IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 11/2018
[2018] NZSC 122

BETWEEN	NGĀI TAI KI TĀMAKI TRIBAL TRUST Appellant
AND	MINISTER OF CONSERVATION First Respondent
	FULLERS GROUP LIMITED Second Respondent
	MOTUTAPU ISLAND RESTORATION TRUST Third Respondent

Hearing:	14 August 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J P Ferguson, A H C Warren and R A Siciliano for Appellant V L Hardy and C D Tyson for First Respondent A F Pilditch and D C S Morris for Second Respondent S J M Mount QC and A R Longdill for Third Respondent G M Illingworth QC and P T Beverley for Te Rūnanga o Ngāi Tahu as Intervener
Judgment:	14 December 2018

JUDGMENT OF THE COURT

A The appeal is allowed.

B We direct that the second respondent's application for a concession be reconsidered by the first respondent's delegate in light of this judgment. The licence awarded to the second respondent on 31 August 2015 will remain in force until that reconsideration has occurred.

C **The decision of the first respondent's delegate granting a permit to the third respondent dated 15 October 2015 is quashed. We direct that the third respondent's application for a concession be reconsidered by the first respondent's delegate in light of this judgment.**

D **Costs are reserved.**

REASONS

ELIAS CJ, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan J)

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Judicial review proceedings

[1] Ngāi Tai ki Tāmaki Tribal Trust (the Ngāi Tai Trust) applied for judicial review of the decision of a delegate of the first respondent, the Minister of Conservation, granting concessions to Fullers Group Ltd and the Motutapu Island Restoration Trust (MRT) for commercial tour operations on Rangitoto and Motutapu.[1] Its claim failed in the High Court.[2] The High Court decision was upheld on appeal to the Court of Appeal.[3] This Court granted leave to appeal, the approved question being whether the Court of Appeal was correct to dismiss the Ngāi Tai Trust's appeal to that Court.[4] Te Rūnanga o Ngāi Tahu was given leave to intervene and we received both written and oral submissions from its counsel.

Issues

[2] The High Court found that the decision-maker had made errors of law in the reasoning supporting the decisions and that finding was not overturned by the Court of Appeal. However, both Courts found that these errors had not affected the outcome. Those errors related to s 4 of the Conservation Act 1987, which requires that that Act be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.[5] The High Court declined to grant relief and that decision was upheld by the Court of Appeal. The primary issue on appeal is whether relief ought to have been granted.

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1 We will refer to the first respondent as "DoC", the recognised abbreviation for the Department of Conservation, given that the decisions under challenge were made by officials of DoC acting under delegated authority of the Minister.

2 *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 300, [2017] NZAR 485 (Fogarty J) [*Ngāi Tai* (HC)]. In a separate costs judgment, Fogarty J ruled that each party should bear its own costs: *Ngai Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 872.

3 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2017] NZCA 613, [2018] 2 NZLR 453 (Kós P, Miller and Clifford JJ) [*Ngāi Tai* (CA)].

4 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 41.

5 All references in these reasons to section 4 or s 4 are to s 4 of the Conservation Act.

[3] The analysis of that issue requires consideration of the application of s 4 to the decisions under review. The essential issue in the appeal is whether the Courts below were correct that the decisions did meet the requirements of that section, despite the errors of law just mentioned.

Factual background

[4] Rangitoto and Motutapu are islands (motu) within the Tīkapa Moana/Hauraki Gulf. They are proximate to each other and connected by a short causeway. We will refer to Rangitoto and Motutapu together as "the Motu". The majority of the land comprising the Motu is subject to the Reserves Act 1977, being land within the Rangitoto Island Scenic Reserve, the Ngā Pona-toru-a-Peretū Scenic Reserve (the summit of Rangitoto), or the Motutapu Island Recreation Reserve.

[5] The Ngāi Tai Trust represents the iwi of Ngāi Tai ki Tāmaki. The rohe of Ngāi Tai ki Tāmaki extends across Tīkapa Moana/Hauraki Gulf and includes the ancestral motu of Rangitoto, Motutapu, and Motu-a-Ihenga (Motuihe), with which it has deep and long-standing connections. There is no dispute that from the mid-nineteenth century Ngāi Tai ki Tāmaki was marginalised from its ancestral islands following a series of transactions in which the Crown participated.[6]

[6] Ngāi Tai ki Tāmaki is part of Ngā Mana Whenua o Tāmaki Makaurau, a group of iwi and hapū that the Crown recognises as having claims based on historical breaches of the Treaty of Waitangi in the Tāmaki Makaurau region (the Tāmaki Collective).[7] While the Crown has pursued and continues to pursue settlement of these claims through negotiation with individual iwi and hapū, the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (the Collective Redress Act) was passed to provide redress relating to maunga, motu and lands "in respect of which all the iwi and hapū have interests" and "in respect of which all the iwi and hapū will share".[8] The vesting of maunga in the Tūpuna Taonga o Tāmaki Makaurau Trust

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6 This has now been acknowledged by the Crown in the Ngāi Tai ki Tāmaki Claims Settlement Act 2018. See ss 7–9 of that Act, and the historical account contained in the Ngāi Tai ki Tāmaki Deed of Settlement of Historical Claims (7 November 2015).

7 See the preamble to the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 [Collective Redress Act].

8 See the preamble to the Collective Redress Act.

(Tūpuna Taonga Trust) was a significant element of the cultural redress provided in that Act. The Tūpuna Taonga Trust is an entity set up to represent the Tāmaki Collective. The Collective Redress Act gave effect to a Deed of Settlement between the Crown and the Tāmaki Collective that was entered into in December 2012 (the Collective Redress Deed).

[7] The Ngā Pona-toru-a-Peretū Scenic Reserve, which encompasses the summit of Rangitoto, was one such site vested in the Tūpuna Taonga Trust although it remains a reserve administered by DoC for the purposes of the Reserves Act.[9] The remaining land[10] on the Motu was temporarily vested in the Tūpuna Taonga Trust before revesting in the Crown 32 days later.[11] James Brown, the Chairperson of the Ngāi Tai Trust, gave evidence to the effect that the Ngāi Tai Trust, the iwi and its negotiators are very clear that, despite the collective nature of the redress provided under the Collective Redress Act, it is Ngāi Tai ki Tāmaki and not the Tāmaki Collective that has mana whenua and customary interests on the Motu. The extent to which other iwi or hapū have overlapping customary rights on the islands is not clear.[12] Ngāti Paoa has an historic and enduring relationship with Motutapu and disputes any suggestion of exclusive interests in Motutapu, despite acknowledging that "Ngāi Tai has a greater level of customary association with Motutapu".

[8] The only members of the Tāmaki Collective who participated in the consultation process in relation to the two decisions under challenge were Ngāi Tai ki

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9 Collective Redress Act, s 70. Two properties on Rangitoto were also vested in the Tūpuna Taonga Trust and are administered by the trustee of that Trust, rather than the Crown: see ss 73 and 77.

10 Except two specific sites on Rangitoto: see above n 9.

11 See ss 68 and 69 of the Collective Redress Act.

12 The statements of association which appeared in the *New Zealand Gazette* on 20 August 2015 acknowledged the following iwi and hapū as having a spiritual, ancestral, cultural, customary and historic interest in Motu-a-Ihenga, Motutapu, and Rangtitoto: Ngāi Tai ki Tāmaki, Ngāti Maru, Ngāti Paoa, Ngāti Tamaoho, Ngāti Tamaterā, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whātua Ōrākei, Ngāti Whātua o Kaipara, Te Kawerau ā Maki and Te Patukirikiri. This includes all members of the Tāmaki Collective, except Te Ākitai Waiohua. However, note that statements of association do not grant, create, or affect any interests or rights in relation to the lands referred to in the statements: s 17 of the Collective Redress Act.

Tāmaki, Te Kawerau ā Maki,[13] Ngāti Whanaunga,[14] Ngāti Whātua Ōrākei,[15] and Te Patukirikiri.[16] The Tāmaki Collective also participated in consultation.

[9] Ngāi Tai ki Tāmaki has also reached its own settlement with the Crown. The deed of settlement (the Ngāi Tai Settlement Deed) was entered into on 7 November 2015 and the legislation to give effect to that settlement, the Ngāi Tai ki Tāmaki Claims Settlement Act 2018 (the Ngāi Tai Settlement Act), came into force on 5 July 2018 and took effect from 27 September 2018.[17] Amongst other things, the settlement provides for the transfer of wāhi tapu sites on Motutapu and Motu-a-Ihenga to the Ngāi Tai ki Tāmaki Trust;[18] statutory acknowledgments of Ngāi Tai ki Tāmaki's relationship with Motutapu and the surrounding coastal marine area;[19] and a Conservation Relationship Agreement between Ngāi Tai ki Tāmaki and DoC.[20]

[10] Ngāi Tai ki Tāmaki is also a member of the Pare Hauraki Collective, which entered into a deed of settlement for collective redress on 2 August 2018.

The challenged decisions

[11] The Ngāi Tai Trust seeks judicial review of two decisions to grant concessions pursuant to s 17Q of the Conservation Act. These were granted by a DoC official as delegate of the Minister.[21] The concession decisions were:

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13 Te Kawerau ā Maki did not oppose the Fullers application but noted Fullers should work towards a greater level of cultural interpretation.

14 Ngāti Whanaunga requested a number of seats on Fullers' Volcanic Explorer shuttle be allocated to iwi free of charge. This was not something DoC was able to impose as a term of the concession and was declined.

15 Ngāti Whātua Ōrākei supported the continuation of the Fullers concession but queried waste disposal. Ngāti Whātua o Kaipara confirmed it was happy for Ngāti Whātua Ōrākei to respond on its behalf.

16 Te Patukirikiri did not oppose the Fullers concession provided there were no concerns raised from other iwi in the Tāmaki Collective.

