Supplementary Analysis Report: Treaty Impact Analysis for the Fast-Track Approvals Bill

Overview and Summary

1. This Treaty Impact Analysis (TIA) analyses in detail the Treaty impacts (positive and negative) of key policy decisions Ministers have made which are proposed to be legislated for in the Fast-Track Approvals (FTA) Bill. Because much of the policy decisions were made separately by delegated Ministers, the TIA for this Cabinet paper is a broad analysis of the Treaty impacts of the policy decisions reflected in the Bill.

2. The FTA Bill strikes a different balance from the RMA, and other legislation included in the regime, in the public interest of progressing some projects more efficiently. Because it relates to the use and development of the environment and natural resources, there are significant Māori rights and interests,[1] Treaty settlements, Takutai Moana and other interests that are engaged, and relevant Treaty principles that need to be considered.

3. Policy development and engagement on the policy proposals has occurred at pace. Whilst there has been some discussion with some Māori groups (some PSGEs, Te Tai Kaha, and advisers to National Iwi Chairs), due to the tight timeframes and limited opportunity to garner the views of iwi/hapū/Māori on the specific policy proposals it has not been possible for this to be as thorough as would be expected for a Bill of this significance. Some groups have also advised that the limited nature of engagement on the policy proposals is insufficient to meet settlement commitments, given the significance of the proposals.

4. Not all decisions that have Treaty impacts have been able to be analysed in this paper in the time available. Further, most Treaty impacts specific to the other legislative regimes that are to be 'fast-tracked' in the FTA Bill are not included in this analysis, which is focused primarily on RMA approvals.

5. Overall, the analysis in this TIA suggests there is likely to be some benefit to Māori developmental interests and broader socio-economic benefits which would have some positive Treaty impacts. However, there are some aspects of the Bill, discussed in the final section of this TIA, which are more challenging from a Treaty perspective, particularly in terms of the broader principles of partnership and active protection. Particularly significant from this perspective are (1) the shift in decision making assessment criteria for RMA approvals, placing the new purpose of the Act above Part 2 RMA in terms of the assessment hierarchy; (2) the decision to include no Treaty clause; and no reference to Treaty clauses in existing legislation (for instance RMA, the EEZ Act, the Conservation Act); and (3) the fact that the Act focuses more on provisions to protect and recognise Treaty settlement and Takutai Moana interests, rather than broader Māori rights and interests.

[1] Māori have a range of rights and interests in respect to natural resources, which have repeatedly been recognised as very significant. The Crown has Te Tiriti o Waitangi | Treaty of Waitangi obligations to provide for and protect Māori rights and interests in relation to resource management legislation and policy development. See for example Waitangi Tribunal, 2011. The Report on the Management of the Petroleum Resource (Wai 796).

Treaty Settlements and Other Arrangements

6. Cabinet agreed that the FTA Bill will "include protections for Treaty of Waitangi settlements and other legislative arrangements"[2] [CAB-24-MIN-0008 refers].

7. The FTA Bill contains provisions and protections for Treaty settlements and other arrangements, as well as broader provisions for Māori, which are discussed in more detail below.

8. It includes an overarching clause requiring that persons exercising powers, functions and duties act consistently with Treaty settlements and customary rights recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

9. If the overarching provision works as intended, in combination with the procedural Treaty settlement protections contained at various decision-making points in the FTA process, they will likely uphold Treaty settlements and Takutai Moana and NHNP rights, and maintain the level of redress provided in those settlements and arrangements.

10. However, the overarching clause does not extend to Mana Whakahono ā Rohe (MWaR) and Joint Management Agreements (JMAs) under the RMA. These were negotiated between iwi authorities (or a hapū group) in a context where the relevant local authority made decisions on both plans and resource consent applications. Not including these arrangements within the scope of the overarching clause could mean that the relevant iwi or hapū groups do not have the same level of influence or involvement where consents are sought under the FTA, within their relevant district or region. However, the FTA Bill does include some provisions relevant to these arrangements, discussed below, which provides a level of protection.

