IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA649/2022
[2023] NZCA 672

BETWEEN	GREENPEACE AOTEAROA INCORPORATED Appellant
AND	HIRINGA ENERGY LIMITED AND BALLANCE AGRI-NUTRIENTS LIMITED Respondents
AND	ŌKAHU-INUĀWAI ME ĒTEHI ATU HAPŪ, NGĀTI TŪ HAPŪ, NGĀTI TAMAAHUROA-TITAHI HAPŪ AND NGĀTI HAUA HAPŪ Interested Parties

Hearing:	23 May 2023
Court:	Cooper P, Katz and Mallon JJ
Counsel:	I T F Hikaka and K M Hursthouse for Appellant P F Majurey, L P Wallace and R E Eaton for Respondents N R Coates and N A T Udy for Interested Parties
Judgment:	21 December 2023 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We make no order as to costs.

REASONS

KATZ AND MALLON JJ

(Given by Mallon J)

Table of contents

INTRODUCTION AND SUMMARY

[1] Hiringa Energy Ltd (Hiringa) and Ballance Agri-Nutrients Ltd (Ballance), the respondents, propose to construct a hydrogen plant at Kapuni, Taranaki. The hydrogen produced will initially be used as feedstock for synthetic nitrogen (urea) fertiliser, at an existing production facility (the Ballance Plant) before transitioning over a five-year period to supply hydrogen fuel for commercial and heavy transport (the Project).

[2] A resource consent for the Project was granted under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (the FTCA) by an expert consenting panel (the Panel) established under the FTCA (the Decision). The intended transition to supplying hydrogen fuel for commercial and heavy transport was the key reason the consent was granted. That is because hydrogen used in that way may help to reduce greenhouse gas emissions associated with road transport. However, urea fertiliser can be harmful to the environment. The conditions of the consent required the respondents to report on progress in achieving the transition from its use for urea fertiliser to hydrogen fuel.

[3] The decision of an expert consenting panel under the FTCA may be appealed to the High Court on a question of law.[1] Te Korowai o Ngāruahine Trust (Te Korowai), supported by four hapū (Ngā Hapū), appealed the Decision to the High Court.[2] Te Korowai is the mandated post-settlement governance entity and representative body for Ngāruahine iwi. Ngāruahine iwi includes the hapū with mana whenua over the land on which the Project is sited. Te Korowai and Ngā Hapū's principal concern was that infrastructure for the Project will include four wind turbines and these structures will impact the relationship of the hapū of Ngāruahine iwi to Taranaki Maunga by obstructing the visual and spiritual pathway to the Maunga from hapū marae. Te Korowai and Ngā Hapū contended that, in granting the consent, the Panel had failed to act in a manner consistent with the Treaty of Waitangi (the Treaty) as required by the FTCA.[3]

[4] Greenpeace Aotearoa Inc (Greenpeace) was also an interested party in the High Court appeal.[4] Its primary concern related to the proposed transition from the use of hydrogen for fertiliser to its intended use as fuel for commercial and heavy road transport. It considered the Panel failed to include any condition requiring the

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1 COVID-19 Recovery (Fast-track Consenting) Act 2020 [FTCA], sch 6 cl 44(1) and (2).

2 The Taranaki Māori Trust Board was also an interested party but did not take an active part in the appeal in the High Court. We have recorded the hapū groups in the intituling as they appear in the notice of appearance for Ngā Hapū in this Court. However we note that, without explanation, Kānihi-Umutahi hapū is included in place of Tamaahuroa-Titahi hapū in Ngā Hapū's submissions.

3 FTCA, s 6.

4 Schedule 6 cls 44(1), 45(6) and 45(8). Under the regime, parties who were invited to comment are served with an appeal and become a party to the appeal if they file a notice of intention to appear. Ngā Hapū and Greenpeace became parties to the appeal through these procedures.

transition to actually occur and that this was an error of law. It also supported the appeal by Te Korowai.

[5] In the High Court Grice J dismissed the appeal.[5] The FTCA also provided a final right of appeal to this Court.[6] Greenpeace now appeals the High Court decision to this Court. Ngā Hapū are parties to this appeal. Te Korowai abides this Court's decision.

[6] On this appeal, Greenpeace contends that the Panel failed to include any condition requiring the transition to actually occur and this:

(a) was an error of law, or alternatively, meant that the Panel erred in assessing the environment effects of the Project on the basis that the transition would occur;

(b) meant that the issue of transition was left to be addressed by the South Taranaki District Council and this was an unlawful abdication of its decision-making function under the FTCA; and

(c) failed to actively protect Māori interests because 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.

[7] Ngā Hapū contends that the Decision was unlawful because it was not consistent with the principles of the Treaty.[7] They say that:

(a) the Crown is under an obligation to protect taonga of great spiritual and physical importance to Māori;

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5 *Te Korowai o Ngāruahine Trust v Hiringa Energy Ltd* [2022] NZHC 2810, (2022) 24 ELRNZ 269 [High Court judgment].

6 FTCA, sch 6 cl 44(3).

7 Greenpeace supports Ngā Hapū's appeal on these grounds.

(b) Taranaki Maunga and Ngā Hapū's tikanga-based relationship with the Maunga is a taonga;

(c) because of the unmitigated adverse spiritual and cultural harm to that connection from the Project, the Decision is inconsistent with the Treaty principle of active protection;

(d) there were no exceptional circumstances to displace this inconsistency; and

(e) this meant the Panel was required to decline consent to the Project or at least to consider properly whether there was an alternative site for the turbines that would not impact on the spiritual and physical relationship of Ngā Hapū with Taranaki Maunga.

[8] We have concluded that the appeal must be dismissed. In summary this is because:

(a) The Project was not referred to the Panel because it would certainly make a successful transition to utilising the hydrogen for transportation. It was referred to the Panel in part 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. The conditions of the consent reflected this intention but did not require a successful transition because that could not be assured. The conditions of the consent properly matched the justification for the Project's referral to the Panel.

(b) The Decision was consistent with the principles of the Treaty. The principle of active protection of taonga did not require the Panel to find that any structure placed on the landscape in front of the Maunga was inconsistent with the principles of the Treaty. This principle, as with other Treaty principles, falls under the overarching principle of partnership. 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 this case the circumstances included that the position of hapū were not consistent nor aligned. Ngāti Manuhiakai, the hapū most affected by the proposed location of the turbines, supported the Project. This was evidence that, with appropriate mitigating measures, the Project was consistent with the duty of active protection and the overarching principle of partnership. It was open to the Panel to conclude that, with appropriate conditions, the Project was consistent with the principles of the Treaty.

[9] We set out below our reasons for the conclusions we have reached. We begin by discussing the FTCA regime and the respondents' application for a consent under the FTCA (the Application). We then discuss the Decision and the High Court judgment as it relates to Greenpeace's grounds of appeal and our assessment of those grounds. We then discuss the Decision as it relates to Ngā Hapū's grounds of appeal and our assessment of those grounds.

FTCA

[10] The FTCA was enacted in the context of the COVID-19 pandemic.[8] Its purpose was set out in s 4 as follows:

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

[11] Section 6 of the FTCA was the Treaty clause. It provided:

> **6 Treaty of Waitangi**
>
> In achieving the purpose of this Act, all persons performing functions and exercising powers under it must act in a manner that is consistent with—
>
> (a) the principles of the Treaty of Waitangi; and

[8] The legislation was repealed on 8 July 2023 by its sunset clause. See FTCA, s 3(1).

(b) Treaty settlements.

[12] The FTCA sought to achieve its purpose by providing for certain resource consent applications to be determined on a fast-track basis by an expert consenting panel appointed to consider the application. Schedule 6 of the FTCA applied to applications made under the FTCA in place of the Resource Management Act 1991 (the RMA) process for resource consent applications.[9] A consent granted under the FTCA had the same force and effect for its duration, and according to its terms and conditions, as if it were granted under the RMA.[10] Except as otherwise provided in the FTCA, the RMA applied.[11]

[13] Resource consent applications qualified for the fast-track process as either a "listed project" or "referred project".[12] Listed projects were itemised in sch 2 of the FTCA. Referred projects were projects that were referred to an expert consenting panel, either on the joint decision of the Minister for the Environment and the Minister of Conservation where the project would occur in the coastal marine area,[13] or on the decision of the Minister for the Environment alone in any other case.[14] The Project was a referred project of the latter kind.

[14] To be referred, the Minister (or Ministers) had to be satisfied that the project would "help to achieve the purpose of [the FTCA]" amongst other things.[15] If the Minister decided to refer a project to an expert panel, the Minister was required to recommend that a referral order be made by Order in Council.[16] The Minister was also to send to the Environmental Protection Agency (the EPA) and the panel convenor all information received that relates to the matter.[17] The EPA provided the application to the expert panel appointed to determine it.[18] Up to four persons could be appointed

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9 Section 12(2)(a).
10 Section 12(2)(b).
11 Section 12(10).
12 Section 14(a) and (b).
13 Section 16(1)(a).
14 Section 16(1)(b).
15 Section 18(2). In considering whether a project would help to achieve the purpose of the FTCA, the Minister could have regard to various specified matters set out in s 19 and these were assessed at whatever level of detail the Minister considered appropriate.
16 Section 27.
17 Section 26(2)(b). The function of a panel convenor was to appoint the members of expert consenting panels: see sch 5 cl 2(5).
18 Schedule 6 cl 3(2).

to an expert panel.[19] One person was to be nominated by the relevant local authorities and one person must be nominated by the relevant iwi authorities.[20] The chairperson was required to be a judge or retired judge or, if the circumstances required, a suitably qualified lawyer with experience in resource management law.[21] Collectively the panel was required to have resource management knowledge, skills and expertise; technical expertise relevant to the project; and expertise in tikanga Māori and mātauranga Māori.[22]

[15] No public or limited notification of applications was permitted.[23] However, the expert panel was required to invite written comments on applications from specified persons or groups.[24] The specified persons or groups for a referred project included the relevant iwi authorities and Greenpeace.[25] Iwi authorities invited to comment could share the consent application with hapū whose rohe was in the project area and could choose to include comments from those hapū with its comments to the expert panel.[26]

[16] There was no requirement to hold a hearing under the fast-track process. This was set out in cl 20 of sch 6 as follows:

> **20 Hearing not required**
>
> There is no requirement for a panel to hold a hearing in respect of a consent application or notice of requirement and no person has a right to be heard by a panel.

[17] If a hearing was held, the procedure for the hearing was set out in cl 21 of sch 6 as follows:

> **21 Procedure if hearing is held**
>
> *Who may appear and be heard*
>
> (1) If, in its discretion, a panel considers it is appropriate to hold a hearing, it may hear from—

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19 Schedule 5 cl 3(1).
20 Schedule 5 cl 3(2).
21 Schedule 5 cl 4(1) and (3).
22 Schedule 5 cl 7(1).
23 Schedule 6 cl 17(1).
24 Schedule 6 cl 17(4) and (6).
25 Schedule 6 cl 17(6)(b) and (o).
26 Schedule 6 cl 18(3).

(a) the applicant; and

(b) any person commissioned by the panel to write a report on the relevant consent application or notice of requirement; and

(c) any person or group that provided comments in response to an invitation given under clause 17(2).

(2) If a person or group that provided comments is heard, a panel must give the consent applicant or requiring authority the opportunity to be heard.

…

[18] Clause 21 of sch 6 went on to provide notice and timing requirements for hearings as well as other provisions for the conduct of hearings.[27] There were tight timeframes for all steps in the fast-track process, beginning from the lodgement of the application with the EPA. The timeframes are summarised in the following diagram:

[19] As this diagram shows, expert panels were required to issue decisions on referred projects within 25 working days of the date for receiving comments, but this could be extended or varied by the referral order.[28] An extension could be for the

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27 Schedule 6 cl 21(3)–(15).

28 Schedule 6 cl 37(2)(b) and (3)(b).

period specified in the referral order or, if the referral order was silent on the matter, up to a further 25 working days.[29]

[20] Timeliness was an element of the procedural principles in s 10 of the FTCA as follows:

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

[21] Clause 31 of sch 6 set out the matters that the expert panel was required to or could have regard to when considering referred projects. The factors in cl 31(1) that the expert panel was required to consider were subject to the purpose and principles of the RMA (in pt 2) as well as the purpose of the FTCA (in s 4). Most relevantly for present purposes, cl 31 provided:[30]

> **31 Consideration of consent applications for referred projects**
>
> *Matters to which panel must have regard*
>
> (1) When considering a consent application in relation to a referred project and any comments received in response to an invitation given under section 17(3), 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
>
> (c) any relevant provisions of any of the documents listed in clause 29(2); and
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> (d) any other matter the panel considers relevant and reasonably necessary to determine the consent application.

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29 Schedule 6 cl 37(3)(b).

30 The documents listed in cl 29(2) of sch 6 are: a national environmental standard, other regulations made under the RMA, a national policy statement, a New Zealand coastal policy statement, a regional or proposed regional policy statement, a plan or proposed plan, and a planning document recognised by a relevant iwi authority and lodged with a local authority.

(2) In respect of the matters listed under subclause (1), a panel must apply section 6 of this Act (Treaty of Waitangi) instead of section 8 of the Resource Management Act 1991 (Treaty of Waitangi).

…

Other matters relevant to decisions

(7) A panel may grant a resource consent on the basis that the activity concerned is a controlled, restricted discretionary, discretionary, or non-complying activity, regardless of what type of activity the application was expressed to be for.

(8) A panel may decline a consent application on the ground that the information provided by the consent applicant is inadequate to determine the application.

(9) In making an assessment on the adequacy of the information, a panel must have regard to whether any request made to the consent applicant for further information or reports resulted in further information or any report being made available.

(10) If a Treaty settlement imposes an obligation on a local authority or other decision maker when determining an application for a resource consent, a panel must comply with that obligation as if it were the local authority or other decision maker (*see* example relating to clause 29(4)).

(11) Subclause (10) is subject to clause 5 of Schedule 5 (conduct of hearings and other procedural matters in context of Treaty settlements).

(12) A panel must decline a consent application for a referred project if that is necessary to comply with section 6 (Treaty of Waitangi).

[22] Clause 32 of sch 6 provided further relevant matters the expert panel was to consider as follows:[31]

32 Further matters relevant to considering consent applications for referred projects

(1) Sections 104A to 104D, 105 to 107, and 138A(1), (2), (5), and (6) of the Resource Management Act 1991 apply to a panel's consideration of a consent application for a referred project.

(2) The provisions referred to in subclause (1) apply with all necessary modifications, including that a reference to a consent authority must be read as a reference to a panel.

...

[31] The provisions of the Resource Management Act 1991 [RMA] referred to in sch 6 cl 32(1) of the FTCA relate to such matters as determining applications for controlled activities, and discretionary or non-complying activities amongst other things.

[23] Clause 35 of sch 6 permitted an expert panel to grant a resource consent subject to "the conditions it consider[ed] appropriate" and the RMA provisions relating to conditions applied with "all necessary modifications".[32]

[24] Clause 36 of sch 6 required the expert panel to provide draft conditions for comment as follows:

> **36 Panel to provide copies of draft conditions**
>
> (1) Before a panel grants a resource consent or confirms or modifies a designation, the panel must provide a copy of its draft conditions to the following, inviting comments on the draft conditions:
>
> (a) the consent applicant or requiring authority; and
>
> (b) every person or group that provided comments in response to an invitation given under clause 17(2).
>
> (2) A panel must set a date by which any comments on the draft conditions must be received by the EPA.
>
> (3) The EPA must, as soon as practicable after receiving comments under subclause(1), provide electronic copies of those comments to—
>
> (a) the members of the panel; and
>
> (b) the consent applicant or requiring authority; and
>
> (c) every person or group that provided comments in response to an invitation given under clause 17(2).
>
> (4) Sections 123 and 123A of the Resource Management Act 1991 apply to the duration of any resource consents granted by a panel.
>
> (5) Before making its final decision on a consent application or notice of requirement, a panel must have regard to all comments received under subclause (1).

[25] The expert panel was required to produce a written report of its decision.[33] As noted, the FTCA provided for appeal rights against panel decisions. An appeal on a question of law could be made by certain persons to the High Court.[34] This included any person who was permitted to and did comment on the application.[35] An appeal

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32 RMA, ss 108, 108A–112 and 220.
33 FTCA, sch 6 cl 37(1)(b).
34 Schedule 6 cl 44(1) and (2).
35 Schedule 6 cl 44(1)(d).

against a High Court decision could be made to the Court of Appeal, but that appeal was final.[36]

[26] The local authority that, but for the FTCA, would have had responsibility for granting a resource consent under the RMA had "all the functions, powers, and duties in relation to a resource consent granted under [the FTCA], as if it had granted the resource consent itself".[37]

REFERRAL

[27] On 2 April 2021 the Governor-General, on the advice and consent of the Executive Council and the recommendation of the Minster for the Environment, referred the Project under the FTCA (the Order).[38] The Order described the scope of the Project as being "to construct, install, and operate a renewable hydrogen hub".[39] The renewable hydrogen hub was described as comprising: four wind turbines and associated infrastructure; an electrolysis plant; hydrogen production infrastructure; hydrogen storage, loadout, and refuelling facilities; and underground electricity cables and associated buildings and structures.[40]

[28] The Order required the respondents to submit to the expert panel a range of further information in addition to that already required under the FTCA.[41] Relevantly, this included:

(a) a landscape and visual assessment, including photomontages showing the scale of the proposed wind turbines in relation to views of Taranaki Maunga;[42] and

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36 Schedule 6 cl 44(3).
37 Schedule 6 cl 42(2)(a).
38 COVID-19 Recovery (Fast-track Consenting) Referred Projects Amendment Order (No 3) 2021 [Amendment Order]. The Order in Council amended the COVID-19 Recovery (Fast-track Consenting) Referred Projects Order 2020 [Order]. The Amendment Order was made on the 29 March 2021 but did not come into force until 2 April 2021. The Amendment Order inserted schs 14 and 15 into the Order.
39 Order, sch 14 cl 3(1).
40 Schedule 14 cl 3(2).
41 Schedule 14 cl 6.
42 Schedule 14 cl 6(a).

