

# IAN GORDON

BARRISTER

5 July 2021

Alex Erceg  
Senior advisor  
Fast track Consents  
EPA

**By email: [alexander.erceg@epa.govt.nz](mailto:alexander.erceg@epa.govt.nz)**

Dear Alex

**RE Papakura to Pukekōhe – Application by Kiwirail Holdings Ltd**

## Introduction

1. You have asked me to address the extent of the Panel's ability to determine the process by which it addresses further consent applications made under the COVID-19 Recovery (Fast-Track Consenting) Act 2020 (**FTA**).
2. Specifically, the question is whether the Panel is able to consider a further consent application made by the consent applicant, together with the original consent application, after the original consent application was lodged.
3. The question arises in the circumstances that:
  - 3.1. Kiwirail Holdings Ltd made a consent application for a listed project (LP-04 in Schedule 2 to the FTA);
  - 3.2. the Council identified further consents were necessary when it reviewed the consent and provided comments to the Panel;
  - 3.3. Kiwirail has since applied for the further consents and provided an updated assessment of environmental effects that show the effects are no more than minor;
  - 3.4. the Panel has sought and received comments on the further consents, none of which raise substantive concerns; and
  - 3.5. Kiwirail wishes to have the further consents considered alongside the original application and within the same timeframes.
4. I have reviewed the submissions on behalf of Kiwirail. While I do not agree with all aspects of the arguments offered in support, there are additional aspects of the FTA that are consistent with Kiwirail's approach. When viewed in the round, I consider the conclusions reached by Kiwirail are capable of support.

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## Analysis

5. A panel may accept and assess a further consent application together with an original consent application as a result of its power to regulate its own procedure, and its duty to take all practicable steps to use efficient processes in exercising its powers. Reading the panel's regulatory power in that way is consistent with the overall purposes of the FTA, as well as specific procedural powers expressly granted to the panel, such as the ability to issue decisions in stages.

6. The panel has a broadly expressed power to regulate its own procedure in cl 10(1) of Schedule 5:<sup>1</sup>

A panel must regulate its own procedure as it thinks appropriate, without procedural formality, and in a manner that best promotes the just and timely determination of an application.

7. It would be inconsistent with cl 10(1) to impose a requirement to make a further application independent of the original application. It imposes a procedural formality that does not best promote a just and timely determination, particularly given the relatively minor and precautionary nature of these applications.

8. Clause 10(1) is subject to any other provision in the FTA relevant to the procedure of a panel.<sup>2</sup> As Kiwirail observes, there is no provision expressly denying the panel the ability to combine a further application with an existing one. However, when exercising powers, s 10 imposes a duty to "take all practicable steps" to use efficient processes proportionate to the powers being exercised:

(1) Every person performing functions and exercising powers under this Act must take all practicable steps to use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions, duties, or powers being performed or exercised.

9. Section 10 further supports Kiwirail's position - not only does the panel have the ability to determine the further applications in this way, the s 10 duty requires it to take all practicable steps to do so.

10. This approach is consistent with the purpose of the FTA to balance two competing concerns, the first of which is economic and social recovery and investment. Section 4 relevantly provides the purpose in this respect is to:

... urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand ...

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<sup>1</sup> Schedule 5, cl 10(1).

<sup>2</sup> Schedule 5, cl 10(2).

11. The second concern is sustainable management of natural and physical resources. The Act seeks to address this by directing that the purpose is also to address the first concern "while continuing to promote" sustainable management.
12. Kiwirail's approach aligns with the first concern by facilitating the swift determination of an application for a project that is already identified as entitled to a fast-track process. At the same time, Kiwirail's approach does not conflict with the second concern. The matters raised by the further applications are able to be addressed via continuing the process as if the further consent were part of the original application for the project. Indeed, some, if not all of the activities for which additional consents are now sought were described in the original application. Therefore, the procedural tools available in the FTA can continue to be used by the panel to promote sustainable management in this instance.
13. Kiwirail considers that the express power of the Minister in cl 22 of Schedule 6 to request a delay for a further application to be lodged supports its view that Parliament contemplated further applications may be required during the fast-track consent process. It infers that the lack of any provision preventing further applications in other circumstances means the relevant procedural powers should be read in. This is not persuasive. It is equally arguable that the fact Parliament contemplated further applications but did not provide the panel or the applicant with any similar procedural rights or powers, suggests the opposite of Kiwirail's inference.
14. The better position is that Parliament has failed to turn its mind to the matter, and the catch-all procedural provisions provide a better framework and indication of Parliament's intention when matters such as this arise.
15. I note that cl 22(9) provides the mandatory requirement that, if a further application is made following a Minister's request for delay, the panel must recommence consideration of the original application while observing the new timeframes that apply to the further application. Kiwirail considers this ought not to apply, because the further applications at issue are minor and precautionary in nature.
16. This is supported by the select committee report on the Bill. The committee inserted cl 22(9) to the Bill to ensure panels were not considering multiple applications for the same project when those applications were at different stages of the process. Clause 22(9) provides the mechanism by which a further application can "catch up" to the original application and they can both be determined together.<sup>3</sup> Here that mischief does not arise. The further applications are for minor aspects of the work, some of which are already addressed in the AEE, and others for which consent is sought on a

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<sup>3</sup> COVID-19 Recovery (Fast-track Consenting) Bill 2020 (277-2) (select committee report) at 13.

precautionary basis. There is no need to delay the overall process to bring the further applications up to the original application timeframe—they are already there.

17. A more persuasive analogy is the power of the panel to issue decisions in stages, which points to a less technical definition of a “consent application”, and an intended flexible approach to considering and determining applications where that would assist in the FTA’s purpose.
18. Clause 39(1) of Schedule 6 provides that, on considering “a consent application ... that includes multiple activities”, the panel may “issue a series of decisions in stages to enable activities to be started while the panel considers and determines later stages of the project that is the subject of the same application or notice”. This provision necessarily contemplates flexibility in the face of multiple consent applications for one project, covering a number of different activities for which decisions can be made independently of each other to assist the timely determination of applications, to urgently promote employment, and to support the certainty of ongoing investment.
19. Let me know if you or the Panel has any queries or concerns arising out of this advice.

Kind regards,

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ian Gordon', written in a cursive style.

**Ian Gordon**

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