IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA364/2019
[2021] NZCA 44

BETWEEN	MINISTER FOR LAND INFORMATION Appellant
AND	SHANE DROMGOOL AND DOROTHY DROMGOOL First Respondents
	ALAN DARVALL POULTON AND JENNIFER POULTON Second Respondents
	NEWMAN FARMS LIMITED Third Respondents

Hearing:	7 and 8 July 2020
Court:	Cooper, Clifford and Goddard JJ
Counsel:	A N Isac QC, M C McCarthy and E M Jamieson for Appellant D M Salmon and A W McDonald for Respondents
Judgment:	5 March 2021 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the High Court is set aside.

C The report of the Environment Court is confirmed.

D The matter is referred back to the Environment Court to finalise the terms of the easements.

E There is no order as to costs.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] This appeal raises an important issue concerning the role and obligations of the Minister for Land Information (the Minister) under s 186(1) of the Resource Management Act 1991 (the RMA).[1]

[2] Section 186(1) of the RMA provides that a network utility operator that is a requiring authority may apply to the Minister to have land required for a project or work acquired or taken under pt 2 of the Public Works Act 1981 (the PWA) "as if the project or work were a government work within the meaning of that Act". The provision then states that the land may be taken or acquired "if the Minister … agrees".

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[1] Section 186 of the Resource Management Act 1991 refers to the Minister of Lands. Although the statute has not been amended, there is now no Minister of Lands and the powers are exercisable by the Minister for Land Information.

[3] Under pt 2 of the PWA land may be acquired by agreement, or compulsorily. In either case, there must be a period of negotiation in good faith in an attempt to reach an agreement for the acquisition of the land.[2] If agreement cannot be reached, the Minister may proceed to take the land under the PWA.[3]

[4] Every person having any estate or interest in the land may object to the Environment Court,[4] which considers the objection in accordance with s 24 of the PWA. Section 24(7) states what the Environment Court is required to do. It must ascertain the Minister's objectives; enquire into the adequacy of the consideration given to alternative sites, routes or other methods of achieving those objectives; and decide whether it would be "fair, sound, and reasonably necessary" for achieving the objectives of the Minister for the land of the objector to be taken.[5] It must then submit a written report to the Minister setting out its findings.[6] The Environment Court's report and findings are binding on the Minister.[7]

[5] In this case, Top Energy Ltd (TEL), a requiring authority, sought to acquire easements to enable construction of an electricity transmission line between Kaikohe and Kaitaia. It made requests to the Minister under s 186(1) of the RMA, in relation to land along the route. The Minister gave her agreement. There were objections to the Environment Court from affected landowners.

[6] In its report on the objections the Environment Court held that the Minister's response to a request under s 186(1) was "fully discretionary".[8] It rejected an argument advanced by counsel for the objectors that the Minister was obliged to consider the matters that would be considered subsequently by the Environment Court in dealing with, and reporting on, an objection under s 24 of the PWA.[9] It found that adequate consideration had been given to alternative sites, routes and methods to

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2 Public Works Act 1981, s 18(1)(d).
3 Section 18(2).
4 Section 23(3).
5 Section 24(7)(a), (b) and (d).
6 Section 24(7)(e) and (f).
7 Section 24(10).
8 *Dromgool v Minister for Land Information* [2018] NZEnvC108 [Environment Court report] at [40].
9 At [44].

achieve the objectives of the Minister and TEL.[10] The Court concluded that the taking of the land would be fair, sound and reasonably necessary for achieving those objectives, and furnished a written report to the Minister accordingly.[11]

[7] The objectors appealed the Environment Court's report to the High Court.[12] Courtney J allowed the appeal and set aside the Environment Court's report.[13] This Court then granted leave for the present appeal,[14] stating that the approved question was whether the High Court erred in law in allowing the appeal and setting aside the Environment Court's report.[15] In granting leave, this Court also said:

> C Counsel should focus their submissions on:
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> (a) the role and obligations of the Minister under s 186 of the Resource Management Act 1991; and
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> (b) whether the inquiry into the adequacy of consideration of alternatives contemplated by s 24(7) of the Public Works Act 1981 is an inquiry into the adequacy of consideration of alternatives by the requiring authority, by the Minister, or by both.

[8] For the reasons we address, we allow the Minister's appeal and confirm the Environment Court's report. We hold that where the Minister's agreement is sought under s 186 of the RMA, the Minister needs to be satisfied that the project of the network utility operator is capable of achieving a favourable report from the Environment Court under s 24(7) of the PWA. But the Minister need not personally assess the merits of, and choose between, alternative means of achieving the objectives of the network utility operator. We further hold that the Minister may withhold consent if the proposal is contrary to the purpose and principles of the RMA, or is undesirable for other reasons that are consistent with the statutory framework. We consider that where the Minister has agreed to the taking under s 186(1), it is likely that the main

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10 At [129].

11 At [165] and [169].

12 Section 299 of the Resource Management Act authorises an appeal against such a report to the High Court on a question of law.

13 *Minister for Land Information v Dromgool* [2019] NZHC 1563 [High Court judgment].

14 Section 308 of the Resource Management Act provides for further appeals to the Court of Appeal. Section 308(1) provides that sub-pt 8 of pt 6 of the Criminal Procedure Act 2011 applies as if the decision of the High Court under s 299 of the Resource Management Act had been made under s 300 of the Criminal Procedure Act. This means a further appeal to the Court of Appeal is by leave, under s 303(1) of the Criminal Procedure Act.

15 *Minister for Land Information v Dromgool* [2019] NZCA 508.

consideration of alternatives will have been by the network utility operator (which can be expected to have the institutional knowledge and expertise required for that purpose) and it is legitimate for the Environment Court to focus its enquiry accordingly.

Relevant facts

[9] TEL owns and operates a 110kV transmission line which runs between Kaikohe and Kaitaia. The Environment Court accepted evidence from TEL's Chief Executive Officer, establishing that:[16]

> (a) the line requires maintenance as it is around 60 years old, and requires replacement within the foreseeable future (around 2030);
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> (b) maintenance works on poles and repairs of breakages have been an ongoing and significant requirement since the takeover. In particular, around 6km of the line runs through the Mangamuku Gorge and is vulnerable to major events;
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> (c) between 2013 and 2017 there were some nine outages of 47.7 hours to substantial parts of the network. Measured in terms of the economic impact of those outages, the cost to the Far North economy is estimated to be $13,368,956;
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> (d) the Juken timber mill in Kaitaia is a major employer, and particularly susceptible to outages. An unplanned outage can mean a cost to the production line through a restart of some $150,000 each time[;]
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> (e) the historic pattern of demand has changed from the urban centres of Kaikohe and Kaitaia, with increasing population on the eastern seaboard area (Kerikeri Peninsula and the Bay of Islands);
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> (f) it was considered that an alternative route to the eastern seaboard would increase supply through the 11kV local network lines, and permit some upgrading to 33kV (for example in Kaeo and Wiroa). Examples were given by Mr Shaw, including Mt Pokaka having to supply their own power for a timber mill employing 100 people, and an 800 unit accommodation in Karikari Peninsula having no secure supply of power;
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> (g) the existing GXP 110kW single circuit was on a route involving the Mangaweka Gorge, and is susceptible to failure through natural events. Significant resilience would be achieved by creating a second circuit to Kaitaia.

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16 Environment Court report, above n 8, at [7].

[10] TEL instructed Boffa Miskell, an environmental planning and design consultancy, to investigate a potential new route to serve the eastern side of the region by means of a proposed "ring circuit", incorporating the substations at Kaikohe and Kaitaia which are used for the existing line. The infrastructure would be upgraded, and a second line installed closer to the new areas of demand. As part of the overall project, TEL investigated a potential route linking a new substation in Wiroa near Kerikeri to a substation at Pamapuria near Kaitaia. That proposed route would affect about 96 properties, over most of which TEL was able to secure easements. The objections heard by the Environment Court related to a route option for an approximately 7-km stretch, known as the "Mangakaretu" section which would run between Wiroa and Kaeo, in respect of which agreement could not be reached.

[11] Boffa Miskell's initial evaluation identified a route passing over land owned by the Office of Treaty Settlements and land-banked for the purpose of claims for redress under the Treaty of Waitangi (the OTS land). In addition to crossing the OTS land, this route (the OTS route) ran through rural land referred to by the Environment Court as the Taylor property, the Poulton property and "Greenacres".[17]

[12] Between 2012 and 2014, TEL pursued the OTS route as its preferred route. It entered into an agreement to grant easements with the owners of the Poulton and Greenacres properties, but could not secure agreement from the owners of the Taylor property or the Office of Treaty Settlements. By October 2014 it was clear that agreement from those parties would not be forthcoming.

[13] Between March and October 2014 TEL investigated alternative routes, which included three that were described by the Environment Court as follows:[18]

> (a) the **FGT/Sutcliffe Route**, slightly to the west of the original route and travelling through the length of the FGT and Sutcliffe properties, relying on the AGE with Poulton and the agreement of Greenacres eventually obtained. This route, of course, still involved crossing the Taylor property, who had already indicated they would not consent, and also further crossing of the FGT Farms Limited, Sutcliffe and Cornelius properties;[19]

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17 At [12].
18 At [14].
19 "AGE" in this passage stands for an agreement to grant an easement.

(b) … the **Objection Route**, travelling through a different portion of the Poulton farm (for which there was no AGE), Newman Farms, Dromgool (the Objectors), Sutcliffe, Kearney and Cornelius properties. This utilised a section of public road between Newman Farms and the Jones property for around 1.5km. … ; and

(c) … a route to the far west (**Far Western Route**), skirting the North Star Dairies Ltd land (on Crown land) and then utilising public road to travel from the west to join up at the Greenacres property. It appears that route was discounted not only for length but impact very early, and no party … suggested that this was a reasonable alternative.

[14] Various alignments between the three routes just described were also examined, and discussions continued with a number of landowners in the area into 2016. In the event, an agreement to grant an easement was reached with respect to the Sutcliffe property along what the Environment Court called the Objection Route, and the FGT/Sutcliffe Route was no longer being pursued.