(b) a cultural impact assessment prepared by or on behalf of the Taranaki Māori Trust Board as the collective representative of Ngā Iwi o Taranaki (or reasons given by the Taranaki Māori Trust Board for not providing that assessment).[43]

[29] Before making the Order, comments were sought and received from the relevant Ministers, local authorities, energy sector participants, Te Korowai, Ngāti Tū and Ngāti Manuhiaki (two of the six hapū of Ngāruahine).[44] The Order specified parties from whom the expert panel was to invite comments, in addition to those specified in the FTCA. They included the six Ngāruahine hapū, as well as Te Rūnanga o Ngāti Ruanui Trust and the Taranaki Māori Trust Board.

[30] The Project was referred for the following reasons:[45]

- the project will help to achieve the purpose of the Act; and
- the project offers the opportunity to create an average of 40 full-time-equivalent jobs, over an 18-month period, in engineering, design, and construction; and
- the project provides infrastructure that will contribute to improving economic and employment outcomes; and
- the project is likely to 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); and
- the project will progress faster than would otherwise be the case under the Resource Management Act 1991 standard processes; and
- any adverse effects arising from the activities occurring in the project, and potential mitigation measures, can be tested by an expert consenting panel, having regard to Part 2 of the Resource Management Act 1991 and the purpose of the Act.

[31] Following the Order, the Panel was established to consider the Application from the respondents for a resource consent under the FTCA.[46]

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43 Schedule 14 cl 6(b).
44 This is discussed at [107]–[109].
45 Order, sch 14.
46 The Panel was comprised of Richard Fowler KC as chair, Sheena Tepania (nominated by Te Korowai), Robert Northcote (nominated by South Taranaki District Council) and Justine Inns (a barrister and solicitor with resource management expertise).

APPLICATION

[32] The Application was described as being to "establish a renewable wind energy facility with associated hydrogen production, storage, offtake and refuelling infrastructure".

[33] Hiringa was described as the first company in New Zealand dedicated to the supply of "green" hydrogen for industrial, public and transport sector use.[47] Ballance was described as a New Zealand farmer-owned cooperative providing agricultural products and services. The Application said Ballance's production facility at Kapuni was one of the largest employers in South Taranaki and it used "natural gas to produce ammonia and urea, the majority of which becomes fertiliser for pasture".

[34] The Application explained that Hiringa and Ballance had entered into an agreement to build facilities at Kapuni that used "wind-powered electricity generation to produce green hydrogen and baseload renewable electricity for the Ballance Plant".

[35] The purpose of the Project was described as being:

> [T]o develop an industrial-scale low emissions energy facility which produces commercially sustainable green hydrogen to be used for industrial and transport applications to enable decarbonisation of industry and assist with New Zealand's transition to a low emissions economy.

[36] The respondents described their objective as being:

> [T]o 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.

[37] The Application set out the reasons the Project was referred.[48] It explained that the hydrogen from the Project would be used to decarbonise the heavy transportation sector and thereby replace the "highest emitting vehicles with [a] zero emissions" solution. It explained that, outside the scope of the Application but related to it, Hiringa was developing a "hydrogen transport refuelling infrastructure network in

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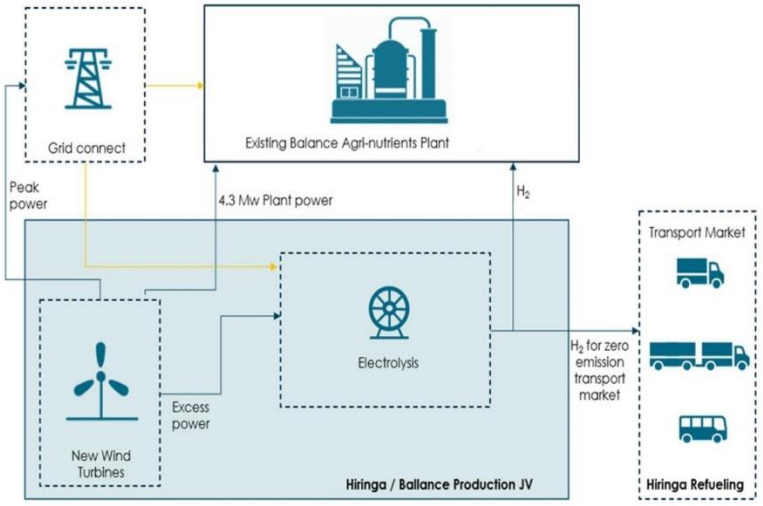
47 Green hydrogen refers to hydrogen produced from renewable energy rather than from diesel, petrol or gas.

48 See [30] above quoting sch 14 of the Order, which sets out the reasons.

New Zealand", allowing low-cost hydrogen produced from the Project to establish a commercially-viable heavy transport hydrogen network.

[38] The Project site included the wind turbine site, the Ballance Plant, and land (private land and/or road reserve) between the wind turbine site and the Ballance Plant in which electricity infrastructure to convey electricity between the wind turbine site and the Ballance Plant would be established.

[39] The Application provided the following project schematic:



[40] The respondents explained that the green hydrogen would be consumed in three ways:

> *Fed back into the plant for use in ammonia production:*
>
> The purpose of the Ballance Plant is to produce ammonia for urea. The resulting green hydrogen will be used by the plant and combined with atmospheric nitrogen to produce urea. Green hydrogen generated will produce up to 7000 tonnes of urea per year.
>
> *Utilised as a fuel supply for heavy transport refuelling:*
>
> The green hydrogen produced will also provide fuel for the transport sector and support the development of a green hydrogen energy and transport hub for South Taranaki. As the hydrogen-powered transport market develops over time, green hydrogen will be diverted to the transport market and green urea production will be reduced. The proposal has the capacity to generate 2000 kg of green hydrogen per day, enough to supply up to 6,000 cars, or 50 heavy vehicles per day though initially, the proposal is to begin refuelling up to 25 heavy vehicles per day. Additional green hydrogen generation can be added as markets develop and demand requires.

Exported from the site:

> Green hydrogen storage and loadout facilities will be constructed on the site to service offtake via (Multi Element Gas Containers – MEGCs). MEGCs will be utilised for delivery of green hydrogen to other refuelling stations within the national network which do not produce green hydrogen onsite, or as supplementary supply.

[41] The Application explained that:

(a) There would be four wind turbines, each 125 m tall with three blades 79 m in length attached to a central hub, giving a total maximum height of 206 m.

(b) The wind turbines could generate about 24–25 MW of electricity, of which the first 4.3 MW would be used to power the Ballance Plant, the next tranche would be used for the hydrogen electrolyser (which had a maximum consumption of about five MW) and, if enough electricity was generated after these two uses, the remainder would be exported to the grid. Further, if the grid demand was high, it might be exported to the grid in preference to hydrogen production from time to time.

(c) The wind turbines had a design life of 25 years and a possible useful life of a further 10 years. Te Korowai had requested that the turbines be removed at the end of their useful life (35 years) and the foundations covered over with soil and replanted into pasture. Hiringa had agreed to volunteer a condition to this effect.

[42] The Application went on to say:

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

[43] The Application contained a discussion of the improved environmental outcomes from the Project:

> **Assessment**: The Project will improve environmental outcomes for air quality 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.

The manufacture of ammonia-urea from green hydrogen will offset up to 12,000 tonnes of greenhouse gas emissions and avoid the import (and associated emissions) of up to 7,000 tonnes of urea from the Middle East and Asia. Production of urea from green hydrogen would eliminate the equivalent amount of CO2 as taking 2,600 cars off the road. The energy used to power the plant may provide up to an additional 20,000 tonnes per annum of CO2 reduction. The Project may also serve as a catalyst for further decarbonisation of the agri-nutrients sector.

In 2018 New Zealand's gross greenhouse gas emissions were mainly made up of carbon dioxide (44.5 percent), methane (43.5 percent), and nitrous oxide (9.6 percent). Carbon dioxide emissions were mainly produced by transport (47.0 percent), manufacturing industries and construction (17.9 percent), and public electricity and heat production (9.4 percent) … Transport emissions were mainly made up by road vehicle emissions (90.7 percent). The Project will provide a zero-emissions fuel source for heavy transport and serve as a catalyst for decarbonisation of that sector.

Pollutants from fossil-fuel vehicles (particularly those that run on diesel) are associated with respiratory illnesses such as asthma, impaired lung development and function, heart and brain problems, and other general health issues. A shift to a low-emissions heavy vehicle fleet would assist to remove these pollutants, provide cleaner air, and reduced rates of illness and mortality caused by air pollution.

Increasing the capacity of renewable electricity generation in New Zealand will also lead to a decentralised power network. This, too, could have potential positive benefits for air quality by displacing carbon-intense fuels with clean, emissions-free local generation.

[44] In other words the environmental benefits of the Project were seen as being:

(a) generating green hydrogen (that is, hydrogen produced from renewable electricity generation) to:

(i) replace hydrogen produced from natural gas, diesel and petrol as a feedstock for the Ballance Plant with green hydrogen, thereby enabling the manufacture of ammonia-urea that would replace the importation of 7,000 tonnes of urea from the Middle East and Asia, and reducing emissions;

(ii) provide a zero-emissions fuel source alternative to fossil fuels for heavy vehicles, contributing to the decarbonisation of the fossil fuel transport fleet; and

(b) increasing New Zealand's renewable electricity generation capacity.

[45] The benefits of green hydrogen both for locally produced urea and for the heavy transport sector were also discussed under the heading "[c]ontributing to New Zealand's efforts to mitigate climate change; and transition more quickly to a low-emissions economy", where the Application stated:

> **Assessment**: At a national level, green hydrogen is … key to the decarbonisation of commercial and heavy transport, agricultural and industrial chemical production, process heat, and energy storage. These sectors have significant potential to accelerate New Zealand's transition to a low emission economy while increasing energy resilience and replacing imports with sustainable regionally produced products. The Project is a tangible example that touches on all those sectors by leveraging the existing infrastructure to deploy green hydrogen production at commercial scale. The additional urea production offsets imported urea with locally produced urea, which typically has higher emissions due to production from coal and ocean transport. As production is diverted to the transport market it offsets fossil fuel imports with locally produced green hydrogen for transport.
>
> A key challenge with establishing a hydrogen network in New Zealand is the need for the transportation demand to match generation or supply capacity. The Project will enhance the Crown Infrastructure Partners (CIP) funded hydrogen supply infrastructure project which is targeting the establishment of nation-wide refuelling infrastructure with green fuels generated within New Zealand. It will do this by providing flexible renewable hydrogen production at scale, that can be diverted to a growing transport market.
>
> Hydrogen from the Project will be used to decarbonise the heavy transport sector. Heavy vehicles produce grossly disproportionate emissions with large line haul trucks generating over 100 times the emission of an average light vehicle. This Project will enable commercially viable hydrogen production to [replace] the highest emitting vehicles with zero emission solutions to accelerate transitions to a low emission economy.

[46] These benefits, as well as those from increased renewable energy generation capacity and employment were discussed under the heading "[s]trengthening environmental, economic, and social resilience" as follows:

> **Assessment**: As previously discussed, the Project will increase renewable energy generation for industry and provide a commercial demonstration of coupling wind generation to green hydrogen via electrolysis in New Zealand. By diversifying electricity production through adding another renewable

> contributor to the region and country, energy resilience is improved; wind generation can fill gaps in generation when hydro lakes are low or the sun does not shine.
>
> The Project creates the basis for a hydrogen transport hub for green hydrogen at Kapuni, aiding in the transition from fossil fuels for the transportation sector and providing a diversified supply of fuel.
>
> Potential associated effects of climate change and the reducing supply of fossil fuels may see more stringent policies and pricing for petrol and diesel, with potential shortages or with supplies being uneconomic. Providing a catalyst for [the] uptake of hydrogen powered heavy vehicles 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.
>
> The Project will reduce reliance on imported urea through the direct additional production and the catalyst for establishment of a larger green hydrogen and urea project.
>
> …
>
> The plant relies on natural gas for its feedstock so the project represents a way to future-proof a large employer and improve the plant's long term economic and environmental outcomes, but also a way to provide a tangible example of a just transition for the region. It will create and support new opportunities, new jobs, new skills and new investments that will emerge from the transition. The Project provides an opportunity to leverage Ballance Plant as a facility, the existing oil and gas infrastructure associated with it, and the proposed new wind and hydrogen facilities and infrastructure. Altogether this future-proofs Ballance and their suppliers as existing employers and generates opportunities for new and continued employment in terms of design, construction, operations and maintenance jobs. These employment opportunities strengthen Taranaki and New Zealand's social resilience.

[47] The benefits of green hydrogen for producing fertiliser from urea were further discussed under the heading "[o]ther benefits" as follows:

> The Project enables the Ballance Plant to manufacture agricultural fertilisers from urea that will have a low emissions profile as compared to that currently being manufactured with a reliance on fossil fuels. This is an opportunity to enhance Ballance's programs for best environmental practice in farm, land and waterway management with regard to the responsible use of products. Low emissions fertiliser therefore offers a product for farmers who are seeking recognition in environmental best practice. Use of this urea reduces New Zealand's dependence on fertiliser imports (particularly from less emission-efficient areas of the world). It is also an opportunity to raise farmer awareness of their complete carbon footprint and best practices. All of these factors contribute overall to a more sustainable pathway for fertiliser use in agriculture.

GREENPEACE'S APPEAL

Introduction

[48] Greenpeace is concerned about the climate and environmental effects of urea. It unsuccessfully opposed the Project before the Panel on that basis. It then supported Te Korowai's High Court appeal on the basis that the Panel had failed to impose conditions that ensured that the transition to utilising the hydrogen as fuel for heavy transport would take place and had not properly considered the environmental effects of urea. Those matters are again raised in this Court.

[49] We first discuss Greenpeace's submissions to the Panel, the Panel's consideration of those submissions in the Decision, and the reasons why the High Court rejected Greenpeace's appeal, before discussing the appeal to this Court.[49]

Submission to Panel

[50] As noted above, Greenpeace was a specified party which was to be invited to comment on the Project.[50] In a joint submission with the Environmental Defence Society Inc (the EDS) and Royal Forest and Bird Protection Society of New Zealand Inc | Te Reo o te Taiao (Forest and Bird), Greenpeace submitted that the Application should be declined on the grounds that the Project's primary purpose was the production of urea that would worsen outcomes nationally for the climate, environment, coastal and freshwater quality, air quality, indigenous biodiversity, and the well-being of current and future generations.[51] Greenpeace submitted this would also undermine New Zealand's efforts to mitigate climate change and transition more quickly to a low-emissions economy. It submitted that the Project would therefore have significant adverse environmental effects, including greenhouse gas emissions.

[51] Greenpeace acknowledged that "green hydrogen [was] a possible solution for reducing greenhouse gas emissions and air pollution", but noted that for the first five years the hydrogen would not be used for anything other than feedstock for the

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49 We discuss iwi and hapū concerns with the Project, the Panel's approach and the reasons why the High Court dismissed Te Korowai and Ngā Hapū's appeal below at [104]–[173].

50 FTCA, sch 6 cl 17(6)(o).

51 The EDS and Forest and Bird were two other specified parties invited to comment.

production of urea. It did not support this use to produce urea nor any other synthetic nitrogen fertiliser. Greenpeace submitted that: the use of synthetic nitrogen fertiliser was a climate pollutant because it emitted nitrous oxide and carbon dioxide when applied to land (direct emissions) and it was a key enabler of the intensification of agriculture, in particular intensive dairying, which was the single largest source of greenhouse gas emissions in New Zealand (indirect emissions); and it was also a water pollutant. Greenpeace submitted that the use of nitrogen fertiliser should be phased out rather than enabled, and that it was not clear from the Application whether the additional 7,000 tonnes of urea produced by the Project would result in any change in urea consumption.

The Decision

Process

[52] The Decision was issued on 1 December 2021. In the period prior to issuing the Decision, the Panel was operating subject to the COVID-19 restrictions.[52]

[53] The Panel decided a hearing was not required. The members conducted a site visit,[53] and meetings occurred by Zoom. The Panel invited and received comments from relevant specified parties. It sought and received from the respondents a further detailed assessment of the landscape and visual effects on four marae. It developed a draft set of conditions based in part on those provided as part of the Application. It provided and received comments on those draft conditions from the respondents, the South Taranaki District Council and others.

Project

[54] The Panel discussed the scope and purpose of the Project. It noted that its purpose was to develop an industrial-scale low-emissions energy facility to produce commercially sustainable green hydrogen to be used for industrial and transport

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52 The Panel was appointed 15 September 2021. Taranaki was in Alert Level 2 from 7 September 2021 and Auckland did not move to Alert Level 2 until 2 December 2021.

53 Initially three members visited the site on 7 October 2021. The fourth member was prevented from attending due to the COVID-19 alert level rules in Auckland but subsequently made the same site visit in November 2021.

applications to enable de-carbonisation of the industry and to assist with New Zealand's transition to a low-emissions economy.

[55] The Panel also referred to the risk of job losses in Taranaki (and in particular South Taranaki) due to the Government announcement in April 2018 that no new offshore petroleum exploration permits would be granted. It noted that Methanex New Zealand Ltd, one of Taranaki's largest employers and making up 10 per cent of the local economy, had confirmed that 75 jobs would be lost from the closure of one of its plants. The Panel also noted that the Project offered the opportunity to create an average of 40 full-time equivalent jobs over an 18-month period in engineering, design and construction.

