IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-267
[2023] NZHC 1388

UNDER	the High Court Rules 2016 and the Judicial Review Procedure Act 2016
IN THE MATTER	of an application under s 8.20 for particular discovery before proceeding commenced
AND IN THE MATTER	of an application under s 15 for interim relief
BETWEEN	CHRIS KARAMEA INSLEY Intending Applicant
AND	MINISTER OF CLIMATE CHANGE Intended Respondent

Hearing: 2 June 2023

Appearances: N Chapman and S L Gwynn for the Intending Applicant
H Ebersohn and S J Collins for the Intended Respondent

Judgment: 5 June 2023

JUDGMENT OF GAULT J

This judgment was delivered by me on 5 June 2023 at 2:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

……

Solicitors:
Ms S McKechnie, Mr N Chapman and Ms S L Gwynn, Simpson Grierson, Wellington
Ms L Theron, Mr H Ebersohn and Mr S J Collins, Crown Law, Wellington

[1] The applicant, Mr Insley, applies for urgent interim orders under s 15 of the Judicial Review Procedure Act 2016 (JRPA) declaring that the Crown ought not to:

(a) make any public announcement relating to the review of the Emissions Trading Scheme (ETS), including the Government's proposals under it, until Mr Insley's judicial review claim is determined or the Court rules otherwise; and

(b) release or announce the substantive proposal document for the scope of the ETS review until the claim is determined or the Court rules otherwise.

[2] At this stage, the statement of claim seeking judicial review is in draft form. Mr Chapman, for Mr Insley, undertook to file the statement of claim on Tuesday, 6 June 2023 on the basis it could be amended to address the Crown's ongoing disclosure of documents sought. Mr Chapman indicated that I could treat the draft statement of claim as an advanced draft that sets out the grounds of review.

[3] The substantive proposal document referred to in the interim orders sought was provided to me after the hearing – it is entitled Te Arotake Mahere Hokohoko Tukunga | Review of the New Zealand Emissions Trading Scheme: Discussion document (discussion document).[1]

[4] The application is opposed. Following a telephone conference with counsel on Wednesday afternoon when the matter was first referred to me, I made timetable directions and scheduled an urgent hearing on Friday as Mr Insley understood that the Government intends to make public announcements on or after Tuesday, 6 June 2023.[2] At the hearing on Friday, Mr Ebersohn, for the Crown, indicated that release of the discussion document could be delayed until 14 June 2023 but he was not in a position to give a commitment to delay any public announcement beyond 6 June 2023. Hence, a decision is required over the long weekend.

---

1 In the draft statement of claim this is referred to as the policy options paper or policy paper.

2 Minute dated 31 May 2023. Mr Insley's understanding was based on Crown Law's advice on 26 May 2023 that no public announcement regarding the review of the ETS will occur before 6 June 2023 at the earliest.

Mr Insley's claim

[5] Mr Insley has been very involved for many years in the development of the ETS and its impact on Māori. I have read his two affidavits,[3] but the application for judicial review is most conveniently summarised from the draft statement of claim. In essence, the claim alleges procedural grounds of review concerning the Crown's lack of "pre-engagement", meaning engagement prior to wider public announcement and consultation, on the Government's proposals under the ETS review.

Te Taumata

[6] Mr Insley brings the claim in his capacity as chair of Te Taumata, a collective that represents Māori interests in trade, including the interests of Māori forestry owners within the ETS. Te Taumata is made up of rangatira with significant direct and indirect interests in Māori forests and carbon assets. Te Taumata's kaupapa includes ensuring that any policy developments impacting the development and economic sustainability of Māori forestry in the ETS, and Māori participation in the carbon economy, are fully considered and properly thought through in a way that considers their direct impact on the livelihoods of Māori.

Māori forestry and ETS interests

[7] The draft claim pleads that, as tangata whenua, Māori have significant rights and interests in forests. They are rangatira, kaitiaki, land and forestry owners, workers and business owners. Whenua and forests are taonga. In addition to their interests under te Tiriti o Waitangi | the Treaty of Waitangi (te Tiriti), Māori have settlement assets and interests in forestry and the ETS. Land eligible for forests, forests and carbon units are vital economic assets for Māori. Forestry and the associated carbon units are one of the few viable economic options for Māori owned marginal land.

