

Before the Expert Panel

FTAA-2603-1179

Under the Fast-track Approvals Act 2024

In the matter of the substantive application by the Department of
Corrections for approvals for the Auckland Prison
Capacity Increase listed project

**Seventh Memorandum of Counsel on behalf of the Department of
Corrections – Response to Minute 6 – sections 7, 82 and 84 of the
Fast-track Approvals Act 2024**

Date: 21 August 2026



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Introduction

- 1 The purpose of this memorandum is to provide a response to Minute 6 on behalf of the Department of Corrections (**Corrections**).
- 2 Through Minute 6, the Expert Panel invited Corrections to provide legal submissions in relation to a specific issue and requested the provision of further information.
- 3 This memorandum provides Corrections' legal submissions in response to the Minute. Attached as **Appendix 1** is a statement from Mr James Whetu that provides the requested further information.

Minute 6

- 4 Through Minute 6, the Panel has requested legal submissions that address how section 53 comments from Ngā Maunga Whakahii o Kaipara Development Trust (**Trust**) on behalf of Ngāti Whātua o Kaipara Iwi might influence the Panel's decision-making under sections 7, 82 and 84 of the Fast-track Approvals Act 2024 (**FTAA**).
- 5 Further, in paragraph [7] the Minute records that the Panel apprehends that the existing Tā kai Hono Agreement between Corrections and Te Rūnanga o Ngāti Whātua is outside the scope of matters that can inform decision making under the FTAA. The Minute then directs Corrections to address in legal submissions whether the Panel's understanding in this regard is correct.

The legislative requirements

6 This memorandum only addresses the three specific sections of the FTAA referred to in the Minute. That is, section 7 (Obligation relating to Treaty settlements and recognised customary rights), section 82 (Effect of Treaty settlements and other obligations on decision making) and section 84 (Conditions relating to Treaty settlements and recognised customary rights).

7 Section 7 of the FTAA requires:

(1) All persons performing and exercising functions, powers, and duties under this Act must act in a manner that is consistent with—

(a) the obligations arising under existing Treaty settlements

8 "Treaty settlement" is defined in the FTAA as a "Treaty settlement Act", or a "Treaty settlement deed". Both of those terms are then also defined.

FTAA, section 4.

9 Section 7 requires identification of obligations arising under the relevant Treaty settlement. It is not a direction to treat every cultural concern as a Treaty settlement obligation.

10 Section 81(2)(c) of the FTAA directs the Panel to comply with section 82. Section 82 of the FTAA applies if a Treaty settlement is relevant to an approval. It is accepted that there are several Treaty settlements relevant to the Proposal, including the Ngāti Whātua o Kaipara Claims Settlement Act 2013 (**Settlement Act**) and the Deed of Settlement between the Crown and Ngāti Whātua o Kaipara (**Deed of Settlement**) which

Substantive Application, Volume 1, section 8.0, paragraph 237.

apply to Auckland Prison site and the Prison Village land.

11 Section 82 of the FTAA requires that:

(2) If the settlement or Act provides for the consideration of any document, the panel must give the document the same or equivalent effect through the panel's decision making as it would have under any relevant specified Act.

(3) The panel must also consider whether granting the approval would comply with section 7.

12 Section 82(4) of the FTAA states that "document" means any document, arrangement, or other matter and includes any statutory planning document amended as a result of the applicable Treaty settlement.

13 Section 81(2)(e) of the FTAA empowers the Panel to impose conditions under section 84 of the FTAA. Section 84 states that:

For the purposes of section 7, the panel may set conditions to recognise or protect a relevant Treaty settlement...

14 Section 84(2) of the FTAA is express that it applies in addition to, and does not limit, any other powers to set conditions under the FTAA.

15 As set out above, section 7 of the FTAA requires the Panel to consider whether granting the proposal is "consistent with" obligations under the Treaty settlement. What this means has been recently considered by the Expert Panel through its draft decision on the Taranaki VTM application. As set out by that Panel (footnotes removed):

Draft decision,
at [229].

