



COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

21 December 2023

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GREENPEACE AOTEAROA INC v HIRINGA ENERGY LTD [2023] NZCA 672

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

1. The Court of Appeal today dismissed the appeal in *Greenpeace Aotearoa Inc v Hiringa Energy Ltd*.
2. The respondents, Hiringa Energy Ltd and Ballance Agri-Nutrients Ltd (Ballance), propose to construct a hydrogen plant and four associated wind turbines at Kapuni, Taranaki (the Project). The Project was referred to an expert panel (the Panel) appointed under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (the FTCA) on the recommendation of the Minister for the Environment.
3. The purpose of the FTCA, now repealed, was to urgently promote employment to support New Zealand’s recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing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 across New Zealand, while continuing to promote the sustainable management of natural and physical resources. The Minister’s reasons for recommending the Project’s referral were that: the Project would help to achieve the purpose of the FTCA; it would create an average of 40 full-time-equivalent

jobs, over an 18-month period; it would provide infrastructure that would contribute to improving economic and employment outcomes; it would likely help to improve environmental outcomes for air quality and assist New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy (subject to a successful future transition to the use of green hydrogen as a fuel in the transport sector); it would progress faster than would be the case under standard processes; and any adverse effects of the Project could be tested by an expert consenting panel.

4. The Panel granted consent for the Project (the Decision). An appeal to the High Court on a question of law brought by Te Korowai o Ngāruahine Trust (Te Korowai), supported by others including Greenpeace Aotearoa Inc (Greenpeace), was dismissed. The FTCA provided for a final right of appeal to the Court of Appeal on a question of law. On an appeal brought by Greenpeace and four hapū of Ngāruahine, the Court of Appeal held that, in making the Decision, the Panel made no error of law. In particular, the Court held that the Panel made no error of law as to the conditions it imposed and in concluding that the Project was consistent with the principles of the Treaty of Waitangi (the Treaty).

Background

5. The intention of the Project, as indicated in its consent application, is to produce hydrogen that initially would be used as feedstock for synthetic nitrogen (urea) fertiliser at Ballance's existing production facility at Kapuni, before transitioning over a five-year period to supplying hydrogen fuel for commercial and heavy transport. Hydrogen used for transportation may help to reduce greenhouse gas emissions associated with road transport.
6. A key reason that the consent was granted was because of this intended transition. The Panel included conditions in the consent that: require the respondents to report on their progress in achieving the transition; and allows the South Taranaki District Council to review the consent's conditions after a specified period for the purposes of assessing the progress of the transition and to propose new conditions to ensure that the transition progresses or continues.

7. Te Korowai is the post settlement governance entity and representative body for Ngāruahine iwi. The 2014 Ngāruahine Deed of Settlement identifies Ngāruahine as including six hapū. Four Ngāruahine hapū (Ngā Hapū) were parties to the appeal to this Court. Their principal concern was that the proposed wind turbines would impact the relationship of Ngāruahine hapū to Taranaki Maunga by obstructing the visual and spiritual pathway to the Maunga from hapū marae. They submitted that the Decision was in breach of s 6 of the FTCA, which required the Panel to act in a manner that is consistent with the principles of the Treaty.
8. Greenpeace was concerned with the negative environmental effects of urea fertiliser. It submitted that the Panel had failed to include any condition that required a transition from the use of hydrogen for fertiliser to its intended use as fuel for commercial and heavy road transport to actually occur and that this was an error of law.

The judgment

9. The Court of Cooper P, Katz and Mallon JJ unanimously dismissed the appeal. The reasons of the Court were given by Mallon J with Cooper P delivering separate reasons in respect of one point (see [13] below).

Greenpeace's appeal

10. The Court held that the Panel made no error in law in relation to the transition conditions it imposed. The Court considered that the conditions of the consent properly matched the justification for the referral under the FTCA. While there was no explicit requirement to transition within a specific period, given that a transition was the justification for a fast-track consent, and the consent application advised that a transition was planned over a five-year period, the South Taranaki District Council would need a good reason for not exercising its review power if the transition had not occurred. If it did not do so it could be the subject of an application for judicial review.
11. In reaching this conclusion, Katz and Mallon JJ considered the Project was not referred to the Panel because it was certain that a transition to utilising the hydrogen for transportation would be successful. Rather, it was referred partly because, if the intended

transition to hydrogen fuel was successful, it would assist New Zealand's efforts to mitigate climate change and transition to a low-emissions economy more quickly.

12. Katz and Mallon JJ considered that the conditions did not require a successful transition because that cannot be assured. The Panel's conditions required a good faith pursuit of the intended transition, but reflected the commercial reality that the uptake of hydrogen fuel by heavy transport is ultimately dependent on factors that are not all within the respondents' control. If the respondents did not continue to pursue a transition, it would be for the South Taranaki District Council to decide whether it was satisfied about this and, if it was not, to impose conditions to ensure progress towards a transition. If the hydrogen continued to be utilised for urea fertiliser production, it would constitute a very small percentage of urea use in New Zealand and it was an existing lawful activity regulated by resource consents held by Ballance.
13. Cooper P considered that, read together, the conditions of the consent required a transition from the utilisation of the hydrogen for the purposes of urea production to utilisation in the transport market. The President considered that, while the conditions contemplated flexibility as to timing, the flexibility did not extend to the possibility that the transition would not occur at all.

Ngā Hapū's appeal

14. The Court held that, in granting consent to the Project subject to conditions, the Panel did not fail to act in a manner consistent with the principles of the Treaty.
15. The High Court Judge's approach as to whether the Decision was consistent with the principles of the Treaty correctly reflected that appeals under the FTCA were limited to questions of law.
16. The Panel made no error in law in how it approached the consistency of the Project with the principles of the Treaty. The Court accepted that Ngā Hapū's connection to Taranaki Maunga is a taonga. However, it did not necessarily follow that the principle of active protection of taonga required the Panel to find that any structure placed on the landscape around the Maunga was not consistent with the principles of the Treaty. The principle of active protection, as with other Treaty principles, fell under the overarching principle of partnership. The Court considered that, where adverse effects on Māori

spiritual or cultural values can be offset with mitigating measures, that may be sufficient to discharge the duty of active protection in some circumstances. In relation to the Project, the position of hapū were not consistent nor aligned. The position of Ngāti Manuhiakai, the hapū most affected by the proposed location of the turbines, supported the Project. The hapū and iwi positions before the Panel indicated that the Project would be consistent with the duty of active protection and the overarching principle of partnership, provided there were appropriate mitigating measures and conditions. With the mitigation measures and conditions of consent, the Court considered the Project reflected a balancing of interests reflective of the partnership that the Treaty represents.

17. The Panel was not required to hold an oral hearing, nor to provide reasons why one was not held. The Court considered that the process adopted by the Panel met the requirements of natural justice.

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