IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA443/2022
CA31/2024
[2026] NZCA 92

BETWEEN	TE RŪNANGA O NGĀTI MANAWA Appellant
AND	CNI IWI HOLDINGS LIMITED First Respondent
	TŪHOE ESTABLISHMENT TRUST Second Respondent
	TE MANA O NGĀTI RANGITIHI Third Respondent
	TŪWHARETOA SETTLEMENT TRUST Fourth Respondent
	TE KOMITI NUI O NGĀTI WHAKAUE Fifth Respondent
	TE RŪNANGA O NGĀTI WHARE Sixth Respondent
	RAUKAWA SETTLEMENT TRUST Seventh Respondent
	TE PŪMAUTANGA O TE ARAWA TRUST Eighth Respondent
	WAYNE NGATA Ninth Respondent

Hearing:	3–5 June 2025
Court:	Campbell, Collins and Woolford JJ
Counsel:	J B Orpin-Dowell and M R G van Alphen Fyfe for Appellant C F Finlayson KC and R M A Jones for First Respondent D J Neutze and T Cooley for Second and Fourth Respondents

No appearance for Third Respondent
J P Kahukiwa for Fifth Respondent
J P Ferguson for Sixth Respondent
S A McClean and A L Clark-Tahana for Seventh Respondent
B A Davies for Eighth Respondent
No appearance for Ninth Respondent
P F Majurey for Ngāti Tahu-Ngāti Whāoa Rūnanga Trust as Intervener

Judgment: 27 March 2026 at 11.00 am

JUDGMENT OF THE COURT

A The appeals are allowed to the extent identified in [128] and [129].

B The declaration at [148(h)] of the relief judgment is set aside. The declarations at [95] of this judgment are made.

C The direction at [149] of the relief judgment is set aside. The direction at [123] of this judgment is made.

D The appeals are otherwise dismissed.

E There is no order as to costs.

REASONS OF THE COURT

(Given by Campbell J)

Table of Contents

Introduction

[1] In 2008, the Crown and eight Central North Island iwi (the CNI iwi) settled the CNI iwi's historical claims for breaches of the Treaty of Waitangi | te Tiriti o Waitangi relating to land in former state forests in the Central North Island. The settlement was contained in a deed of settlement (the Deed of Settlement) and given effect to by the Central North Island Forests Land Collective Settlement Act 2008 (the Act).

[2] Under the settlement, the Crown transferred 176,000 hectares of Central North Island forests land (the CNI forests land), together with accumulated rentals from Crown Forestry Licenses (CFLs) to which the land is subject, to CNI Iwi Holdings Ltd (the Company). Shares in the Company are held equally by the respective post-settlement governance entities (PSGEs) of each iwi. The Company holds the land and accumulated rentals, and receives and holds ongoing rentals from the CFLs, as trustee under a Trust Deed and Shareholders' Agreement (the TDSA). The parties to the TDSA are the Crown, the Company and the CNI iwi through their respective PSGEs. The role of the Company is to hold and administer the land and distribute the rentals in accordance with the Act, the Deed of Settlement and the TDSA.

[3] The settlement was final as between the Crown and the CNI iwi. But there were issues amongst the CNI iwi that the settlement did not resolve. The iwi agreed on the allocation between themselves of the accumulated rentals from the CFLs and of the ongoing rentals until 1 July 2044 (or such earlier date as unanimously agreed). But they did not agree on the allocation of the underlying CNI forests land or of the ongoing rentals from 1 July 2044. They merely agreed on a process to determine the allocation of the land, with the rentals from 1 July 2044 (or such earlier date as unanimously agreed) to run with the land.

[4] Under the agreed process for the allocation of the land, if CNI iwi cannot agree through negotiation or mediation on the allocation of a particular area of land, the allocation of that land is to be decided by an adjudication panel. This appeal arises out of applications for judicial review, brought by the Company and by Ngāti Manawa (one of the CNI iwi), of a decision of the adjudication panel. In the High Court,

Gwyn J found there were errors in the panel's decision and made a series of declarations and a direction to a new panel.[1] Ngāti Manawa appeals against parts of the Judge's decisions.

Background

[5] Under the Act, the adjudication panel is to comprise at least three members. The members must be fluent in te reo Māori and be knowledgeable on matters of tikanga, including how mana whenua is held and exercised by iwi.[2] The task of the panel is to reach a decision on allocation of disputed land in accordance with the "mana whenua test",[3] defined (in summary) as "the mana that iwi traditionally held and exercised over the land, determined according to tikanga".[4] The agreed process is thus a tikanga-based resolution process.

[6] The Deed of Settlement, the TDSA and the Act all contemplated that allocation of the CNI forests land would be agreed, or decided by adjudication, by June 2011. Regrettably, this allocation has been much delayed. The delay has arisen in part from issues with decisions made by an adjudication panel appointed under the tikanga-based resolution process in respect of nine disputed blocks of the CNI forests land. Each block is defined by reference to the CFL to which it is subject. Accordingly, the blocks are generally referred to as CFL blocks.

[7] The panel, comprised of Moana Jackson, Wayne Ngata and Tahu Potiki, conducted hearings between April and May 2014. All CNI iwi except Ngāti Whare presented evidence and questioned witnesses. Ngāti Whare attended the hearing but advised the panel that it was not in adjudication with any of the other iwi. It said it had instead signed agreements with other iwi around its areas of interest. All iwi, including Ngāti Whare, made closing submissions.

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1 *CNI Iwi Holdings Ltd v Tūhoe Establishment Trust* [2022] NZHC 1880 [substantive judgment]; and *CNI Iwi Holdings Ltd v Tūhoe Establishment Trust* [2023] NZHC 3470 [relief judgment].
2 Central North Island Forests Land Collective Settlement Act 2008 [CNI Settlement Act], sch 2 cl 6(10).
3 Schedule 2 cl 6(14).
4 Schedule 2 cl 4(2).

[8] The panel released its decision on 26 June 2014. The panel made findings as to the mana whenua interests of the CNI iwi in the nine disputed CFL blocks. The panel recognised three types of mana whenua interest, which it described as "substantive", "medial" and "limited". We say more about these interests later in the judgment. The panel also gave "weightings" to each interest: substantive interests were given a weighting of four, medial interests two, and limited interests one. The panel said it would be up to each of the iwi recognised as holding mana whenua within each block "how this weighting is recognised in a practical sense". The panel did not make any findings as to Ngāti Whare having mana whenua interests in any of the blocks, but in respect of four blocks it said Ngāti Whare's mana whenua "should be recognised in their agreement with Ngāti Manawa".

[9] A few days after the panel released its decision, Mr Potiki provided the Company with a table which showed the mana whenua interests in each block of disputed land, expressed as percentages. No percentage was allocated to Ngāti Whare in any of the blocks. A Company representative asked how the agreements between Ngāti Whare and the other iwi had been factored into the percentages. On 30 June 2014, the panel members agreed that Ngāti Whare should be recognised as having mana whenua interests in five of the disputed blocks and approved an updated table to this effect. This agreement was reached informally and made outside the adjudication process.

[10] The Company then, on 1 July 2014, executed a final allocation agreement. This agreement appended the panel's 26 June 2014 decision. It did not attach the table expressing the mana whenua interests in percentages that the panel had subsequently prepared or refer to the informal agreement that the panel had reached on 30 June 2014 in respect of Ngāti Whare's interests.

[11] Ngāti Manawa sought judicial review of the panel's 26 June 2014 decision and of the Company's final allocation agreement on the ground that the panel had failed to make any allocation of the land. No issue was taken, at that time, with how the panel had dealt with Ngāti Whare's mana whenua interests.

[12] In a June 2016 judgment, Ellis J upheld Ngāti Manawa's claim.[5] The Judge found that, although the panel had determined the mana whenua interests of each iwi, it had failed to take the additional step of allocating the disputed land as required by the Act.[6] In addition, the panel did not have the power to refer the question of allocation back to iwi for further negotiation.[7] The Judge declared that the panel had not completed the allocation exercise, that the Company's final allocation agreement was invalid because it did not record any allocation of the disputed land, and that the Company had the power to reconvene the panel and require it to allocate the disputed blocks.[8] The Judge also declared, "[f]or the avoidance of doubt", that the part of the panel's decision that determined the mana whenua interests "remains a valid (partial) adjudication decision".[9]

[13] The panel reconvened and issued a second decision. By majority (Mr Jackson and Mr Ngata), the panel decided that the nine blocks should continue to be held in one title retained by the Company, with the mana whenua interests of iwi instead recognised by distributing rental income from the blocks in accordance with the percentage share of each iwi's mana whenua interest. The percentage shares used by the majority were based on the informal agreement the panel had reached on 30 June 2014 that Ngāti Whare should be recognised as having mana whenua interests in five of the disputed blocks. The majority also decided that the rental income (re)distribution should take effect from the date of their decision. That was in opposition to the Act and the TDSA, under which rental income was to be distributed in accordance with fixed proportions (set out in sch 3 to the Act) until 1 July 2044 (or earlier, if unanimously agreed by the iwi).

