shadow flicker or any other environmental effects. The register will be available to staff and authorised agents of the South Taranaki District Council and to members of the Consultative Group at all reasonable times upon request.

(j) *Condition 107 — Decommissioning and site rehabilitation:*

The turbines must be removed from the site either at the end of their useful life or the end of the term of this consent, (35 years) whichever occurs earliest, in accordance with a Decommissioning Plan certified by the Group Manager – Environmental Services, South Taranaki District Council.

(k) *Conditions 107–110 — Decommissioning Plan and alternative site:*

The Decommissioning Plan must be prepared in collaboration with Te Korowai, Ngāti Tu and Ngāti Manuhiakai. If hydrogen production is to continue at the site after the duration of the consent, the plan must also include an alternative site plan at a minimum containing a process to identify an alternative site or sites situated coastward of State Highway 45 to locate any replacement wind turbines on.

(l) *Condition 111 — Review and monitoring:*

One year after the commencement of the resource consent, and at five-yearly intervals thereafter, the South Taranaki District Council or the Taranaki Regional Council may give notice of its intention to review the conditions for the purpose of reviewing the effectiveness of the conditions to avoid, remedy or mitigate adverse effects on the environment, address unforeseen adverse effects and review the adequacy of the monitoring programmes or management plans required under the conditions.

(m) *Condition 115 — Long-term peer review monitoring:*

The results of long-term monitoring required under the consent to be provided to the South Taranaki District Council in the event it is required for peer review. Results of the long-term monitoring to be provided to Te Korowai, Ngāti Tu and Ngāti Manuhiakai.

Treaty and cultural issues — the statutory framework

Treaty clauses

[149] The New Zealand courts have provided guidance on Treaty clauses and their applications.

[150] In relation to the application of pt 2 of the RMA, including the s 8 Treaty clause, in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* the Supreme Court said:[211]

(a) The purpose is the guiding principle and intended as a guide to interpretation for those performing functions under the RMA.[212]

(b) The s 5 statement of principle is given further elaboration in the remaining sections in pt 2, namely ss 6, 7 and 8.

(c) Section 6 requires decision-makers to "recognise and provide for" listed matters of "national importance". Section 7 ("other matters") is more abstract, requiring decision-makers to "have particular regard to" the listed matters.[213]

(d) Section 8 (the Treaty clause) requires decision-makers to "take account of" in the sense that "the principles of the Treaty may have an additional relevance to decision-makers". For instance, Treaty principles may be relevant to process, such as applications that a local authority must carry out performing its functions under the Act.[214] It also reflects that among the matters of national importance identified in s 6 are "the relationship of Māori and their culture and traditions with their ancestral lands, water, sights, waahi tapu and other taonga" and other protections and s 7 addresses kaitiakitanga.[215]

(e) The RMA envisages the "formulation and promulgation" of a "cascade of policy documents" each intended to give effect to s 5 and to pt 2 more generally.[216]

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211 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
212 At [24(a)].
213 At [26].
214 At [27].
215 At [27].
216 At [30].

[151] In *McGuire v Hastings District Council*, the Privy Council considered an appeal concerning the designation of a road through Māori land. Lord Cooke noted that decision-makers are "bound by certain requirements and these include particular sensitivity to Maori issues."[217] The Privy Council there described the cultural provisions contained in ss 6(e), s 7 and s 8 of the RMA as "strong directions, to be borne in mind at every stage of the planning process."[218]

[152] More recently, in *Ngāti Maru Trust v Ngāti Whātua Orākei Whaia Maia Ltd* Whata J noted there were comprehensive provisions in the RMA for Māori and Iwi interests "both procedurally and substantively".[219]

[153] Whata J pointed to the provisions of pt 2 concerning the purpose of the RMA and its reference to "cultural well-being" in the context of the sustainable management of natural and physical resources.[220] His Honour said that the legislative and planning scheme under the RMA confirmed widely framed powers to impose conditions under the Act with a broad scope for consideration of mana whenua and management of adverse effects.[221]

[154] Whata J pointed out that when making resource management decisions, local authorities and the Environment Court are not engaged in a process of "conferring, declaring or affirming tikanga-based rights, powers or authority per se".[222] Neither are they empowered to "confer, declare or affirm the jural status of iwi".[223] However, the decision-maker was required to "meaningfully respond" when different iwi make "divergent tikanga-based claims" as to what is required to meet tikanga obligations.[224]

[155] This may require evidential findings in respect of the applicable tikanga and a choice as to which course of action best discharges the decision-maker's statutory

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217 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
218 At [21].
219 *Ngāti Maru Trust v Ngāti Whātua Orākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [29].
220 At [35].
221 At [34].
222 At [67].
223 At [67].
224 At [68].

duties,[225] to result in a "precisely articulated resource management outcome."[226] This needed to be worked out in any individual case having regard to the views of all affected iwi.[227]

[156] Whata J reiterated that it was the obligation of the decision-maker under the RMA to recognise and provide for the relationship of Māori and their culture and traditions with their whenua and taonga, to have regard to their kaitiakitanga and "to take into account the principles of the Treaty of Waitangi".[228] This required the decision-maker to determine resource management outcomes based on the evidence, even when there were competing claims. Whata J said:[229]

> To ignore or to refuse to adjudicate on divergent iwi claims about their relationship with an affected tāonga (for example) is the antithesis of recognising and providing for them and an abdication of statutory duty.

[157] In summary, the role of the decision-maker is to determine on the evidence the appropriate cultural interests to be recognised in terms of the matter at hand and how to properly acknowledge, recognise and protect them within the RMA framework. This does not provide those affected iwi with a right of veto,[230] but the decision-maker has the obligation to engage with the evidence.[231]

[158] The Treaty clause in s 4 of the Conservation Act requires Te Papa Atawhai | the Department of Conservation to "give effect to" Treaty principles in the administration of that Act. That provision has been the subject of judicial comment on a number of occasions. In 2018, the Supreme Court noted that it had "some similarity" to s 9 of the State-Owned Enterprises Act 1986, which provided that the Crown shall not act in a manner "that is inconsistent with the principles of the Treaty of Waitangi".[232]

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225 At [68].
226 At [110].
227 At [122].
228 At [73].
229 At [73].
230 At [109], citing *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 305.
231 The evidence establishing the facts alleged should be sufficiently probative: *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2012] NZRMA 123 (HC) at [51].
232 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48] (emphasis added).

[159] In *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, the Supreme Court said that the obligation in s 4 "to give effect to" Treaty principles was stated in "imperative terms".[233] Referring to the leading authority on the application of s 4 to decisions made in respect of concession applications, *Ngai Tahu Maori Trust Board v Director General of Conservation* (the *Whales* case), the Supreme Court adopted the observations of Cooke P in that case that statutory provisions for *giving effect* to the principles of the Treaty in matters of interpretation and administration should not be construed narrowly.[234]

[160] An interpretation *to give effect* to the principles of the Treaty was required "at least to the extent that the provisions of the Act and Regulations were not clearly inconsistent with those principles."[235] In the context of commercial whale watching concessions, the Treaty principles were relevant and required "active protection of Māori interests", which required "more than mere consultation with iwi: restricting the active protection obligation to consultation 'would be hollow'".[236] However, a claim that a permit should not be granted without the consent of mana whenua (not to be unreasonably withheld) was said to be "pitched too high".[237]

[161] The Supreme Court said that the application of the Treaty clause as it applied to a particular decision would depend on which Treaty principles were relevant and "what other statutory and non-statutory objectives are affected".[238] In that case the Crown had not satisfied the duty of active protection of Māori interests, failing to treat iwi with sufficient precedence. The refusal to grant a concession to the relevant iwi was referred back for consideration to DoC. In that case the Supreme Court noted that the s 4 Treaty provision should not merely be part of an exercise "balancing it against the other relevant considerations".[239] The majority took the view that what was required was a process under which "the meeting of other statutory or non-statutory

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233 At [48].
234 At [49] and [50(a)], citing *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [the *Whales* case].
235 At [50(a)].
236 At [50(c)], citing the *Whales* case, above n 234, at 560.
237 At [50(b)].
238 At [55]. The issue in that case related to a concession opportunity.
239 At [54].

objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles."[240]

[162] More recently, in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, the Supreme Court was required to consider the application of a Treaty clause in an appeal granting consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) relating to marine discharges.[241] The appellant had sought marine consents and marine discharge consents in order to undertake seabed mining within New Zealand's exclusive economic zone. The decision-making committee (DMC) of the Environmental Protection Agency had granted the for consents with conditions. The DMC's decision had been set aside by the High Court, whose decision was upheld in the Court of Appeal.

[163] The Supreme Court noted that the relevant Treaty clause[242] directed the decision-maker to take into account the effects of the activity on existing interests in a manner that recognised and respected the Crown's obligation to give effect to the principles of the Treaty, which was said to be a "strong direction".[243] That direction could only be given effect through the way in which the decision-maker interpreted and applied the relevant factors.

[164] The Court went on to say: [244]

> … Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of the statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

[165] The Supreme Court said that the guarantee of tino rangatiratanga in article 2 of the Treaty in the context of the marine environment required that the decision-maker consider the kaitiakitanga of iwi of the relevant rohe and their possible interests and

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240 At [54].
241 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.
242 Section 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
243 *Trans-Tasman Resources Ltd*, above n 241, at [149].
244 At [151] (citations omitted).

claims the Marine and Coastal Area (Takutai Moana) Act 2011 as well as interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[245]

[166] The Supreme Court in *Trans-Tasman Resources Ltd* stressed the guarantee in art 2 of the Treaty of tino rangatiratanga was more particularly relevant to the consideration of customary interests as opposed to more abstract Treaty principles such as partnership in that case.[246] The Court noted that of particular importance was the kaitiakitanga of iwi of their relevant rohe.[247]

[167] The Crown's duty under art 2 of the Treaty to actively protect the exercise of tino rangatiratanga[248] cannot be avoided by the Crown by delegation to local authorities or other bodies. They must afford the same degree of protection as is required by the Treaty to be afforded by the Crown.[249]

[168] The Supreme Court noted that the iwi parties had emphasised the mauri of the area. The Court said the proposed activity in terms of tikanga "may indicate that material harm extends beyond the physical effects of a discharge, or that pollution can be spiritual as well as physical. In any event the relevant issues need to be considered under one heading or the other."[250]

[169] The Supreme Court also agreed that the decision-maker was required to give reasons to justify a decision to override existing interests of this kind.[251] However, that requirement must be tempered by the fact that:[252]

> … this is an area where it may not be possible to do much more than explain the balance struck, having set out the evidence for the findings of fact on which that balance depends. It also needs to be kept in mind that the DMC is not a judicial body, but is comprised of lay members. Further, the DMC has to work within the statutory time limits, and the subject matter which the DMC has to deal with in a case like the present is complex and will often involve measuring incommensurable values. In the context then, and as we understand the Attorney-General accepts, where there are a number of factors

245 At [154].
246 At [154].
247 At [154].
248 See Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 98.
249 See at 98.
250 *Trans-Tasman Resources Ltd*, above n 241, at [172].
251 At [156].
252 At [157].

> to be taken into account an interest relevantly reflecting Treaty obligations, the decision-maker will need to explain, albeit briefly, the way in which the balance has been struck.

[170] The Supreme Court said the decision-maker's failure there was to properly engage with the nature of the interests affected, rather than in the absence of reasons.[253] The decision-maker had stated that it had taken into account the duty of active protection of Māori interests but had concluded that the relevant interests of iwi could be met through imposed conditions. This included conditions relating to the direction to the applicant to offer to establish and maintain a "Kaitiakitanga Reference Group" "with the purpose of, amongst other things, recognising the kaitiakitanga of tangata whenua and the establishment of the kaimoana monitoring programme, which would be required to operate even in the absence of iwi engagement in the Reference Group."[254]

[171] The Supreme Court concluded that the decision-maker had not effectively grappled with the true effect of the proposal for iwi parties nor how the ongoing monitoring could meet the iwi parties' concern that they would be unable to exercise their kaitiakitanga "to protect the mauri of the maritime environment, particularly given the length of the consent and the long-term nature of the effects of the proposal on that environment."[255]

[172] The Supreme Court said that what was required was for the decision-maker to indicate an understanding of "the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply."[256]

[173] The decision-maker in that case needed to explain, "albeit briefly", why the existing interests were outweighed by other factors in that case, or sufficiently accommodated in other ways.[257]

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253 At [159].
254 At [159].
255 At [161].
256 At [161].
257 At [161].