Applicable consents required and planning instruments

[56] The Panel discussed the consents that the Project needed:

(a) for the replacement of a culvert within the tributary of the Waiokura Stream (relating to the wind turbine site) — this was a discretionary activity under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 and the Regional Freshwater Plan for Taranaki;

(b) for the disturbance of soil in relation to the Ballance Plant site — this was a discretionary activity under the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011;

(c) for the wind turbine site — this was a discretionary activity under the South Taranaki District Plan because it did not meet the definition of "small scale renewable energy generation";

(d) for the location and size of the Ballance Plant buildings and the width of the vehicle crossings — these were discretionary activities under the South Taranaki District Plan;

(e) for earthwork volumes exceeding permitted volumes and potentially being undertaken in the winter period in relation to the cable route between the wind turbine site and the Ballance Plant — these were controlled activities under the Regional Freshwater Plan for Taranaki; and

(f) for ground water potentially taken from excavations and discharged after treatment to land or water surface if the dewatering of the turbine foundations if required — this was a discretionary or a controlled activity (depending on the volume) under the Regional Freshwater Plan for Taranaki.

Evaluation of effects

[57] The Panel evaluated the potential environment effects. It began with a discussion under the heading "[e]nd use of urea". It noted that Greenpeace, the EDS and Forest and Bird had asserted the "continuing production of urea at the Ballance Plant" was a potential adverse effect.

[58] The Panel noted that 607,000 tonnes of urea were used in New Zealand in 2019 and the Ballance Plant currently produced 265,000 tonnes of urea annually. As the Ballance Plant was the only ammonia manufacturing plant in New Zealand, it seemed that 56 per cent of the urea used in New Zealand was imported and the annual production of 7,000 tonnes generated from the Project would amount to only 1.15 per cent of the total urea used in New Zealand. Further, the resource consents from the Taranaki Regional Council associated with Ballance's existing urea production for water take and discharges will expire in 2035.

[59] The Panel went on to say:

> 61. Critically, the proposal is that over a five-year period the utilisation of green hydrogen will transition from 100% urea production (i.e. 7,000 tonnes per year) to entire use for fuel cells as the electric fleet is expected to increase.
>
> 62. 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 the 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 the increasing use of hydrogen fuel in heavy transport. We therefore do not consider this is a reason to deny the availability of fast-track consenting, or to decline consent itself. However, it has some relevance to the process of transition.

[60] Immediately following this discussion, the Panel said:

> 63. Turning then to the effects that ought to be evaluated in this application, the Assessment of Environmental Effects identified the following actual or potential effects:

[61] The Panel then went to discuss each of these identified effects as follows:

(a) Landscape and visual effects: the Panel discussed the visual impact of the four turbines in some detail. It concluded that the turbines could be successfully accommodated without significant adverse landscape and visual effects with appropriate conditions for the relatively small number of properties that were more directly adversely affected. The Panel noted that this did not address the adverse effect on landscape character for iwi for whom the connection with the Maunga and its influence on the wider landscape held special value. This was to be addressed in its discussion on adverse cultural effects.[54] Shadow flicker effects were addressed by conditions that referred to established international guidelines. There were no discernible adverse effects on rural character or amenity, aside from the visual effects.

(b) Ecology: the Panel concluded that the turbines did not pose a risk of collision to bats or migrating birds and conditions provided for a lizard survey and, if necessary, a lizard management plan, as recommended by the Department of Conservation. The Panel further accepted that, with appropriate mitigation steps, there would be no or minimal adverse effects on freshwater ecology.

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[54] See below at [107]–[164] for the relevant information as to the adverse cultural effects.

(c) Noise: the Panel concluded that there would be nil or minimal adverse noise effects either during construction or during operation at the sites.

(d) Traffic and transport effects: the Panel concluded traffic and transport effects were limited to effects during construction and these were addressed through conditions. Following construction there were no effects of "any particular moment" other than the benefits arising from the decarbonisation of the transport industry.

(e) Hazards: the Panel noted that the modelling showed that the risk of release from underground piping was minimal and the risk of explosion could be managed to be as low as reasonably practicable. The Panel considered that the proposed works did not add any new hazard to the Ballance Plant since it already manufactured hydrogen from natural gas in significantly higher quantities than would be produced by the Project. The Panel considered that adverse effects from natural hazards, while always possible if they occurred on a biblical scale, otherwise appeared to be low.

(f) Historic heritage: the Panel considered the likelihood of recovering in-situ archaeological evidence was low and an archaeological discovery protocol was to be added as a condition.

[62] Effects on sites of significance to Māori and on cultural values were further actual or potential adverse effects identified and discussed in the "Assessment of Environmental Effects" section. We discuss the Panel's views in relation to those effects in the section in this judgment on Ngā Hapū's appeal grounds.[55]

Relevant policy statements in planning instruments

[63] The Panel assessed the Project against relevant policy statements in planning instruments. It considered that the Project was a comfortable fit with some relevant objectives or was consistent with them. The only issues related to the

[55] The Panel's conclusions on this matter are summarised below at [157]–[164].

Taranaki Maunga and its cultural and spiritual significance to iwi and tangata whenua. As noted, those matters are discussed below in the section in this judgment about Ngā Hapū's grounds of appeal.

Conditions

[64] The Panel then referred to having further developed the conditions, with reference to the comments it had received. It listed the subjects that the conditions covered. Beyond this, the only condition it discussed was the "[c]ondition relating to urea transition". The Panel noted the existing urea production was a permitted baseline and that consideration of the end-use was legally uncertain:

> **Condition relating to urea transition**
>
> 236. The Panel recognises that the current urea production is a lawful activity utilising existing resource consents that do not expire until 2035. As such, if nothing else happens, that would be part of the permitted baseline and, as pointed out earlier, it is far from clear as a matter of law that consideration of the potentially adverse effects of an end use product in these particular circumstances is open to the Panel.

[65] The Panel, however, noted that the transition was an important part of the Project, and a justification for its fast-tracking:

> 237. However, what is more relevant here is that this project is said to be justified for fast-track consenting, and that is squarely premised on the transition to utilisation of hydrogen in the heavy transport industry (and see FTCA Schedule 6 clause 31(1)(b)). Indeed at 4.4 of the Assessment of Environmental Effects it is explicitly said:
>
> > "Green hydrogen production is planned to transition from 100% urea to the transport market over a 5 year period as the fuel cell electric vehicles market increases, with the intention to increase electrolysis capacity once green urea production falls below a minimum threshold."
>
> 238. Absent that transition (i.e. if the proposal were simply to continue producing urea) it is difficult to see how the fast-track consenting could be justified. The proposal may or may not have succeeded as an ordinary application under the Resource Management Act. Therefore, given the reliance on transition to justify fast-tracking, it is appropriate to ensure that any consent matches that justification, and is reflected in the appropriate conditions.
>
> 239. The applicants raised a concern that part of the condition proposed by the Panel introduced an element of uncertainty to the project by

> enabling the South Taranaki District Council to impose fresh conditions if transition was rendered difficult in the prevailing market conditions. The Panel has reviewed this, but does not consider the condition required further amendment. As currently framed, it will be open to the consent holder to refer [to] the market conditions in exchanges with the Council in the review process as a factor it regards as of significance to any consideration of further conditions.

[66] As relevant to Greenpeace's appeal the conditions on which the resource consent was granted included the following:

> **GENERAL**
>
> (1) The construction, operation and maintenance of the Kapuni Green Hydrogen Project shall be undertaken in general accordance with the information provided in "Kapuni Green Hydrogen Project Resource Consent Application and Assessment of Environmental Effects" dated August 2021 and any other documentation relevant to the resource consent applications. In the event of any conflict or discrepancy between these documents and the conditions of this resource consent, the conditions shall be determinative.
>
> …
>
> **TRANSITION FROM UREA PRODUCTION**
>
> (112) Over a five year period, on the dates specified below, the consent holder shall provide a written report to the South Taranaki District Council as to progress in achieving the transition of green hydrogen production from utilisation entirely for the purposes of urea production to utilisation in the transport market.
>
> (113) The dates specified for the purposes of Condition 112:
>
> (a) By 30 June 2023; and
>
> (b) Each anniversary thereafter until 30 June 2028.
>
> (114) Pursuant to s 128(1)(a)(iii) of the Resource Management Act 1991, the South Taranaki District Council may review this condition at any time after 30 June 2028 for the purpose of assessing progress of the transition referred to in Condition 112 above, and/or to propose new conditions to ensure that that transition progresses or continues.

Conclusion

[67] The Panel set out its conclusion on the Application. It considered that the pt 2 principles of the RMA were of prime importance because the considerations in cl 31 of sch 6 of the FTCA were subject to pt 2. The Panel's view was that the Application was "entirely consistent" with the pt 2 principles.

[68] As to the considerations in cl 31 of sch 6, the Panel concluded that:

(a) with appropriate conditions, there were no disenabling actual or potential effects on the environment (sch 6, cl 31(1)(a));

(b) with appropriate conditions, there were measures to ensure that the positive actual and potential effects on the environment offset or compensated for any adverse effects from the activity (sch 6, cl 31(1)(b));

(c) the activities within the Project for which consents were necessary were discretionary activities at worst, while others were controlled or restricted discretionary activities where the ambit of the Panel's discretion was limited, and with conditions the activities were not contrary to and were mostly consistent with the applicable planning instruments (sch 6, cl 31(1)(c));

(d) there were no other matters relevant and reasonably necessary to determine the Application (sch 6, cl 31(1(d)); and

(e) with conditions, granting consent was consistent with the Treaty and with relevant Treaty settlements (sch 6, cl 31(2)).

[69] The Panel noted that, in reaching its conclusions, it had disregarded the adverse effects of any activity permitted by planning instruments and any effect on persons who gave their written approvals to the Application. It granted consent to the Project, subject to conditions, for a term of 35 years from the date of the grant.

High Court

[70] Te Korowai, supported by Ngā Hapū and Greenpeace, appealed the Panel's decision to the High Court. Greenpeace took the primary carriage of the grounds of appeal that related to environmental issues and Te Korowai and Ngāti Tū, one of

the hapū within Ngā Hapū, took the primary carriage of the grounds that related to the Treaty and cultural matters.[56]

[71] On environmental issues, there were two main grounds of appeal. First, Greenpeace said that a critical reason for the Panel's approval of the Project was the anticipated transition to use the hydrogen for fuel and yet, despite this, the conditions did not require that the transition occur within five years.[57] Secondly, Greenpeace said that the Panel had not properly considered the end use of urea as fertiliser and its harmful greenhouse gas and pollutant effects.[58]

[72] On the first main ground of appeal, the Judge held that the Panel had made no error in finding the transition from the use of the hydrogen for urea to use for transport was a critical reason for approving the Project.[59]

[73] As to the conditions directed to this transition, the Judge said:[60]

> [285] The resource consent application recorded that the intention was to complete a transition within five years. However, the exact timeframe was dependent on the growth of demand in the transport sector. This was recognised by the Panel in its reference to the "expected" increase in the electric fleet. The five-year period was not an absolute time limit.
>
> [286] In any emerging alternative technology, there will be some uncertainty particularly in the timeframe for implementation. The fact itself that hydrogen storage, loadout and refuelling facilities were part of the Project indicates a strong commitment by Hiringa to move to hydrogen use for transport.
>
> [287] Importantly, the conditions as framed ensure that the transition over five years will be monitored by the South Taranaki District Council, which has the ability to amend the conditions to progress the transition. The only purpose for which the local authority is able to review the condition is to ensure that that transition progresses or continues, and any condition imposed by the local authority under s 128(1) is to ensure the maintenance of the transition.

[74] The Judge went on to note that the respondents had submitted that they were commercially incentivised to ensure the transition, but also that they did not have

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56 As noted, we discuss the Treaty and cultural matters in relation to the hapū appeal below at [104]–[212].
57 High Court judgment, above n 5, at [277].
58 At [295].
59 At [293].
60 Footnote omitted.

complete control over how quickly the hydrogen transport market developed.[61] The Judge noted that the respondents had therefore objected to conditions beyond reporting requirements but that the Panel had nonetheless refused to amend the conditions as requested.[62]

[75] The Judge disagreed with a submission from Ngāti Tū that the conditions left it to the respondents to evaluate the speed of transition.[63] The Judge accepted that the transition clause did not impose a hard limit.[64] It allowed "some appropriate leeway".[65] Importantly, however, the Judge considered that the Application referred to a five-year period and that the provisions of the Application that made reference to the transition were incorporated by reference through Condition 1 of the consent.[66] The Judge saw Condition 1 as requiring that there be a transition from "entirely" urea production to hydrogen use within five years.[67] In the Judge's view, there was an appropriate mechanism to monitor that transition through the local authority's review.[68]

[76] The Judge summarised her conclusion on this ground at the end of the judgment:

> [325] … Though the conditions imposed in this respect did not impose a "hard" requirement to ensure that the transition would occur within five years, I am satisfied the conditions imposed, as well as the evidence before the Panel itself, ensured that the transition would occur in a timely manner, relevant to the five-year timeframe, with appropriate review by the South Taranaki District Council. There was no unlawful delegation, nor were the transition conditions, which were certain and not unreasonable, ultra vires.

[77] As to the second main ground of appeal, Greenpeace submitted that the Panel had not properly considered the end use of urea as fertiliser, and in particular the greenhouse emissions from fertiliser use on pasture on which sheep and cattle grazed,

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61 At [290].
62 At [290].
63 At [291].
64 At [291].
65 At [292].
66 At [291].
67 At [292].
68 At [292].

and the possibility the Project never transitioned to the production of hydrogen for fuel or was delayed.[69]

[78] The Judge referred to the evidence before the Panel from the respondents that: the Project would not increase the use of urea in New Zealand; the use and rate of application of urea was subject to a range of regulatory and industry-based factors that were independent of the way urea is manufactured; and the Project would enable imported urea to be replaced with lower emission domestically produced urea.[70] The Judge found that it was open to the Panel to accept this evidence and to conclude that "the causal relationship between the activity and the indirect adverse effect would unlikely be altered by allowing or refusing the activity".[71]

[79] Greenpeace also submitted that, by failing to ensure a transition from use of the hydrogen for urea to use as fuel, Māori interests would be damaged through the contribution fertiliser made to the harmful effects of climate change and to water pollution.[72] The Panel was said to have acted inconsistently with the principles of the Treaty. The Judge said these end use effects were "well down the chain".[73] The Judge was satisfied the Panel had considered these indirect effects and had held that they should not be given determinative weight in the circumstances.[74]

[80] Overall, the Judge was satisfied that the Panel properly considered the end use of urea and related environmental effects and, in view of the urea transition conditions, was entitled on the evidence before it to not decline the Application on that basis.[75]

Submissions on this appeal

[81] On appeal to this Court, Greenpeace again submits that the Panel erred by not imposing conditions that required the hydrogen use to transition from urea to fuel when that was the critical reason for the Panel's decision to grant consent to the Project. It submits that, absent that transition, the Panel erred in its assessment of the

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69 At [295].
70 At [309].
71 At [311].
72 At [312].
73 At [313].
74 At [314].
75 At [315].

environmental effects of the Project. Additionally, because it did not require a transition to occur, it unlawfully delegated its decision-making function under the FTCA to the South Taranaki District Council and failed in its duty to act consistently with the principles of the Treaty.

Discussion

[82] We start with what the Panel decided in response to Greenpeace's submissions that using the hydrogen as a feedstock for fertiliser had harmful environmental effects. On this topic, the Panel regarded the following considerations to be relevant:

(a) the urea produced from green hydrogen as a result of the Project would be a "very small fraction" of the annual tonnage of urea used in New Zealand;

(b) the Ballance Plant had resource consents from Taranaki Regional Council for water take and discharges associated with urea production that expired in 2035; and

(c) critically, the proposal was for a 100 per cent transition from urea to fuel over a five-year period as the electric fleet was expected to increase.

[83] In light of these considerations, the Panel expressly did not reach a view on whether the use of the hydrogen to produce urea would have adverse environmental effects. This was for two reasons:

(a) it was not clear, as a matter of law, that it could do so given that urea production was already a lawful activity under existing resource consents that did not expire until 2035; and

(b) more relevantly, fast-track consenting was squarely premised on a transition to using the hydrogen as a fuel for heavy transport and would not have been justified if the Project was simply to continue providing urea.

[84] The Panel considered it was appropriate to ensure that the consent matched the justification for fast-tracking and this be reflected in the appropriate conditions. In our view, this did not require the Panel to include a condition prohibiting the hydrogen produced from the Project from being used as a feedstock for fertiliser after a period of time, for example five years.

[85] The Panel's focus was not on potential adverse effects associated with urea. That was because, as it explained, the proposed urea production from hydrogen would be a very small percentage of all urea produced in New Zealand and, so far as urea produced at the Ballance Plant was concerned, it was already a lawful activity at least until 2035. The Project consent conditions were not the place to manage urea use that was part of permitted baselines. As the Panel can be expected to have known, urea is managed at a national level by a range of regulatory and industry-based controls.[76]

[86] That is, the conditions were not intended to be and were not directed at prohibiting urea production. Rather, the Panel's focus was to have conditions directed to the intended transition to utilisation of the hydrogen as a fuel for heavy transport for the benefits that could bring. We turn now to consider the effect of the conditions that the Panel did impose relating to this intended transition.

[87] Condition 112 required the respondents to report as to progress in achieving the transition from utilising the green hydrogen for urea to utilising it in the transport market. This reporting is required "[o]ver a five year period, on the dates specified below". It is a reporting requirement only. It assumes there will be a transition at some, unspecified, date, but does not require it.

[88] Condition 113 sets out "specified" dates for the reporting required by Condition 112. We note that in fact Condition 113 requires reports over a six-year period, rather than the five-year time frame specified in Condition 112, and the last specified date under Condition 113 is 30 June 2028. Because Condition 112 does not require transition to have occurred within five years, the 30 June 2028 date only has

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[76] That includes a cap introduced on the application of synthetic nitrogen fertiliser for land grazed by livestock. Any activity that exceeds the cap is deemed to be a non-complying activity and therefore requires a resource consent: see Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

the effect of enabling the South Taranaki District Council to be informed as to whether the intention of a transition within five years has in fact been achieved. If a transition has occurred, that will bring to an end the Council's monitoring role.