Legal framework

[8] The draft claim states that Māori rights and interests in whenua and forests are protected and guaranteed by Articles Two and Three of te Tiriti. Te Tiriti principles

---

[3] His affidavit in reply filed on 1 June 2023 was unsworn.

require that the Crown be properly informed of Māori interests and act reasonably and with the utmost good faith towards Māori. The respondent, the Minister of Climate Change (the Minister), is aware that te Tiriti rights and Māori interests are impacted by reform of forestry and the ETS. The Minister has a duty to consult, as an officer of the Crown, with Māori as the indigenous people of New Zealand, consistent with the honour of the Crown.

[9] The draft pleads that the Minister is responsible for the administration of the Climate Change Response Act 2002 (CCRA), including the ETS. Section 160 of the CCRA sets out the Minister's powers and duties in relation to any review of the operation and effectiveness of the ETS. Section 3A of the CCRA, and the background to its enactment, provide enhanced protections for te Tiriti and Māori interests. I set out the relevant statutory provisions below.

Review of the ETS from September 2022

[10] The draft claims that the Minister initiated a review of the ETS in or about September 2022. The Cabinet Minute of Decision noted that it "will be critical to engage with iwi/Māori throughout the review process, and that officials are exploring options to facilitate this and are developing an engagement plan".

[11] The Minister declined to appoint an independent panel as it risked delaying the start of the review.

Direct Ministerial commitments to engage with Mr Insley and Te Taumata on reforms affecting forestry in the ETS

[12] The draft claims that, since April 2022, Mr Insley has been engaged in correspondence with the Minister and others within Government regarding various proposed reforms to forestry within the ETS. Through this correspondence, Mr Insley has raised concerns regarding the impact of the proposed reforms on Māori forestry landowners and the Māori economy more broadly. Throughout this correspondence, the Minister has made a number of commitments to actively engage with Te Taumata on forestry issues within the ETS. This has included commitments to carry out pre-engagement.

[13] I interpolate that the affidavits indicate that initial engagement involved the Government's proposed changes to exclude exotic forests (such as pinus radiata) from the permanent forestry category of the ETS, which was of concern to Māori forestry landowners.

[14] The draft pleads that the Minister provided direct verbal undertakings at a hui held at Parliament on 3 August 2022. The Minister assured attendees that the proposal to exclude exotic forests from the permanent forestry category of the ETS would be abandoned, not attempted by other means, and that he would take steps to ensure that Māori would see "all of the pieces of the jigsaw puzzle".

[15] The draft claims that there was further correspondence between the parties relating to the status of permanent exotic forestry in the ETS. However, I interpolate that Mr Insley's affidavit says that despite the commitments to work together, there was next to no further engagement over the next few months.

ETS review policy prepared in secret

[16] The draft pleads that the ETS review was not publicly announced until 22 March 2023. Mr Insley first became aware of it on that date. The ETS review was not referred to in any of the parties' ongoing correspondence or meetings related to issues with forestry and the ETS between 27 September 2022 and 24 March 2023.

[17] The draft says that during that period, officials prepared a very detailed policy options paper for the reform of the ETS (that is the discussion document). The discussion document was prepared without any consultation with Māori and does not contain adequate analysis to ensure that the options are te Tiriti compliant.

[18] The draft alleges that the discussion document proposals are:

(a) ETS market sensitive information and their release will impact significantly on market participants;

(b) will have significant and irreversible effects on Māori forestry, carbon assets and the wider Māori economy; and

(c) will disproportionately impact on Māori.

[19] The draft further alleges that release of the discussion document will:

(a) create considerable market uncertainty;

(b) impact on investor confidence, the carbon sector and both immediate and long term Māori economic interests in forestry and carbon; and

(c) without having first completed sufficient analyses of the potential impacts, is an unacceptable risk to Māori rights and interests in the New Zealand carbon units (NZU) market and contrary to the principles of te Tiriti.

Failed efforts at pre-engagement

[20] The draft pleads that Mr Insley first became aware of the discussion document on 24 March 2023.