[174] The Supreme Court also noted that the decision-maker made an error of law in taking as its starting point that the principles of the Treaty were not directly relevant, but, rather, could "colour" the approach taken.[258] The Supreme Court referred the matter back to the EPA for reconsideration, allowing leave for a party to seek directions from the High Court should that prove necessary.[259]

[175] In some contexts, the protection of Treaty and cultural interests might create a bottom line. In *Tauranga Environmental Protection Society Inc v Tauranga City Council*, Palmer J considered the decision of the Environment Court confirming the relocation of electricity transmission lines across Te Awanui (Tauranga Harbour) which would involve the construction of a large new pole right next to the marae of the hapū Ngāti Hē.[260] Ngāti Hē was mana whenua and held the "considered, consistent, and genuine view" that the lines and pole would have a significant and adverse impact on an area of cultural significance to them and on Māori values related to the Outstanding Natural Features and Landscapes (ONFL). In such circumstances, his Honour said it was not open to the Court to decide otherwise.[261] The view of the hapū was "determinative" of findings as to the cultural effects on it.[262]

[176] The High Court reached this conclusion based on its interpretation of the Bay of Plenty Regional Coastal Environment Plan (RCEP), which required adverse effects on the area, as an "area of spiritual, historical or cultural significance" to the Ngāti Hē hapū, to be avoided "where practicable".[263] A further policy required adverse effects on the medium to high Māori values of Te Awanui to be avoided unless there were "no practical alternative locations available," or the "avoidance of effects is not possible" and "adverse effects are avoided to the extent practicable".[264]

[177] Palmer J found on the evidence before the Environment Court that alternatives to the proposal were in fact technically available.[265] This meant the avoidance of

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258 At [161].
259 At [229] and [231].
260 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882.
261 At [65].
262 At [65].
263 At [129(a)] and [142].
264 At [129(b)].
265 At [149].

adverse effects on the Bay was possible and therefore there were "practical alternative locations" available.[266] The conclusion was that the Environment Court had erred in failing to recognise the cultural bottom line.[267] The "practicable" and "possible" threshold determined whether the proposal could proceed at all. The Court quashed the Environment Court's decision and noted it was "desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible".[268] His Honour noted:[269]

> With goodwill, and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal.

[178] The s 6 FTCA Treaty clause has some similarity with the section that was the subject of the important *Lands* case.[270] The Court of Appeal there was considering s 9 of the State-Owned Enterprises Act, which provided:

> **9. Treaty of Waitangi** – Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

[179] In that case, the Crown intended to transfer Crown land to state-owned enterprises to give effect to the Government's policy of corporatisation. The Court of Appeal found that the choice by Parliament of the expression "inconsistent with the principles of the Treaty of Waitangi" was deliberate.[271] Cooke P (as he then was) said the Treaty signified a partnership between Pākehā and Māori requiring each to act towards the other reasonably and with the utmost good faith.[272] The relationship between the Treaty partners created responsibilities analogous to fiduciary duties.[273] The duty of the Crown was not merely passive but extended to act in the protection of Māori and their use of their lands and waters to the fullest extent practicable.[274]

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266 At [150].
267 At [146].
268 At [163].
269 At [164].
270 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*].
271 At 659 per Cooke P and 702–703 per Casey J.
272 At 664.
273 At 664.
274 At 664.

[180] Cooke P noted that a "broad, unquibbling and practical interpretation is demanded."[275] He went on to say that the wording of s 9 was "plain and unqualified. In its ordinary and natural sense the section had the impact of a constitutional guarantee within the field covered by the State-Owned Enterprises Act."[276] The Court concluded that the firm declaration by Parliament that nothing in the Act would permit the Crown to act inconsistently with the principles of the Treaty of Waitangi "must be held to mean what it says."[277] In that case it meant that the Act restricted the Crown "to acting under it in accordance with the principles of the Treaty. It [became] the duty of the Court to check, when called on to do so in any case that arises, whether that restriction has been observed and, if not, to grant a remedy."[278]

[181] Although there were five separate judgments in that case, all had reached the same two conclusions, which were put by Cooke P as follows:[279]

> … First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.
>
> That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured.

[182] Words requiring that a decision-maker "give effect to" the principles of the Treaty have been seen as an even stronger imperative to the decision-maker than "not inconsistent with". In *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, the Supreme Court noted the requirement to "give effect to" will be affected by the specificity or otherwise of the relevant provision to be given effect to:[280]

> [80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaced the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

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275 At 655.
276 At 658.
277 At 660.
278 At 660–661.
279 At 667.
280 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 211, at [80].

[183] Similarly, a provision that a decision-maker is to act in a manner "consistent with" the principles of the Treaty appears be a stronger direction than to "take into account" as is the formulation under s 8 of the RMA.

The legal framework

[184] Part 2 of the RMA, to which consent applications under the FTCA remain subject, comprises: s 5, the purpose of the RMA; s 6, matters of national importance; and s 7, other matters. As already noted, s 8 which appears in pt 2, is replaced by s 6 of the FTCA. When considering a consent application for a referred project (as here), a panel must, subject to pt 2 of the RMA[281] and the purpose of the FTCA, have regard to:[282]

> (a) any actual and potential effects on the environment of allowing the activity;
>
> (b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity;
>
> (c) any relevant provisions of any of the documents listed in clause 29(2); and
>
> (d) any other matter the panel considers relevant and reasonably necessary to determine the consent application.

[185] I repeat for convenience the purpose of the FTCA, as set out at s 4, as follows:

> … to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

[186] The reference to "sustainable management" is borrowed from s 5 of the RMA. That section provides that the purpose of the RMA is to promote the sustainable

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281 But replacing the Treaty clause in s 8 of the RMA with the s 6 FTCA Treaty clause.
282 Schedule 6 cl 31(1) of the FTCA.

management of natural and physical resources. Sustainable management is defined in s 5(2) of the RMA as "managing the use, development, and protection of natural and physical resources in a way … which enables people and communities to provide for their social, economic and cultural well-being".

[187] Two other provisions are directly relevant to considerations of kaitiakitanga and cultural issues. Section 6(e) of the RMA provides that in achieving the statutory purpose, all persons exercising functions and powers under the RMA in relation to managing the use, development and protection of natural and physical resources shall "recognise and provide for" the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Secondly, s 7(a) requires that all persons exercising functions and powers under the Act in relation to managing the use, development, and protection of natural and physical resources shall have particular regard to kaitiakitanga. Other provisions in ss 6 and 7 are also relevant to the sustainability of the environment but less specifically require consideration of the cultural landscape.[283]

[188] The substitution of s 8 of the RMA with the Treaty clause in s 6 of the FTCA is reinforced by a direction to the Panel that it "must decline a consent application if that is "necessary to comply with s 6 (Treaty of Waitangi)."[284] The Panel may also decline a consent application on the ground that the information provided by the consent application is "inadequate to determine the application"[285] or if the Panel "considers that granting a resource consent … with or without conditions would be *inconsistent* with s 6 (Treaty of Waitangi).[286]

[189] Section 6 of the FTCA reads:

6 Treaty of Waitangi

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283 For instance, one of the matters of national importance under s 6 is "(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development". This involves cultural issues in the landscape. The planning documents promulgated by the local authorities provide more specifically for these issues in chapters on "outstanding natural features and landscapes."

284 Schedule 6 cl 31(12).

285 Schedule 6 cl 31(8).

286 Schedule 6 cl 34(1)(b) (emphasis added).

> In achieving the purpose of this Act, all persons performing functions and exercising powers under it must act in a manner that is consistent with—
>
> (a) the principles of the Treaty of Waitangi; and
>
> (b) Treaty settlements.

[190] Section 6 of the FTCA differs from s 8 of the RMA in that it requires that the decision-maker must, in achieving the purpose of the Act, "act in a manner that is consistent with", rather than "taking into account", the principles of the Treaty. Section 6 specifically also requires consistency with "Treaty settlements" in addition to the principles, and the consent application must be declined if it does not comply with the Treaty clause.[287]

[191] Parliament rejected the Select Committee's recommendation that the Treaty clause in what is now s 6 of the FTCA be replaced by s 8 of the RMA.[288] Comments made in the debate suggest that s 6 was retained to ensure the legislation did not "cut across Treaty settlements". During the debate the Hon Nanaia Mahuta, then Associate Minister for the Environment,[289] said the s 6 Treaty clause would:[290]

> … enable a more productive conversation by region … about the way in which iwi could contribute to economic recovery that would see the creation of jobs, that would also see the protection of the environment, and that would be a more proactive, productive way of trying to initiate that type of focus and conversation at a local level.

[192] While those comments must be viewed with caution bearing in mind that they are merely expressions of a Member of Parliament's own view, nevertheless there was specific consideration and rejection of a proposal by the Select Committee to revert to the wording of the s 8 RMA Treaty clause.[291] This supports the contention that the FTCA Treaty clause was intended to provide a firmer direction to the decision-maker on the significance of Treaty principles than does s 8 of the RMA.

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287 Schedule 6 cl 31(12) of the FTCA

288 COVID-19 Recovery (Fast-track Consenting) Bill 2020 (select committee report) at 4.

289 Though speaking in her role as Associate Minister for the Environment, the Hon Nanaia Mahuta was also at that time Minister for Māori Development, Minister for Local Government, Associate Minister for Housing and Associate Minister for Trade and Export Growth.

290 (2 July 2020) 747 NZPD 19459.

291 Notwithstanding the recommendation of the Environment Committee in its report, above n 288, at 4, to remove the substituted Treaty clause, s 6 of the FTCA was reinstated in its present form by Supplementary Order Paper 2020 (534) COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277–2).

[193] A number of principles have emerged from the case law in relation to the interpretation of Treaty clauses which must be borne in mind here. They include that:

(a) A liberal interpretation (broad, unquibbling and practical) must be applied to a Treaty clause. The clause must be given a "broad and generous construction".[292]

(b) A statutory requirement to "act in a manner consistent" in a Treaty clause is a "strong direction" to a decision-maker.[293] The decision-maker must ensure that consistency with the principles of the Treaty occurs in not only a procedural way, but also substantively.[294] That means that the principles of the Treaty will have "procedural as well as substantive implications, which decision-makers must always have in mind".[295]

(c) Consistency with Treaty principles is not an objective to be balanced against other objectives.[296] However, the application of the Treaty clause as it applies to a particular decision will depend on which Treaty principles are relevant and "what other statutory and non-statutory objectives are affected."[297]

(d) Meeting of other statutory or non-statutory objectives is to be achieved to the extent that can be done consistently with the relevant Treaty principles.[298] The implementation of the directive in a Treaty clause will be affected by what it relates to. For instance, the requirement "to give effect to" Treaty principles will be affected by what it relates to — a requirement to give effect to a policy which is framed in a specific and unqualified way may in a practical sense be more prescriptive than

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292 This approach to the interpretation of Treaty clauses was adopted by all members of the Supreme Court in *Trans-Tasman Resources Ltd*, above n 241, at [8].
293 At [149].
294 *Ngāti Maru Trust v Ngāti Whātua Orākei Whaia Maia Ltd*, above n 219, at [29].
295 *Environment Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 211, at [88].
296 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, above n 232, at [54].
297 At [55].
298 At [54].

a requirement to give effect to a policy which is worded at a higher level of abstraction.[299]

(e) In some circumstances, depending on the relevant legislation and planning documents engaged and related requirements, the "consistently and genuinely held views" of the hapū will be determinative.[300]

(f) In particular, the decision-maker must:

(i) Identify and properly engage with the nature of the interests affected.[301]

(ii) Identify the Treaty principles at play. In the *Trans-Tasman Resources Ltd* case, the Supreme Court stated that the decision-maker must "indicate an understanding of the nature and extent of relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply."[302]

(iii) Explain, even briefly, why the existing interests have been outweighed by other factors in the particular case or sufficiently accommodated in other ways.[303] In other words, the decision-maker must explain the balance struck.[304]

(g) "Consistency" with Treaty principles does not import a requirement for consent by mana whenua.[305]

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299 *Environment Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 211, at [80].
300 *Tauranga Environmental Protection Society Inc v Tauranga City Council*, above n 260, at [65].
301 *Trans-Tasman Resources Ltd*, above n 241, at [159].
302 At [161].
303 At [161].
304 At [157].
305 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, above n 232, at [50](b).