[89] Condition 114 is directed to the position after 30 June 2028. It enables the South Taranaki District Council to "review this condition at any time after 30 June 2028". The review is pursuant to s 128(1)(a)(iii) of the RMA. That section permits a consent authority to serve notice of an intention to review the conditions of a resource consent for any purpose "specified in the consent".[77] Condition 114 specifies that such a review may be for two purposes: (1) "assessing progress of the transition referred to in Condition 112"; and/or (2) "to propose new conditions to ensure that [the] transition progresses or continues".

[90] Condition 114 assumes, therefore, that a transition may not have occurred within five, or even six, years. It does not explicitly require the South Taranaki District Council to undertake any review after 30 June 2028. It provides only that it "may" review the Condition. The discretion would need to be exercised in light of the Condition's purpose and the purpose of the consent as a whole. Given the Panel's decision that a transition was the justification for a fast-track consent, and the Application advised that a transition was planned over a five-year period, we consider that there would need to be a good reason for not exercising the review power after 30 June 2028 if the transition had not occurred. Failure to exercise the s 128 power could be the subject of an application for review under the Judicial Review Procedure Act 2016.

[91] The question then is what the Panel intended from any such review. As noted, Condition 114 provides two purposes. The first is to assess progress of the transition. It would be possible, in furtherance of this purpose, for the South Taranaki District Council, to require further progress reports on whether a transition is occurring. That could be with the purpose of determining whether a transition was still intended to occur and by when. If a transition was still intended, then the South Taranaki District Council might be sufficiently satisfied as to progress so as not to require any further

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[77] RMA, s 128(1)(a)(iii). Sections 128–132 contain the relevant powers and procedural requirements to review and vary consents.

action from it. Or it might use the review power for the second purpose in Condition 114, that is, to propose "new conditions to ensure that [the] transition progresses or continues". That is a broadly constructed purpose that leaves some discretion to the Council.

[92] Condition 114 does not, however, provide what is to happen if the respondents no longer intend to continue with the planned transition. It does not provide the South Taranaki District Council with the authority to cancel the consent.[78] The power in s 128(1)(a)(iii) of the RMA is instead a review power allowing a consent authority to consider changing the conditions to make them more appropriate in the light of the circumstances triggering the review.[79] There are limited grounds for the cancellation of a consent following a review under s 128. In particular for these purposes, a consent can be cancelled under s 132(3) following a review under s 128(1)(c) if the resource consent application was materially misleading, materially influenced the decision to grant consent, and there are significant adverse effects on the environment from the exercise of the consent.

[93] The combined effect of these conditions is, therefore, to enable the South Taranaki District Council to be informed and to monitor progress toward a transition both up to 30 June 2028 and beyond. It left unspecified what condition it could propose to ensure that a transition "continues", but the conditions at least enabled consideration to be given to whether any further conditions were appropriate in the circumstances as they might arise. The conditions do not directly address what is to happen if the respondents were to advise the South Taranaki District Council that they had decided against proceeding with a transition and, for example, intended to use the hydrogen solely for urea production or for some other purpose, or intended to halt hydrogen production and use the power from the turbines to sell to the national grid or for some other purpose.

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78 Section 132 of the RMA, which concerns decisions following a review, does not enable a consent authority to cancel a consent following a review under s 128(1)(a)(iii).

79 *PVL Proteins Ltd v Auckland Regional Council* EnvC Auckland A061/2001, 3 July 2001 at [82] as cited in Stephen Blackley (ed) *Brookers Resource Management* (looseleaf ed, Thomson Reuters, Wellington, 2008) at A128.01(2).

[94] That leaves the general Condition 1. It required the "construction, operation and maintenance" of the Project to be "undertaken in general accordance with the information provided" in the Application and any other documents relevant to the Application. Arguably, "operation" of the Project encompassed using the hydrogen in accordance with the information provided in the Application and other relevant documents. As the premise of the Application was a planned transition to using the hydrogen as fuel for heavy transport, it could be argued that the condition requires that transition. This was the view accepted in the High Court, albeit that there was no "hard time limit" in which the transition had to occur.[80]

[95] In our view, however, that is not the intended effect of Condition 1. That is because it would be a requirement without any specific deadline. The Application intended that a transition would take place within five years but it was clear from the Application that this might not occur. As stated in the Application, the intended use of the hydrogen was "subject to a successful future transition", was a "planned transition … as the fuel cell electric market increases" and there were "challenge[s] [in] establishing a hydrogen market", and Condition 114 envisaged and permitted a transition occurring later than five years.

[96] As a matter of commercial reality, this was a new venture that would not be embarked upon without the respondents intending it to be successful and being committed to its success. As Grice J noted, the commitment to this venture was demonstrated by the intention to build hydrogen loading, storage and refuelling facilities as part of the Project.[81] But, as a new venture, there was not a guarantee of its success or as to a timeframe if it were to succeed. This commercial reality was reflected in the Minister's reasons for accepting the referral, as recorded in the Order. Those reasons referred to the Project being "likely" to help improve air quality and to assist New Zealand's efforts to mitigate climate change "subject to a successful future transition to the use of green hydrogen as a fuel in the transport sector".[82]

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80 High Court judgment, above n 5, at [316].
81 At [286].
82 Order, sch 14.

[97] We consider the Minister recommended the Project for referral not because the future transition was assured, but because it *could* be successful, in which case it would have the environmental and climate change benefits that he identified. Moreover, even if the transition was not successful, the Minister considered that the Project promoted employment and the certainty of investment in New Zealand which were also part of the purpose of the FTCA.[83] Seen in this light, the importance of the Project was as an investment aimed at supporting a zero-emissions fuel for the benefit of the environment, which would also provide employment opportunities both in the construction of the necessary infrastructure and in the pursuit of the transition to hydrogen fuel, even if that transition was not ultimately successful.

[98] In other words, it was critical that the respondents pursued a successful transition to using the hydrogen for fuel. It was not critical that the respondents achieve a successful transition. Ultimately a successful transition would be dependent on market uptake and that would depend on factors beyond the respondents' control. The Minister's decision to recommend the referral of the Project, despite the fact that it would not necessarily succeed in its aims, can be understood in the context of the purpose of the FTCA to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19.[84] Investment in the pursuit of alternatives to fossil fuel promoted the sustainable management of natural and physical resources because of the climate emergency, even though ultimately the investment may not succeed in its aims.

[99] In light of the Order, the Application and the conditions the Panel imposed, we consider the Panel did not intend that the Project would become an unlawful activity if the transition did not occur within five years or at all providing the respondents had acted in good faith in pursuing a transaction.[85] Had it so intended, it would not have imposed the conditions that it did. As we have discussed, it appears clear that a transition was envisaged but not required within five years or at all providing the

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83 FTCA, s 4.

84 Section 4.

85 The proper scope of a resource consent includes its conditions and supporting documentation incorporated by a condition. It is determined objectively. See *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385 (CA) at [22]–[23]; *Gillies Waiheke Ltd v Auckland City Council* HC Auckland A131/02, A132/02, A1333/02 20 December 2002 at [23]; and *Palmerston North City Council v New Zealand Windfarms Ltd* [2014] NZCA 601, (2014) 18 ELRNZ 149 at [57].

respondents had pursued the intended transition in good faith. The Panel was a body with resource management expertise that could be expected to have intentionally imposed the conditions in the terms that it did. It would have known that it had not required that after a specified period of time the hydrogen from the Project could only be utilised for fuel.

[100] We consider that the conditions were intended to keep the South Taranaki District Council informed of progress as a check on a good faith pursuit by the respondents of the intended transition, and to provide the Council with information about the utilisation of the hydrogen from the Project, but in light of the commercial reality that uptake of hydrogen fuel by heavy transport was ultimately dependent on factors that were not all within the respondents' control. Those conditions matched the justification for fast-tracking because there was a public benefit in the pursuit of a successful transition ("the baby" the Panel referred to).[86] If, however, the electricity generated from the turbines continued to be used to produce hydrogen utilised as a feedstock for fertiliser ("the bathwater" the Panel referred to) this did not give rise to adverse environmental effects additional to the existing production (a lawful activity at the Ballance Plant regulated by resource consents for water take and discharge that applied until 2035).[87]

[101] Our conclusion on the Panel's intention is reinforced by the conditions that the parties proposed and which were not accepted by the Panel. Greenpeace sought a condition that the hydrogen be utilised entirely for the transport market and not for the production of urea or any other synthetic nitrogen fertiliser. Neither this condition, nor any variation of it, was accepted by the Panel. For their part, the respondents sought conditions that more specifically addressed the purposes of South Taranaki District Council's review power and which did not authorise it to impose new conditions. The respondents said they were commercially incentivised to ensure a transition but they did not have complete control over how quickly the hydrogen transport market would develop. The Panel acknowledged this but regarded it as open to the respondents to inform the South Taranaki District Council of this as part of the review process on the conditions it imposed. It would then have been for the Council

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86 See above at [59] quoting the Panel decision.
87 See above at [59] quoting the Panel decision.

to decide whether it was satisfied about this and, if it was not, to impose conditions to ensure progress towards a transition.

Conclusion

[102] We conclude that the Panel did not err in law in imposing the conditions that it did in relation to the intended transition of the use to which the hydrogen is put. Rather, the Panel's conditions carefully reflected the justification of the fast-track process, which was the pursuit of a successful transition, not a guarantee of successful transition.

[103] Lastly, we refer to Greenpeace's submission that, in not addressing the harmful effects of urea on Māori interests, the Panel had acted contrary to the principles of the Treaty. We do not accept this submission. As the High Court Judge found, on the evidence before the Panel the urea produced was a small percentage of the total urea available for use in New Zealand.[88] This was a lawful activity regardless of the Project. The Panel was right to put it to one side. What was required for consistency with the principles of the Treaty is the focus of Ngā Hapū's appeal to which we now turn.

NGĀ HAPŪ'S APPEAL

Introduction

[104] The appeal by Ngā Hapū concerns the requirement in s 6 of the FTCA that the Panel must act in a manner that is consistent with the principles of the Treaty.[89] Ngā Hapū submit that the Panel erred in finding that granting consent to the Project was consistent with the principles of the Treaty. Ngā Hapū say that the Panel wrongly considered that the conditions of the consent had, to a large extent, satisfied relevant iwi and hapū, and that the Panel therefore did not properly grapple with what consistency with the Treaty required.

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88 High Court judgment, above n 5, at [298].

89 Section 6 of the FTCA is incorporated into the decision-making at issue by cl 33(6) of sch 6 of the FTCA. The clause makes clear that the requirement in s 8 of the RMA, that the principles of the Treaty be taken into account, does not apply. Section 6 is set out above at [11].

[105] Principally, Ngā Hapū say that the requirement of consistency with Treaty principles engaged the duty of active protection. They say that consistency with that principle required the Panel to investigate whether there was an alternative site for the turbines that would not impact on the spiritual and physical relationship that Ngā Hapū has with Taranaki Maunga.

[106] We first outline the iwi and hapū involved, and the process of engagement with them and their respective positions. We then discuss the Decision and the High Court judgment as is relevant to the iwi and hapū positions, before addressing Ngā Hapū's submissions on this appeal.

Iwi and hapū

Ngāruahine

[107] Ngāruahine is one of eight iwi in Taranaki.[90] As noted, Te Korowai is the mandated post-settlement governance entity and representative body for Ngāruahine. As defined in the 2014 Ngāruahine Deed of Settlement, Ngāruahine are those who descend from one or more Ngāruahine tipuna and include Kanihi-Umutahi hapū; Ōkahu-Inuāwai hapū; Ngāti Manuhiakai hapū; Ngāti Tū hapū; Ngāti Haua hapū; and Ngāti Tamaahuroa me Titahi hapū.

[108] The Order for the Project required the Panel to invite comment from these hapū. Four of these six hapū (Ōkahu-Inuāwai hapū, Ngāti Tū hapū, Ngāti Haua hapū and Ngāti Tamaahuroa me Titahi hapū) are the interested parties on the appeal to this Court.[91]

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90 We note for completeness that the Taranaki Māori Trust Board was invited to prepare a cultural impact assessment as the collective representative of Ngā Iwi o Taranaki but it did not "consider it necessary or appropriate" to provide a separate assessment to the iwi and hapū with mana whenua over the Project site.

91 The intituling also refers to "ētihi atu hapū" (other hapū) reflecting that, within collective Māori society, it is not necessarily the case that the four hapū are discrete groups.

[109] The Ngāruahine rohe is in south-western Taranaki.[92] It is shown in the following figure:

Ngāti Ruanui

[110] Ngāti Ruanui is another of the eight iwi in Taranaki. Te Rūnanga o Ngāti Ruanui Trust (the Ngāti Ruanui Trust) is the mandated iwi recognised in the Ngati Ruanui Claims Settlement Act 2003. The Order required the Panel to invite comment from the Ngāti Ruanui Trust. The rohe of Ngāti Ruanui is in South Taranaki to the east of Ngāruahine.[93]

Process and views

Te Korowai

[111] As discussed in the Application, the respondents engaged with Te Korowai at an early stage. Meetings were held with representatives of Te Korowai in July and October 2019 and with Te Korowai's board in December 2019. Following the Order,

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92 Collectively, each hapū rohe lies between the mouths of the Taungatara Stream in the west, the Waingongoro River in the east and the respective sources of these rivers on Taranaki Maunga.

93 As described in the Decision: "[t]he takiwā of Ngāti Ruanui (South Taranaki) begins at the W'enuakura River in the South to the Pātea River (a shared area of interest with the neighbouring iwi of Ngā Rauru Kītahi). From the Pātea River, the ro'e reaches inland to W'aka'urangi and back to the coast to wa'apu o te awa o Waingongoro (mouth of the Waingongoro River) and offshore from the mouth of the W'enuakura River north to the Waingongoro River and beyond to Te Tai-o-Re'ua (the Tasman Sea)".

Te Korowai prepared a Cultural Impact Assessment report (CIA) dated 16 August 2021 resourced by the respondents. Te Korowai also provided written comments to the Panel on 18 October 2021 in response to the invitation to comment. It also subsequently provided comments on the proposed conditions of consent on 30 November 2021.

[112] As stated in the CIA, Te Korowai's purpose was to inform the Panel of the issues and potential impacts of the Project on Ngāruahine cultural values and interests. The CIA summarised Te Korowai's views as follows:

> The traditional, historical, cultural, and enduring relationship of Ngāruahine is articulated in relation to the Ngāruahine Kaitiaki Area which includes our most valued site of significance, Taranaki Maunga. Te Korowai recognises and supports a transition to renewable energy technologies as an important step in reducing human impacts on our Taiao. However, the permanent placement of wind turbines has the potential to have a considerable impact on the highly valued relationship of Ngāruahine Uri to Taranaki Maunga. Te Korowai conditionally supports the proposal if there is a clear commitment from the applicant to remove the wind turbines from the proposed site at the end of their useful life or after a maximum of 35 years of operation (whichever occurs earliest). This is based on our concerns regarding the protection of the unique Ngāruahine Cultural Landscape. The fast track consenting process also has serious consequences for both completed and ongoing Treaty of Waitangi settlement claims. Our recommendations and conditions identify what will be required for Te Korowai to support the proposal.

[113] The CIA noted that Te Korowai had advised the respondents in May 2020 that it should engage only with the two hapū most directly affected, Ngāti Tū and Ngāti Manuhiakai. However, with more knowledge of the details of the Project, Te Korowai now considered that the impacts from the turbines were likely to affect all six hapū of Ngāruahine. The CIA explained that, although the Project was on land in private ownership, it was the rohe of Ngāti Tū and Ngāti Manuhiakai. However, the surrounding air space and cultural landscape remained an important part of spiritual, cultural and kaitiaki connections with Taranaki Maunga for all uri of Ngāruahine.

[114] The CIA explained the mitigation measures offered by the respondents that Te Korowai supported. This included, for example: the installation of a new solar energy system at Te Aroha and Waiokura Marae that would fully cover the electricity costs of those marae and would also have the potential to provide income; identifying work experience opportunities for Ngāruahine young people and associated pathways;

and working with hapū to assess the wind and renewable energy potential of hapū land and future development partnership potential.

[115] The CIA explained that Te Korowai recommended a turbine decommissioning plan be developed with Ngāti Manuhiakai and Ngāti Tū. This plan would "[d]escribe how the four wind turbines [would] be removed from [the] site at the end of their useful life or after a maximum of 35 years of operation" (whichever occurred first).

[116] The CIA also stated that Te Korowai recommended an alternative site plan for new replacement turbines be developed in consultation with Ngāti Manuhiakai and Ngāti Tū in the event that hydrogen production were to continue at the Ballance site after 35 years of operation. This plan would contain a process to identify an alternative site, or sites, to locate any replacement wind turbines. A location coastward of State Highway 45 was suggested. The CIA explained that such a plan should also contain a commitment from the respondents to establish development partnerships with Ngāti Manuhiakai and Ngāti Tū for their involvement in identifying replacement or additional wind turbine sites, including through the joint purchase of lands.

[117] The CIA set out other specific conditions of consent that Te Korowai supported. These included conditions that there be no increase to the water take under the existing Ballance site consent for the Waingongoro River or the Kapuni Stream and that there be a maximum of four wind turbines erected at the Project site.

[118] The CIA explained that:

> There is a lack of alternatives offered by the applicant particularly regarding the location of the wind turbines. Our recommendation for an Alternative Site Plan provides a time based alternative which allows for the [Project's] initial economic viability to be developed while ensuring the vital connection of Ngāruahine to Taranaki Maunga is protected into the future.

[119] The CIA also set out responses from each of the six hapū of Ngāruahine (we discuss these below).

[120] Subsequently, in its 18 October 2021 written comments to the Panel, Te Korowai expressed "serious misgivings" about the fast-track consenting process, regarding it as enabling Treaty claims settlements to be "in effect – ignored".