[15] It was not possible to reach agreement with the present respondents, and in May 2016 TEL applied to the Minister under s 186(1) of the RMA to have easements in respect of those properties acquired or taken. The Minister granted those applications. The landowners objected to the taking of the easements, resulting in a hearing before the Environment Court.[20]

The Environment Court's report

[16] The Environment Court proceeded on the basis that s 186 of the RMA did not contain an explicit requirement that the Minister take into account any particular matters.[21] Rather, the Minister's decision was "fully discretionary".[22] Any failures in the consideration of alternatives would be relevant to the report and findings of the Environment Court under s 24(7) of the PWA, but not at the stage of ministerial agreement under s 186 of the RMA.[23] In reaching that conclusion, the Environment Court referred to and was guided by the decision of the Supreme Court in *Seaton v Minister for Land Information*.[24] The Environment Court held:

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20 Public Works Act, s 24.
21 Environment Court report, above n 8, at [37].
22 At [40].
23 At [43].
24 At [45]–[53], citing *Seaton v Minister for Land Information* [2013] NZSC 42, [2013] 3 NZLR 157.

> [53] Notwithstanding the repeated submissions of Mr Salmon as to the necessity for the Minister to comply with s 24(7) when a decision under s 186 is made, we can find no reference in this or any other case to such a requirement. Mr Salmon's own submissions … noted that references to the Minister in s 186 and s 24(7) (a) and (d) must be read as reference to [TEL], relying on *Seaton,* paragraph [83]. We agree. Thus, it is difficult to read into s 186 a requirement that the Minister, at the time they agree to proceed with Part 2 of the Public Works Act, has an obligation to ensure that the taking complies with s 24(7) of the Act.

[17] The Environment Court concluded that there had been "extensive consideration of alternatives by both Boffa Miskell and TEL".[25] While TEL would have preferred the OTS route, the refusal of the Minister for Treaty of Waitangi Negotiations to provide an easement over the OTS land meant that route could not proceed because of the absence of power to compulsorily acquire Crown land.[26]

[18] After discussing the various alternatives considered, the Environment Court said:

> [125] We are satisfied that, at the time of the Minister's agreement under s 186, three takes were required on the Objection route and three takes (Taylor, FGT and Sutcliffe) would have been involved in the FGT/Sutcliffe route.
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> [126] We are in no doubt that consideration had been given by TEL to the FGT/Sutcliffe route, and that this is demonstrated not only by the Sutcliffe's agreement to an alternative route but by a consideration of the impact [of] the other route upon the Sutcliffe and FGT properties. It is likely that the impact upon the Taylor properties was considered by TEL to be acceptable, but concerns had been identified as to the impact on the FGT and Sutcliffe properties.
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> [127] We are satisfied that the Western Deviation of the [Mangakaretu] Alignment was developed in an iterative process, including consultation with landowners. It is not for this Court to reach a conclusion as to which is the best route alternative. We are satisfied that alternatives have been considered on a reasonable basis, and that the choice of route is reasonable in the Wednesbury sense. Our finding is that there has been an adequate consideration of sites and routes to achieve the objectives.

The appeal to the High Court

[19] On appeal to the High Court, the objectors alleged the Environment Court had made five errors of law.[27] One alleged error focussed on the Environment Court's

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25 At [109].

26 At [109]. The Minister for Treaty of Waitangi Negotiations is referred to as the "Minister of Treaty Settlements" in the Environment Court report and the High Court judgment.

27 High Court judgment, above n 13, at [2].

conclusion that the Minister had an unfettered discretion in determining TEL's applications under s 186 of the RMA, and was not required to consider any specific factors including those identified in s 24(7)(b) and (d) of the PWA. Those provisions refer respectively to the consideration given to alternative sites, routes or methods of achieving the objectives of the Minister or local authority and whether the proposed takings were "fair, sound, and reasonably necessary".

[20] The Judge accepted the objectors' argument that the s 186 discretion is not unfettered. As she pointed out, a statutory power is subject to limits, even if conferred in unqualified terms, and Parliament must be taken to have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the legislation.[28] That raised the question of what the Minister was required to consider, and the significance of TEL's knowledge. The Judge saw it as significant that s 186 of the RMA is not the source of the Minister's power to take or acquire land.[29] That power is in s 16 of the PWA, and s 186 of the RMA merely allows a network utility operator to request the exercise of the power. The Judge considered that this meant it was necessary for the Minister to consider any relevant matters. She held:

> [47] It follows that it must be the Minister alone who has the obligation to consider any relevant factors. The exercise of the statutory power of compulsory acquisition process involved a recognised decision-making process beginning with a formal application by the requiring authority under s 186 and the provision of the usual briefing material from Ministry officials. The statutory power and the decision-making process are the antithesis of an agent acting for a private entity. Such an approach could, as Mr Salmon pointed out, result in deficiencies and inaccuracies being attributed to the Minister, with no apparent recourse by those affected. I therefore do not accept that the Minister acts as TEL's agent in the true sense so that the Minister is impressed with TEL's knowledge for the purposes of making a decision to take land under the PWA.

[21] The Judge did not consider that the Minister was required to consider all the factors in s 24(7).[30] But she held that it was "implicit and obvious from s 24(7)(b) that the Minister is required to consider alternative routes and methods".[31] It followed that the Environment Court had erred in concluding that there was no obligation on the

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28 At [42], referring to *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].
29 At [46].
30 At [48]. See also [53].
31 At [48].

Minister to consider the relevant factors in s 24(7)(b) in making the decision to compulsorily acquire easements over the subject land.[32]

[22] A second alleged error challenged the Environment Court's decision that any defects in the acquisition process could be cured at any point up to the date of the Environment Court hearing. This alleged error turned on the fact that the Environment Court found that the Minister had not considered alternative routes, and that in fact "no alternatives were ever before the Minister".[33] This was because the s 186 applications were dealt with by staff at Land Information New Zealand (LINZ) who relied on the evaluations undertaken by TEL, and the briefing papers provided to the Minister contained no details of alternative sites.

[23] The Judge considered the Environment Court was entitled to take into account information that became available following the making of the s 186 decision.[34] However, the Judge held that in finding that there had been adequate consideration of alternatives, the Environment Court had wrongly relied on the consideration given to alternatives by TEL. This was wrong because the consideration given to alternatives by TEL was not relevant: the Environment Court was required to examine what consideration had been given to alternatives by the Minister.[35]

[24] In respect of these two grounds of appeal the Judge concluded:

> [64] The Environment Court erred in holding that the Minister's discretion was unfettered. It should have approached the question of consideration of alternatives under s 24(7)(b) on the basis that this was a factor (among others) that the Minister was required to consider.
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> [65] In examining the adequacy of the Minister's consideration of alternative sites, the Environment Court found that there was no information of alternative routes before the Minister. As TEL's knowledge cannot be attributed to the Minister, it is clear that the Minister's consideration of any alternatives was inadequate. It follows that the Court's conclusion that, notwithstanding the lack of any consideration of alternatives by the Minister, there had been adequate consideration was an error. For the same reason, the Environment Court's iterative approach proceeded on the wrong premise that there had been adequate consideration of alternatives.

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32 At [53].
33 Environment Court report, above n 8, at [42].
34 High Court judgment, above n 13, at [63].
35 At [63].

[25] To that extent, the appeal succeeded.[36] The Judge rejected the other grounds of appeal. One of those grounds alleged that TEL's route selection had been based on improper and irrelevant considerations, and that TEL had withheld material information from the Minister. It was claimed that the Environment Court had erred in treating the Minister's decision as valid when it was defective for these reasons. The Judge considered that this ground of appeal did not raise an appealable question of law. She considered the objectors were effectively trying to review the validity of the Minister's decision rather than advancing a relevant error of law in the Environment Court's decision.[37]

[26] A further ground of appeal alleged that the Environment Court had erred in failing to consider that, as a matter of law, the Crown could have granted easements over the OTS land, thereby avoiding the need to acquire private land. There was another related complaint, that the Environment Court had not taken into account the fact TEL failed to challenge the Crown's decision not to grant an easement over the OTS land.

[27] The Judge considered the Environment Court's approach was correct. In the absence of a challenge by the objectors to the exercise of the discretion not to make the OTS land available for construction of the lines, the Environment Court had been entitled to proceed on the basis that the decision of the Minister for Treaty of Waitangi Negotiations not to grant consent was a valid one.[38] Further, the Judge considered the Crown was correct in its contention that a requiring authority need not exhaust legal pathways in respect of each alternative prior to focussing on another route.[39] The question of whether the OTS route was objectively better than the route in fact chosen was also a question of fact and not a question of law.[40]

[28] The final ground of appeal concerned the failure of the Minister to provide sufficient reasons for the taking of the easements over the objectors' land. This was rejected by the Judge on the basis that errors in the Minister's own decision-making

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36 At [66].
37 At [68].
38 At [73].
39 At [74].
40 At [75].

were properly within the ambit of judicial review, not an appeal from the Environment Court.[41] Accordingly, that ground of appeal was also rejected.

The relevant statutory provisions

[29] Before dealing with the arguments on appeal to this Court, it will be helpful to summarise the relevant statutory provisions. The most relevant for present purposes are s 186 of the RMA and s 24 of the PWA. However, the resolution of the issues raised by the appeal requires those provisions to be read together, and in each case, having due regard to the role that each provision plays in the respective statutory schemes.

The RMA

[30] We begin with the RMA. Part 8 of that Act provides for designations and heritage orders. Designations are defined as provisions made in district plans to give effect to a requirement made by a requiring authority under s 168, s 168A or cl 4 of sch 1.[42] Network utility operators may be approved as requiring authorities,[43] and are generally companies or public authorities who undertake works of public utilities. The statute lists various kinds of utility, as well as allowing for regulations to define utility operations additional to those set out in the Act.[44]

[31] A notice of requirement may be given to a territorial authority under s 168(1) for a public work, or in respect of any land, water, subsoil or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work. For similar purposes, a territorial authority may issue a notice of requirement for a public work within its own district for which it has financial responsibility under s 168A. In each case, the notice of requirement is for a designation in a district plan. Designations inserted under the power given by cl 4 of sch 1 are in relation to designations sought to be included in a new district plan or review of a district plan

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41 At [76].