The Panel's report

Engagement with the relevant interests

[194] Te Korowai and Ngāti Tu had both recognised the good faith in which Hiringa had undertaken its consultation and had offered up conditions to meet the concerns of the iwi and hapū in the period leading up to the hearing as well as Hiringa's intentions to continue to develop those relationships. The Panel noted the importance of the continuing relationship established between Hiringa and the iwi and hapū as follows:[306]

> 202. As discussed above, the processes of engagement undertaken with representatives of tangata whenua have facilitated opportunities for involvement in the development of the CIAs, relationship agreements, iwi resource development and investment, long term relationships, appropriate conditions of consent and enabled the exercise of kaitiakitanga.
>
> 203. We are satisfied the applicants have consulted all iwi and hapū with an interest in the Project, with a desire to determine how kaitiakitanga can be integrated into the project, to mitigate cultural effects of the project and to find partnership opportunities that will benefit tangata whenua.
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> …
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> 211. We acknowledge the applicants' intention to continue to work closely with Te Korowai and the mana whenua hapū Ngāti Manuhiakai and Ngāti Tu, to ensure the cultural impacts of the Project are understood and respected, and to build a relationship that results in positive outcomes for the hapū, Te Korowai, the broader community, and the environment. We also acknowledge the sincerity in the applicants' response that they have developed a relationship agreement with Te Korowai and signed the agreement though the matter currently sits before Te Korowai's Board to complete. Whether or not their Board or delegated authority agrees and executes that relationship agreement has no bearing on the decision we have reached.

[195] The Panel granted the consent for 35 years on the conditions attached.[307]

[196] The Panel's reasons were succinct but must be taken in the context of the decision as a whole and in particular with reference to the CIAs. The reasons for its findings were summarised[308] and these findings are correlated to the evidence and the information it had set out earlier in its report.[309]

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306 The Panel Report, above n 4.
307 At [248].
308 At [199]–[211], set out at [133] and [194] above.
309 At [110]–[198].

[197] The report dealt with the discrete environmental issues raised such as visual impacts and ecological effects. The particular concerns of Ngāti Tu had been met, apart from a royalty arrangement. For instance, the riparian planting it sought had been largely agreed to by Hiringa,[310] and the freshwater concerns it had expressed had been met by Hiringa by providing an ecological assessment,[311] as well as the other conditions imposed.[312] The only real requirement which had not been satisfied was the royalty payment.

[198] The expressed concerns of Te Korowai, as set out in its comments on the project in October 2021, were, first, the relocation to an alternative site coastward of State Highway 45 once the useful life of the turbines had been reached,[313] and secondly, its concern that due to the short timeframe, the Board had not yet sighted the relationship agreement, which was to include Hiringa's offers of multiple mitigation measures. Te Korowai had said it would only support the application if the Board agreed and signed the relationship agreement developed during consultation.[314]

[199] In its subsequent comments on the conditions, Te Korowai said its concerns remained that there had been no alternatives identified in relation to the location of the wind turbines. The Panel accepted on the evidence of Hiringa that there were no presently available alternative sites which did not affect cultural sites or create other problems. The issue of decommissioning and alternative sites was an issue which Te Korowai and Ngāti Tu had raised in their CIAs. The Panel imposed conditions dealing with the decommissioning of the turbines at the end of the consent, including a requirement to relocate to an alternative site, in collaboration with Te Korowai and the two mana whenua hapū.

[200] The conditions set out in the Report covered particular monitoring involvement, including on the matters that Te Korowai had submitted should be

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310 The Panel Report, above n 4, at [144(a)]. Though the issue of double planting remained under consideration by Hiringa, that is a minor issue and could properly be left for later determination by the landscapers.

311 At [166].

312 Appendix 2 condition 38.

313 Te Korowai o Ngāruahine Trust "Comment on the Kapuni Green Hydrogen Project" (8 October 2021) at 4.

314 At 4.

included in the conditions, which allowed the hapū and Te Korowai to exercise kaitiakitanga on discrete matters. For instance, Ngāti Manuhiakai and Ngāti Tu were to receive information in relation to the lizard survey,[315] and be provided the opportunity of performing karakia and being on site for earthworks.[316] They were also to be represented on the ongoing community consultative group for the project.[317] Hiringa was also required to collaborate with the two hapū and Te Korowai to ensure appropriate plans were in place for the decommissioning of the turbines at the end of their useful life or 35-year consent period. An alternative site coastward of State Highway 45 for the turbines would be required if the Project was to continue beyond that time.[318]

[201] With the exception of the cultural significance to tangata whenua and their culture and traditions (including mauri) and sites of cultural and spiritual significance, namely the Maunga, the Panel said the project was consistent with the objectives and policies of historic heritage. This was because there were no known features of significance, and the archaeological protocol enabled steps to be taken if such features were discovered.

[202] Nevertheless, the Panel reached the "unavoidable conclusion" that the Project was not fully consistent with all the objectives and policies of the RPS. However, it referred to its reasons set out on the cultural and heritage values as to why it did not consider such inconsistency as "problematic".

[203] The Panel summarised the nub of the wider issues which were engaged as follows:[319]

> … To the extent that those policies require engagement and consultation they have been met. But again the real issue evolved to the substantive recognition and provision for the relationship of tangata whenua and their culture and traditions (including mauri) with their sites and areas of cultural and spiritual significance – namely the Maunga. The Panel accepts that a potential inconsistency arises in that regard and makes the same observation made in respect of the RPS policies on those topics.

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315 Appendix 2 condition 73 of the Panel Report, above n 4.
316 Appendix 2 conditions 90–91.
317 Appendix 2 condition 102.
318 Appendix 2 condition 110.
319 At [233].

[204] In turn, the Panel found that the lack of "full consistency" with the objectives and policies "not problematic" because:

(a) The applicants had consulted all iwi and hapū with a desire to determine how kaitiakitanga could be integrated into the project and to mitigate the cultural effects of the project and find partnership opportunities that would benefit tangata whenua.

(b) The applicants had resourced and supported the development of CIAs by iwi and hapū and had genuinely sought to address adverse effects of concern where possible. Those mitigation measures were largely supported by Te Korowai and the recommendations and requested consent conditions from Te Korowai had been adopted by the applicants.

(c) The applicants had sought to minimise the impact on the cultural landscape as far as possible, including relocating and reorienting the turbines and reducing the spacing between them.[320] The applicants had sought to implement kaitiakitanga and other cultural practices, and had identified sites of potential cultural significance. The proposal avoided sites and areas of cultural and spiritual significance, with hapū observation of earthworks and ongoing environmental monitoring and a discovery protocol if previously unknown features were discovered.[321]

(d) To a large extent the development was constrained to its present intensity through mitigation measures undertaken by the applicants on conditions of consent which to a large extent satisfied Te Korowai and Ngāti Tu.[322]

(e) The number of turbines was limited to four on the site and the turbines were to be removed after the useful life or 35 years of operation, subject

320 At [205].
321 At [206].
322 At [208].

to a decommissioning plan prepared in collaboration to Te Korowai, Ngāti Tu and Ngāti Manuhiakai, including an alternative site plan if necessary.[323]

[205] The resource consent application and assessment referred to the engagement and the acknowledgement by the two mana whenua hapū that Hiringa had "taken into account the principles of the Treaty of Waitangi and is committed to continue to work openly and in good faith with tangata whenua."[324] The Panel noted the open and positive engagement with tangata whenua by Hiringa, and the fact that it acted reasonably and with good faith attempting "to address concerns, where possible, with a view to forming ongoing and constructive long-term relationships".[325]

[206] In summary:

(a) In general, the Panel recognised the Te Korowai concerns that the impact of the turbines "is not de minimis and that the impact will be high and potentially lead to cumulative adverse cultural effects."[326]

(b) The Panel noted Ngāti Ruanui's emphasis on their connection to the Maunga and the interconnection between the maunga, the w'enua and the moana. It recorded that Ngāti Ruanui considered the intensity of the development proposed eroded this connection and therefore the mauri of the ecosystem and the mauri of Ngāti Ruanui.

(c) Hiringa had acknowledged the cultural significance of Taranaki Maunga and the visual effects of the turbines and had "sought to minimise as far as practicable the cultural and visual impacts, and proposed a number of mitigation measures."[327]

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323 At [209].

324 Hiringa Energy Ltd and Ballance Agri-Nutrients Ltd *Resource Consent Application and Assessment of Environmental Effects: Kapuni Green Hydrogen Project* (18 August 2021) at 45. I note the assessment's analysis was undertaken under the RMA s 8 Treaty provision, as it was required to under the Act.

325 The Panel Report, above n 4, at [117].

326 At [156].

327 At [162].

(d) The Panel acknowledged the commitment by Hiringa to continue to work long-term with tangata whenua in good faith.[328]

(e) The Panel also acknowledged the concerns raised by Te Korowai in relation to the fast-track consenting process but considered they were not matters the Panel had jurisdiction over.[329]

Recognition of the principles of the Treaty

[207] The Panel turned its mind to the requirement under s 6 of the FTCA that all persons performing and exercising powers under it must, in "achieving the purpose of [the FTCA], … act in a manner that is consistent with" the principles of the Treaty and Treaty settlements.[330]

[208] The Panel, relying on the Te Korowai CIA, identified the principles of the Treaty as defined through the findings of the Waitangi Tribunal and decisions of the courts as including:[331]

(a) kāwanatanga — the Crown's right to govern and delegate resource management decision-making powers to local authorities;

(b) rangatiratanga — the right of iwi to control, manage and use tribal resources according to their cultural preferences;

(c) partnership — a relationship between iwi and central and local government based on the concepts of good faith, mutual respect, reasonable co-operation, and compromise;

(d) resource development — the facilitation of iwi resource development; and

328 At [117] and [211].
329 At [210].
330 At [199].
331 At [200], referring to the Te Korowai CIA, above n 96, at 15.

(e) spiritual principle — recognition of the spiritual relationship that tangata whenua have with the environment.

[209] The Panel observed that case law indicated the principles may also include active protection, good faith consultation and communication.[332]

[210] The Panel recognised the importance of the principle of rangatiratanga through its recognition of the effects of the project on the cultural landscape of Ngāruahine.

[211] Regard was had to kaitiakitanga as set out in the CIAs and the conditions involving iwi and hapū. This included the specific monitoring provisions and membership of the community consultative group chaired by an officer of the local authority and importantly their involvement in the decommissioning plans. The Panel also recognised the relationship that Hiringa had established with iwi and hapū and their acknowledgement of Hiringa's approach and engagement with them.

Explaining the balance struck

[212] Under sch 6 cl 37 of the FTCA, as soon as practicable after a panel has completed its consideration of a consent application or notice of requirement, it must make its final decision and produce a written report of that decision.[333] The written report of the decision must: (a) state the decision made by the panel; (b) state the panel's reasons for its decision; (c) include a statement of the principal issues that were in contention; and (d) include the main findings of the panel on those issues.[334]

[213] I have set out above the Panel's summary of its reasons in relation to the Treaty and cultural issues.[335] It also adopted the conditions sought by Te Korowai in its feedback on the conditions. These provided some monitoring and the provision of information to hapū and iwi in specific areas.

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332 At [201].
333 Schedule 6 cl 37(1) of the FTCA.
334 Schedule 6 cl 37(6).
335 At [203]–[211] of the Panel Report, above n 4, referred to above at [133] and [194].

[214] Importantly, the conditions included a firm mechanism to ensure the removal and decommissioning of the turbines and site rehabilitation. If the Project was to continue it was to be relocated to an alternative site.

[215] Hiringa was required to prepare the decommissioning plan in collaboration with Te Korowai and the two mana whenua hapū. A condition required disposal of the wind turbines occurred in an environmentally responsible way.[336] The Panel found that this together with the other conditions would satisfy consistency with Treaty principles.[337]

[216] In this case the consents would operate for 35 years. The ongoing positive relationship between hapū, iwi and the applicant had been properly identified by the Panel as a crucial ongoing component that enabled the Panel to be satisfied that the grant of the consents was consistent with the Treaty principles. This long-term future relationship was to be captured in a written relationship agreement. Due to the short timeframe, the relationship agreement, which was to include "multiple mitigation measures", had not been signed by the time of the final decision.[338] The Panel acknowledged the sincerity in Hiringa's approach and said the fact that the relationship agreement might not be executed had "no bearing" on the decision reached.[339]

[217] While the general thrust of the terms of the agreement was referred to in the material before the Panel, neither the details of the proposed provisions of the relationship agreement nor the details of the kaitiakitanga obligations and "royalty payment" sought were apparently before the Panel, nor were they before this Court.

[218] Ngāti Tu in its CIA had sought recognition as kaitiaki of the rohe.[340] Ngāti Tu were unsuccessful in negotiating the royalty payment it sought for the execution of this kaitiakitanga obligation by way of a "royalty payment".[341]

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336 Appendix 2 conditions 108–110.
337 At [241] and [246].
338 Comments of Te Korowai to the Expert Consenting Panel (18 October 2021) at 4.
339 At [211] of the Panel Report, above n 4.
340 Ngāti Tu CIA, above n 95, at 22.
341 At 22. A royalty payment in general would not appear to be an appropriate condition. However, payment for kaitiaki duties may be an appropriate condition.