[14] There was substantial disagreement between the iwi as to the validity of the panel's second decision. Given the disagreement, the Company did not execute a final allocation agreement incorporating the decision.

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5 *Te Runanga o Ngāti Manawa v CNI Iwi Holdings Ltd* [2016] NZHC 1183.
6 At [83].
7 At [90].
8 At [99(a), (d) and (e)].
9 At [100].

[15] The Company and Ngāti Manawa each sought judicial review of the panel's second decision. In an August 2022 judgment, Gwyn J held there were errors in the panel's second decision (the substantive judgment).[10] The Judge said the panel did not have the power to decide that the blocks could continue to be held in one title retained by the Company, nor did it have the power to change the allocation of the rental proceeds from that set out in the Act.[11] The Judge noted that recognition of mana whenua did not require that a particular iwi receive exclusive title to a sub-divided portion of a block, though that was an option open to the panel. And the panel could have decided that the blocks be held in one title retained by the Company if it had gone on to require, for example, that title was to be held on separate trusts for each block, with the beneficial interests of each iwi (as determined) being reflected.[12]

[16] Gwyn J also held that the panel's reliance on the informal 30 June 2014 agreement was invalid because that agreement impermissibly altered the mana whenua interests determined in the 26 June 2014 decision.[13] The Judge recognised that her finding of invalidity was detrimental to Ngāti Whare and that if a reconvened panel used the 26 June 2014 decision as a starting point, some iwi, including Ngāti Whare, would be disaffected, which might threaten the intergenerational durability of any settlement.[14] The Judge therefore gave the iwi the opportunity to consider her substantive findings and explore options for resolution before she ordered any relief.[15]

[17] The CNI iwi then engaged in negotiations. They agreed to a two-stage process. The purpose of the first stage was to try to reach agreement on Ngāti Whare's relative mana whenua interests in the CFL blocks. If such agreement could be reached, the second stage of the process would involve them trying to reach agreement as to how the land itself was to be allocated.

[18] The CNI iwi reached agreement in the first stage of the process. At a hui on 23 November 2022, they resolved to ratify and approve a "Final Mana Whenua

10 Substantive judgment, above n 1.
11 At [307(b), (d) and (e)].
12 At [139]–[141], citing CNI Settlement Act, sch 2 cl 6(14)(e).
13 Substantive judgment, above n 1, at [234] and [307(f)].
14 At [235] and [311]–[312].
15 At [313].

allocation Percentage Table" for the nine CFL blocks in dispute. The table included percentage allocations for Ngāti Whare in four of the CFL blocks. However, negotiations broke down at the second stage in December 2022, and the CNI iwi were unable to agree how the land itself was to be allocated.

[19] The matter therefore went back before Gwyn J to determine two issues. First, what declarations needed to be made to reflect the findings in the substantive judgment? The parties ultimately reached agreement on the form of these declarations.[16] Secondly, what directions should be made to the Company in relation to the appointment of a new panel? This issue turned on whether the 23 November 2022 resolution (approving the "Final Mana Whenua allocation Percentage Table") was binding on the CNI iwi and, if so, how that should be reflected in the directions to the Company.

[20] Gwyn J delivered judgment on these issues in November 2023 (the relief judgment). On the first issue, the Judge made declarations reflecting her findings in the substantive judgment.[17] On the second issue, the Judge found that the 23 November 2022 resolution was an unconditional agreement that had been reached in accordance with the tikanga-based resolution process and which was therefore binding on the CNI iwi.[18] The Judge directed the Company to appoint a new panel (Mr Jackson and Mr Potiki having by then passed away) to determine and allocate the mana whenua interests of the CNI iwi in the disputed blocks, "using as its starting point the 23 November 2022 percentage interest allocation table agreed by iwi and having regard to the findings of the Court in this judgment".[19]

Ngāti Manawa's appeals

[21] Ngāti Manawa appeals against parts of the substantive and relief judgments. The other parties to the appeals are the Company, the other CNI iwi, the surviving panel member (Mr Ngata) and another iwi that was given leave to intervene (Ngāti Tahu-Ngāti Whāoa). Formally, the iwi parties are their respective PSGEs.

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16 Relief judgment, above n 1, at [35].
17 At [148].
18 At [108], [130] and [131].
19 At [149].

[22] Ngāti Rangitihi (one of the CNI iwi and the third respondent) and Mr Ngata have not participated in the appeal. Those who have participated take a variety of positions. However, they all agree that the adjudication panel has not yet allocated the disputed land, and that the issue of allocation will need to be considered by a new panel. They also agree that five issues arise on the appeal, all relating to the basis on which the new panel must undertake its task:

(a) Did the Judge err in making the declaration at [148(h)] of the relief judgment? That declaration was:[20]

> The substantive recognition of mana whenua does not require that a particular CFL iwi receive exclusive title to a subdivided portion of a CFL, although that is an option open to the adjudication panel. The retention of all of the CFL Forests Land in one title would satisfy the requirements of the tikanga-based resolution process if the adjudication panel had gone on to require that, for example, title was to be held on the basis of separate trusts for each CFL block, with the beneficial interests of each iwi as determined being reflected.

(b) Did the Judge err in directing that the new panel determine and allocate mana whenua interests using as its starting point percentage interests in the CFL blocks?

(c) Was the statutory tikanga-based resolution process amended by the 23 November 2022 resolution so as to make percentage interests the basis on which the new panel would allocate the land, or did the 23 November 2022 resolution otherwise have that effect in a way that complied with the statutory requirements of the tikanga-based resolution process?

(d) Was the 23 November 2022 resolution a contractually binding agreement that the new panel would allocate the disputed land on the basis of the percentages referred to in the resolution?

(e) Does this Court need to give further directions to the new panel in relation to Ngāti Whare's interests?

20 At [148(h)].

[23] Before turning to these issues, we provide an overview of the Act and the TDSA.

The Act and the TDSA

[24] The purpose of the Act, set out in s 3, includes to:

> (a) give effect to the vesting of the Crown forest land described in … Schedule 1 in the company and the transfer of accumulated rentals in relation to that land to the company in order to enable those assets to be allocated to the CNI Iwi Collective in settlement of their historical CNI forests land claims …; and
>
> (b) record the principles and process by which the allocation of the CNI forests land and accumulated rentals is to be achieved …

[25] The Act has separate provisions dealing with, on the one hand, the CNI forests land and, on the other, the accumulated and ongoing rentals from the land. As to the land, s 6 vested this in the Company, subject (relevantly) to the TDSA and s 16. In respect of those two qualifications:

(a) The TDSA provides that the Company must retain the CNI forests land and dispose of it only to make a distribution in accordance with a document, prepared by the Company, recording the outcome of the tikanga-based resolution process in the TDSA. The tikanga-based resolution process in the TDSA is identical to that in the Deed of Settlement and almost identical to the resolution process set out in the Act.

(b) Section 16 provides that a CNI iwi, or two or more CNI iwi acting jointly, may request the company to transfer an area of CNI forests land to that iwi or to those iwi jointly. If the request complies with the terms of an allocation agreement under s 14 and the TDSA, the Company must transfer that area of land in accordance with the request.

[26] The efficacy of a transfer request under s 16 therefore depends on whether it complies with the terms of an allocation agreement under s 14. Section 14 provides:

> **14 Principles for allocation of CNI forests land**
>
> The iwi of the CNI Iwi Collective may, in accordance with the resolution process set out in Schedule 2, agree among themselves as to which specific area or areas of the CNI forests land is or are to be transferred to the iwi of the Collective.

[27] Schedule 2 sets out the tikanga-based resolution process. An allocation agreement under s 14 is therefore one that is reached in accordance with that process. We say more about that process in a moment.

[28] Because the focus of this appeal is on the provisions dealing with the allocation of the CNI forests land, we need only touch on the provisions relating to the accumulated and ongoing rentals. By s 13, the accumulated rentals were transferred to the Company, which then had to allocate them to each iwi in accordance with percentages set out in sch 3.[21] As to the ongoing rentals, the effect of s 15(2) and the TDSA is that until 1 July 2044 (or such earlier date as unanimously agreed) the Company must allocate these to iwi in accordance with the percentages set out in sch 2 to the TDSA (which are the same as those found in sch 3 to the Act). From 1 July 2044, the TDSA provides that ongoing rentals from "any particular part" of the land will "become an entitlement of the [iwi] to whom that part of the land is distributed". As the Act puts it, from that date "income will run with the land".[22]

The tikanga-based resolution process

[29] The tikanga-based resolution process is central to the allocation of the CNI forests land. The process is described in the Deed of Settlement, the Act and the TDSA. The Deed and the TDSA describe the process in identical terms; the Act differs from that description in one regard. We will refer, as the parties did, to the process as it is described in the Act. As we do so, we will briefly note how the process has thus far progressed. We will then identify one respect in which

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21 CNI Settlement Act, s 15(1).
22 Schedule 2 cl 7(3)(b).

the description of the process in the Deed of Settlement and the TDSA differs from that in the Act.