Te Korowai said that the main issue with the Application was the location of the wind turbines and their impact on the relationship of Ngāruahine with Taranaki Maunga.

[121] In those comments, Te Korowai acknowledged that the respondents had been obliging and earnest in their consultation and engagement. However, the respondents' attempts to address Ngāruahine's concerns had amounted to tinkering with turbine angles and configurations rather than positioning the turbines in alternative locations. Te Korowai had asked for an alternative site plan to be developed due to its concern as to "the effects of scaling up or extending the project if there was an increase in demand for hydrogen". Te Korowai went on to say:

> We acknowledge the applicants need to ensure hydrogen production is cost effective in order to compete with the fossil fuels currently used by heavy transport vehicles. However, if the Project is to be ongoing, we expect the turbines to be relocated to an alternative site coastward of SH45 once their useful life has been reached.

[122] Te Korowai also stated that one of its "main policies for the environment" was to support the move away from fossil fuels to renewable energy.

[123] Te Korowai's comments to the Panel on the draft conditions for the Project were provided by letter on 30 November 2021. This letter expressed concerns about the fast-track process, which it described as a "direct assault" on the rights negotiated in the Ngāruahine Claims Settlement Act 2016 and the yet to be completed Taranaki Maunga settlement. The letter went on to state:

> While hapū hold various views, and rightly so, their position can be described on a spectrum from strong opposition to unconvinced or not opposed. In no circumstance can hapū be described as strong supporters of the project. …
>
> … The wind turbines significantly alter [the Ngāruahine Cultural Landscape] and do not consider the impacts on our sense of place. Sight lines and view corridors do not adequately capture the holistic nature of our Cultural Landscape. Many sites of significance within the Ngāruahine rohe, including the Ngāruahine Cultural Landscape, are not actively protected due to a lack of faith from Whānau and Hapū in statutory heritage and resource management processes. The adverse effects of the turbines in their current location have not been addressed by the applicant i.e. identifying an alternative site.

[124] This letter went on to provide specific feedback on the conditions concerning culverts, the lizard survey, the cultural significance of the project area, air traffic safety, the minimisation of glare and light trespass, and water takes.

[125] At around the same time, Te Korowai also wrote to the Minister for the Environment, expressing concerns about the fast-track process and the recent draft conditions timeline.

Ngāti Manuhiakai hapū

[126] As noted above, in May 2020 Te Korowai advised the respondents to engage directly with the two hapū in whose rohe the Project was located. Ngāti Manuhiakai was one of those two hapū. The Application noted that, as a result, the respondents had been in regular contact and dialogue with Ngāti Manuhiakai since mid-2020.

[127] On 15 February 2021 Ngāti Manuhiakai wrote to the Minister for the Environment advising that it had an ongoing and constructive relationship with the respondents and was satisfied with the respondents' consultation. The letter advised that, although the respondents had offered to resource Ngāti Manuhiakai hapū to prepare a CIA in relation to the Project, the hapū did not consider it necessary to prepare one. The letter went on to say:

> We are satisfied that the potential impacts that have been identified can and will be appropriately mitigated by the applicants and that the applicants have taken our interests into account.
>
> …
>
> We confirm that we support the project in principle and look forward to working with the Applicants in the delivery and operation of this exciting project.

[128] This letter was attached to Te Korowai's CIA dated 16 August 2021.

Ngāti Tū hapū

[129] As with Ngāti Manuhiakai hapū, the respondents were in regular contact with Ngāti Tū from mid-2020. The respondents resourced Ngāti Tū to prepare a CIA. Ngāti Tū's CIA was dated July 2021.

[130] Amongst other things, the Ngāti Tū CIA discussed the advantages and disadvantages of wind turbines. It commented that many of the advantages of wind turbines cancelled out the disadvantages. Ngāti Tū was, however, concerned that the

disposal of propellors in 20 to 25 years could be carried out in a manner that was not environmentally friendly. In particular, it was concerned about the landfill disposal of the propellors. Ngāti Tū advised that, in response to this concern, the respondents were prepared to commit to involving Ngāti Tū in the decommissioning plan to find alternative options not involving landfill disposal. Further, in response to Ngāti Tū's wish for trees to be planted to increase the activity of birdlife, the respondents offered to plant additional trees at locations around the site, including in an area approved by Ngāti Tū.

[131] The Ngāti Tū CIA advised that it was "happy with the general direction" Hiringa was "heading". The CIA noted the intention to use hydrogen for vehicles was also positive, but noted that the viability was not totally known and would be for Hiringa to evaluate over time.

[132] Te Korowai's CIA dated 16 August 2021 supported the contents of Ngāti Tū's CIA. The Application noted that the Ngāti Tū CIA confirmed that Ngāti Tū was "generally supportive of the Project, with no cultural issues raised".

Kānihi-Umutahi hapū

[133] Te Korowai's CIA noted that no official feedback had been received from Kānihi-Umutahi hapū.

[134] The Application explained that two hui were held on 22 December 2020 and 14 January 2021 with the then chairperson of Kānihi-Umutahi prior to her passing. These meetings were largely about the water use of the Project as well as the minimisation of water use at the Ballance Plant. This issue arose because of the significance to the hapū of the Waingongoro River and Kapuni Stream, where water is drawn from. The respondents clarified in those meetings that water use for the Project would be accommodated within existing water permits and would constitute approximately one per cent of Ballance's existing water permit limits.

[135] The Application also stated that, at these two meetings, it was said that the Kānihi-Umutahi position was likely to be to support the mana whenua hapū position on the Project — that is, the positions of Ngāti Manuhiakai and Ngāti Tū.

The Application also stated that the respondents had continued to follow up with Kānihi-Umutahi but had received no further feedback.

Ngāti Tamaahuroa-Titahi hapū

[136] Te Korowai's CIA and the Application referred to a full hapū hui with the respondents in April 2021. Following that hui, Ngāti Tamaahuroa-Titahi confirmed in an email dated 3 June 2021 (and referred to in Te Korowai's CIA and the Application) that it supported Hiringa's work to reduce emissions and would support Ngāti Tū and Ngāti Manuhiakai in the decisions they made on the Project.

Ngāti Haua hapū

[137] The Application advised that the respondents had held a "full hapū hui" with Ngāti Haua on 27 March 2021. The respondents had given a PowerPoint presentation about the reasons for the Project and understood, following the meeting, there was general support for what the Project was trying to achieve, but that the hapū had questions about the effects of the turbines on the visual and spiritual connection of the hapū with Taranaki Maunga, the use of urea and how the hapū could benefit from the Project. The respondents showed the hapū the visual modelling demonstrating that the wind turbines would not interfere with the view of the Maunga from Ngāti Haua's marae.

[138] The Application noted that Ngāti Haua subsequently submitted a response to Te Korowai advising that it did not support the Project. Te Korowai's CIA included Ngāti Haua's response in full. In this response Ngāti Haua expressed concern about the short timeframe it had to respond to the Application. Ngāti Haua referred to the record of understanding signed between the Crown and Taranaki iwi of the intention that legal personality be granted to Taranaki Maunga. Ngāti Haua said that it wanted to collectively uphold the mana of Taranaki Maunga as tūpuna. It acknowledged some hapū may be impacted more, but said that many uri belonged to many of the marae in the area. It went on to say:

> Therefore, our Hapū spiritual values are under threat from this offensive use of our maunga, waterways and whenua and the encompassing separation of people and the Taiao in order for pakeha private enterprise which utilise the resources of our rohe to fulfil their profitable objectives. Benefits that Hapū

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

Ōkahu-Inuāwai hapū

[139] The Application advised that several hui were held with the chairperson of Ōkahu-Inuāwai. It advised that Ōkahu-Inuāwai was not supportive of the Project due to the visual and noise effects of the wind turbines. It had chosen to withdraw from further engagement on the Project. Consistent with this, Te Korowai's CIA advised that Ōkahu-Inuāwai had resolved by general consensus that it did not support the wind turbines, did not support the fast-tracking of the Project and had now formally withdrawn from future discussions.

Ngāti Ruanui iwi

[140] The Application explained that the respondents engaged with Ngāti Ruanui Trust following the Minister's direction to do so. The respondents met with a representative for the Trust in March 2021, providing an overview of the Project and the fast-track process. The respondents subsequently provided documents that detailed the Project. Ngāti Ruanui Trust advised by email dated 3 June 2021 that the visual impact of the Project was a concern.

[141] On 21 October 2021 the Ngāti Ruanui Trust provided its comments to the Panel. It advised that its comments were on behalf of the 8,000 uri, 16 hapū and 10 marae affiliated with it. It supported the development of sustainable energy that replaced fossil fuels but had "serious concerns about the impact of the wind turbines both from a visual perspective and a cultural one". It noted that the turbines were likely to be the largest ever constructed in Aotearoa and would profoundly dominate the landscape. The Trust was concerned that the turbines would be precedent setting and, if approved, would set a new benchmark for "what could be more to come". On this basis, it opposed the size of the turbines.

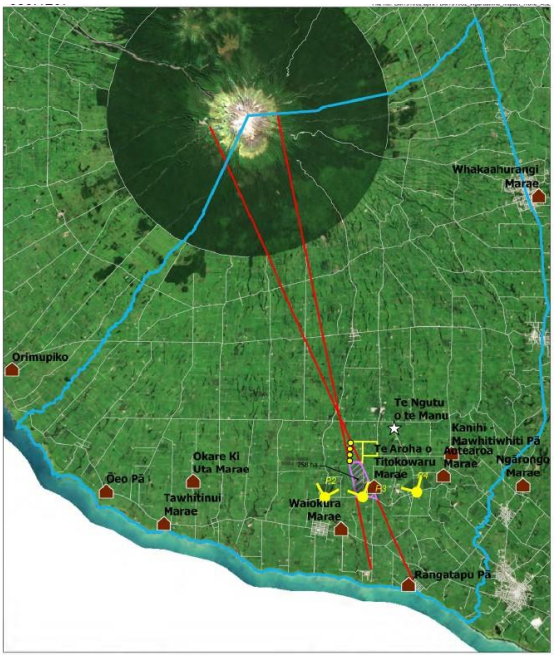
Further hapū view

[142] A further letter was submitted to the Panel by "Ngāruahine iwi authority", on behalf of the hapū of Ngāruahine iwi. The letter was undated but appears to have been

sent in response to the timeframe for providing comments on the draft conditions for the Project.[94] The letter requested further time to consider the Application because the COVID-19 outbreak had kept hapū away from their marae to fully discuss the Project. The letter accepted that the Project was new and innovative and good for the environment but hapū had "concerns where they plan[ned] to erect their Wind Turbines, on [Ngāti Tū] Ancestral Lands". It went on to say that the Ngāruahine iwi authority was "unanimous in their collective Hapū view that [they] wish[ed] for a hold to be put on the Hiringa project until [their] concerns [were] adequately addressed".[95]

Landscape and visual effects assessment

[143] In deciding to recommend a referral of the Project, the Minister required preparation of assessments of sightlines of Maunga Taranaki, viewed from sites of importance to Māori as determined by Ngāruahine hapū and Te Korowai. The respondents engaged Boffa Miskell to prepare a Landscape and Visual Effects Assessment (the LVEA) that included assessments of such sightlines. The LVEA included a line of sight map that included the location of affected marae, the proposed turbines and the "Direct Line of Sight Area" in relation to the maunga. The map is shown below:



94 It corresponds with the similar response from Te Korowai at this time, discussed at [125] above.

95 Counsel for Ngā Hapū have also informed the Court that they have been instructed that another Taranaki hapū, Araukuku, supports this appeal but their views were not before the Panel and we therefore cannot take this into account.

[144] The LVEA also assessed the effects on particular marae. The LVEA noted that Te Aroha Marae is the closest marae to the site of the proposed turbines, a distance of 2.4 km. The visual effects from Te Aroha Marae were assessed as "high" (meaning "a major change in views"). This was shown in the following visual simulation included in the LVEA:

[145] As summarised by the Panel, the LVEA concluded that, while the turbines were not located directly in front of the Maunga, they were very much viewed in its context and interrupted the view of the lower sleeping slopes. The direction of the turbine rotors impacted upon the effect of the turbines. There was "a noticeable difference" when the rotors were facing the dominant westerly wind direction. The Panel noted that Te Aroha Marae is the marae of Ngāti Manuhiakai hapū, who supported the Project.

[146] The visual effects from Māwhitiwhiti Marae were assessed as "moderate" (meaning "new elements may be prominent in views but not necessarily uncharacteristic within the receiving landscape").[96] Māwhitiwhiti Marae is the marae of Kānihi-Umutahi hapū.[97] The marae is situated 6.9 km east of the proposed turbine

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96 Initially the LVEA had assessed the visual effects of Māwhitiwhiti Marae as "N/A". This was because the views of the turbines from the marae did not feature Taranaki Maunga as a backdrop. However, the Panel sought an addendum report covering this marae and three other marae that were also assessed as "N/A" for the same reason. This led to the "moderate" assessment for Māwhitiwhiti Marae and "low" or "very low" assessments for the other three assessed marae.

97 As noted above, Kānihi-Umutahi hapū had indicated it was likely to support the mana whenua hapū position on the Project, that is the positions of Ngāti Manuhiakai and Ngāti Tū, and did not provide further feedback after this indication. However, see above n 2.

site. As summarised by the Panel, the turbines were not viewed in the immediate context of the Maunga. Further, the significant distance between the marae and the Project site meant that, while the turbines were visible on the flat landscape, they were not of a dissimilar scale to shelterbelt trees. The visual simulation shows this:[98]

[147] The visual effects from Waiokura Marae, the marae of Ngāti Tū, were assessed as "low" (meaning the "modification or change is not uncharacteristic or prominent within views and absorbed within the receiving landscape"). Waiokura Marae is 4.7 km south of the proposed turbine site. As discussed in the LVEA, from the marae there are clear views of Taranaki Maunga with the cluster of turbines situated to the east and well separated from the Maunga. The LVEA included the following visual simulation from Waiokura Marae:

98 The turbines can be seen in the distance and not in the context of Taranaki Maunga.

[148] The visual effects from Aotearoa Marae, the marae of Ōhaku-Inuāwai, were assessed as "low". It is 6.6 km to the east of the proposed turbine site. The turbines could be viewed from the marae but they are not in front of the Maunga and instead sit against the backdrop of the sky. This was shown in the LVEA by the following visual simulation:[99]

[149] The visual effects from the other three marae were assessed as "very low" (meaning approximating a "no change" situation and a negligible change in views). These were: Oeo Pā located approximately 16.8 km from the closest turbine; Ōkare Ki Uta Marae located approximately 10.9 km from the turbine site; and Tāwhitinui Marae, located south of Oeo Pā and 13.4 km from the turbine site. In each case the LVEA explained that the proposed turbines were to the right of the Maunga with considerable separation between the Maunga and the proposed turbines.

[150] No marae were assessed as having the highest rating on the scale used in the LVEA of "very high" (meaning "a complete change of landscape character in views").

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99 The turbines can only be seen faintly on the horizon behind the marae on the left hand side of the picture. The image shows the turbines do not sit in front of the Maunga and are seen against a sky background.

The Application

[151] The Application set out in detail the respondents' engagement with, and the various positions of, iwi and hapū. In its conclusion section it summarised these positions as follows:

> Iwi and hapū have been consulted on the Project. Te Korowai have provided their conditional support for the Project with the majority of the conditions supported by the applicant. In respect of hapū - the two mana whenua hapū and one other hapū have provided their support for the Project, one hapu has adopted a neutral position and two other hapū are opposed.

[152] The Application set out the conditions requested by Te Korowai and its agreement to them. This included:[100]

(a) a condition that required a decommissioning plan to be prepared in collaboration with Te Korowai, Ngāti Tū and Ngāti Manuhiakai;

(b) that if the hydrogen production associated with the Project continued at the Ballance Plant site after the consent duration, an alternative site plan would be developed in consultation with Ngāti Manuhiakai and Ngāti Tū;

(c) the respondents would provide solar panel systems for Ngāti Tū and Ngāti Manuhiakai and had offered in kind support for solar panel systems or alternate electricity supply at the remaining marae of hapū agreeable to this and to working with the respondents;

(d) a condition limiting the maximum number of turbines at the site to four; and

(e) a condition requiring that the turbines be removed at the end of their useful life or a maximum of 35 years from the commencement of operation (whichever occurred earliest).

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[100] There was also a condition addressing potential effects on communication services and two other conditions — one irrelevant and one the respondents could not agree to because they did not own the land.

[153] The Application also set out other measures to avoid or mitigate the cultural effects of the Project that the respondents had offered. These were:

> - Ngāti Tu and Ngāti Manuhiakai hapū will be invited to perform karakia prior to earthworks for the Project commencing;
> - Representatives from Ngāti Tu and Ngāti Manuhiakai hapū have been offered the opportunity to monitor earthworks for the Project;
> - Inductions for contractors working on the Project will include a cultural component to ensure all workers are aware of the cultural significance of the area and the protocols in place related to earthworks monitoring and archaeological discovery;
> - An archaeological discovery protocol will be in place and will form part of the contract documents for the civil contractors working on the Project;
> - An offer to Ngāti Tu and Ngāti Manuhiakai to erect pou or other agreed cultural markers at the Wind Turbine Site;
> - Ability for iwi/hapū to name the Project and/or wind turbines;
> - Sharing of environmental monitoring reporting undertaken by Hiringa/Ballance;
> - Hiringa/Ballance contribution to an environmental restoration project of importance to Ngāti Tu and Ngāti Manuhiakai hapū;
> - Supporting Ngāti Tu and Ngāti Manuhiakai involvement in development of the Decommissioning Plan for the Project;
> - Removal of reference to "green urea" in the application; and
> - Earthworks to be managed in accordance with an approved ESCP.
>
> Although not related directly to avoiding or mitigating adverse effects of the Project, the applicant has also offered to support and contribute to other partnership opportunities with Te Korowai and mana whenua hapū. Ultimately which mitigation measures are supported needs to be endorsed by the mana whenua hapū and Te Korowai.