[21] It claims that the first attempt at pre-engagement on the discussion document with Mr Insley and Te Taumata in March 2023 was flawed. This involved an invitation on 24 March 2023 to a meeting on 27 March 2023, which required signing a non-disclosure agreement (NDA) before receiving the discussion document on 24 March 2023. At the meeting on 27 March 2023, officials gave Mr Insley until the end of the following day to provide any input into the scope and focus of the ETS review and advised that the discussion document was going to Cabinet for approval the following Monday, 3 April 2023 with a public announcement shortly after that. Mr Insley raised serious concerns about this first attempt at pre-engagement, which were acknowledged by the Minister and the Minister agreed not to take the discussion document to Cabinet that week.

[22] The draft pleads that between 29 March 2023 and 17 May 2023 there was further failure by the Minister and his officials to provide material pre-engagement with Mr Insley and Te Taumata, including that Mr Insley understood that Te Taumata would have six weeks from the lifting of the NDAs to provide meaningful

pre-engagement comments until the Minister wrote to him on 17 May 2023 advising that Te Taumata had until 18 May 2023 to provide feedback.

[23] The draft says that Mr Insley has been advised that, following the public announcements, the Minister intends to consult for an eight week period on the discussion document.[4]

First ground of review

[24] The first ground of review pleaded in the draft statement of claim is failure to satisfy the requirements of s 160 of the CCRA. In essence, the claim is that, having initiated a review of the ETS, s 160(5) requires the Minister to undertake a number of specified steps and that it was inconsistent with those requirements:

(a) for the Minister's officials to prepare the discussion document without input from any Māori groups, as the scheme of the CCRA directs that there is substantive Māori engagement; and

(b) for the Minister merely to direct officials to "investigate establishing a reference group" and, "if a reference group is formed, it will be important to include Māori representatives, particularly those with expertise in climate policy and the forestry sector", when his statutory obligations require that he must consult representatives of iwi and Māori who appear to the Minister to be likely to have an interest in the review.

[25] Mr Insley claims it is a substantive breach of the Minister's obligations under s 160(5)(b) to fail to meaningfully engage with Mr Insley and Te Taumata as the Minister had acknowledged that they had a qualifying interest, and the Minister was already engaging with them on closely related issues. Further, insofar as the Minister set out a process in the September 2022 Cabinet Paper, his instructions to officials were not carried out.

---

4 This is based on a letter from the Minister of Forestry, the Hon Peeni Henare, dated 19 May 2023.

Second ground of review

[26] The second ground of review is procedural impropriety. The claim is that the Minister has procedural fairness obligations to those affected by the ETS review, which include providing adequate notice of the review and an opportunity to be heard as part of it. The claim is that obligations are heightened in respect of tangata whenua (including Mr Insley and Te Taumata) as a consequence of duties owed by the Crown under te Tiriti and encompass a requirement to undertake meaningful pre-engagement and co-design, meaning providing Mr Insley on behalf of Te Taumata adequate notice of the discussion document and an opportunity to be heard on it before it is released for public consultation. It is alleged that the Minister failed to give adequate notice to Mr Insley of the discussion document and an opportunity to be heard on it and that the Minister has therefore breached his procedural fairness obligations.

Third ground of review

[27] The third ground of review is legitimate expectation. The claim is that the Minister made repeated commitments to Mr Insley since June 2022 to the effect that any proposals affecting forestry in the ETS would be the subject of meaningful pre-engagement and co-design with Mr Insley and Te Taumata. The claim alleges that these commitments are consistent with, and often expressly referred to, as the Crown's obligations arising from the principles of te Tiriti. Mr Insley, on behalf of Te Taumata, reasonably relied on the commitments in proactively seeking to engage with the Minister on ETS reform, including in preparing an extensive report and analysis into transition forestry. The commitments gave rise to Mr Insley's legitimate expectation that meaningful pre-engagement and co-design would take place with Te Taumata prior to the Government making any public announcement in relation to its proposals under the ETS review. The claim alleges that the ETS review has been conducted without meaningful pre-engagement with or co-design and therefore the legitimate expectation has been breached.