[219] At the time of its decision, the Panel was apparently unaware of the withdrawal of support for the project by Ngāti Tu.

Treaty and cultural issues — analysis

[220] The approach to interpreting an enactment is set out in s 10 of the Legislation Act 2019, which provides in full:

> **10 How to ascertain meaning of legislation**
>
> (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.
>
> (2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.
>
> (3) The text of legislation includes the indications provided in the legislation.
>
> (4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.

[221] As the Supreme Court has stated, "[e]ven if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose".[342] The Court said, in determining the purpose of an enactment, the Court must have regard to the legislative context, and the social, commercial or other objective of the enactment may also be relevant.[343]

[222] Under s 6 of the FTCA, the Panel, "in achieving the *purpose* of [the] Act", was required to perform its functions and exercise its powers in a manner "consistent with" the principles of the Treaty and relevant Treaty settlements.[344]

[223] There was no challenge to nor appeal from the Panel's conclusion that the purposes of the FTCA were met insofar as the promotion of employment to support New Zealand's recovery from the effects of COVID-19 and supporting the certainty of ongoing investment across New Zealand are concerned. The issues on appeal are

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342 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].
343 At [22].
344 Emphasis added.

relevant to the second part of the purpose, relating to continuing to support the sustainable management of resources.

[224] The Panel had adopted the conditions that Te Korowai had suggested in relation to the proposed conditions. Te Korowai had made those suggestions "without prejudice" to its overall position. The other issues in matters such as visual amenity and ecosystem concerns had been isolated and largely dealt with by the Panel or by the conditions as I have set out above. It made no errors in dealing with those.

[225] The outstanding issue for Ngāti Tu was the matter of a royalty payment to Ngāti Tu as kaitiaki of the rohe on which the Project is situated. The CIA described this as for the purposes of funding the "immediate needs of hapū". The Panel did not require any royalty or payment direct to Ngāti Tu in its conditions in this respect.

[226] A royalty payment is generally not a matter which is properly the subject of a condition in a resource consent unless agreed upon.[345] Failure to impose a royalty condition does not mean the Panel failed to act in a manner "consistent with" the principles of the Treaty. To require that such a payment should be made to hapū might be seen as a payment to avoid a veto of the Project by Ngāti Tu.

[227] Counsel for Ngāti Tu argued on appeal that the royalty requirement was in the nature of payment for kaitiakitanga responsibilities. The details of the negotiations over that royalty payment were not before the Panel nor were they before this Court. It was open for the Panel to consider incorporating a specific payment condition for that purpose beyond the requirement for Hiringa to pay direct costs of the community consultative group. Payments for appropriate services in any event may be arguably covered under that specific condition in any event. The imposition of such a requirement however was a matter within the Panel's discretion and does not give rise to a ground of appeal.

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345 Section 108AA(1)(a) of the RMA.

[228] The more significant issue, as the Panel correctly noted, was the less tangible effect of the Project on the wider Ngāruahine cultural landscape. The Panel did properly engage with the nature of these interests affected.[346]

[229] The CIAs of Te Korowai and Ngāti Tu, and the Panel's consideration of these, are particularly relevant. The CIAs provided significant detail about the hapū, the relationships between hapū and the Ngāruahine cultural landscape, and the concerns the hapū held about the effects the Project would potentially have on its cultural identity. The Panel recognised that to iwi, the Ngāruahine cultural landscape described not only a physical area but also the relationship and interaction between Ngāruahine and the environment.[347] It recognised that values within the landscape went beyond the visual aesthetics or concern for the natural involvement but included "the sense of space that underpins Ngāruahine identity".[348] Taranaki Maunga was, as the Panel recorded, the "most significant wāhi tapu" to Ngāruahine, and had a "direct effect on their wellbeing, sense of place and identity as Ngāruahine."[349]

[230] The Panel noted that the concerns of Te Korowai and Ngāti Tu had been largely met in the course of the significant involvement of Hiringa with hapū and iwi. Hiringa had gone to some length to address the concerns raised. In addition to the discrete points raised and dealt with in the Report and in the conditions, the Project was proceeding on the basis of the stated intention of Hiringa to "continue to work closely" with Te Korowai and mana whenua to ensure the cultural impacts of the Project were "understood and respected, and to build a relationship that results in positive outcomes for the hapū, Te Korowai, the broader community, and the environment."[350] This engagement bears out the comments made at the parliamentary debate on the COVID-19 (Fast-track Consenting) Bill that there would be a more "proactive, productive … conversation at a local level."[351]

[231] The Te Korowai CIA, which the Panel canvassed in detail, noted the support that Hiringa had expressed not only for the mitigation measures for cultural effects but

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346 See *Trans-Tasman Resources Ltd*, above n 241, at [159].
347 The Panel Report, above n 4, at [153].
348 At [153].
349 At [158].
350 At [211].
351 See [191] above.

also for exploring opportunity for hapū employment during construction as well as long-term employment, installation of solar energy systems in the marae, material support for education, identification of work experience for Ngāruahine students and (though declined) the opportunity to invest in the hydrogen project.[352] The CIA also recorded other initiatives which were being discussed with Hiringa.[353] The RMA (via the FTCA in this case) allows for such compensation to be taken into account.[354]

[232] In the timeframe, the written relationship agreement had not been progressed and the constructive relationship with iwi — which was crucial to the continued support of iwi — remained to be finalised. Te Korowai said the timeframe prevented it from ensuring it advanced "the economic, social, cultural, and environmental wellbeing of Ngāruahine".[355] While it may have been preferable to have such an agreement in place, the Panel had sufficient information before it to satisfy itself that in granting the consents it was acting in a manner consistent with the principles of the Treaty.

[233] This application particularly engaged the principles of rangatiratanga — the right of iwi to control, manage and use tribal resources according to their cultural preferences — on the one hand, and kāwanatanga — the Crown's right to govern and delegate resource management decision-making powers to local authorities, or in this case the Panel — on the other.

[234] The rangatiratanga of Te Korowai and the hapū was recognised and incorporated into the process in a number of ways. For instance, the CIA was prepared against the draft iwi management plans and values of Te Korowai as well as its draft kaitiaki plan. In addition, the nominee of Te Korowai was appointed as a member of the Panel. At the request of Te Korowai, the deadline for receipt of its comments on the conditions was extended to 25 November 2021. Though subsequently they were

352 Te Korowai CIA, above n 96, at 19–20.
353 At 19–20.
354 Schedule 6 cl 31(1)(a) of the FTCA.
355 Letter from Paula Carr (Pouwhakarae of Te Korowai o Ngāruahine Trust) to the Expert Consenting Panel regarding its comments on the draft conditions for the Kapuni Green Hydrogen Project (30 November 2021) [Te Korowai comments on draft conditions] at 1.

not ultimately received until the end of November, the Panel nevertheless took those comments into account.[356]

[235] Te Korowai, Ngāti Tu and Ngāti Manuhiakai were to be represented in the community consultative group chaired and administered by South Taranaki District Council. Te Korowai's relationship with the local authority in relation to the Project, therefore, was ongoing.

[236] The preferences of iwi and hapū as they related to the specific land affected by the Project, but, more importantly, as they related to the cultural landscape affected, were set out in the CIAs, which expressed the elements of rangatiratanga involved.[357]

[237] In the circumstances, the principle of kāwanatanga was engaged by the referral by the Crown of the application for determination by the Panel. The Panel was then required to exercise of kāwanatanga by applying the requirements of the FTCA.

[238] The Panel was required to assess the consistency of the proposal with relevant Treaty principles within the statutory framework. The applications did not satisfy all that iwi and hapū had sought in terms of tino rangatiratanga, but the Panel was required in achieving the purpose of the Act, to exercise its powers, in a manner "consistent with" the principles of the Treaty and Treaty settlements. The Treaty clause and related cultural provisions do not require the consent of iwi and hapū to the Project to achieve such consistency.

[239] As Whata J noted, resource management decision-makers, in their determinations of consent applications, are not empowered to (nor do they) "confer, declare or affirm the jurisdiction of iwi"[358] but must nevertheless meaningfully respond within the framework of the legislation. The Panel was not able to go beyond the FTCA framework but was required to determine the application based on the evidence it had before it.

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356 Minute of the Kapuni Green Hydrogen Project Expert Consenting Panel (M-5), 10 November 2021.

357 More particularly set out at [132]–[148] above.

358 *Ngāti Maru Trust v Ngāti Whātua Orākei Whaia Maia Ltd*, above n 219, at [68].

[240] In the context of achieving the particular purposes of the FTCA, it was open to the Panel to be satisfied that in granting the consents it was acting in a manner consistent with the Treaty principles. Within the overarching legislative framework, and the particular limitations of the fast-track consenting scheme, it made no error in reaching that conclusion.

[241] The CIAs were resourced by Hiringa but prepared by the relevant iwi or hapū, and the statutory process allowing submissions on the application and on the proposed conditions was followed. It is relevant to consistency with Treaty Principles in relation to process that the CIAs had been prepared against the Te Korowai draft kaitiaki plan, which had not yet been submitted to the relevant local authority for adoption and use in Council resource consent processes. I also note in this regard that a nominee of Te Korowai was on the Panel, which reflected the importance of iwi representation in resource consent decision-making. The Settlement Act itself provided for both of those measures in relation to local authority decision-making.

[242] The point of appeal raised in relation to process was that there were no reasons given for not holding a hearing. I deal with that issue below and find that the Panel made no error in process in that regard.

Reasons — striking the balance

[243] In *Trans-Tasman Resources Ltd*, the Supreme Court noted that the decision-maker in that case was required to give reasons.[359] However, this requirement was tempered in that case by the fact that it was an area where it may not have been possible to do "much more than explain the balance struck, having set out the evidence of the findings of fact for which the balance is struck."[360] The Supreme Court also referred to difficulties that may arise in the context of balancing incommensurable values with particular reference to s 5(2) of the RMA, that is the purpose of promoting the sustainable management of resources as it relates to social,

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359 *Trans-Tasman Resources Ltd*, above n 241, at [156].

360 At [157], referring (at n 251) to the authorities: *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [81]; and Harry Woolf and others *De Smith's Judicial Review* (8th ed, Thomson Reuters, London, 2018) at [7-105]–[7-106]. See also *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, above n 21.

economic and cultural wellbeing, where there is no common measure to undertake that balancing.[361]

[244] The Panel did engage with the interests expressed and showed an understanding of them. It identified the principles of the Treaty which had been engaged. It recognised the concerns that had been set out in the CIAs, which present in-depth analyses of the cultural concerns of the appropriate iwi and hapū. The Panel was entitled to and properly did rely on those reports. The requirements of the legislation as to reasons to be set out in the report did not require the Panel to set out its reasoning in more detail than it did. Rather, the Panel set out its findings and explained how it struck the balance within the framework of the FTCA.

[245] This was not a case such as in the *Tauranga Environmental Protection Society* case, where the views of the hapū as to the cultural effects on it were "determinative" and the decision-maker had not satisfied itself (as it was required to under the provisions of the relevant coastal planning instruments) that the avoidance of those effects was not practicable.[362]

[246] The Minister had decided this was an appropriate matter to be referred to the Panel. Such a referral required the Panel to work within that legislative framework. The Panel, operating within the legislative framework, was exercising kāwanatanga and powers within that statutory constraint, and was obliged to act in a manner that actively protected the exercise of tino rangatiratanga to the same degree of protection as required by the Treaty of the Crown.[363] The Panel pointed out the concerns of Te Korowai in particular were with the legislation and its fast-track design.[364] As Te Korowai stated in its comments to the Panel on the draft conditions:[365]

> The [fast-track] process is, in effect, a direct assault on the rights negotiated in the [Settlement Act] and the yet to be completed Taranaki Maunga

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361 *Trans-Tasman Resources Ltd*, above n 241, at [157] and n 253.

362 *Tauranga Environmental Protection Society Inc v Tauranga City Council*, above n 260, at [65], [143] and [146], with reference to the Bay of Plenty Regional Coastal Environmental Plan, New Zealand Coastal Policy Statement 2010, National Policy Statement on Electricity Transmission and Bay of Plenty Regional Policy Statement.

363 Refer to the discussion above at [167] relating to the need for delegated bodies to afford the same degree of protection as is required by the Treaty of the Crown; and see in this respect Te Puni Kōkiri, above n 248, at 98.

364 The Panel Report, above n 4, at [210].

365 Te Korowai comments on draft conditions, above n 355, at 1.

> Settlement. Te Korowai o Ngāruahine Trust has a responsibility to ensure that it advances the economic, social, cultural, and environmental wellbeing of Ngāruahine. The fast-track process prevented us from doing this.

