I te Kōti Pīra o Aotearoa | In the Court of Appeal of New Zealand

CA649/2022

between

GREENPEACE AOTEAROA INCORPORATED
Appellant

and

HIRINGA ENERGY LIMITED AND BALLANCE AGRI-NUTRIENTS LIMITED
Respondents

and

ŌKAHU-INUAWAI ME ĒTEHI ATU HAPŪ, NGĀTI TU HAPŪ, NGĀTI TAMAAHUROA-TITAHI HAPŪ, NGĀTI HAUA HAPŪ
Interested Parties

SYNOPSIS OF ARGUMENT FOR THE APPELLANT

17 APRIL 2023

COUNSEL:
ISAAC HIKAKA
MILLS LANE CHAMBERS, AUCKLAND
TELEPHONE 64 21 2169 532
EMAIL isaac.hikaka@millslane.co.nz

LeeSalmonLong
Barristers and Solicitors
LEVEL 16 VERO CENTRE 48 SHORTLAND STREET
PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND
TELEPHONE 64 9 912 7100
EMAIL: david.bullock@lsl.co.nz SOLICITOR ON RECORD: DAVID BULLOCK
EMAIL: kate.hursthouse@lsl.co.nz SOLICITOR ACTING: KATE HURSTHOUSE

SUBMISSIONS FOR THE APPELLANT

MAY IT PLEASE THE COURT

Introduction

1. Hiringa Energy Limited and Ballance Agri-nutrients Limited (together **Hiringa**) propose to construct a hydrogen plant at Kapuni, Taranaki, within the rohe of Ngāruahine and its hapū (**Project**). It is proposed that the hydrogen will be generated through electrolysis using electricity generated from four large wind turbines.

2. The hydrogen produced will be used as feedstock for synthetic nitrogen fertilizer made at the nearby Ballance fertilizer plant. Synthetic nitrogen fertilizer is a major climate and environmental pollutant.[1] However, Hiringa has advanced the Project on the basis of an intention to transition production away from fertiliser feedstock and to 100 per cent use as an alternative fuel for heavy road transport within 5 years.[2] If the hydrogen is used in that way, then it may help to reduce greenhouse gas emissions associated with road transport. The benefits connected to a transition to fuel use were the key reason that the Project was referred by the Minister under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**), and that a consent for the Project was granted by an expert consenting panel (**Panel**).[3]

3. Despite the Panel identifying the transition of the Project as a crucial reason for it granting a consent,[4] and explicitly recognising the need for the consent conditions to match this justification,[5] the Panel failed to include any condition requiring the transition to actually occur. Instead, the Panel only included conditions requiring reporting on transition progress, and leaving open the possibility that the South Taranaki District Council might, at its discretion, one day choose to exercise powers under s 128 of the Resource Management Act 1991 to begin a process to change the consent conditions.

4. Greenpeace's appeal concerns the failure of the Panel to appropriately address the issue of transition. First, Greenpeace submits that having

[1] See Greenpeace comments in response to consultation **[CB 303.1173]**.
[2] Application for resource consent and assessment of environmental effects, dated 18 August 2021 (**Application**) at 36 **[CB 301.0044].**
[3] Environmental Protection Authority FTC Kapuni Green Hydrogen decision report and conditions of consent (**Decision**), dated 1 December 2021, at [61] **[CB 101.0015]**.
[4] Ibid.
[5] Decision at [238] **[CB 101.0052]**.

decided that the transition was a crucial reason for the decision to grant the consent, it was an error of law for the Panel to fail to include any conditions requiring that transition to occur. Secondly, and in the alternative, Greenpeace submits that having not included any conditions requiring transition to occur, the Panel erred in assessing the environmental effects of the Project on the basis that transition would occur. Thirdly, Greenpeace submits that the Panel's approach of leaving this crucial issue to be addressed by the South Taranaki District Council under the RMA was an unlawful abdication of its decision-making function under the FTCA. Fourthly, Greenpeace submits that the approach taken by the Panel was inconsistent with s 6 for the FTCA because it failed to actively protect Māori interests, and it left a crucial decision about the project to be made by a decision-maker who (unlike the Panel) was not required to act consistently with the principles of the Treaty of Waitangi. It is submitted that this was, of itself, a failure to comply with the duty of active protection.

5. Greenpeace has been provided a special role by Parliament under the FTCA, and this appeal is taken as part of that role. This appeal does not concern the merits or otherwise of the project. It is a question of law about the reasoning and process adopted by the Panel and approved by the High Court, and the wider legal impact that will result if the High Court and Panel's analysis is correct.

6. The Project has been approved using a special procedure established under a time-limited statute passed to respond to an unusual circumstance. To ensure consistency with the rule of law, the Court ought to give special scrutiny to processes adopted under such legislation especially where, as here, the legislation bypasses the public participation and input processes that would apply were it not for the special legislation. The Court must ensure that the reasons given for approving a project under special legislation are certain, enforceable and will be given effect to. Otherwise the special statute is not being used in accordance with its purpose. In the present case, the approach of the Panel and the High Court means that will not occur – the basis for approving the Project under the FTCA (rather than under the RMA) may not be achieved.

The Project

7. The Project consists of the construction and operation of four large wind turbines (maximum height of tips being 206m, with a rotor-diameter of 162m), an electrolysis plant and hydrogen production infrastructure (including storage, loadout and refuelling) in Kapuni, Taranaki.

8. The hydrogen produced by the plant will, in the first instance, be used with to produce ammonia and urea for agricultural synthetic nitrogen fertiliser. This is significant as synthetic nitrogen fertilisers are a major source of agricultural greenhouse gas emissions (both directly, as through the emission of nitrous oxide, and by enabling more intensive livestock farming which produces methane).[6] Synthetic nitrogen fertiliser is also a major contributor to the pollution of waterways and groundwater in New Zealand.[7]

9. The stated intention of the operators is that the hydrogen production is:[8]

> ...planned to transition from 100% urea to the transport market over 5 year period as the fuel cell electric vehicles market increases, with the intention to increase electrolysis capacity once green urea productions falls below a minimum threshold.

