

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CIV-2022-463-000105
[2023] NZHC 3680**

UNDER the Judicial Review Procedure Act 2016 and
Part 30 of the High Court Rules 2016

IN THE MATTER OF an application for judicial review

BETWEEN WHARENUI CLYDE TUNA
Applicant

AND TE UREWERA BOARD
First Respondent

TRUSTEES OF TŪHOE – TE URU
TAUMATUA
Second Respondent

DIRECTOR-GENERAL OF
CONSERVATION
Third Respondent

Hearing: 13 – 14 November 2023

Counsel: WL Aldred, TWR Lynskey and BR Arapere for Applicant
TC Stephens for First and Second Respondents
JR Gough, LH Borthwick and J-EM Sarich for Third Respondent

Judgment: 14 December 2023

JUDGMENT OF DOWNS J

*This judgment was delivered by me on Thursday, 14 December 2023 at 9 am.
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

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The case

[1] It is important to be clear what this case is and is not about. The case is about the lawfulness of decision-making in relation to the demolition of a network of huts in Te Urewera. It is not about the huts' demolition, which the law contemplates.

[2] A summary of what this judgment holds is at [106]–[109].

Background

[3] On 4 June 2013, Ngāi Tūhoe and the Crown signed an historic deed of settlement in relation to the former's claims against the latter.¹ By the deed, Te Urewera would have its own legal personality, rather than being a national park. The deed recognised the injustices suffered by Tūhoe; Te Urewera is Tūhoe's homeland; and Te Urewera is prized by other iwi and hapū, and of great importance to all New Zealanders.

¹ The deed.

[4] To give effect to the deed, Parliament enacted Te Urewera Act 2014.²

[5] Under the Act, the rights, powers, and duties of Te Urewera must be exercised by Te Urewera Board.³ Operational management is the shared responsibility of the Chief Executive⁴ of Tūhoe Te Uru Taumatua⁵ and Director-General of Conservation.⁶ TUT is the entity responsible for administering the deed on behalf of Tūhoe.

[6] Te Urewera had, and has, a network of huts.

[7] The huts were built in the 1950s and managed by the Department of Conservation.⁷ The huts have been used by Tūhoe and public as a base for activities within Te Urewera. Though majestic, Te Urewera is remote and rugged. Many areas can be reached by foot, horse, or helicopter only. Camping is possible, but the weather can turn.

[8] Some huts were biodiversity huts. As the name suggests, these were used by Department personnel for biodiversity work, including trapping predators and monitoring native species. Biodiversity huts were not open to the public.

[9] Under the Act, all of the huts remain vested in the Crown. Put simply, the huts are Crown property. However, as with other Crown infrastructure in Te Urewera, the Act contemplates their demolition; either the Chief Executive or Director-General may demolish the huts in a manner consistent with an annual operational plan.

[10] On 17 May 2022, the Board passed the resolution at the heart of the case. The resolution supported “the decommissioning of all DOC structures and infrastructure from Te Urewera”.⁸ No annual operation plan then existed.

[11] Subsequent events demonstrate the resolution was directed at a majority of huts comprising the network. A single sequence is illustrative. On 11 October 2022, a

² The Act.

³ The Board.

⁴ The Chief Executive.

⁵ TUT.

⁶ The Director-General.

⁷ The Department.

⁸ The resolution.

person on behalf of TUT emailed a member of the Department's staff with the table below. To the extent the last column of the table may require explanation, that can be gained from another table accompanying an earlier email the same day:

Wharua	Equipment	Equip Desc	Technical obj type	Area (m2)	DCOM Decision
Ruataahuna	100065459	Duckville Hut	Basic Hut/bivvy	16	Close and remove
Ruataahuna	100073037	Hanamahihi Hut	Standard Hut	23	Close and remove
Ruataahuna	100031266	Manohou Right Branch Hut	Standard Hut	32	Close and remove
Ruataahuna	100065460	Mangapouri Hut	Standard Hut	19	Close and remove
Ruataahuna	100055145	Ngahiramai Hut	Standard Hut	34	Close and remove
Ruataahuna	None	Old Waiawa Hut	Standard Hut	TBC	Close and remove
Ruataahuna	100031262	Otanetea Hut	Standard Hut	22	Close and remove
Ruataahuna	100065683	Takarua Hut	Standard Hut	12	Close and remove
Ruataahuna	100055143	Tawhiwhi Hut	Standard Hut	68	Temp Kaimahi Accom
Ruataahuna	100033506	Te Totara Hut	Standard Hut	23	TBC Historic
Ruataahuna	100055146	Waiawa Hut	Standard Hut	27	Close and remove
Ruatoki	100065462	Apiti Hut	Standard Hut	22	Close and remove
Ruatoki	100065458	Casino Hut	Basic Hut/bivvy	16	Close and remove
Ruatoki	100097822	Hapenuia Hut	Staff Accom	18	Close and remove
Ruatoki	100065121	MANGAAWAI HUT (EX SADDLE BIVY)	Staff Accom	20	Close and remove
Ruatoki	100042187	Mangamako Hut	Standard Hut	35	Close and remove
Ruatoki	100097830	Ngatamatea Hut	Staff Accom	16	Close and remove
Ruatoki	100031264	Ohane Hut	Standard Hut	22	Close and remove
Ruatoki	100072188	Ohora Hut	Standard Hut	61	Close and remove
Ruatoki	100072732	Onepu Hut	Standard Hut	22	Close and remove
Ruatoki	100072765	PAPANUI HUT	Staff Accom	10	Close and remove
Ruatoki	100031263	Waihua Hut	Standard Hut	16	Close and remove
Ruatoki	100056434	WAIKARE JUNCTION HUT	Standard Hut	28	Temp Kaimahi Accom
Ruatoki	100065118	WAIKOKOPU HUT	Staff Accom	16	Close and remove
Ruatoki	100000773	WAIKOKOPU HUT	Staff Accom	22	Close and remove
Ruatoki	100072480	Wharekahika Hut	Standard Hut	23	Close and remove
Waikaremoana	100055798	Central Waiau Hut	HUT	38	Close and remove
Waikaremoana	100043228	Manuoha Hut	HUT	16	Close and remove
Waikaremoana	100054900	MARAUNUI RANGER BASE	Staff Accom	134	Open and consider
Waikaremoana	100033509	Te Waiotukapiti Hut	HUT	31	Close and remove
Waikaremoana	TBC	Te Wairoa/Rogers Hut	HUT	35	TBC Historic
Waikaremoana	100065705	Whakatakaa Hut	HUT	18	Close and remove
Waikaremoana	100073373	Whanganui Hut	Great Walk Hut	60	Close and remove
Waikaremoana	100073082	Sandy Bay Hut	Serviced Hut	65	Open and consider
Waikaremoana	100035208	Panekire Hut	Great Walk Hut	135	Open and consider
Waikaremoana	100055336	Waiopaoa Hut	Great Walk Hut	90	Open and consider
Waikaremoana	100043530	Waiharuru Hut	Great Walk Hut	160	Open and consider
Waikaremoana	100033502	Marauiti Hut	Great Walk Hut	98	Open and consider
Waimana	100072187	Makomako Hut	Standard Hut	19	Close and remove

Waimana	100065463	#Tataweka Hut	Basic Hut/bivvy	19	TBC Historic
Waimana	100097824	Kaharoa Hut	Staff Accom	12	Close and remove
Waimana	100056032	Koahunui Hut	Standard Hut	57	Close and remove
Waimana	100042282	Makakoere Hut	Standard Hut	22	Close and remove
Waimana	100065461	Mangatoatoa Hut	Standard Hut	22	Close and remove
Waimana	100097827	Mosen's hut	Staff Accom	10	Close and remove
Waimana	100065662	OTAMATUNA HUT	Staff Accom	43.6	Close and remove
Waimana	100043342	Otane Hut	Basic Hut/bivvy	22	Close and remove
Waimana	100065464	Otapukawa Hut	Standard Hut	19	Close and remove
Waimana	100039861	PAKOAKOA HUT	Staff Accom	10.8	Close and remove
Waimana	100043343	Taurawharona Hut	Standard Hut	23	Close and remove
Waimana	100073360	Te Panaa Hut	Standard Hut	38	Close and remove
Waimana	100072737	Te Pourewa Hut	Standard Hut	24	Close and remove
Waimana	100065465	Te Pua Hut	Standard Hut	23	Close and remove
Waimana	100075617	Te Rangaakapua Hut	Basic Hut/bivvy	15	Close and remove

Explanatory table:

Decision	Meaning of decision
Close and remove	Means exactly that
Temp Kaimahi Accom	Means that the public hut will be removed and an on site replacement 'Kaimahi operations hut' will be situated. No public use.
TBC Historic	Means that we are still understanding what the "Historic" value is of this hut but very likely want it removed. Removed as a whole if someone wants it and pays for that exercise.
Open and consider	Means open to public and maintained to a safe and functional standard, but still under consideration with regards to Re Design.