11. The interaction between Treaty settlements and the new regime will be complex in some cases, and may give rise to some uncertainty in terms of what is required to act consistently with Treaty settlements. This is largely because existing settlements, which interact with other legislation, were agreed in the context of that legislation (for example Part 2 RMA; hearing and participatory rights. Some Treaty settlements alter decision making-standards by reference to existing provisions.[3]

Other Provisions and Protections

12. Māori have a broad range of economic, environmental, cultural and social interests at local, regional and national levels. Depending on the circumstances, these interests may either align with and support a given project or the opposite (and there may be difference between different Māori groups in this respect). Iwi/hapū/Māori may also be applicants.

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[2] Other arrangements listed in the Cabinet paper included legislative arrangements made under the Marine and Coastal Area (Takutai Moana) Act 2011, Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, and joint management agreements and mana whakahono ā rohe agreed under the RMA.

[3] For example, Te Aupouri Claims Settlement Act 2015 requires that, when making decisions in the korowai area, decision makers must, in applying section 4 Conservation Act, give effect to the principles of the Treaty; and comply with particular provisions in a Schedule, which provide for transparent decision-making for conservation matters in the korowai area.

Treaty and Māori rights and interests are multi-faceted, and under the Treaty of Waitangi, both the developmental and environmental protection aspects of these interests need to be considered and provided for.

13. There are a range of provisions and protections in the FTA Bill which are intended to protect and provide for Māori rights and interests. In particular:

    a. *Ineligibility criteria for referral* – Certain categories of land or CMT areas are either ineligible for referral, or can only be referred with consent. This provides protection for these areas, while still enabling the owners to allow for projects. Protection of these areas is consistent with Treaty principles of active protection, redress[4] and good faith[5].

    b. *Information requirements for applicants* – applicants under the FTA Bill must include in their application a set of information which ensures relevant Treaty settlement and other arrangements, Māori land, and statutory areas within the location of the project, are identified and considered.

    c. *Consultation requirements* – The applicant is required to undertake engagement with relevant iwi, hapū and Treaty settlement entities; Takutai Moana applicant groups, NHNP and relevant local authorities; and provide a record of the engagement and statement of how it has informed the project.

    d. *Report on Treaty settlements and other obligations* – This report is an important mechanism by which Ministers can ensure they are fully informed of the relevant Treaty settlement and other arrangements, and Māori rights and interests that are particular to the application in question. Ministers are required to consider the report before making a referral decision.

    e. *Process after Ministers' receive application* – the joint Ministers must copy the application to, and invite written comments from, relevant iwi authorities; Treaty settlement entities; Takutai Moana rights holders and applicants, parties to MWaR and JMAs and particular Māori land owners.

    f. *Ministers' referral decision* – the joint Ministers may decline an application (even if it meets the eligibility criteria) if they consider it is inconsistent with relevant Treaty settlements or other arrangements.

    g. *Comments on application* – the Expert Panel must invite comments on a consent application or notice of requirement from (among others), relevant iwi authorities

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[4] The Courts and the Tribunal have both acknowledged the principle of redress and "that past wrongs give rise to a right of redress", pg.100. Te Puni Kōkiri. 2001. *He Tirohanga ō Kawa ki te Tiriti o Waitangi – A guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal.*, which Treaty settlements (and land returned under them) are a key mechanism for fulfilling this principle. The Tribunal has noted that an essential element of this Treaty principle is "a commitment by the Crown to honour Treaty principles in the future to prevent continuing or new breaches of the Treaty", pg.103. Ibid. which speaks to the need to ensure that the integrity, intent and effect of redress provided is upheld.

[5] The Tribunal has said of this principle that "Acting in good faith requires the Crown and Māori to demonstrate, in all their dealings, respect, fairness, honesty, and openness", pg.1232. Waitangi Tribunal. 2015. *He Whiritaunoka: The Whanganui Land Report, Vol. 3 (Wai 903).*

and Treaty settlement entities, groups with Takutai Moana and NHNP interests, any entity with a role under iwi participation legislation, and any other group identified in the Treaty Settlements and Other Obligations Report. The Expert Panel also has the discretion to invite comment from any other person if they consider it appropriate.

h. *Specific provisions to uphold specific settlement and existing arrangements* – The Bill includes various specific provisions to uphold specific settlement redress and existing provisions of MWaR and JMAs under the RMA. These include a requirement that the Expert Panel must comply with any relevant obligations under these arrangements, imposed on decision makers under the RMA, as if they were that decision maker. A similar provision applies to procedural matters under Settlements and other arrangements. There is also a specific clause confirming the role of Te Ture Whaimana as the primary direction setting document for the Waikato River (similar to s104 NBA with modifications).