The process described in sch 2 to the Act

[30] Schedule 2 to the Act describes the tikanga-based resolution process. Clause 2 sets out the principles of the resolution process. Clause 2(1) provides that the CNI forests land:

> … will be allocated to iwi on the basis of mana whenua and the agreements reached between iwi in a kanohi ki te kanohi process or otherwise determined by the resolution process provided for in this schedule.

"Kanohi ki te kanohi" means face-to-face.

[31] Clause 2(2) provides that the iwi collectively are committed to "deciding upon the allocation of CNI forests land for themselves, on their own terms, answerable to one another". In cl 2(3), the iwi acknowledge their commitment to a process that (among other things) promotes whanaungatanga, manaakitanga and kotahitanga amongst the iwi and recognises the desirability of post-settlement collaboration between them in the collective management of assets. Clause 2(4) provides that allocation of the land "will be to iwi only, or their nominees".

[32] The resolution process has three stages.

Stage one: claims by iwi to mana whenua interests

[33] Clause 4(1) required each CNI iwi to provide to the Company, by 31 August 2009, "maps … indicating the extent of their mana whenua interests over the CNI forests land". Clause 4(2) provides that the test of mana whenua is "the mana that iwi traditionally held and exercised over the land, determined according to tikanga", including but not limited to such factors as take whenua and demonstration of ahi kā roa, ahi tahutahu or ahi mātaotao.[23]

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[23] In the substantive judgment, above n 1, Gwyn J provided an overview of these tikanga concepts (drawing from the expert tikanga evidence of Dr Carwyn Jones and Professor Margaret Mutu), saying "[t]ake whenua refers to the origin or source of an iwi's rights in land, for instance, through ancestry or conquest and occupation of land; ahi kā roa is where the fire has burned continuously and an iwi's connection to the land has been maintained steadily through intergenerational

[34] Clause 4(1) clarified that the area of interest claimed by an iwi "is not constrained by the current legal boundaries of the CNI Crown forestry licence blocks", thus recognising that the boundaries of the CFL blocks bore no, or no necessary, relation to the boundaries of the areas over which iwi may have traditionally held and exercised mana whenua. Nonetheless, iwi articulated their claims to mana whenua by reference to the CFL blocks, and the disputes that arose were adjudicated by the panel on that basis.

[35] Once the iwi provided maps to the Company, the Company's board was required, by 30 September 2009, to identify, based on the maps:[24]

> (a) the areas of CNI forests land in which a particular iwi has exclusive mana whenua interests; and
>
> (b) the extent to which there is agreement on allocation of particular areas of CNI forests land to particular iwi. Agreements must be in writing and signed by authorised representatives of the governance entities of each of the iwi that had claimed mana whenua interests; and
>
> (c) areas of land for which agreement has not been reached, and the iwi that are claiming that land …

[36] The Company was required to record, in a draft final allocation agreement, any allocations agreed under (a) and (b).[25] All CNI forests land for which allocation was not agreed was to go to stage two of the process.[26]

[37] Stage one was completed in the middle of 2009. There were no CFL blocks in which, according to the claims made in the maps provided by iwi, any iwi had exclusive mana whenua interests.

Stage two: kanohi ki te kanohi negotiations

[38] Clause 5(1) provided that following stage one, iwi were to embark on kanohi ki te kanohi negotiations with iwi "with whom they have overlapping claims", to reach agreement on allocation of the CNI forests land in question. The iwi involved were to

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occupation; ahi tahutahu is where the connection has been maintained in an intermittent or semi-permanent way; ahi mātaotao is where the fire has become cold because the connection to the land has not been maintained": at [13], n 12. On appeal, no party took issue with this overview.

24 CNI Settlement Act, sch 2 cl 4(5).

25 Schedule 2 cl 4(7).

26 Schedule 2 cl 4(8).

determine the tikanga that applied to the negotiations.[27] Clause 5 contemplated that the negotiations would be completed by 30 June 2010.

[39] Clause 5(3) described possible "[i]nnovative solutions" that could be achieved from the kanohi ki te kanohi negotiations:

> The iwi concerned in each process will endeavour to reach consensus on the allocation of the CNI forests land in question, having regard to the strength of the mana whenua interests. Innovative solutions that reflect tikanga, whanaungatanga, manaakitanga and kotahitanga, and the complexity of mana whenua interests could include, but are not limited to—
>
> (a) joint or multiple ownership of land as tenants in common, either divided in equal shares or proportionally according to the respective interests of the iwi; and
>
> (b) subdividing land and allocating the subdivided portions to each iwi; and
>
> (c) agreeing to "exchange" interests in more than 1 block, so that exclusive interests can be granted to each of the blocks; and
>
> (d) one iwi becoming the owner, but acknowledging the relationship of other iwi with the land in an agreed manner; and
>
> (e) agreeing not to transfer title of the land from the company, but acknowledging mana whenua interests in a manner agreed by the iwi.

[40] Once the kanohi ki te kanohi negotiations were completed, the Company was to prepare a further draft of the final allocation agreement recording any agreements reached on allocation of the land.[28] The draft was also to record "any remaining areas of CNI forests land for which agreement has not been reached amongst the iwi who claimed mana whenua interests in that area in the maps provided".[29]

[41] Stage two produced very little agreement between all iwi with overlapping claims in a given CFL block. Most of the CNI forests land remained the subject of dispute. Under cl 6(3), the iwi interested in the disputed land were then to decide whether to refer the dispute to mediation or to adjudication, under stage three of the process.

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27 Schedule 2 cl 5(2)(a).
28 Schedule 2 cl 6(1)(a).
29 Schedule 2 cl 6(1)(b).

Stage three: mediation or adjudication

[42] Mediation was not possible because the deadline in sch 2 for reaching agreement through mediation (30 November 2010) passed before a mediator could be agreed to. This meant the dispute would be determined by adjudication.[30]

[43] Clause 6(10) provides that members of the adjudication panel must be fluent in te reo Māori and be knowledgeable on matters of tikanga, in particular how mana whenua is held and exercised by iwi. The Company appointed an initial panel, but the members resigned in May 2011 because they deemed they would not be able to complete the adjudication by the date stipulated in sch 2 (25 June 2011). The Company then obtained a declaratory judgment from the High Court confirming that the iwi could extend the timeframe in the Act and so postpone the date by which the allocation agreement was to be completed.[31] The iwi then agreed unanimously to extend the date to 1 July 2014 and to refer only nine of the 23 CFL blocks to adjudication. In December 2013, the Company appointed a panel comprising Mr Jackson, Mr Ngata and Mr Potiki.

[44] Clause 6(14) says the panel's task is to reach a decision on allocation of the disputed lands "in accordance with the mana whenua test set out at clause 4(2)". Clause 6(14) then says the panel will have the power to:

> (a) allocate the land to 1 iwi; or
>
> (b) allocate the land to more than 1 iwi in joint or multiple ownership as tenants in common in a block, either divided in equal shares or proportionally according to the respective interests of the iwi; or
>
> (c) subdivide the block and allocate the subdivided portions to individual iwi; or
>
> (d) allocate the land to 1 iwi, but acknowledge the relationship of the other iwi with the land in a specified manner; or
>
> (e) implement any other solutions proposed by 1 or more of the parties, subject to any modifications determined by the adjudication panel.

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30 Schedule 2 cl 6(5).
31 *CNI Iwi Holdings Ltd v Raukawa Settlement Trust* HC Wellington CIV-2011-485-982, 14 June 2011.

[45] The options available to the panel under cl 6(14) are expressed differently to the solutions described in cl 5(3) as possible outcomes of the kanohi ki te kanohi negotiation.

[46] Once the dispute is determined by adjudication, the panel's decision must be recorded in a final allocation agreement prepared by the Company.[32] That agreement is final and binding.[33] Clause 7(3) provides that on receiving a written request from an iwi's PSGE, the Company will transfer the CNI forests land to that PSGE in accordance with the final allocation agreement and the TDSA. However, cl 7(3)(b) makes clear that even if there is such a transfer, the ongoing rentals and other income from the land continue to be distributed according to the percentages fixed in sch 2 to the TDSA until 1 July 2044. This reflects the effect of s 15(2) and the TDSA (noted at [28] above).

[47] Finally, cl 7(6) provides that in some circumstances the Company will retain title to areas of the CNI forests land:

> If agreement is reached not to transfer areas of the CNI forests land, or iwi do not request a transfer in writing, then the company will retain title, subject to the vested beneficial entitlement of iwi in accordance with the final allocation agreement and the deed of trust.

The diagram in the Deed of Settlement and the TDSA

[48] The tikanga-based resolution process is also set out in the Deed of Settlement and the TDSA. However, the process set out in the Deed and the TDSA includes a diagram which is not found in sch 2 to the Act.