[247] I now turn to consider the particular points raised on appeal.

Particular points on appeal

Failing to consider the cultural landscape of Ngāruahine as a whole

[248] As I have noted, in particular at [102]–[110] above, the Panel recognised the concerns of Te Korowai about the effect of the Project on the Ngāruahine cultural landscape, and emphasised that Te Korowai had made its expectations around the protection of the Ngāruahine cultural landscape clear.

[249] The Panel had acknowledged what the Ngāruahine cultural landscape meant to the uri, whānau and hapū of Ngāruahine. The Panel had significant material before it, much of which it referred to in its report, recognising that the cultural landscape includes more than the objective physical reality. It derives aesthetic qualities and meaning from other sources, informed by knowledge, memory and cultural values and associations with a place.

[250] Planning documents submitted in support of Hiringa's resource consent applications also referred to the impact on the cultural landscape. The "Landscape and Visual Effects Assessment", tendered in support of the resource consent applications, for example, in its analysis identified four additional marae to be considered as part of addressing potential cultural landscape effects.[366] That assessment had earlier noted the "special value" the maunga and its "connection and influence on the wider landscape" held to Taranaki iwi, and that "siting of the turbines in key viewshafts across the ring plain will result in adverse cultural landscape effects."[367] It is worth noting the following comments from the landscape and visual assessment, which the Panel had before it:[368]

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366 Boffa Miskell *Kapuni Green Hydrogen Project: Landscape and Visual Effects Assessment – Prepared for Hiringa Energy* (8 June 2021) at 31.

367 At vi.

368 At ii.

> The Project will have an adverse effect on landscape character when the turbines are considered as a small cluster of individual elements, however, when they are considered in broader context of the simple 'geometry' of the ring plain and the wider South Taranaki district, the effects on landscape character are attenuated.
>
> …
>
> The turbines will have an adverse effect on landscape character and while this will be relatively limited, it does affect the associative values, especially those expressed by Nga iwi o Taranaki in relation to the maunga and its connection and influence on the wider landscape.

[251] Hiringa was aware of the effects the Project would have, and the Panel recognised the measures taken, or agreed to be taken, by Hiringa to mitigate the effects as far as possible.

[252] Added to this, the Panel reflected on the significance of the cultural landscape of Ngāruahine as a whole in its detailed and comprehensive consideration of the CIAs of both Te Korowai and Ngāti Tu. It understood the effects on the cultural landscape would not be de minimis but that Hiringa had sought to minimise the impact on the cultural landscape as far as possible, including relocating and reorienting the turbines and reducing the spacing between them.[369]

[253] While the Panel noted that the Project was not "fully consistent" with all the objectives of the RPS, that was not necessarily required. Rather, it was consistency with the Treaty principles and settlements in achieving the purpose of the Act which was required.

[254] The Panel, on the basis of all the evidence before it, accepted that the impacts on the cultural landscape would be significant, but it was satisfied that the granting of the consents subject to the conditions imposed in accordance with the preferences of the mana whenua hapū met the legislative requirements under the FTCA. The Panel did not err in reaching this conclusion.

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369 The Panel Report, above n 4, at [205].

Failure to consider the precedential effect to be an adverse effect that could not be mitigated

[255] Te Korowai raised concerns that there would be potential for precedent if the Project and technology were scaled up and extended. The Panel imposed conditions limiting the number of turbines to four and requiring them to be removed and/or relocated at the end of their useful life or at latest the consent period of 35 years.

[256] On appeal, Te Korowai argued that these conditions did not sufficiently deal with their fears that the project created a precedent for other operators. Te Korowai in its submissions indicated that it was seeking a prohibition of such developments in the area.

[257] However, that is a matter for it to pursue with the relevant local authorities. For the purposes of the Panel's decision, any future consent applications would be required to consider the environment,[370] and a cumulative effect analysis would then be carried out.[371]

[258] The Panel was required to assess the present application on its merits as it did, taking into account the limitation applied on the number of turbines (four) and the duration of the consent together with the decommissioning conditions. The Panel made no error under this head.

Reasons were not required for determining a hearing was not required on any issue

[259] The Panel said it had decided that a hearing "was not required on any issue".[372] Te Korowai and Ngāti Tu submitted that specific reasons were required for the decision not to hold a hearing. There had been no invitation to the parties to provide their views on whether a hearing was needed or not. Counsel submitted a hearing would have provided significant clarification of key issues for the hapū and iwi which it says were not "apparently clear" in the minds of the Panel. They argued the interests of the hapū and iwi of the rohe based on both Treaty principles and the relevant Treaty

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370 See *Royal Forest and Bird Protection Society of New Zealand v Buller District Council (No 1)* [2013] NZHC 1324, [2013] NZRMA 275 at [32].

371 At [68]. "Effect" includes any cumulative effect: RMA, s 3 definition of "effect".

372 The Panel Report, above n 4, at [38].

settlements were key to this application. Therefore, not having a hearing removed a key opportunity for tangata whenua to articulate the nature of their opposition, relevant tikanga and the nature of kaitiakitanga which was at play here.

[260] In *Murphy v Rodney District Council*, Baragwanath J explained that, as had been endorsed by the Privy Council in *R v Taito*, "the duty of a decision-maker to give reasons" was required to enable an appellate Court to understand the "intellectual route" taken by the decision-maker, "which provides some protection against error", and because "failure to give reasons means that the lawfulness of what is done cannot be assessed by an appellate Court".[373] As his Honour observed, however, "[t]he reasons may be succinct; in some cases they will be evident without express reference."[374]

[261] More recently this Court set out the standard for the duty in *Maungaharuru-Tangitū Trust v Hastings District Council* as follows:[375]

> The standard for the duty to give reasons depends on the particular circumstances and the statutory context. Where there is a straightforward factual dispute, no more may be required than simply stating whether the Judge believes one witness over another.[376] Where the dispute is more complex with reasons and analysis on either side, the Judge must engage with the issues, analyse the evidence and make reasoned findings. Reasons might be abbreviated and evident without express reference.[377] But generally, reasons ought to state the material findings of fact and evidential support and must tell the parties why they lost or won.[378] The reasons should be sufficient to enable those affected to understand why the decision was made and to be satisfied it was lawful.[379]
>
> Whether or not sufficient reasons are given depends on the legal question, and complexity of the legal issue. In some contexts a court or tribunal is required to engage in a particular analysis. It is only by the reasons given that it can be seen that the required analysis has been undertaken. …

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373 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC) at [25].
374 At [25].
375 *Maungaharuru-Tangitū Trust v Hastings District Council* [2019] NZHC 2576 at [21]–[22].
376 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 382.
377 *Housing New Zealand v Auckland Council* [2018] NZHC 288, (2018) 20 ELRNZ 441 at [81].
378 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at [70], citing Stanley De Smith, Harry Woolf and Jeffrey Jowell *Judicial Review of Administrative Action* (5th ed, Sweet & Maxwell, London, 1995) at [9-049].
379 At [73], citing *Lewis v Wilson & Horton Ltd*, above n 360, at [80].

[262] It is also arguable that Treaty principles may support a right to be heard. In *Raukawa Settlement Trust v Waitangi Tribunal*, for example, the Court referred to the tikanga of "natural justice" reinforcing a right to a hearing in the Waitangi Tribunal.[380]

[263] In this case, the Panel gave adequate reasons for its substantive decision recognising the Project would achieve the purposes of the FTCA to promote engagement and ongoing investment while continuing to support sustainable management.[381]

[264] In relation to whether reasons should be given for not holding a hearing, it is relevant that the FTCA provides that there is "no requirement for a panel to hold a hearing" and that no person had a right to be heard by the panel.[382] Furthermore, while under sch 6 cl 37(6) written reasons were required from the Panel for its decision as to the consent application, the legislation contains no statutory requirement to give reasons for not holding a hearing. This is consistent with the emphasis on time-limited decision-making under the FTCA. The position in in contrast with the requirements in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, where the hearing panel was specifically required to give reasons and did not do so.[383]

[265] The provisions of the FTCA were directed at enabling decision-making on applications within short time frames. Section 10 required all "practicable steps to use timely, efficient, consistent and cost-effective processes" proportionate to the functions being performed. A general requirement to provide reasons for a procedural decision to hold a hearing would run counter to the "fast-track" nature of the FTCA. That is not to say a duty to give reasons would not arise in some circumstances.[384] However, it did not in this case. Indeed, no party made any specific request for a hearing.

[266] I am satisfied the Panel made no error in determining that a hearing was not required on any issues without giving reasons.

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380 *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722 at [69].
381 Section 4 of the FTCA.
382 The Panel Report, above n 4, at [38].
383 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*, above n 21.
384 For instance, in *Raukawa Settlement Trust v Waitangi Tribunal*, above n 380, at [69], the Court referred to the "tikanga of natural justice".

Delegation to local authority

[267] It was submitted on appeal that the Panel acted inconsistently with the principles of the Treaty by effective devolution of decision-making to the Council under the RMA.

[268] If a condition leaves the settling of detail to a delegate, to be lawful it that can only be to certify, using that person's skill and experience, rather than to act as an arbitrator to judge how a matter is to be provided for.[385] The principle is commonly invoked in relation to management plans, where the detailed measures to achieve the standards set in the conditions will be addressed after consent is granted. The conditions must clearly indicate the standards to be achieved by the consent holder in order to be valid.

[269] In this case, the condition clearly indicated that there was to be a transition to hydrogen over five years and that would be monitored by the council. This was a permitted role for the local authority under the RMA.[386] It did not amount to a delegation of decision-making. The end requirement was transition to use hydrogen for transport. The role of the local authority was to monitor and review the conditions to ensure this was achieved, by ensuring Hiringa kept to that transition.

[270] I am satisfied the inclusion of an ongoing role for the South Taranaki District Council in monitoring and reviewing the conditions did not amount to an unlawful delegation of decision-making.

Conclusion on cultural issues

[271] It is well established law that iwi do not have a right of veto of a project.[387] However, as William Young and Ellen France JJ commented in *Trans-Tasman Resources Ltd*, the decision-maker is required:[388]

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385 *Turner v Allison* [1971] NZLR 833 (CA).
386 Section 128 of the RMA, which applies by virtue of s 12(10) of the FTCA.
387 See above at n 230.
388 *Trans-Tasman Resources Ltd*, above n 241, at [161] (footnotes omitted).

> … to indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply.

[272] The decision-maker must show it has engaged with the cultural issues raised and satisfied itself that the adverse cultural effects which would prevent "consistency" with the principles of the Treaty have been addressed.

[273] The purpose under s 4 of the FTCA was to "urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment continuing to promote the sustainable management of natural and physical resources."

[274] I am satisfied that in the circumstances of this case, the Panel in achieving the purpose of the Act acted, in process and in substance, in a manner "consistent with" the principles of the Treaty and Treaty settlements, as it was required to under s 6 of the FTCA. The assessment of the Panel must take place within the legislative scheme based on the evidence before it at the time it heard the application. I am satisfied the Panel addressed all concerns of and material provided by, in particular, Te Korowai and Ngāti Tu adequately and imposed appropriate conditions accordingly.

Second major issue — environmental issues

[275] The second major area of appeal related to environmental issues. This related to the transition conditions put in the Particularised Points on Appeal as:

Failing to consider the precedent effect of the proposal to be an adverse effect over the life of the project that could not be mitigated; and finding that a critical reason for approving the project was 100 per cent transition to use of "green hydrogen" for transport

[276] Additionally, under this heading is the issue of the end product, to which I refer below.

[277] Greenpeace, which took primary carriage of these arguments, said that a critical reason for approving the project was that there was to be a 100 per cent transition to the use of "Green Hydrogen" from use for urea production to use for

transport over five years. It argued that the transition was a condition of support of the project by Te Korowai and Ngāti Tu.

[278] Essentially, Greenpeace submits that the conditions relating to the transition from use for urea production do not provide a hard direction that the 100 per cent transition was to occur within five years, which was a critical reason for approving the application.

[279] The Panel recognised the importance of this transition to the fast-track consent application. It said in its report:

> 61. Critically, the proposal is that over a five-year period the utilisation of green hydrogen will transition from 100% urea production (i.e. 7,000 tonnes per year) to entire use for fuel cells as the electric fleet is expected to increase.

[280] In its assessment of environmental effects section, the Panel said:

> 237. Green hydrogen production is planned to transition from 100% urea to the transport market over a 5 year period as the fuel cell electric vehicles market increases, with the intention to increase electrolysis capacity once green urea production falls below a minimum threshold.
>
> 238. Absent that transition (i.e. if the proposal were simply to continue producing urea) it is difficult to see how the fast-track consenting could be justified. The proposal may or may not have succeeded as an ordinary application under the Resource Management Act. Therefore, given the reliance on transition to justify fast-tracking, it is appropriate to ensure that any consent matches that justification, and is reflected in the appropriate conditions.