[12] In summary, 43 of the 54 huts were marked for demolition without replacement; two were marked for demolition with replacement by temporary accommodation (not intended for public use); three were marked as "very likely" to be demolished, subject to historical significance; and six were to remain.

[13] In October 2022, TUT announced it would demolish the huts. On 12 October 2022, TUT circulated an email directed at hunters, foreshadowing demolition. The message noted "While there won't be any huts, camping is encouraged. You are very much invited to continue your enjoyment of Te Urewera".

TUT began demolishing the huts that month by burning them to the ground (after removal of some items).

[14] The narrative thus far has introduced the parties to the case, save Wharenuī Tuna. Mr Tuna is Ngāi Tūhoe, of Te Whakatāne hapū. Mr Tuna was, and remains, concerned about the huts' demolition.

[15] On 31 October 2022, Mr Tuna wrote to the Department. He requested a copy of the annual operational plan. On 3 November 2022, the Department replied:

We are unable to provide a copy of the current operational plan for Te Urewera that meets the criteria you specified because, for the 2022-2023 year, DOC and TUT have not worked together on a draft annual operational plan for the Board's consideration.

However, DOC is working in support of TUT and its vision for the future, which includes decommissioning of huts and the replacement with some new, fit-for-purpose structures.

[16] It follows the huts' demolition also occurred in the absence of an annual operation plan. As with the preceding (2021/2022) year, the relationship between the Department, TUT and Board was strained, and no annual operational plan agreed. Tamati Kruger, the Board's chair, says this had nothing to do with the huts' demolition; rather, it reflected the Department's "passive aggressive" behaviour and mistaken view of its authority.

[17] On 5 November 2022, Mr Tuna filed a claim for judicial review of the decision-making in relation to the huts' demolition. Mr Tuna also applied for interim relief, so demolition was halted by the Court until his case was determined.

[18] On 8 November 2022, Woolford J granted Mr Tuna that relief.⁹ Woolford J also directed TUT compile a list of the huts it had demolished.¹⁰ The next day, TUT advised 29 huts had been demolished. On 20 December 2022, the Chief Executive filed an affirmation recording that to the best of her knowledge, the Board and TUT had complied with the Court's orders.

⁹ *Tuna v Te Urewera Board* [2022] NZHC 2924.

¹⁰ At [35].

[19] It is now clear no fewer than 10 additional huts have been demolished. All had been marked for demolition, or likely demolition. The Board and TUT deny responsibility for the demolition of the additional huts and have offered their cooperation in any Police investigation. I was told the demolition of additional huts has been referred to Police. Three further matters deserve mention, as background.

[20] First, on 24 August 2023, the Director-General advised Mr Tuna of the existence of a “retrospective” annual operational plan for 2022–2023, that is, for the year ending 30 June 2023:

The Crown considers it is relevant to update your client, prior to the filing of its evidence, that the annual operational plan for the main period in question (2022-2023) was retrospectively accepted by Te Urewera Board by motion dated 9 May 2023, subject to endorsement of the plan by the Department of Conservation, as required by Clause 24 of Schedule 2 of Te Urewera Act. The Department subsequently endorsed the plan on 11 July 2023. A copy of the annual operational plan is attached.

We therefore consider that the Crown has now fulfilled its obligations under Te Urewera Act in relation to the preparation of an annual operational plan for the 2022-2023 year.

[21] As is apparent from the correspondence, the retrospective plan was endorsed by the Department on 11 July 2023, 376 days after the applicable year began.

[22] Second, the Crown supported the Board’s decision to demolish the huts. From early 2022, the Chair of the Board and Director-General discussed the huts’ demolition as part of a project to redesign the way people experience Te Urewera. On 11 October 2022, the Department received the table, discussed earlier, which identified most of the huts were to be demolished. Minutes of a Board meeting on 18 September 2022 record:

Minister Poto Williams will acknowledge mistakes and offences by her department that led to serious relationship difficulties with Tūhoe. She [is] to signal DOC support for the decommissioning and redesign priorities and acceptance of Tūhoe leadership position in all matters for Te Urewera. Her statements are cabinet approved and will be the basis of a media release to follow.

[23] Third, a petition contesting the huts’ demolition has attracted more than 12,000 signatures.

The Act: a brief overview

[24] Sections 3, 4, 5 and 6 are foundational, and warrant reproduction in full:

3 Background to this Act

Te Urewera

- (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.
- (2) Te Urewera is a place of spiritual value, with its own mana and mauri.
- (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

Te Urewera and Tūhoe

- (4) For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe.
- (5) For Tūhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland.
- (6) Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera.

Te Urewera and all New Zealanders

- (7) Te Urewera is prized by other iwi and hapū who have acknowledged special associations with, and customary interests in, parts of Te Urewera.
- (8) Te Urewera is also prized by all New Zealanders as a place of outstanding national value and intrinsic worth; it is treasured by all for the distinctive natural values of its vast and rugged primeval forest, and for the integrity of those values; for its indigenous ecological systems and biodiversity, its historical and cultural heritage, its scientific importance, and as a place for outdoor recreation and spiritual reflection.

Tūhoe and the Crown: shared views and intentions

- (9) Tūhoe and the Crown share the view that Te Urewera should have legal recognition in its own right, with the responsibilities for its care and conservation set out in the law of New Zealand. To this end, Tūhoe and the Crown have together taken a unique approach, as set out in this Act, to protecting Te Urewera in a way that reflects New Zealand's culture and values.

- (10) The Crown and Tūhoe intend this Act to contribute to resolving the grief of Tūhoe and to strengthening and maintaining the connection between Tūhoe and Te Urewera.

4 Purpose of this Act

The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—

- (a) strengthen and maintain the connection between Tūhoe and Te Urewera; and
- (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and
- (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.

5 Principles for implementing this Act

- (1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—
- (a) Te Urewera is preserved in its natural state:
 - (b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated:
 - (c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected:
 - (d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected:
 - (e) the historical and cultural heritage of Te Urewera is preserved:
 - (f) the value of Te Urewera for soil, water, and forest conservation is maintained:
 - (g) the contribution that Te Urewera can make to conservation nationally is recognised.
- (2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

6 Interpretation generally

It is the intention of Parliament that the provisions of this Act are interpreted in a manner that best furthers the agreements expressed in the deed of settlement.

[25] As observed earlier, the rights, powers, and duties of Te Urewera must be exercised by the Board (in the manner provided for by the Act).¹¹ The Board currently has nine members, six of whom are appointed by the trustees of TUT, and three by the Minister of Conservation.¹²

[26] The Board may consider, and give expression to, Tūhoetanga and Tūhoe concepts of management.¹³ The Board must consider, and provide appropriately for, the relationship of iwi and hapū and their culture and traditions with Te Urewera when making decisions.¹⁴

[27] The Chief Executive and Director-General are responsible for the operational management of Te Urewera.¹⁵ They must prepare an annual operational plan for the operational management of Te Urewera,¹⁶ and present that plan to the Board for acceptance.¹⁷

A précis of the claim

[28] Mr Tuna contends:

- (a) In resolving to demolish the huts, the Board failed to give effect to s 5 of the Act, and thereby acted unlawfully.
- (b) The Board and TUT had a duty to consult hapū and the public before making the resolution, did not consult either and therefore acted unlawfully.

¹¹ Te Urewera Act, s 11(2).

¹² This composition applies from the third anniversary of the settlement date: Te Urewera Act, s 21(2).

¹³ Te Urewera Act, s 18(2)

¹⁴ Section 20(1).

¹⁵ Section 50.

¹⁶ Section 53.

¹⁷ Schedule 2, cl 24.

- (c) TUT acted unlawfully by demolishing the huts:
 - (i) In reliance on an unlawful resolution of the Board.
 - (ii) Without the annual operational plan.
- (d) In demolishing the huts, TUT failed to give effect to s 5 of the Act and therefore acted unlawfully.
- (e) The Crown acted unlawfully in failing to prepare an annual operational plan for the years 2021/2022 and 2022/2023; and by supporting the huts' demolition absent the annual operational plan.
- (f) The Board and Crown acted unlawfully by purporting to adopt a retrospective annual operational plan authorising the huts' demolition.

[29] The absence of an annual operational plan unites (c)(ii), (e) and (f). I address these contentions first, then return to the earlier contentions.

The effect of the absence of an annual operational plan

[30] The obvious starting point is s 50(2)(d) of the Act, which provides “the operational management of Te Urewera *must* be in accordance with the annual operational plan”.¹⁸

[31] The next provision of significance is s 53, which reads:

53 Annual operational plan

- (1) Each year the chief executive and the Director-General must prepare an annual operational plan for the operational management of Te Urewera in the following year.
- (2) The operational plan must—
 - (a) reflect the purpose of this Act; and
 - (b) as far as practicable, implement the management plan; and

¹⁸ Emphasis added.