42 Resource Management Act, s 166, definition of "designation".

43 Section 167.

44 Section 166, definition of "network utility operator". In the present case, TEL was a network utility operator because of its status as an "electricity operator" or "electricity distributor" as defined in s 2 of the Electricity Act 1992 for the purpose of line function services as defined in that section.

under s 79. By contrast, ss 168(1) and 168A contain powers able to be exercised at any time.

[32] Where what is proposed is not otherwise allowed by a district plan, a designation will confer the necessary authority under the RMA for the work to proceed. That is because s 176(1)(a) provides that s 9(3), which prohibits the use of land in a manner that contravenes a district rule, does not apply to a public work undertaken pursuant to a designation. Section 176(1)(b) further provides that no person may, without the prior written consent of the requiring authority, do anything in relation to land that is subject to a designation that would prevent or hinder the public work.

[33] A designation is necessary only if a district plan does not provide that the proposed public work may be carried out without a resource consent. In the present case, for example, the relevant rural environment zone of the operative Far North District Plan provided for "above ground utility services for supply of electricity including lines, structures, and support structures for the transformation, transmission or distribution of electricity" as permitted activities. It appears from the Environment Court's report that TEL's project may require resource consent in respect of some parts of the line. However, the Environment Court recorded that TEL was evidently confident of obtaining any necessary consent and had not served a notice of requirement on the Far North District Council.[45]

[34] Section 185 is the first provision of pt 8 which addresses land *ownership* as opposed to land *use*. Under s 185(1), an owner of an estate or interest in land that is subject to a designation or requirement (including one who may have unsuccessfully opposed the relevant designation) may apply at any time to the Environment Court for an order obliging the relevant requiring authority to acquire or lease all or part of the owner's estate or interest in the land under the PWA. The Environment Court is empowered to make such an order in the circumstances set out in s 185(3). That subsection provides:

> (3) The Environment Court may make an order applied for under subsection (1) if it is satisfied that—

[45] Environment Court report, above n 8, at [10].

(a) the owner has tried but been unable to enter into an agreement for the sale of the estate or interest in the land subject to the designation or requirement at a price not less than the market value that the land would have had if it had not been subject to the designation or requirement; and

(b) either—

(i) the designation or requirement prevents reasonable use of the owner's estate or interest in the land; or

(ii) the applicant was the owner, or the spouse, civil union partner, or de facto partner of the owner, of the estate or interest in the land when the designation or requirement was created.

[35] Section 185(5) provides that if the Environment Court makes an order under s 185(3), the owner is deemed to have entered into an agreement with the requiring authority responsible for the designation or requirement for the purposes of s 17 of the PWA.[46] In addition, where s 185(5) applies in respect of a requiring authority which is a network utility operator, s 185(6) provides that:

(a) any agreement shall be deemed to have been entered into with the Minister of Lands on behalf of the network utility operator as if the land were required for a government work; and

(b) all costs and expenses incurred by the Minister of Lands in respect of the acquisition of the land shall be recoverable from the network utility operator as a debt due to the Crown.

[36] It is relevant to note that the connection between s 185 and the relevant PWA provisions in the case of designations or requirements of network utility operators is made by deeming there to have been an agreement between the owner of the estate or interest ordered to be taken, and the Minister. But the Minister is effectively deemed to have entered into an agreement to purchase the land or interest concerned "as if the land were required for a government work",[47] without having formed any view as to the appropriateness or otherwise of the work in question proceeding. The absence of

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46 Section 17 of the Public Works Act provides for acquisition by agreement.

47 Section 2 of the Public Works Act provides that a "government work" means a work or an intended work that is to be constructed, undertaken, established, managed, operated or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose. It includes land held or to be acquired for the purposes of the Conservation Act 1987 or any of the Acts specified in sch 1 of that Act (except the marine and coastal area), even where the purpose of holding or acquiring the land is to ensure it remains in an undeveloped state.

any such requirement reflects the role of s 185: it provides relief for an affected landowner from the consequences of a designation.

[37] It is in that context that we now turn to s 186 itself. In a sense, this section is the converse of s 185, setting out a process by which a requiring authority may be authorised to take land it requires for a project or work it intends to undertake, whether or not it also requires authority under the RMA to undertake that project or work. The section provides as follows:

> **186 Compulsory acquisition powers**
>
> (1) A network utility operator that is a requiring authority may apply to the Minister of Lands to have land required for a project or work acquired or taken under Part 2 of the Public Works Act 1981 as if the project or work were a government work within the meaning of that Act and, if the Minister of Lands agrees, that land may be taken or acquired.
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> (2) The effect of any Proclamation taking land for the purposes of subsection (1) shall be to vest the land in the network utility operator instead of the Crown.
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> (3) Land which is subject to a heritage order shall not be taken without the consent of the heritage protection authority.
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> (4) Any land held under any enactment or in any other manner by the Crown or a local authority may, with the consent of the Crown or that authority and on such terms and conditions (including price) as may be agreed, be set apart for a project or work of a network utility operator in the manner provided in sections 50 and 52 of the Public Works Act 1981 (with the necessary modifications), but the setting apart shall not be subject to sections 40 and 41 of that Act. Any land so set apart shall vest in the network utility operator.
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> (5) Any claim for compensation under the Public Works Act 1981 in respect of land acquired or taken in accordance with this section shall be made against the Minister of Lands.
>
> (6) All costs and expenses incurred by the Minister of Lands in respect of the acquisition or taking of land in accordance with this section (including any compensation payable by the Minister) shall be recoverable from the network utility operator as a debt due to the Crown.
>
> (7) Sections 40 and 41 of the Public Works Act 1981 shall apply to land acquired or taken in accordance with this section as if the network utility operator concerned were the Crown.
>
> (7A) This section does not apply if—

(a) the network utility operator is a responsible SPV; and

(b) the land is protected Māori land.

(8) For the purposes of this section, an interest in land, including a leasehold interest, may be acquired or taken as if references to land were references to an interest in land.

[38] As can be seen, s 186(1) authorises a network utility operator that is a requiring authority to apply to the Minister for land which is required for a project or work to be acquired or taken. The process takes place under pt 2 of the PWA "as if the project or work were a government work within the meaning of that Act".

[39] Proclamations under s 26 of the PWA are the means by which land is formally taken and vested in the Crown, or a local authority which has financial responsibility for the work. The drafting of s 186(2) reflects the fact that where the proclamation is made to authorise the taking of land for the purposes of a project or work to be undertaken by a network utility operator, the land is vested in the network utility operator, not the Crown.

The PWA

[40] Before we consider s 24(7) of the PWA in detail, it is appropriate to explain the context in which it comes into effect. The relevant provisions begin at s 16. By s 16(1), the Minister is empowered to acquire under the PWA any land required for a government work. By s 16(2), every local authority is empowered to acquire under the Act any land required for a local work for which it has financial responsibility. Such acquisitions may be by agreement, or as the result of a compulsory process.

[41] Where any land is required for a public work, s 18(1)(a) provides that the Minister or local authority must first serve a notice of the desire to acquire the land on every person having a registered interest in it. The notice must also be lodged with the Registrar-General of Land.[48] This is followed by an invitation to the owner to sell the land, with an estimate, after a valuation carried out by a registered valuer, of the amount of compensation to which the owner would be entitled.[49] The Minister or local

[48] Public Works Act, s 18(1)(b).
[49] Section 18(1)(c).

authority concerned is required to "make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land".[50]

[42] If negotiations are successful, s 17(1) authorises the Minister or local authority to enter into an agreement to purchase any land for any public work for which the Minister or local authority is responsible.[51] Section 20(1) provides that if satisfied that the owner of the land has agreed to the land being acquired and that no private injury will be done by the acquisition (or compensation is provided by the Act for any private injury resulting from the acquisition), the Minister may issue a declaration in writing that the land is thereby acquired for the purpose for which it was authorised to be acquired. Section 20(2) provides that every declaration issued under subs (1) has the effect of and is deemed to be a proclamation under s 26.

[43] If there is no response to the invitation to sell, the owner refuses to negotiate, or an agreement for the sale and purchase of the land has not been made with the owner after a period of three months, the Minister or local authority is authorised by s 18(2) to proceed to take the land under the Act.

[44] The principal provisions of the PWA dealing with the compulsory acquisition of land are ss 23 and 24. Under s 23(1), when land, other than land owned by the Crown, is required to be taken for any public work, the Minister (in the case of a government work) or the local authority (in the case of a local work) must take a number of steps. First, they must cause a survey to be made and a plan to be prepared and lodged with the Chief Surveyor showing the land required to be taken and the names of its owners.[52] Secondly, they must cause a notice to be published in the *Gazette* and twice publicly notified. This notice must give a general description of the land required to be taken, a description of the purpose for which the land is to be used, the reasons why the taking of the land is considered reasonably necessary and a period within which objections may be made.[53]

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50 Section 18(1)(d).

51 Section 17(2) provides that an agreement to sell land to the Crown or a local authority under the section may be implemented by a declaration under s 20 or by a transfer instrument under the Land Transfer Act 2017 for the stated public work.

52 Section 23(1)(a).

53 Section 23(1)(b). The period within which objections must be made in this section does not apply to objections by persons served with a copy of a notice under s 23(1)(c).

[45] The owners of the land, and persons with a registered interest in it, must be served with a notice of intention to take the land in the form set out in sch 1.[54] The notice contains, amongst other things, a description of the public work, the purposes for which the land is to be used and the reasons why the Minister or local authority considers it essential to take the interest in the land. It advises that the recipient has a right to object, and, if that right is to be exercised, that a written objection must be sent to the Registrar of the Environment Court within 20 working days after service of the notice. It further advises that if the recipient makes an objection, a public hearing will be held unless written notice is given to the Environment Court that the owner wishes the hearing to be held in private. The notice also advises that the objector will have the right to appear and be heard personally or be represented by a barrister and solicitor or any other person authorised. The notice concludes with advice about the right to full compensation under the PWA if the interest in the land is taken. The recipient of the notice must be advised that if the amount of compensation cannot be agreed, it can be determined in separate proceedings before the Land Valuation Tribunal.

