BEFORE AN EXPERT PANEL **FTAA-2025-1069**
WAITAHA HYDRO SCHEME

Under the	**FAST-TRACK APPROVALS ACT 2024**
In the matter of	an application for approvals in relation to the Waitaha Hydro Scheme
Between	**WESTPOWER LIMITED**
	Applicant

EXPERT PANEL: WESTPOWER LTD MEMORANDUM #17 MEMORANDUM OF COUNSEL IN RESPONSE TO THE DEPARTMENT OF CONSERVATIONS FURTHER INFORMATION RESPONSE OF 5 MARCH 2026

Dated: 10 March 2026

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MAY IT PLEASE THE PANEL:

1. This memorandum is filed on behalf of the applicant, Westpower Limited (**Westpower**) in response to the further information response from the Department of Conservation (**Department**) dated 5 March 2026 and changes to the concession term sought by Westpower.

2. This memorandum:

   (a) provides Westpower's response to the Department's information in relation to the s 78 condition on the setting the concession fee;

   (b) attaches a letter from Mr Penrose addressing effects of the change to the operational term on his valuation; and

   (c) concludes with how Westpower's proposed approach enables the Panel to meet the Department's minimum level of the activity fee and the purpose of the FTAA.

Legality of the s 78 condition on the concession fee

3. In its memorandum, the Department states that:

   (a) the panel must impose the s 78 condition imposing the process for setting the concession fee – the panel has no discretion; and

   (b) Ministerial papers and briefings support the position that the setting of fees was contemplated as a measure to manage Crown risks and liabilities.

4. In support of that position, the Department advances a number of arguments.

5. Westpower has set out its position on this matter on a number of previous occasions[1] and, with respect, the Department's memorandum does not assist the Panel or advance the position.

6. By way of summary:

   (a) the Department does not confront the central issue in any detail: the legislation simply does not provide for the Minister to set a concession fee through a mandatory s 78 condition;

[1] Including Memorandum #1 at [26]; Memorandum #7 at [2.22]–[2.28]; Memorandum #11 at [42(a)]; and Memorandum #14 at [5].

(b) s 78 refers to managing 'risks to and potential liabilities of' the Crown through those conditions. The FTAA deals with the setting of concession fees in entirely separate provisions and if Parliament had intended that a s 78 condition could be used to set concession fees, it would have expressly provided for that;

(c) a plain reading of the FTAA is that the setting of concession fees is not covered by the s 78 conditions covering 'risks to and potential liabilities of' the Crown;

(d) the briefing papers provided by the Department do not assist the Panel. It is Parliament that enacts legislation and while the background Departmental briefing papers may have included broad references to fees, there is no evidence that was translated into statutory provisions through the Parliamentary legislative process;

(e) the fact that these types of background briefings are of no real assistance in statutory interpretation has been made clear by the courts, and extracts from two Court of Appeal decisions reinforcing that position are set out in appendix one to this memorandum; and

(f) the other arguments advanced by the Department also do not assist the Panel – eg in relation to the Minister's separate ability to call this matter in. That does not support the interpretation of unrelated provisions in the FTAA such as in relation to the setting of concession fees. Further, Westpower has always been clear that the Panel can impose a concession fee (to address the Department's concern that a concession fee may not be imposed).

7. Westpower maintains its position that it is the role of the Panel to set the concession fee in accordance with clause 8 of Schedule 6 of the FTAA – that clause and the FTAA clearly and expressly contemplate the Panel setting the concession fee. The Department is asking the Panel to rely on an interpretation of s 78 that is not supported by the actual words of the statute and a s 78 condition providing that the Minister will set the concession fee is unlawful. The Panel is not required to, and with respect should not, apply that s 78 condition.

Mr Penrose's response to Mr Dunkley's statement

8. In the appended letter, Mr Penrose confirms that his valuation of the concession fee did not consider the matters below which would support a lower concession fee than that in his report:

   (a) that the length of the term relating to generation has been reduced by Westpower's change to one concession term of 49 years for both construction and operation;

   (b) there are no rights of renewal; and

   (c) there is a risk of having to relitigate the concession fee every three years.

9. It is submitted that Mr Penrose's letter and the points above support the Panel setting a lower concession fee.

The level of the concession fee

10. Westpower's request for the Panel is to set a concession fee that is no more than that identified in Memorandum #14, Attachment Mr Griffiths, achieves a balance between:

    (a) addressing the 'risks and liabilities' the Department considers warrant the concession fee (and why it is included as a s 78 condition in their view); and

    (b) the purpose and a plain interpretation of the FTAA.