[154] The Application noted that r 20.5.12(r) of the South Taranaki District Plan provided that, for "Large-Scale Renewable Electricity Generation Activities" involving significant adverse effects on the environment, an assessment was to be made as to the suitability of the site and the extent to which alternative locations or methods had been considered. The Application went on to say:

> None of the expert environmental assessments undertaken for the Project conclude that the Project will result in significant adverse effects on the

environment. Despite this an assessment of alternative locations has been undertaken.

There are a number of factors which combine at Kapuni to make the proposed location especially suitable for the Project, including:

- a world class wind resource;
- a relatively sparse population and density of houses;
- the Ballance Plant as a large-scale industrial user of hydrogen with a proven safety record, which is currently using non-renewable natural gas as a feedstock;
- a large local heavy vehicle fleet that could be converted to hydrogen vehicles;
- other large scale industrial plants located nearby that are powered by natural gas that could also be provided with renewable energy;
- a good water supply provided within existing consents; and
- an available grid connection for excess power.

With a difficulty in sourcing other locations that exhibit the above qualities, the proposed location for the activities is therefore considered superior to any others available to the applicant at this time.

[155] The Application also emphasised the wind quality of the site:

Wind speed and direction data from 40 m to 200 m heights above ground level has been collected at the Wind Turbine Site since July 2019, exceeding wind resource expectations and setting a scientific basis for the proposal. The expected turbine capacity factors will be equivalent to, if not better than, some of the best wind farms in the world. The proposed turbine model, site and placement overall represent what is considered to be the optimal design with regard to:

- The number of turbines;
- Wind speed and direction;
- Wake losses from interaction between turbines;
- Distance from surrounding dwellings;
- Potential noise and visual impacts;
- Land availability;
- Land topography; and
- Geotechnical analysis.

[156] It concluded its assessment of alternatives as follows:

> All other feasible turbine locations with regard to the sites available to the applicant are therefore considered to be inferior to that proposed.
>
> Leveraging the existing infrastructure at the Ballance Plant provides for efficient and optimal resource use. The development of a new stand-alone wind to urea plant would require significantly more capital and is not currently a commercially viable project. The perceived levels of risk associated with building new hydrogen infrastructure without certainty of demand are high. The proposal presents a unique opportunity to materially de-risk the situation where the supply of green hydrogen can be immediately fully utilised at the Ballance Plant to manufacture nitrogen fertilisers that will have a low emissions profile while the hydrogen transport market develops.

The Decision

[157] The Panel discussed the size of the turbines and the landscape and visual effects of them. The following provides a summary of its assessment generally:

> 65. An important potentially adverse effect is the visual impact of the turbines. … [T]he turbines are, by any measure, a very significant landscape issue given their height.
>
> …
>
> 67. At a 206m tip height (when the blade is standing vertically) there are no other built elements of that height or scale on the Taranaki Maunga ring plains. Further, the form of the turbines and their dynamic movement also contribute to their visibility.
>
> 68. The assessment establishes that adverse visual effects will be experienced from a limited number of private properties, and those have been identified. The visual effects from these properties are primarily those with an open and panoramic view of Taranaki Maunga from the internal and/or external living areas. However, many land owners of these properties have extensively planted around their dwellings for wind protection and enclosure, and thus views towards the Maunga or towards the turbines are screened.
>
> 69. Given the height of the turbines, there is very limited opportunity to mitigate adverse visual effects. Really only tree planting close to the viewpoint can provide effective screening. For properties where such screen planting does not exist currently and the visual effects are high, the applicants have offered tree planting, and a mechanism for offering and completing agreements in that regard is volunteered in the conditions.
>
> 70. As to broader views, the evidence shows that at viewing distances of 2km or less, the visual effects are generally moderate, sometimes greater, but beyond this the visual effects rapidly diminish. At distances of 3-5km or more, the dominant horizontal nature of the ring

> plain means that the turbines are generally visually absorbed into the wider landscape.
>
> 71. From roads and other public areas, the views are transient and ever changing as the viewpoint moves. Weather conditions also have a major influence on visibility.
>
> 72. The site is well separated from the surrounding towns and settlements and from both State Highway 3 and State Highway 45. The scale of Taranaki Maunga remains the dominant element in the landscape and its presence provides an overall context.
>
> 73. In terms of the broader impact on landscape character, the Panel concludes that while the turbines will introduce a new prominent element into the ring plain landscape, they will not visually dominate it, any more than either the Kapuni Gas Plant or Ballance Plant already do. In that sense, while the turbines will be prominent when viewed from various places on the ring plain, the nature and scale of the landscape is such that the four turbines can be successfully accommodated without significant adverse landscape and visual effects together with appropriate planting conditions for the benefit of a relatively small number of properties that are more directly adversely affected.

[158] The Panel acknowledged that this assessment did not address "the adverse effect on landscape character for iwi for whom the connection with the Maunga and its influence on the wider landscape holds special value". It addressed this issue in its discussion under the headings: "[p]otential effects on mana whenua" and "[m]area viewpoints". Under those headings, the Panel discussed the respondents' engagement with iwi and hapū, Te Korowai's CIA (including the views of hapū included in that CIA, the mitigation measures and suggested conditions), the Ngāti Tū CIA, the LVEA on marae viewpoints, the comments provided by Ngāti Ruanui and the comments on the draft conditions. Under the heading "[o]ther matters considered", the Panel also discussed the draft Ngāruahine Environmental Plan and the status of Treaty settlement negotiations.

[159] Throughout this discussion, the Panel explicitly acknowledged the ancestral, spiritual and physical relationship of Ngāruahine to Taranaki Maunga, that it is their "most significant wāhi tapu", and that it has "a direct effect on their wellbeing, sense of place and identity". The Panel also referred to the Crown's acknowledgment in the 2014 Ngāruahine Deed of Settlement that Tupuna Koro o Taranaki is of "great traditional, cultural, historical and spiritual importance" to Taranaki iwi. The Panel

also referred to the "Maunga values" contained in the record of understanding agreed between Taranaki iwi and the Crown in 2017.

[160] As to what s 6 of the FTCA required the Panel said:

> 199. Section 6 of the Act requires that all persons performing functions and exercising powers under it must, in achieving the purpose of the Act, act in a manner that is consistent with the principles of the Treaty of Waitangi and Treaty settlements.
>
> 200. The Te Korowai CIA identifies a number of principles which have been defined through the findings of the Waitangi Tribunal and decisions of the Courts including:
>
> (a) Kāwanatanga – the Crown's right to govern and delegate resource management decision-making powers to local authorities.
>
> (b) Rangatiratanga – the right of iwi to control, manage and use tribal resources according to their cultural preferences.
>
> (c) Partnership – a relationship between iwi and central and local government based on the concepts of good faith, mutual respect, reasonable co-operation, and compromise.
>
> (d) Resource development – the facilitation of iwi resource development.
>
> (e) Spiritual principle – recognition of the spiritual relationship that tangata whenua have with the environment.
>
> 201. Case law indicates that these principles may also include active protection, good faith consultation and communication.
>
> 202. As discussed above, the processes of engagement undertaken with representatives of tangata whenua have facilitated opportunities for involvement in the development of the CIAs, relationship agreements, iwi resource development and investment, long term relationships, appropriate conditions of consent and enabled the exercise of kaitiakitanga.

[161] The Panel's assessment as to whether s 6 of the FTCA was met was as follows:

> 203. We are satisfied the applicants have consulted all iwi and hapū with an interest in the Project, with a desire to determine how kaitiakitanga can be integrated into the project, to mitigate cultural effects of the project and to find partnership opportunities that will benefit tangata whenua.
>
> 204. The applicants have resourced and supported the development of CIAs by iwi and hapū and genuinely sought to address adverse effects of concern where possible. It is clear from both CIAs that the

mitigation measures suggested by the applicants during consultation are largely supported by Te Korowai and in turn, Te Korowai's recommendations and requested consent conditions have been adopted by the applicants.

205. The applicants have sought to minimise the impact on the cultural landscape of Ngāruahine and its hapū as far as practicable. These measures include relocating the turbines south of the Ballance Kapuni plant to PKW land, orientating the turbines in a north south configuration, and reducing the spacing between the turbines and considering the impact from the Marae located near the PKW farm.

206. Kaitiakitanga has been implemented via practices such as site walkovers and karakia with due diligence to identify sites of potential significance to tangata whenua, noting also that there are no known archaeological sites on the application site. The proposal avoids sites and areas of cultural and spiritual significance with hapū observation of earthworks and ongoing environmental monitoring and a discovery protocol in place if previously unknown features are discovered.

207. The Panel recognises that the proposed turbines will have an impact on the cultural landscape and the special relationship Ngāruahine and their hapū have with Taranaki Maunga for the duration that the turbines are in place. We acknowledge that while the Project Site might not be in their rohe, Ngāti Ruanui expressed a similar view given their connection with the maunga and its influence on the wider landscape.

208. Whilst we acknowledge those concerns we are cognisant of the mitigation measures undertaken by the applicants and the conditions of consent which to a large extent have satisfied Te Korowai, Ngāti Tū and Ngāti Manuhiakai, to ensure that this development is constrained to its present intensity.

209. With the number of wind turbines to be erected at the PKW site limited to four, the removal of the turbines after the expiry of their useful life or after a maximum of 35 years of operation subject to a Decommissioning Plan prepared in collaboration with Te Korowai, Ngāti Tū and Ngāti Manuhiakai, including an Alternative Site Plan if necessary to identify an alternative site/s coastward of SH45, we are satisfied the concerns of the iwi and hapū regarding the protection of their cultural landscape have been addressed, while also recognising the importance of the Government's commitment to renewable energy, including as contained in the NPS-REG.

[162] The Panel returned to this when assessing relevant policy statements in planning instruments. These instruments included Chapter 10 (Natural Features and Landscapes, Historical Heritage and Amenity Value) and Chapter 16 (Statement of Resource Management Issues of Significance to Iwi Authorities) of the Taranaki Regional Policy Statement. The Panel said it was an "unavoidable conclusion that the [P]roject [was] not fully consistent with all the objectives and policies" of the

identified chapters of the Regional Policy Statement. It did not regard "such inconsistency as problematic" for the reasons it had addressed in the above discussion. It expressed similar views in relation to similar objectives and policies in the South Taranaki District Plan.

[163] The Panel acknowledged the concerns about the fast-track process but noted it had no jurisdiction over the process matters raised. The Panel also said:

> 211. We acknowledge the applicants' intention to continue to work closely with Te Korowai and the mana whenua hapū Ngāti Manuhiakai and Ngāti Tū, to ensure the cultural impacts of the Project are understood and respected, and to build a relationship that results in positive outcomes for the hapū, Te Korowai, the broader community, and the environment. We also acknowledge the sincerity in the applicants' response that they have developed a relationship agreement with Te Korowai and signed the agreement though the matter currently sits before Te Korowai's Board to complete. Whether or not their Board or delegated authority agrees and executes that relationship agreement has no bearing on the decision we have reached.

[164] The consent included conditions limiting the number of turbines to four, incorporating cultural components in site inductions and karakia to bless sites, and ongoing consultation with a representative from each of Ngāti Tū and Ngāti Manuhiakai. It also included conditions requiring decommissioning at the end of the turbines' useful life or the end of the term of the consent (whichever occurs earliest), that a decommissioning plan be prepared in collaboration with Te Korowai, Ngāti Tū and Ngāti Manuhiakai, and that the decommissioning plan include an alternative site plan that at a minimum contained a process for identifying an alternative site or sites situated coastward of State Highway 45 on which to locate any replacement wind turbines.

High Court

[165] The appeal to the High Court on Treaty issues was brought by Te Korowai and supported by Ngā Hapū.[101]

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[101] As noted, Ngā Hapū are interested parties on this appeal and made submissions on this point. Te Korowai abides this Court's decision on this appeal.

[166] Ngā Hapū included Ngāti Tū who, as the Judge noted, had been supportive of the Project. The Judge discussed the apparent change in position by Ngāti Tū. The Judge referred to Ngāti Tū advising the Court that it had withdrawn its support because it considered that the respondents had not met the conditions to which its support had been subject.[102] The Judge considered that the only condition that had not been met was a royalty payment.[103] Ngāti Tū, in its CIA, had sought a royalty payment recognising it was kaitiaki of the rohe of the proposed turbine site. The Judge noted that the details of the royalty payment were not before the Court and nor, apparently, had they been before the Panel.[104]

[167] The Judge concluded that the absence of a condition requiring a royalty penalty was not an error because:[105]

> [226] A royalty payment is generally not a matter which is properly the subject of a condition in a resource consent unless agreed upon. Failure to impose a royalty condition does not mean the Panel failed to act in a manner "consistent with" the principles of the Treaty. To require that such a payment should be made to hapū might be seen as a payment to avoid a veto of the Project by Ngāti Tu.
>
> [227] Counsel for Ngāti Tu argued on appeal that the royalty requirement was in the nature of payment for kaitiakitanga responsibilities. The details of the negotiations over that royalty payment were not before the Panel nor were they before this Court. It was open [to] the Panel to consider incorporating a specific payment condition for that purpose beyond the requirement for Hiringa to pay direct costs of the community consultative group. Payments for appropriate services in any event may be arguably covered under that specific condition in any event. The imposition of such a requirement however was a matter within the Panel's discretion and does not give rise to a ground of appeal.

[168] In relation to Te Korowai, the Judge discussed its concerns as set out in its October 2021 written comment.[106] The Judge noted that one of those concerns was to identify an alternative site once the useful life of the turbines had been reached and that this concern was met by the conditions imposed.[107] The Judge also noted that

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102 High Court judgment, above n 5, at [76].
103 At [197].
104 At [227].
105 Footnote omitted.
106 At [198].
107 At [198]–[199].

Te Korowai's other concern was that it had not at that time sighted the relationship agreement which was to include the respondents' offered mitigation measures.[108]

[169] As to the relationship agreement the Judge said:[109]

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

[170] The Judge discussed key authorities considering the interpretation of various statutory requirements that incorporate the Treaty.[110] These various formulations included requirements on decision-makers to take into account, or give effect to, or not to act inconsistently with, the principles of the Treaty. The Judge referred to authority that regarded "give effect to" as a stronger imperative than "to not act inconsistently with".[111] Similarly, the Judge considered that a requirement to act in a manner "consistent with" the principles of the Treaty appeared to be stronger direction than one to "take into account" the principles of the Treaty.[112] The Judge discussed and summarised the principles she viewed as emerging from the case law and the Panel's assessment against that case law.[113]

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108 At [198].

109 Footnote omitted.

110 At [149]–[183] citing *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352; *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA); *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882; and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*].

111 High Court judgment, above n 5, at [182].

112 At [183] quoting *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 110, at [80].

113 High Court judgment, above n 5, at [193]–[219].

[171] The Judge then went on to analyse whether the Panel had met the requirements of s 6 of the FTCA. The key parts of the Judge's analysis are as follows:[114]

> [233] This application particularly engaged the principles of rangatiratanga — the right of iwi to control, manage and use tribal resources according to their cultural preferences — on the one hand, and kāwanatanga — the Crown's right to govern and delegate resource management decision-making powers to local authorities, or in this case the Panel — on the other.
>
> [234] The rangatiratanga of Te Korowai and the hapū was recognised and incorporated into the process in a number of ways. For instance, the CIA was prepared against the draft iwi management plans and values of Te Korowai as well as its draft kaitiaki plan. In addition, the nominee of Te Korowai was appointed as a member of the Panel. At the request of Te Korowai, the deadline for receipt of its comments on the conditions was extended to 25 November 2021. Though subsequently they were not ultimately received until the end of November, the Panel nevertheless took those comments into account.
>
> [235] Te Korowai, Ngāti Tu and Ngāti Manuhiakai were to be represented in the community consultative group chaired and administered by South Taranaki District Council. Te Korowai's relationship with the local authority in relation to the Project, therefore, was ongoing.
>
> [236] The preferences of iwi and hapū as they related to the specific land affected by the Project, but, more importantly, as they related to the cultural landscape affected, were set out in the CIAs, which expressed the elements of rangatiratanga involved.
>
> [237] In the circumstances, the principle of kāwanatanga was engaged by the referral by the Crown of the application for determination by the Panel. The Panel was then required to exercise of kāwanatanga by applying the requirements of the FTCA.
>
> [238] The Panel was required to assess the consistency of the proposal with relevant Treaty principles within the statutory framework. The applications did not satisfy all that iwi and hapū had sought in terms of tino rangatiratanga, but the Panel was required in achieving the purpose of the Act, to exercise its powers, in a manner "consistent with" the principles of the Treaty and Treaty settlements. The Treaty clause and related cultural provisions do not require the consent of iwi and hapū to the Project to achieve such consistency.
>
> …
>
> [240] In the context of achieving the particular purposes of the FTCA, it was open to the Panel to be satisfied that in granting the consents it was acting in a manner consistent with the Treaty principles. Within the overarching legislative framework, and the particular limitations of the fast-track consenting scheme, it made no error in reaching that conclusion.
>
> [241] The CIAs were resourced by Hiringa but prepared by the relevant iwi or hapū, and the statutory process allowing submissions on the application and on the proposed conditions was followed. It is relevant to consistency with

[114] Footnotes omitted.

> Treaty Principles in relation to process that the CIAs had been prepared against the Te Korowai draft kaitiaki plan, which had not yet been submitted to the relevant local authority for adoption and use in Council resource consent processes. I also note in this regard that a nominee of Te Korowai was on the Panel, which reflected the importance of iwi representation in resource consent decision-making. The Settlement Act itself provided for both of those measures in relation to local authority decision-making.