10. That is, the Project is said to be premised on the basis that the output of the plant will transition so that 100% of the hydrogen will be used as clean fuel for the heavy transport sector (rather than to produce fertiliser), supporting the development of a green hydrogen and transport hub for South Taranaki.

The FTCA

11. The FTCA records its purpose as follows:[9]

> ... 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.

12. It does this in two ways:

    (a) By mandating that decision-making on certain listed projects be appointed to an expert consenting panel for determination (**listed projects**);[10] and

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[6] Greenpeace comments in response to consultation **[CB 303.1173]**.
[7] Greenpeace comments in response to consultation **[CB 303.1175]**.
[8] Application at 36 **[CB 301.0044]**.
[9] FTCA, s 4. The explanatory note to the bill as introduced provided that the concept of sustainable management includes "supporting the transition to a low-emissions economy and improving resilience to climate change and natural hazards while supporting sustainable management": COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-1) (explanatory note) at 1.
[10] FTCA, s 14(a).

(b) By allowing other projects or part-projects to be referred to an expert consenting panel by the Minister for the Environment[11] upon an application to the Minister (**referred projects**).[12]

13. The expert consenting panel considers applications and determines resource consent and designations on a fast-track basis. This includes:

(a) No public or limited notice of applications, with only specified persons required to be invited to comment on the applications (which includes Greenpeace), and a discretion to invite others;[13]

(b) No requirement to hold a hearing;[14] and

(c) A decision issued within (generally) 25 working days of the date the panel specifies for receiving comments on the application.[15]

14. An appeal on a question of law may be made by certain persons to the High Court.[16] Errors of law include:[17]

(a) Misinterpretation or misdirection as to statutory requirements;

(b) Overlooking any relevant matters or taking into account irrelevant matters;

(c) Where an ultimate decision of a fact-finder is so insupportable and untenable that the proper application of the law requires a different answer.

15. An appeal of the High Court may be made to the Court of Appeal, but that appeal will be the final appeal as the legislation ousts the jurisdiction of the Supreme Court.[18]

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[11] And by the Minister of Conversation if any party of the project occurs in the coastal marine area: FTCA, s 16(1).
[12] FTCA, ss 16–27.
[13] FTCA, s 17.
[14] FTCA, s 21.
[15] With an ability to extend this timeline by up to 25 working days (unless the referral order says otherwise) if the scale or nature of the proposal is such that the panel is not able to make its decision in this timeline: sch 6, cl 37.
[16] Being the applicant, relevant local authority, the Attorney-General, persons who were permitted to and did comment on the application, and any person who has an interest in the decision "that is greater than that of the general public": sch 6, cl 44.
[17] On the scope of appeals on questions of law, see for example, *Bryson v Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721 at [24]–[28]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC138, [2012] 3 NZRL 153 at [50]; *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
[18] FTCA, s 44(3).

16. It is apparent that the core principles and environmental standards required under the RMA are intended to be carried across to the FTCA.[19] This includes the matters to which a panel must have regard:[20]

> (1) When considering a consent application in relation to a referred project and any comments received in response… a panel must, subject to Part 2 of the Resource Management Act 1991 and the purpose of this Act, have regard to—
>
> > (a) any actual and potential effects on the environment of allowing the activity; and
> >
> > (b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity; and
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> > (c) any relevant provisions of any of the documents listed in clause 29(2); and
> >
> > (d) any other matter the panel considers relevant and reasonably necessary to determine the consent application.

17. That is, the referred project must be considered having regard to the list of factors in the FTCA (such factors mirroring those in s 104 of the RMA) and subject to the purposes and principles of the RMA (Part 2 of the RMA) and the FTCA. In this connection, it is also important to observe that the meaning of "effect" is defined by incorporating the extended definition in s 3 of the RMA.[21]

18. There is a significant difference between the RMA and the FTCA regarding the Treaty of Waitangi. Section 6 of the FTCA requires that all persons performing and exercising powers under the FTCA must do so in a manner *consistent* with the principles of the Treaty of Waitangi and Treaty settlements. By contrast, s 8 of the RMA only requires that the principles of the Treaty of Waitangi be *taken into account*. Accordingly, under the FTCA, the panel must apply higher substantive consistency requirements of s 6 of the FTCA instead of s 8 of the RMA.[22]

19. The consistency threshold in s 6 of the FTCA is a strong legal requirement, directing the decision-maker to substantively implement the principles of

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[19] See at [25]–[28] of the appellant's submissions.
[20] FTCA sch 6, cl 31(1).
[21] See s 7(1).
[22] FTCA sch 6, cl 31(2). Section 6 of the FTCA was retained notwithstanding the recommendation of the Select Committee that it be replaced with a provision replicating s 8 of the RMA: COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-2) (select committee report) at 4.

the Treaty of Waitangi,[23] not merely to take them into account. In this way the FTCA embodies the strong principles of the line of cases dealing with s 9 of the State-Owned Enterprises Act 1986.[24]

The referral here was premised on transition to fuel use

20. Following the requisite application by the Respondents, the Project was referred to an expert consenting panel (the **Panel**) by the Hon David Parker, Minister for the Environment.

21. It is apparent that the basis for the referral was premised on the transition of the project away from fertiliser production and towards clean fuel, noting that:

(a) The scope of the Project was the construction, installation and operation of a renewable hydrogen hub.[25]

(b) This hub was to include hydrogen refuelling facilities and the Project involved work to construct and operate those facilities; [26]

(c) The Project would, on this basis help to achieve the purpose of the FTCA, which include to promote the sustainable management of natural and physical resources; [27] and

(d) The Project was likely to 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 using the hydrogen for fuel for transportation. [28]

22. The reasons for the Project's referral were listed as part of the rationale of the Project in the resource consent application and assessment of environmental effects submitted by the respondent (the **Application**).[29]

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[23] The principles of the Treaty of Waitangi include: (1) partnership, embodying an obligation of utmost good faith and reasonableness; (2) the active protection of Māori interests to the fullest extent practicable; and (3) redress and reconciliation of grievances. See, for example, the discussion in Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 83.