- (c) as far as practicable, implement the Board’s statement of priorities for the relevant year; and
 - (d) identify the funding for the management of Te Urewera for the relevant year that is available from—
 - (i) the chief executive; and
 - (ii) the Director-General; and
 - (e) describe the management activities that are planned for Te Urewera, including—
 - (i) capital and operational projects; and
 - (ii) policy and planning projects; and
 - (iii) projects spanning more than 1 financial year; and
 - (iv) restoration and maintenance activities; and
 - (v) contracts for management activities; and
 - (vi) the processing of applications for concessions and activity permits; and
 - (vii) the monitoring of activities undertaken under activity permits and concessions; and
 - (f) identify the responsibility of the chief executive and the Director-General for particular management activities; and
 - (g) identify opportunities for members of Tūhoe to carry out or participate in management activities; and
 - (h) identify priorities and actions for building Tūhoe capability to undertake operational management in Te Urewera; and
 - (i) include any other information relevant to the operational management of Te Urewera.
- (3) The annual operational plan may refer to funding that extends over more than 1 year.
 - (4) The nature and extent of funding referred to in subsection (2)(d) is solely at the discretion of the body or person providing that funding.
 - (5) Implementation of the matters identified under subsection (2)(b), (c), and (e) is required only to the extent that funding and other resources make that practicable.

[32] As will be evident, s 53(1) requires the Chief Executive and Director-General to prepare an annual operational plan “for the operational management of Te Urewera in the following year”. The phrase—“in the following year”—suggests the plan must

be prepared before the year begins to which it relates. This accords ordinary usage of the term “plan”, which by definition, concerns future events. It also accords clause 24 of schedule 2 to the Act, which reads:

24 Process for preparation

- (1) Each year the chief executive and the Director-General must present a draft annual operational plan (**draft plan**) to the Board before the beginning of the year to which the plan relates.
- (2) The Board must consider the draft plan and determine whether it is consistent with the management plan and statement of priorities.
- (3) The Board may—
 - (a) accept the draft plan in part or as a whole as being consistent with the management plan and statement of priorities; or
 - (b) reject the draft plan in its entirety.
- (4) The Board must notify the chief executive and the Director-General in writing of its decision as soon as practicable after receiving the draft plan and, in the event that it—
 - (a) accepts part of the draft plan only, it must—
 - (i) advise which parts of the draft plan are accepted; and
 - (ii) refer those parts that are not accepted to the chief executive and the Director-General for further consideration; and
 - (iii) meet with the chief executive and the Director-General to discuss the Board’s decision:
 - (b) rejects the plan in its entirety, take the steps set out in paragraph (a)(i) to (iii).
- (5) The Board, the chief executive, and the Director-General must, in good faith, seek to resolve any disagreement over the draft plan, with the intention to make the whole plan acceptable to the Board as soon as is reasonably possible.
- (6) From the commencement of the relevant year,—
 - (a) the chief executive and the Director-General—
 - (i) must undertake management activities in accordance with the accepted parts of the draft plan; and
 - (ii) may, in an emergency, undertake other management activities they consider necessary for the safety of Te Urewera or any person in Te Urewera; but

- (b) each retains discretion over the use of their respective funds to implement the annual operational plan.
- (7) At the end of each year, the chief executive and the Director-General must report to the Board on the implementation of the operational plan for that year.

[33] Notably, clause 24(1) requires the Chief Executive and Director-General to present a draft operational plan—or draft plan—to the Board “before the beginning of the year to which the plan relates”. The Board must consider the draft plan and determine whether it is consistent with its management plan (and stated priorities).

[34] Clause 24 recognises the possibility disagreement may remain over the draft plan even though the year to which it relates has begun. Hence, clause 24(6) provides:

- (6) From the commencement of the relevant year,—
 - (a) the chief executive and the Director-General—
 - (i) must undertake management activities in accordance with the accepted parts of the draft plan; and
 - (ii) may, in an emergency, undertake other management activities they consider necessary for the safety of Te Urewera or any person in Te Urewera; but
 - (b) each retains discretion over the use of their respective funds to implement the annual operational plan.

[35] However, clause 24 does not contemplate a wholly retrospective annual operation plan, meaning a plan agreed after the expiry of the year to which it related. This is apparent from the opening language of clause 24(6)—“From the commencement of the relevant year”; from clause 24(6)(a), which contemplates only management activities in accordance with the accepted parts of the plan and emergency management activities; from clause 24(6)(b), which maintains discretionary use of funds “to implement the annual operation plan”; and from clause 24(7), which contemplates a report to the Board, at “the end of each year ... on the implementation of the operational plan for *that* year”.¹⁹

¹⁹ Emphasis added.

[36] This view is consistent with s 50(2)(d), which requires the management of Te Urewera to be in accordance with the annual operational plan, rather than a draft plan, and bedrock notions of probity in relation to the expenditure of public money, which typically involve this or an analogous cycle:

- (a) An organisation prepares a plan for the period to come.
- (b) The plan is approved.
- (c) Funding is provided according to the plan as the period unfolds.
- (d) At the end of the period, the organisation reports how funding has been used.

[37] Section 56(c) of the Act also points against a wholly retrospective annual operational plan. In context, s 56(c) reads:

56 Activities for which no authorisation required

The following classes of activity may be undertaken in Te Urewera without authorisation:

- (a) a cultural, recreational, or educational activity that—
 - (i) is undertaken by an individual or group without any specific gain or reward for that activity, whether pecuniary or otherwise (other than a reasonable charge to recover the reasonable expenses of organising the activity); and
 - (ii) otherwise complies with this Act:
- (b) a mining activity that is authorised under the Crown Minerals Act 1991:
- (c) an activity carried out by or on behalf of the Board, the chief executive, or the Director-General in relation to the management of Te Urewera under this Act, the management plan, and the annual operational plan:
- (d) an activity that is necessary to—
 - (i) save or protect human life or health; or
 - (ii) prevent serious damage to property; or

- (iii) avoid an actual or likely adverse effect on the environment within Te Urewera.

[38] Unsurprisingly, an activity carried out “under ... the annual operational plan” does not require further authorisation; by s 56(c), the annual operational plan *is* authorisation for the activity.

[39] The remaining provision of significance is s 95(1) of the Act, which reads:

95 Ownership of improvements

(1) Crown improvements—

- (a) remain vested in the Crown; and
 - (b) may be used, occupied, accessed, maintained, removed, or demolished by the chief executive or the Director-General in a manner that is consistent with—
 - (i) the management plan; and
 - (ii) the annual operational plan for Te Urewera.
- (2) Subsection (1)(b) applies only to the extent that the use, occupation, access, maintenance, removal, or demolition of the improvements is not inconsistent with—
- (a) the terms of an existing interest (within the meaning of section 92(1)); or
 - (b) any existing grant by the Crown to a third party for the use of the improvements.
- (3) Other improvements attached to the establishment land that are not governed by an existing interest (within the meaning of section 92(1)) are vested in—
- (a) the person or body that attached the improvement to the land; or
 - (b) if that person or body no longer exists or no longer has an interest in the improvement, the person or body who would have had ownership rights to the improvement immediately before the vesting, as if the improvement were personal property.

[40] The huts constitute Crown improvements within s 95(1). So, their demolition, which is expressly contemplated, must, according to s 95(1)(b), “be in a manner consistent with the annual operation plan for Te Urewera”. Again, as with ss 50(2)(b) and 56(c), s 95(1)(b) refers to the annual operational plan, not a draft plan. Indeed, clause 24 is the only provision in the Act to refer to a draft annual operational plan.

[41] As will be recalled, no annual operational plan existed for the 2021/2022 year, when the Board resolved to demolish the huts. No annual operational existed for the 2022/2023 year either, when TUT demolished the huts.

[42] All this means TUT acted unlawfully in demolishing the huts. In fairness, TUT does not argue otherwise. It offers a responsible concession it acted unlawfully by demolishing the huts without an annual operational plan, though TUT does contest relief.

[43] The Crown offers no such concession. It contends the absence of an annual operational plan is “a relatively technical matter”.²⁰ The Crown contrasts an annual operational plan with the management plan prepared by the Board, noting the latter, unlike the former, does not expire.²¹

[44] The Crown also emphasises the importance of the relationship between it and Tūhoe. It notes both parties wanted to demolish the huts. This, it says, weighs heavily against the absence of the annual operational plan having legal significance, especially given the parties’ hitherto fraught relationship, both historically and more recently.

[45] Finally, the Crown contends an adverse determination would pose a significant practical problem for Te Urewera, as without the annual operational plan, “operational activities could not continue”.

[46] The last argument is addressed by clause 24, especially subclause (6), as to which see [33]–[35], and s 56(d). By the latter, activity to save or protect human life; to prevent serious damage to property; or to avoid an actual or likely adverse environmental effect; may be carried out without authorisation, that is, without an annual operational plan.

[47] The Crown’s first argument does not advance its position; that the management plan is different is not informative of the issue to be determined. The Crown’s second argument treats the terms of the Act as unimportant, even though the Act gives effect

²⁰ Crown submissions para 71.