Fourth ground of review

[28] The fourth ground of review is breach of the principles of te Tiriti. This claim is that the Minister's responsibility to give effect to the principles of te Tiriti, including in s 3A of the CCRA, includes an obligation to deal with Mr Insley on behalf of Te Taumata in good faith. The good faith obligation includes a duty to make informed decisions on matters affecting the interests of Māori, which requires the Crown to undertake meaningful consultation with Māori on major issues. The claim pleads that the ETS review, and in particular the content and form of the discussion document, is a major issue. It claims that the Minister therefore breached the principles of te Tiriti in failing to undertake meaningful consultation with Mr Insley on behalf of Te Taumata in relation to the discussion document prior to it being released for public consultation.

Fifth ground of review

[29] The fifth ground of review is selective engagement with Māori groups. The claim is that the Minister has undertaken selective engagement with Māori groups in breach of his obligations of good faith. This ground of review is to be developed and the pleading amended when Mr Insley has been able to review material provided by the Crown.

Relief

[30] The draft statement of claim seeks substantive relief in the form of:

(a) a declaration that the Minister's failure to undertake meaningful pre-engagement and co-design with Mr Insley on the discussion document was unlawful / procedurally improper;

(b) an order requiring the Minister to undertake meaningful pre-engagement and co-design on the contents of the discussion document with Mr Insley on behalf of Te Taumata over a period of at least six weeks;

(c) an order preventing the Minister from publicly releasing the discussion document until that pre-engagement and co-design has occurred.

CCRA

[31] I now set out the relevant provisions of the CCRA. Its purpose is stated in s 3:

> **3 Purpose**
>
> (1) The purpose of this Act is to—
>
> (aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that—
>
> (i) contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and
>
> (ii) allow New Zealand to prepare for, and adapt to, the effects of climate change:
>
> (a) enable New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement, including (but not limited to)—
>
> (i) its obligation under Article 3.1 of the Protocol to retire Kyoto units equal to the number of tonnes of carbon dioxide equivalent of human-induced greenhouse gases emitted from the sources listed in Annex A of the Protocol in New Zealand in the first commitment period starting on 1 January 2008 and ending on 31 December 2012; and
>
> (ii) its obligation to report to the Conference of the Parties via the Secretariat under Article 12 of the Convention, Article 7 of the Protocol, and Article 13 of the Paris Agreement:
>
> (b) provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—
>
> (i) assisting New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement; and
>
> (ii) assisting New Zealand to meet its 2050 target and emissions budgets:
>
> (c) provide for the imposition, operation, and administration of a levy on specified synthetic greenhouse gases contained in motor vehicles and also another levy on other goods to support and encourage global efforts to reduce the emission of those gases by—

(i) assisting New Zealand to meet its international obligations under the Convention, the Protocol, and the Paris Agreement; and

(ii) assisting New Zealand to meet its 2050 target and emissions budgets.

(2) A person who exercises a power or discretion, or carries out a duty, under this Act must exercise that power or discretion, or carry out that duty, in a manner that is consistent with the purpose of this Act.

[32] Section 3A relevantly provides:

3A Treaty of Waitangi (Te Tiriti o Waitangi)

In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi,—

…

(d) with respect to section 161 (which relates to the appointment and conduct of a review panel),—

(i) if the Minister initiates a review under section 160(1) or 269(1) and appoints an independent panel under section 160(3) or 269(3), the Minister must ensure that the review panel has at least 1 member who, in the Minister's opinion, has the appropriate knowledge, skill, and experience relating to the principles of the Treaty of Waitangi and tikanga Māori to conduct the review; and

(ii) the review panel must consult with the representatives of iwi and Māori that appear to the panel likely to have an interest in the review; and

(iii) the terms of reference for the review panel must incorporate reference to the principles of the Treaty of Waitangi.

[33] As Mr Chapman submitted, although s 3A(d) does not specifically apply, the Supreme Court's statement in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, concerning a similarly worded clause, is apposite:[5]

---

5 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [8].