[24] See, for example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) (the "Lands" case) and *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 (the "Mixed Ownership Model" case).

[25] Referral Order at 3(1) **[CB 302.0687]**.

[26] Referral Order at 3(2)d) and 4(c) **[CB 302.0687]**.

[27] Referral Order Statement of Reasons **[CB 302.0690]**.

[28] Referral Order Statement of Reasons **[CB 302.0690]**.

[29] Application at 5 **[CB 301.0013]**.

23. The use of the hydrogen produced for transport (and the associated necessary transition for this purpose) was fundamental to both the referral of the Project by the Minister and the Application submitted by the Respondents. No less than 24 references are made in the Application to the use of green hydrogen for transport and its benefits. The Application begins:[30]

> The applicant's objective is to both demonstrate New Zealand's capability in the de-carbonisation of the heavy industry and heavy transport sectors and to also provide infrastructure that will improve economic, employment and environmental outcomes.

24. The Project's commitment to decarbonisation of the transport sector is made on a positive "will" basis throughout. The Application relies on the transition to justify the Project's consistency with the purpose of the Act, including that the Project will:

(a) provide infrastructure in order to improve economic, employment, and environmental outcomes, and increase productivity by delivering "sustainable and reliable source of electricity to the Ballance Plant and hydrogen for vehicle refuelling and export from the site, increasing the resilience and productivity of Ballance as a large employer";[31]

(b) improve environmental outcomes "by actively lowering the level of emissions generated from combustion of natural gas and petrol or diesel through the provision of a renewable energy source and clean-burning hydrogen as a feedstock for the Ballance Plant and displacing diesel trucks operating in the area by providing for hydrogen refuelling facilities";[32]

(c) contribute to New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy as "production is diverted to the transport market" and "offsets fossil fuel imports with locally produced green hydrogen for transport";[33]

(d) strengthen environmental, economic, and social resilience by creating the "basis for a hydrogen transport hub for green hydrogen at Kapuni, aiding in the transition from fossil fuels for the

[30] Application at 5 **[CB 301.0013]**.
[31] Application at 51 **[CB 301.0059]**.
[32] Application at 52 **[CB 301.0060]**.
[33] Application at 53 **[CB 301.0061]**.

transportation sector and providing a diversified supply of fuel" and provide a "catalyst for uptake of hydrogen powered heavy vehicles" that will "enable transportation fuel to be generated from New Zealand renewable energy and reduce dependence on imported fossil fuels making New Zealand more economically resilient".[34]

The Panel process

25. Comments were invited from parties as required and/or permitted under the FTCA by letter 30 September 2021 and were due by 21 October 2021. These comments were provided to the Respondents, who responded in turn on 2 November 2021.[35] Draft conditions and an invitation to comment on these conditions were sent to the applicants, South Taranaki District Council and the parties who responded to the invitations to comment. Greenpeace Aotearoa commented on both the application[36] and the draft conditions.[37]

26. The Panel issued its decision on 1 December 2021, following six internal Zoom meetings between 24 September 2021–30 November 2021 and a site visit by each member. No hearing was held as the Panel's decision was that "a hearing was not required on any issue".[38]

27. The Panel granted the application for a term of 35 years subject to conditions.

The High Court Judgment

28. Te Korowai and others appealed the Panel decision to the High Court for errors of law,[39] including that it:

    (a) failed to properly consider various cultural issues relating to Māori and the Treaty of Waitangi;

    (b) found that a critical reason for approving the project was 100 per cent transition to use of "green hydrogen" for transport;

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[34] Application at 54 **[CB 301.0062]**.
[35] Late comments were accepted from the Department of Conservation on 29 October 2021 and responded to on 4 November 2021: Decision at [35] **[CB 101.0008]**.
[36] **[CB 303.1167]**.
[37] **[CB 303.1179]**.
[38] Decision at [38] **[CB 101.0009]**.
[39] Grounds of appeal as further particularised in the appellant's Particularised Points of Law on Appeal, dated 8 March 2022, for which Her Honour granted leave to be argued, at [26].

(c) failed to properly take into account the environmental effects of the end users of the urea fertiliser produced by the Project;

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

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

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

29. Greenpeace gave notice of its intention to appear on the appeal and became a party under cl 45(8) of Sch 6 of the FTCA.[40]

30. The High Court considered the points on appeal under two major issues: Treaty and cultural issues, and environmental issues.

Treaty and cultural issues

31. In relation to Treaty and cultural issues, the High Court determined that there was no failure by the Panel to act in a manner "consistent with" the principles of the Treaty and Treaty settlements, as it is required to under s 6 of the FTCA. The High Court considered that it addressed all concerns of, and material provided by, in particular, Te Korowai and Ngāti Tu adequately, and imposed appropriate conditions accordingly.

Environmental issues

32. In relation to environmental issues, the High Court determined that the Panel made no error in its treatment of considerations and that the conditions imposed were adequate. The High Court recognised that the conditions imposed no "hard limit" for transition, but said that the "transition conditions" imposed, being those requiring yearly reporting and enabling council review, were sufficient.[41] Further, the High Court considered that Condition 1, which requires the project to be undertaken in "general accordance" with the information in the consent application, would ensure

[40] The High Court judgment refers to Greenpeace an "interested party". That was incorrect. Under cl 45(8) of Sch 6 of the FTCA Greenpeace was a "party".
[41] *Te Korowai o Ngāruahine Trust v Hiringa Energy Ltd & Anor* [2022] NZHC 2810 (**HC Judgment**) at [325] **[CB 101.0358]**.

transition occurs, although the Court did not elaborate on why that would be the case.[42]

Did the conditions of the consent require transition from fertiliser production to transport fuel?

