IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2021-485-622
[2022] NZHC 2116

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	STUDENTS FOR CLIMATE SOLUTIONS INCORPORATED Applicant
AND	THE MINISTER OF ENERGY AND RESOURCES Respondent

Hearing: 25–27 July 2022

Appearances: M Heard, E D Nilsson and E F Armstrong for the Applicant
A Boadita-Cormican, E G R Dowse and D Ranchhod for the Respondent

Judgment: 24 August 2022

JUDGMENT OF COOKE J

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[1] The applicant is a body incorporated in August 2021. It was established to enable students to develop and support climate friendly initiatives. In these proceedings it challenges decisions to grant petroleum exploration permits under s 25 of the Crown Minerals Act 1991 (the CMA) to two companies: Greymouth Gas Turangi Ltd (Greymouth) and Riverside Energy Ltd (Riverside) by way of judicial review.

[2] The applicant contends that the relevant decision-maker failed to substantively consider the climate change implications of the decisions. There are effectively three grounds of judicial review:

(a) that the decision-maker failed to substantively consider the climate change implications of the decision as mandatory relevant considerations;

(b) that for similar reasons the decision was unreasonable; and

(c) that there was a failure to have proper regard to the principles of the Treaty of Waitangi.

[3] Six affidavits were filed in support of the application, including from those associated with the applicant and other deponents having expertise in matters associated with climate change. Five affidavits have been filed by the respondent, including from the decision-maker, and those having statutory responsibility under the CMA and in relation to climate change on behalf of the Crown. Written submissions were filed by both parties and I heard oral argument by remote means over more than two days. Greymouth and Riverside were both served with the proceeding but elected not to take an active part.

[4] Notwithstanding the scope of the materials provided to the Court, and the extent of the documentation that I was taken to, the ultimate questions for the Court to

determine are narrow. The extent of the materials and argument before the Court is reflective of the significant climate change concerns held by those associated with the applicant, and the perception that they need to take some action to seek to avoid the catastrophe that the earth is potentially facing. The substantive material filed and addressed by the respondent is then seen as necessary to respond to the points so raised. One of the issues for the Court is the identification of its proper role in the context of these wider issues of public importance — some say the most important issues facing present day humanity. I address this further below.

The statutory framework

[5] I begin by addressing the relevant statutory scheme. That involves considering two areas of legislative enactment — that concerning mining under the CMA, and that concerning climate change principally addressed under the Climate Change Response Act 2002 (the CCRA). As I will explain below the challenge ultimately turns on how these two enactments relate to one another, and how climate change considerations potentially affect the exercise of discretionary powers under the CMA. There is a further related question concerning the implications of the principles of the Treaty of Waitangi that also needs to be addressed.

The scheme of the CMA

[6] I begin by outlining the scheme of the CMA.

[7] As I will explain in greater detail below the focus of the CMA is mining. Section 1A was inserted into the Act by amendment in 2013, and it describes the overall purpose of the Act in the following terms:[1]

> **1A Purpose**
>
> (1) The purpose of this Act is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand.
>
> (2) To this end, this Act provides for—
>
> (a) the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and

[1] Crown Minerals Amendment Act 2013 (2013/No 14), s 6.

(b) the effective management and regulation of the exercise of those rights; and

(c) the carrying out, in accordance with good industry practice, of activities in respect of those rights; and

(d) a fair financial return to the Crown for its minerals.

[8] Petroleum is defined to include both oil and gas in s 2. The CMA contemplates three types of permit for mining for petroleum. They are specified in s 23 and involve prospecting, exploration, and mining. All three types of permit are issued under s 25. The permits challenged here were exploration permits.

[9] The three different types of permit reflect the different types of activity involved in searching for, locating, and commercially mining petroleum. Prospecting permits are often issued over large regional areas which may contain hydrocarbons. Prospecting permits can involve the gathering of data, but they do not allow the permitholder to drill. There are no petroleum prospecting permits currently in force in New Zealand.

[10] Exploration permits enable permit holders to explore and drill in an area for the purpose of determining whether there is commercially producible petroleum in any part of that area. They are typically granted for smaller areas, and for 10 to 15 years depending on their location. Their permitted activities include conducting surveys, and desktop work as well as drilling. The production and sale of petroleum is not the purpose of an exploration permit. That is the purpose of a mining permit. The ultimate "success" of an individual exploration permit is likely to be low. Only five such permits have been granted for petroleum in the last six years, although 59 have been granted in the last 10 years.