17 See ss 2 and 4 of the Ngāi Tai ki Tāmaki Claims Settlement Act 2018 [the Ngāi Tai Settlement Act].

18 This is a governance entity formed in 2013 and is a different trust from the Ngāi Tai Trust.

19 See s 74 of the Ngāi Tai Settlement Act, which acknowledges the statements of association made in the documents schedule to the Settlement Deed.

20 Discussed in more detail below at [45]–[46].

21 The decision-maker was a senior DoC official. She received and acted on the recommendations set out in a report prepared by another DoC employee. We will refer to them as the decision-maker and the report writer respectively.

(a) The decision of 24 June 2015 to grant a permit for a period of five years allowing the MRT to conduct guided walking tours on the Motu. MRT subsequently requested to defer the term of its concession, resulting in a new decision made on 15 October 2015.

(b) The decision of 31 August 2015 to grant a licence for a period of five years allowing Fullers to conduct guided walking and tractor/trailer tours on Rangitoto.

[12] The Ngāi Tai Trust itself had been granted a concession on 22 May 2014, to operate guided walking tours on the Motu. That concession is for a term of nine years and eleven months. This is discussed in more detail below.[22]

[13] Applications relating to the two challenged decisions, together with two similar applications relating to concessions on Rangitoto and Motu-a-Ihenga respectively, were referred to the same DoC report writer for consideration. The Ngāi Tai Trust's concession application does not appear to have been part of this consolidated group.

[14] Prior to the preparation of the reports to the decision-maker on the Fullers and MRT applications, the Manager – Conservation Partnerships for the Auckland Region prepared a memorandum dated 30 April 2015 giving advice on issues that the Ngāi Tai Trust had raised in relation to those applications. We will call this the Advice Memorandum. Extracts from the Advice Memorandum are set out in the reasons of William Young J.[23]

Fullers decision

[15] Fullers operates a number of ferry services in the Waitematā Harbour and Tīkapa Moana/Hauraki Gulf. It has been operating a ferry service to Rangitoto since 1988. In 1999, Fullers launched its Volcanic Explorer service, which offers guided tours around Rangitoto in a tractor/trailer vehicle. It stops at the base of the summit track on Rangitoto, where the driver and guide accompanies those able and willing to walk to the summit. In accordance with its current and previously held concession

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22 See below at [28]–[29].
23 William Young J below at [120]–[121].

licences, Fullers is obligated to maintain the roads on which the Volcanic Explorer operates. Fullers also jointly funded a new boardwalk providing access to the summit of Rangitoto as part of the original concession. Fullers does not offer a standalone guided walking service.

[16] On 23 August 2013, Fullers sought a rollover of its existing concession which allowed it to operate its Volcanic Explorer service on Rangitoto. A pre-application meeting between Fullers and DoC was held on 24 September 2013. Fullers was advised its application for a new concession would be assessed as a renewal on the basis that there was no material change to the proposed concession activity. On 20 November 2013, DoC confirmed the existing concession would roll over and invited Fullers to apply for the new concession, which Fullers did on 18 December 2013.

[17] Fullers' application specified the activities being applied for as: (a) use of DoC's building at Rangitoto Wharf as a lunch room and for storage; and (b) a licence to operate tractor train tours and guided walks to the summit of Rangitoto, to operate 364 days per year, with a maximum party size of 60 people and maximum of six trips per day. The concession was sought for a period of 10 years.

[18] In the environmental impact assessment annexed to the application, Fullers provided details of the consultation it had undertaken to date. This was mostly with Ngāi Tai ki Tāmaki and included discussions relating to Te Haerenga Project, a proposed guided walk on the Motu, which is explained in further detail below, and other possible opportunities to involve Ngāi Tai ki Tāmaki personnel in Fullers' services.[24]

[19] It appears that in the time between the Fullers application being lodged in December 2013 and the concession being granted in August 2015, communication between DoC, Fullers and the Ngāi Tai Trust broke down. Mr Brown's evidence was that the Ngāi Tai Trust was not re-engaged in the consultation process until December 2014. In January 2015 the Ngāi Tai Trust's solicitors wrote to DoC formally recording the Ngāi Tai Trust's objection to the Fullers concession application, as well as raising

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[24] Below at [24].

concerns over DoC's handling of the application. The primary objections raised related to the rollover provisions and DoC's unwillingness to provide information to the Ngāi Tai Trust.

[20] The Ngāi Tai Trust then met with DoC on 30 March 2015 to discuss its objections to all four concession applications under consideration. It recounted its key concerns in a letter of 19 May 2015, noting that they mirrored concerns detailed in a letter of 17 November 2014 regarding MRT's concession application. These included the negative impact on culture and whakapapa because of the operators' mispronunciation of te reo Māori and inadequate cultural knowledge. The Ngāi Tai Trust argued that a concession holder should have sufficient knowledge of things like motu names, pā sites and native flora and fauna, including an understanding of tikanga and background to those sites and names. The Ngāi Tai Trust was also concerned about the continued progression of the applications given its expectation that no concessions would be granted while Ngāi Tai ki Tāmaki's Treaty settlement negotiations were underway. While the letter does refer to the Ngāi Tai Trust's aspirations to develop its own presence on the Motu, there was no mention of an intention to set up a guided vehicle tour which would compete with (or replace) the Volcanic Explorer service.

[21] The decision to approve the Fullers concession was made on 31 August 2015. The concession was granted for a term of five years to align with the development of a conservation management plan for the Tīkapa Moana/Hauraki Gulf inner motu that is to be developed in accordance with the Collective Redress Act.[25] It imposed conditions requiring Fullers staff to attend a te reo course at DoC's direction and to make all reasonable endeavours to participate in any cultural induction or competency training offered by local iwi. It also required Fullers to consult with mana whenua prior to providing interpretation on matters of cultural significance. Fullers was notified of the decision on 1 September 2015.

[22] Mr Brown indicated that despite repeated follow-ups, the Ngāi Tai Trust was not made aware of this decision until 7 October 2015, when DoC emailed the Ngāi Tai

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[25] Discussed further below at [43].

Trust informing it of the outcome of all of the four applications referred to above at [13]. While that is clearly a matter of concern to the Ngāi Tai Trust, it does not affect the matters at issue in the present appeal.

MRT concession

[23] MRT was formed in 1993 to implement the Motutapu Restoration Plan. Its charitable purposes include habitat restoration, protection of indigenous plants and animals, and management and enhancement of conservation lands. MRT estimates the value of its total contribution to Motutapu at over $70 million.

[24] MRT applied for a concession to conduct guided walking tours on the Motu on 21 October 2014. This was a new application; MRT had not previously held a guided walking concession although discussions had been in the pipeline for several years. In 2011, MRT, together with DoC, Fullers and the Newmarket Rotary Club, consulted Ngāi Tai ki Tāmaki about the development of a "Great Rangitoto-Motutapu walk" (Te Haerenga). Following a reconnaissance trip in 2012, Ngāi Tai ki Tāmaki indicated that after its Treaty settlement it expected to be in a position to lead the cultural component of the visitor experience. The progress on the project stalled in 2014. MRT was surprised to learn that the Ngāi Tai Trust had applied for an individual guided walking concession in April 2014, considering it had been part of the steering group on the shared guided walk concept for several years. A trustee of MRT gave evidence that MRT never considered the guided walk concept to be the exclusive domain of any one entity.

[25] Despite the granting of a concession for a guided walk to the Ngāi Tai Trust, MRT resolved to apply for its own guided walk concession. The evidence of MRT trustees was that they regarded the application as mutually beneficial and complementary to the Ngāi Tai Trust's concession for guided cultural tours. This was reflected in MRT's concession application. The application also stated that MRT did not intend to interpret or provide cultural information as that is the property of mana whenua. Rather, it would focus on showcasing the MRT's work in restoring Motutapu. The application also covered tracks and walkways on Rangitoto, stating that guided walks would cover ecological restoration. The maximum party size was 13 people,

with up to 12 trips per week on Motutapu and seven on Rangitoto. The concession was sought for a period of nine years and six months.

[26] The decision to grant the concession was made on 24 June 2015, although the concession was not formally granted until 3 August 2015. The concession contract was for a period of five years. The approval letter recommended a number of measures similar to the conditions contained in Fullers' concession contract. MRT staff were required to attend a te reo course at DoC's direction and to make all reasonable endeavours to attend any cultural induction or competency training offered by local iwi. MRT were also required to engage with mana whenua prior to providing information of cultural significance. MRT executed the contract and returned it to DoC.

[27] MRT then wrote to DoC asking to vary the start date of its concession so that the Ngāi Tai Trust could establish Te Haerenga without any perception of challenge or competition. It was not possible under the terms of the Conservation Act to vary the original concession. Therefore, DoC required MRT to surrender its concession and apply for a new one. The decision to grant the new concession was made on 15 October 2015. The only changes in the concession contract were that the start date was deferred to 1 October 2016, and the recommendations previously made in the letter of approval were inserted as conditions in the contract. Even under its deferred concession, MRT is not taking steps to commence its guided walks until the current proceedings are resolved, out of respect for Ngāi Tai ki Tāmaki.

The Ngāi Tai Trust's Te Haerenga concession and Ngāi Tai ki Tāmaki's aspirations

[28] The Ngāi Tai Trust's concession to operate guided walks on the Motu was granted on 22 May 2014 for a term of nine years and eleven months. The parameters of the activity were a maximum party size of 13, frequency of one group per day and maximum number of 365 trips per year. Activity, monitoring and management fees were waived for the first year of the concession, with fees commencing from 1 June 2015.