²¹ By s 48(1), the management plan must be reviewed within 10 years.

to the deed and uses much of its language. In this respect, the argument fails to acknowledge s 6, which provides:

Interpretation generally

It is the intention of Parliament that the provisions of this Act are interpreted in a manner that best furthers the agreements expressed in the deed of settlement.

[48] The short point is fourfold. First, the Act requires an annual operation plan for the operational management of Te Urewera. Second, the Act requires the operational management of Te Urewera to be in accordance with the annual operational plan, including demolition of Crown improvements. Third, in each respect, the Act mirrors, and gives effect to, the deed. Fourth, no annual operational plan existed when the Board resolved to demolish a majority of the huts, or when TUT demolished the huts in consequence of that resolution.

[49] It follows I accept Ms Aldred's submission on behalf of Mr Tuna that:

- (a) TUT acted unlawfully by demolishing the huts without an annual operational plan.
- (b) The Crown acted unlawfully by failing to prepare an annual operational plan for the years 2021/2022 and 2022/2023, and by supporting the huts' demolition without an annual operational plan.
- (c) The Board and Crown acted unlawfully by purporting to adopt a retrospective annual operational plan authorising the huts' demolition.²² Indeed, the Crown's adoption of a wholly retrospective annual operational plan is a striking example of reviewable error.

In resolving to demolish the huts, did the Board act contrary to s 5 of the Act?

[50] Mr Tuna contends that by passing the resolution, the Board failed to act in accordance with the principles in s 5 of the Act (see [24]). In her written submissions

²² This conclusion makes it unnecessary to address Ms Aldred's submission that the retrospective annual operational plan was unlawful as it omitted the schedule identifying the huts concerned.

on behalf of Mr Tuna, and at the hearing, Ms Aldred focused attention on s 5(1)(b), s 5(1)(c), and s 5(2). I call these the ecological, Tūhoetanga, and public access contentions. These are convenient labels, not more.

The ecological contention: s 5(1)(b)

[51] All persons performing functions under the Act must act so, as far as possible, the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals exterminated. The ecological contention is that the resolution imperils the ecology of Te Urewera, as all but two of the biodiversity huts were to be, and have been demolished, with no plans for or steps toward their replacement, and no strategy in their absence to protect native species and eradicate pests.

[52] This aspect of Mr Tuna's claim has a procedural objection that requires determination. The Board's objection concerns these paragraphs in the statement of claim and associated evidence of Annette Assen:²³

39. None of the biodiversity huts that have been burned down have been replaced with facilities to provide bases for conservation work. The first and second respondents have taken no steps to plan their replacement to ensure that conservation work and the extermination of predators can continue.
40. The actions of the second respondent in burning down the biodiversity huts has resulted in a lack of accommodation for conservation workers, which is inimical to the preservation of taonga species within Te Urewera and the extermination of pests:

Particulars:

- 40.1. On or about 31 July 2023 the second respondent by its employee or agent terminated the contract of Ms Annette Assen, a contractor previously engaged to trap possums, citing the lack of accommodation (due to burning of the biodiversity huts).

[53] The Board contends these paragraphs prejudice it because they were not in earlier statements of claim, and it did not appreciate Mr Tuna was advancing them until the final statement of claim, which was filed shortly before the hearing. On behalf of the Board, Mr Stephens argued it would have responded with evidence

²³ TUT offers an identical objection.

had the Board known these points were advanced. Consequently, the Board objects to Mr Tuna pursuing these paragraphs and to the admission of the evidence of Ms Assen, which was filed and served 31 August 2023.²⁴ Mr Stephens argues the ecological contention should be assessed without reference to these aspects.

[54] History is instructive in assessing the objection.

[55] An earlier statement of claim pleaded the existence of biodiversity huts:

Some of the huts (including Papanui, Mosens, Otamatuna and Pakoakoa huts) are “biodiversity huts”, being huts that are not used by the public but are located around core conservation areas. They are used to provide accommodation and a base for conservation personnel for biodiversity work, including trapping predators and monitoring rare taonga species, including, but not limited to kōkako, kiwi, kaka, whio and mistletoe.

The earlier statement of claim identified at least three biodiversity huts had been demolished, and at least two other such huts were listed to be demolished. That claim also pleaded the Board had failed to act in accordance with the principles in s 5.

[56] Mr Tuna’s evidence in support of interim relief contained these passages:

Loss of huts will mean loss of biodiversity

I am also aware that some huts to be removed serve to provide accommodation for biodiversity management projects in the Waimana valley. These huts are critical for pest control operations and monitoring of rare species such as kiwi, kōkako, whio and kaka. These species are taonga for Tūhoe and it distresses me that there is no plan that I have been made aware of to replace the huts that provide this support.

These rare species are an important part of Te Urewera and must be protected as far as possible.

Part of my sense of Tūhoetana and connection with Te Urewera comes from their very presence and knowing that they are being protected as far as possible.

Knowing that these species are vulnerable affects my Tūhoetana and my wairua.

[57] In support of interim relief, Mr Tuna adduced an affidavit from Peter Shaw, a former conservation officer. Mr Shaw said:

²⁴ Lang J directed the issue be resolved at trial; Minute dated 20 September 2023 at [2].

Biodiversity concerns

My major concern as a conservationist, however, is that the biodiversity of Te Urewera may be adversely affected by the removal of what are called “biodiversity huts”. This refers to huts that are used by conservation personnel as a base for biodiversity work, including trapping predators and monitoring rare taonga species, including, but not limited to kōkako, kiwi, kaka, whio and mistletoe. These huts are not open to general public and are often locked. They were put in place as part of the extensive Te Urewera Mainland Island project. Initially this project area covered 50,000ha, but due to budget cuts it was scaled-back to 20,000ha. This project took a rapidly declining kōkako population and turned it around to be the largest, most rapidly recovering, most genetically diverse and most song diverse population in the country. The kōkako were just a keystone species and the forest as a whole was recuperating after years of predation and browsing by possums, rats and mustelids.

The huts included in the list of huts to be “closed and removed” that are biodiversity huts are: Papanui, Mosens, Otamatuna and Pakoakoa. These huts were located around what were termed “Core Areas”. What was found in the early 1990s was that a lot of the kōkako had gone from Te Urewera and that those that were left were clustered in a few hotspots of biodiversity. At this same time the cause of the decline of many of our bird species, including kōkako, was clarified and possums were found to be one of the main agents for this decline. If possums, mustelids and rats could be controlled then a range of threatened species could be restored. The ambitious plan developed was to first identify where these hotspots were and then to build infrastructure so that intensive possum, mustelid and rat control could be achieved and an excess of rare species could be produced. These “Core Areas” were surrounded by a “Background Area” of intensive possum control over 20,000ha. If the species spilled out into the Background Areas they would be able to repopulate them.

Following intensive species monitoring it was shown that it worked and at the time of handover to Te Uru Taumatua, the whole of the 20,000ha was well on-track to be filled with species not seen there for decades. The biodiversity huts were a key element in the infrastructure required to achieve this conservation outcome.

With these biodiversity huts removed the infrastructure to maintain the huge conservation gains achieved prior to hand-back are removed. I am not aware of any plans to replace these facilities to enable this important work to continue.

[58] Woolford J cited Mr Shaw’s evidence when granting interim relief:²⁵

A conservationist and former manager of the Te Urewera Mainland Island project from 1996 to 2002, Peter Geoffrey Shaw, is concerned about biodiversity risks of destroying the remainder of the huts as well as the reduction of public access that will inevitably result. He specifically refers to the effect that removal of the huts used for accommodation of conservation staff as a base for the trapping of predators in core areas will have on endangered species, particularly the kōkako population of Te Urewera.

²⁵ *Tuna v Te Urewera Board*, above n 9, at [22].

[59] Mr Tuna later filed evidence from James Barsdell, another former conservation officer. Mr Barsdell says this in his affidavit of 26 July 2023, which was served on or about 4 August 2023:

Loss of biodiversity huts

Several of the huts that were burnt after the injunction was established were biodiversity huts in the Waimana Valley, all of which had been tagged for burning by TUT in prior correspondence, and all of which played a central role in enabling biodiversity work in Te Urewera both pre and post settlement. These huts were Otamatuna, Omahuru, Mosen's and Pakoakoa.

Illegal burning of these huts was personally very hurtful given how much I care about the health of the Te Urewera nahere and the 10+ years of my life I gave to working in this area to establish revitalisation of Te Urewera's indigenous species.

In my time working for DOC, a number of our workforce were local Tūhoe and we worked with the community to deliver operations. Local Tūhoe supported our work including many Kaumātua and Kuia.

Our operations were extremely successful in bringing back kokako from the brink of local extinction to the point where after 10 years of intensive work, kokako from Te Urewera were able to be translocated to other rohe to support national kokako recovery.

The translocations were completed with the blessing and involvement of local Tūhoe whanau.

Now however, I am informed on good authority that pest control is sporadic and kokako monitoring stopped about 6 years ago.