[46] Section 23(3) provides that every person having any estate or interest in the land intended to be taken may object to the taking of the land to the Environment Court in accordance with the provisions of the notice. Under s 23(4) every notice of intention to take land under s 23 ceases to have effect on the expiration of one year after the date of publication in the *Gazette* unless, prior to the expiration of that period:

(a) a proclamation taking the land has been published in the *Gazette*; or

(b) the Minister or local authority has served a further notice confirming the intention to take the land; or

(c) the intention to take is the subject of any inquiry by the Environment Court or an ombudsman, or of any application for judicial review. In such cases, the notice of intention remains valid for three months after the date of the Environment Court's report, the date on which the Environment Court receives written notice of the withdrawal of

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54 Section 23(1)(c).

the objection, the date of the completion of any inquiry by an ombudsman, or the judicial decision, as the case may be.

[47] Section 24 then provides for the processes which take place in the Environment Court after it receives a written objection under s 23(3). It relevantly provides:

> **24 Objection to be heard by Environment Court**
>
> (1) On receiving a written objection under section 23, the Environment Court shall, as soon as practicable, send a copy of the objection to the Minister or local authority, as the case may require.
>
> (2) Within 1 month after receiving a copy of the objection or within such further period as the Environment Court may allow, the Minister or local authority, as the case may require, shall send to the Environment Court and serve on the objector a reply to the objection containing the following information:
>
> (a) the statutory or other authority under which it is proposed to take the land; and
>
> (b) the nature of the work to be constructed or the purpose for which the land is required; and
>
> (c) such other matters as may be appropriate having regard to the objections made and to any practice directions issued by the Environment Court.
>
> (3) The Environment Court shall inquire into the objection and the intended taking and for that purpose shall conduct a hearing at such time and place as it may appoint.
>
> …
>
> (6) At every such hearing the Minister or the local authority may be represented by counsel or by an officer of the Minister's department or local authority, as the case may require, and the objector may appear and act personally or by counsel or any duly authorised representative.
>
> …
>
> (7) The Environment Court shall—
>
> (a) ascertain the objectives of the Minister or local authority, as the case may require:
>
> (b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:

(c) in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court:

(d) decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:

(e) prepare a written report on the objection and on the court's findings:

(f) submit its report and findings to the Minister or local authority, as the case may require.

…

(9) At the same time as the Environment Court submits its report and findings to the Minister or local authority, it shall send a copy of the report and findings to the objector, and make copies of them available to the public.

(10) The report and findings of the Environment Court shall be binding on the Minister or, as the case may be, the local authority.

(11) Any objection filed under section 23 may be withdrawn by the objector at any time before the court makes its report and findings under this section.

(12) Where the objection is withdrawn by the objector pursuant to subsection (11), the court shall not be obliged to make a report and findings under this section.

(13) The Environment Court may award such costs as it considers just either in favour or against the objector, the Crown, or the local authority.

(14) Subject to sections 299 and 308 of the Resource Management Act 1991, no appeal shall lie from any report or recommendation of the Environment Court under this section.

[48] The important points to note about s 24 are as follows. First, consistently with the other provisions of the PWA we have mentioned, the section reflects a dichotomy between the Minister or local authority as the person or body responsible for the taking of the land on the one hand, and the objectors to the taking on the other. The Minister or local authority, as the case may be, must carry out the required steps under s 23, including service of the necessary notice on the landowner and persons with a registered interest in the land of the intention to take the land. But any objection is not considered by the Minister or local authority: they are simply served with a copy of

the objection by the Environment Court.[55] The Minister or local authority must then file and serve a reply to the objection giving the details required by s 24(2). They are essentially in the position of being a party to the hearing of the objection by the Environment Court, at which they will be the proponent of the taking of the land, and the objectors will be the opponents of it. Both the proponents and the objectors are heard by the Environment Court and may be represented as set out in s 24(6).

[49] Secondly, the role of the Environment Court is to submit a binding report on its findings to the Minister or local authority having carried out the steps required by s 24(7). While the Court, in its discretion, can send the matter back to the Minister or local authority for further consideration in the light of any directions which it gives,[56] it is clear that in such cases it is not sending the matter back for decision. It is only where an objection is withdrawn by the objector that the Court is not obliged to make a report and findings under the section.[57] Otherwise, it must proceed to decide whether it would be "fair, sound, and reasonably necessary for achieving the objectives" it has ascertained for the land of the objector to be taken.[58]

[50] Thirdly, the requirement of s 24(7)(a) to ascertain the objectives of the Minister or local authority is plainly, in context, a reference to the nature of the work to be constructed or the purpose for which the land is required. These are the matters to which reference is made in s 24(2)(b), and in briefer language (but to similar effect) the requirement in s 23(1)(b)(ii) that the notice published in the *Gazette* state the purpose for which the land is to be used. And the enquiry required by s 24(7)(b) into the adequacy of the consideration given to alternatives is clearly into the alternatives examined by the Minister who, or local authority which, will have financial responsibility for the work.

[51] In summary, the scheme for the compulsory acquisition of land under the PWA contemplates that the Environment Court will decide whether a proposed compulsory acquisition is fair, sound and reasonably necessary for achieving objectives which the Minister or local authority will have developed. While the Court must consider

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55 Section 24(1).
56 Section 24(7)(c).
57 Section 24(12).
58 Section 24(7)(d).

whether there has been adequate consideration given to alternative means of achieving the objectives, it is not required or empowered to consider which option is preferable.

The interrelationship between the RMA and PWA

[52] It is clear from the discussion to this point that the PWA contemplates the compulsory acquisition of land either by the Minister or by a local authority. It does not in terms provide for compulsory acquisition of land by a network utility operator that is a requiring authority.

[53] It is s 186 of the RMA which makes that possible. It does so by the simple expedient of empowering the network utility operator to apply to the Minister to have land required for a project or work acquired or taken under the PWA "as if the project or work were a government work within the meaning of that Act". The acquisition or taking may occur "if the Minister of Lands agrees". In simple terms, s 186(1) has the effect that pt 2 of the RMA applies to the proposed work of the network utility operator as if it were a government work.

[54] We return to s 186 of the RMA and its implications below.

The appeal

Appellant's argument

[55] In accordance with this Court's suggestion in granting leave to appeal, Mr Isac QC addressed the Minister's principal arguments on appeal under two headings: first, the role and obligations of the Minister under s 186 of the RMA and second, whether the focus of the enquiry required by s 24(7)(b) of the PWA should be on the consideration of alternatives by the Minister, by the requiring authority or by both.

[56] On the first issue, Mr Isac submitted that s 186 of the RMA contains a "consent power", in respect of which it is for the Minister to determine what is relevant to the manner and intensity of the enquiry into any matter. The Minister's role is supervisory and involves carrying out a check on the work carried out by the requiring authority to ensure that it has made an analysis of alternatives sufficient to enable the process to

proceed to the next statutory phase. To perform the Minister's function, and in accordance with the LINZ Standard for the Acquisition of Land under the PWA (LINZS15005),[59] the Minister receives details of the assessment of alternatives made by the requiring authority, and decides to accept or decline the application under s 186 after considering that assessment. It is not the Minter's role to consider the merits of the proposal beyond satisfying himself or herself that the proposal is one that is capable of being confirmed by the Environment Court.

[57] It is for the Court to decide whether the proposal should be accepted, applying s 24(7) of the PWA. Mr Isac submitted that in carrying out its function the Environment Court can consider any relevant information available as at the date of the hearing, whether or not the information was before the Minister when he or she exercised the power under s 186(1). In accordance with what Mr Isac described as this "iterative approach", changes to the project might occur after the Minister has made a decision. For example, landowner consultation and negotiation might result in changes to the final location of necessary infrastructure. In addition, given the inevitable time-lapse between consideration by the Minister and the hearing before the Environment Court, updated information might disclose errors in conclusions relied on at an earlier stage. The High Court was therefore wrong to conclude that the relevant consideration of alternatives was completed when the Minister decided to give her agreement under s 186.

[58] Mr Isac argued the High Court was wrong to conclude that the Minister had not considered alternatives, because no alternatives were ever before the Minister.[60] While it was correct that the Minister was not presented with alternatives to choose between, she had been adequately advised of the alternatives considered by TEL as the requiring authority, and that was all that was required for the purposes of s 186. It also followed that the High Court was wrong to conclude the Environment Court erred when it held that there had been adequate consideration of alternatives.

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59 Land Information New Zealand *Standard for the Acquisition of Land under the Public Works Act 1981: LINZS15005* (2 June 2017) [LINZS15005].

60 High Court judgment, above n 13, at [59].

[59] Mr Isac submitted that in carrying out its enquiry under s 24(7)(b) of the PWA, the Environment Court is not limited to any consideration by the Minister when assessing an application under s 186 of the RMA. Rather, the Environment Court's focus is on the adequacy of all consideration of alternatives up to the date of its enquiry, whether by the requiring authority, or the Minister, or both. Mr Isac argued that the statutory scheme, which involves steps by both the requiring authority and the Minister, as well as receipt by the Environment Court of all relevant information, does not support the High Court's conclusion that the Minister "alone" must consider alternatives.[61]

Respondents' argument

[60] For the respondents, Mr Salmon first submitted that the role of the Minister when making a decision under s 186 of the RMA is to decide whether to exercise the powers of acquisition under s 16 of the PWA. In making that decision, the Minister is obliged to consider mandatory relevant factors, including alternative routes. Secondly, Mr Salmon submitted it is the adequacy of the Minister's consideration of alternatives that is examined as part of the s 24(7)(b) enquiry.

[61] In support of his first contention, Mr Salmon submitted that although the Minister's power in s 186 of the RMA is broadly framed, the Minister is obliged to consider any mandatory relevant considerations when making his or her decision. Here, he submitted the mandatory considerations were as follows:

(a) Alternative sites, routes or other methods of achieving the relevant objectives. Mr Salmon submitted this was clear from the statutory framework, and s 24(7)(b) of the PWA in particular.

(b) The information required to be provided to the Minister in accordance with LINZS15005.

(c) The contents of the s 186 applications.