In considering the effect of the Treaty of Waitangi clause in s 12 of the EEZ Act, all members of the Court agreed that a broad and generous construction of such Treaty clauses, which provide a greater degree of definition as to the way Treaty principles are to be given effect, was required. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.[6]

[34] Section 160 provides:

> **160 Review of operation of emissions trading scheme**
>
> (1) The Minister may, at any time, initiate a review of the operation and effectiveness of the emissions trading scheme.
>
> (2) A review may be undertaken by any method the Minister considers appropriate.
>
> (3) Without limiting the Minister's discretion under subsections (1) and (2), the Minister may appoint a review panel—
>
> (a) to conduct a review under subsection (1); and
>
> (b) to report in accordance with the terms of reference.
>
> (4) If the Minister appoints a panel, the Minister must—
>
> (a) specify the written terms of reference for the review; and
>
> (b) make the report of the panel publicly available; and
>
> (c) present a copy of the report to the House of Representatives.
>
> (5) If the Minister initiates a review but does not appoint a panel, the Minister must—
>
> (a) consult persons (or their representatives) who appear to the Minister likely to have an interest in the review; and
>
> (b) consult representatives of iwi and Māori who appear to the Minister to be likely to have an interest in the review; and
>
> (c) specify the written terms of reference for the review; and
>
> (d) establish a procedure that the Minister is satisfied is appropriate, fair in the circumstances, and in accordance with the terms of reference.

---

[6] At [150]-[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

Approach to interim orders in judicial review

[35] There is no dispute as to the applicable approach to interim orders in judicial review proceedings. Section 15 of the JRPA relevantly provides:

> **15 Interim Orders**
>
> (1) At any time before the final determination of an application, the court may, on the application of a party, make an interim order of the kind specified in subsection (2) if, in its opinion, it is necessary to do so to preserve the position of the applicant.
>
> (2) The interim orders referred to in subsection (1) are interim orders –
>
> (a) prohibiting a respondent from taking any further action that is, or would be, consequential on the exercise of the statutory power:
>
> …
>
> (3) However, if the Crown is a respondent, –
>
> (a) the court may not make an order against the Crown under subsection (2)(a) or (b); but
>
> (b) the court may, instead, make an interim order –
>
> (i) declaring that the Crown ought not to take any further action that is, or would be, consequential on the exercise of the statutory power:
>
> …
>
> (4) An order under subsection (2) or (3) may –
>
> (a) be made subject to such terms and conditions as the court thinks fit; and
>
> (b) be expressed to continue in force until the application is finally determined or until such other date, or the happening of such other event, as the court may specify.

[36] It is common ground that if the Court is satisfied that an interim order of the kind available is reasonably necessary to preserve the position of the applicant (the threshold question),[7] the Court has a wide discretion to consider all the circumstances

---

[7] As Mr Chapman noted, the threshold question can be further divided into two: whether the interim order is reasonably necessary, and whether it is of the kind available under s 15. However, nothing should turn on the approach.

of the case, including the apparent strengths or weaknesses of the applicant's claim for review, and all the repercussions, public and private, of granting interim relief.[8]

[37] As this Court has indicated in several cases,[9] the Court should avoid an overly formalistic approach to the threshold question. Interim relief can encompass orders placing the applicant in the position it would have been but for the illegality alleged.

Issues

[38] I therefore address the issues arising as follows:

(a) whether an interim order of the kind available is reasonably necessary to preserve Mr Insley's position pending final determination of his application for judicial review; and

(b) whether the circumstances of the case, including the apparent strengths or weaknesses of his claim, and all the repercussions, public and private, weigh in favour or against granting interim relief.

Necessity to preserve the position

[39] As a preliminary point, I note the order sought is amended from that sought in the filed application, acknowledging that the Court may not prohibit the Crown from taking action under s 15(2)(a) of the JRPA but may make an interim order declaring that the Crown ought not to take such action under s 15(3)(b)(i).

[40] Mr Chapman submitted the interim orders are necessary on the basis that the Minister has committed a series of procedural errors that illustrate a pattern of behaviour, and Mr Insley faces significant prejudice if interim orders are not made. He also submitted the orders sought are of a kind that may be made under s 15.

---

8 *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101; (2007) 18 PRNZ 754 at [3], citing *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.

9 *Greer v Chief Executive, Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [22]-[25]. See also *Christiansen v Director-General of Health* [2020] NZHC 887, [2020] 2 NZLR 566 at [58], *Parents of Courtney v Principal* [2021] NZHC 2075 at [26] and *Auckland Yacht and Boating Association Inc v Auckland Council* [2023] NZHC 1047 at [38].