I keep asking myself "Now the huts are burnt and TUT wants DOC out of Te Urewera, what does this mean for our nahere? Will one day we be like some other unfortunate iwi who are lamenting the impoverished state of their nahere and seeking the ability to translocate lost species back to their nahere?" That is a situation we are heading for if things don't change.

We don't have time on our side, we need to act now. Re-establishment of worker hut accommodation in the Waimana Valley and reinvestment in kokako recovery (which benefits the entire ecosystem) needs to happen now.

[60] It follows the Board has long known, or ought to have known, Mr Tuna was advancing an ecological contention founded on the resolution to demolish a majority of the biodiversity huts, albeit against the backdrop of an admittedly broad pleading in relation to s 5. Furthermore, while the most recent statement of claim was filed and served only shortly before the hearing, Ms Assen's evidence, on which the objected paragraphs are based, was served on the Board on 31 August 2023, 10 full weeks beforehand. That gave the Board sufficient time to respond to Ms Assen's evidence

with evidence of its own, or at the very least, to seek an adjournment citing prejudice. The Board did neither.

[61] Two other points should also be made. First, the Board has not offered any evidence in response to the evidence offered by or on behalf of Mr Tuna in relation to the ecological contention.²⁶ It is therefore difficult to accept the Board's contention that but for more time, it would have responded to Ms Assen's evidence (and associated pleading). Second, and as will be apparent, Ms Assen's evidence buttresses the ecological contention rather than raising anything new.

[62] As to Ms Assen, she is a pest control contractor who has worked in Te Urewera for 14 years (until 31 July 2023). Ms Assen says she was told TUT could not continue to engage her services because of insufficient accommodation within Te Urewera, now most of the biodiversity huts are gone. Ms Assen says:

Species affected by removal of the huts

26. All species will be affected by the decision to remove the huts.
27. I have worked the same blocks for a long time, and I walk in circles on the same lines. I have come to know where the family groups for each species and the individuals live, and I have roughly worked out their territories. These species are:
 - 27.1. Small birds: tītītipounamu/rifleman, riroriro/warbler, miromiro/tomtit, toutouwai/robin, pōpokotea/whitehead;
 - 27.2. Medium birds: tui, korimako/bellbird, kākārīki, pipiwharau/roa/shining cuckoo; and
 - 27.3. Large birds: koekoea/long tailed cuckoo, kaka, kōkako, kereru, ruru/morepork and kiwi.
28. I can tell when no rat control has been done, because in one or two seasons there is an immediate, noticeable decline in the presence of small birds. Sadly, I have observed this in the Mangaone block. With no possum control, I have also noticed a decline in the bigger birds. In spring the morning chorus used to be so loud it woke you up, now it is very thin and sparse.

²⁶ It relies on these two paragraphs from Louise Luke, the chief executive officer for TUT:
Te Uru Taumatua conducts the biodiversity operations in Te Urewera and I am confident the removal of the huts and the planned replacements will not compromise the ability to undertake that work. I do not believe the assertions from the witnesses for the applicant are informed or accurate in relation to these matters.

29. Lack of possum control also affects the foliage density dramatically. When I started work in the Mangaone block, you could see 30 to 40 metres through the bush. Now you can stop at any point and see 80 plus metres in any direction. That has only happened since possum control stopped. Possums eat the seedlings and thin out the trees. This has coincided with pigs becoming more prevalent too, and they muddy up the ground where previously there was ground cover.
30. Since possum control stopped and rat control was reduced a whole flock of pōpokotea/whitehead has disappeared. Tītītipounamu/rifleman were always scarce, usually existing in very small groups of 3 or 4, but even still, I now only see a single bird at a time and it is rare to see one. I see kaka nesting yearly (they always nest in the same tree) but they have not fledged within the last 5 years.
31. There also used to be a small flock of kākārīki (perhaps 5 or 6), but now there are none. I have not heard a kiwi call for about two years. In the past, because I would sometimes walk back to the hut in the dark (especially in winter with shorter days) I would often hear them, and I was aware there used to be one near Mangaone hut. He was a male, and in the occasional year a female would join him.
32. Hunters bring their dogs into this block (previously dogs were not allowed at all) and I am sure this has also contributed to the kiwi's decline. Over the years I have told various people at TUT about this decline. I have expressed my concern with the different bosses I have had, with the chief executive and with a board member. They listen, but nothing changes (except less pest control).

TUT's decision

33. The removal of the huts is very upsetting. The result is that we are going to end up with a skeleton bush overridden with pests and very, very few birds left. They might decide to do a 1080 drop, but it could well be too late because you need a certain population in order for them to bounce back. It is actually quite an urgent situation because pests take over quickly. Core areas might be trapped, but you need to do surrounding areas too or your traps will not keep up - it goes backward very fast in my experience,
34. I understood why TUT wanted a clean slate, and to have the Government footprint out. I understand it is sacred land, and some of the sites the huts were situated on were tapu and should not have been there. I am also aware that getting Te Urewera back, and starting with a clean slate, was very special for the elders.
35. That all makes perfect sense, but the way they went about it was problematic. They said they were going to replace the huts, but that has to be done in a timely fashion so that you can stay on top of pest control. I do not understand why TUT did not either modify the existing structures to fit its vision, or decommission/replace the huts one at a time so that conservation work could continue.

The Tūhoetanga contention: s 5(1)(c)

[63] All persons performing functions under the Act must act so, as far as possible, that Tūhoetanga, which gives expression to Te Urewera, is valued and respected. Tūhoetanga is not defined in the Act, presumably because the concept defies precise definition. The concept acknowledges the deep-seated connection between Tūhoe and Te Urewera, a connection supported by, but transcending, the physical realm.

[64] Mr Tuna says:

Connecting with Te Urewera strengthens our sense of Tūhoetana. Connecting with the whenua, the nahere, feeling the essence of Te Urewera's being gives a profound sense of connectedness to our whakapapa, our history, our identity. Tūhoetana for me is a lot of things, but connecting physically with Te Urewera brings a huge sense of Tūhoetana to my life. I know that the majority of my whānau, hapū and iwi feel the same.

Having the huts enables this connection and we all use the huts as part of our everyday lives.

The huts are important bases for us in our hunting practices where we gather kai to feed our whānau, hapū and manuhiri.

Knowing that the huts are there gives us the function to connect with Te Urewera, to stay in Te Urewera, to spend time and reflect. Giving us the opportunity to take our tamariki into Te Urewera to transfer inter-generational knowledge. To encourage our tamariki to make that same connection and appreciate their whakapapa and history.

Taking away the huts undermines my connection, and it is the same for a number of my whānau, hapū and iwi.

Without the huts we are less able to connect with Te Urewera. Camping is significantly more difficult than staying in huts. When staying in a hut, all I need to carry is my food and basic gear. Without huts, I am less able to traverse Te Urewera, because my pack is heavier and I am less able to shelter from the severe weather that can be encountered. Without the hut network, I am less likely to come to know her extent and fullness. Her grandness and vastness. I am more disconnected.

[65] Mr Barsdell, who is also Ngāi Tūhoe, says:

From a young age, I have loved going into Te Urewera to stay in the huts, as a base for hunting and travelling from one end of Te Urewera to the other. In more recent years, the huts have been important facilities to enable whānau hikoi and trips to places of historic significance, such as pā (settlements) and battle sites.

On many of these trips I have taken my children, nieces and nephews, and extended whānau, where the huts have been a key enabler for these expeditions.

It is important to me to transfer knowledge to the next generation and instil in them a connection with Te Urewera by spending time together traversing and becoming familiar with the landscape.

[66] Paki Nikora was a member of Te Kaunihera Kaumātua o Tūhoe (Council of Tūhoe Elders) before he died. Mr Nikora swore an affidavit, in which he said:

History / Pūrākau

I have a profound connection to these huts. I spent 20 years in Te Urewera in my younger days (throughout the 1970s, 80s and 90s) and it was a real blessing to have those huts. I absolutely loved the bush, and I lived in many of the huts down near the Ruatoki Valley, and from Maungapohatu down to the Waimana Valley, as well as 2 huts at Waikaremoana. I went hunting every weekend, and the only way to describe Te Urewera is to say it is another world. The huts give you access to that special place. How do you replace these memories once the huts are gone? We took kids up there and they still talk about it today. If you are going to do something so drastic that affects so many people's connection with the land, surely you get buy in from your own people about doing it, and about what you are going to replace them with.

I know that many people cherish these huts. TUT makes it sound like they are a hangover of colonialism, but they have been there 50 plus years. The huts have been there for so long, they are Te Urewera. They create a spiritual, cultural and traditional connection between Te Urewera and Tūhoe, and between Te Urewera and the wider public.

The huts belong to the public. How can they be destroyed without any strategy planning, feasibility or consultation so that people can express their views?

We also have no idea how long it will be before TUT come up with their replacements, because it has not told us any of that. We have no idea how we feed into the design of those replacements. From what we have seen from TUT, I expect we will not feed in at all. It is their way or the highway. This has been our consistent experience post-settlement.