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61 At [47].

[62] Mr Salmon contended it was misconceived to describe the Minister's role under s 186(1) as "supervisory". The plain words of s 186 provide that a private network utility operator may apply to the Minister to have land taken by the Crown that will vest in the network utility operator at the time of proclamation. The process requires the active use of the Minister's power to take private land. Mr Salmon submitted the Minister's role in the circumstances cannot be a passive one. Once the s 186 application has been made and granted, the applicant has no further role until the Governor-General issues a proclamation vesting the land in the applicant. Even if the landowner files an objection, the network utility operator is not a party to the proceedings in the Environment Court.

[63] Mr Salmon submitted that at the s 186 stage, the Minister must decide whether to exercise his or her powers of acquisition under the PWA. The Minister can proceed to take the land if he or she is unable to negotiate an outcome three months after the acquisition process has been initiated. It would not make sense if a private entity, a network utility operator, could initiate the Crown's coercive powers of acquisition on the basis of a flawed, incorrect or misleading route-selection process with the only check occurring when the matter comes before the Environment Court after an objection has been filed. This would be to reduce the exercise of the Minister's power to a rubber-stamping exercise. Such a conclusion would be inappropriate given that compulsory acquisition by its nature results in the "trammelling" of private property rights.

[64] Mr Salmon submitted the High Court was right to uphold the Environment Court's conclusion that "no alternatives were ever before the Minister".[62] On this issue the High Court noted that the s 186 applications were dealt with by LINZ employees who relied on the evaluations undertaken by TEL.[63] While the report provided by TEL provided some background information on how route selection was made, Mr Salmon submitted there was insufficient information on alternative routes to allow a proper consideration of alternatives by the Minister.

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62 At [47].
63 At [59].

[65] Mr Salmon also noted that LINZS15005 requires the s 186 applications to provide an "analysis of requirement", including "details of the assessment of any alternative sites, routes or methods of achieving the applicant's objectives".[64] Effectively then, the Crown's own application criteria required sufficient information to allow alternative routes to be considered. Similarly, Mr Salmon argued that the Minister is obliged to consider the contents of the s 186 applications. He submitted it was self-evident that an application needs to be considered before any decision can properly be made to grant it.

[66] In this case, Mr Salmon said the applications were inadequate because they contained insufficient information as to alternatives, as the High Court held. The Minister had taken a fundamentally passive approach, with the result that her decision was affected by substantive defects in TEL's own approach. In fact, TEL misled the Minister as to the necessity of the taking, by failing to advise that its board had not yet decided whether to construct the transmission line, and by representing the objection route as the only economic and practicable route available when there were multiple potential routes, two of which TEL regarded as preferable. The most preferred route was in fact over the OTS land, but this was abandoned by TEL because the Minister for Treaty of Waitangi Negotiations refused to grant an easement. The second preferred route was abandoned on grounds that should have been regarded as objectionable and disqualifying: specifically, it was claimed, because of political connections of an affected landowner.

[67] On the second issue, Mr Salmon submitted the High Court correctly held that under s 24(7)(b) of the PWA the Environment Court must enquire into the adequacy of the Minister's consideration of alternative sites and routes. This reflected the fact the decision to take private land pursuant to an application under s 186 is the Minister's decision to make, and involves exercise of the Minister's power. While it was correct to treat the relevant objectives to be considered under s 24(7)(a) as being those of the requiring authority, it would be an unjustified leap of logic to conclude this meant that the consideration of alternatives under s 24(7)(b) was limited to the consideration carried out by the requiring authority.

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64 LINZS15005, above n 59, at 33.

[68] Mr Salmon argued that would essentially contemplate the abdication of decision-making power by the Minister, and had that been the intention of the legislature, it would have been set out expressly in the statute. Mr Salmon submitted the High Court's approach was correct, and consistent with an earlier High Court decision, *Kett v Minister for Land Information*.[65]

[69] Mr Salmon addressed various other arguments purportedly in support of the High Court judgment but in fact based on alleged errors in the Environment Court's decision. We deal separately with those issues later in this judgment.

Decision

The nature of the Minister's power under s 186 of the RMA

[70] The words "if the Minister … agrees" in s 186 of the RMA are couched in open language consistent with the conferral of a broad discretion. But it is trite law that there is no such thing as an unfettered discretion. As was said by the Supreme Court in *Unison Networks Ltd v Commerce Commission*:[66]

> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act".[67] A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.[68]

[71] The statutory context in which the Minister's power is to be exercised necessarily establishes broad parameters for the exercise of the power. The purpose of s 186(1) is to authorise a network utility operator to apply for the Minister's agreement to the proposed taking or acquisition of land required for a proposed project or work, and to give the Minister the power to decide whether or not to agree to the

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65 *Kett v Minister for Land Information* HC Auckland AP404/151/00, 28 June 2001.
66 *Unison Networks Ltd v Commerce Commission*, above n 28.
67 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030 per Lord Reid.
68 *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA) at [42] and [43]; and *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) at 393–394.

taking of the land. Although the Minister's power in s 186(1) is exercised prior to the commencement of the formal PWA processes, it is implicit, having regard to the statutory scheme comprising the relevant provisions of the RMA and the PWA, that the power must be exercised on the basis that in the case of objection the issue of whether or not the land should be taken will be determined by the Environment Court.

[72] We consider this means the Minister must be satisfied that the proposed taking is capable of meeting the statutory test in s 24(7)(d) that the Environment Court would apply if there was an objection: namely that it is fair, sound and reasonably necessary for achieving the objectives of the network utility operator that the land should be taken. That requires the Minister to have sufficient information to ascertain what the objectives are, and also that there has been appropriate consideration of alternative sites, routes or other methods of achieving those objectives. But we do not consider it is the Minister's role to decide which of a number of alternatives should be pursued. Rather, it is for the Minister to decide whether the proposal which is the subject of the s 186 application can meet the statutory test.

[73] The open language in which the power is conferred on the Minister, however, suggests that the Minister's decision might also properly be affected by policy considerations relevant to the proposed project or work. The Minister is being asked to lend the coercive powers of the state to the acquisition of land by another party. It is inappropriate in the circumstances to suggest that there can be no room for the application of government policy (provided that policy does not frustrate the purpose of the Act) and broad considerations of where the public interest lies. Putting that another way, given the nature of the Minister's power, we think it would be wrong to characterise taking into account broadly relevant government policy as using the Minister's discretion to run counter to the policy and objects of the legislation. The relevant legislative policy and objects here are derived not just from considering the PWA, but also the RMA, which requires all decision-makers to take into account the principles of the Treaty of Waitangi.[69]

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[69] Resource Management Act, s 8.

[74] For example, a proposal that otherwise appeared meritorious might be considered inappropriate because of its implications for land of particular cultural or spiritual value to Māori. Similarly, the facts of the present case included consideration of a potential route (the apparently less costly OTS route) over land which was land-banked for the provision of potential redress in the settlement of claims under the Treaty of Waitangi. We consider a decision made in good faith not to consent to the acquisition of such land under s 186(1) would be appropriate even if the project might otherwise be considered suitable to meet the objectives of a network utility operator. It is also possible that projects might be advanced by network utility operators that might be contrary to central government policies relevant to climate change or the preservation of natural landscapes of outstanding quality or other environmental policies.[70] Again, in such cases the Minister might lawfully withhold agreement under s 186(1).

[75] These conclusions are supported by the more detailed reasoning that follows.

The role of the Minister

[76] Section 186 of the RMA was discussed in the judgments delivered in the Supreme Court in *Seaton v Minister for Land Information*.[71] The question in that case was whether the Minister had properly invoked the compulsory acquisition powers under the PWA to acquire easements over land necessary to relocate supporting towers for electricity lines owned by a network utility operator because of the widening of the carriageway forming part of State Highway 1 on which the towers had been located. It was held by the majority that the easements were not reasonably required for the widening of the road, but rather for the conveyance of electricity, the latter not being undertaken by the Crown.[72] The correct course for acquisition of the easements would have been for the utility company to apply under s 186(1) of the RMA for the Minister to agree to the compulsory acquisition of the easements.

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70 The matters of national importance set out in s 6 of the Resource Management Act must be recognised by all persons exercising functions and powers under the Act, so would extend to the Minister acting under s 186(1).

71 *Seaton v Minister for Land Information*, above n 24.

72 At [21]–[22] per Elias CJ and [67] per Chambers and Glazebrook JJ.

[77] The issue in that case does not arise here. We note however that Elias CJ observed that whether land is taken under s 16(1) of the PWA for a government work or whether it is taken under s 186 of the RMA for a project or work of a network utility operator, the procedures are those contained in pt 2 of the PWA. She noted that "[i]n both cases the acquisition is conducted by the Minister of Lands either for himself or for the network utility operator, as the case may be."[73] She contrasted the position of network utility operators and local authorities, pointing out that the latter are empowered to act directly in the case of local works for which they have financial responsibility and "not through the Minister or under any deeming provision such as that which treats applications on behalf of network operators as if their proposed works were Government works".[74]

[78] William Young J (writing for himself and McGrath J) explained that when the PWA was enacted in 1981, utilities were generally publicly owned and, where that was not the case, usually operated under and exercised statutory powers conferred in private Acts of Parliament.[75] However, the corporatisation and privatisation of the functions of such utilities which subsequently occurred "significantly reduced the scale of central and local government utility activities and thus the potential scope for compulsory acquisition".[76] Section 186 was designed to address the "resulting lacuna".[77]

[79] Later, in a passage which we think is directly relevant here, after setting out s 24(7) of the PWA William Young J wrote:

> [83] Where s 186(1) of the Resource Management Act has been invoked, the references to "Minister" in (a) and (d) must be read as a reference to the network utility operator (because the proposed taking will be to give effect to its objectives, rather than those of the Minister). …

[80] We respectfully agree with that approach. It is similar to the reasoning of Chambers J (who also wrote for Glazebrook J), who emphasised the importance of the Minister following the correct procedure by referring to the effect on matters relevant

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73 At [5] (footnote omitted).
74 At [5], n 6.
75 At [76], n 52.
76 At [76].
77 At [77].

to the Environment Court's inquiry under s 24(7).[78] Thus, if s 186 were not invoked, the Environment Court's focus would be on the extent to which the easements were required for road widening purposes. On the other hand, if s 186 had been invoked:[79]

> … the focus would be on the utilities' need for these easements compared with other relocation measures that might be open to them. The difference is subtle, but there is a difference.