[49] The Deed of Settlement defines "Collective's Allocation Agreement" as the tikanga-based resolution process for the allocation of the CNI forests land as set out in sch 3 to the Deed, "including the diagram in that Schedule 3". The definition then allows for change by saying:

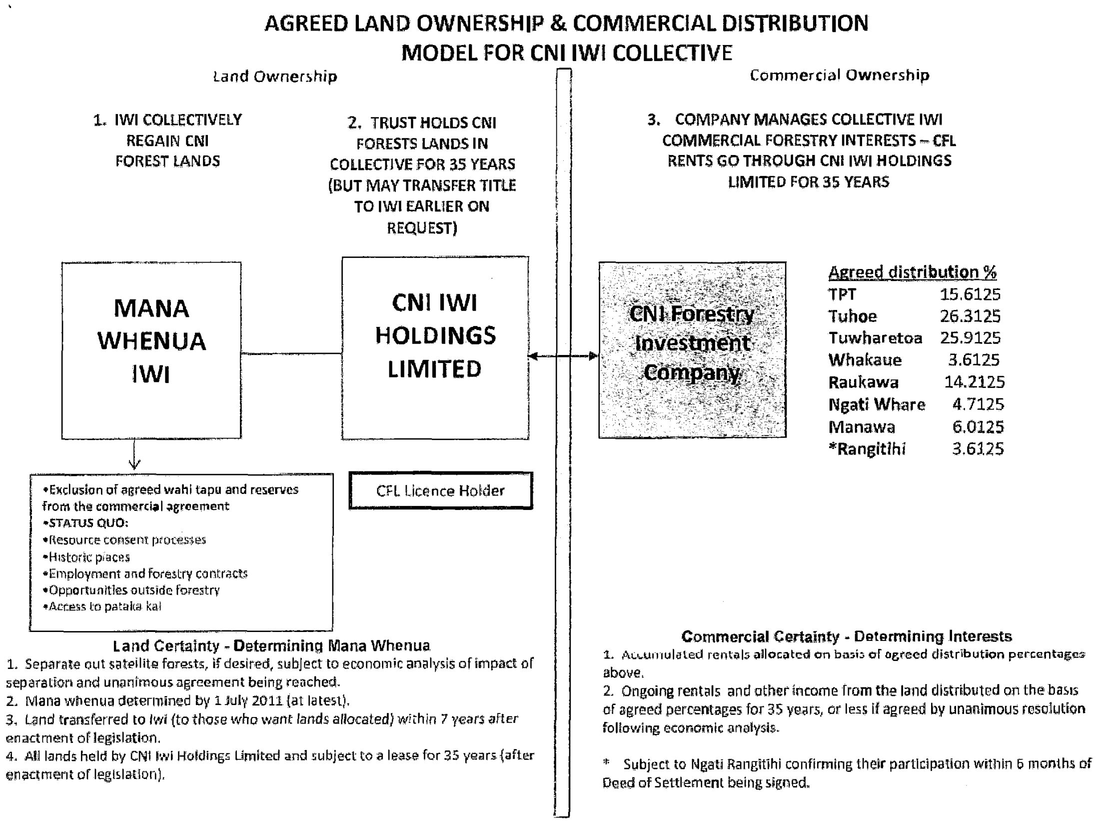
> [I]t is acknowledged this is the same as the definition of Collective Allocation Agreement in the attached draft of the Trust Deed and Shareholders' Agreement and that any change to that definition will be deemed to effect a

32 CNI Settlement Act, sch 2 cls 6(6) and 7(1).
33 Schedule 2 cl 7(2).

corresponding change to the definition of Collective Allocation Agreement in this Deed[.]

[50] Both the draft and executed TDSA contain a definition of Collective's Allocation Agreement that differs slightly from the definition in the Deed of Settlement. The definition in the TDSA says that the process is as set out in sch 5 to the TDSA, "including *in particular* the diagram in that Schedule 5".[34] Given the clause of the Deed that we have just quoted, the definition in the TDSA prevails.

[51] This is the diagram:



[52] Although the tikanga-based resolution process in sch 5 to the TDSA is said to include this diagram, no clause in sch 5 makes any reference to it. The diagram therefore has no direct operative force. We consider, however, that the diagram is part of the context against which the clauses in sch 5 are to be interpreted.

[34] Emphasis added.

[53] The diagram is not part of the tikanga-based resolution process in sch 2 to the Act and therefore is not part of the context against which the clauses in sch 2 are to be interpreted. There is, therefore, potential (albeit limited potential) for the process in the Act to be interpreted differently from the process in the TDSA. Were that to occur, we consider the TDSA interpretation would prevail. This is because the Act provides that the Company holds and administers the CNI forests land subject to the TDSA and that an iwi can request the Company to transfer land only if the request complies with the TDSA.[35]

Issue one: Did the Judge err in making the declaration at [148(h)] of the relief judgment?

[54] For convenience, we repeat the declaration made by the Judge:[36]

> The substantive recognition of mana whenua does not require that a particular CFL iwi receive exclusive title to a subdivided portion of a CFL, although that is an option open to the adjudication panel. The retention of all of the CFL Forests Land in one title would satisfy the requirements of the tikanga-based resolution process if the adjudication panel had gone on to require that, for example, title was to be held on the basis of separate trusts for each CFL block, with the beneficial interests of each iwi as determined being reflected.

[55] Ngāti Manawa says this declaration was wrong in law. Mr Orpin-Dowell, senior counsel for Ngāti Manawa, advanced four submissions:

(a) The panel is required to allocate the disputed land on the same basis as mana was traditionally held and exercised over the land.

(b) Consequently, if the panel finds an iwi traditionally held and exercised mana over an area of the CNI forests land on an exclusive basis, an exclusive allocation of that area of land to that iwi is required.

(c) The panel found, in its first decision of 26 June 2014, that Ngāti Manawa exercised mana whenua over parts of the CNI forests

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35 Sections 6(2)(a) and 16(1)(b)(ii).

36 Relief judgment, above n 1, at [148(h)]. This is the declaration exactly as it appears in the relief judgment and the sealed judgment. The Judge's references to "CFL iwi" and "CFL Forests Land" were, we assume, intended to be references to "CNI iwi" and "CNI Forests Land" respectively.

land on an exclusive basis. As a result, the new panel is required to allocate those parts of the land to Ngāti Manawa on an exclusive basis.

(d) An order to settle a trust is not an allocation of land on the basis of mana whenua.

[56] Ngāti Manawa asks that this Court set aside the declaration and instead make the following declaration:

> … allocating land to iwi in accordance with the mana that iwi traditionally held and exercised over the land requires the panel to, first, determine the mana that iwi traditionally held and exercised over the land and, second, to make an allocation of the land in accordance with that mana. That is not discretionary. If iwi traditionally held and exercised mana whenua over land on an exclusive basis, an exclusive allocation of that land is required.

[57] Ngāti Whakaue supports Ngāti Manawa's position. The Company, Tūhoe, Tūwharetoa, Raukawa and Te Pūmautanga o Te Arawa Trust (TPT) all generally say that the Judge was correct to make the declaration and that the panel did not find any one iwi to have exclusive mana whenua over the whole of a CFL block so as to require allocation on an exclusive basis. Ngāti Whare says it is theoretically possible for a new panel to determine that all the CNI forests land be held in a single title subject to a trust or sub-trusts but only if the panel is satisfied of certain matters. Ngāti Tahu-Ngāti Whāoa (the intervener) says that, consistent with mana whenua allocation, its preference is for titles to follow allocation.

[58] The following questions arise:

(a) Is the panel required to allocate the disputed land on the same basis as mana was traditionally held and exercised over the land?

(b) If the panel finds that an iwi traditionally held and exercised mana over an area of the CNI forests land on an exclusive basis, is an exclusive allocation of that area of land to that iwi required?

(c) Did the panel find, in its decision of 26 June 2014, that Ngāti Manawa exercised mana whenua over parts of the CNI forests land on an exclusive basis?

(d) Can an order to settle a trust be an allocation of land on the basis of mana whenua?

Is the panel required to allocate the disputed land on the same basis as mana was traditionally held and exercised over the land?

[59] Mr Orpin-Dowell noted that cl 6(14) of sch 2 to the Act requires the panel to "reach a decision on allocation of the disputed lands … in accordance with the mana whenua test". The test of mana whenua in cl 4(2) is "the mana that iwi traditionally held and exercised over the land" (determined according to tikanga). Mr Orpin-Dowell submitted that the panel must therefore allocate the land on the same basis as mana was traditionally held and exercised. He said the panel could not allocate land on a basis inconsistent with how mana was traditionally held and exercised in order to promote other tikanga such as whanaungatanga, manaakitanga or kotahitanga amongst the iwi or to promote post-settlement collaboration between them. Those objectives, he said, while "aspirations" for the resolution process, are not the statutory basis on which the panel is required to allocate.