33. The High Court held that condition 1 included a requirement to transition. Condition 1 requires the project to be undertaken in "general accordance" with the information in the consent application. The High Court stated that Condition 1 generally required transition but that it placed no "hard limits" as to when transition should occur, or how much the projected needed to transition (at [291]). In this way, the High Court considered that the effect of Condition 1 was to allow "some appropriate leeway for the period of transition" (at [292]).

34. The approach of the High Court is problematic, and it is submitted that on its terms, and in view of caselaw, condition 1 was not effective to require transition.

35. First, in the past these types of general conditions have not been uncommon in resource consents. They are typically included in resource consents to avoid the need to specify in the consent conditions details like measurements, drawings or locations.[43] Their effect is not to transmogrify statements of general intention (i.e. a stated intention to transition completely within 5 years) into an enforceable but different condition (i.e. that a transition is required but without any limits on the amount or timing of transition).

36. The Environment Court has found that it is no longer acceptable for consent conditions to include this type of catch-all wording, which should instead be replaced with a specific list of documents and plans relevant to the consent, its application and enforcement.[44] That serves to overcome vagueness and ensure certainty. This both confirms the proper scope of Condition 1, addressed above, and explains why it is inappropriate to have the effect the High Court found it to have.

[42] HC Judgment at [292] **[CB 101.0349]**.
[43] The editorial note to *Resource Management* (online ed, Thomson Reuters) at [A 108] observes that "'Generally in accordance with' conditions have become almost standard. Often (and preferably) they are linked to specific plans and referenced documents (e.g. a noise report) rather than the entire AEE and further information. It is common to include a note that were there is conflict between earlier and later information provided, the most recent information prevails; and where there is conflict between the general conditions and specific conditions, the latter prevail".
[44] *Puke Coal Ltd v Waikato Regional Council* [2015] NZEnvC 212 at [131]-[132].

37. Secondly, if this were the effect of condition 1 then it would appear to be unenforceable for lack of certainty and vagueness.[45] The vagueness and certainty of Condition 1 as a means of requiring transition arises from:

(a) The application only refers to an *intention* or *plan* to transition completely within 5 years and contains no unequivocal commitment to transition;[46] and

(b) Condition 1 requiring only that the consent holder act "generally in accordance" with its application.

38. To the extent Condition 1 engages on transition at all, at most it would seem to require Hiringa to act generally in accordance with an intention to transition. It would be difficult a council or court to sensibly or objectively assess whether such a condition has been complied with. In any event, an obligation to act only in accordance with an intention will not bring about the substantive transition that the approval was premised upon.

39. To that end, Condition 1 would also appear to be unenforceable for redundancy if and to the extent it concerns transition. A majority of the Court of Appeal determined that there was no breach of a condition to operate a wind farm project "generally in accordance" with the application's noise predictions where noise controls had been expressly provided for in other conditions of the consent (Conditions 4 and 5).[47] In that case, the Court held that if the noise levels exceeded those predicted in the application, but did not reach the specific noise limits set in conditions 4 and 5, there could be no actionable breach of a similar provision to Condition 1 despite the failure to operate in accordance with the predictions.[48] Applying the same approach to the present matter, if there is no transition within 5 years but Hiringa complies with its specific reporting conditions on transition (Conditions 112 and 113), then in line with that Court of Appeal authority there could be no actionable breach of Condition 1.

40. The issues with the High Court's approach to Condition 1 can be tested with some hypotheticals:

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[45] A condition must be sufficiently certain and not unreasonable: *Aubade NZ Ltd v Marlborough District Council* [2015] NZENVC 154 at [37].
[46] Before the Panel Hiringa's position was that the ability to transition was subject to market conditions and on that basis it resisted the Panel's proposal to include even minimal monitoring and review conditions. This suggests a high level of uncertainty as to whether and when transition might eventuate.
[47] *Palmerston North City Council v New Zealand Windfarms Ltd* [2014] NZCA 601.
[48] At [71]-[72].

(a) Consider a situation where complete transition does not happen after 5 years. Could the Council enforce Condition 1 to require transition or shut the Project down? The High Court's approach would suggest not, because it contains no limit on the amount or timing of transition.

(b) Consider a situation where after 34 years transition has still not occurred. Could the Council enforce Condition 1 to require transition or shut the Project down? The High Court's approach would suggest not, perhaps so long as Hiringa still intended to transition in the final year of the consent.

(c) One can also readily foresee Hiringa resisting any hypothetical enforcement action relying on Condition 1 on the basis that it is too vague as to the timing or amount of transition to be enforceable as a condition.

41. Condition 1 does not have the effect of requiring transition. Authority indicates that this is not the effect of conditions of this nature, and it is unlikely that the Panel considered that the condition had this effect. Even if it did, Condition 1 is too vague on its terms and in light of the consent application to have the effect of requiring any transition (generally, or within any particular timeframe).

The Panel viewed transition as critical to its decision to grant the consent but failed to ensure than transition would occur (generally, or within a particular timeframe)

42. The importance of the whether transition was required by the conditions of the consent, and whether it was required to occur in a particular way (i.e. within a particular timeframe or in a particular amount), arises from the approach taken by the Panel to exercising its powers under the FTCA relating to the consideration of the effects of the Project.

43. Under cl 31 of Sch 6 of the FTCA that Panel was required to have regard to, among other things;

(a) any actual and potential effects on the environment of allowing the activity (cl 31(1)(a); and

(b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity (cl 31(1)(b)).

44. The decision whether to grant the consent had to be made against these mandatory considerations and the purposes of the FTCA.

45. As set out above, the Minister's referral of the Project under the FTCA was squarely based on its transition away from fertiliser feedstock to producing clear transport fuel. This was an important issue before the Panel, given recognition that fertiliser synthetic nitrogen fertiliser is a major environmental and climate pollutant whereas renewably generated hydrogen fuel is a clean energy source.