[11] The final stage is a mining permit. These permits allow commercial mining activities. The area of the permit will be defined by the proven commercially producible hydrocarbons and can be issued for long periods. Five such permits have been granted for petroleum in the last 10 years.

[12] Section 25 creates a broadly expressed discretion to issue the three types of permit I have described. Legal controls on that discretionary power are to be found

elsewhere in the CMA, including in s 29A which was first introduced in 2013, and subsequently amended over time.[2] Most relevantly s 29A provides:

> **29A Process for considering application**
>
> …
>
> (2) Before granting a permit, the Minister must be satisfied—
>
> (a) that the proposed work programme provided by the applicant is consistent with—
>
> (i) the purpose of this Act; and
>
> (ii) the purpose of the proposed permit; and
>
> (iii) good industry practice in respect of the proposed activities; and
>
> (b) that the applicant is highly likely to comply with, and give proper effect to, the proposed work programme, taking into account—
>
> (i) the applicant's technical capability; and
>
> (ii) the applicant's financial capability; and
>
> (iii) any relevant information on the applicant's failure to comply with permits or rights, or conditions in respect of those permits or rights, to prospect, explore, or mine in New Zealand or internationally; and
>
> (c) that the applicant is highly likely to comply with the relevant obligations under the Act or the regulations in respect of reporting and the payment of fees and royalties; and
>
> (d) in the case of a Tier 1 permit for exploration or mining, that the proposed permit operator has, or is highly likely to have, by the time the relevant work in any granted permit is undertaken, the capability and systems that are likely to be required to meet the health and safety and environmental requirements of all specified Acts for the types of activities proposed under the permit.
>
> (3) For the purposes of the Minister satisfying himself or herself of the matter in subsection (2)(d), the Minister—
>
> (a) is only required to undertake a high-level preliminary assessment; and

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2 Crown Minerals Amendment Act 2013 (2013/No 14), s 24.

(b) must seek the views of the health and safety regulator and may, but is not required to, obtain the views of any other regulatory agency; and

(c) may, but is not required to, rely on the views of the regulatory agencies; and

(d) is not required to duplicate any assessment process that a regulatory agency may be required to undertake in accordance with a specified Act.

(4) To avoid doubt, subsection (2)(d) does not limit, have any effect on, or have any bearing on—

(a) whether the permit holder or permit operator is required to obtain any permit, consent, or other permission under any health and safety or environmental legislation:

(b) the granting to the permit holder or permit operator of any permit, consent, or other permission necessary under any health and safety or environmental legislation by any government agency, consent authority, or Minister responsible for the administration of that legislation.

…

[13] Under s 24 of the CMA the Minister is empowered to offer permits for allocation by public tender. This is known as a "block offer" for permitting rights. Since 2013 the allocation of petroleum exploration permits has been exclusively through annual block offer tenders. But ultimately the process involved in the block offer procedure results in the need for a decision under s 25 of the Act, which will include an assessment of the mandatory requirements set out in s 29A.

[14] Under s 22 of the CMA decision-makers "must act in accordance with" any minerals programme issued by the Governor-General by Order in Council on the recommendation by the Minister under s 19 of the CMA. Such minerals programmes operate as secondary legislation which bind the decision-makers under the Act. In accordance with s 22(2) the Act prevails in the event of any inconsistency between a minerals programme and the provisions of the Act.

[15] The current petroleum minerals programme came into force on 24 May 2013, the same day as the purpose provision in s 1A was introduced into the CMA.[3] Under

[3] Crown Minerals Amendment Act 2013 (2013 No 14), s 6.

cl 7.2(1) all exploration permits are required to be allocated competitively. It contains more detailed provisions, including provisions describing how consultation will occur with iwi on block offer proposals. It also contains provisions relevant to assessing the purposes of the CMA, and the considerations relevant to decision-making. When first enacted, s 20 of the CMA required each minerals programme to be reviewed within 10 years. This requirement was repealed in 2013.[4] As I understand it the review of the approach to be adopted under the CMA is now to be addressed as part of the Government's anticipated further consideration of the CMA, including in connection with climate change issues.

[16] In the present case, and consistently with the minerals programme, a decision was made on behalf of the Minister under s 24(1) of the CMA to make a block offer for exploration permits in the relevant areas. That decision was made on 27 July 2020. It is not challenged in this proceeding.