[67] Mr Tuna acknowledges the Board has said it proposes to replace the huts with modern structures reflecting "Te Urewera and Tūhoetana". However, Mr Tuna emphasises the absence of an associated plan, and the immediate, ongoing harm to the connection envisaged by s 5(1)(c) by inability to use the demolished huts, which comprised a majority of the network.

The public access contention: s 5(2)

[68] Section 5(2) says all persons performing functions under the Act must act so the public has freedom of entry and access to Te Urewera, subject to any conditions necessary to achieve the purpose of the Act or public safety. Mr Tuna contends the resolution has also imperilled public access to Te Urewera (rather than entry), as the huts are critical to *meaningful* access given location, topography, and climate. Again, Mr Tuna emphasises the absence of any plan or steps by the Board to construct replacement or alternative accommodation within Te Urewera.

[69] Peter Askey is the president of Ngā Tapuwae O Taneatua Tramping Club, one of the main recreational groups to use the northern tracks of Te Urewera. He says:

The hut facilities in the back country, whether in Te Urewera or elsewhere are a key part of our activities and trip planning. The huts in our opinion play a vital role in enabling us to safely run multi day trips. When planning and leading a trip Health and Safety of the group is always a key concern. The NZ back country weather is changeable and conditions can go from benign to challenging very quickly.

The huts in the central north island were originally established in the 1950's and 60's for deer culling. The huts were deliberately and well sited. Generally they were placed 4-5 hours apart. A culler could travel between huts, with gear, in a day. Very importantly, in event of changing weather or an injury, they were never more than around 2 hours from shelter. Seventy years later we as recreational users find this logic impeccable.

On our overnight trips members will often carry a light tent. This is in case other parties are present. However the hut provides a base for cooking, toilet facilities, a water supply and a roof if the weather really packs in.

The hut network provides an essential contingency for travel if things go wrong due to weather, illness or injury.

To quote a recent example, we had a member fall ill and become dehydrated on a trip down the Whakatane River. The group was able to take refuge at Tawhiwhi hut overnight, and in the morning made the call to activate a PLB. The SAR saw exactly where they were, landed at the hut helipad and within 30 minutes the member was on their way to medical assistance.

We would also make the observation that the track network in Te Urewera is being poorly maintained, if at all. Even easy "front country" tracks like Pohatu or the track into Waiiti stream are not increasingly blocked with windfall. How the TUT pest control contractors manage to complete their work efficiently on these tracks is a puzzle.

Removal of the huts combined with overgrown tracks in our experience from many years of back country travel makes access difficult. In effect access is

limited to only small parties of younger and fitter people. Even then travel will be slow.

In this regard we find the stated claim from TUT and the minister of Conservation that “access will still be fully available” to be at best ignorant of the realities of back country travel and at worst disingenuous and misleading.

[70] As will be recalled, Mr Barsdell is a former conservation officer. He says:

Ability to access, use and enjoy Te Urewera compromised

56. Removal of the huts reduces and harms people’s ability to use and enjoy Te Urewera for recreation, learning, for spiritual reflection and as an inspiration. This extends to Tūhoe and manuhiri.

57. TUT’s messaging through this time to the public to ‘just take a tent’ is hopelessly unrealistic:

57.1 To traverse the Te Urewera landscape now without huts, a traveller must carry more gear (tent, mattress and pots/pan, axe) making packs heavier and travel slower. Because this makes travel harder, Te Urewera is less accessible, and the public are less able to use and enjoy Te Urewera.

57.2 Some users of Te Urewera may not own a tent or fly and for these users Te Urewera is now less accessible.

57.3 Access is now more dangerous with the removal of the huts which provided the ability to shelter from extreme weather and dry out wet gear. The risk of hypothermia is now increased and as such users must be much more cautious about how and when they enter Te Urewera. This reduces the ability of the public to use and enjoy Te Urewera.

57.4 Where once a trapper or hunter may have accessed Te Urewera with a marginal forecast knowing they had the hut to shelter in, now they would be inclined to not make the trip. Where once a hunter or trapper may have accessed Te Urewera in the winter knowing they could keep themselves warm at night with the hut fire going, they are now highly likely to not venture into Te Urewera in the colder months at all.

57.5 These examples demonstrate how access has been negatively impacted by the unlawful removal of huts and how Te Urewera is less able to be used and enjoyed by the public, which includes local Tūhoe and my whānau also.

58. Without even a semi-coherent plan for hut replacements we are left to grasp at straws about what the future might look like for visitor assets in Te Urewera. As stated previously, the only public information from TUT has pointed towards ‘chalet’ type accommodation. What will it cost to stay at these facilities? How functional will the chalets/huts be? Will there be a booking system? Where will they be located?

59. The previous hut network and hut design worked for hundreds of thousands of visitors over the years, many of whom have been regular occupants in Te Urewera huts over generations with many great memories made and special times had. If there is a plan for a new ‘hut network’? will it in anyway come close to what we have lost?

[71] Mr Nikora said in his affidavit:

In addition to this lack of consultation, no due diligence, strategic plans or feasibility reports were ever produced for Iwi consideration and subsequent ratification. The approach of TUT seems to have been to desecrate the huts in the first instance and worry about whether to replace them, and if so, with what, afterwards. This directive creates major health and safety issues in Te Urewera in the interim, as the huts provided much needed shelter for hunters and trampers, including when the weather turns or someone gets injured.

[72] Mr Tuna offers similar evidence to these witnesses.

The Board’s response to the contentions

[73] The written submissions on behalf of the Board do not address the ecological, Tūhoetanga, or public access contentions. Indeed, the Board’s written submissions do not acknowledge the contentions, which go unmentioned. This cannot reflect surprise. Every iteration of the statement of claim has asserted a contravention of s 5; some of the supporting evidence was offered in support of interim relief; and Mr Tuna’s written submissions outline each contention in detail; these, of course, were served first.

[74] Despite this (significant) omission, Mr Stephens resisted each contention at the hearing. He argued:

- (a) Section 5 of the Act contains “high level statements of principle”, “not a set of stringent standards”.
- (b) The huts are a longstanding symbol of colonial oppression, and their demolition is anticipated by the Act. The Board was, therefore, doing no more than what the Act contemplates by resolving to demolish them.
- (c) The Crown supported demolition.

- (d) The evidence adduced by the Board and TUT meets all three contentions, especially as some form of replacement structures is anticipated.

[75] Mr Kruger says this in his affirmation:

TE UREWERA BOARD'S POSITION

Te Urewera Board supported and continues to support the raising of the standard of infrastructure within Te Urewera, and as part of that process the decommissioning of the DOC huts.

Te Urewera Board does not accept the position taken in the evidence filed by the applicant in this proceeding, particularly that the huts were somehow part of the heritage of Te Urewera to be maintained or the removal of them is inconsistent with Tūhoetana, the Te Urewera legislation or harmful to biodiversity or safety objectives. That is not the case.

Te Urewera Board strongly supports the removal of the huts and their replacement with modern, fit for purpose structures that reflect Te Urewera and Tūhoetana. This process will enhance the experience for both Tūhoe and manuhiri in Te Urewera and will provide a sound basis for the reconnection between Tūhoe and Te Urewera and the ongoing implementation of Te Kawa.

Te Urewera Board considers that this project to raise the standard of infrastructure in Te Urewera to be both appropriate and necessary to meet the purposes and objectives of the Tūhoe Treaty settlement, Te Urewera Act, Te Kawa and the board's statements of priorities.

[76] Ms Luke says this in hers:

DOC HUTS IN TE UREWERA

One particular issue we had to deal with in the Tūhoe settlement negotiations was the existence of residual Crown infrastructure within Te Urewera. Tūhoe did not want to take ownership of or responsibility for that infrastructure, and that is why it remained in Crown ownership following the settlement.

There were mechanisms included in Te Urewera Act to provide for that residual infrastructure to be managed together by Tūhoe and DOC.

Tūhoe has never supported the Crown structures, assets and infrastructure that exist within Te Urewera, which were not designed for, with, or to benefit, Tūhoe.

Removing the Crown footprint in Te Urewera is seen by Te Uru Taumatua as a healthy step towards the restoration of Tūhoe responsibility. For many Tūhoe people, the huts have symbolised Crown control over Te Urewera and their decommissioning is a step towards Tūhoe reconnection.

I do not agree with the statements in evidence (including from Mr Nikora and Mr Barsdell) that the huts are not a symbol of colonisation or have been there long enough to be Te Urewera. That is tantamount to saying Crown injustice is long and sustained and therefore has been around long enough that Tūhoe should just accept that. My understanding of the Tūhoe view is that a justice wrong should never be accepted or tolerated because that 'hara', that 'he' remains. The wrong must be corrected, in order for justice to be restored.

Te Uru Taumatua has a vision of infrastructure in Te Urewera that embodies Tūhoetana, which requires redesign and new infrastructure led by Tūhoe.