46. Accordingly, and as the High Court accepted,[49] the Panel saw this transition as "critical" to its decision on the consent application:[50]

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

47. The benefits of this transition were what led the Panel to accept a trade-off which involved allowing the environmental harms associated with synthetic nitrogen fertiliser production in the short term in return for the long-term benefits arising from developing a hydrogen fuel source. It stated:[51]

> In the view of the Panel, taking into account the very small fraction of the annual tonnage that would be immediately attributable to production from green hydrogen, and then the intended transition, there is a danger that to disenable this proposal on the basis of urea production end use would be to throw the baby out with the bathwater vis-à-vis the much more ambitious and significant greenhouse gasses / climate change reductions that will be achieved through increasing use of hydrogen fuel in heavy transport. We therefore do not consider that this is a reason to deny the availability of fast-track consenting, or to decline the consent itself. However, it has some relevance to the process of transition.

48. To that end, the Panel recognised the environmental harms associated with initially using the hydrogen to make fertiliser feedstock, but it considered that this was ultimately outweighed by the benefits of transition to fuel use.

49. The Panel went on to acknowledge that the project was "squarely premised on the transition to utilisation of hydrogen in the heavy transport industry", and specially referred to cl 31(1)(b) of Sch 6 of the FTCA,[52] which requires Panel to have regard to measures proposed by the applicant "to ensure

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[49] At [279] **[CB 101.0345]**.
[50] At [61] **[CB 101.0015]**.
[51] At [62] **[CB 101.0015]**.
[52] At [237] **[CB 101.0052]**.

positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing that activity", namely the trade-off described above.

50. The Panel's reference to cl 31(1)(b) of Sch 6 is significant. It shows the Panel explicitly recognising that: (a) there will be adverse effects associated with initially using the hydrogen as fertiliser feedstock; but (b) these adverse effects will be offset by measures ensuring positive effects, being the benefits of transition to clean fuel.

51. The Panel then referred explicitly to paragraph 4.4 of Hiringa's Assessment of Environment Effects which referenced its intention to transition:[53]

> Green hydrogen production is planned to transition from 100% urea to the transport market over a 5 year period as the fuel cell electric vehicle market increases, with the intention to increase electrolysis capacity once green urea production falls below a minimum threshold.

52. The Panel acknowledged that "[a]bsent that transition (i.e. if the proposal were simply to continue producing urea) it is difficult to see how the fast-track consenting could be justified" and that it was not clear whether a consent would otherwise be granted under an ordinary RMA application.[54] Crucially, the Panel continued:

> Therefore, given reliance on transition to justify fast-tracking, it is appropriate to ensure that any consent matches that justification, and is reflected in the appropriate conditions.

53. It is respectfully submitted that it is here where the decision misfired:

(a) If Condition 1 does require Hiringa to act generally in accordance with its stated intention to transition but not to do so within any specific time or in any specific way, that the condition was not effective to achieve the Panel's stated goal of ensuring the consent matched the transition justification as the consent gave no certainty that transition would occur or would occur promptly. This uncertainty was highly relevant to the Panel's assessment of effects under cls 31(1)(a) and 31(1)(b) but it was not considered in that context.

(b) To the extent that some conditions were included that explicitly related to transition, they were not conditions that ensured transition. Rather, conditions 112 to 114 only required Hiringa to

[53] At [237] **[CB 101.0052]**.
[54] At [238] **[CB 101.0052]**.

report to the South Taranaki District Council on its transition progress on 30 June 2023 and each year until 30 June 2028.[55] A further condition left open a discretionary power for the Council, under s 128(1)(a)(iii) of the RMA, to review the transition conditions after 30 June 2028 "for the purpose of assessing progress of the transition ... and/or to propose new conditions to ensure that that transition progresses or continues".[56] There is no requirement that the power be exercised, or that if exercised conditions would be changed in any particular way.

54. The Panel did not explain how or why it considered these three explicit conditions would ensure the transition that it said justified granting the consent. Nor did it assess effects under cl 31(1)(a) or cl 31(1)(b) on the basis that transition might not occur or might be substantially delayed, and instead assessed these matters as if it were clear that transition would occur.

55. Despite finding that transition to crucial to justifying the consent, the effect of the conditions imposed by the Panel is that Hiringa can use its hydrogen for fertiliser feedstock for 35 years subject to reporting on its progress towards transition for several years and the possible review of its consent conditions by the Council. Hiringa might or might not decide to transition some or all of that production to hydrogen fuel, but that is not guaranteed. To adopt the Panel's analogy, the consent as given could create a situation where the baby is never placed into the bath.

First error: failure to impose condition requiring transition

56. The Panel explicitly viewed transition to fuel use as critical to whether the Project should be consented. That reflected the justification for the project having been referred by the Minister under the FTCA. As noted, the Panel expressly referenced cl 31(1)(b) of Schedule 6 showing it considered transition to be a means of offsetting the adverse environmental effects of initial urea production.[57] In that way, the fact of transition was central to the Panel's consideration of the environmental effects of the project, and it enabled the Panel to conclude that initial adverse effects would be offset by future benefits.

57. Absent transition, it seems that the Panel would not have granted the consent because the Project would not have met the purposes of the

[55] Conditions 112 and 113 **[CB 101.0087]**.
[56] Condition 114 **[CB 101.0087]**.
[57] Decision at [237] **[CB 101.0052]**.

FTCA, and for this reason the Panel recognised that it was necessary to use its condition-making powers to "*ensure* that any consent matches that justification" (that justification being Hiringa's indicated transition to 100% fuel use within 5 years).[58]

58. Having decided to grant the consent on the basis that its conditions needed to match the justification of transition, it was incumbent on the Panel to include conditions having that effect. It was an error of law for the Panel to decide to grant the consent on the basis that transition needed to be ensured, and having assessed effects on the basis of transition, but without exercising its power to include conditions[59] requiring that transition to actually occur. This is reenforced by the Panel's reference to cl 31(1)(b) of Sch 6, which only allowed consideration measures that offset or compensated for adverse effect by "ensur[ing] positive effects on the environment": here the transition. The Panel relied on those positive effects but did not take steps to ensure they arose.