[281] The relevant transition conditions imposed are as follows:

(a) *Conditions 112–113: transition progress reports*

That over a five-year period, specifically by 30 June 2023 and each anniversary thereafter until 30 June 2028, to provide a written report to the South Taranaki District Council as to progress in achieving the transition of green hydrogen production from utilisation entirely for the purposes of urea production to utilisation in the transport market.

(b) *Condition 114: Council review*

> That the South Taranaki District Council may, pursuant to s 128(1)(a)(iii) of the RMA, review the conditions above at any time after the five-year period for the purpose of assessing progress of the transition and/or to propose new conditions to ensure the transition progresses or continues.

[282] It is also relevant to note at this point that Condition 1 provided:

> (1) The construction, operation and maintenance of the Kapuni Green Hydrogen Project shall be undertaken in general accordance with the information provided in "Kapuni Green Hydrogen Project Resource Consent Application and Assessment of Environmental Effects" dated August 2021 and any other documentation relevant to the resource consent applications. In the event of any conflict or discrepancy between these documents and the conditions of this resource consent, the conditions shall be determinative.

[283] These conditions on the transition were among those circulated in draft for comment by the parties. Hiringa in its response to the draft conditions sought an amendment to allow it more flexibility in the transition. In this regard, however, the Panel said:

> 239. The applicants raised a concern that part of the condition proposed by the Panel introduced an element of uncertainty to the project by enabling the South Taranaki District Council to impose fresh conditions if transition was rendered difficult in the prevailing market conditions. The Panel has reviewed this, but does not consider the condition required further amendment. As currently framed, it will be open to the consent holder to refer the market conditions in exchanges with the Council in the review process as a factor it regards as of significance to any consideration of further conditions.

[284] Osborne J recently outlined the approach to interpretation of resource consents in *Speargrass Holdings Ltd v van Brandenburg*.[389] His Honour said:

> [117] The wording of resource consents is to be interpreted according to their plain ordinary meaning, having regard also to the context in which the words are used. That includes the statutory regime of which the consent was a part of, the relationship between the parties and the terms of the application itself.[390] In other words, the scope of the consent is able to inform the interpretation of the condition and vice versa.[391]

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389 *Speargrass Holdings Ltd v van Brandenburg* [2021] NZHC 3391 at [117]–[118].
390 *Red Hill Properties Ltd v Papakura District Council* (2000) 6 ELRNZ 157 (HC) at [47].
391 *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765, (2019) 21 ELRNZ 364 at [100].

> [118] In the interpretation exercise, the Court may have regard to:[392]
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> (a) specific information included in the application under s 88 RMA (whether explicitly referred to or not);
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> (b) additional information provided if required by the consent authority under s 92 RMA (whether explicitly referred to or not); and
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> (c) any relevant background information which may assist the decision maker to determine what the consent authority using the words might reasonably have been understood to mean by them.

[285] The resource consent application recorded that the intention was to complete a transition within five years. However, the exact timeframe was dependent on the growth of demand in the transport sector. This was recognised by the Panel in its reference to the "expected" increase in the electric fleet. The five-year period was not an absolute time limit.

[286] In any emerging alternative technology, there will be some uncertainty particularly in the timeframe for implementation. The fact itself that hydrogen storage, loadout and refuelling facilities were part of the Project indicates a strong commitment by Hiringa to move to hydrogen use for transport.

[287] Importantly, the conditions as framed ensure that the transition over five years will be monitored by the South Taranaki District Council, which has the ability to amend the conditions to progress the transition. The only purpose for which the local authority is able to review the condition is to ensure that that transition progresses or continues, and any condition imposed by the local authority under s 128(1) is to ensure the maintenance of the transition.[393]

[288] The transition condition is certain, not unreasonable, nor ultra vires the powers of the local authority and therefore is valid as a condition.[394] The FTCA provides for the relevant local authority to review consent conditions imposed by an Expert

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392 *Red Hill Properties Ltd v Papakura District Council*, above n 390, at [42] and [44]–[45].

393 While the review of a local authority is specifically permitted under s 128 of the RMA, it is incorporated in s 12(10) of the FTCA.

394 See generally Helen Atkin and others *Brookers Resource Management* (online loose leaf ed, Thomson Reuters) at [A108.02].

Panel.[395] In particular, s 128(1) of the RMA permits a local authority to review the conditions of a resource consent for any purpose specified in the consent.

[289] As Ngāti Tu had recognised in its CIA, the transition to hydrogen-powered vehicles was positive but also "the viability is something not totally known but it will be for Hiringa to evaluate over time."[396] Te Korowai also referred to its support for the generation of renewable energy from the wind and did not make its support conditional on transition to the transport sector within five years.

[290] In response to the draft conditions proposed, Hiringa submitted that it was "commercially incentivised" to ensure the transition but went on to say it did not have complete control over how quickly the hydrogen transport market developed. For that reason, it sought flexibility and in particular objected to "the imposition of unknown conditions beyond reporting requirements" due to creating uncertainty for the project. The Panel refused to amend the condition to allow that flexibility.[397]

[291] The Panel did not leave it to Hiringa to evaluate the speed of transition, as suggested by Ngāti Tu. While the transition clause did not apply a "hard limit", the application was directed at moving the transition of the hydrogen to transport either entirely or substantially over five years. The application's provisions were incorporated as a condition by Condition 1. The resource consent application itself and the assessment of environmental concerns referred to this transition in a number of places. The consent application, for instance, noted that the green hydrogen production was planned to transition from 100 per cent urea to the transport market "over a five year period as the fuel cell electric vehicles market increases, with the intention to increase electrolysis capacity once green urea production falls below a minimum threshold",[398] and refers on a number of occasions to the goal of transitioning the green hydrogen use to heavy transport "within five years".

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395 Section 12(10).

396 Ngāti Tu CIA, above n 95, at 23.

397 Applicant Comments on Draft Conditions of Consent, attached in a letter from Catherine Clennett (Chair of Hiringa Energy Ltd) and Andrew Clennett (CEO of Hiringa Energy Ltd) to the Expert Consenting Panel (17 November 2021) at proposed condition 117.

398 Hiringa Energy Ltd and Ballance Agri-Nutrients Ltd *Resource Consent Application and Assessment of Environmental Effects: Kapuni Green Hydrogen Project* (18 August 2021) at 36.

[292] The transition clause allows some appropriate leeway for the period of transition. To ensure the transition occurs as proposed by Hiringa in the application, it was incorporated by reference in Condition 1. That condition requires the Project to be undertaken in general accordance with the information in the consent application and documentation relevant to that.[399] The important factor was that the transition would be from the product being used "entirely" in urea production to hydrogen use within five years. With the review by the local authority, the Panel left in place an appropriate mechanism to monitor that transition.

[293] I am satisfied the Panel made no error in finding the transition was a critical reason for approving the Project, and that it provided for that transition appropriately in the conditions.

Failure to consider the end use of urea and related environmental effects

[294] This ground of appeal is based on the requirement for the Panel to have regard to the actual and potential effects on the environment of allowing the Project.[400]

[295] The hydrogen produced by the Project initially would be used for the production of urea to be for use as fertiliser. Hiringa planned to transition the hydrogen from urea production to fuel for the transport sector over five years. Greenpeace submitted that the Panel had failed to properly consider the end use of the fertiliser and the environmental effects associated with that use by the fertilisation of pasture and thus grazing of sheep and cattle and so the production of greenhouse gas emissions. It said the Panel failed to specifically consider the environmental effects of the urea fertiliser should the Project never transition to the production of hydrogen fuel or that transition be delayed.

[296] Greenpeace also criticised the economic impact assessment provided by the Hiringa in the application which suggested that domestic urea production would displace the need to import urea but it did not state that it would do so entirely. Greenpeace said that the economic impact assessment made no effort to model what

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399 Appendix 2 condition 1 of the Panel Report, above n 4.
400 Schedule 6 cl 31(1)(a) of the FTCA.

might be the effect of the affordable urea for domestic fertiliser use, nor did it attempt to explain the effects in the context of the consistent upward trend in the use of urea in New Zealand.

[297] As the Panel described the position, Greenpeace submitted to the Panel that the "urea production as an end use outweighed the claimed environmental benefits of the project unless, or until the end use of green hydrogen production was entirely for the transport market."[401] The Panel noted that the assessment of "whether an end use that is otherwise lawful is a disenabling factor" had its complexities. It noted:[402]

(a) the current plant is the ammonia manufacturing plant in New Zealand and relies on electricity from the grid and natural gas from nearby gas fields;

(b) Hiringa's assertion that urea produced locally offsets urea that would otherwise be imported from production methods that have higher emissions;

(c) the 7,000 tonnes of urea produced annually by this project from green hydrogen would only be 1.15 per cent of the total urea used in New Zealand; and

(d) the proposal for transition for the hydrogen from 100 per cent to urea to fuel over the five-year period was critical.

[298] In light of the small percentage of annual urea used immediately attributable to the Project and the intended transition, the Panel considered there was a danger that to decline the application on the basis of the end use of urea would be to "throw the baby out with the bathwater" relative to the "much more ambitious and significant" environmental gains connected with hydrogen fuel production for the increasing use of hydrogen fuel in heavy transport.[403]

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401 As noted at [56] of the Panel Report, above n 4.
402 At [59]–[61].
403 At [62].

[299] The Panel therefore concluded that while the end use of urea had "some relevance to the process of transition", this was not a reason to deny the availability of fast-track consenting, or to decline consent itself.

[300] On appeal, Greenpeace submitted that the Panel failed to take into account relevant considerations as required by sch 6 cl 31 because it failed to properly have regard to the environmental effects of the synthetic nitrogen (urea) fertiliser produced by the project being used on farms. Greenpeace also said that the Panel failed to properly take into account the effects of climate change under s 7(i) and failed to adequately assess the impacts of the Project on climate change in circumstances where the Project transition from fertiliser production to fuel production was not certain.

[301] Greenpeace submitted that without any definite commitment to transition completely within five years, and the vague evidence on the potential market for such fuel, it was logically impossible for the Panel to weigh up the environmental benefits of hydrogen fuel use against the environmental harms of urea use because it had no way to know which of those uses would dominate the life of the Project.

[302] The consideration of the end use of a product resulting from a resource consent has been the subject of consideration in a number of recent decisions, both in New Zealand and in the England and Wales courts.

[303] In *R (Finch) v Surrey County Council*, the Court of Appeal of England and Wales indicated that the assessment of "downstream" greenhouse gas emissions from the future combustion of refined oil products said to emanate from the development site fell to be considered on the basis of whether there was a sufficient degree of connection between the effects of the end use product and the project.[404] In that case the downstream effects could reasonably be seen as far removed from the proposed development itself and not causally linked to it because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions.[405] The crude oil extracted at the application site could only find its way to

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404 *R (Finch) v Surrey County Council* [2022] EWCA Civ 187.
405 At [66].

the various uses after it had passed through several other distinct processes and activities.[406]

[304] While care needs to be taken with different statutory frameworks, New Zealand's approach is consistent with the England and Wales approach. In *Clutha District Council v Otago Regional Council*, the High Court considered an appeal against a resource application to take water from the Clutha/Mata-Au River for the purposes of a community water scheme which supplied water to rural and urban properties (including dairy farms) in the Clutha District.[407] The consent was required as a controlled activity. The District Council contended that the end water use was not a relevant consideration for decision-makers to take into account. The Council's primary submission was that the end use of the water (dairy shed wash) and the effects of that aspect of the activity on the environment "were too remote to be relevant considerations under the RMA."[408]

[305] Nation J there held that the Environment Court was able to have regard to the end use of water subject to the "limits of nexus and remoteness".[409] His Honour referred to *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, which concerned the export of spring water overseas and the subsequent disposal of plastic bottles.[410] The Court in that case quoted the Environment Court decision on appeal in that case as follows:[411]

> [61] Nexus … refers to the degree of connection between the activity and the effect, while remoteness refers to the proximity of such connection, both being considered in terms of causal legal relationships rather than simply in physical terms. Experience indicates that these assessments are likely to be in terms of factors of degree rather than of absolute criteria and so be matters of weight rather than intrinsically dispositive of any decision…

[306] In this respect, in *Clutha District Council v Otago Regional Council*, Nation J found that the end use of water for dairy shed wash and its subsequent discharge to the

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406 At [65].
407 *Clutha District Council v Otago Regional Council* [2022] NZHC 510, [2022] NZRMA 242.
408 At [42].
409 At [43].
410 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76.
411 At [81], citing *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [61].

environment "had a sufficient nexus to the take and were not so remote as to be matters which the Environment Court could not consider when fixing the duration for the water take consent for the scheme."[412] As his Honour found, "[t]he Court therefore had to have regard to these effects under s 104(1)(a) of the RMA."[413]

[307] Hiringa pointed to the decision in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, referred to above.[414] In that case the High Court found no error of law in the Environment Court's analysis of legal principles, which included the following statement:[415]

> [60] The ambit of the RMA in the context of considering an application for resource consent under s 104(1)(a) requires consideration of an effect of allowing the activity. It does not extend as far as considering any effect on the environment which, given the broad inclusive definitions of those words, might be anything at all. There must be a causal relationship between allowing the activity and the effect: if an effect would occur unchanged regardless of whether the activity was allowed or not, then such an effect would not be within the scope of s 104(1)(a) of the RMA. If the extent or degree of such an effect would be altered by allowing or refusing the activity, then that effect would be relevant at least in terms of that change but its nexus and remoteness would need to be assessed.