[81] We think the discussion in *Seaton* implies that where s 186 of the RMA has been relied on, the enquiry into the adequacy of the consideration of alternatives under s 24(7)(b) of the PWA must embrace the consideration of alternatives by the network utility operator.

[82] In this case, the Judge took a different view. Her essential reasoning was set out at [47] of the High Court judgment, which we have quoted above.[80] While we agree that the Minister's particular statutory role is not captured by describing her as the agent of the network utility operator, we consider the Judge's statement that "it must be the Minister alone who has the obligation to consider any relevant factors" is incorrect.[81] If by saying that the Judge intended to imply that the Minister must personally consider alternatives additional to those that the network utility operator has considered, or decide which of the alternatives considered should be preferred, we do not consider that would be in accordance with the statutory scheme. We accept that the Minister might reach the view, after considering an application, that further alternatives should be considered and decline the application for that reason. That would be an available course given the openness of the statutory language. But that is a different proposition from the Judge's conclusion that the Minister alone has the obligation to consider any relevant factors.

[83] The proposal after all is that of the network utility operator, which will inevitably be much more familiar with the purpose of and need for the intended works. It will have developed the proposal having identified its objectives for the project or work. As all the Judges seem to have accepted in *Seaton*, by the stage s 24(7)(a) and

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78 At [66].
79 At [66].
80 Above at [20].
81 High Court judgment, above n 13, at [47].

(d) of the PWA are reached it is the network utility operator's objectives that are being considered.[82] This seems to us inconsistent with the notion that the Minister has the central role contemplated by the High Court at the earlier stage of the process. It also seems inconsistent with the idea that in a case involving s 186 of the RMA, it is the adequacy of the Minister's consideration of alternatives that is to be assessed under s 24(7)(b) of the PWA.

[84] The statutory scheme in fact assumes that the network utility operator will have identified its objectives, the means of achieving them and a preferred option prior to making an application to the Minister under s 186(1). The Minister is the Minister for Land Information, and could not be expected to have access to institutional knowledge and expertise equivalent to that of the network utility operator, so far as assessment of the technical and economic feasibility of different alternatives is concerned. Nor is there any indication in the statutory scheme that the Minister has the role of deciding that the proposal is one that should be approved on the merits. That is an issue deliberately left to the Environment Court where there is an objection.

[85] We do not consider that in deciding whether or not to agree to a request under s 186(1) of the RMA the Minister is required to be satisfied that the proposal will definitely meet the requirements of s 24(7) of the PWA. It will be enough if the Minister is satisfied it is capable of doing so. The s 186(1) decision occurs prior to the matter being considered by the Environment Court. If the legislative intent was that both the Minister and the Environment Court were required to be satisfied of the same matters it would be surprising if the statutory regime specified the criteria to be applied at the subsequent stage, but not the former. We think that if that was what was intended, the legislature would have stipulated the considerations relevant to the Minister's decision, and then said they should also govern the Environment Court's decision. The Environment Court could then have been placed in a role analogous to its role in determining an appeal in exercise of its functions under the RMA, but that is obviously not what s 24 of the PWA contemplates.

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82 *Seaton v Minister for Land Information*, above n 24, at [24] per Elias CJ, [66] per Chambers and Glazebrook JJ and [83] per William Young and McGrath JJ.

[86] There are also practical reasons why requiring the Minister to be satisfied the proposal will definitely meet the s 24(7) requirements would not work. When the Minister is acting under s 186(1) of the RMA, the PWA procedures will not have been commenced. Whether or not a particular proposal will be accepted by the affected landowners or whether there will be objections cannot at that point be ascertained. And any consideration of the merits at the s 186 stage would take place in the absence of the information produced as a result of the receipt and consideration of objections, and without there being any equivalent process designed to achieve input from affected parties, which is a feature of the hearing of objections by the Environment Court. It is consistent with this that the Environment Court is the body which actually exercises the power to decide whether or not the land of the objector may be taken. Its decision is binding on the Minister.[83] In the present case information from objectors was referred to in the briefing materials given to the Minister, including criticisms of TEL's failure to pursue the OTS route and other issues raised by the objectors' solicitors. Although this added to the material before the Minister relevant to the question of alternatives, and it was open to the Minister to consider it when making the s 186 decisions, it was not the Minister's role under s 186 to reach a view on the merits of different routes and the provision of this information in the present case did not require the Minister to do so.

[87] In addition, negotiations with those affected may well result in modifications to a proposal by the time the matter reaches the Environment Court. Those changes may be designed to respond to issues that have been raised by objectors. We do not see any suggestion in the legislation that this iterative approach cannot occur. Indeed, the possibility of modification is inherent in the concept of mandatory prior negotiation, which is a central feature of the procedures required by pt 2 of the PWA.[84] It can be said in fact that the statutory procedures must leave room for the ongoing consideration of alternatives after a notice of intention to take land has been given under s 23. It would be artificial and inconsistent with the obligation to negotiate in good faith if the serving of the notice of intention to take were seen as necessarily

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83 Public Works Act, s 24(10).

84 Section 18(1)(d). A modification resulting in a proposal affecting different land might of course require the statutory procedures to be recommenced in the absence of agreement from the newly affected landowners.

bringing negotiations to an end. Similarly, negotiation might result in the withdrawal of a notice of intention to take under s 23(8) on the basis that it was no longer considered necessary to take the land.

[88] The fact that a proposal is initiated by a network utility operator does not put it in an exceptional category in this respect. On the contrary, s 186(1) has clearly been drafted with the intention that the PWA procedures will apply.

[89] Mr Salmon placed considerable emphasis on the fact that it is only if the Minister agrees under s 186 that the compulsory acquisition procedures may be implemented. As noted above, he submitted that the Minister must decide at the s 186 stage to exercise the powers of acquisition under the PWA. Once the Minister has agreed, if unable to negotiate an outcome after three months he or she can proceed to take the land.[85] Mr Salmon submitted the prospective exercise of the Crown's coercive powers of acquisition means the Minister needs to be in a position to ensure that using those powers is appropriate, which must include the consideration of alternatives by the Minister.

[90] However, it is not accurate to describe the Minister's role under s 186 as involving a decision to exercise the powers of compulsory acquisition. If the affected landowners agree, there will be no compulsory acquisition, and no use of the Crown's coercive powers. There may be a proclamation, but that will be implementing the agreement. Absent agreement by the affected landowners, the acquisition will be able to proceed only if the Environment Court considers there has been an adequate examination of alternatives,[86] and reaches the evaluative judgement that the land should be taken.[87] If the Environment Court were to reach the view that the consideration of alternatives was inadequate it could send the matter back to the Minister for further consideration,[88] or simply report adversely on the proposal.

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85 Section 18(2).
86 Section 24(7)(b).
87 Section 24(7)(d).
88 Section 24(7)(c).

[91] These possible outcomes do not mean the Minister has the sole responsibility to consider "any relevant factors" as the High Court held.[89] On the contrary, they are consistent with the fact that where a network utility operator is involved, it will have assumed primary responsibility for the consideration of alternative means of achieving its objectives. Of course it is open to the Minister, in an appropriate case, to decide that the consideration of alternatives has been inadequate. But where the Minister agrees to the land being taken or acquired under pt 2 of the PWA, and the matter proceeds to the Environment Court, the question the Court will ask is whether there has been adequate consideration given to the alternatives. The Court's obligation under s 24(7)(b) is to enquire into that issue and report on it, as well as the other matters it is required to consider. It is not directed to enquire into whether the *Minister* personally has given adequate consideration to alternatives.

[92] In describing the nature of the Minister's decision under s 186 as "supervisory", Mr Isac relied on the decision of the Supreme Court in *Schmuck v Opua Coastal Preservation Inc*.[90] That case required the Court to consider the power given in s 48(1)(f) of the Reserves Act 1977 to the administering body of a reserve to grant rights of way and other easements over any part of the reserve for various purposes in respect of land not forming part of the reserve. The power of the administering body to grant the rights of way and other easements was exercisable "with the consent of the Minister and on such conditions as the Minister thinks fit".[91] The Supreme Court considered that the terms "check" and "supervisory" were useful shorthand descriptions of the role of the Minister in giving consent to a grant,[92] but added:[93]

> … we do not consider that the Minister is under any obligation in process terms to reconsider the matters taken into account by the administering body in granting the easement, so long as they are within the administering body's powers.
>
> [131] In characterising the Minister's power as supervisory, we are not intending to create any artificial limit on that power. All we are saying is that there is no requirement to re-run the process already undertaken by the administering body of the reserve. However, if the Minister takes a different view of the situation from that taken by the administering body, there is nothing to stop the Minister refusing to consent to a decision that the

89 High Court judgment, above n 13, at [47].
90 *Schmuck v Opua Coastal Preservation Inc* [2019] NZSC 118, [2019] 1 NZLR 750.
91 Reserves Act 1977, s 48(1).
92 *Schmuck v Opua Coastal Preservation Inc*, above n 90, at [130].
93 At [130]–[131].

> administering body has made lawfully and which the administering body considers is reasonable. We agree with the Court of Appeal that the Minister is free to take a different view from that of the administering body as grantor. But there is also nothing requiring the Minister to reconsider matters decided by the administering body and the Minister does not act unlawfully if he or she does not do so.

[93] The Court agreed with a submission that the Minister's decision is not a rubber-stamping exercise. However, in the absence of any statutory requirements as to process, it was for the Minister to determine what was relevant to the decision, and:[94]

> … the manner and intensity of the inquiry into any such matter (beyond the essentials of checking that the statutory process has been undertaken by the administering body and that the easement was lawfully granted), subject only to challenge on grounds of unreasonableness.