[60] The other parties did not, of course, disagree with what cls 4(2) and 6(14) say. But some disagreed with the submission that the promotion of whanaungatanga, manaakitanga, kotahitanga or post-settlement collaboration are irrelevant to the panel's allocation of the land under cl 6(14).

[61] We largely accept Mr Orpin-Dowell's submission. It reflects the text and structure of the tikanga-based resolution process and is consistent with an earlier decision of this Court.

[62] Clause 2(3) provides:

> The iwi acknowledge their commitment to a resolution process that —
>
> (a) enhances and promotes the mana and integrity of all iwi; and

(b) is open and transparent; and

(c) promotes whanaungatanga, manaakitanga, and kotahitanga amongst the iwi; and

(d) recognises the desirability of post-settlement collaboration between them in the collective management of assets.

[63] The commitment that is acknowledged in cl 2(3) is expressly directed to the resolution *process*. It is not directed to the outcome of that process. We recognise that sub-cls (c) and (d) have more of a natural role to play in relation to outcome than process. However, it is clear from the balance of sch 2 that these matters are irrelevant to adjudication under cl 6(14):

(a) At stage one, if only one iwi claims mana whenua over a particular area of land, that land is to be allocated to it.[37] Such allocation is thus made solely on the basis of mana whenua. Matters such as whanaungatanga, manaakitanga, kotahitanga and post-settlement collaboration in the collective management of assets are irrelevant.

(b) At stage two, kanohi ki te kanohi negotiation, cl 5(3) identifies various solutions that iwi could reach "that reflect tikanga, whanaungatanga, manaakitanga and kotahitanga, and the complexity of mana whenua interests". Clause 5(3) thus encourages iwi to consider outcomes that reflect these matters. But any outcomes at stage two are the result of negotiations between iwi. It is therefore up to iwi to decide how, if at all, these matters will be reflected in an outcome.

(c) At stage three, cl 6(14) makes no reference to these matters when describing the panel's task in allocating the land. The contrast with cl 5(3) is stark. Clause 6(14) contains one direction: the panel is to reach a decision on allocation "in accordance with the mana whenua test". This is a firm direction: "in accordance with" is much stronger than, say, "having regard to" (which appears in cl 5(3)).

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37 CNI Settlement Act, sch 2 cls 4(5)(a) and 4(7).

[64] Our view is consistent with this Court's decision in *Bidois v Leef*.[38] That decision was concerned with a tikanga-based resolution process between hapū that was in material respects the same as that before us. The issue before the Court was whether the powers conferred on the adjudication panel in cl 6.14 of a mana whenua process agreement enabled the panel to do something other than allocate the disputed land "in accordance with the mana whenua test". In determining that issue, the Court said any allocation at stage one (which similarly required hapū to provide maps indicating the extent of their mana whenua interests) was to be made "based solely on the mana whenua test".[39] The Court said that at the third, adjudication stage:[40]

> [50] … the word "allocation" … simply means the allocation required to be made to particular hapū in accordance with the mana whenua test as defined. The outcome applying that test, whether by agreement or adjudication, would dictate the allocation of the disputed lands to one hapū if that hapū established exclusive mana whenua interests over particular lands, or to more than one hapū in shares proportionate to their respective mana whenua interests in those lands. *The allocation was entirely dependent on which hapū satisfied the mana whenua test as defined* …

[65] We disagree with Mr Orpin-Dowell's submission in only one minor respect. He says allocation must be made "on the same basis as" mana was traditionally held and exercised. This language draws on the principle stated in cl 2(1), that the land will be allocated to iwi "on the basis of mana whenua". We prefer to use the language in cl 6(14), "in accordance with".

[66] We therefore conclude that the panel is required to allocate the disputed land solely in accordance with the mana that iwi traditionally held and exercised over the land.

If the panel finds that an iwi traditionally held and exercised mana over an area of the CNI forests land on an exclusive basis, is an exclusive allocation of that area of land to that iwi required?

[67] Mr Orpin-Dowell submitted that it flowed from the answer to the first question that if mana was traditionally held and exercised over an area of the CNI forests land on an exclusive basis, an exclusive allocation of that area is required. He said this

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38 *Bidois v Leef* [2017] NZCA 437.
39 At [47].
40 Emphasis added.

reflected the text of the Act and was consistent with expert tikanga evidence (which he said was unchallenged) and the background to the Act (and settlement more generally).

[68] This question raises an important point of principle for iwi. As Ms McLean, senior counsel for Raukawa, pointed out, the manner in which a panel is required to allocate the land is relevant to all the CFL blocks, not just the nine blocks that have thus far gone to adjudication.

[69] Ms McLean submitted that the Act does not require exclusive mana whenua (if found to be held on that basis) to be recognised by an allocation of exclusive ownership. She said that mana whenua and land ownership are distinct concepts. She referred to the evidence of Tamati Kruger in this respect. He said that title and other concepts of land division were pakeha concepts which undermined tikanga and mana whenua. Mr Neutze, for Tūhoe and Tūwharetoa, made a similar submission, though his was directed more at explaining why the panel might have decided not to allocate land exclusively. Mr Majurey, counsel for Ngāti Tahu-Ngāti Whāoa, submitted that the Act does not require the allocation of exclusive ownership.

[70] We accept that ownership or title to land (as that concept is understood in the common law) is a concept distinct from mana whenua. But, as we will show, both concepts are employed in the tikanga-based resolution process. All iwi agreed, through the Deed of Settlement, to that process and thus to both concepts being used.

[71] We concluded, when answering the first question, that the panel is required to allocate the disputed land in accordance with the mana that iwi traditionally held and exercised over the land. We agree with Mr Orpin-Dowell that it appears to follow that if the panel finds that an iwi holds and exercises mana whenua on an exclusive basis, the panel is required to allocate the land to that iwi on an exclusive basis. We consider that this is confirmed by other features of the Act, including the tikanga-based resolution process.

[72] Section 4 defines "CNI forests land" as the "fee simple estate" in the land described in sch 1 to the Act. Section 6(1) vested that fee simple estate in

the Company. Section 16 requires the Company, on a request that complies with an allocation agreement (produced pursuant to the tikanga-based resolution process), to "transfer" an area of CNI forests land to an iwi or to two or more iwi jointly, or their nominees. Read in the context of ss 4 and 6, this means a transfer of the fee simple estate in that area of land. A fee simple estate is exclusive, albeit it can be subject to other interests.

[73] If at stage one of the resolution process an area of CNI forests land is identified "in which a particular iwi has exclusive mana whenua interests",[41] cl 4(7) provides that the Company will record that area as an agreed allocation in the draft final allocation agreement. Once the allocation agreement is finalised, the iwi to whom that area of land has been allocated is entitled, under s 16 and cl 7(3), to require the Company to transfer the land to it. Read in context, this can only mean a transfer of the fee simple estate in that land exclusively to that iwi.

[74] Clause 5(3) says that an example of an "[i]nnovative" solution available to iwi in their kanohi ki te kanohi negotiations is "subdividing land and allocating the subdivided portions to each iwi".[42] It is implicit in this that there will be an exclusive allocation of each subdivided portion. That this is implicit is reinforced by the next stated solution, which is to exchange interests "in more than 1 block, so that *exclusive* interests can be granted to each of the blocks".[43] Clause 5(3) also describes allocation by using the concept of ownership or title. The fourth solution is that one iwi becomes the "owner" but acknowledges the relationship of other iwi with the land.[44] The fifth solution is agreeing "not to transfer title of the land" from the Company, implying that other allocations generally do involve the transfer of title (to a fee simple estate).[45]

[75] Similar observations can be made about the options available to the panel under cl 6(14). The first option is to allocate the land "to 1 iwi".[46] The third is to subdivide

41 CNI Settlement Act, sch 2 cl 4(5)(a).
42 Schedule 2 cl 5(3)(b).
43 Schedule 2 cl 5(3)(c) (emphasis added).
44 Schedule 2 cl 5(3)(d).
45 Schedule 2 cl 5(3)(e).
46 Schedule 2 cl 6(14)(a).

a block and allocate portions of that block “to individual iwi”.[47] Any transfer under s 16 (or cl 7(3)) that follows from an allocation under either option would be a transfer of the fee simple estate in the relevant land to that one iwi.

[76] The diagram that the TDSA includes as part of the tikanga-based resolution process is headed “Agreed Land Ownership & Commercial Distribution Model for CNI Iwi Collective”. It says the iwi will collectively regain the CNI forests land and the Company will hold the land on trust for 35 years but that the Company may transfer “[t]itle” to iwi earlier on request. The diagram embraces the concept of ownership or title as the outcome of the resolution process.