In *Greenpeace v Hiringa Energy* the Court of Appeal considered whether there was any legal error in a panel decision where the requirement was for the panel to be “consistent with” the principles of the Treaty. Importantly, iwi and hapū views on the project’s cultural effects did not align, leading to some being in support and some in opposition to the project. In that context, the Court relevantly found that:

- a. 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.
- b. 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.
- c. a finding that a project is not fully consistent with Māori cultural and spiritual values does not mean a project is not consistent with the principles of the Treaty.

- 16 The Panel in that matter sought to identify the relevant Treaty settlement obligations then determine whether granting approvals is consistent with them. It is submitted that the same assessment approach should be taken by this Panel.

Ngāti Whātua o Kaipara Claims Settlement Act 2013 and Deed of Settlement

- 17 Given the focus of Minute 6 on the comments received from the Trust, this memorandum only addresses the Settlement Act and the Deed of Settlement, even though there are other relevant Treaty settlements. As set out at paragraph 238 of Volume 1 of the Substantive Application:

Including, as noted in paragraph 239 of Volume 1, the Te Kawerau ā Maki Claims Settlement Act 2015 which also specifically applies to the Prison site.

...the Ngāti Whātua o Kaipara Claims Settlement Act 2013 was enacted on 12 June 2013 and formalises the Deed of Settlement between the Crown and Ngāti Whātua o Kaipara. The Settlement Act gives Ngāti Whātua o Kaipara a non-exclusive right of first refusal for a period of 170 years over Auckland Prison (Pāremoremo) and a non-exclusive deferred selection right to purchase the Pāremoremo Housing Block (Prison Village).

- 18 Mr Whetu stated in the Māori Consultation and Cultural Values Assessment that this confirms that there is a traditional, historical and spiritual association of Ngāti Whātua o Kaipara with the Auckland Prison site.

Māori Consultation and Cultural Values Assessment, Substantive Application, Vol 1, Appendix 1F.

- 19 There is no statutory acknowledgment held by Ngāti Whātua o Kaipara over or adjoining the site within the Settlement Act or Deed of Settlement. There is also no publicly available Environmental Management Plan in place for Ngāti Whātua o Kaipara.

FTAA requirements regarding the Treaty Settlement

- 20 It is acknowledged by Corrections that Ngāti Whātua o Kaipara is best placed to identify and articulate their cultural values and relationships with the area, and the effects that arise from the Proposal and on them as mana whenua.
- 21 Corrections understands that its role is to meaningfully respond to the outcomes sought by Ngāti Whātua o Kaipara (alongside other mana whenua).
- 22 Set out in the Section 55 Report, many of the recommendations and requests the Trust made via its section 53 comments as to mitigation measures are acknowledged, and are viewed by Corrections

Section 55 Report, paragraph 59 and Table 8, Appendix 9.

as having already been incorporated into the proposed mitigation and associated conditions to consider the values and views of mana whenua. The comments made by the Trust should be considered in that light.

- 23 Corrections considers that the adverse effects raised by the Trust have been acknowledged, and to the extent possible within the confines of an established operating prison site, have been appropriately avoided, remedied or mitigated and do not fall into the category of being sufficiently significant to be out of proportion to the project's regional or national benefits.

FTAA, section 85(3)(b).

- 24 Regardless, in reliance on the Court of Appeal decision in *Greenpeace*, should the Panel reach a finding that the Proposal is not fully consistent with Ngāti Whātua o Kaipara's cultural and spiritual values, that does not mean the Proposal is not consistent with the Settlement Act or Deed of Settlement.

Greenpeace Aotearoa Inc v Hīringa Energy Ltd [2023] NZCA 672, (2023) 25 ELRNZ 546, at [207].

- 25 As acknowledged at paragraph 245 of Volume 1 of the Substantive Application, the application to increase capacity at Auckland Prison does not compromise the future outcomes sought by the Settlement Act or Deed of Settlement, including for the Prison Village.
- 26 The Proposal does not impact on the non-exclusive right of first refusal over the Prison site (noting that the Prison is already established and will continue to operate on site regardless of the approvals sought).