[29] In his evidence, Mr Brown explained that Ngāi Tai ki Tāmaki also aspires to run its own volcanic explorer activity and ferry services. It is not clear that DoC was

aware of these specific aspirations when it was considering granting the Fullers and MRT concessions. However, it is clear from the concession reports that Ngāi Tai ki Tāmaki had argued that DoC was obliged not to grant concessions to other parties as part of its duty of active protection of Māori interests. Ngāi Tai ki Tāmaki said that was because granting other concessions would limit or remove opportunities for Māori, whether economic or otherwise. However it appears Ngāi Tai ki Tāmaki did not provide detail about what those opportunities would be, in terms of the type of activity or the timeframe within which Ngāi Tai ki Tāmaki could be expected to develop them.

Summary

[30] To summarise, the three parties involved (Fullers, MRT, and the Ngāi Tai Trust) applied for different concession activities. The Ngāi Tai Trust's concession was to conduct guided walks on the Motu with a cultural focus. It was granted first and came as a surprise to MRT, which was under the impression that the Ngāi Tai Trust wanted to partner in developing a joint venture. MRT nevertheless applied to conduct its own guided walking tours on the Motu, but saw its proposed activity as complementary to the Ngāi Tai Trust's, in that it would provide information about its own activities and ecological restoration, rather than any cultural interpretation. Fullers did not consider its application for renewal of the Volcanic Explorer service on Rangitoto would be in competition with guided walking tours, as the service targeted only those who did not wish to walk.

[31] While the Ngāi Tai Trust expressed its view that no concessions should be granted to other operators in order to preserve its opportunities to develop services on the Motu, the detail of these services was not elaborated beyond the guided walking/Te Haerenga venture.

Statutory scheme

[32] As already mentioned, the provision at the heart of this appeal is s 4. However, the concession decisions also engaged a number of other statutory provisions and other considerations. To provide the context for the discussion of s 4, we summarise briefly these other provisions and considerations.

[33] We begin with s 4 itself. It provides:

> **4 Act to give effect to Treaty of Waitangi**
>
> This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

[34] Section 4 applies in the present case because the concessions relate to reserves under the Reserves Act. Under s 6 of the Conservation Act, DoC is responsible for the administration of the enactments in sch 1 to the Conservation Act. The Reserves Act is one of the enactments specified in sch 1 and the obligation under s 4 extends to those enactments.[26]

Reserves Act

[35] The Reserves Act sets out the purposes for which particular types of reserves are established. In the case of scenic reserves, s 19(1)(a) of the Act provides that such reserves are established "for the purpose of protecting and preserving in perpetuity for their intrinsic worth and for the benefit, enjoyment, and use of the public". In the case of recreation reserves, s 17(1) of the Act provides that such reserves are established "for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside".

Hauraki Gulf Marine Park Act

[36] The Motu are within the boundaries of the Hauraki Gulf Marine Park and therefore subject to the Hauraki Gulf Marine Park Act 2000 (the HGMP Act). The HGMP Act provides, through ss 7 and 8, a coastal policy statement for resource management purposes. Those provisions also take effect as a statement of general policy under s 17B of the Conservation Act.[27]

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[26] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [the *Whales* case] at 557–558.

[27] Hauraki Gulf Marine Park Act 2000 [HGMP Act], ss 10 and 11.

[37] The connection of Māori to the Tīkapa Moana/Hauraki Gulf area is emphasised in the preamble to the HGMP Act:

> …
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> (4) The Treaty of Waitangi was signed by tangata whenua of the Hauraki Gulf both at Waitangi and on the shores of the Gulf. The Treaty provides guarantees to both the Crown and tangata whenua and forms a basis for the protection, use, and management of the Gulf, its islands, and catchments. The Treaty continues to underpin the relationship between the Crown and tangata whenua. The assembled tribes of the Hauraki Gulf reaffirmed its importance to them in a statement from a hui at Motutapu Island, 14–15 November 1992 (**The Motutapu Accord**):
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> …

[38] Section 7 of the HGMP Act records the national significance of the Tīkapa Moana/Hauraki Gulf. Section 7(2) provides:

> (2) The life-supporting capacity of the environment of the Gulf and its islands includes the capacity—
>
> (a) to provide for—
>
> (i) the historic, traditional, cultural, and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands; and
>
> (ii) the social, economic, recreational, and cultural well-being of people and communities:

[39] Section 8 sets out the objectives of the management of Tīkapa Moana/Hauraki Gulf islands and catchments. These include:

> …
>
> (c) the protection and, where appropriate, the enhancement of those natural, historic, and physical resources (including kaimoana) of the Hauraki Gulf, its islands, and catchments with which tangata whenua have an historic, traditional, cultural, and spiritual relationship:
>
> (d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:
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> …
>
> (f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and

> enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.

[40] Section 13 of the HGMP Act requires the decision-maker to have particular regard to ss 7 and 8 when considering a concession application relating to the Motu.

Part 3B of the Conservation Act

[41] Part 3B of the Conservation Act deals with concessions. Under s 59A(1) of the Reserves Act, Part 3B applies to concessions relating to reserves, and so is relevant to the concessions in issue in this appeal. Under s 17Q of the Conservation Act, the Minister of Conservation may grant a concession in the form of a lease, licence, permit or easement in respect of any activity. In the present case, the MRT concession is a permit and the Fullers concession is a licence. The Minister has delegated this power to specified DoC officials. The Minister must not grant a concession if the proposed activity is contrary to the Conservation Act or the purposes for which the land is held.[28] Section 17U(1) of the Act sets out a list of matters to be considered in relation to concession applications.

Auckland Conservation Management Strategy

[42] Another document that is relevant to the concession applications is the Auckland Conservation Management Strategy 2014–2024 (Auckland CMS) made under s 17D of the Conservation Act. The concession reports for both the Fullers application and that of MRT contain an extensive outline of the relevant provisions of the Auckland CMS. The Auckland CMS records the vesting and revesting of the Motu in the Tāmaki Collective[29] and states that, after the passing of the Collective Redress Act, iwi or hapū of the Tāmaki Collective have a role in the co-governance of the Motu. It also records the great potential of the Motu as visitor destinations, given their close proximity to Auckland and the need for adequate facilities to support increased interest and visitor numbers.

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[28] Conservation Act, s 17U(3). The Conservation Act was amended in 2017 to give the Minister power to decline an application for a concession if it is obviously contrary to the Conservation Act or any relevant conservation management plan or conservation management strategy: see s 17SB(1).

[29] See above at [7].

Collective Redress Act and the Motu Plan

[43] The Collective Redress Act, discussed earlier, was also relevant. Subpart 10 of Part 2 of the Collective Redress Act requires the Director-General of DoC to prepare a conservation management plan for the Tīkapa Moana/Hauraki Gulf inner motu (Motu Plan) and for the final plan to be approved by the Director-General and the Tūpuna Taonga Trust. The Director-General is required to consult the Tūpuna Taonga Trust, Auckland Council and other interested parties. The Motu Plan had not been prepared when the concession discussions were made and has still yet to be prepared. One of the reasons given for the five year terms for the Fullers and MRT concessions was that it was envisaged that the Motu Plan would be finalised by the time that term had lapsed. It could then be factored into any decisions as to whether those concessions should be renewed.

Ngāi Tai Settlement and Conservation Relationship Agreement

[44] The Ngāi Tai Settlement Act was passed only recently and was therefore not a factor in the concession decisions. But the negotiation of the Ngāi Tai Settlement Deed was well advanced at the time the concession decisions were made and was clearly relevant to the decisions, given the likelihood that it would be finalised during the term of the concessions.

[45] Provision is made in the Ngāi Tai Settlement Deed for a Conservation Relationship Agreement to be entered into between Ngāi Tai ki Tāmaki and DoC. The terms of this document had been substantially agreed at the time the concession decisions were made. It was not envisaged that it would be signed until after the coming into effect of the Ngāi Tai Settlement Act and we were told it remained unsigned at the time of the hearing of the appeal. Nevertheless, the draft provided relevant context.

[46] The draft agreement records that two of the purposes of the agreement are to complement the cultural redress provided for in the Ngāi Tai Settlement Act and to give effect to the principles of the Treaty as required by s 4. The agreement refers to Ngāi Tai ki Tāmaki's aspirations to have a meaningful role in influencing policies in a way consistent with their mana whenua status and partnership relationship with the

Crown. It also records Ngāi Tai ki Tāmaki's desire to welcome and host all visitors to Motutapu as part of any cultural concession that Ngāi Tai ki Tāmaki acquires for Motutapu (the provision does not refer to Rangitoto). However, another provision refers to Ngāi Tai ki Tāmaki's strong interest in exploring opportunities for concessions, including guided walking tours on the Motu and other locations.

Section 4

[47] Much of the argument before us centred on what s 4 requires of DoC when considering a concession application relating to an area over which an iwi or hapū has mana whenua.

[48] Section 4 is stated in imperative terms. The obligation on DoC in its administration of the Conservation Act is to "give effect to" Treaty principles. This has some similarity to s 9 of the State-Owned Enterprises Act 1986, which provides: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."[30] Section 9 was recently described by this Court as a "fundamental principle guiding the interpretation of legislation" in *New Zealand Maori Council v Attorney-General*.[31] The requirement to "give effect to" the principles is also a strong directive, creating a firm obligation on the part of those subject to it, as this Court noted in a different context in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.[32]

[49] The leading authority on the application of s 4 to decisions made in respect of concession applications is *Ngai Tahu Maori Trust Board v Director-General of Conservation* (the *Whales* case).[33] The context was a decision by the Director-General of Conservation to issue a permit under the Marine Mammals Protection Regulations 1990 (made under the Marine Mammals Protection Act 1978) for a whale watching business off the Kaikōura coast. An entity owned by Ngāi Tahu had held a permit for

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30 There are now 25 Acts that contain provisions requiring some form of consideration of the principles of the Treaty, but s 4 is the only one requiring that effect be given to them.

31 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [59].