Second (alternative) error: irrelevant consideration

59. The second error is the flipside of the first, and necessarily an alternative ground. If the Court finds that the Panel did not err in failing to include a condition requiring transition, or that Condition 1 had only the general requirement to transition found by the High Court, then the Panel must have erred by taking into account the fact of transition in its assessment of environmental effects.

60. The requirements of cl 31(1) of Sch 6 are set out above, and it required the consideration of environment effects and also positive effects which would offset adverse effects. The language of cl 31(1)(b)—the offsetting provision—is particularly important. The relevant consideration is of measures that "*ensure* positive effects on the environment" (emphasis added). A measure that only creates a potential of positive effects, but does not "ensure" them, is irrelevant under cl 31(1)(b). Parliament's use of the word "ensure" here is deliberate, and can be contrasted with the wider concept of "actual and potential effects" in cl 31(1)(a).

61. The Panel approached both considerations from a premise that transition would occur. Nowhere in the decision does the Panel consider the possibility that transition might never occur, or that it might be substantially different to Hiringa's intention of a complete transition with 5 years. Nowhere does the Panel consider that, faced with no progress towards

[58] Decision at [238] **[CB 101.0052]**.
[59] Schedule 6, cl 35.

transition, the South Taranaki District Council might not choose to exercise its review powers under s 128 of the RMA, or having exercised those powers might conclude that it is comfortable with the project not transiting or not transitioning rapidly (and thus not requiring any change in the conditions).

62. Absent a condition requiring transition, it is entirely possible that transition will not occur or will be limited, or that it will be significantly delayed. For example, a market for hydrogen fuel might not develop or might develop slowly (which was the reason why Hiringa pushed back against any conditions relating to transition progress before the Panel). Or it might be that the market for fertiliser is such that there is no economic incentive transition to fuel, if that is a less profitable option. Whatever the case, transition is not guaranteed by the consent or in fact.

63. Hiringa's proposal was put forward on the basis that complete transition to fuel use was intended to occur within 5 years. The Panel considered the environmental effects of the project on the basis that it would transition.[60] However, without any guarantee or requirement that the transition would occur, the prospect of a potential transition was irrelevant to the decision and its consideration amounted to an error of law. Absent a requirement that transition occur (in a particular amount and within a particular time), the Panel ought to have considered environmental effects on the basis that there would be no transition, and accordingly on the basis that transition did not offset the adverse environmental effects of the project and that the project would simply produce hydrogen for fertiliser production.

The two errors in a nutshell

64. Put simply, the Panel had to pick a lane:

(a) if the Panel was going to consider effects on the basis of transition, then it needed to include conditions ensuring that transition would happen in a way that reflected its assessment of effects;

(b) if the Panel was not going to require a transition within a particular time, then it needed to consider environmental effects on the basis that there would (or might) be no transition because, with all the will in the world, a transition might never happen, might be minimal, or might be delayed.

[60] At [56] **[CB 101.0014]** to [62] **[CB 101.0016]**; at [236] to [239] **[CB 101.0052]**.

65. The High Court's finding that Condition 1 generally required a transition but not within any particular time limit or others parameters does not displace this logical fork. The second of these issues remains: that the Panel did not assess effects on the basis that transition might not happen or that it might be substantially delayed, and so erred.

66. The Panel's approach did not achieve its stated goals. Its conditions did not achieve its stated goal of ensuring that transition occurred in a way that matched the justification for the consent. However, its consideration of effects was premised on transition occurring and did not take into account the possibility that, on the conditions actually made, transition might be delay or not occur at all such that the offsetting benefits under cl 31(1)(b) of Sch 6 might never arise.

67. To achieve its goal of ensuring that the conditions of the consent matched the "justification" of transition, and its reliance on cl 31(1)(b), it was incumbent on the Panel to:

    (a) Specify when transition had to occur and at what level. Subject to the arguments about Te Tiriti o Waitangi, it would have been open to the Panel to allow the Council to retain review powers and for Hiringa to make a case to the Council to relax those requirements of obstacle to transition arose;

    (b) Alternatively, or additionally, direct the Council as to the matters it needed to consider when reviewing the consent conditions. For example, by setting minimum or baseline transition requirements, or constraining the amount of "leeway" to be given to Hiringa if issues arose.

68. To the extent explicit conditions relating to transition were included in Conditions 112 to 114 they do not overcome these issues because they do not provide parameters for transition against which the Panel could have properly considered that matters in cl 31(1) of Sch 6 of the FTCA.

69. Put another way, the consent did not grant one project, instead it granted a spectrum of projects. It granted a project that would see hydrogen used to make fertiliser, with the potential that at some point in period of the consent some portion of that hydrogen would be transitioned to fuel use. This meant that the actual and potential effects of the Project for the purposes of cl 31(1)(a) of Sch 6 of the FTCA were many and varied (depending on whether, when and how much the Project transitioned), but were not considered by the Panel on that basis. It also meant that there was no basis for the Panel to find, under cl 31(1)(b) of Sch 6 of the FTCA,

that the proposed transition would "ensure" positive effects which offset the adverse effects associated with use as fertiliser feedstock because those effects might never eventuate or might take materially different forms (for example, transition with 5 years will create many more positive effects than transition after 34 years). The Panel erred by failing to consider these matters.

Abdication of decision-making power and its consequences

70. By failing to include conditions relating to transition, and instead leaving any assessment of transition process or implementation of transition requirements, entirely to the discretion of the Council, the Panel abdicated a core aspect of its statutory function. In so doing, it also failed to comply with its obligations under s 6 of the Act.