- 27 The Proposal may have a positive impact on the non-exclusive deferred selection right to purchase the Prison Village. Te Kawerau Iwi Tiaki Trust (on behalf of Te Kawerau ā Maki) has stated that the proposal to remove the Prison Village land from the spatial extent of the designation is a beneficial impact on the durability of its Treaty Settlement, as it reduces the encumbrance on commercial redress. It is however acknowledged by Corrections that the FTAA approval process is independent from any property disposal process that may happen in the future.
- 28 The approvals sought through the FTAA are not inconsistent with the Settlement Act or Deed of Settlement. Granting the approvals in the form sought does not create any inconsistency with any obligation arising under them.
- 29 Regarding the obligation imposed through section 82 of the FTAA, there are no documents that the Settlement Act or Deed of Settlement requires the Panel to consider.
- 30 As explained below, the proposed conditions are appropriate to address the impacts of the Proposal on cultural values. No further conditions need to be imposed under section 84 to recognise or protect the obligations in the Settlement Act or Deed of Settlement.

Te Kawerau Iwi
Tiaki Trust,
Section 53
Written
comments,
Section 16.0,
page 33.

The Tākai Hono agreement

- 31 The Tākai Hono agreement is an existing partnership agreement between Corrections and Te Rūnanga o Ngāti Whātua. Te Rūnanga o Ngāti Whātua is the central representative body for ngā uri of Ngāti Whātua. The agreement sets the

Māori
Consultation
and Cultural
Values
Assessment,
Substantive
Application, Vol
1, Appendix 1F,
Table 6, page
53.

parameters for a sustainable and effective strategic partnership between the parties and provides a framework to facilitate engagement and cooperation on matters of mutual interest. It facilitates an enduring relationship. The Tā kai Hono agreement is not being relied on through this application or assessment process and accordingly does not need to be relied on by the Panel.

Māori
Consultation
and Cultural
Values
Assessment,
Substantive
Application, Vol
1, Appendix 1F,
Appendix J,
page 174.

- 32 Instead, a condition requiring the establishment of an Iwi Forum has been proposed as the mechanism for ongoing iwi involvement. That is DES50 which provides opportunities for cultural input, collaboration, monitoring, reporting, and discussion of mitigation measures across cultural, ecological, landscape, archaeological, and construction matters. That condition is considered to be the appropriate mechanism for involvement of Te Rūnanga o Ngāti Whātua, as well as Ngāti Whātua o Kaipara in works and activities authorised by approvals, as opposed to reliance on a broader agreement that applies also to matters outside the Auckland Prison Site and beyond the scope of the approvals sought.
- 33 For completeness, as recorded in the Section 55 Report, Corrections does not support a formal relationship agreement as a designation condition. The proposed Iwi Forum (DES50) provides an appropriate specific mechanism for ongoing engagement, cultural input, collaboration, and discussion of management plans and measures for the proposal. As a result, it is not necessary to include a relationship agreement as part of the designation conditions for the Proposal.

Conclusion

- 34 Corrections acknowledges that Ngāti Whātua o Kaipara is best placed to identify and articulate their cultural values and relationships with the area, and the effects that arise from the Proposal and on them as mana whenua. Corrections considers that the cultural effects can be managed and that appropriate conditions have been proposed by it in that regard.
- 35 The FTAA requires the Panel to separate the cultural effects assessment from the analysis under sections 7, 82 and 84. Corrections has acted in manner that is consistent with obligations under Treaty settlements and considers that the Proposal is consistent with those obligations. The proposed conditions, including the establishment of the Iwi Forum, provide an appropriate framework for ongoing engagement and cultural input throughout the implementation of the Proposal. No further conditions, beyond those proposed by Corrections, need to be imposed by the Panel.

Date: 21 August 2026



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Counsel for the Department of Corrections

Appendix 1 – Mr Whetu Memorandum in Response to Minute 6