[41] Mr Chapman referred to the observations of this Court in *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission*,[10] where Anderson J said that when concerns fundamental to concepts of rangatiratanga come before the Court, the position of applicants relative to the question of necessity for preservation must be viewed in an indigenously sensitive and not an overly technical way.[11] Anderson J went on to say that too many valid grievances of Māori have been perpetuated by systemic impatience.[12]

[42] Mr Ebersohn submitted that pre-engagement can only be preliminary. Here, there will be consultation on the discussion document and then a further round of consultation on the detailed design of proposals. Therefore, he submitted, Mr Insley has no position to preserve. Mr Ebersohn also submitted that the Minister's ability to make a public announcement is not constrained and, in terms of s 15 of the JRPA, is not "consequential on the exercise of the statutory power" in s 160 of the CCRA. Further, Mr Ebersohn submitted that the interim order sought in relation to a public announcement may even be contrary to the Minister's obligation in s 160(5)(a) to consult persons (or their representatives) who appear to the Minister likely to have an interest in the review.

[43] The Court may make an interim order declaring that the Crown ought not to take further action that is, or would be, consequential on the exercise of the statutory power, that is the statutory powers in issue under s 160 of the CCRA. I acknowledge Mr Ebersohn's argument that a public announcement by the Minister is not consequential on the exercise of the statutory power. (Indeed, Mr Chapman accepted that an order declaring that the Crown ought not to make any public announcement relating to the review of the ETS would be too broad and could be narrowed to focus on disclosure of the substantive proposals.)

[44] However, an overly formalistic approach to the threshold question should be avoided. The claim is essentially that the Minister must carry out meaningful pre-engagement with Mr Insley/Te Taumata before releasing the proposals in the

---

10 *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* HC Wellington CP 395/93, 31 March 1999.
11 At 10-11.
12 At 12.

discussion document for public consultation. If interim relief is not granted and the claim ultimately succeeds, Mr Insley will have lost the opportunity for meaningful pre-engagement (even though consultation is ongoing). In that sense, I accept for the purposes of the threshold question that he has a position to preserve and that, at least in part, the interim orders sought relate to further action that is, or would be, consequential on the exercise of the statutory power, that is the Minister's statutory powers under s 160 of the CCRA.

[45] Leaving aside at this stage the strength of the claim and the scope of any final relief, I also accept for the purposes of the threshold question that an interim order of the kind available (albeit less broad than sought) may be necessary to preserve Mr Insley's position. I consider it is more appropriate to consider whether an interim order is reasonably necessary and the issues of prejudice in the context of the discretionary factors.

Circumstances of the case relevant to discretion

[46] I deal with the discretionary factors under the headings of apparent strengths or weaknesses of the intended claim and the repercussions of granting interim relief.

Apparent strengths or weaknesses of the intended claim

[47] There is considerable overlap between the first to fourth grounds of judicial review.[13] I deal with them together. The proceeding is at a very early stage, with the statement of claim still in draft form. Furthermore, the urgency of the application for interim orders precluded a detailed focus on the merits. In any event, it is not the Court's role to make substantive factual determinations on an application for interim orders with affidavits. I limit my further observations accordingly.

[48] Mr Chapman submitted there is a good arguable case. He submitted that the Minister's commitments, particularly that Māori would see "all of the pieces of the jigsaw puzzle" was a commitment to pre-engagement before the discussion document was completed in respect of what the Government was planning in relation to forestry

---

[13] I say nothing more about the fifth ground of review (selective engagement with Māori groups) which remains to be developed.

ETS matters. He submitted this was a much wider workstream than the earlier proposal to exclude exotic forests from the permanent forestry category of the ETS.

[49] He submitted that despite these commitments, officials worked on the ETS review from September 2022 to March 2023 without Te Taumata's input (despite the Minister's instructions) and then the pre-engagement in March 2023 was deeply flawed and was not subsequently remedied. He submitted that the NDA did not permit Mr Insley to share the discussion document to get expert input, and that Mr Insley was not aware of the 18 May 2023 deadline for feedback until the Minister wrote to him on 17 May 2023.