71. Clause 35(2) of Schedule 6 empowered the Panel to "grant a resource consent subject to the conditions it considers appropriate". While framed as a discretion, the exercise of the power is conditioned by the requirements of legality, fairness and reasonableness.

Third error: Failure to make conditions regulating transition and instead leaving that issue of future decision-making by the Council under the RMA

72. Parliament has created an Act that allows for Panels to make decisions on certain consent applications under a bespoke and expedited statutory scheme. Parliament has entrusted these Panels with determining whether consents should be granted and on what terms.

73. It is well established that a decision-maker cannot use (or fail to exercise) as discretionary power in a way that frustrates the object of an Act.[61] As the United Kingdom Supreme Court held in *RM v The Scottish Ministers*: "The importance of *Padfield* was its reassertion that, event where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention".[62]

74. In the present case, having been granted by Parliament the function of determining whether to grant the consent and on what conditions, it was incumbent on the Panel to exercise those powers. We have seen that transition was at the heart of the Panel's assessment of environmental effects, and that it considered it necessary to ensure that the conditions of

[61] *RM (AP) v The Scottish Ministers* [2012] UKSC 58 at [42], [47]; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[62] At [47].

the consent matched the transition justification. It was not open to the Panel, having decided that the consent should only be granted on conditions that ensured transition, to then make no conditions ensuring transition.

75. While it was open to the Panel to create a role for the Council going forward, it was nevertheless necessary for the Panel to substantively address the conditions needed to achieve the transition that it had found it needed to ensure. The Panel abdicated this decision by leaving it to be dealt with in the future by a different body, without any parameters or constraints as to timeframes or extent of progress, or consequences for failure to meet those targets, and that was an error of law.

76. In the FTCA Parliament has allocated decision-making functions to expert consenting panels operating under the auspicious of the Environmental Protection Agency. In this way, decision-making has been situated at a *national* level (although local authorities can nominate one of the panel members[63]). This reflects the stated purpose of the Act and the fact it was responding to a national emergency. There is also a risk that local decision-makers will take a parochial approach: the South Taranaki District Council might be content to allow the project to continue making fertiliser if it is contributing to the local economy, even if that is inconsistent with the reasons for which the project was referred and consented. The Panel was expected to take a broader view, and this was the reason the Project could be considered under the FTCA. The Panel's abdication of decision-making on the key aspect of the project was material and inconsistent with the scheme and purpose of the legislation.

Fourth error: Inconsistency with s 6 of the FTCA

77. Section 6 of the FTCA requires all persons performing functions and exercising powers under the Act to act in a manner that is *consistent* with the principles of the Treaty of Waitangi.

78. Those principles include active protection. That principle was first recognised by the Court of Appeal and extends to "active protection of the Māori people in the use of their lands and waters to the fullest extent practicable".[64]

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[63] FTCA, Sch 5, cl 3(2)(a).
[64] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

79. The Panel's failure to include conditions requiring transition, and to instead leave that matter to the Council's potential to exercise powers under s 128 of the RMA created two errors of law in light of s 6 of the FTCA.

Differing requirements in relation to Treaty considerations

80. First, the powers that would be exercised by the Council are powers under the RMA and not under the FTCA. The RMA does not require decision-makers to act consistently with the principles of the Treaty of Waitangi. Section 8 of the RMA only requires that decision-makers "take into account the principles of the Treaty of Waitangi". These are different obligations.

81. Treaty clauses are to be given broad and generous construction; that is the position as set out by the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[65] However, it does not follow that the Council's obligation to "take into account" Treaty principles can be elevated to the same standard as the Panel's obligation to "act consistently" with Treaty principles. In *Trans-Tasman* the Supreme Court considered the legislative history of s 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**):[66]

> Relevantly, in the EEZ Bill as introduced, the clause that became s 12 referred to the Crown's responsibility to "take appropriate account" of the Treaty. The Select Committee considering the Bill recommended that the clause be amended "to give effect to the principles of the Treaty of Waitangi" through the specified provisions. That change was made, but a supplementary order paper which would have added in a new subsection like that in s 4 of the Conservation Act stating that the Act "must be interpreted and administered so as to give effect to the principles of the Treaty" was rejected.

82. This makes it clear that Parliament intended "take appropriate account" to mean something different to "give effect to", in relation to Treaty principles. In the present case, Parliament must have intended that the Council's obligation to "take into account" Treaty principles, pursuant to the RMA, must mean something different to the Panel's obligation to "act consistently" with Treaty principles, under the FTCA.

83. It is submitted that the Panel's obligation in s 6 of the FTCA is more onerous than that of the Council under s 8 of the RMA. The Panel must take into

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[65] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151] and [296].
[66] At [147] (footnotes omitted).

account Treaty principles *and* it has a positive obligation to act consistently with those principles. The Council need only take into account Treaty principles which, even on a generous construction, cannot impose the same positive obligation to ensure consistency.

84. The result is that decisions about the issue that the Panel considered to be crucial to its decision to grant the consent—whether transition will occur, and if so when and by how much—will be left to a decision-maker, the Council, that is not required to act consistently with the principles of the Treaty of Waitangi. This supports the previous argument that Parliament intended the Panel to make the key decisions about the consent that the Panel acted unlawfully in abdicating that role.

Breach of principle of active protection

85. Secondly, the failure of the Panel to make conditions ensuring transition was a breach of s 6 of the FTCA because it was not consistent with the principle of active protection.

86. Active protection required the Panel to achieve the outcome it found needed to be achieve—that the consent conditions matched the transition justification—and not to leave this important issue open in the hope that Hiringa would act as it represented, or that the Council would ensure that transition occurred. The interests of Māori were not actively protected by leaving these matters at large and by leaving open the possibility the transition would not occur.

87. To that extent, active protection required that the Panel deal with the important issue of transition. The interests of Māori were not actively protected by leaving this issue to be addressed years down the track by a body—the Council acting under the RMA—that was not itself required to make those decisions consistently with the principles of the Treaty of Waitangi. That is the opposite of active protection.