32 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

33 The *Whales* case, above n 26.

the same activity for some years and was concerned that the entry of a competitor would compromise this business, in which it had made a significant capital investment.

[50] It was common ground in the *Whales* case that s 4 applied to decisions made under the Marine Mammals Protection Regulations. In a judgment delivered by Cooke P, the Court of Appeal made a number of important observations about s 4. In particular:

(a) Statutory provisions for giving effect to the principles of the Treaty of Waitangi in matters of interpretation and administration should not be narrowly construed. In the context of the decision under review, the Director-General was required to interpret the Marine Mammals Protection Act and Regulations to give effect to the principles of the Treaty, at least to the extent that the provisions of the Act and Regulations were not clearly inconsistent with those principles.[34]

(b) The claim by Ngāi Tahu that no permit should be granted without its consent (not to be unreasonably withheld) was "pitched too high".[35]

(c) Although a commercial whale watching business was not a taonga or the enjoyment of a fishery within the contemplation of the Treaty, it was sufficiently linked to taonga and fisheries "that a reasonable treaty partner would recognise that treaty principles are relevant".[36] The principles require active protection of Māori interests and this required more than mere consultation with iwi: restricting the active protection obligation to consultation "would be hollow".[37] On the facts of the case a reasonable Treaty partner would not restrict consideration of the Ngāi Tahu interests to mere matters of procedure.[38]

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34 At 558.
35 At 559.
36 At 560.
37 At 560.
38 At 561.

(d) Ngāi Tahu was in a different position in substance and on the merits from other possible applicants for permits. Subject to overriding conservation considerations and the quality of service offered, "Ngai Tahu are entitled to a reasonable degree of preference".[39]

[51] The matter was referred back to the Director-General for reconsideration. However the Court emphasised that it was the particular combination of features of the case that influenced the Court, and that that combination may well be unique. It added that the "precedent value of this case for other cases of different facts is likely to be very limited".[40]

[52] Despite the unusual facts of the *Whales* case and the importance of the factual context in determining how s 4 influences particular decision-making powers, some general observations can be made. In the present case, there was agreement among counsel about some elements of s 4. In particular, counsel for DoC, Ms Hardy, accepted (correctly, in our view) that, in the context of decisions relating to the granting or declining of concessions:[41]

(a) Section 4 is a "powerful" Treaty clause because it requires the decision-maker to give effect to the principles of the Treaty.

(b) Section 4 requires more than procedural steps. Substantive outcomes for iwi may be necessary including, in some instances, requiring that concession applications by others be declined.

(c) Enabling iwi or hapū to reconnect to their ancestral lands by taking up opportunities on the conservation estate (whether through concessions or otherwise) is one way that the Crown can give practical effect to Treaty principles.

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39 At 562.

40 At 562.

41 Counsel for Fullers adopted the submissions of counsel for DoC. Counsel for MRT accepted in his oral submissions that the passages identified by the Courts below and noted below at [57]–[58] were misstatements of the law but did not specifically comment on the requirements of s 4.

[53] To this can be added the general requirement that, in applying s 4 to a decision relating to a concession application, DoC must, 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.

[54] We acknowledge that s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. For example, in the present case, the direction given in s 4 must be reconciled with the values of public access and enjoyment in the Reserves Act designations relating to the Motu. Those values are also reflected in s 6(e) of the Conservation Act, which lists as one of the functions of DoC the fostering of the use of natural and historic resources for recreation and allowing their use for tourism to the extent that this is not inconsistent with the conservation of such resources. They are also a feature of s 8(e) of the HGMP Act. This complexity is also reflected in the Auckland CMS.[42] But s 4 should not be seen as being trumped by other considerations like those just mentioned. Nor should s 4 merely be part of an exercise balancing it against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles.

[55] How these observations are applied to a particular decision will depend on which Treaty principles are relevant and what other statutory and non-statutory objectives are affected.

Application of s 4 in this case

[56] We will deal with the issues arising in the appeal by addressing three questions:

(a) Were there errors of law in the decisions under challenge?

(b) If so, did the decisions nevertheless comply with s 4?

(c) If not, should a remedy have been granted?

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[42] See above at [42].

Were there errors of law?

[57] The Ngāi Tai Trust's challenge to the concession decisions focuses on two statements made in the reports of the report writer to the decision-maker. These passages were:

(a) In the Fullers concession report, the report writer wrote:

> Economic benefit to Iwi: [the Ngāi Tai Trust] requested the declining of applications on the basis that concession opportunities should be preserved for the economic benefit of Iwi within whose rohe that opportunity was presented.
>
> Applications for concessions are processed in the chronological order in which they are received, unless there is an allocation process being undertaken. There is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents.

A statement to the same effect appeared in the concession report for MRT's application.

(b) In the MRT concession report, the statement just mentioned was repeated and was followed by the following statement:

> Furthermore, the economic benefit that could potentially be accrued as a result of a concession, or the fact that another applicant is interested in that same benefit, is not something that can be taken account of under the Conservation Act for the purposes of determining a concession.

The Courts below

[58] In the High Court, Fogarty J found that both of these statements were errors of law.[43] DoC did not cross-appeal to the Court of Appeal against that finding and the Court was not prepared to differ from Fogarty J in the absence of a cross-appeal.[44]

[59] However, the Court of Appeal did consider for itself the requirements of s 4, in the context of its analysis of ss 7 and 8 of the HGMP Act, which was the main focus

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43 *Ngāi Tai* (HC), above n 2, at [7] and [86]–[87].

44 *Ngāi Tai* (CA), above n 3, at [54]. The Court of Appeal's analysis of the decisions focused on their compliance with ss 7 and 8 of the HGMP Act rather than s 4.

of the Court's decision. The Court considered the application of the HGMP Act required a balancing of diverse interests and values reflected in ss 7 and 8 of that Act.[45] It concluded that the decision-maker had turned her mind to the purposes of the HGMP Act and had balanced the relevant competing interests. The Court said that, in applying ss 7 and 8 of the HGMP Act, the decision-maker needed also to comply with the obligations in s 4. It noted that the concessions were granted for five years and commented:[46]

> Limited consenting for an existing activity for so short a period does not in our view impair materially the Crown's capacity to take reasonable action in the future to comply with its Treaty obligations.

[60] The Court considered that the Ngāi Tai Trust's reliance on the *Whales* case was overstated. It considered that that case could be distinguished from the present case.[47] It was not satisfied that any error could be demonstrated in either the High Court decision or in the decisions under challenge, and certainly none that could demonstrate that the principles of the Treaty were not given effect to.[48] It concluded as follows:[49]

> Neither the provisions of the HGMP Act nor those of the Conservation Act, severally or in combination, required Fullers and MRT's applications be declined in the face of objections by Ngāi Tai.

Submissions

[61] Counsel for the Ngāi Tai Trust, Mr Ferguson, argued that the guided tour activities on the Motu to which the concessions granted to Fullers and MRT apply are activities that fall within the scope of the customary rights and responsibilities that Ngāi Tai ki Tāmaki is entitled to exercise in accordance with tikanga as part of its rangatiratanga resulting from its mana whenua status. He said that the Ngāi Tai Trust has the right and responsibility to exercise manaakitanga and kaitiakitanga in its traditional rohe. This right arises from the principles of the Treaty, as applied through s 4 as well as ss 7 and 8 of the HGMP Act and the common law recognition of the relevance of tikanga, he argued.

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45 At [41].
46 At [45] (footnote omitted).
47 At [48]–[50].
48 At [50].
49 At [53].

[62] The principles of the Treaty he relied on were those of partnership, active protection, right to development, and redress. Mr Ferguson emphasised that these principles do not cease to apply when the Crown has settled a claim for historical breaches of the Treaty, as has now occurred in relation to Ngāi Tai ki Tāmaki's claims.[50] He said it was important to Ngāi Tai ki Tāmaki that the redress provided under the Ngāi Tai settlement is complemented by the application of the principles of the Treaty, as s 4 requires. It was not appropriate, nor in accordance with Ngāi Tai ki Tāmaki tikanga, for other groups to be providing guided tours on Ngāi Tai ki Tāmaki's most sacred lands, he argued.[51]

[63] Ms Hardy did not take issue with the relevant Treaty principles that were identified by Mr Ferguson, but argued that the Ngāi Tai Trust's position was, in effect, a claim to have a veto over the granting of concessions under the Reserves Act on the Motu. She argued this was an overstatement of the content of the s 4 obligation, just as a similar claim to a veto by Ngāi Tahu in the *Whales* case had been characterised by the Court of Appeal in that case as overstating the position.

There were errors of law in the challenged decisions

[64] As can be seen from this summary of the submissions made to us, the parties had differing views as to the nature of the obligation imposed on DoC by s 4 in the present context. We do not consider it is appropriate for us to rule definitively on that issue, given that it is, as the *Whales* case illustrates, an issue that has to be evaluated in light of the particular facts. There are some gaps in the evidence and factual uncertainties that need to be resolved before a view on the content of the s 4 obligation in the present context can be reached. For example, the nature of the associations of other iwi, hapū or collectives of iwi and/or hapū with the Motu is not clear to us. Although some iwi participated in the consultation by DoC, it is unclear whether that included consultation on the Ngāi Tai Trust's claim that its mana whenua was such that issuing concessions to others would be inappropriate.

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50 Citing *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [51] per Elias CJ and Arnold J.

51 Mr Ferguson made it clear, however, that the Ngāi Tai Trust was not suggesting that there should be any restriction of public access to the Motu. Its concern relates only to the commercial operations on the Motu.

[65] We do not see it as necessary to resolve the differing views on how s 4 should be applied in order to determine whether there were errors of law in the decisions under challenge. Ms Hardy did not seriously contest that the statements highlighted by Fogarty J were errors of law.[52] But she refuted the submissions of the Ngāi Tai Trust as to the content of the s 4 obligation. Neither did counsel for Fullers, Mr Pilditch, nor counsel for MRT, Mr Mount QC, take issue with the High Court's finding that the decision-maker had misstated the law as to the application of Treaty principles.