[94] Mr Salmon invited us to distinguish *Schmuck* on the basis that the administering body had the power to grant the easement and the Minister's role in granting consent was simply a final check on the exercise of that power. In those circumstances it was appropriate to describe the power as "supervisory", especially as the Minister's consent was being given to a voluntary granting of an easement by the owner of the land. Moreover, the decision to grant the easement was subject to specific requirements as to compliance with the RMA, and mandatory public notification and consideration of public submissions.[95] Given that the Minister's consent power was being exercised after a prior decision-making process that was public and contestable, a narrow view of the power was understandable. By contrast, in the present case requiring the Minister to consider alternative sites and routes when acting under s 186 of the RMA would not be to require repetition of a process already undertaken by another public body, the situation that applied in *Schmuck*.

[95] We agree that the statutory setting here is clearly different from that considered by the Supreme Court in *Schmuck,* and the case can be distinguished for the reasons advanced by Mr Salmon. Nor do we think the word "supervisory" an accurate description of the Minister's role under s 186(1). Where s 186 is engaged the Minister is doing more than approving an action which the network utility operator is itself able

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94 At [132] (footnote omitted).
95 Reserves Act, s 48(2).

to carry out. The Minister is taking a crucial step to facilitate the project, which could not proceed without the Minister's agreement. For these reasons we think the "supervisory" label is inappropriate and might in fact be misleading.

[96] However, some aspects of the reasoning in *Schmuck* may properly be applied by analogy. In both cases the Minister's power is expressed in open language without reference to statutory criteria governing its exercise, and in both cases the exercise of the Minister's power is contingent on another entity making a decision, subject to public rights of participation and process. In this case, the result of the Minister's agreement under s 186(1) of the RMA is that the taking may proceed, but, if the taking is opposed, it may occur only after the Environment Court agrees, after carrying out its function under s 24(7) of the PWA. As in *Schmuck*, there is a justification for reading the relevant statutory provisions in a way that avoids duplication of process, especially when the PWA gives such a pivotal role to the Environment Court.

[97] Further, as in that case, we see nothing in the statutory language which prevents the Minister from reaching his or her own view as to the intensity of the enquiry it is appropriate for him or her to undertake. Doubtless the Minister should be satisfied that the proposal is one that is capable of passing muster in the Environment Court, but we do not see how a reasonable decision to that effect could render unlawful the PWA process that ensues. And importantly, as mentioned above, we consider the broad statutory language in s 186(1) of the RMA leaves room for the Minister to consider relevant government policies that might make it inappropriate to facilitate a project or work proposed by a network utility operator by agreeing to the taking or acquisition.

[98] The Judge found persuasive the discussion of s 24(7)(b) of the PWA by High Court in *Kett v Minister for Land Information*,[96] a case on which Mr Salmon also relied. The case involved a proposed acquisition of land for the purposes of the realignment of State Highway 1 between Orewa and Puhoi. In the present case, the Judge noted that the Environment Court's duty to enquire into alternatives under s 24(7)(b) presupposed that someone would have considered the alternatives before

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[96] *Kett v Minister for Land Information,* above n 65.

the matter reaches the Environment Court, and held that "[t]hat person must, self-evidently, be the Minister",[97] citing what Paterson J said in *Kett*:[98]

> If this phrase is given its normal plain and dictionary meaning, the Court was required to consider whether the Minister sufficiently and with due regard, chose the route, after taking into account circumstances which were reasonably relevant relating to that route and alternative routes. I see no reason, from the context of the Act or statements made when the Bill was introduced, to give the term any other meaning. … The Court was not itself required to determine whether the route was the most suitable of the available alternatives. Its role was to ensure that the Minister had carefully considered the possibilities, taken into account relevant matters and come to a reasoned decision.

[99] We do not think this statement has the significance that the Judge afforded it, for a number of reasons. First, in the quoted passage Paterson J was giving reasons for rejecting an argument advanced on behalf of an objector that the Environment Court had applied the wrong test in determining that the Minister had given adequate consideration to alternative routes. It was submitted that the Environment Court should have required the Minister to establish that there was no alternative to the option that required the compulsory acquisition of land to which the landowner had objected. Paterson J disagreed. But the discussion was about the role of the Environment Court, not the Minister.

[100] Secondly, the requiring authority was Transit New Zealand, a Crown entity responsible for the designation of the realigned section of the State Highway. The case did not involve a network utility operator or, therefore, a request to the Minister under s 186 of the RMA. For this reason, it does not assist with the definition of the Minister's role under that section.

[101] Thirdly, although in the passage set out above Paterson J referred to the Minister choosing the route, the actual discussion in the judgment, about whether there was evidence on which the Environment Court could have concluded the Minister had given adequate consideration to alternative routes, focused on the consideration of alternatives by Transit New Zealand.[99] The Judge did not draw any distinction between the Minister and Transit New Zealand insofar as the consideration of

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97 High Court judgment, above n 13, at [49].
98 At [51], citing *Kett v Minister for Land Information*, above n 65, at [32].
99 *Kett v Minister for Land Information,* above n 65, at [37]–[38].

alternatives was concerned, and it does not appear to have been argued that he should have. We suspect that reflects the fact that the Environment Court defined the relevant objectives of the Minster as being:[100]

> … to enable Transit to give effect to the proposal to construct and operate the Realignment of State Highway 1 between Orewa and Puhoi generally in accordance with the designation for it in the district plan as part of a safe and efficient highway system.

[102] In any event, we consider it is clear from the relevant discussion in the judgment that the High Court considered the relevant history of investigation of various alternatives by Transit New Zealand, which led to the development of the particular proposal, should be considered as relevant to the enquiry under s 24(7)(b). We do not consider the Court was requiring a number of alternatives to be put before the Minister to enable him to choose between various alternatives at the stage of deciding to give notice of an intention to take land for a particular proposal.

[103] In this case, having held that the Minister was required to consider alternative routes and that the Environment Court was required to examine the adequacy of that consideration, the Judge thought it significant that the evidence before the Environment Court from Mr Sun, a LINZ official, was that "no alternatives were ever before the Minister".[101] The Judge took that quotation from the Environment Court's report, but Mr Isac drew our attention to the context in which it appeared. The Environment Court recorded a submission made to it by Mr Salmon that the Minister should have considered alternative routes, and should then have chosen between them.[102] It then continued:[103]

> Mr Sun noted that no alternatives were ever before the Minister. The Ministry of Land Information deals with the application made by the requiring authority. Although the report by the requiring authority does indicate some background information on how the route selection was made, we agree that this cannot bind the Minister at the s 186 decision stage.

[104] Mr Isac noted that in this part of its report the Environment Court was dealing with Mr Salmon's submission that the s 186 applications should have set out

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100 *Kett v Minister of Land Information* EnvC Auckland A110/2000, 15 September 2000 at [44]. The Environment Court's finding in this respect was not challenged on appeal.

101 High Court judgment, above n 13, at [59].

102 Environment Court report, above n 8, at [42].

103 At [42].

alternatives for the Minister to choose between. Mr Sun's evidence was effectively that an application setting out two options and requiring the Minister to choose the route she preferred would not be provided to the Minister. He explained:

> It's not my understanding of the s 186 process … It's a requirement that the applicant identifies what it's applying for. The Minister does not pick (a),(b) or (c). She decides "yes" or "no". … [If an applicant advised that there were two equally good routes] … the relevant official would say to the applicant, "decide which one's better and tell us why".

[105] Mr Isac contrasted this with the proposition that no information was before the Minister about the alternatives that had been examined, which was not correct. He emphasised in this respect that the material provided by TEL for the purposes of the s 186 applications was substantial and dealt with a number of relevant matters, including the need for the project, the efforts that had been made to negotiate agreements with affected landowners and the assessment of alternatives. The applications identified four routes that TEL had considered, and were placed before the Minister with the briefing papers prepared by LINZ officials, which referred the Minister to the various parts of the applications where the assessment of alternatives was addressed. The papers given to the Minister included a "decision sheet" which she marked to indicate that the consideration of alternatives had been assessed.

[106] The Environment Court found that there had been adequate consideration of alternatives by TEL, and that was sufficient for the purposes of its enquiry under s 24(7)(b) of the PWA.[104] On the view we take, the summary given by LINZ officials to the Minister of the consideration of alternatives by TEL was adequate for her to reach the view that TEL's applications were capable of achieving a favourable report from the Environment Court. A second appeal on questions of law is not an appropriate proceeding for the merits of the Environment Court's report to be challenged.

[107] We note further that it is clear from the Minister's decision that she took into account the contents of the applications made by TEL, which were attached to the briefing papers prepared for her by LINZ officials. The arguments that she did not consider the contents of the applications, and that the requirements of LINZS15005

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[104] At [109].

were not met, appear to be further manifestations of the argument that the Minister was obliged to personally consider and decide between the alternatives. Those arguments cannot be sustained for the reasons we have earlier discussed.

Other issues

[108] Mr Salmon endeavoured to support the outcome in the High Court on grounds additional to those given by the Judge. He submitted in particular that the Environment Court erred by:

(a) treating the Minister's decision as valid when it was defective because TEL's route selection was based on improper and irrelevant considerations (including a landowner's alleged political connections) and the s 186 applications contained "fatal omissions";

(b) failing to consider that, as a matter of law, the Crown could have granted easements over the OTS land without requiring compulsory acquisition; and

(c) treating the reasons given in the Minister's notice of intention to take land as sufficient, when they were not.

Improper/irrelevant considerations and omissions

[109] The first issue was based on the contention that TEL had decided against one of the potential routes on the basis that the landowner concerned was connected to a Minister of the Crown. Mr Salmon secured a concession in cross-examination in the Environment Court that the relationship had been considered in the route selection process, a matter that had not been referred to in the briefing papers given to the Minister. However, the Environment Court rejected this contention, noting that the landowner concerned had in fact signed an agreement to grant an easement in respect of his property, although in a different location and for a shorter distance than had been proposed at one stage.[105] The Court considered that the previous proposal would have

[105] At [113].

had a greater impact on some parties than the route in fact selected.[106] In the High Court, the Judge considered the issue did "not raise an appealable question of law".[107] She expressed the view that the Minister's decision-making process could not bear on an appeal against the Environment Court's decision.[108]

[110] We think it would be possible in an appropriate case for the Environment Court to consider, in the course of its inquiry under s 24(7) of the PWA, the processes that had been followed by the Minister in making a decision under s 186(1) of the RMA. An unfair process might have the implication that there had been an inadequate consideration of alternatives or justify a finding that it would not be fair for the land of the objector to be taken. In either case, it would need to be shown that what had occurred had a material impact on the decision. There is no basis upon which we could reach that view in this case. We do not consider any error has been demonstrated.