i. *Proposed changes to Treaty settlement Acts* – Some further changes have also been agreed (subject to confirmation by the relevant Treaty settlement entities), to amend relevant Treaty settlement Acts to refer to the FTA as well as the RMA; where identifying Acts under which decision makers have to have regard to particular legal frameworks or provisions within those Settlement Acts (*Waikato Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Ngati Tuwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Ngati Rangi Claims Settlement Act 2019).*

Broader Treaty and Treaty Settlement Provisions and Protections

14. Although the above provisions are collectively intended to protect and provide for Treaty settlements and Takutai Moana and NHNP rights and interests in particular, and also more broadly for Māori rights and interests and the Crown's Treaty obligations, they do so within a new framework, with a particular development focus.

15. In this context, there are remaining issues from a Treaty perspective where there is ambiguity; or where issues of consistency with Treaty principles may arise. In particular, refer to the issues set out below.

Treaty Clause

16. The Bill does not contain a clause in relation to Treaty principles, meaning it is uncertain what decision makers' obligations are with respect to the Treaty, and broader Māori rights and interests.

17. There is also no requirement in the Bill to consider the Treaty clauses in relevant legislation under which the need for approvals arise (ie section 8 RMA, section 4 Conservation Act, which provides the strongest level of Treaty principles protection).

18. The lack of a Treaty clause is likely to be seen as significant for Māori, and creates uncertainty as to how persons exercising functions and powers under the Act will apply the

Treaty. A Treaty clause is also likely to have provided a greater level of comfort for Māori in terms of recognition and protection of broader rights and interests (outside of the Treaty settlements and Takutai Moana rights), including for unsettled groups.

19. Engagement with iwi/Māori technicians and PSGEs has indicated support for including a Treaty clause (a clause that references the Treaty of Waitangi) as one of the provisions to uphold Treaty settlements and other arrangements, and to recognise and protect broader Māori rights and interests.

Information Requirements

20. Under the previous fast track regime, and under the RMA, cultural impact assessments are usually required as part of the applications for significant projects. No cultural impact assessments are required under this FTA Bill.

21. Not including cultural impact assessments as part of the information an applicant must provide means applicants may not have engaged with relevant issues or sourced information from the appropriate Māori groups. A cultural impact assessment also would have assisted in the preparation of the Treaty report (collated by the officials) and could have informed about cultural and environmental impacts that affect Māori. When the applicant is aware of these issues at the beginning of the process, they can work with the relevant Māori groups to determine appropriate mitigations at the outset, and this would have enabled a smoother process in later stages.

22. It is noted, however, that there is obligation on applicants to consult, and this will go some way to ensuring that some level of information is provided on Māori rights and interests as part of the application.

Eligibility Criteria

23. Unlike under current RMA fast track (and other) provisions, an activity is not ineligible for fast-tracking if it includes an activity that is prohibited under the RMA (although Ministers *may* decline to refer a project on this basis).

24. This may have the effect of overriding RMA plans or National Direction. There are specific provisions in both the RMA and in Treaty settlements, and other arrangements, that provide for iwi and hapū input into these plans, including identification of prohibited activities in certain areas. There are risks that this approach may undermine plans and therefore those underlying arrangements, or settlement redress, or allow activities in areas that are inappropriate locations for Māori.

25. This risk should be addressed for Treaty settlements, by the inclusion of provisions requiring consistency with Treaty settlements, in particular the overarching clause, and providing joint Ministers the discretion to decline to refer an application on the basis that it includes a prohibited activity.

26. The discretionary eligibility criteria are open-ended and could be applied to many significant infrastructure, developmental or environmental projects. This could include projects that potentially have negative Treaty impacts, such as a development that could have significant adverse effects on environmental taonga. This is partially mitigated by the ineligibility criteria which would exclude a number of situations where Treaty issues may arise, and by the discretionary eligibility criteria being only matters that the Minister ‘may’

consider. Officials' Treaty advice to Ministers, which will be informed by the Treaty Settlements and Other Obligations report, in relation to a specific project will be critical to inform Ministers' decisions.