[77] We therefore consider that the Act makes it clear that if the panel finds that an iwi exercises mana whenua over an area of the CNI forests land on an exclusive basis, the panel is required to allocate that area to that iwi on an exclusive basis. This interpretation of the legislative scheme is consistent with *Bidois v Leef*, in which this Court said that the outcome of applying the mana whenua test “would dictate the allocation of the disputed lands to one hapū if that hapū established exclusive mana whenua interests over particular lands”.[48]

[78] Mr Orpin-Dowell submitted that this conclusion was also consistent with the expert tikanga evidence of Dr Carwyn Jones and Professor Margaret Mutu. That evidence was to the effect that mana whenua is not shared and that an allocation of land to the Company to hold on trust for all iwi could not be an allocation of land “on the basis of mana whenua”. Mr Orpin-Dowell characterised that evidence as unchallenged in the High Court. Some of the respondents disagreed with that characterisation, referring to the evidence of Mr Kruger and of Temuera Hall. We do not have to engage with this tikanga dispute. The question with which we are presently engaged is concerned with the meaning of the Act. The tikanga evidence was, by contrast, directed at the concept of mana whenua (which is a matter for the panel) and concerned with whether exclusive ownership (in a common law sense) is consistent with mana whenua. As we have explained, it is clear from the Act that, regardless of

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47 Schedule 2 cl 6(14)(c).
48 *Bidois v Leef*, above n 38, at [50].

any potential inconsistency, exclusive ownership is a potential outcome of the tikanga-based resolution process.

[79] We conclude that if the panel finds that an iwi traditionally held and exercised mana over an area of the CNI forests land on an exclusive basis, an exclusive allocation of that area of land to that iwi is required.

Did the panel find, in its decision of 26 June 2014, that Ngāti Manawa exercised mana whenua over parts of the CNI forests land on an exclusive basis?

[80] Mr Orpin-Dowell made two inter-related submissions on this question. First, he said the panel affirmed that mana whenua could be exclusively held by an iwi in a particular rohe and then identified three categories of mana whenua interest, describing the first (a substantive interest) as one based on a clear exercise of mana whenua "in a clearly demarcated and unimpeded area". Mr Orpin-Dowell submitted that the essential characteristic of a substantive interest is therefore exclusivity.

[81] Secondly, Mr Orpin-Dowell noted that the panel found Ngāti Manawa had substantive mana whenua interests in seven of the nine CFL blocks. He said that in doing so the panel accepted there were settlements still occupied by Ngāti Manawa in relation to which it could claim ahi kā roa.[49] He submitted, therefore, that the panel found that Ngāti Manawa exercised mana whenua over parts of those seven CFL blocks on an exclusive basis.

[49] Dr Jones and Professor Mutu said ahi kā roa can be translated as "long burning fires". The panel described this principle as "proven intergenerational occupation of a site through until recent times or until an unjust intervention by the Crown".

[82] We do not accept these submissions. The panel identified several mana whenua principles (including ahi kā roa) that it said "ma[d]e up the criteria to be met in order to satisfy the mana whenua test". It then said:

> The Panel also concluded that mana whenua could be exclusively held by an Iwi in particular rohe according to the above principles but that such exclusivity was always subject to the need to respect and indeed manaaki the interests and rights of others.

[83] The panel thereby recognised that mana whenua *could* be exclusively held. But the panel did not go on to find that mana whenua *was* exclusively held by any iwi in any particular rohe or area of the CNI forests land. The panel found that in each CFL block there were "quite distinct and varying interests and applications of mana whenua that represent equally distinct histories and traditions". The panel gave weightings to the interests it identified which reflected "the reality of the mana whenua which each Iwi asserted over a particular whenua". It characterised its "allocations" as either substantive, medial or limited interests. It described these interests as:

> 1. Substantive interests — that is interests based on a clear exercise of mana whenua in a clearly demarcated and unimpeded area that covers a significant area of influence within the CFL. To have a Substantive Interest one should be left in no doubt that the Iwi was a significant presence within the CFL that has met many of the Mana Whenua test conditions[.]
>
> 2. Medial interests — that is interests based on the clear exercise of mana whenua that may overlap with others but is considered either secondary or to have a lesser area of influence within the CFL. To have Medial Interests recognised some Mana Whenua test conditions must be met but in a less comprehensive or extensive manner.
>
> 3. Limited interests — that is interests based on a clear exercise of mana whenua that is recognisable but limited in extent and reach. To have Limited Interests recognised an Iwi may have a presence in a small part of a CFL, be recognised by other Iwi as having a legitimate presence within the CFL [or] have met certain conditions but failed to prove a high degree of influence. The Mana Whenua test must have been met to at least some degree.

[84] We accept that the reference, in the description of substantive interests, to the exercise of mana whenua in a "clearly demarcated and unimpeded area" is suggestive of exclusivity. But when the panel found that Ngāti Manawa had substantive interests in seven of the CFL blocks, it did not identify any demarcated areas over which Ngāti Manawa exercised mana whenua in an unimpeded fashion. We refer first to the findings on the following four CFL blocks:

(a) Northern Boundary — Ngāti Manawa claimed exclusive mana whenua over this block. The panel concluded that Ngāti Manawa had a substantive interest and that Tūhoe and Ngāti Rangitihi had medial interests.

(b) Tōtara — Ngāti Manawa claimed exclusive mana whenua over this block. The panel concluded that Ngāti Manawa had a substantive interest, that Tūhoe and Ngāti Rangitihi had medial interests, and that Tūwharetoa and TPT had limited interests.

(c) Caves — Ngāti Manawa claimed exclusive mana whenua in this block. The panel concluded that Ngāti Manawa had a substantive interest, that Tūhoe and Ngāti Rangitihi had medial interests, and that Tūwharetoa had a limited interest.

(d) Wairapukao — Ngāti Manawa claimed exclusive mana whenua in this block. The panel concluded that Ngāti Manawa and TPT had substantive interests, that Ngāti Rangitihi had a medial interest, and that Tūwharetoa had a limited interest.

[85] For each of those four blocks, the panel did not demarcate any areas within the block over which any of the iwi found to have mana whenua interests held or exercised their interests. Nor did the panel express any conclusion as to whether Ngāti Manawa did or did not exercise its mana whenua exclusively in the block.

[86] The panel found that Ngāti Manawa had substantive interests in three other CFL blocks: Flaxy Creek, Matea and Whirinaki. For each of these blocks, the panel recorded that Ngāti Manawa claimed it had "equal mana whenua status" with Ngāti Whare.[50] The panel concluded there were other iwi with medial and/or limited interests in each block. As well, the panel concluded that Ngāti Whare's mana whenua "should be recognised in their agreement with Ngāti Manawa". The panel did not demarcate any areas within these blocks over which any of the iwi held or exercised

50 The panel said, in relation to Whirinaki, that Ngāti Manawa stated it had "mana whenua status" with Ngāti Whare. We assume the panel meant to say "equal mana whenua status", as it said was the case in relation to Flaxy Creek and Matea.

their mana whenua interests. The panel did not express any view on whether Ngāti Manawa did or did not exercise its mana whenua exclusively in the block. Indeed, the panel did not record Ngāti Manawa as having claimed exclusive mana whenua in these blocks.

[87] It is clear from this review of the panel's decision that it did not make any finding that Ngāti Manawa exercised mana whenua over any parts of the CFL blocks on an exclusive basis. To the contrary, we think the panel deliberately refrained from deciding whether Ngāti Manawa (or any other iwi) did or did not exercise mana whenua exclusively. That is consistent with the panel's reluctance to complete the allocation task before it.

[88] We thus answer this question "No".

Can an order to settle a trust be an allocation of land on the basis of mana whenua?

[89] Mr Orpin-Dowell submitted that the Judge was wrong to declare that the requirements of the resolution process would be satisfied by the Company retaining title to all the land subject to the creation of separate trusts (or sub-trusts) for each CFL block.

[90] First, he said there is no power for the panel to settle a trust. We accept that cl 6(14) does not explicitly say that the panel has the power to direct that the Company hold the land subject to a trust or a series of trusts. But cl 6(14)(e) empowers the panel to implement any solution proposed by one or more iwi. If an iwi proposes a trust as a solution, the panel is thereby empowered to implement that solution — subject to the overriding requirement that the allocation be in accordance with the mana whenua test.

[91] Secondly, he submitted that the trust solution would give decision-making authority over the land to the Company and that this would be inconsistent with the decision-making authority that iwi found to have mana whenua held and exercised over the land. We do not accept that such inconsistency is inherent in the use of a trust — it would depend on the terms of the trust instrument (which, we acknowledge, might have to be very detailed) and on findings about mana whenua. Indeed, in oral

submissions Mr Orpin-Dowell said the inconsistency arose because Ngāti Manawa held (he said) exclusive mana whenua over parts of the CNI forests land. But the panel did not make any finding that Ngāti Manawa did (or did not) hold mana whenua exclusively.