Te Uru Taumatua and Te Urewera Board (as noted by Mr Kruger) considered that removal of the huts and replacing them with new huts would be appropriate for a number of reasons, including:

- (a) as noted above, the huts were a legacy of a Crown controlled era and did not reflect the philosophy of Te Urewera (including as expressed in Te Urewera Act and Te Kawa);
- (b) the ongoing DOC control and role in relation to those huts did not reflect the philosophy of Te Urewera;
- (c) the huts were in poor condition with health and safety issues and needed to be upgraded, or decommissioned from non-use;
- (d) it was a better use of resources to remove the huts and implement a programme to build new, fit for purpose huts in appropriate locations, which is the intention;
- (e) it was not the case that the huts could simply be upgraded to a state that was fit for purpose; and
- (f) the huts were no longer fit for purpose when we were contemplating a new track network or different hapū responsibilities that then required accommodation in other areas.

...

Replacement of huts

Te Urewera Board and Te Uru Taumatua have always intended that there will be new structures established in Te Urewera in place of the current huts. That intention is confirmed in the Te Urewera Board's statement of priorities and the annual operational plans (2022/23 and 2023/2024).

There have already been three temporary shelters and a cabin with six beds, a fireplace and closed in kitchen installed.

The new structures will be settlements, as opposed to just huts. They will be more like mini-villages with power, water supply and waste water infrastructure, and Ministry of Education arrangements to enable whānau lifestyles and livelihoods to be connected.

The replacements will be Te Urewera structures. They will reflect Tūhoetana, the philosophy of Te Urewera, Te Urewera Act and Te Kawa. They will reflect a redesigned Te Urewera experience for manuhiri.

The structures will not be straight replacements of the huts, there will be diverse shelter options and not necessarily all in the same locations.

The freedom of access to manuhiri will be maintained and enhanced.

Te Uru Taumatua conducts the biodiversity operations in Te Urewera and I am confident the removal of the huts and the planned replacements will not compromise the ability to undertake that work.

I do not believe the assertions from the witnesses for the applicant are informed or accurate in relation to these matters.

Analysis of the contentions

[77] The starting point is ss 4 and 5, which I reproduce again:

4 Purpose of this Act

The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—

- (a) strengthen and maintain the connection between Tūhoe and Te Urewera; and
- (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and
- (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.

5 Principles for implementing this Act

- (1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—
 - (a) Te Urewera is preserved in its natural state:
 - (b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated:
 - (c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected:

- (d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected:
 - (e) the historical and cultural heritage of Te Urewera is preserved:
 - (f) the value of Te Urewera for soil, water, and forest conservation is maintained:
 - (g) the contribution that Te Urewera can make to conservation nationally is recognised.
- (2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

[78] The two provisions are interrelated. Section 4 identifies the purpose of the Act; s 5, principles for achieving that purpose. Furthermore, the principles in s 5 build on the illuminations of purpose in s 4(a)–(c). Section 4(a) clearly links to s 5(1)(c); s 4(b) to s 5(1)(a), (b), and (e)–(g); and s 4(c) to s 5(2). These are not offered as exhaustive, merely as examples of linkage.

[79] The language of s 5 is important: *all* persons performing functions (and exercising powers) under the Act *must* act, so far as possible, in accordance with the principles identified in achieving the Act’s purpose. The language is both embracing and mandatory, albeit with the qualification, “as far as possible”.

[80] Given these features, I do not accept the premise animating Mr Stephen’s first submission—that s 5 is aspirational. Rather, s 5 creates mandatory principles to achieve the purpose of the Act, with close linkage between those principles and the illuminations of purpose in s 4(a)–(c).

[81] I do, however, accept those performing functions (and exercising powers) under the Act enjoy a considerable margin of appreciation in the exercise of those functions (and powers), including the application of s 5. The position could hardly be otherwise. The Board governs Te Urewera, not the courts. The same is true of operational management, which, as observed, is entrusted to the Chief Executive and Director-General. The obvious should also be recorded: the Board, Chief Executive

and Director-General have institutional expertise in relation to Te Urewera; the courts do not.

[82] I pivot to fact. I accept the Board and Chief Executive consider the huts a longstanding symbol of colonial oppression, and I assume many others share this view too. I accept also the Crown supported the huts' demolition, and the Act contemplates demolition. However, as I observed at the outset, the case is not about the huts' demolition. Rather, it is about the lawfulness of associated decision-making.

[83] These observations introduce the map below, which shows Te Urewera and the hut network.²⁷

[map over page]

²⁷ The map was admitted by agreement at the hearing.

Hut status, Te Urewera

Hut / staff accommodation





- Existing
- Existing and historic
- Decommissioned before 10-11-22
- Removed after 10-11-22

0 2 4 6 8 km

Te Urewera

Department of Conservation
Te Papa Atawhai

Te Kāwanatanga o Aotearoa
New Zealand Government

-  Existing
-  Existing and historic
-  Decommissioned before 10-11-22
-  Removed after 10-11-22

0 2 4 6 8 km

Department of
Conservation
Te Papa Atawhai

**Te Kāwanatanga
o Aotearoa**
New Zealand Government

[84] The huts in black were demolished before interim relief was granted; those in red, subsequently, by persons unknown. As will be recalled, while those in red have been demolished without authorisation, all were marked for demolition.²⁸ It follows the map conveys much of the anticipated effect of the resolution, save even fewer huts would remain. Some of the huts in blue would also be demolished; so too, potentially, those in brown; see [10]. Given the evidence of Mr Tuna and others outlined earlier, this has obvious implications for the preservation of the ecology of Te Urewera; the ability of Tūhoe to access Te Urewera, thus Tūhoetanga; and public access to Te Urewera.

[85] Mr Kruger says the Board will replace the huts “with modern, fit for purpose structures that reflect Te Urewera and Tūhoetana.”²⁹ Ms Luke says, “three temporary shelters and a cabin with six beds” have already been installed,³⁰ and the new structures “will be settlements, as opposed to just huts”, “more like mini-villages with power, water supply and waste water infrastructure”.³¹

[86] This brings me to the heart of the case. No documented plan exists in relation to replacement structures, at least not any placed in evidence. No evidence was offered of where the replacement structures will go, how many there will be, or when they will be built. No evidence was offered to meet the proposition that demolition of all but two of the biodiversity huts is likely to be injurious to Te Urewera’s ecology, beyond Ms Luke saying she is “confident the removal of the huts and the planned replacements will not compromise the ability to undertake [biodiversity] work”. No evidence was offered to address the immediate or short-term implications for public access to Te Urewera, or meaningful access by Tūhoe to Te Urewera, in the huts’ absence.³² Herein then lies the decisive feature: the resolution to demolish a majority of the huts was not accompanied by a plan to accord, in the immediate to short term at least, the principles in s 5(1)(b), (c) or 5(2) of the Act. That no plan

²⁸ Or likely demolition.

²⁹ Affidavit of Mr Kruger at para 46.

³⁰ Affidavit of Ms Luke at para 63.

³¹ At para 64.

³² Beyond the fact of three temporary shelters and a cabin with six beds.

apparently exists now, more than a year after demolition began, serves to emphasise the point.

[87] For completeness, Mr Stephens argued the evidence in support of the ecological contention was misguided, even gratuitous. There are two answers to this submission. First, Mr Barsdell and Mr Shaw are former conservation officers with considerable experience of Te Urewera, and Ms Assen is a pest control contractor who has worked in Te Urewera for 14 years (until earlier this year). Their testimony is relevant, probative, and admissible. Second, the Board could have offered evidence to contest this testimony. It chose not to.

[88] The last observation highlights the Board's lack of response to Mr Tuna's s 5 contentions; it has chosen not to engage. This is unfortunate. Given the margin of appreciation I described earlier, and the Board's institutional expertise of Te Urewera, its view would have been afforded weight. Without that—and absent associated evidence—I am driven to conclude Mr Tuna's contentions are established for the reasons identified. Again, the resolution to demolish the huts was not accompanied by a plan to accord, in the immediate to short term at least, the articulated statutory principles.

In demolishing the huts, did TUT act contrary to s 5 of the Act?

[89] Given the analysis above, the answer to this question is necessarily yes for the same reasons. What I said about the Board's lack of engagement in relation to s 5 is also true of TUT.

Consultation

[90] Mr Tuna's remaining contention is that the Board had a duty to consult hapū and public before making the resolution, did not consult either and therefore acted unlawfully. Mr Tuna also contends TUT failed like obligations before demolishing the huts. For reasons that will become apparent, this part of the case can be addressed relatively swiftly.

[91] Mr Tuna's contention in relation to hapū ultimately rests on the minutes of meetings on 16 and 17 May 2022. On 16 May 2022, TUT and the Department held a workshop. Marewa Titoko, the Waimana Kaaku chair, attended. The workshop's minutes record:

Meeting with DG Friday to discuss the decommissioning of TU.
Tūhoe is not bluffing, have tried an array of ways to attempt to rectify the relationship – the board is our only hope to repair Crown-Tūhoe relationship.
Don't understand what an iwi is – continue to judge TUT as another corporate
Can't operate outside their ministerial set of priorities

...