27. It is important to note there may also be positive Treaty impacts from the wider discretionary eligibility criteria. Māori have a broad range of economic, environmental, cultural and social interests at local, regional and national levels. These include development interests and recognition of the Treaty principle of the 'right to development'[6]. For example, Māori housing development projects, particularly for papakāinga; or climate change mitigation and adaptation activities (noting that some iwi and hapū have supported applications under the Covid-19 Recovery (Fast-track Consenting) Act 2020 on the basis that the projects would reduce emissions Māori land is disproportionately in natural hazard risk areas, so projects that address these issues would benefit Māori.

No public or limited notification

28. Although comments on applications are provided for from identified Māori groups, this is much more restricted than under the RMA. Under the RMA, a significant project or notice of requirement of this type would be publicly notified, with opportunities to submit, to be heard and provide evidence, in respect of the application.

29. While this needs to be balanced against the objectives of the new legislation, in order to provide a more efficient process for some projects, there are risks that Treaty principles, particularly those of active protection, may not be met under this new process. This is because only some Māori groups are entitled to comment on an application; and the right to comment is relatively limited compared to under the RMA. Considering these issues at the time of the referral may assist to mitigate these risks, as may the fact that the panel has the discretion to invite any other person to comment if they consider it appropriate.

Decision Making

30. The decision-making framework for both listed and referred projects for the panel (and Ministers) is a subject to a hierarchy of considerations. First in the hierarchy is the new purpose of the FTA Bill, which is focused on facilitating the delivery of infrastructure and development projects with significant regional and national benefits. Next in the hierarchy is the purpose of the relevant legislation under which consents are sought; then sections 6 and 7 RMA, followed by policy and planning documents prepared under the RMA (or CA); and Mana Whakahono ā Rohe and JMAs.

31. The agreed purpose provides for enabling infrastructure and other projects, which would support Māori development interests[7]. The omission of the promotion of "sustainable management of natural and physical resources for current and future generations", which

[6] The Treaty principle of the right to development means that "Māori had the right to develop as a people and to develop their properties", pg.50. Waitangi Tribunal. 2012. *The Stage 1 report on the National Freshwater and Geothermal Resources Claim (Wai 2358).*

[7] There is a Treaty principle of the 'right to development' that the Waitangi Tribunal has found to mean that Māori have "the right to develop as a people and to develop their properties" pg.50. Waitangi Tribunal. 2012. *The Stage 1 report on the National Freshwater and Geothermal Resources Claim (Wai 2358).*

was present in the Covid Fast Track Act, removes some protection of Māori environmental protection interests in taonga[8] .

32. The matters in Part 2 of the RMA and the purposes of other Acts, are significant for the provision for and protection of Māori rights and interests under those Acts.

33. Part 2 of the RMA contains several provisions that are of importance to the Treaty and Māori rights and interests. Key among them are:

    a. Section 6 (e) which requires, as a matter of national importance, all persons exercising functions and powers under the Act to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;

    b. Section 7 (a) which requires all persons exercising functions and powers under the Act to have particular regard to kaitiakitanga; and

    c. Section 8 which requires all persons exercising functions and powers under the Act to take into account the principles of the Treaty of Waitangi / Te Tiriti o Waitangi

34. Sections 6 (e) and 7 (a) are also means by which decision makers under the RMA can take into account the principles of the Treaty and assist the Crown in meeting its obligations to provide for and protect Māori rights and interests under the RMA. For example, providing for Māori relationships with taonga relates to the Treaty principle of active protection[9] and the having particular regard to kaitiakitanga as a recognition of "a core principle of mātauranga Māori"[10] provides for the Treaty principle of mutual recognition and respect[11].

35. In some circumstances other aspects of Part 2 will be determinative and "the degree of Māori influence is dictated by the priority accorded Māori interests in part 2 of the RMA, and by the cogency of the issue the tangata whenua wish to bring forward"[12].

36. In addition to the other mechanisms provided for in the RMA (such as iwi planning documents), these provisions have been described as "the first genuine attempt to import tikanga in a holistic way into any category of the general law"[13]. Additionally, Treaty settlements provide for arrangements and other tools that have been negotiated, in part, in a way that links into RMA processes and tools that themselves link to Part 2 provisions.