[50] In terms of the timing of the review, Mr Chapman referred to the Cabinet decision minute of 27 September 2022 which identified two phases. The first phase would consider what balance of gross and net emissions reductions should be incentivised through the ETS and develop recommendations on a preferred balance of both gross emissions reductions and emissions removals required to meet the emissions budgets. The second phase would include proposals to amend the ETS to drive gross and net emissions reductions in line with the Government's preferred balance. Cabinet agreed to a report back to Cabinet in the first quarter of 2023 seeking agreement to a package of proposals to amend the ETS to drive gross and net emissions reductions in line with Cabinet's preferred balance. Mr Chapman submitted that is the decision Cabinet is being asked to make now prior to release of the discussion document, indicating the end of the first phase of the review.

[51] Mr Ebersohn noted that the ETS review follows the Climate Change Commission advice (of 2021). He accepted there were two workstreams but submitted they were interrelated. He submitted that the first phase of the review is ongoing until after public consultation.

[52] Mr Ebersohn also characterised the Crown's engagement with Te Taumata differently. A briefing paper to the Minister of Forestry exhibited to Ms Smith's affidavit explained that following the Cabinet decisions in September 2022 officials attempted to develop a technical working group to support further work to redesign the permanent forest category but Mr Insley stated that the group should only consist

of officials and Te Taumata's nominees. This was reflected in an earlier letter from Mr Insley of 14 September 2022. Te Taumata (and others) also raised concerns with the proposed terms of reference. The working group did not proceed. By December 2022, Mr Insley's solicitors were writing to Ministers stating that Te Taumata expected officials to engage with Te Taumata's own technical group in the creation of policies impacting Te Taumata and before any policies were publicly stated as being the position of the Ministry of Primary Industries and/or the Crown.

[53] Mr Ebersohn accepted the duty under the CCRA to consult meaningfully but submitted that officials needed an initial period to gather their thoughts internally and, as indicated, that pre-engagement can only be preliminary and consultation will be ongoing. Mr Ebersohn acknowledged that the Crown sought to pre-engage because of te Tiriti, and he accepted that the initial period for pre-engagement in late March 2023 was too short. However, he did not accept that there is an obligation to pre-engage and he submitted the Court should not put too much weight on the attempt at pre-engagement.

[54] Mr Ebersohn submitted that, having decided to have preliminary pre-engagement, the NDAs were to manage the risk of releasing proposals that had not been approved by Cabinet. Ms Smith's evidence is that NDAs were required given the market sensitivity of the information in the discussion document, but officials sought to identify and discuss any perceived obstacles. Mr Ebersohn submitted there were opportunities for pre-engagement, but Mr Insley/Te Taumata was holding out for a six week period after the NDAs were lifted and would not engage. Mr Ebersohn submitted the Crown did not agree to lift the NDAs.

[55] While there is a dispute as to whether the 18 May 2023 timeframe was communicated to Mr Insley before 17 May 2023, it seems there was no agreement that pre-engagement would be extended for six weeks from when the NDAs were lifted and thus no legitimate expectation to that effect. Mr Ebersohn also submitted there was no te Tiriti issue relating to the NDAs during pre-engagement.

[56] The relevant provisions of s 160 of the CCRA say nothing about pre-engagement as opposed to consultation. There is nothing explicit about phases of

consultation. In this case of an ETS review without a review panel, s 160(5) relevantly requires the Minister to consult representatives of iwi and Māori who appear to the Minister to be likely to have an interest in the review, and to establish a procedure that the Minister is satisfied is appropriate, fair in the circumstances, and in accordance with the terms of reference.[14] However, the September 2022 Cabinet decision minute noted that it will be critical to engage with iwi/Māori throughout the review process.

[57] Even if that Cabinet direction, or s 160 interpreted in light of the te Tiriti clause, requires pre-engagement before completion/release of the discussion document and consultation, it may be that Mr Insley/Te Taumata contributed to the lack of meaningful engagement by insisting on the lifting of the NDAs rather than extending NDAs to its experts. It may also be that a failure to pre-engage meaningfully could be remedied during the consultation. The discussion paper acknowledges that Māori have significant interests in the ETS review. It states that the Government is committed to embedding te Tiriti in the Crown's climate response and that it is critical to consider Māori aspirations for kaitiakitanga and rangatiratanga of whenua and taonga in the ETS review. Therefore, even if procedural errors are found, the substantive relief may not extend to the orders sought requiring the Minister to undertake meaningful pre-engagement and co-design on the contents of the discussion document with Mr Insley on behalf of Te Taumata over a period of at least six weeks and preventing the Minister from publicly releasing the discussion document until that has occurred.