[66] Ms Hardy highlighted the fact that the decision-maker amended the concession report in a manner which, she said, indicated that the decision-maker was aware of the nature of the active protection principle. The amendment was made in the following part of the first MRT concession report:

> Active protection of Maori interests: [The Ngāi Tai Trust] have identified that future opportunities on the Island are important to them, whether economic or otherwise. They have noted concern that the granting of concessions to other parties is not "active protection" of Maori interest by the Crown, and that the granting of other concessions may limit or remove opportunities for Maori.
>
> The granting of this concession does not remove the opportunity for [the Ngāi Tai Trust] to apply for concessions that cover the same or similar activities, and the Department is committed to exploring any potential opportunities with Iwi. The Inner Motu CMS will provide an opportunity to further clarify and protect Maori interests on the Islands, and provide guidance for future management of these resources.
>
> *The Department will not recommend a decline on the basis of active protection of Maori interests, instead implementing a shorter term to align with the development of policy documents.* Monitoring of concessions on the Islands will provide further information to support the development of any management plan.
>
> (emphasis added)

[67] The decision-maker made a handwritten comment adjacent to the italicised part of the quotation above. That handwritten notation was:[53]

> In some cases declining an application for a concession may be the only way to ensure active protection – in this case the recommendation is not to decline.

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52 See above at [57].

53 This notation was not made in the second MRT concession report, which reported on the proposal that MRT's concession would commence one year later than the commencement date of the concession initially granted to MRT.

[68] We accept the handwritten amendment made by the decision-maker in relation to the MRT concession report indicates that she considered that there may be a case in which declining an application was required because of the operation of s 4, though apparently only when there is no other way of providing active protection. That qualification is problematic. In addition, the decision-maker's acknowledgment did not lead her actually to apply that statement to the application under consideration, and the handwritten amendment did not affect the Fullers application decision at all.[54]

[69] We do not consider there is any doubt that the statements set out above at [57] misstated the law relating to s 4. The statement that there is no basis for preferential entitlement to concessions cannot be reconciled with the *Whales* case. Similarly, the statement that economic benefit to an iwi with mana whenua cannot be taken into account failed to recognise the active protection principle of the Treaty. The handwritten annotation referred to above at [67] appears to acknowledge the error.

[70] The decisions under challenge were made on the basis that demand for services of the kind to be offered by Fullers and MRT should be met, that is, subject to other considerations[55] and in the absence of a limited supply situation,[56] the concessions should be granted. The errors of law essentially excluded from consideration the possibility of deciding not to meet that demand if a refusal to grant any concession was what s 4 required. That was the outcome the Ngāi Tai Trust was seeking. The decision-maker should have grappled with that preference.

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54 Nor did it affect the revised MRT decision, which is the concession decision under challenge. However, the handwritten notation in the first MRT decision indicates the thinking of the decision-maker in relation to MRT's application and we are prepared to assume this also applied to the revised decision, which was aimed at changing the commencement date of MRT's concession and otherwise adopted the original MRT decision.

55 Such as those which the decision-maker is required to consider under s 17U of the Conservation Act. See also the requirements of the statutory regime set out above at [32]–[46].

56 The report writer explained that a limited supply situation occurs when the number of concessions available for allocation is capped under relevant planning and policy strategies in order to protect the conservation values and recreational experiences of visitors. In those situations, DoC will undertake a competitive allocation process such as a tender. However, at the time the challenged decisions were made, there was no limit on the number of visitors to the Motu nor on the number of providers permitted to operate on the Motu.

[71] This exclusion of the possibility of declining to award a concession where demand exists is also illustrated by the observation in the concession report for the Fullers application that DoC was:[57]

> wary of setting standards which effectively exclude all other providers of visitor experiences, as the standard set is such that no one other than Iwi can meet the high test of knowledge and competency that have been identified.

[72] As acknowledged earlier, s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. Our earlier discussion of those considerations illustrates the complexity of the task facing the decision-maker.[58]

[73] We consider that DoC failed to apply these statutory and other legal considerations consistently with the requirements of s 4. The decision-maker's dismissal of the possibility of preference being accorded to an iwi with mana whenua over the land to which the challenged decisions related and of the economic benefit that could accrue to such an iwi being taken into account meant she did not give proper consideration to those possibilities as s 4 required her to do.

[74] We uphold the finding of Fogarty J that the statements set out above at [57] were errors of law.

[75] Before we leave this aspect of the case, we comment on two relevant matters.

Conservation General Policy

[76] The Conservation General Policy published by DoC includes the following statement under the heading "Treaty of Waitangi Responsibilities":[59]

> The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4, Conservation Act 1987). Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply.

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57 An almost identical observation appeared in the concession report for the MRT application.
58 Above at [54].
59 Department of Conservation *Conservation General Policy* (revised 2007) at 15.

[77] We disagree with that statement, which effectively says s 4 is trumped by other statutory provisions. As noted earlier, what is required is that those other statutory provisions be applied consistently with the s 4 requirement.

Mana whenua

[78] The Ngāi Tai Trust argued that the Court of Appeal erred in its consideration of whether Ngāi Tai ki Tāmaki has mana whenua over the Motu and rangatiratanga in relation to them.

[79] The Ngāi Tai Trust's case is based on its claim that Ngāi Tai ki Tāmaki has mana whenua over the Motu. The Ngāi Tai Trust argues that this brings with it rangatiratanga, entitling it to the preference it claims in relation to concessions regarding the Motu. Ms Hardy confirmed that DoC accepts Ngāi Tai ki Tāmaki has mana whenua over the Motu. Mr Ferguson was critical of the Court of Appeal's observation (endorsing a similar observation by Fogarty J) that, while there was no doubt Ngāi Tai ki Tāmaki held mana whenua over the Motu, it could not be determined whether Ngāi Tai ki Tāmaki had rangatiratanga over the Motu.[60] The Court of Appeal's observation was premised on the need for exclusivity of interest in order to have rangatiratanga. The Court pointed out, correctly, that other iwi or hapū and the Tāmaki Collective also have interests in the Motu.

[80] Like the Courts below, we have no doubt that Ngāi Tai ki Tāmaki has mana whenua over the Motu. This is clear from many of the documents and legislative instruments produced in evidence or as authority.[61] Mr Ferguson emphasised that the Ngāi Tai ki Tāmaki Trust will receive exclusive redress on Motutapu under the Ngāi Tai Settlement Deed, which he said confirmed it had a pre-eminent interest in the Motu.[62] There are, however, many indications of overlapping interests of iwi and hapū in the Motu, as the Collective Redress Act confirms.[63] But lack of an exclusive interest does not necessarily undermine the Ngāi Tai Trust's position as to preference and

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60 *Ngāi Tai* (CA), above n 3, at [5].

61 These include the Ngāi Tai Settlement Deed, the statement of association (to form part of statutory acknowledgments) set out in the Documents Schedule to that Deed in relation to the Tīkapa Moana/Hauraki Gulf and the Motutapu Island Recreation Reserve, and the Conservation Relationship Agreement.

62 The redress is the vesting of fee simple title to certain sites on Motutapu.

63 See above at [6]–[7].

active protection in relation to concessions on the Motu. Mr Ferguson put it this way in oral argument:

> … if one has mana whenua status, even if others might also assert that … then it follows that type of control and authority, an exercise of tikanga kaitiakitanga, manaakitanga flows from that.

[81] The Ngāi Tai Trust's claim to preference in relation to certain concessions on the Motu needs to be evaluated against that background.

Did the decisions nevertheless comply with s 4?

[82] The Ngāi Tai Trust's case was that the errors of law made by the report writer and adopted by the decision-maker were such that the challenged decisions were wrong in law and should be reconsidered. We start our consideration of this submission by outlining what was decided in the Courts below.

Courts below

[83] As mentioned earlier, Fogarty J found that the statement that there was no basis for preferential entitlement was an error of law, as was the statement that economic benefits were irrelevant.[64] However, he concluded that these errors were not sufficient to say that the Minister had failed to give effect to Treaty principles, as required by s 4. His conclusion is summarised in these paragraphs:

> [103] I have found so far, applying the first step in the analysis, that there is an identifiable error of law in the reasoning of the two DoC decisions. I have made that finding recognising that DoC overstated the law when saying that there is no basis for preferential entitlement, and that economic benefits were irrelevant considerations.
>
> [104] The next step is whether, nonetheless, the DoC decisions give effect to the principles of the Treaty of Waitangi. I am satisfied that they did. It was not, on the facts, reasonable to prefer [the Ngāi Tai Trust] beyond limiting the Fullers and MRT concessions to five years, and in so doing giving the parties time to come to a mutually beneficial accommodation of self-interests. …
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> …
>
> [107] I find that the errors of statements of principle by the Minister's delegates were not sufficient to say that the Minister failed to give effect to Treaty principles. I find that in fact he did give effect to the principles of the

64 *Ngāi Tai* (HC), above n 2, at [7] and [86]–[88].

> Treaty of Waitangi by limiting the new terms of Fullers, and MRT to five years, enabling the possibility of a partnership with [the Ngāi Tai Trust] in the near term. I would add the Minister's delegates were acting reasonably and in good faith.
>
> [108] Overall I find that the Minister and his delegates, notwithstanding their misstatements of the law, did not fail to give effect to the Treaty principles. On the facts both decisions did "give effect to the principles of the Treaty of Waitangi". Accordingly, there is no basis for this Court to intervene and set aside the decisions.

[84] The Court of Appeal upheld Fogarty J's decision, though its reasoning differed from his in some respects.