Fifth error: Wider issues with s 6 of the FTCA and the Panel's approach to the principles of the Treaty of Waitangi

88. In the High Court, Greenpeace submitted that the Panel failed to implement s 6 of the FTCA as a *substantive* rather than merely procedural threshold for decision-making, and that this is an error of law of itself. This failure occurred by the Panel failing to consider what would happen to Māori interests in the event that transition to fuel production did not occur or was delayed.

89. In the High Court, Greenpeace submitted that the failure to ensure transition would damage Māori interests through the contribution of that

fertiliser to the harmful effects of climate change and through water pollution.[67] This failure to consider Māori interests is evident in the Panel's failure to give any reasons on this point.

90. The High Court found that the Panel was entitled to find that the indirect effects of the end-use of urea should not be given "determinative weight" in the circumstances (of a project intended to transition), and so considered it was not required to provide detailed reasons on this aspect.[68] However, the High Court did not assess the Panel's failure to consider the impact of delayed or unsuccessful transition on Māori interests, absent any condition requiring transition to occur.

91. First, and at a minimum, the Panel needed to consider what would happen to Māori interests if transition to fuel production did not occur or was delayed. That is because the continued production of synthetic nitrogen fertiliser under the consent has the potential to damage Māori interests through the contribution of that fertiliser to the harmful effects of climate change[69] and through water pollution.[70]

92. In failing to directly consider these matters, including in relation to effects on Māori, the Panel's decision was not consistent with the principles of the Treaty of Waitangi because it failed to actively protect Māori and Māori interests (including because it failed to ascertain those interests).

93. A further failure of active protection was the Panel's decision not to include a condition requiring the Project to transition to fuel production within 5 years or some fixed period. Instead, and as discussed, the Panel left open the possibility that no transition would ever occur or that it would be substantially delayed, in which case the Project would continue to primarily

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[67] At [312] **[CB 101.0355]**.
[68] At [314] **[CB 101.0355]**.
[69] It is submitted that the Court can take judicial notice of the particular vulnerability of Māori to the effects of climate change. This proposition is accepted across government and the literature. See, for example, the report of the Ministry for the Environment's Climate Change Adaption and Technical Working Group *Adapting to Climate Change in New Zealand* (MfE, 2017); Shaun Awatere et al "A changing climate, a changing world" (2021) 7 Te Arotahi 1; Darren Ngaru King et al "The climate change matrix facing Māori society" in RAC Nottage et al (eds) *Climate change adaption in New Zealand: Future scenarios and some sectoral perspectives* (New Zealand Climate Change Centre, Wellington 2020); Hayley Bennett et al "Health and equity impacts of climate change in Aotearoa-New Zealand, and health gains from climate action" (2014) 127 (1406) NZMJ 16.
[70] Similarly, it is submitted that judicial notice can be taken of the effects of the pollution of New Zealand's water resources on Māori. This, too, is widely recognised by the government and in the literature. See, for example, Ministry for the Environment *Our Freshwater 2020* (MfE, Wellington, 2020). The significance of rivers to Māori is also recognised in numerous Waitangi Tribunal decisions and Treaty settlements.

produce an environmental pollutant. The inclusion of a condition requiring transition would have mitigated the risks to Māori interests connected to the ongoing use of the Project to produce fertiliser, and engaged with the duty of active protection.

94. Greenpeace submits that having identified transition from urea to fuel as the critical feature of the Project it was incumbent on the Panel to, at a minimum, identify what effects that would have on Māori and to address those effects by including conditions requiring transition in order to actively protect Māori interests. Rather than protecting Māori interests to the fullest extent practicable by placing the risk of a failure or inability to transition on the consent holder, the Panel instead placed that risk on Māori and the wider community.

Relief

95. For the reasons set out in these submissions, the Panel erred in law in its decision to grant the consent. The appeal should be allowed, the Panel's decision quashed, and the matter remitted to Panel to be reconsidered afresh.

Costs

96. If Greenpeace's appeal fails, then it relies on r 35(6)(c) of the Court of Appeal (Civil) Rules 2005 and respectfully submits that a costs order should not be made against it for the following reasons:

    (a) Greenpeace has no private interest in the appeal and appears solely as a representative of the public interest.

    (b) Greenpeace's role as a representative of the public interest is explicitly recognised in FTCA. While Parliament has significantly limited public participation and appeal rights, it has specified Greenpeace as one of a number of groups who must be invited to comment on applications and which have an ability to participate in appeals.[71] Greenpeace takes the role entrusted to it seriously.

    (c) Greenpeace's role in this proceeding is consistent with the courts' longstanding recognition of the responsible and important "watchdog" role played by Greenpeace in relation to public

[71] COVID-19 Recovery (Fast-track Consenting) Act 2020, Sch 6, cl 17(6)(o).

decision-making connected to the environment.[72] Here is this role was especially important given the limited ability of other New Zealanders to challenge or test the decision.[73]

(d) Counsel for Greenpeace appear on a *pro bono* basis, reflecting the public interest elements of the proceeding.

(e) Greenpeace has responsibly brought and progressed the appeal, including meeting its obligations under the Fast Track Protocol and adjusting its representation to accommodate this fixture.

Dated 17 April 2023

I T F Hikaka / D A C Bullock / K M Hursthouse
Counsel for the appellant

[72] Summarised in *Greenpeace New Zealand Incorporated v Environmental Protection Authority* [2020] NZHC 1167 at [9]-[11]. More generally, see also *Lawyers for Climate Action NZ Incorporated v Climate Change Commission* [2023] NZHC 527.

[73] See, for example, *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 167 at [24], where the Supreme Court observed "Public interest litigants in such cases may meet a real need in presenting important perspectives that would otherwise be unrepresented in the decision-making processes. Such representation may assist in the legitimacy of the process and its outcome."