[58] Overall, I consider that, as Mr Ebersohn submitted, the strengths and weaknesses of the intended claim are at best neutral.

Repercussions of granting interim relief

[59] In relation to prejudice and the need for interim orders, Mr Chapman relied on Mr Insley's evidence that he is very concerned that, if the Government's proposals regarding the ETS review are released to the public in any way, the interests of Te Taumata's members and Māori forestry landowners will be seriously impacted.

---

[14] The terms of reference proposed a reference group including Iwi/Māori which appears to be the proposed technical working group referred to above.

Mr Chapman submitted these issues are hugely important and the market will react to any public announcement immediately as evidenced by the fact that the Government is so intent on keeping the NDAs in place. Any announcement outlining the proposals to reform the ETS will damage Māori forestry landowners' economic well-being. Specifically, the proposals will create significant uncertainty in the carbon market, causing a fluctuation in price which will impact on revenues for Māori landowners and negatively impact on possible investors and funders. In addition to the impact on existing plantations and investments, many Māori are presently undertaking further investments in marginal land and permanent transition forestry. The funding for those investments, involving multi-million dollar planting programmes, about to go into the ground, will be impacted by the uncertainty these policies will create. External investment in marginal Māori land is hard won and may be difficult to secure in the future. Mr Chapman acknowledged there is no expert evidence as to the market sensitivity of the contents of the discussion document but submitted that the NDAs imply there will be market movement on release.

[60] Mr Ebersohn submitted there is no actual prejudice to Mr Insley/Te Taumata as pre-engagement is only part of the consultation process.

[61] The Court is not in a position to assess the likely market impact of release of the discussion document. While it indicates policy options, decisions following the consultation will be a matter for the next government. Even if there is a short term negative impact as a result of lack of pre-engagement such that the Minister or officials are not sufficiently informed as alleged, that impact may be reduced or even reversed following meaningful consultation in relation to the same issues. There may be an interim effect but it is speculative to suggest that consultation would not lead to the Minister or officials being sufficiently informed and willing to change their proposals, thus leading to informed decisions, to which the market will respond.

[62] Mr Chapman submitted there would be no prejudice to the Government in delaying the announcement since the Minister's letter of 17 May 2023 indicated that the Government does not anticipate seeking policy decisions before the election. However, the issue is broader than one of prejudice to the Government. The dispute about pre-engagement is delaying wider consultation with others who have an interest

in the ETS review and is ultimately delaying the review's completion. The importance of getting pre-engagement right has to be balanced against the importance of wider consultation and ultimately of policy progress to a decision.

[63] Mr Chapman submitted that it is in the broader interests of fairness and the public interest that interim relief is granted. He submitted it is contrary to the public interest that the Minister be permitted to breach legitimate expectations, the requirements of procedural fairness and the principles of te Tiriti.

[64] Mr Ebersohn submitted that it is not in the public interest to impose interim orders. He acknowledged that the principle of comity/non-interference with Parliamentary proceedings had limited relevance here and that the Courts may intervene where a procedure is set out in statute. The review is governed by statutory powers under s 160 of the CCRA and, as Mr Chapman submitted, focuses on the Minister's actions as a member of the Executive performing a statutory power. The ETS review's potential outcomes are not limited to legislative amendment. There are regulation making and other powers.[15] As the majority of the Supreme Court said in *Ngāti Whātua Ōrākei Trust v Attorney General*:[16]

> It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights.

[65] Nevertheless, Mr Ebersohn submitted that the policy process would grind to a halt if interim orders were made in cases such as this where proposals are controversial and involve vested interests. I consider the Court should exercise restraint where there is a clear right to consultation but the claimed right to additional pre-engagement would have wider ramifications.

[66] For these reasons and stepping back, I consider the strengths and weaknesses of the intended claim and all the repercussions, public and private, weigh against granting interim orders.

---

15 For example, under ss 30GB, 30W, 60A and 196F of the CCRA.

16 *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46].

Result

[67] The application for interim orders is dismissed.

Gault J