[111] As to the suggestion of a "fatal omission", the argument is that TEL's applications to the Minister had been premised on urgency and necessity whereas board documents made available prior to the Environment Court hearing demonstrated that the board had not yet decided to proceed with constructing the line, and that diesel generation might be a possible means of avoiding the need for the line altogether. The Environment Court considered this argument in the course of ascertaining TEL's objectives. It decided that the relevant objectives were the construction of lines for a network distribution system, not the production of power.[109] Mr Salmon also contended that TEL misrepresented the objection route as the "only practical and economic route", and withheld its costing modelling for the various routes from the Minister.

[112] The High Court considered that these various omissions could not be relevant to the appeal against the Environment Court's decision.[110] We agree.

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106 At [114].
107 High Court judgment, above n 13, at [68].
108 At [68].
109 Environment Court report, above n 8, at [83].
110 High Court judgment, above n 13, at [68].

The OTS land

[113] The second issue raised by Mr Salmon concerned the possibility the Crown might grant easements over the OTS land. The Environment Court considered that since the PWA did not permit compulsory acquisition of land owned by the Crown, there was no means of obtaining the OTS land without the agreement of the Minister for Treaty of Waitangi Negotiations.[111] While recording that it could not review the decision of that Minister, it thought there was a reasonable basis for that Minister to refuse to allow the easements, given the objections of tangata whenua and evidence from a witness at the Office of Treatment Settlements.[112]

[114] The evidence for that view was summarised in the Environment Court's report. It recorded, amongst other things, that the OTS land was part of an area of some 4000 ha, referred to as the OTS block, the taking of which had been disputed by Te Whiu, a hapū of Ngāpuhi, over the years since 1868. Some 2000 acres had been re-vested in Te Whiu in 1921. What was referred to as the OTS remnant land was part of the original tūrangawaewae of Te Whiu, and contained urupā and a pā site. The Court observed that it had been "repeatedly identified as of significant cultural value to Te Whiu".[113] Further, it was the sole remnant land available of their original ancestral lands, which increased its importance for the purposes of cultural redress under the Treaty of Waitangi.[114]

[115] The Judge considered the Environment Court's approach was correct.[115] No challenge had been mounted in relation to the refusal of the Minister for Treaty of Waitangi Negotiations to make the OTS land available for the construction of transmission lines, and the Environment Court was entitled to proceed on the basis that the decision of that Minister not to grant consent was valid.[116] Further, TEL was not obliged to exhaust the legal pathways available in respect of the OTS route before seeking consent under s 186(1) of the RMA.[117]

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111 Environment Court report, above n 8, at [64].
112 At [66].
113 At [60(c)].
114 At [65(d)].
115 High Court judgment, above n 13, at [73].
116 At [73].
117 At [74].

[116] In this Court, Mr Salmon again submitted the Environment Court erred by failing to consider that as a matter of law the Crown was able to grant easements over its own land-banked land without resorting compulsory acquisition to allow TEL to proceed with its project. He contended that the reasons for the Crown's refusal were "policy-driven, and as such, irrelevant". He referred to Phillip A Joseph, *Constitutional and Administrative Law in New Zealand* for the proposition that considerations such as the public interest, administrative efficiency or government policy may not excuse an unauthorised statutory purpose or reliance on an irrelevant consideration.[118] He also repeated the argument advanced in the High Court that the Environment Court erred by failing to take into account that TEL had not challenged the refusal of the Crown to grant an easement over the OTS land.

[117] It will be apparent from the discussion earlier in this judgment that we cannot accept these arguments. In the High Court, Mr Salmon relied on the decision of the High Court in *Dannevirke Borough Council v Governor-General*.[119] Although he did not refer to it in this Court, that judgment reflects the basis of the argument he advanced, based on a narrow conception of the purpose of the statutory scheme. The case concerned a resolution by the Council that land be compulsorily acquired under the Public Works Act 1928 (the PWA 1928) for the purposes of a new rubbish dump. In accordance with constitutional procedures, it was necessary for the Minister of Works to recommend to the Governor-General that land be taken for the purposes of the proposed work. The Minister declined to recommend to the Governor-General that the subject land be taken, giving as his reason the fact that the land was Māori land and it was government policy not to allow its compulsory acquisition.

[118] After reviewing the scope and purposes of the PWA 1928, Davison CJ referred to *Padfield v Minister of Agriculture, Fisheries and Food*.[120] He held that the Act did not enable particular classes of land or land owned by particular classes of persons to be excluded from the compulsory taking provisions of the legislation by the exercise of the discretion of the Minister or Governor-General, and that by making a decision

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118 Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [23.2.6].
119 *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129 (HC).
120 *Padfield v Minister of Agriculture, Fisheries and Food*, above n 67.

based on the policy not to compulsorily acquire Māori land, the Minister exercised his powers for an improper purpose. In this regard, Davidson CJ stated:[121]

> The Government policy to which the Minister referred is contrary to the policy and objects of the Act. It is a consideration which did not entitle him to refuse to recommend the compulsory taking of the land. If the Government wishes to implement the stated policy in relation to Maori land then it must be given legislative effect by an appropriate statutory enactment. It cannot apply a policy which is contrary to the statute.

[119] This reasoning appears anachronistic judged in the light of today's enhanced appreciation of the importance of the Treaty of Waitangi and the need to ensure that land use issues of significance to Māori are properly recognised and provided for. Further, the legislation has undergone significant change, which makes application of the approach adopted in *Dannevirke* inappropriate as a general proposition. The Minister's power in s 186(1) of the RMA must now be exercised in a statutory setting which requires application of the purposes and principles expressed in pt 2 of the RMA, including the requirement to recognise and provide for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".[122] And under s 8 of the Act, the Minister is obliged to take into account the principles of the Treaty of Waitangi.

[120] Given these provisions of the RMA, it cannot possibly be said that allowing such considerations an influential role in the decision-making process would do anything other than promote the purposes of the statutory scheme.[123] If such matters can legitimately be considered under s 186(1) of the RMA it would be odd if they could not be brought into account under the PWA. In this field both statutes clearly need to operate in a complementary manner.

[121] More fundamentally, treating the significance of land to Māori as a policy-driven and therefore "irrelevant" consideration in determining whether land should be acquired or taken under pt 2 of the PWA runs counter to the principles of

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121 *Dannevirke Borough Council v Governor-General*, above n 119, at 134–135.

122 Resource Management Act, s 6(e). As earlier discussed, other subsections of s 6 could be relevant where a project gives rise to issues of environmental concern.

123 See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210–211 where Chilwell J noted that the Water and Soil Conservation Act 1967 and Country Planning Act 1977 comprised a "comprehensive statutory scheme" providing for the terms of one statute to be useful for interpreting another.

the Treaty of Waitangi. While s 24(7) does not expressly require the Environment Court to have recourse to the Treaty of Waitangi or its principles, where the acquisition of land of significance to Māori is at issue the Treaty is clearly relevant to the Environment Court's inquiry.[124]

[122] These considerations underline the correctness of the conclusion of the Courts below that the refusal to grant an easement over the OTS land, and the "failure" of TEL to challenge that decision, were not matters that needed to be weighed against the project.

Notice of intention

[123] The final issue raised by Mr Salmon was based on the requirement in s 23(1)(c) of the PWA that notices be served on the landowners explaining, amongst other things, why the taking of the land is considered reasonably necessary. Here, the respective notices of intention relevantly asserted that the project would allow TEL to construct a single circuit high-voltage transmission line and other electrical and communication works. Further, it was said that the project was required:

> … to improve the capacity, security and reliability of the electricity distribution network in the Far North region to meet growth and increasing demand for electricity in the region; and to remedy underlying network weaknesses which will provide a more secure supply for the region.

[124] Mr Salmon criticised this on the basis that the reasons given were generic statements about the benefits of the transmission line project as a whole. He argued that they did not enable the landowners to know why the decision to take the easements over their land was made, and to be satisfied that it was lawful.

[125] The Environment Court rejected this argument. It held that in the case of a linear project affecting (as was the case here) some 96 properties, there was no requirement for the objectives to relate to each specific property.[125] The High Court

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124 See *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [74], citing *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184. See also *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]; and *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [248] per Chambers J.

125 Environment Court report, above n 8, at [91].

then rejected the appeal on this issue on the basis that errors affecting the Minister's decision-making were properly within the ambit of judicial review, not appeal.[126]

[126] We do not consider the Environment Court made any relevant error of law in dealing with this issue. It is possible that an error of a fundamental kind affecting a notice issued under s 23(1) of the PWA might mean that the appropriate response of the Environment Court is to refer the matter back to the Minister for further consideration under s 24(7)(e) or to report adversely on the proposal. At least theoretically a failure by the Environment Court to take such steps might give rise to an appealable question of law. But this case is far from that. There is no suggestion that anyone was misled by the nature of the works or the need for the acquisition of easements along the intended route. There is no error of law.

Costs

[127] For the reasons we have expressed, we conclude that the High Court was wrong to set aside the Environment Court's report, and the appeal must be allowed. In that event, the Minister sought costs calculated for a standard appeal. Having considered this issue, we record our view that the issues raised have resulted in important clarification of the statutory powers relevant to the compulsory acquisition of land required for a project or work of a network utility operator. In the circumstances, although the Minister has succeeded, we consider costs should lie where they fall.

Result

[128] The appeal is allowed.

[129] The decision of the High Court is set aside.

[130] The report of the Environment Court is confirmed.

[131] As requested by Mr Isac, we refer the matter back to the Environment Court to finalise the terms of the easements as contemplated by the report.[127]

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126 High Court judgment, above n 13, at [76].
127 Environment Court report, above n 8, at [176]–[177].

[132] We make no order as to costs.

Solicitors:
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