

APPENDIX J: Weighting of relevant matters to be taken into account

Introduction

1. This report responds to the Panel Convener's Minute dated 8 December 2025,¹ directing the Director-General to provide advice including on: "[h]ow the weighting of matters ... should be approached, having regard to relevant senior court decisions."
2. The Minute refers to the matters set out in:
 - a. Schedule 6, Clause 4 of the FTAA (concessions);
 - b. Schedule 6, Clause 43 (conservation covenant);
 - c. Schedule 7, Clause 3 of the FTAA (wildlife approval); and
 - d. Schedule 9, Clause 4 of the FTAA (freshwater fisheries activity approval).
3. The matters listed in the schedules are those which the FTAA directs must be addressed by the Director-General's s 51(2) reports.² For reasons of efficiency, this report responds to all approvals collectively.
4. The s 51(2)(b) covenant report has legal submissions attached in Appendix C which make brief comments on "weighting" and should be read alongside this report in relation to the covenant approval.

Weighting generally

5. Generally, the weighting to be accorded to relevant considerations by a statutory decision maker is for that decision maker to determine,³ however where a statute directs the weight to be given to a matter, that direction must be given effect to.⁴
6. The senior courts have recognised that apparently disproportionate, inadequate or undue weight attached to a relevant factor can lead to judicial consideration of whether the weighting applied was within the limits of reason, and hence, whether the ultimate decision was unreasonable in an administrative law sense. A court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or which has given excessive weight to a relevant factor of no great importance.⁵

¹ [MINUTE OF THE PANEL CONVENER – Request for Section 51 Report for the Bendigo-Ophir Gold Project](#)

² The schedule clauses referenced in the Minutes exclude consideration of the purpose of the FTAA from the ambit of the request. However, in order to respond to the Panel Convener's request in relation to consideration of weighting, it is necessary to refer to the purpose of the FTAA given the statutory directive that this consideration be given "the greatest weight" relative to other mandatory considerations (i.e. relative to the matters that must be addressed by the Director General's s 51 reports). This advice has therefore been prepared on that basis.

³ See, for example *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR (HC) 188 at 223: The weight to be given to the evidence in the balancing exercise ... is a matter for the primary tribunal and the Planning Tribunal on appeal.

⁴ *Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC) at 540: "Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine."

⁵ See, for example *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] LGHNZ 17 (CA).

7. Accordingly, mandatory relevant considerations must be given genuine consideration and weighting by statutory decision makers.

Weighting under the Fast-track Approvals Act 2024

8. The Schedules to the FTAA list mandatory considerations that decision-making Panels must take into account, when determining applications for the various approvals that can be granted under the Act.⁶
9. The only directive regarding weighting contained in the FTAA, is that the “greatest weight” is to be given to the purpose of the FTAA.⁷
10. While described in the FTAA as “criteria”,⁸ the mandatory matters to be taken into account can be described as “factors”, in the sense that they are matters to be assessed on the basis of their qualities, rather than quantities. They establish the foundation for assessment rather than the outcome of it.⁹ Accordingly, the criteria, or factors, are not tick-boxes to be crossed off a list but are matters that must be qualitatively assessed.
11. The FTAA does not direct how much relative weight should be given to, or between, relevant matters other than the purpose of the FTAA. Nor does the FTAA specify how much greater weight should be accorded to its purpose relative to other mandatory considerations. It may be the case (as set out in the conservation approval reports for this Project) that some of the factors listed in the relevant clauses may be found to have no relevance. Consequently, that factor will have no weight accorded to it in the balancing exercise.
12. While the purpose of the FTAA is to be given the greatest weight, the purpose of the FTAA does not automatically outweigh all other considerations. By listing other considerations besides the purpose of the FTAA, it is implicit that weight be attached to them, and that they should receive genuine consideration where relevant.¹⁰
13. Accordingly, while the greatest weight is to be accorded to the purpose of the FTAA, it does not follow that when qualitatively assessed, the regional or national benefits of a project must necessarily outweigh other considerations, in combination or in isolation, such as the adverse environmental effects of a project. The extent of regional or national benefits will vary between projects. Also, adverse effects will vary between projects in nature and severity. Each factor

⁶ See Schedule 7, Clause 5 (wildlife approval); Schedule 6, Clause 7 FTAA (concession); and Schedule 9, clause 5 (complex freshwater fisheries activities approval).

⁷ This directive occurs multiple times in the FTAA, including at Schedule 6, Clause 7 (concessions); Schedule 7, Clause 5 (wildlife approval); and Schedule 9, Clause 5 (complex freshwater fisheries activities approval).

⁸ This is the terminology used in the titles for each of the relevant clauses listed in fn 5.

⁹ *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147, at [117]-[118].

¹⁰ See also s 85(3)(b) of the FTAA which provides for the decline of a FTAA application if the adverse impacts are sufficiently significant to be out of proportion to the project's regional or national benefits that the panel has considered.

must be qualitatively assessed and those assessments weighed. Where they pull in different directions, they must be weighed against each other.

14. The issue of legislatively directed weighting was considered by the Court of Appeal in *Enterprise Miramar Peninsula Inc v Wellington City Council*,¹¹ when considering the application of s 34 the Housing Accords and Special Housing Areas Act 2013 (HASHAA). Section 34 provides:

34 Consideration of applications

An authorised agency, when considering an application for a resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater to lesser) in the order listed:

- (a) the purpose of this Act:
- (b) the matters in Part 2 of the Resource Management Act 1991:
- (c) any relevant proposed plan:
- (d) the other matters that would arise for consideration under—
 - (i) sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
 - (ii) any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):
- (e) the key urban design qualities expressed in the Ministry for the Environment’s *New Zealand Urban Design Protocol (2005)* and any subsequent editions of that document.

15. The Court held that all the listed matters must first be individually assessed prior to the exercise of weighing them in accordance with the prescribed hierarchy. The listed matters in subsection (1)(b)–(e) cannot properly be weighed alongside the purpose of HASHAA under subs (1)(a) if that purpose has first been used to effectively neutralise the matters listed in subs (1)(b)–(e).¹²
16. Applying that approach to the FTAA, the relevant matters should first be individually assessed, uninfluenced by the purpose of the FTAA, “before standing back and conducting an overall balancing” where the purpose of the FTAA is to be given greatest weight.¹³ It would be an error of law to use the purpose of the FTAA to eliminate or reduce individual assessment of the other specified mandatory relevant considerations.¹⁴

¹¹ *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541.

¹² *Enterprise Miramar Peninsula Inc*, at [53].

¹³ *Enterprise Miramar Peninsula Inc*, at [52]. Note that the FTAA does not take the same cascading hierarchy of “greater to lesser” weight, but only that the “greatest weight” be given to the purpose.

¹⁴ *Enterprise Miramar Peninsula Inc*, at [55]–[59].