[172] The Judge went on to discuss the specific points of appeal, namely that: the Panel had failed to consider the cultural landscape of Ngāruahine as a whole; the Panel had failed to consider the precedential effect of the Project to be an adverse effect that could not be mitigated; reasons were required for determining not to hold an oral hearing; and that the Panel had improperly delegated decision-making to the Council on whether the Project was consistent with the principles of the Treaty.[115] The Judge considered that none of these grounds of appeal were made out.

[173] The Judge concluded:[116]

> [271] It is well established law that iwi do not have a right of veto of a project. However, as William Young and Ellen France JJ commented in *Trans-Tasman Resources Ltd*, the decision-maker is required:
>
> > … to indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply.
>
> [272] The decision-maker must show it has engaged with the cultural issues raised and satisfied itself that the adverse cultural effects which would prevent "consistency" with the principles of the Treaty have been addressed.
>
> [273] The purpose under s 4 of the FTCA was to "urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment continuing to promote the sustainable management of natural and physical resources."
>
> [274] I am satisfied that in the circumstances of this case, the Panel in achieving the purpose of the Act acted, in process and in substance, in a manner "consistent with" the principles of the Treaty and Treaty settlements, as it was required to under s 6 of the FTCA. The assessment of the Panel must take place within the legislative scheme based on the evidence before it at the time it heard the application. I am satisfied the Panel addressed all concerns of and material provided by, in particular, Te Korowai and Ngāti Tu adequately and imposed appropriate conditions accordingly.

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115 At [248]–[270].
116 Footnotes omitted.

Discussion

First appeal ground: the High Court's approach on appeal

[174] The first alleged error is that the High Court failed to assess whether granting fast-track consent was consistent with the Treaty principles. This was said to be because the High Court adopted an approach more akin to the reasonableness ground of judicial review. Ngā Hapū's submissions point to two paragraphs in the Judge's fulsome discussion of the cultural issues raised by the appeal where this approach was said to be evident.

[175] In one of those paragraphs the Judge said: "it was open to the Panel to be satisfied that in granting the consents it was acting in a manner consistent with the Treaty principles".[117] In the other paragraph the Judge concluded that the Panel had not erred in its assessment of the impact of the Project on the cultural landscape because the Panel had been satisfied that the grant of the consent subject to conditions met the requirements of the Act.[118]

[176] Appeals under the FTCA are limited to questions of law.[119] This meant that the Judge was assessing whether the Panel had directed itself correctly in law and whether its findings were available on a correct position of the law. If they were, there was no error on a question of law. The Judge's approach reflected this. As we have set out above, the Judge extensively examined case law and the approach of the Panel and then proceeded to set out detailed reasons why she concluded that the Panel had exercised its powers consistently with the Treaty. We accordingly consider this ground of appeal is not made out.

Second appeal ground: Treaty consistency

[177] This ground claims that the Panel did not exercise its powers consistently with the principles of the Treaty. Under this ground we will consider: first, the relevant evidence; secondly, the interpretation of s 6; thirdly, the principles engaged and applicable authorities; and fourthly, the issue of Treaty consistency in this case.

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117 At [240].
118 At [254].
119 FTCA, sch 6 cl 44(2)

[178] In relation to the evidence in this case, Ngā Hapū's submissions on this point begin as follows:[120]

> It is recognised by all Parties (and the Panel) that the proposed turbines will have a significant adverse effect on the cultural landscape and will fundamentally impede the special relationship of Ngā Hapū to the Maunga.

[179] We consider that this submission is put in somewhat stronger terms than some of the views that were before the Panel. It is also stronger than the Panel's assessment of the information it received. We have set out earlier the range of views of hapū and the somewhat evolving views of Te Korowai and others that were before the Panel. To summarise:

(a) This submission does not accurately reflect the views initially presented to the Panel on behalf of the two hapū with mana whenua in relation to the Project site. Specifically, Ngāti Manuhiakai was satisfied that "potential impacts" would be appropriately mitigated and Ngāti Tū was generally supportive, raising no cultural issues. Two further hapū (Kānihi-Umutai and Tamaahuroa-Titahi) supported Ngāti Manuihaikai and Ngāti Tū as the two mana whenua hapū in relation to the Project. Subsequently the Ngāruahine iwi authority collective of hapū sought further time to respond to the draft conditions and asked for the Project to be put on hold.

(b) The view before the Panel that best correlates with this submission came from Ngāi Haua who described their spiritual values as "under threat from this offensive use of our maunga", and said the Project would be "a reminder that [they] continue[d] to be colonised to the point that [they] may now have a physical obstruction between [them] and [their] Tupuna Maunga". Although not phrased in this way, Ōkahu-Ināwai were also opposed to the turbines. Ngāti Ruanui Trust had serious concerns about the impact of the wind turbines from a visual and cultural perspective and the potential for the turbines to be precedent setting.

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120 Footnote omitted.

(c) For its part, Te Korowai's CIA referred to the turbines as having "the potential to have a considerable impact on the highly valued relationship" to Taranaki Maunga. Nevertheless, it conditionally supported the Project provided that the wind turbines were removed from the site at the end of their useful life or after 35 years. By 30 November 2021, Te Korowai described the wind turbines as "significantly alter[ing]" the landscape and impacting on the sense of place of hapū and they said the respondents had not addressed the adverse effects by identifying an alternative site.

(d) For its part, the Panel recognised that the turbines "will have an impact on the cultural landscape and the special relationship Ngāruahine and their hapū have with Taranaki Maunga" while they were in place.

[180] We again note that this appeal is limited to questions of law. That said, we accept that the current position of Ngā Hapū is that the turbines will have a significant adverse effect on the cultural landscape and will fundamentally impede the special relationship of Ngā Hapū to the Maunga.

[181] We now turn to examine the meaning of s 6. Ngā Hapū submit that s 6 of the FTCA is a powerful clause that acts as a substantive constraint on the powers that Parliament has granted such that a consent for a project that is not consistent with the principles of the Treaty (and Treaty settlements) must be declined. They submit that the consistency with the principles must be read in the context of Ngāruahine's loss of land and experience of environmental damage as acknowledged by the Crown in the Ngāruahine Claims Settlement Act 2016. The detailed terms of that acknowledgement are set out in s 9 of that Act and conclude with:[121]

> The Crown acknowledges that its breaches of the Treaty of Waitangi and its principles during the 19th and 20th centuries have together significantly undermined the traditional systems of authority and economic capacity of the Ngāruahine iwi, and the physical, cultural, and spiritual well-being of its people. The Crown acknowledges that it has failed to protect the rangatiratanga of Ngāruahine, in breach of its obligations under Article Two of the Treaty of Waitangi.

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121 Ngāruahine Claims Settlement Act 2016, s 9(16).

[182] We agree that s 6 imposes a stronger directive than the requirement in s 8 of the RMA which requires all persons exercising functions or powers under that Act in relation to natural and physical resources to "take into account the principles of the Treaty of Waitangi".[122] The stronger directive in s 6 of the FTCA was intentional. Parliament rejected the recommendation of the Select Committee that what became s 6 of the FTCA be replaced by s 8 of the RMA.[123]

[183] It is possible that s 6 of the FTCA was also intended to be a stronger directive than the requirement in, for example, s 9 of the State Owned-Enterprises Act 1986, which provides that nothing in that Act permits the Crown "to act in a manner that is inconsistent with" the principles of the Treaty of Waitangi.[124] We say that because the directive is framed positively in s 6 of the FTCA (to act consistently with) rather than negatively (not to act in a manner inconsistent with) and so is more directive in tone, if not in practical effect.[125]

[184] In the High Court, Grice J discussed another Treaty clause variation found in s 4 of the Conservation Act 1987.[126] That section provides that the Act is to be interpreted and administered as "to give effect to" the principles of the Treaty. The Supreme Court has held it to be a "powerful" clause that goes beyond merely balancing the Treaty principles against other relevant considerations.[127] It can have

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122 See *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 110, at [27] and [88].

123 COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-2) (select committee report) at 4. See also Supplementary Order Paper 2020 (534) COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277–2).

124 That language was described, for example, as "strong and unambiguous language" by Casey J in *Lands*, above n 110, at 701. In *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*] the Privy Council, in the context of a Crown transfer of broadcasting assets to a state-owned enterprise, asked whether that transfer would impair the ability of the Crown to fulfil its Treaty obligations in relation to te reo Māori (a taonga) in which case the transfer could not occur: at 520 and 525. On the facts the Privy Council held that the transfer did not prevent the Crown from fulfilling its Treaty obligations and so was not inconsistent with the Treaty.

125 We also note that in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 110, at [8], the Court said "all members of the Court agreed that a broad and generous construction of such Treaty clauses" was required. See also [151] per William Young and Ellen France JJ, [332] per Winkelmann CJ, [237] per Glazebrook J and [296] per Williams J. The decision in that case perhaps indicates that the exact phrasing of Treaty clauses will not be highly material to its practical effect. For present purposes, the important point is that s 6 of the FTCA is a strong Treaty clause.

126 High Court judgment, above n 5, at [158]–[161].

127 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, above n 110, at [52]. See also the decision of this Court in *Ngai Tahu Maori Trust Board v Director-General of Conservation*, above n 110.

both procedural and substantive effect.[128] In that case, it required the Department of Conservation, when making a decision relating to a concession application, to "so far as is possible, apply the relevant statutory and other legal considerations in a manner that gives effect to the relevant principles of the Treaty".[129]

[185] We consider that, as relevant for these purposes, s 6 of the FTCA constrains the Panel's power to grant a consent by requiring that the relevant considerations in cl 31 of sch 6 are applied consistently with the relevant principles of the Treaty. In other words, the actual and potential effects on the environment, any measure to offset or compensate for adverse effects and any other relevant consideration must be viewed through the lens of the Treaty principles. If the effects on the environment would be contrary to the principles of the Treaty and cannot be offset or compensated for in a manner that is consistent with those principles, the Application must be declined. Further, we accept Ngā Hapū's submission that consistency with Treaty principles in this context is to be considered against the backdrop of the Crown's acknowledgement to Ngāruahine of Treaty breaches.

[186] We now turn to identify the relevant principles of the Treaty. Ngā Hapū's submissions in this Court emphasise the principles of active protection and the exercise of tino rangatiratanga over taonga. They say that consistency with these principles required the Application to be declined or at the least for meaningful alternative options to have been explored and adopted. To understand how those principles might operate in the present case, we start with the articulation of the principle of partnership as discussed by this Court in *New Zealand Maori Council v Attorney-General* (the *Lands* case),[130] the foundational case in this area; and the Privy Council in *New Zealand Maori Council Attorney-General* (the *Broadcasting Assets* case),[131] its successor.

[187] As Cooke P explained in the *Lands* case, when the Treaty was signed its aims partly conflicted.[132] The Treaty was, however, to be seen as "an embryo rather than a

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128 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, above n 110, at [52].
129 At [53]. See also the discussion at [54].
130 *Lands*, above n 110.
131 *Broadcasting Assets*, above n 124.
132 *Lands*, above n 110, at 663 per Cooke P.

fully developed and integrated set of ideas".[133] Although there were differences in the English and Māori texts, what mattered was the Treaty's "spirit".[134] Cooke P considered that the Treaty "signified a partnership" creating responsibilities "analogous to fiduciary duties", with each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other.[135] The other members of the Court reached a similar view.[136] The *Lands* case concerned whether the proposed transfer of land from the Crown to various state-owned enterprises would remove the ability of that land to be returned to Māori as a form of redress for Treaty claims. In that context, Cooke P emphasised that the principles of the Treaty included the duty of the Crown of "active protection of the Maori people in the use of their lands and waters" to the fullest extent "reasonably practicable".[137]

[188] In the *Broadcasting Assets* case, the issue was whether the transfer of broadcasting assets to a state-owned enterprise would impact on the Crown's obligations in relation to te reo Māori. There was no question that te reo Māori was a taonga in a vulnerable state. The Privy Council dismissed the appeal because it was satisfied that the Crown's duty could be met despite the transfer. In doing so, it commented on the nature of the Treaty principles in these terms:[138]

> Both the [Treaty of Waitangi Act 1975] and the [State-owned Enterprises Act 1986] refer to the "principles" of the Treaty. In Their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. … With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.
>
> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. *It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and*

133 At 663 per Cooke P.
134 At 663 per Cooke P.
135 At 664 per Cooke P.
136 See the summary of the Court's conclusions in *Lands*, above n 110, in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.
137 *Lands*, above n 110, at 664.
138 *Broadcasting Assets*, above n 124, at 517 (emphasis added).

> *trust.* It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. *While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.* For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.

[189] In the *Lands* and *Broadcasting Assets* cases, the differences between the English and Māori texts of the Treaty were recognised but not regarded as significant to the issues before those Courts.[139] In the *Lands* case, Cooke P described the basic terms of the Treaty bargain as follows:[140]

> In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated.

[190] Cooke P also emphasised that a court should give "much weight" to the opinions of the Waitangi Tribunal (Te Rōpu Whakamana i te Tiriti o Waitangi) in interpreting the phrase "the principles of the Treaty of Waitangi".[141] The approach of the Waitangi Tribunal has been to give special weight to the Māori text in establishing the Treaty's meaning and effect where there is ambiguity between the two texts because it was the Māori text that was signed and understood by the Rangatira, amongst other reasons.[142]

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139 *Lands*, above n 110, at 663 per Cooke P; and *Broadcasting Assets*, above n 124, at 516.

140 *Lands*, above n 110, at 663.

141 At 661 per Cooke P.

142 Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: Stage 2 Report on Te Paparahi o Te Raki Claim* (Wai 1040, 2022) [*Tino Rangatiratanga* report] at 22. See also Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 208.

[191] In 2022, in *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (the *Tino Rangatiratanga* report), the Waitangi Tribunal described the principle of partnership in this way:[143]

> … [T]he principle of partnership states the basis on which post-treaty relationships between Māori and the Crown should be conducted.
>
> The Tribunal has considered the principle of partnership over many years and has talked about it in different ways. It has generally been understood as reciprocal, involving 'fundamental exchanges for mutual advantage and benefits'. Māori 'ceded' sovereignty (in the English text) or kāwanatanga (governance, in the Māori text) of the country in return for the Crown's guarantee that their tino rangatiratanga (full authority or autonomy) over their land, people, and taonga would be protected. …
>
> …
>
> Turning to the principle of partnership, the Tribunal [in the *Wai 262* volume 2 report] suggested it could be seen as an overarching principle, 'beneath which others, such as kāwanatanga and tino rangatiratanga, lie'. … The Tribunal noted that, in New Zealand, '[w]e … have our own protective principle that acknowledges the Crown's Treaty duty actively to protect Māori rights and interests. But it is not the framework. Partnership is.'

[192] In the *Tino Rangatiratanga* report, the Tribunal reviewed previous reports discussing the principle of tino rangatiratanga. Those reports described the principle as involving "autonomy" and meaning the right of Māori to retain their own customary law and institutions, and the right to determine their own decision-makers and rights in land, with tikanga underpinning how it was to be exercised.[144] Another way it has been put by the Tribunal is that rangatiratanga and mana are "inextricably related" and that rangatiratanga denotes "the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences".[145]

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143 *Tino Rangatiratanga* report, above n 142, at 51 and 53 (footnotes omitted). In the stage 1 report, the Tribunal concluded that there was no cession of sovereignty in Te Raki when the rangatira entered into a treaty agreement with the Crown in February 1840. See: Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014). The stage 2 report, the *Tino Rangatiratanga* report, considered the implications of that conclusion for the principles of the Treaty in relation to Te Raki Māori.

144 *Tino Rangatiratanga* report, above n 142, at 45–46.

145 Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) [*Motunui-Waitara* report] at 51.

[193] In the *Tino Rangatiratanga* report, the Tribunal also referred to the principle of active protection as a key Treaty principle.[146] It obliged the Crown not only to recognise the Māori interests specified in the Treaty but to actively protect them.[147] The Tribunal explained that active protection required honourable conduct and fair processes by the Crown.[148] It regarded the principle of active protection as closely linked to the principle of equity.[149] More broadly the Tribunal summarised the equity principle as follows:[150]

> … [T]he Tribunal has outlined the principle [of equity] in accordance with obligations arising from kāwanatanga, partnership, reciprocity, and active protection as requiring the Crown to act fairly to both settlers and Māori and to ensure that settlers' interests were not prioritised to the disadvantage of Māori.

[194] We accept that consistency with the principle of active protection may have both procedural and substantive implications. That is, not only must the Crown adopt fair consultative processes with Māori in respect of planned projects that may engage Treaty principles, the principle of active protection may be relevant to whether the project should proceed on the site proposed or at all. To illustrate this point, Ngā Hapū referred us to four projects considered by the Waitangi Tribunal that engaged this principle.

[195] The first was the 1978 *Waiau Pa Power Station* report.[151] The Tribunal considered a proposal by the former New Zealand Electricity Department to construct a power station on a site close to Waiau Pā on the south-western shores of the Manukau Harbour. The proposal concerned the Treaty guarantee of Māori customary fishing rights.[152] The evidence established that the area at Waiau Pā was the principal

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146 *Tino Rangatiratanga* report, above n 142, at 59. The report also discusses at 79–81 that, for Te Paparahi o Te Raki, "active protection" is an inapt description because of its connotation of a relationship with unequal power. The Tribunal considered that the principle of mutual recognition and respect better reflected the treaty-based partnership that Te Raki Māori entered into. It considered "[p]artnership, not active protection, is the framework for governance of New Zealand".