TOMORROW

...

A resolution prepared for tomorrow stamping – the removal of DOC.
Marewa [Titoko]: may be an issue with unanimous support for Decommissioning of DOC – Waimana have not had that discussion about it.
In terms of processes, to be pushing for a resolution tomorrow something that may not be supported. = it's a TUB resolution, the Tūhoe position has been informed by hapu – there hasn't been a tribal chair hui around this. Easily Tūhoe could say that all hapu except waimana support this. A leadership call to be made – needs to be made tomorrow, a knowing of the feeling of the people.

[92] On 17 May 2022, the Board met and passed the resolution. Ms Titoko attended as a member of the Board. The minutes record:

TUB Resolution- decommissioning of DOC from Te Urewera

Following a full discussion at yesterday's workshop the Board passed a resolution to read;

'United with Tūhoe Te Uru Taumatua the Te Urewera board supports the decommissioning of all DOC structures and infrastructure from Te Urewera'. The minutes will detail this as in reference to the operational role DOC holds.

Marewa [Titoko] abstained from the resolution citing need to receive endorsement from the Waimana Kaaku tribal.

The Chair to relay this decision to the Minister and DG.

Recommendation(s)

1. TUB and TUT are united in supporting the decommissioning of the DOC structure and structures from Te Urewera.

[93] Ms Aldred argues both sets of minutes demonstrate Ms Titoko was caught by surprise by the proposal to demolish the huts; that the issue had not been raised by her with Waimana Valley hapū; and this is why Ms Titoko abstained from voting at the 16 May meeting. Ms Aldred says this, in turn, explains why Waimana Valley hapū witnesses did not know about the proposal, as they say in evidence.

[94] This interpretation is available, but the minutes are far from definitive. Ms Titoko, who is central to events, is not a witness. In the absence of evidence from her, the interpretation remains a possibility only. Expressed directly, it is incumbent on Mr Tuna to establish this contention as more likely than not, and he has not done so given the equivocal complexion of the evidence.

[95] The issue in relation to public consultation is legal, not factual, for it is common ground the public were not consulted before the resolution was made or demolition began.

[96] Professor Joseph observes a consultation duty may arise in three ways: as a legitimate expectation, based upon a promise or past practice; as a statutory obligation, whether express or implied; or as a common law incident of fairness.³³

[97] Ms Aldred relies upon all three. In relation to legitimate expectation, Ms Aldred relies upon observations from a draft of the management plan, called Te Kawa, released to the public. The management plan is prepared by the Board, as required by s 44 of the Act. The draft plan released in May 2017 said this:

Does Te Kawa affect public access?

No. Public access for recreation, education and cultural purposes is guaranteed in Te Urewera Act, and love of manuhiri (visitors) is an intrinsic part of Te Urewera expressed in Te Kawa. Te Kawa encourages providing for those who want to have a deeper relationship with Te Urewera. It guides the board to open dialogue looking at ways to provide more information about Tūhoe practices and culture for those who wish to educate themselves, opportunities for visitors to introduce themselves to Tūhoe, and to work together on restorative projects.

Te Urewera Board will consider the purpose of Te Kawa when authorising commercial activity or other activity that could impact the living system of Te Urewera.

How does Te Kawa affect rules for licenced recreational activities in Te Urewera?

Te Kawa does not set out rules. It sets out principles for Te Urewera, with a focus on bringing people closer to Te Urewera. In developing how those principles are applied through the Te Urewera Board's decision making,

³³ P A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at [25.4.9], citing *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (CA) at 369-370.

priority statements and operational management plans, the Board will seek the views of the many groups and individuals who have history and connections with Te Urewera, including recreational groups.

[98] This argument cannot succeed as there is no evidence any person relied on these passages in expecting to be consulted.

[99] In relation to statute, Ms Aldred contends ss 4(c) and 5(2) support an implicit consultation duty. As will be recalled from earlier discussion of the Act's purpose and principles, both provisions protect public access to Te Urewera. Ms Aldred says because the resolution (and demolition) significantly affect access, a consultation duty therefore arose.

[100] However, as Mr Stephens observes, the Act contains a detailed framework which identifies when consultation, including public consultation, is required, and the existence of this framework counts against a broad, additional consultation duty in relation to access:

- (a) Members of the public may attend meetings of the Board. Public notice of those meetings (and agenda) must be given.³⁴
- (b) Consultation and public notice obligations arise in relation to the preparation of the management plan.³⁵
- (c) The draft management plan must be publicly notified. There is opportunity for submissions from the public and attendance at hearings.³⁶
- (d) The Board must issue, annually, a publicly notified statement of priorities for implementing the management plan.³⁷

³⁴ Te Urewera Act, Sch 2, cls 4(2) and 5.

³⁵ Schedule 2, cl 19.

³⁶ Schedule 2, cls 20 and 21.

³⁷ Section 51.

- (e) There is a process for engagement between the Board, Chief Executive and Director-General in relation to the annual operational plan.³⁸
- (f) There are other specific consultation obligations in relation to Tāwhiua³⁹ and for the introduction of biological control organisms.⁴⁰

[101] Furthermore, the Act does not require consultation by the Board, Chief Executive or Director-General when carrying out operational activities in Te Urewera (such as the removal of the huts), or when preparing the annual operational plan. The annual operation plan need not be published either. I, therefore, accept Mr Stephens' submission the scheme of the Act excludes the duty contended for.

[102] This leaves fairness. Ms Aldred emphasises the importance of the resolution, and demolition, to public access. She contends the circumstances are analogous to *Lower North Island Red Deer Foundation Inc v Minister of Conservation*.⁴¹ In *Red Deer*, the Minister of Conservation altered rules concerning wild animal recovery operations having consulted operators, but not deer hunters. Simon France J held the Minister was obliged to consult the latter as the decision involved significant changes to their detriment; wild animal recovery operators had been consulted; deer hunters had statutory recognition under the Act; and there had been earlier, extensive consultation. The Judge concluded this combination meant the Minister was required to consult deer hunters to act fairly.

[103] The combination that informed *Red Deer* is not readily apparent here. Moreover, the obligation said to arise concerns the public as a whole, not a select group. So, *Red Deer* is not really analogous.

[104] Despite this, there is force in Ms Aldred's submission the huts' significance to public access required consultation. After all, the Act requires Te Urewera be a place "for public use and enjoyment",⁴² all persons performing functions under the Act must

³⁸ Schedule 2, cl 24.

³⁹ Section 133(2)(a).

⁴⁰ Section 63(2)(a).

⁴¹ *Lower North Island Red Deer Foundation Inc v Minister of Conservation* [2017] NZHC 1346, [2017] NZAR 1058.

⁴² Te Urewera Act, s 4(c)

act so that the public has freedom of entry and access to Te Urewera,⁴³ and demolition affects public access.

[105] The point has caused me anxiety as when there are legislative provisions requiring consultation—as there are, and as discussed above—a concurrent common law consultation obligation “will always be difficult to establish”.⁴⁴ Ultimately, I consider the legislative scheme decisive, and as (also) excluding a fairness-based duty.

Summary of conclusions

[106] In resolving to demolish the huts without a plan to accord, in the immediate to short term at least, the principles in s 5(1)(b), (c) and 5(2) of the Act, the Board failed to give effect to these principles and thereby acted unlawfully.

[107] By demolishing the huts, TUT acted contrary to the principles in s 5(1)(b), (c) and 5(2) of the Act. TUT also acted unlawfully by demolishing the huts:

- (a) In reliance on an unlawful resolution of the Board.
- (b) Without the annual operational plan.

[108] The Crown acted unlawfully in failing to prepare an annual operational plan for the years 2021/2022 and 2022/2023; and by supporting the huts’ demolition absent the annual operational plan. The Board and Crown acted unlawfully by purporting to adopt a retrospective annual operational plan authorising the huts’ demolition. As observed earlier, the Crown’s adoption of a wholly retrospective annual operational plan is a striking example of reviewable error.

[109] The Board and TUT did not act unlawfully in relation to consultation.

⁴³ Section 5(2).

⁴⁴ *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [48]; *Evans v Clutha District Council* [2020] NZCA 5, [2021] NZRMA 374 at [34]–[35]; *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 370.

Relief

[110] The parties offered wide-ranging submissions about relief. These would be better informed by this judgment, in turn helping me determine relief. I, therefore, invite brief, further submissions about relief, in accordance with the timetable below. Each submission must not exceed 12 pages (including in relation to costs, as to which see below).

Costs

[111] Submissions about relief should also address costs, assuming these cannot be agreed.

Result

[112] Mr Tuna's claim is upheld, save in relation to consultation.

[113] Relief (and costs, if necessary) will be determined following submissions from:

- (a) Mr Tuna, on or before **5 pm, 29 February 2024**.
- (b) The Board, TUT, and the Crown, on or before **5 pm, 14 March 2024**.

[114] To avoid doubt, Woolford J's orders endure until further order of the Court.

.....

Downs J