11. It is notable that the Department has proposed a minimum concession fee to address the risks and liabilities it has identified.[2]

12. Westpower has proposed a concession fee (no more than the figure proposed by Mr Griffiths) that is above the minimum concession fee proposed by the Department (but below that recommended by Mr Dunkley and Mr Penrose).

13. In conclusion, by imposing a concession fee of no more than the figure proposed by Mr Griffiths, that should address the concern of the Department as that fee will be above the minimum fee proposed by the Department. The other option for the Panel is to set the concession fee at the minimum fee

[2] Para 5, bullet point 3, Westpower Memorandum #14 Attachment Rodger Griffiths Concession Fee CONFIDENTIAL UNREDACTED.

proposed by the Department. As outlined above, either option should meet the interests of both Westpower and the Department, noting that the best way to ensure the success of the project (and therefore meet the purpose of the FTAA) is to set the fee as low as possible (and it also satisfies the 'no more onerous than necessary' requirement in s 83 of the FTAA).

Dated: 10 March 2026

Paul Beverley / David Allen / Rachael Balasingam

Counsel for Westpower Limited

APPENDIX ONE

EXTRACTS FROM COURT OF APPEAL DECISIONS

Wellington International Airport Ltd v Air New Zealand **[1993] 1 NZLR 671 (CA)**

At 675:

Mr Fardell, who argued this part of the case for the airlines, sought to impose a higher test. He referred us first to statements in the Port Louis and other cases to the effect that what is meant by consultation must be determined by the particular context, and by the object and purpose of the consultation. To determine the object and purpose in the present context, he invited us to refer to the parliamentary debates on the Bill, to the ministry papers and departmental correspondence which preceded it, and to the minutes of the select committee. In our view, it is inappropriate to do this. The law is to be found in the enactment itself, and not in the subjective intentions of the draftsman or of the department, nor in those of the Minister or of other members of the legislature. In a very few cases the Court may find it helpful to refer to such extraneous material "as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief aimed at or to clarify some ambiguity in the Act" per Cooke J in Marac Life Assurance Ltd v Commissioner of Inland Revenue [1986] 1 NZLR 694 at p 701. We were referred also to New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 where Hansard was referred to in the judgment of Cooke P at p 658, but with the comment, "As is so often the case, however, Hansard ultimately provides no significant help". As the Court has often said, it would not wish to encourage reference to such materials, except in the exceptional case. For observations to that effect, see Attorney-General v Whangarei City Council [1987] 2 NZLR 150, 152; Devonport Borough Council v Local Government Commission [1989] 2 NZLR 203, 208-209; McKenzie v Attorney-General [1992] 2 NZLR 14, 19. To do otherwise may not only burden the Court with irrelevant material, but may result in counsel feeling they must research such extraneous materials in every case of statutory interpretation in case they may find something, thereby adding unnecessarily to the burden of cost on the litigant. The material we were invited to consider in the present case does not, in our view, add anything to

what is implicit in the words of the section, and in the context provided by the Act as a whole.

Skycity Auckland Ltd v Gambling Commission **[2007] NZCA 407, [2008] 2 NZLR 182**

[40] It is true that, as Mr Browne pointed out, Cabinet materials are not "parliamentary", in that they are not placed before Parliament and are not part of the parliamentary processes like, for example, select committee reports or explanatory notes are. Nevertheless they are now often in the public domain and obtainable under the Official Information Act 1982. That was so in this case. However, we doubt that reference to Cabinet papers and reports to Cabinet will ever be of much assistance to courts involved in interpreting specific statutory provisions. They may provide some indication of the overall purpose of the legislation, but that will normally be apparent from the text of the Bill itself or, if not, from the explanatory memorandum or other parliamentary material. In the present case the two possible interpretations of ss 11 and 12 are both broadly consistent with the overall purpose of preventing any expansion of gambling activities, which is one of the general purposes of the legislation identified in the Cabinet material.

[41] Another factor is that, while Cabinet papers may reveal the intention of the Executive at the time of the relevant Cabinet meeting, that may differ from Parliament's intention when a Bill is passed. That is particularly so in an MMP environment, where the government of the day may well need to seek support from minor parties, and make trade-offs to obtain that support.