[308] Hiringa argued that the downstream effects of the use of urea were independent of the effects associated with the manufacturing of urea (or, more specifically, the *way* in which it was manufactured) and that the project would make no appreciable difference to the overall use of urea nor have any perceptible adverse effects on the environment different from those already existing. It further said that the use of urea was managed by a range of regulatory and industry-based controls, including the Resource Management (National Environmental Standards for Freshwater) Regulations 2020. Hiringa had submitted to the Panel that it was not open to it to effectively prohibit or control urea use in relation to an application to establish a renewable wind energy facility with associated hydrogen production, storage, offtake

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412 *Clutha District Council v Otago Regional Council*, above n 407, at [52].

413 At [52].

414 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (HC), above n 410. Leave to appeal the decision was granted by the Court of Appeal on 29 July 2021 on five questions, including whether the end use was beyond scope for consideration in the application for consents and land use activities: *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354. The approved question was amended in a decision delivered on 9 September 2021: *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 452.

415 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (HC), above n 410, at [82], citing (at [81]) *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (EnvC), above n 411, at [60].

and refuelling infrastructure. A prohibition on the production of urea would require direct legislative intervention at a national level.[416]

[309] Hiringa provided evidence to the Panel that the Project itself would not increase the use of urea in New Zealand. Hiringa told the Panel in this respect that "[t]he use and rate of application of urea is subject to a range of regulatory and industry based factors, which are independent of the way in which urea is manufactured." Hiringa advised the Panel, however, that the Project would "enable imported urea to be replaced with lower emission domestically produced urea."[417]

[310] In this case, Greenpeace argued that the basis upon which the Panel made its decision was factually incorrect, namely that the imported fuel and the amount of urea being maintained is steady. The evidence before the Panel upon which it based its analysis included evidence from Balance which supports its approach.[418] The Panel undertook a balancing exercise, in which it considered the end use of urea.

[311] Greenpeace submitted that the analysis of the urea production, and the suggestion that it was, due to an increase in the use of urea, able to be produced more cheaply, supported its position that the end use should have been given greater weight by the Panel. However, it was open to the Panel to accept the evidence it had before it that the casual relationship between the activity and the indirect adverse effect would unlikely be altered by allowing or refusing the activity. The weight on the effect was for the Panel.[419]

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416 This is work being undertaken by the Government to reduce greenhouse gas emissions in the primary sector. This has subsequently given rise to the He Waka Eke Noa: Primary Sector Climate Action Partnership, a collaboration between government, the primary sector, and Māori agribusiness formed in 2019 to, according to its recent report, "design a practical, credible, and effective system for reducing emissions at farm level, as an alternative to government policy to bring agriculture into the New Zealand Emissions Trading Scheme": He Waka Eke Noa: Primary Sector Climate Action Partnership *Recommendations for pricing agricultural emissions: Report to Ministers* (31 May 2022) at 1 and 4.

417 Applicants' Responses to Comments, attached in a letter from Catherine Clennett (Chair of Hiringa Energy Ltd) and Andrew Clennett (CEO of Hiringa Energy Ltd) to the Expert Consenting Panel (2 November 2021) at 10.

418 Letter from Mark Wynne (CEO of Ballance Agri-Nutrients) to the Expert Consenting Panel (2 November 2021).

419 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council* (HC), above n 410, at [60].

[312] Greenpeace also said the failure to ensure the transition would damage Māori interests through the contribution of that fertiliser to the harmful effects of climate change and through water pollution. Therefore, it said, in failing to require the transition through the imposed conditions, the Panel acted inconsistently with the principles of the Treaty of Waitangi.

[313] In this case the end use effects are well down the chain. The emissions are said to flow from the use of fertiliser produced with the application of energy from the project on pasture, the ingestion of that pasture and the result an increase in numbers grazing which in turn produce greenhouse gases. The consideration by the Panel of that effect in this case in these circumstances.

[314] The Panel was not required to go into detail in its reasons on this aspect. Its reasons were sufficient given the statutory requirements on the reasons required in the report. It is apparent that it took the view the indirect effect should not be given determinative weight in the circumstances of the case.

[315] I am satisfied that the Panel did properly consider the end use of urea and related environmental effects. It was entitled to find on the basis of the evidence before it, as it did, that the end use of the urea produced — in view of the transition conditions I have considered above — did not have a sufficient nexus to the environmental effects complained of sufficient to decline the application. Greenpeace seeks to revisit the merits of the Panel's assessment.

Conclusion as to environmental issues

[316] Overall, in relation to the environmental issues raised, I am satisfied the Panel made no error. In particular, I am satisfied the conditions imposed by the Panel, though they did not provide a hard time limit for transition to use of the hydrogen in the transport sector within five years, were adequate. I am satisfied the Panel made no errors in its treatment of these considerations.

Summary

[317] This appeal was brought on the following grounds of appeal, that the Panel erred in law in:

(a) finding that the proposal was "entirely consistent" with pt 2 of the RMA, and in particular ss 6(e) and s 7(a);

(b) failing to consider the cultural landscape of Ngāruahine as a whole;

(c) failing to consider the precedent effect of the proposal to be an adverse effect over the life of the project that could not be mitigated;

(d) concluding that the project has no impact on two cultural redress properties;

(e) determining that a hearing was not required on any issue without giving reasons; and

(f) finding that a critical reason for approving the project was 100 per cent transition to use of "green hydrogen" for transport.

[318] I granted leave to argue on appeal whether the Panel in fact applied the Treaty clause under provisions under s 6 of the FTCA, and as to the Panel's consideration of the end use of the green energy created by the Project as well as its alleged failure to adequately ensure transition to use of the hydrogen for fuel transport occurs within the five-year timeframe.

[319] In respect of the Treaty and cultural issues canvassed in this appeal, I am satisfied that both procedurally and substantively the Panel performed its functions and exercised its powers in a manner "consistent with" the principles of the Treaty and Treaty settlements, as it was required to do under s 6 of the FTCA. In respect of the environmental issues raised on appeal, I am similarly satisfied that the Panel did not err.

[320] In summary, those conclusions on each ground of appeal are as follows.

[321] In relation to the first ground, ground (a), I am satisfied that in finding that the application was "entirely consistent" with pt 2 of the RMA, in particular ss 6(e) and 7(a), the Panel acted in a manner "consistent with" the principles of the Treaty and Treaty settlements. The Panel correctly identified and engaged with the cultural concerns of Te Korowai and Ngāti Tu. It was satisfied the application taken with the conditions it imposed, many of which had been proposed by Te Korowai, adequately dealt with these concerns sufficiently to satisfy the Panel as to consistency with Treaty Principles and that cultural requirements of pt 2 of the RMA were met. The Panel acknowledged the effort Hiringa had gone to in order to ensure it had consulted all iwi and hapū with an interest in the project, to determine how kaitiakitanga could be integrated into the project, to mitigate the cultural effects of the project and to build a relationship that would result in positive outcomes for the hapū, Te Korowai, the broader community and the environment.

[322] In relation to ground (b), I am satisfied the Panel did not fail to consider the cultural landscape of Ngāruahine as a whole. The Panel canvassed the material presented to it in detail, in particular in this regard the CIAs, which had been funded by Hiringa but prepared by Te Korowai and Ngāti Tu respectively. The Panel recognised the significance of the cultural landscape to the hapū and I am satisfied it acknowledged the cultural effects as conveyed Te Korowai and the hapū were determinative.

[323] With regard to ground (c), failing to consider the precedent effect of the proposal to be an adverse effect over the life of the project that could not be mitigated, I am satisfied the Panel did properly assess the application on its merits and on the evidence before it as it did, which in particular included limiting the number of turbines to four and providing for appropriate decommissioning of the turbines.[420]

[324] In relation to ground (e), the Panel's determination not to hold a hearing without giving reasons for that decision, I am satisfied that there was no requirement for the Panel to give reasons for not holding a hearing. No party had made any specific

[420] Ground (d), relating to cultural redress properties, was not pursued.

request for a hearing. The Panel gave adequate reasons for its decision to grant consent.

[325] The final ground, ground (f), generally concerns the Panel's consideration of the transition of use for urea to hydrogen fuel, which it considered to be a critical reason for approving the application. The Panel acknowledged that it was difficult to see how the fast-track consenting process could be justified absent the timeframe for the transition. I am satisfied the Panel did not err in finding this to be a critical reason for approving the project. Though the conditions imposed in this respect did not impose a "hard" requirement to ensure that the transition would occur within five years, I am satisfied the conditions imposed, as well as the evidence before the Panel itself, ensured that the transition would occur in a timely manner, relevant to the five-year timeframe, with appropriate review by the South Taranaki District Council. There was no unlawful delegation, nor were the transition conditions, which were certain and not unreasonable, ultra vires.

[326] The final outstanding matter, on which I granted leave to appeal despite it not being raised in the initial grounds of appeal, relates to the Panel's alleged failure to consider the environmental effects of the end use of the hydrogen, and associated conditions. I am satisfied the Panel considered the end uses of the urea produced.

Conclusion

[327] The appeal is dismissed.

Costs

[328] Any application for costs should be made by application and supporting submissions within five days of the date of this decision. Any responses should be filed within a further five days and any reply within a further three days.

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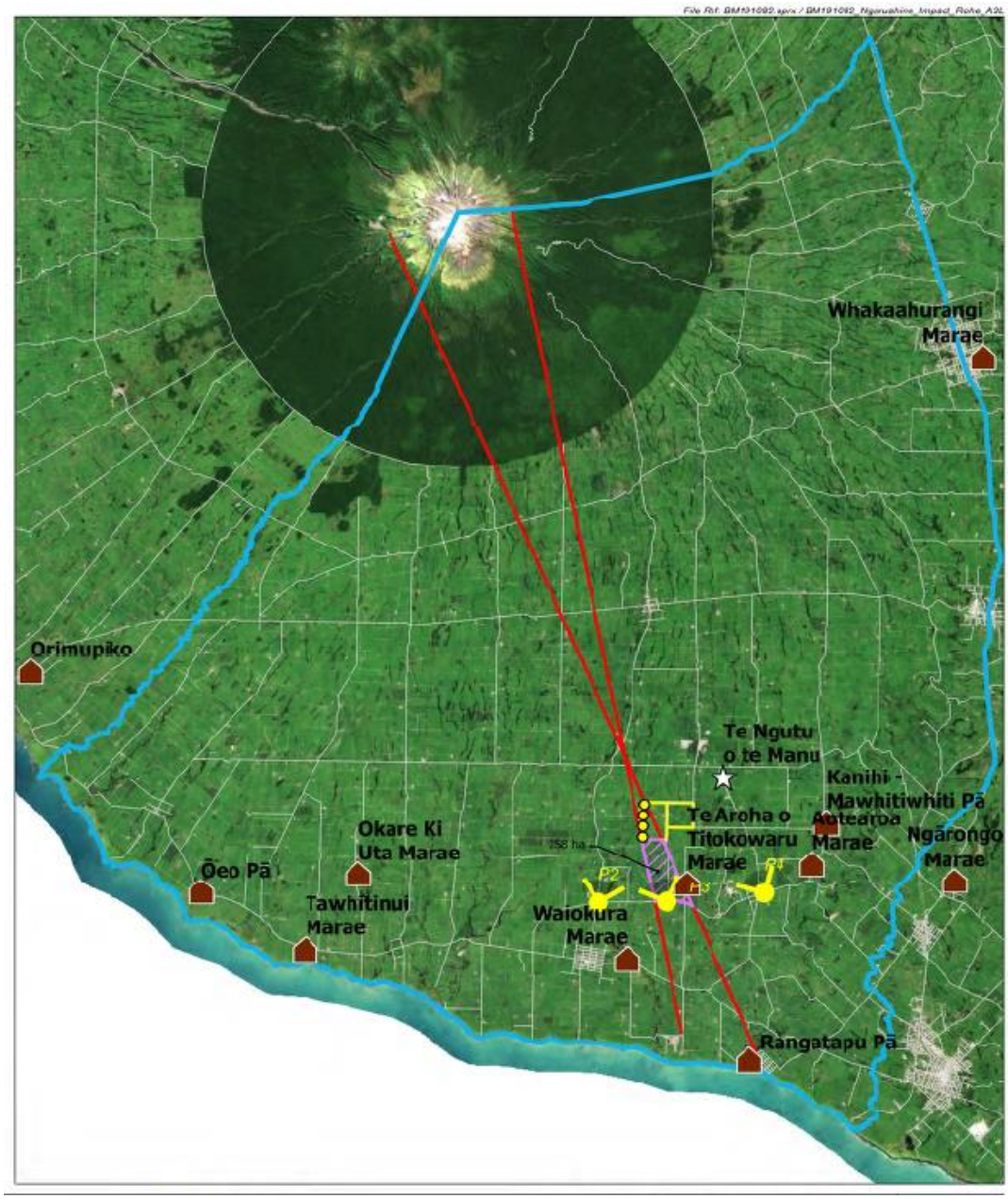
Grice J