[92] Thirdly, he said any trust would have a maximum duration of 125 years (by operation of s 16(1) of the Trusts Act 2019). When the trust is eventually wound up, the land would vest in the beneficiary iwi in accordance with the provisions of the TDSA (namely, the percentage shares that were designed to apply to ongoing income until 1 July 2044), unless the trust instrument specified otherwise. Effectively, a trust would simply delay distribution of the land to iwi, which would be inconsistent with the essential structure of the Act (that land would be centrally held for a short period before being returned to mana whenua). We again consider that the alleged inconsistency is not inherent in the use of a trust — it would depend on the terms of the trust instrument and on findings about mana whenua.

[93] We therefore consider that the retention by the Company of title to all (or some) of the land subject to a trust or series of trusts *could* be an allocation of land in accordance with mana whenua. But it would depend on how iwi held and exercised mana whenua and on whether the trust instrument could allocate the land in accordance with how mana whenua was held and exercised. The Judge went too far in saying that the requirements of the tikanga-based resolution process *would* be satisfied if the panel had gone on to require that the Company hold title on the basis of separate trusts for each CFL block, with the beneficial interests of each iwi as determined being reflected.

[94] For the avoidance of any doubt, we repeat our earlier finding: if the panel finds that an iwi traditionally held and exercised mana over an area of the CNI forests land on an exclusive basis, an exclusive allocation of that area of land to that iwi is required. We do not consider that such an allocation could be through the mechanism of a trust, unless it was nothing more than a bare trust. But there would seem no point in making an allocation on that basis, as the iwi would then be able to call for the land to be transferred to it.

Conclusion

[95] Although we have not accepted all of Ngāti Manawa's submissions, we do consider there are some errors in the Judge's declaration. We therefore set it aside and instead make the following declarations:

(a) The panel is required to allocate the disputed land in accordance with the mana that iwi traditionally held and exercised over the land. If the panel finds that an iwi traditionally held and exercised mana over an area of the CNI forests land on an exclusive basis, an exclusive allocation of that area of land to that iwi is required.

(b) The retention within the Company of title to all (or some) of the land subject to a trust or series of trusts could be an allocation of land in accordance with mana whenua. Whether it is would depend on how iwi held and exercised mana whenua and on whether the trust instrument could allocate the land in accordance with how mana whenua was held and exercised.

Issue two: Did the Judge err in directing that the new panel determine and allocate mana whenua interests using as its starting point percentage interests in the CFL blocks?

[96] The Judge directed the Company to appoint a new panel to:[51]

> [149] … determine and allocate the mana whenua interests of the CNI Iwi in the relevant CFL blocks, using as its starting point the 23 November 2022 percentage interest allocation table agreed by iwi and having regard to the findings of the Court in this judgment.

[97] Ngāti Manawa (supported by Ngāti Whakaue) says that, putting aside the question of what percentage interests to use (the subject of the third and fourth issues), the Judge erred in making this direction. Ngāti Manawa says the errors are:

(a) the direction is inconsistent with the panel's statutory task and will divert the panel away from the "core" issues it needs to address; and

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51 Relief judgment, above n 1.

(b) the direction trespasses into the merits of the panel's decision and usurps the panel's function.

[98] Tūhoe, Tūwharetoa, Raukawa, TPT and Ngāti Tahu-Ngāti Whāoa say the direction was correct and percentages are an appropriate starting point, particularly as no one iwi has exclusive interests over the whole of a CFL block. They also say that an issue estoppel arises from the earlier decision of Ellis J which prevents Ngāti Manawa from challenging the direction.

[99] Ngāti Whare takes a middle ground. It says percentage interests can be used as the starting point but they do not in and of themselves constitute (or "predetermine") allocation of land "on the ground". Ngāti Whare says no issue estoppel arises from Ellis J's decision.

[100] Two questions arise:

(a) Is the direction that the new panel determine and allocate mana whenua interests using as its starting point percentage interests in the CFL blocks inconsistent with its statutory task?

(b) Does an issue estoppel arise from Ellis J's decision preventing Ngāti Manawa from challenging the direction?

Is the direction that the new panel determine and allocate mana whenua interests using as its starting point percentage interests in the CFL blocks inconsistent with its statutory task?

[101] The new panel's statutory task is to allocate the CNI forests land in accordance with the mana whenua test. To do that the panel first has to determine the mana that iwi traditionally held and exercised over the land. The panel then has to allocate the land in accordance with that determination.

[102] The Judge's direction is that the new panel "determine and allocate the mana whenua interests" of the iwi in the CFL blocks, using the percentage interests. There is an error of expression in this direction. While the panel does have to determine mana whenua interests, it then allocates the land (not the mana whenua interests).

While this error of expression (which we expect was unintended) received little attention at the hearing, it should be corrected.

[103] The focus of the hearing was on whether it was an error to direct the panel to determine mana whenua interests and then allocate the land using percentage interests as a starting point. We consider that this direction is inconsistent with the new panel's statutory task, simply because the concept of a "starting point" is not reflected in sch 2 to the Act. Further, we consider the direction is in error because it is ambiguous. This became apparent at the hearing. The parties had very different views as to how much leeway the new panel would have to depart from the starting point (if there was to be one), ranging from considerable (Ngāti Manawa) to very little (Tūwharetoa and Tūhoe).

[104] This is not to say there should be no direction at all to the new panel about how to take into account the work that has already been undertaken, both by the previous panel in determining mana whenua interests in its decision of 26 June 2014 and then by the iwi working together to reach the agreement in November 2022 (the latter of which we address further under the third and fourth issues). The path forward was indicated by Mr Majurey, who submitted that disregarding those matters would not be tika. No party suggested that we should decide whether that is so as a matter of tikanga. We consider that, in relation to the iwi's November 2022 agreement, it is for the new panel to make that assessment. The new panel should determine what regard should be given to that agreement, in light of the tikanga principles in sch 2 to the Act (both the principles underlying the resolution process and those in the mana whenua test that governs its task in cl 6(14)). A direction in those terms will be consistent with the panel's statutory task.

[105] The position is different with respect to the previous panel's determination, in the 26 June 2014 decision, of mana whenua interests. Ellis J declared that that was a valid partial adjudication decision.[52] No party appealed from that declaration and so all iwi are bound by it. Therefore, to the extent that the previous panel made

52 *Te Runanga o Ngāti Manawa v CNI Iwi Holdings Ltd*, above n 5, at [100].

determinations of mana whenua interests in that decision, the new panel cannot revisit those determinations. The new panel should be directed accordingly.

[106] Such a direction should make clear, however, that it does not prevent the new panel from making further determinations about mana whenua (so long as they are not inconsistent with the earlier determinations). As we explained earlier (when dealing with the first issue), the previous panel refrained from deciding whether any iwi did or did not exercise mana whenua exclusively. It will therefore be open to the new panel to decide such matters. This is the case under the direction as it is currently phrased (given that it requires the new panel to determine mana whenua interests using the percentage interests merely as a starting point) and no party appealed against that aspect of the direction. But we consider this should be made clearer.

Does an issue estoppel arise from Ellis J's decision preventing Ngāti Manawa from challenging the direction?

[107] As we have just indicated, the declaration made by Ellis J prevents any iwi from disputing the validity of the determinations of mana whenua interests in the previous panel's 26 June 2014 decision. But Ngāti Manawa is not, by challenging the direction made by Gwyn J in the relief judgment, seeking to dispute the validity of those earlier determinations. No issue estoppel arises.

Conclusion

[108] There are some errors in the Judge's direction to the new panel, and it should be reframed. The reframed direction will also have to reflect our decisions on the third and fourth issues. We will address the direction once we have determined those issues.

Issue three: Was the statutory tikanga-based resolution process amended by the 23 November 2022 resolution so as to make percentage interests the basis on which the new panel would allocate the land, or did the 23 November 2022 resolution otherwise have that effect in a way that complied with the statutory requirements of the tikanga-based resolution process?

[109] When the parties returned to the High Court after the iwi's unsuccessful attempts to reach a resolution on the allocation dispute (following the substantive judgment), some iwi argued that the Court should direct the new panel to use as its

starting point the mana whenua percentage allocation table adopted in the 23 November 2022 resolution. In response, Ngāti Manawa had a general objection to the use of percentage interests as a starting point, which we have just addressed under the second issue. Ngāti Manawa also had two specific objections to the use of the 23 November 2022 percentages. The first specific objection was that the new panel could not be directed to allocate the land on the basis of the percentages resolved on 23 November 2022 (rather than on the basis of the mana whenua test) unless iwi had validly amended the tikanga-based resolution process.