Submissions

[85] DoC's position is that the concession decisions reflect a reasonable and practical balancing of interests sufficient to give effect to Treaty principles, and therefore comply with s 4. The fact that the report writer misstated the law when saying there was no basis for preferential entitlement for iwi and that potential economic benefit was not something that could be taken into account in the concession decisions does not undermine that conclusion.

[86] DoC argued that the decision-maker did, in fact, consider the economic interest of Ngāi Tai ki Tāmaki (the Ngāi Tai Trust's desire to operate concessions on the Motu) and the limitation of the term of the concessions granted to Fullers and MRT to five years addressed that interest. DoC also argued that this meant that the decision-maker did, in fact, accord a reasonable degree of preference to the Ngāi Tai Trust. When all three concession decisions are considered together, the ten year term allowed for the Ngāi Tai Trust's concession, when compared to the five year terms for Fullers and MRT, indicates that preference has been given to the Ngāi Tai Trust. The waiving of fees for the first year of the Ngāi Tai Trust's concession also involves preference.

[87] DoC's position was supported by both Fullers and MRT. Both argued that, when the concession decisions were considered alongside the decision granting the Ngāi Tai Trust's concession, it was apparent that the errors of law identified in the Courts below had not affected the outcome and the decision met the requirements of s 4. This meant that it was appropriate that no order for reconsideration of the

decisions was made. For MRT, Mr Mount characterised the High Court decision as follows:

> … the best reading of it is that whilst finding what the [High Court] Judge called an error of law, overall he concludes that the decision-maker did not err in law, is because he doesn't directly address the question of remedy.

[88] DoC's counsel also undertook a detailed analysis of the concession decisions highlighting extracts indicating that the interests of Ngāi Tai ki Tāmaki had been considered by the concession report writer and the decision-maker, and highlighting in particular the handwritten amendment mentioned above.[65]

The decisions did not comply with s 4

[89] We accept that Ngāi Tai ki Tāmaki's interests were considered by the report writer and the decision-maker. The shorter terms of the concessions granted to Fullers and MRT were intended to provide a future opportunity for fuller consideration of Ngāi Tai ki Tāmaki's commercial position once the Motu Plan had been made and the Ngāi Tai settlement had been implemented. It is debatable however whether the shorter terms for Fullers' and MRT's concessions than for the Ngāi Tai Trust's is truly a "preference" to the Ngāi Tai Trust.

[90] Even if the shorter terms for the concessions granted to Fullers and MRT were classified as a "preference" to the Ngāi Tai Trust, that would not provide an answer to the allegations that the errors of law made by the report writer affected the proper application of s 4 to the concession decisions. In effect, DoC's argument is that the errors of law did not affect the outcome because the decisions involved some preference in favour of the Ngāi Tai Trust and some acknowledgment of its commercial interest. We do not think that logically leads to a conclusion that the errors of law had no impact on the decisions. If the decisions had been made on the basis of a proper understanding of s 4, the preference in favour of the Ngāi Tai Trust and the economic benefit to it may have been of greater substance.

[91] The High Court and the Court of Appeal appear to have taken the view that, unless s 4 required DoC to refuse any concession to any non-Ngāi Tai ki Tāmaki party,

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[65] Above at [67].

then the errors of law were not material to the eventual outcome. The respondents' arguments in this Court echoed this. That can be attributed to the fact that the Ngāi Tai Trust's argument in this Court was to the effect that s 4, in combination with ss 7 and 8 of the HGMP Act and the common law recognition of tikanga, "provide a preference to mana whenua iwi/hapū to be granted concessions to undertake activities on conservation land within a rohe of an iwi where the activities engage the tikanga principles that underpin the practices of manaakitanga and kaitiakitanga".

[92] This argument was interpreted by the Courts below and the respondents as a claim to a veto over the granting of concessions to entities that do not have mana whenua over the Motu. As we have said, we do not consider it would be appropriate to make a generic ruling on the impact of s 4 (whether or not in combination with other factors) on the granting of concessions in areas where one or more iwi or hapū have mana whenua. As was made clear by the Court of Appeal in the *Whales* case, this is a matter of applying the principles of the Treaty to the facts of the particular case. In the present case, that involves the consideration of the mana whenua status of Ngāi Tai ki Tāmaki in relation to the Motu[66] and the other relevant considerations highlighted above at [35]–[46]. The lapse of time since the decisions under challenge were made means that some of those considerations have taken on greater prominence (the passing of the Ngāi Tai Settlement Act, for example). Future developments (such as the completion of the Motu Plan and the Conservation Relationship Agreement between DoC and Ngāi Tai ki Tāmaki) will have a similar impact.

[93] Rather, we consider the issue that needs to be resolved is whether the errors of law affected the concession decisions in a manner that meant the Ngāi Tai Trust's claim for preference as an iwi or hapū holding mana whenua was not evaluated properly, that is, in accordance with the law. If the answer is that it was not, then the case for the remedy sought by the Ngāi Tai Trust needs to be evaluated.

[94] In our view, the errors of law were such that they diverted the report writer and the decision-maker from proper consideration of the application of s 4 in the context

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[66] See the discussion above at [78]–[81]. Ms Hardy suggested in oral argument that Ngāi Tai ki Tāmaki's interest in, and association with, Rangitoto may be less significant than with Motutapu, requiring different consideration in respect of each of them. The argument was not developed and we do not consider it would be appropriate to address it in the absence of full argument.

of the concession applications. If the report writer had not misdirected herself about s 4 potentially requiring a degree of preference to be given to Māori and for Māori economic interests to be taken into account, she may well have reached a different conclusion on the application of s 4. She may, for example, have made further inquiries about Ngāi Tai ki Tāmaki's mana whenua status and how that fitted in with the interests of the Tāmaki Collective and the other iwi and hapū comprising the Tāmaki Collective in relation to the Motu. She may also have given further consideration to the possibility that what the Ngāi Tai Trust was contending for, namely that either or both of the Fullers and MRT applications should not be granted, leaving only the Ngāi Tai Trust's concession as an operative concession on the Motu, was what s 4 required.

[95] We do not make a finding that s 4 does, in fact, require that no concessions be granted in relation to the Motu, other than to mana whenua applicants. We accept that s 4 does not create a power of veto by an iwi or hapū over the granting of concessions in an area in which the iwi or hapū has mana whenua. Nor does it give such an iwi or hapū authority to require that only entities associated with the iwi or hapū will be granted concessions in the area. But we do consider that, having made the errors of law identified earlier, the report writer and the decision-maker did not put themselves into a proper position to assess the Ngāi Tai Trust's submission that what s 4 required was that no concessions be granted even though there was demand for the services subject to the proposed concessions.

[96] We do not, therefore, agree with the Courts below that the identified errors of law did not affect the outcome. Nor do we agree that the factors that led the Courts below to conclude that a degree of preference had been provided to the Ngāi Tai Trust in relation to its concession (a longer term and a waiver of fees) were necessarily sufficient to satisfy s 4 notwithstanding the flawed consideration of the application of that section to the concession applications. That will be a matter that the decision-maker should address when the decisions are reconsidered in the correct legal framework.

[97] As will be apparent, we do not agree with the view expressed by William Young J in his reasons that the decision to grant the MRT concession was not

influenced by the error of law set out at [57](b) above.[67] Nor do we regard the Advice Memorandum as supporting that view. The analysis in the Advice Memorandum begins by recording that the Ngāi Tai Trust seeks "to preserve economic opportunities for their iwi on the islands" then says that preserving such opportunities "cannot currently be considered as a relevant matter for decision makers".[68] This replicates the error in the MRT decision and the Fullers decision (or, perhaps more correctly, the error in the decisions replicates this error in the Advice Memorandum). The later discussion in the Advice Memorandum does nothing to correct the error and concludes without further reasoning that it is not appropriate to do what the Ngāi Tai Trust was asking for – decline other applications for concessions.[69] We consider the earlier error of law which ruled out this level of preference (describing it as a matter that cannot be considered as relevant) led to that conclusion being reached.

[98] We consider that the challenged decisions should not be allowed to stand and that the decision-maker should be required to reconsider the applications for concessions by Fullers and MRT applying s 4 correctly. The context in which the decisions will be made on reconsideration will be somewhat different from the position at the time the decisions were made, given that the Ngāi Tai Settlement Act is in force and, possibly, the Motu Plan will be finalised.

[99] In reconsidering its decisions, DoC will be required to consider whether, despite the fact that there is no issue of over-capacity or risk of environmental degradation of the Motu from the operation of the proposed concessions, nevertheless the correct outcome is to decline to grant the concession applications, given the requirements of s 4.

[100] We reiterate that we do not say that the decisions made in relation to the Fullers and MRT concession applications were wrong. Nor do we make any finding on the Ngāi Tai Trust's case that only those with mana whenua should be granted concessions on the Motu at least for a period of years. Rather, we conclude that the basis on which the concession applications were considered was flawed, and the Ngāi Tai Trust is

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67 See the reasons of William Young J below at [133].

68 At paras 5 and 6 of the Advice Memorandum, set out in the reasons of William Young J below at [120].

69 The relevant excerpts are set out in the reasons of William Young J below at [121].

entitled to have the decisions made after proper consideration of the application of s 4 which did not occur in relation to the decisions under review.

Should a remedy be granted?

Court of Appeal

[101] The Court of Appeal considered the question of remedy on the basis that the decision-maker had made the errors of law identified in the High Court judgment, despite its misgivings as to whether they were, in fact, errors. This was because the High Court's findings had not been subject to a cross-appeal.[70] The Court emphasised that relief is discretionary in judicial review cases, and identified three features of the case leading to the conclusion that it should decline to grant relief. These were: [71]

(a) the errors were minor;

(b) the Ngāi Tai Trust's fundamental challenge based on a perception of priority given in the HGMP Act in combination with s 4 had failed; and

(c) the Ngāi Tai Trust would not suffer "substantial prejudice" if the decisions were allowed to stand. On the other hand, both Fullers and MRT would suffer significant prejudice if what were already short-term interim decisions were quashed and their activities on the Motu were compelled to cease.