Solicitors:
Govett Quilliam, New Plymouth

Attachment 1 — Marae and Area with Direct Line of Sight

Marae and Area with Direct Line of Sight



Attachment 2 — Excerpt from Appendix 2 conditions (relating to cultural conditions)

General

(1) The construction, operation and maintenance of the Kapuni Green Hydrogen Project shall be undertaken in general accordance with the information provided in "Kapuni Green Hydrogen Project Resource Consent Application and Assessment of Environmental Effects" dated August 2021 and any other documentation relevant to the resource consent applications. In the event of any conflict or discrepancy between these documents and the conditions of this resource consent, the conditions shall be determinative.

Wind turbine characteristics

(8) The maximum number of wind turbines that may be installed on the Wind Turbine Site … shall not exceed 4.

Culverts

(36) Within 20 working days after completion of the installation of the culvert on the Wind Turbine Site, the consent holder shall collect and provide the following information, together with the time and date of its collection, to the Chief Executive of the Taranaki Regional Council (and, with respect to the information listed in paragraphs (e), (f) and (g), to Te Korowai o Ngāruahine Trust, Ngāti Tu and Ngāti Manuhiakai):

(a) the type of the structure;

(b) the geographical co-ordinates of the structure;

(c) the flow of the river or connected area (whether none, low, normal, or high);

(d) at the structures location:

i. the width of the river or connected area at the water's surface; and

ii. the width of the bed of the river or connected area;

(e) whether there are any improvements to the structure to mitigate any effects the structure may have on the passage of fish;

(f) whether the structure protects particular species, or prevents access by particular species to protect other species;

(g) the likelihood that the structure will impede the passage of fish;

(h) visual evidence (for example, photographs) that shows both ends of the structure, viewed upstream and downstream;

(i) the culvert's asset identification number, if known;

(j) whether the culvert's ownership is;

i. held by the Crown (for example, the Department of Conservation), a regional council, a territorial authority, the New Zealand Transport Agency, or KiwiRail Holdings Limited; or

ii. held publicly by another person or organisation; or

iii. held privately; or

iv. unknown;

(k) the number of barrels that make up the culvert;

(l) the culvert's shape;

(m) the culvert's length;

(n) the culvert's diameter or its width and height;

(o) the height of the drop (if any) from the culvert's outlet;

(p) the length of the undercut or erosion (if any) from the culvert's outlet;

(q) the material from which the culvert is made;

(r) the mean depth of the water through the culvert;

(s) the mean water velocity in the culvert;

(t) whether there are low-velocity zones downstream of the culvert;

(u) the type of bed substrate that is in most of the culvert;

(v) whether there are any remediation features (for example, baffles or spat rope) in the culvert;

(w) whether the culvert has wetted margins;

(x) the slope of the culvert;

(y) the alignment of the culvert; and

(z) the numbers of each other type of structure to which this subpart applies, or of wingwalls or screens, on the culvert.

(45) The consent holder must ensure that a plan is implemented to monitor and maintain the culvert so that fish passage is maintained and does not reduce over time … the consent holder shall prepare a plan for that monitoring and maintenance …

Lizard survey

(73) Upon finalisation of infrastructure plans and associated extents and locations of vegetation clearance (including associated grassland), including the earthworks footprint, a lizard survey must be conducted in these clearance areas by a suitably qualified and experienced herpetologist prior to works commencing. The lizard survey report shall be provided to the Department of Conservation, the Group Manager – Environmental Services, South Taranaki District Council, the Chief Executive, Taranaki Regional Council and Te Korowai o Ngāruahine Trust, Ngāti Tu and Ngāti Manuhiakai.

Archaeology

(88) The Archaeological Discovery Protocol will apply to the unexpected discovery of artefacts or archaeological material encountered during earthworks undertaken as part of this project …

Cultural

(89) The consent holder shall ensure that site inductions for all contractors working on the Kapuni Green Hydrogen Project include a cultural component which provides details of mana whenua Iwi and Hapū for the project area, the cultural significance of the project area to mana whenua and the protocols in place related to earthworks monitoring and archaeological discovery.

(90) The consent holder shall provide Ngāti Tu and Ngāti Manuhiakai Hapū an opportunity to perform a karakia to bless the project site/s prior to works commencing.

(91) The consent holder shall provide an opportunity for a representative both of Ngāti Tu and Ngāti Manuhiakai Hapū to be present on site during any earthworks for the Kapuni Green Hydrogen Project.

Community consultation

(99) At least 40 working days prior to the commencement of construction works authorised as part of this resource consent, the consent holder shall establish and co-ordinate a Consultative Group for the Kapuni Green Hydrogen Project. Subject to the conditions below, this group is to be consulted, as a minimum, at least six monthly during the construction phase and over the first two years of the operation of the Kapuni Green Hydrogen Project. Thereafter, the frequency of consultation is to be determined by a majority of the Consultative Group itself. Individual Consultative Group members may, with the agreement of the Group Manager – Environmental Services, South Taranaki District Council, call meetings at shorter intervals to deal with any interim matters that need to be addressed before the next scheduled meeting.

(100) The objective of the Consultative Group will be to facilitate information flow between the consent holder's management team and the community and will be an on-going point of contact between the consent holder and the community. The functions of the Consultative Group shall also include acting as a forum for relaying community concerns about the construction and on-going operation of the Kapuni Green Hydrogen Project to the consent holder's

on-site management team, developing acceptable means of addressing (where possible) and managing those concerns, and reviewing the implementation of measures to resolve and manage community concerns.

(101) The consent holder shall be responsible for convening the meetings of the Consultative Group and shall cover the direct costs associated with the establishment and operation of the meetings. The consent holder shall be responsible for the keeping and distribution of the Consultative Group's minutes to all participants in the Consultative Group. A person independent of the consent holder shall chair the meeting. The chair of the Consultative Group shall be appointed by the Group Manager – Environmental Services, South Taranaki District Council.

(102) The consent holder shall notify its intention to establish a Consultative Group for the Kapuni Green Hydrogen Project by public notice. The consent holder shall invite, as a minimum, the following parties to participate in the Consultative Group:

(a) A representative of property owners and occupiers on local roads surrounding the Wind Turbine Site identified for use by construction traffic;

(b) A representative of property owners who own land adjacent to the site as identified in BTW drawing 191149 – GIS – 105 Sheet 1 Rev 5;

(c) An elected representative of the South Taranaki District Council; and

(d) A representative each from Ngāti Tu and Ngāti Manuhiakai Hapū.

(103) No owner or occupier of any property on which the Kapuni Green Hydrogen Project is located may be a member of the Consultative Group. The consent holder shall not be in breach of this condition if any one or more of the parties specified above do not wish to be members of the Consultative Group or to attend any particular meeting.

(104) The Consultative Group shall cease to exist when a 75% majority of the Consultative Group vote that it is no longer necessary.

(105) The consent holder shall maintain and keep a Complaints Register to record any complaints about construction works and operation of the Kapuni Green Hydrogen Project received by the consent holder in relation to traffic, noise, dust, television or radio reception interference, shadow flicker or any other environmental effects. The register shall record, where this information is available, the following:

(a) The date, time and duration of the incident that resulted in the complaint;

(b) The location of the complainant when the incident was detected;

(c) The possible cause of the incident; and

(d) Any corrective action taken by the consent holder in response to the complaint, including the timing of the corrective action.

(106) The Complaints Register shall be available to staff and authorised agents of the South Taranaki District Council and to members of the Consultative Group at all reasonable times upon request. Complaints received by the consent holder that may infer non-compliance with the conditions of this resource consent shall be forwarded to the Group Manager – Environmental Services, South Taranaki District Council within 48 hours of the complaint being received.

Decommissioning and site rehabilitation

(107) The wind turbines shall be removed from the site, either at the end of their useful life or the end of the term of this consent, whichever occurs earliest, in accordance with a certified Decommissioning Plan as per Conditions 108-110.

*Note: For the purposes of this consent, "**useful life**" means the period of time that the wind turbines remain fit for purpose and structurally sound. For the avoidance of doubt, structurally sound means free from flaw, defect or deterioration to the extent that the turbines remain capable of adequately and safely accommodating the wind turbine blades and motors. (When the turbines are rendered obsolete and uneconomic to modify or repair or when a period of 35 years has passed, they are to be decommissioned from the site in accordance with the conditions of this consent).*

(108) At least 80 working days prior to the commencement of decommissioning of the wind turbines authorised as part of this resource consent, the consent holder shall submit a Decommissioning Plan to the Group Manager – Environmental Services, South Taranaki District Council for endorsement acting in a technical certification capacity to certify that the plan meets the objectives in this Condition 108 (a) – (c). The Decommissioning Plan shall be prepared by a suitably qualified and experienced person and provide for the following objectives:

(a) Decommissioning of the wind turbines and associated infrastructure in a manner that complies with all legislative requirements;

(b) Leaving the land in a condition that is safe and suitable for the subsequent land use (as agreed with the landowner); and

(c) Ensuring that the components and infrastructure are disposed of in a way that maximises re-use and recycling. For any parts that cannot be reused or recycled, ensuring that they are not sent to landfill but are disposed of in an environmentally responsible way in accordance with industry best practice.

(109) The Decommissioning Plan shall include but not be limited to:

(a) Details on all infrastructure to be decommissioned, including details, method and location of reuse, recycling or disposal and the reasons why the options have been chosen;

(b) Details of specific infrastructure to remain on-site post-closure and reasons why it will remain on site;

(c) Scheduling and timing for decommissioning;

(d) Details for finished ground cover at completion of decommissioning and future intended land use;

(e) A Transport Plan for the transport of wind turbine components and any other infrastructure off site addressing the matters in Condition 65 (a) – (m);

(f) Details of management, any ongoing maintenance, monitoring and reporting proposed by the consent holder to ensure post-closure activities are carried out in accordance with the conditions of this resource consent.

(110) The Decommissioning Plan shall be prepared in collaboration with Te Korowai o Ngāruahine Trust, Ngāti Tu and Ngāti Manuhiakai, and evidence of this shall be submitted to the Group Manager – Environmental Services, South Taranaki District Council. If hydrogen production associated with the Project is to continue at the Ballance site after the duration of the consent, the Decommissioning Plan shall also include an Alternative Site Plan that is to be prepared in collaboration with Ngāti Tu and Ngāti Manuhiakai. The Alternative Site Plan shall, as a minimum, contain a process to identify an alternative site, or sites, situated coastward of SH45 to locate any replacement wind turbines on.

Review

(111) Pursuant to Sections 128 to 131 of the Resource Management Act 1991, the South Taranaki District Council or the Taranaki Regional Council may, 1 year after the commencement of this resource consent, and at 5 yearly intervals thereafter, serve notice on the consent holder of its intention to review any or all of the conditions of this resource consent for any of the following purposes:

(a) To review the effectiveness of the conditions of this resource consent in avoiding, remedying or mitigating any adverse effects on the environment that may arise from the exercise of this resource consent (in particular, the potential adverse environmental effects in relation to ecology, archaeology, noise, hazardous substances, earthworks, traffic and roading, visual, landscape and amenity effects);

(b) To address any adverse effects on the environment which have arisen as a result of the exercise of this resource consent that were not anticipated at the time of commencement of this resource consent, including addressing any issues arising out of complaints; and

(c) To review the adequacy of, and necessity for, any of the monitoring programmes or management plans that are part of the conditions of this resource consent.