37. [redacted]

[8] There is a Treaty principle of 'active protection' that includes "that Treaty obligations included a duty of active protection of taonga", pg.37, *Bleakley v Environmental Risk Management Authority [2001] NZHC 436 at [76]*

[9] This principle, in this context, relates to "that Treaty obligations included a duty of active protection of taonga", pg.37, *Bleakley v Environmental Risk Management Authority [2001] NZHC 436 at [76]*

[10] Pg. 109, Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (Wai 262).*

[11] The Treaty principle of mutual recognition and respect requires that "each party must recognise and respect the values, laws, and institutions of the other", pg. 85, Waitangi Tribunal, 2022. *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry (Wai 1040).*

[12] Pg. 115, Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (Wai 262).*

[13] Pg.18, Williams, J. 2013. *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern NZ Law.*

[redacted]

Other approvals included in the FTA Bill

38. Each statutory regime the FTA Bill will interact with has its own specific provisions for Māori interests, different Treaty clauses, and each regime has been modified by Treaty settlements in different ways.

39. As noted earlier, most Treaty impacts specific to the other legislative regimes that are to be 'fast-tracked' included in the FTA bill are not included in this analysis. However, it is worth noting the historical complexities with the Public Works Act regime and consistency with the principles of the Treaty[14]. Interaction of the Public Works Act with the FTA may bring these complexities into Māori rights and interests considerations under the FTA Bill. The Waitangi Tribunal has concluded that the Public Works Act and its predecessors, along with the Native Land Court and its contemporaries, have contributed to land being taken from Māori in a way that does not always accord[15][OBJ].

Appeals

40. Limiting appeals to points of law (and judicial review) will put extra onus (compared with RMA appeals) on the Treaty consistency (particularly in relation to substantive outcomes) of the referral process, the EP's process, the decision made on whether to grant the application and the conditions applied. The proposed appeal approach is consistent with the approach taken under both the Natural and Built Environment Act (NBA) and the Fast-Track Consenting Act (FTAA) for fast tracking, and does enable an avenue on a point of law for some Treaty matters to be appealed.

Listed projects

41. Listing projects carries a strong presumption that the application will be granted. The proposal has efficiency and certainty benefits (including for Māori development projects).

42. The Bill that will be introduced to Parliament will no longer have projects listed in the Schedules (the Schedules will be empty on introduction) – instead these will be added through a parallel process to the Parliamentary process before enactment. This reduces the risk that a project may be listed before it is known if the project is inconsistent with the principles of the Treaty or Treaty settlements – by allowing time to analyse projects against the proposed criteria in the Bill and engage with relevant groups as needed. The

[14] See for example complexities with the large suite of legislation as it has evolved in New Zealand, The Tribunal in He Maunga Rongo (Waitangi Tribunal 2008, Wai 1200, vol 2, p873) concludes that, from 1882 to 1974, multiply owned Māori land was subject to sustained and serious discrimination. The legislation was in breach of the Treaty principles of equity, active protection, partnership and reciprocity.

[15] For example, some land that became part of the Tongariro National Park was initially taken for defence purposes, under the Public Works Act 1928, and then incorporated into the park without consultation with Ngāti Tūwharetoa or any attempt to offer the lands back to them, breaching the Treaty principle of good faith. See Te Kāhui Maunga: The National Park District Inquiry Report, Waitangi Tribunal, 2013, Wai 1130 Vol. 1 from p739 for an outline of takings under the Public Works Acts throughout history.

overall level of risk here will depend on the process established to assess possible listed projects before they are included in the legislation, and how much of the eligibility criteria and other protections included in the Bill will be used to assess projects before listing. The EP when considering listed projects, and Ministers making final decisions on listed projects, will still be required to comply with the overarching Treaty settlements clause, which ensures a final layer of protection for Treaty settlements and other arrangements.

43. There is a risk that there could be limited engagement with Māori groups on the projects to be listed, although as above, this is tempered by the decision to delay including projects in the schedules to the bill until later in the Parliamentary process. A lack of engagement may raise natural justice, as well as Treaty issues. The Waitangi Tribunal has noted that engaging on every matter in which Māori have some residual interest would be "unduly burdensome on Māori"[16], though also said that "the Crown must carefully consider and inform itself of the impact its laws and policies may have on Māori individuals and groups … proceeding with law and policy without consulting Māori can only be treaty-consistent in exceptional circumstances, such as when delays might cause prejudice"[17].

[16] Pg.681. Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Vol. 2 (Wai 262).*
[17] Pg.58. Waitangi Tribunal. 2022. *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry (Wai 1040)*