Submissions

[102] The Ngāi Tai Trust submitted that the MRT decision should be quashed and that an order should be made that the MRT concession application be reconsidered in light of this judgment. However, in relation to the Fullers decision, the Ngāi Tai Trust sought a declaration that the Fullers concession application decision was unlawful and

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70 See above at [58].
71 *Ngāi Tai* (CA), above n 3, at [61].

that it should be reconsidered in light of this judgment.[72] The Ngāi Tai Trust did not seek the immediate quashing of the Fullers decision, and made it clear that it did not object to the Fullers concession being allowed to continue during the period that Fullers' concession application was being reconsidered. However, it was only during the hearing in this Court that it became clear that this was what the Ngāi Tai Trust was seeking.

[103] The Ngāi Tai Trust's position in relation to Fullers reflects the pleading in its statement of claim, but it seems that its position in the Court of Appeal (as it was in its written submissions in this Court) was to seek the immediate quashing of the Fullers decision – hence the Court of Appeal's comment as to the likely prejudice to Fullers.

[104] Counsel for Fullers, Mr Pilditch, emphasised the potential harm to Fullers if its concession was quashed given the significant investment it has made in infrastructure on Rangitoto and its ongoing commitment to maintenance of the roads which its Volcanic Explorer operation utilises. He emphasised that Fullers was an innocent third party that would be adversely affected if the decision granting its concession was quashed. That submission was made against the background of the written submission on behalf of the Ngāi Tai Trust seeking the immediate quashing of the Fullers concession decision. It is obvious that the prejudice to Fullers from an order that the decision be reconsidered, but without quashing the order, substantially reduces the prejudice to Fullers.

A remedy should be granted

[105] We disagree with the three reasons given by the Court of Appeal for declining relief.

[106] We do not agree with the Court of Appeal that the errors were minor. Section 4 is a provision of fundamental importance in the exercise by DoC of its powers and

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[72] Judicature Amendment Act 1972, s 4(5)–(6). The Judicature Amendment Act applies to this proceeding notwithstanding its repeal by s 22 of the Judicial Review Procedure Act 2016 because it was commenced before that Act came into force: see s 23(2) of the Judicial Review Procedure Act. A declaration of this kind (with a requirement for reconsideration but not the quashing of the original decision) was made in broadly similar circumstances in *Hauraki Catchment Board v Andrews* [1987] 1 NZLR 445 (CA); and *Franz Josef Glacier Guides Ltd v Minister of Conservation* HC Greymouth CP14/98, 13 October 1999.

responsibilities. The effective sidelining of s 4 in the decisions under challenge, in circumstances where the Ngāi Tai Trust's interest was based on its mana whenua in relation to the Motu, was a failure to comply with this fundamentally important requirement. It was therefore an error of some consequence.

[107] Nor do we agree that the Ngāi Tai Trust's challenge based on s 4 failed. The Court of Appeal reached that view because of its focus on ss 7 and 8 of the HGMP Act, rather than on s 4. As we see it, the Ngāi Tai Trust has succeeded in establishing that s 4 was not properly applied in the challenged decisions. It did not need to establish that it was entitled to a decision that denied concessions to parties other than iwi or hapū with mana whenua to succeed in establishing an error in the application of s 4. So, in contrast to the Court of Appeal, we see the errors as serious and conclude that the Ngāi Tai Trust succeeded in its claim of error of law in relation to s 4, which is all it was required to do.

[108] We do not see the prejudice to Fullers and MRT as sufficiently serious to justify denying the Ngāi Tai Trust a remedy. The quashing of the MRT decision will have little practical impact on MRT, given that it is not, in fact, operating tours in accordance with its concession, out of respect for the position of the Ngāi Tai Trust. The proposed orders in relation to the Fullers application, which preserve its concession while the reconsideration of its application takes place, largely deal with the potential prejudice to Fullers.

Result

[109] We therefore allow the appeal and make the orders sought by the Ngāi Tai Trust. We quash the decision granting a concession to MRT and order that MRT's application be reconsidered in light of this judgment. We order that the Fullers application be reconsidered in light of this judgment. Fullers' concession will remain in force while this occurs.

Costs

[110] We reserve costs. If the parties do not agree on costs in this Court and the Courts below, submissions should be filed and served in accordance with the following timetable:

(a) Appellant: by 28 January 2019;

(b) Respondents: by 11 February 2019;

(c) Appellant in reply: by 18 February 2019.

WILLIAM YOUNG J

The relevant statutory framework

[111] This is discussed at length in the reasons of the majority.[73] For my purposes, it is sufficient to set out ss 4 and (6)(e) of the Conservation Act 1987 and ss 17(1) and 19(1)(a) of the Reserves Act 1977.

[112] Sections 4 and 6(e) of the Conservation Act provide:

> **4 Act to give effect to Treaty of Waitangi**
>
> This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.
>
> **6 Functions of Department**
>
> The functions of the Department are to administer this Act and the enactments specified in Schedule 1, and, subject to this Act and those enactments and to the directions (if any) of the Minister,—
>
> …
>
> (e) to the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism:

[73] See above at [32]–[46].

[113] Section 17(1) of the Reserves Act, applicable to Motutapu Island, is in these terms:

> **17 Recreation reserves**
>
> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as recreation reserves, for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.
>
> …

And s 19(1)(a), relevant to Rangitoto Island, provides:

> **19 Scenic reserves**
>
> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as scenic reserves—
>
> (a) for the purpose of protecting and preserving in perpetuity for their intrinsic worth and for the benefit, enjoyment, and use of the public, suitable areas possessing such qualities of scenic interest, beauty, or natural features or landscape that their protection and preservation are desirable in the public interest:
>
> …

The sequence of events relating to consideration of the applications

[114] The Ngāi Tai ki Tāmaki Tribal Trust (the Ngāi Tai Trust) application was granted on 22 May 2014. The concession was granted for a period of nine years and eleven months. It allows the Ngāi Tai Trust to operate guided walks on Rangitoto and Motutapu.

[115] On 30 April 2015, the Department of Conservation's manager of conservation partnerships (Antonia Nichol) wrote a memorandum addressed to the issues raised by the Ngāi Tai Trust in respect of the Motutapu Island Restoration Trust (MRT) and Fullers Group Ltd (Fullers) applications. I will refer to this as the "Nichol memorandum".

[116] A draft of the first internal report to the decision-maker on the MRT application was finished on 2 June 2015. The handwritten note of the decision-maker to which I later refer was on this document. The initial decision to grant a concession to MRT was made on 24 June 2015.

[117] In the case of the Fullers application, a draft of the internal report to the decision-maker was completed on 27 July 2015 and the decision to grant the application was made on 31 August 2015.

[118] The second application by MRT, in effect to defer commencement of the concession by one year, was the subject of a report dated 13 October 2015 and the decision was made on 15 October 2015.

[119] The same person wrote the three reports (in other words, there was only one report writer) and there was, likewise, only one decision-maker.

The Nichol memorandum

[120] Under the heading "Competition and economic opportunities", the memorandum records:

> 5. NTKT [Ngāi Tai ki Tāmaki] seek to preserve economic opportunities for their iwi on the islands, and in some cases oppose these applications on the basis of potential or real competition for the provision of services to visitors such as guiding.
>
> 6. These are matters that cannot currently be considered as a relevant matter for decision makers under Part IIIB of the Conservation Act 1987. The legislation does not provide for this as a relevant matter under section 17U of the Act.
>
> 7. Applications for concessions are assessed in the sequence that they are lodged, unless a limited opportunity situation applies and concessions are then awarded under an allocation process. The Auckland Conservation Management Strategy 2014-2024 does not identify any limited opportunity situations on the relevant islands.
>
> 8. In future it may be possible that a limited opportunity situation could be provided for in statutory planning documents for some of the activities subject to these concession applications, if there are conservation related grounds to do so. This will be explored further through the conservation management plan to be developed for the inner Gulf motu under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.

9. It is appropriate to avoid locking in long terms for any of these concessions so that fresh decisions can be made relatively soon after the conservation management plan is approved. That would ensure that any limited opportunity situations can be given effect to relatively quickly, if they are provided for in the conservation management plan.

10. We do not consider that a shorter term will have an adverse effect for any of the applicants or concessionaires that could be seen as unreasonable in the circumstances. For example we are not aware of any significant capital expenditure that specifically hinges off the granting of any of these concessions.

Recommendation

11. That a shorter term be granted for the concession applications while the conservation management plan is being developed, up to a maximum of five years.

[121] The next section of the memorandum is headed "Active protection of Māori interests". It includes the following passage:

12. NTKT have identified that future opportunities on the islands is a key concern for them, whether economic or other. As noted above we expect that issues around these will be explored further in the conservation management plan, where policy guidance is necessary.

13. NTKT having identified to the Crown that they wish to explore opportunities are very concerned about those opportunities being narrowed or eliminated by the granting of concessions to others. They view the granting of concessions in this context as evidence of the Crown not fulfilling the terms the collective redress settlements expressed in the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. They also view this as non fulfilment of their individual iwi Deed of Settlement [which is yet to be signed with the Crown].

14. In this situation the Treaty principle of active protection of Māori interests is relevant. We consider that it is very appropriate to explore ideas for opportunities on the islands through the conservation management plan process, and to not close off opportunities without the chance for them to be fully considered and tested in that framework. The conservation management plan will also be an opportunity to explore and test mechanisms that help to protect cultural values on the islands.

15. We also note that settlement redress in the form of a number of proposed land transfers to NTKT is also a form of active protection of their interests.