147 At 59.

148 At 60.

149 At 61.

150 At 64.

151 Waitangi Tribunal *The Report of the Waitangi Tribunal on the Waiau Pa Power Station Claim* (Wai 2, 1978) at 3.

152 The Tribunal, at 8, referred to the acceptance of the importance of fish as a food to Māori, that Māori had fished in the Manukau Harbour for centuries, that Art 2 of the Treaty confirmed and guaranteed fishing rights and that Māori customary fishing rights had not been disturbed through legislative action.

fishing ground for local Māori as well as for their kinfolk at Tūrangawaewae and other areas, and that had been so for generations. The evidence also established that a cooling pond (a potential cooling system for the station) would occupy a significant portion of the fishing area with consequent and significant loss of that area for fishing.[153] On that basis, the Tribunal noted that the claims before it were "well-founded".[154] Ultimately, however, the Tribunal declined to make a recommendation in respect of the project at Waiau Pā because the Government had decided not to proceed with it.[155]

[196] The second example was the 1984 *Kaituna River* report.[156] It involved a proposed pipeline to transfer treated effluent from Lake Rotorua to the Kaituna River, where Māori traditional fishing rights existed.[157] The Tribunal considered the proposal to be contrary to the Treaty guarantee of continued enjoyment and undisturbed possession of fishing rights (a taonga).[158] The discharge of (treated) sewage effluent into this fishery was contrary to Māori cultural and spiritual values.[159] The Tribunal considered that the Ministry of Works and Development had insisted on the pipeline and closed its mind to other alternatives. The evidence before the Tribunal showed that there was a less costly alternative to the pipeline that involved stripping biological nutrients from the effluent discharged into the lake.[160] It noted that even this alternative was a compromise because the continued mingling of effluent into the lake was offensive to Māori spiritual and cultural values but the Tribunal considered it was, in the circumstances, the most practical course.[161]

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153 An alternative cooling system involved cooling towers with associated chemical discharges. The Tribunal considered that a detailed study would be necessary to determine whether those discharges would be damaging to the fishery: at 13.

154 At 13.

155 At 13.

156 Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984).

157 This pipeline was part of a scheme to reduce the pollution of Lake Rotorua caused partly by the effluent and partly from run-off from surrounding farmland. Another part of the scheme involved fencing off the watercourses from stock (with piped water supplies for these farms) and retiring other farm land (fencing them off and planting them with trees). This part of the scheme could proceed regardless of the pipeline proposal.

158 At 31.

159 At 31.

160 At 25–26.

161 At 32.

[197] The third example was the 1983 *Motuni-Waitara* report.[162] It also involved the discharge of sewage and industrial waste on to or near the traditional fishing grounds and reefs of Te Atiawa, in Taranaki. The Tribunal found that the Crown measures intended to protect the fish resource and coastal environs insufficiently recognised and protected these fishing grounds and Māori interests in them. The Tribunal's discussion of the Treaty included the following:[163]

> The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people. ...
>
> The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.
>
> We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.
>
> We do not therefore consider that both the Maori and the Crown should be so bound that both sides must regard all Maori fishing grounds as inviolate. In our view it is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change.
>
> In particular, it is not inconsistent with the Treaty that the Te Atiawa hapu should accept a degree of pollution in respect of certain of their fishing grounds, on the basis that other grounds will not be spoilt.

[198] The last paragraph was a reference to Te Atiawa having been willing to accommodate the national interest by not insisting upon the protection of all their reefs, as they might have done, and accepting limited discharges in one area.

[199] The fourth and final example is the 1988 *Mangonui Sewerage* report.[164] It concerned a sewage treatment pond on farmland in Taipa, Northland. The sewage pond was part of a scheme for intended housing developments in Doubtless Bay, the historic homeland of Ngāti Kahu. The report explained that Taipa was of special importance to Ngāti Kahu as the place where Te Pārata arrived from Hawaiki to dwell

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162 *Motunui-Waitara* report, above n 145.
163 At 52.
164 Waitangi Tribunal *Report of the Waitangi on the Mangonui Sewerage Claim* (Wai 17, 1988).

with Kahutianui and from that relationship the Ngāti Kahu tribe was born.[165] The report stated that Ngāti Kahu lost most of its land shortly after the Treaty was signed but in recent times had reclaimed some of that land through purchases or gifts from settler families.[166] The farmland on which the sewage treatment pond was to be sited had been sold to the tribe in 1986.

[200] The Tribunal discussed the Treaty as follows:[167]

> In this context the Treaty is particularly important. The basic concept was that a place could be made for two people of vastly different cultures, to their mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed. That is still the fundamental base from which we examine the sewerage scheme and from which we will later need to consider the developments in Doubtless Bay as a whole. It is obvious that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.
>
> Some things on the other hand, like lands and fisheries, could forever be retained, according to the Treaty's terms, for so long as there was a wish to keep them. … The enjoyment and continued possession of lands and fisheries was guaranteed.
>
> The Treaty envisaged British settlements and the development of new towns. With high concentrations of people, sewerage schemes are required. We must balance in this case the record of Ngati Kahu concerns with the long saga of events behind the sewerage scheme, bearing in mind that such a scheme must proceed. …

[201] The Tribunal noted that the treatment works had been proposed for the site since 1973 which was well before the land was purchased by Ngāti Kahu.[168] The Tribunal went on to find that, because of the significance of the land at Taipa to Ngāti Kahu and the strong cultural views on human waste, another site should be sought if it could reasonably be found. It commissioned a consultant to review alternatives near to the Taipa area. However, none of the alternatives were clearly superior in terms of cost. They also posed other problems that "could very well result in further objections from Maori and non-Maori alike, when planning consents were sought".[169] The Tribunal considered that no alternative was "sufficiently free of other problems to warrant Parliamentary intervention" to require the relocation of the

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165 At 1 and 13–14.
166 At 1.
167 At 4.
168 At 7.
169 At 7.

proposed works.[170] The Tribunal weighed the alternatives with the reality that the works on the proposed site would be largely obscured from view and the discharge would be effected elsewhere.

[202] Ultimately, the Tribunal declined to make a recommendation. It concluded:[171]

> The Treaty as we have said, requires a balancing of interests in some cases, and a priority for Maori interests in others. This is one occasion where a balancing of interests is needed and some compromise must be made. We have considered at length the background to both the tribe and the scheme and we have noted that the land was acquired after the designation was made. The scheme, we note, has been arranged and changed to reduce the cultural impacts, and the continued possession and enjoyment of tribal land and fisheries is not in the circumstance unduly encroached upon.

[203] We consider the discussion on balancing of interests in *Mangonui Sewerage* report, as well as the case law referred to above, reflects the overarching principle of partnership,[172] and is relevant here. Importantly, while Ngā Hapū's connection to Taranaki Maunga is a taonga, it does not necessarily follow that any new addition to the landscape around the Maunga will always be contrary to the principle of active protection. Tino rangatiratanga required the Panel to respect the views of iwi and hapū about the effect of the turbines on their spiritual and cultural values, but in this case these views were not consistent nor aligned. Moreover, the LVEA provided evidence of the visual effects alongside which these inconsistent and non-aligned views could be considered.

[204] Ngāti Manuhiakai, the hapū in whose rohe the proposed turbines are to be located and whose view to the Maunga is most affected, was in favour of the Project. As in the *Motuni-Waitara* report where Te Atiawa's accommodations were considered to be Treaty-consistent, Ngāti Manuhiakai's support was evidence of Treaty consistency here.[173] The withdrawal of support for the project by Ngāti Tū, the other hapū in whose rohe the proposed turbines are to be located, appears to have been over the failure to obtain a royalty payment. As in the High Court, we do not have details about this and so do not know whether its position was reasonable in the context of

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170 At 7.
171 At 7.
172 At 7.
173 *Motunui-Waitara* report, above n 145.

the Treaty partnership. We do know, however, that the Panel did not include a condition requiring a royalty payment. Similarly, Te Korowai, which could be expected to have an overall perspective for Ngāruahine, was initially supportive subject to conditions. The positions of these two most affected hapū and the iwi position indicated to the Panel that the Project would be consistent with the principles of the Treaty provided appropriate conditions could be negotiated. The Panel's approach in this respect is consistent with the idea that the Treaty is a partnership involving reasonableness and cooperation in which the rights, values and needs of one are not inevitably subsumed by those of the other and where mitigation measures may appropriately offset adverse effects.

[205] In our view, the position here can be contrasted with sewage discharge into an important fishing ground or cooling towers which would result in a significant loss of an important fishing area. That was a direct, clear and significant interference with a protected taonga. For better or worse, the landscape around the Taranaki Maunga has existing structures reflecting development over time. In this context the turbines have mainly low or very low adverse visual effects relative to the Maunga from the marae of the hapū who now oppose the Project. Importantly, the turbines are to generate renewable power to produce hydrogen that may provide an alternative fuel source for the benefit of New Zealand's response to the climate emergency the world faces. It was for that significant public interest that the Project was recommended for referral by the Minister for fast-tracking. Te Korowai and hapū expressed support for a move away from fossil fuels to renewable energy sources. It is also important that the respondents have agreed to decommissioning and an alternative site plan if necessary when the turbines are at the end of their life (a maximum of 35 years). A range of other mitigating measures have been offered and cultural components are included in the conditions of consent imposed by the Panel.

[206] We consider it was not necessary for the Panel to interrogate the possibility that an alternative site might be found in order for the Project to be consistent with the Treaty. This was not advanced as being necessary by the iwi and hapū who provided written comments except as a condition at the end of the useful life of the turbines (accepting that Te Korowai's position about this was more equivocal in its comments on the conditions in late November). The Application directly addressed that

alternative sites were considered and explained why the proposed site was the location especially suitable for the Project. There was no reason for the Panel to second guess the respondents' investigations and conclusions about this. We agree with Grice J that the Panel's assessment must be based on the evidence before it and that the Panel addressed the concerns that were raised at the time.

[207] We acknowledge that the Panel found that the Project was not fully consistent with Māori cultural and spiritual values. But that is not the same as finding that the Project was not consistent with the principles of the Treaty. The Panel concluded that the Project *with conditions* was consistent with the principles of the Treaty. We consider that the Panel made no error in finding that the mitigation measures, including identifying an alternative site at the end of the useful life of the turbines, ensured that the Project was consistent with the Treaty. The Project was important to the Government's commitment to renewable energy and provided employment opportunities. It met the purposes of the FTCA. With the mitigation measures and conditions of consent, we consider it was a project that reflected a balancing of interests reflective of the partnership that the Treaty represents. It met the duty of active protection in the circumstances, taking into account the Crown's acknowledgment to Ngāruahine of past treaty breaches.[174]

[208] Returning to the considerations in cl 31 of sch 6, we consider that the Panel properly had regard to the actual and potential effects on the environment of allowing the activity, and to measures proposed or agreed to ensure that positive effects offset or compensated for any adverse effects in allowing the activity, as viewed through the lens of what consistency with the principles of the Treaty required. For these reasons, we consider that the Panel made no error of law in how it approached the Treaty consistency of the Project.

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[174] Although this was not the focus of the submissions before the Panel or this Court, we note that nothing has been identified as inconsistent with any Treaty settlement either, other than as providing context for the concerns of hapū about the Project and as context for past Treaty breaches (which may inform current duties by the Crown).

Third appeal ground: reasons for no hearing

[209] Ngā Hapū submit that the Panel erred in not holding an oral hearing. They say that the discretion to hold a hearing (in cl 20 of sch 6) was fettered by the need for Treaty consistency. Ngā Hapū submit that a hearing would have provided critical insight into what active protection and tino rangatiratanga required given that the position of hapū and iwi remained "murky" and concerns about their capacity to engage with the process had been raised. Ngā Hapū submit that Treaty consistency required, at a minimum, that the Panel give reasons for not holding a hearing.

[210] We do not accept this submission. The evidence before the Panel was that the respondents had engaged with relevant iwi and hapū at an early stage. The process allowed for a CIA from Te Korowai and Ngāti Tū as well as the preparation of the LVEA. All parties were able to and did provide their comments, other than Kāhihi-Umutahi hapū which did not provide official feedback.[175] Concerns were raised about timing when feedback was sought on conditions. However, Te Korowai, while expressing those concerns, did provide specific comments on the conditions. Moreover, the fact hapū held views ranging from strong opposition to supportive, did not mean that the Panel had insufficient information and needed to conduct an oral hearing to test the "murky" views raised.

[211] The real question is what natural justice required. It is well established that this is context-dependent and is considered in light of the statutory scheme. We consider that the process adopted by the Panel met the requirements of natural justice in this case. All relevant parties had the opportunity to be heard through the respondents' early engagement with them, followed by the opportunity to make written comments on the Application and subsequently on the draft conditions. Through those opportunities the Panel had the full spectrum of views. It was for the Panel to assess those views in the context of the statutory criteria and in the timeframe stipulated by the legislation. In the absence of any party requesting an oral hearing or explaining why one was necessary, the Panel cannot be criticised for failing to provide reasons for why it adopted the default position under the FTCA that a hearing was not required.

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[175] See above n 2.

Conclusion

[212] We conclude that Ngā Hapū have failed to show that, in granting consent to the Project subject to conditions, the Panel did not act in a manner consistent with the principles of the Treaty. We also consider that the Panel did not err by failing to hold a hearing nor by failing to provide reasons for why a hearing would not be held.

COSTS

[213] We decline to make an award of costs. Greenpeace and Ngā Hapū each raised matters of public importance in the context of a fast-tracked process under legislation that gave them standing to do so and where no public notice was permitted.

RESULT

[214] The appeal is dismissed.

[215] We make no order for costs.

COOPER P

[216] I agree that the appeal should be dismissed, and with the reasons set out in the judgment of Mallon J, save in one respect. The point on which I disagree is as to the effect of Conditions 112 to 114 imposed by the Panel.

[217] For ease of reference, I set out those conditions again:

> (112) Over a five year period, on the dates specified below, the consent holder shall provide a written report to the South Taranaki District Council as to progress in achieving the transition of green hydrogen production from utilisation entirely for the purposes of urea production to utilisation in the transport market.
>
> (113) The dates specified for the purposes of Condition 112:
>
> (a) By 30 June 2023; and
>
> (b) Each anniversary thereafter until 30 June 2028.
>
> (114) Pursuant to s 128(1)(a)(iii) of the Resource Management Act 1991, the South Taranaki District Council may review this condition at any time after 30 June 2028 for the purpose of assessing progress of the

> transition referred to in Condition 112 above, and/or to propose new conditions to ensure that that transition progresses or continues.

[218] I consider that read together, these conditions assume that there is to be a transition from utilisation of the green hydrogen for the purposes of urea production to utilisation in the transport market. While the conditions contemplate flexibility as to timing, I do not consider the flexibility extends to the possibility that the transition would not occur at all.[176] I say this for the following reasons.

[219] First, the transition was an essential feature of the Application. The Panel highlighted what had been said in relation to the transition at paragraph 61 of the Decision:

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

[220] Subsequently, in paragraph 237, the Panel described the Project as being "squarely premised on the transition to utilisation of hydrogen in the heavy transport industry", and quoted from the assessment of environmental effects where it was "explicitly" said:

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

[221] Again, at paragraphs 238 and 239, the Panel said:

> 238. Absent that transition (i.e. if the proposal were simply to continue producing urea) it is difficult to see how the fast-track consenting could be justified. The proposal may or may not have succeeded as an ordinary application under the Resource Management Act. Therefore, given the reliance on transition to justify fast-tracking, it is appropriate to ensure that any consent matches that justification, and is reflected in the appropriate conditions.
>
> 239. The applicants raised a concern that part of the condition proposed by the Panel introduced an element of uncertainty to the project by enabling the South Taranaki District Council to impose fresh conditions if transition was rendered difficult in the prevailing market conditions. The Panel has reviewed this, but does not consider the

[176] As is contemplated at [99] of Mallon J's judgment.

> condition required further amendment. As currently framed, it will be open to the consent holder to refer [to] the market conditions in exchanges with the Council in the review process as a factor it regards as of significance to any consideration of further conditions.

None of this is consistent with the idea that the transition might never occur.

[222] Second, it is clear that Condition 112's requirement, to provide a written report as to the progress made in achieving the transition, assumes that the transition will be under way. That assumption also underpins Conditions 113 and 114 which follow. The reports provided in accordance with these conditions would be pointless if all they were doing was stating (as might notionally be the case if the transition need not occur) that no progress had been made.

[223] Third, the Panel expressly stated that Condition 114 needed no further amendment, in response to the respondents' expressed concern that an element of uncertainty would be introduced if the Council could introduce fresh conditions in the event prevailing market conditions impeded the transition. The Panel stated that Condition 114, as it was framed, allowed the consent holder to raise the prevailing market conditions in discussion with the Council as a factor of significance to any consideration of further conditions. I see this as underlining the fact that the transition did need to occur. That was the entire purpose of Condition 114.

[224] As discussed above, the imposition of further conditions was expressly for the purpose of ensuring the transition progressed or continued. Maintenance of Condition 114 in the face of the respondents' opposition is, in my view, only consistent with the notion that the Panel intended to allow for flexibility as to the timing, and not implementation, of the transition.

[225] I am not persuaded that the Panel's intention was to provide for a situation in which the transition might not occur. Given the clear statements made, and commitments given, about the transition in the documentation submitted with the Application, the Panel may well have felt justified in taking it as a given that the transition would occur, that the respondents would take genuine steps to ensure that it did, and that allowing for temporal flexibility would be sufficient to deal with any difficulties that arose.

[226] Following a report prepared in accordance with Condition 112, a review could occur under s 128(1)(a)(iii) of the RMA, for the purposes set out in Condition 114. These include the imposition of new conditions designed to ensure that the transition took place. I note that, after giving notice of review under s 128(1)(a)(iii), the Council could then propose "new consent conditions" under s 129(1)(d).

[227] The imposition of a condition particularising the timeline for the transition would be difficult to criticise in light of the intentions expressed in the Application. If the transition still did not occur, an essential element of the basis on which the consent was sought, dealt with and granted on an expedited basis under the FTCA would fall away. In these circumstances, it would be unlawful to continue to utilise the consent. The Council could then seek an enforcement order either requiring the activity to cease under s 314(1)(a) of the RMA (as an activity contravening a resource consent), or requiring the transition to occur to comply with the resource consent under s 314(1)(b)(i).

[228] For these reasons, I consider that Conditions 112 and 114 are designed to ensure that the transition occurs, even though it may not do so within the timeframes that were originally envisaged.

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