[110] In relation to that objection, the Judge found that all iwi were bound by the 23 November 2022 resolution. Her reasons were:[53]

> [125] … the real question [is] whether or not what occurred was in fact consistent with the sch 2 resolution process.
>
> [126] The statutory scheme is focussed on the CNI Iwi resolving matters themselves through kanohi ki te kanohi negotiations first, and through formal mechanisms, such as an adjudication panel, only where disputes remain. Clause 2(1) expressly allows, and in the first instance encourages, CNI Forests Land to be allocated to iwi on the basis of mana whenua and the agreements reached between iwi in a kanohi ki te kanohi process. It otherwise allows for determination in accordance with the resolution process set out in sch 2 as a secondary method of resolution.
>
> [127] The Act must be applied to the circumstances as they arise, in light of its text, purpose and context. The mana whenua percentage allocation ratified by the CNI Iwi is empowered by sch 2 of the Act, as the primary mechanism to be employed by iwi in the tikanga-based resolution process.
>
> [128] Schedule 2 of the Act did not contemplate that a second panel would be required, so there is no express requirement that a new adjudication panel must start afresh. However, it is consistent with the purpose of the Act to uphold an agreement reached by iwi, as occurred in November 2022.
>
> …
>
> [130] I am satisfied that the process whereby the mana whenua percentage allocation table was ratified and approved on 23 November 2022 was in accordance with the tikanga-based resolution process prescribed in sch 2.
>
> [131] The resolution of 23 November 2022 is therefore binding on the parties.

[111] Ngāti Manawa, with the support of Ngāti Whakaue, says that the Judge was wrong. It says there was no amendment to the tikanga-based resolution process and

53 Relief judgment, above n 1 (footnote omitted).

in the absence of such an amendment the new panel's task remains simply as set out in the Act: to allocate the land in accordance with the mana whenua test.

[112] Mr Orpin-Dowell submitted there was no evidence that, in the course of the negotiations that led to the 23 November 2022 resolution, the parties intended to, discussed or understood that they were amending the tikanga-based resolution process. He also submitted, but with less vigour, that the procedural requirements for an amendment (found in the TDSA) were not met.

[113] We accept Mr Orpin-Dowell's principal submission. There is nothing in the evidence to suggest that anyone thought they were amending the tikanga-based resolution process. We consider the process was not amended.

[114] But this does not meet the Judge's reasons for finding that the 23 November 2022 resolution was binding on the parties. The Judge did not reason that it was binding because there had been an amendment to the sch 2 process. Rather, as can be seen in the passages quoted above, the Judge considered the issue was whether what happened was "consistent with the sch 2 resolution process".[54] The Judge concluded it was, because it was "consistent with the purpose of the Act to uphold an agreement reached by iwi" and the process by which the resolution was agreed "was in accordance with the tikanga-based resolution process".[55]

[115] We agree with the Judge's reasons. As Mr Neutze submitted, the iwi's decision to enter into further kanohi ki te kanohi negotiations to explore options to resolve the issues that remained in dispute was in accordance with the sch 2 process and did not require an amendment. It is true that sch 2 provides for a staged approach in which on "completion" of kanohi ki te kanohi negotiation there will be mediation and/or adjudication.[56] But there is nothing in the provisions governing the adjudication stage which prevents iwi from entering further negotiations or which prevents the outcome of those negotiations being given effect to, or being taken into account, by the panel. To imply such a restriction would be inconsistent with the principle in cl 2(2), that iwi

54 At [125].
55 At [128] and [130].
56 CNI Settlement Act, sch 2 cl 6(1).

commit to "deciding upon the allocation of CNI forests land for themselves, on their own terms, answerable to one another".

[116] We conclude that the 23 November 2022 resolution was reached consistently with the tikanga-based resolution process.

Issue four: Was the 23 November 2022 resolution a contractually binding agreement that the new panel would allocate the disputed land on the basis of the percentages referred to in the resolution?

[117] In the High Court, Ngāti Manawa's other specific objection to the new panel being directed to use the 23 November 2022 mana whenua percentage allocation table was that the table had been agreed at the first stage of a two-stage process. Ngāti Manawa said agreement on the use of the table was conditional on agreement also being reached at the second stage as to the actual allocation of the CNI forests land. That further agreement not having been reached, Ngāti Manawa said the 23 November 2022 resolution was not binding. Ngāti Manawa also said that there was no agreement that the percentages in the table would be used by a new adjudication panel if the parties failed to reach agreement.

[118] In response to Ngāti Manawa's second point, the Judge said:[57]

> [72] It is implicit in this context that the purpose of the hui was to reach a position that would inform the Court's decision about the appointment of a new panel. … [I]t is plain that must necessarily have encompassed whether the new panel would take as its starting point any agreement reached by iwi, or the 26 June 2014 Panel Decision, or start with a clean slate.

[119] As to whether there was a binding agreement, the Judge applied the test for contract formation found in this Court's judgment in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*.[58] The Judge analysed the relevant events and communications in considerable detail. She noted that during and after the negotiations Ngāti Manawa did not communicate to other iwi that their agreement

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57 Relief judgment, above n 1.
58 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [53] per Richardson P, Keith, Blanchard and McGrath JJ.

to the 23 November 2022 resolution was conditional on agreement being reached on allocation at the second stage of the process.[59] The Judge concluded that:

> [108] … the November resolution unanimously approving the mana whenua percentage allocation table was not conditional or contingent on iwi reaching agreement at the second stage of the process.

[120] Ngāti Manawa, supported by Ngāti Whakaue, says the Judge erred in three ways. Mr Orpin-Dowell submitted that the first error was that the agreement found by the Judge amounted to an amendment to the tikanga-based resolution process, but the process had not been validly amended. We reject this characterisation of the agreement and of the Judge's finding, for the reasons we set out under the third issue.

[121] The other two errors for which Mr Orpin-Dowell contended were that the Judge had misapplied the test for contract formation (in finding that the agreement was not conditional) and had implied a term into the agreement (in the passage we have set out at [118] above) that did not meet the test for the implication of a term set out by the Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*.[60] The other iwi disagreed. Mr Cooley, junior counsel for Tūwharetoa and Tūhoe, presented comprehensive submissions that engaged with the principles relating to contract formation, interpretation of contracts and implication of terms.

[122] We mean no disrespect to counsel in saying that we found the contractual analysis in which they engaged to be quite inapt to assess the legal effect of the 23 November 2022 resolution. A contractual analysis may have been appropriate had iwi reached a complete agreement at the end of their negotiations in 2022 such that they did not have to return to the tikanga-based resolution process, and if an issue had arisen as to the meaning or effect of the agreement. But the parties did not reach a complete agreement, with the consequence that the iwi do have to return to that process. Given that the resolution process is based in tikanga, we consider that the effect of the 23 November 2022 resolution on the issues that remain before

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59 Relief judgment, above n 1, at [83]–[84], [87], [92], [100] and [106].

60 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [116] per Winkelmann CJ and Ellen France J (with whom Glazebrook, O'Regan and Williams JJ agreed: at [232(b)]).

the panel should be determined by the panel, keeping in mind the tikanga principles in sch 2. The new panel should be directed accordingly, and the iwi will be able to advance their arguments in that tikanga context.

The direction to the new panel

[123] We set aside the direction at [149] of the relief judgment. Reflecting our conclusions on the second, third and fourth issues, we make the following direction:

> The Company is to appoint, under cl 6(10) of sch 2 to the Act, a new adjudication panel to reach a decision, under cl 6(14), on allocation of the nine CFL blocks in accordance with the mana whenua test set out at cl 4(2). In reaching that allocation decision, the new panel:
>
> 1. cannot revisit the determinations of mana whenua interests made by the previous panel in its 26 June 2014 decision;
>
> 2. is able to make further determinations of mana whenua interests (in accordance with the mana whenua test in sch 2) so long as they are not inconsistent with the determinations in the 26 June 2014 decision;
>
> 3. is to determine what regard should be given (either in determining mana whenua interests or allocating the land, or both), in light of the tikanga principles in sch 2 to the Act (both the principles underlying the resolution process and those in the mana whenua test that governs its task in cl 6(14)), to the percentage interest allocation table agreed by iwi on 23 November 2022; and
>
> 4. is to have regard to the findings of the High Court in its judgment dated 30 November 2023, as varied by this judgment.

Issue five: Does this Court need to give further directions to the new panel in relation to Ngāti Whare's interests?

[124] This issue was raised in case the outcome of the first four issues was that the new panel was bound by the mana whenua findings in the 26 June 2014 decision

and could not have any regard to the agreement reached by iwi in the 23 November 2022 resolution. Had that been the case, Ngāti Whare (supported by some other iwi) contended that further directions would be necessary to ensure that its interests were protected (because the 26 June 2014 decision did not identify any mana whenua interests on the part of Ngāti Whare, other than through its agreement with Ngāti Manawa).

[125] We have decided that the new panel can have regard to the 23 November 2022 resolution. The fifth issue therefore falls away.

Costs

[126] Success and failure have been shared in largely equal measure by the parties. We make no order as to costs.

Result

[127] The appeals are allowed to the extent identified in [128] and [129].

[128] The declaration at [148(h)] of the relief judgment is set aside. The declarations at [95] of this judgment are made.

[129] The direction at [149] of the relief judgment is set aside. The direction at [123] of this judgment is made.

[130] The appeals are otherwise dismissed.

[131] There is no order as to costs.

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