16. We do not consider that it is appropriate to outright decline any of the applications, but rather the requirement to prepare a conservation management plan in the next few years is another reason to grant shorter terms for the concessions. Fresh decisions can then be made

> in the context of the new conservation management plan. Our depth of engagement with iwi, including NTKT, will have increased over this time and we are likely to hold new knowledge and a deeper understanding of cultural concerns at that time.

[122] As I read the memorandum (particularly in light of the two headings to which I have referred) para 7 records the Department's position on competition arguments. Where there is a "limited opportunity situation" (a limit on the total amount of concession activity that can be carried out at a site), there is an allocation process based, in most cases, on tenders.[74] Otherwise, applications for concessions are assessed in the order in which they are lodged. Although this is not spelt out with precision in the memorandum, I take it that a limited opportunity situation might be the result of practical constraints which mean that it is feasible to allow only one operator. It is at least implicit that such practical constraints did not apply in respect of the MRT or Fullers applications. The memorandum also contemplates that a limited opportunity situation (in what I take to be the slightly different sense of a preference for Māori) might be created by statutory planning instruments. The last sentence of para 7 notes that the then current instrument did not create such a preference.

[123] I read paras 8–10 as contemplating the possibility that, in the future, there might be scope for a limited opportunity situation – in the form of a preference for Māori – to be created. To facilitate the implementation of such a preference, these paragraphs proposed that the concessions for Fullers and MRT should be for periods of time which would enable "any limited opportunity situations [to] be given effect to relatively quickly".

[124] In contradistinction I read paras 12–16 as dealing with what was treated in the memorandum as a separate issue, that is whether in the meantime – pending provision for a preference for Māori in the planning instruments – the duty of active protection required the MRT and Fullers applications to be declined. The memorandum recognised that such an outcome was legally possible – that depending on the circumstances, it might be appropriate to decline the applications so as not to limit future opportunities for Ngāi Tai ki Tāmaki. The recommendation, however, was that

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[74] The mechanism for competitive allocation processes is set out in s 17ZG(2) of the Conservation Act 1987.

active protection could be appropriately provided for in the respects identified in the memorandum.

The MRT concession

[125] The report to the decision-maker in respect of the MRT application contains the following passage, the paragraphs of which I have numbered for ease of future reference:

> (1) Cultural Effects
>
> (2) Through consultation undertaken with Ngai Tai ki Tamaki Tribal Trust (NTKT) across a number of concessions for the inner Hauraki Gulf Islands, a number of cultural effects have been identified. *These issues were later discussed between members of the Auckland District Office Partnerships Team, the Permissions Team, and the Legal Team. The document can be seen in full at dme://docdm-1594228/, but the issues raised are addressed and summarised as follows*:
>
> (3) Economic benefit to Iwi: NTKT requested the declining of applications on the basis that concession opportunities should be preserved for the economic benefit of Iwi within whose rohe that opportunity was presented. They held concerns that their aspirations, as set out in the draft Deed of Settlement with the Crown, would not be given effect to if concession opportunities they are interested in are being granted to other parties.
>
> (4) Applications for concessions are processed in the chronological order in which they are received, unless there is an allocation process being undertaken. There is no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents. Furthermore, the economic benefit that could potentially be accrued as a result of a concession, or the fact that another applicant is interested in that same benefit, is not something that can be taken account of under the Conservation Act for the purposes of determining a concession.
>
> (5) The activity applied for in this instance does not require a large degree of capital expenditure, nor has the activity been identified as one which is a limited opportunity (albeit that the activity will be based from a building which under the [Memorandum of Understanding] with the department is operated by the applicant as a museum). To put it another way, the granting of a concession to one party will not exclude any other party from applying for a similar activity for a similar amount of time.
>
> (6) The Department recommends a 5 year term for this concession, aligning with the development of the Tāmaki Makaurau motu plan ("the Inner Motu CMS") and any management direction which may result through this documentation. This shorter term has an associated

effect of not foreclosing the opportunities to undertake similar activities by other potential concessionaires.

(7) In regards to the NTKT's individual Deed of Settlement, the Department acknowledges that this will soon be formalised, however must make decisions within the context of legally approved legislation and policy.

(8) Active Protection of Maori Interests: NTKT have identified that future opportunities on the Island are important to them, whether economic or otherwise. They have noted concern that the granting of concessions to other parties is not 'active protection' of Maori interest by the Crown, and that the granting of other concessions may limit or remove opportunities for Maori.

(9) The granting of this concession does not remove the opportunity for NTKT to apply for concessions that cover the same or similar activities, and the Department is committed to exploring any potential opportunities with Iwi. The Inner Motu CMS will provide an opportunity to further clarify and protect Maori interests on the Islands, and provide guidance for future management of these resources.

(10) The Department will not recommend a decline on the basis of active protection of Maori interests, instead implementing a shorter term to align with the development of policy documents. Monitoring of concessions on the Islands will provide further information to support the development of any management plan.

(emphasis added)

The document referred to in the italicised portion of para (2) is the Nichol memorandum.

[126] Paragraphs (3) and (4) were found by Fogarty J to be erroneous in law,[75] as indicating an in limine rejection of the Ngāi Tai Trust's contention that it was entitled to preferential treatment extending to the declining of the MRT and Fullers' applications; such rejection being inconsistent with *Ngai Tahu Maori Trust Board v Director-General of Conservation* (the *Whales* case).[76]

[127] I agree that para (4) appears to be a response to the argument recorded in para (3) and that, read in this way, paras (3) and (4) are erroneous. On the other hand, the report separately addresses, in paras (8)–(10), active protection of Māori interests

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75 *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZHC 300, [2017] NZAR 485 at [86]–[88].

76 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [the *Whales* case].

and, in particular, picks up and addresses the complaint by the Ngāi Tai Trust that granting concessions to others is not "'active protection' of Māori interests by the Crown".

[128] It will be observed that the passage which I have cited from the report bears a textual similarity to the passages which I have cited from the Nichol memorandum, which is unsurprising as this part of the report is expressed to be by way of summary of the Nichol memorandum. Accordingly, it seems to me that the report must be read together with that memorandum.

[129] As I read the report – and particularly in light of the earlier Nichol memorandum – the report writer:

(a) In para (4) was:

(i) setting out the departmental position on competition arguments: that if there was a limit on the total amount of concession activity, an allocation process applied; but, otherwise, applications were dealt with in the order in which they were lodged, without regard to trade protection arguments – such as, the effect on other current or likely concession holders – which I think is what is encompassed by "another applicant … interested in [the] same benefit"; and

(ii) noting that there was no provision for preference in the legislation or planning instruments.

(b) Addressed active protection arguments in paras (8)–(10).

(c) Was of the view that active protection might warrant a decision to decline applications, but did not recommend this in light of the option of stipulating a shorter concession term to align with the development of policy documents (para (10)).

[130] I regard this reading of the report as consistent with the report writer's affidavit in which she said:

> Overall the Department did not consider that active protection of relevant Treaty interests reasonably required recommending declining of the concessions in the circumstances and instead that implementing a shorter than standard concession term and requiring certain conditions in the concession contracts were a reasonable approach in the circumstances.

[131] The decision-maker plainly considered that she had the power to decline the application on the basis of active protection because she annotated para (10) with this comment:

> In some cases declining an application for a concession may be the only way to ensure active protection – in this case the recommendation is not to decline.

[132] And in her affidavit, the decision-maker said:

> 29. I also note that Ngāi Tai ki Tāmaki sought a decline of the concessions to ensure their economic interests were preserved. It was my assessment that Ngāi Tai ki Tāmaki sought to have the economic opportunities available via these concession opportunities for their exclusive use and it was their view that this was provided for in the Ngāi Tai ki Tāmaki settlement then under negotiation. It was my understanding that this was not a provision in their pending settlement and therefore I was not compelled to decline these concessions on this basis.
>
> 30. This was not a limited opportunity situation where I had to decide between competing applications. I agreed that there were opportunities for Ngāi Tai ki Tāmaki to establish a guiding enterprise which could recognise their interests in the Islands despite there being existing concessions. My role was to consider how to actively protect the Treaty interests of Ngāi Tai ki Tāmaki (and the other iwi) in the Islands. In this case I thought this could be achieved through the conditions imposed … and did not require the concessions to be declined.

[133] Against this background I see no basis for concluding that the decision to grant the concession was influenced by the mistake of law apparently embodied in para (4) of the report. The decision-maker's reference to active protection can only have been derived from s 4 of the Conservation Act. In her affidavit she said:

> 18. In making my decision I was very aware that section 4 of the Conservation Act 1987 required me as a decision maker to give effect to the principles of the Treaty of Waitangi when considering whether to grant the concessions under Part 3B of the Conservation Act 1987.

She recognised that this duty might extend to requiring an application to be declined. It is not suggested by the majority that the circumstances associated with this application necessarily required this result. Nor has it been held the decision to grant the concession was necessarily wrong. In particular the majority have not held that the Ngāi Tai Trust had a right of veto. I might add that I would see a conclusion that there was a right of veto (with its effect on the practicality of public access) as not easy to reconcile with s 6(e) of the Conservation Act and s 17(1) of the Reserves Act.

The Fullers application

[134] The Fullers report was in at least broadly similar terms to the MRT report, albeit that it was not annotated by the decision-maker in the same way. Given the way in which the applications were dealt with, with the same report writer and decision-maker and the general sequence of events, it is reasonable to assume that the decision-maker's general approach to the Fullers application was the same as her approach to the MRT application.

[135] For the reasons given in respect of the MRT concession, I am not persuaded that there was any material mistake of law in respect of the Fullers application.

Disposition

[136] I would dismiss the appeal.

Solicitors:
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Crown Law Office, Wellington for First Respondent
Cook Morris Quinn, Auckland for Second Respondent
Alderton Mackenzie, Auckland for Third Respondent
Buddle Findlay, Wellington for Intervener