[17] The challenged decisions here arose out of this block offer process. The ultimate decisions were made under s 25 by Ms Phillippa Fox on 29 June 2021 acting under delegated powers. As a result of the decisions two exploration permits were issued, one to Riverside for a 10-year term, and one to Greymouth for a 10-year term.

The climate change framework

[18] It is also necessary to outline the framework for addressing climate change issues under New Zealand law. This arises primarily under the CCRA, but the background involves international initiatives, and New Zealand's international obligations. The international obligations and New Zealand's response were comprehensively described by Mallon J in *Thomson v Minister for Climate Change Issues* although the legislation has since been amended.[5] For present purposes a more abbreviated description can be provided.

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4 Crown Minerals Act 2013 (2013, No 14), s 18.

5 *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [19]–[43].

[19] The starting point is the United Nations Framework Convention on Climate Change (the Convention) signed in June 1992 and coming into effect in March 1994.[6] This is the foundation global treaty that deals with climate change. Under Article 4(2)(a) of Annex I of the Convention the state parties committed themselves to adopting national policies to address climate change.

[20] Under the Convention there is a Conference of the Parties that meets every year. Developed countries, including New Zealand, were and are expected to include a detailed description of the policies and measures they have adopted to implement their commitments, as well as a specific estimate of the effects of those policies on emissions.[7]

[21] But the Convention did not establish any particular targets, or international obligations in relation to particular targets. Targets were first introduced under the Kyoto Protocol. The Kyoto Protocol was a subsidiary agreement under the Convention. It was adopted on 11 December 1997 and came into force in February 2005. New Zealand ratified the Protocol in 2002. Article 4 required developed countries to set internationally binding emissions reduction targets over a commitment period. The first commitment period was between 2008 to 2012.

[22] In December 2015 a new global agreement was then reached and adopted in Paris. The Paris Agreement came into force in November 2016. Article 2 of the Paris Agreement sets out the goal of holding the increase in the global average temperatures to well below 2º C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5º C above pre-industrial levels. It requires all state parties to have a Nationally Determined Contribution (or NDC). Each NDC is required to be communicated every five years and should represent a progression beyond the previous communication and reflect the state party's highest possible ambition. The Paris Agreement nevertheless leaves the targets to be determined by each state party. New Zealand first submitted a NDC in July 2015, and then again on 5 October 2016. It revised the NDC on 31 October 2021.

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6 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

7 Article 12.

[23] In order to give effect to New Zealand's obligations the CCRA was enacted in 2002, the same year that New Zealand ratified the Kyoto Protocol. The purpose of the CCRA is set out in s 3 includes providing a framework for New Zealand to meet its international obligations under the Convention, the Kyoto Protocol and the Paris Agreement. The purpose provision now states:

> **3 Purpose**
>
> (1) The purpose of this Act is to—
>
> (aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that—
>
> (i) contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and
>
> (ii) allow New Zealand to prepare for, and adapt to, the effects of climate change:
>
> …

[24] The Act as amended includes a number of measures directed to these ends. This included the establishment of the Climate Change Commission, the setting of emissions budgets and the establishment of an emissions reduction target in s 5Q of the Act. Section 5Q sets a target for 2050 involving a net accounting for emission gasses other than biogenic methane at zero by 2050, and in respect of biogenic methane at 10 per cent less than 2017 emissions by 2030, and 24 to 47 per cent less than 2017 emissions by 2050. Biogenic methane emissions are those arising from agricultural activities.

[25] The CCRA has been amended a number of times since it was first enacted. When the position was assessed in *Thompson v Minister for Climate Change Issues*, climate change targets were implemented under ss 224 and 225.[8] These provisions were repealed by the Climate Change Response (Zero Carbon) Amendment Act 2019 and were replaced by sub-part 1 of part 1B of the CCRA which introduced the 2050 target, and stipulates the effect of a failure to meet the 2050 target and associated emissions budgets.[9] Under this revised framework the Minister has a duty to set an

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8 *Thomson v Minister for Climate Change Issues*, above n 5; these provisions conferred the power to set targets and for making regulations setting targets.

9 Climate Change Response Act 2002, s 5ZN.

emissions budget for each emissions budget period and ensure they are met.[10] In doing so the Minister is required to do so with a view to "contributing to the global effort under the Paris Agreement".[11]

[26] A key concept underlying this legislation, and the international framework, is that of a "just transition". This is seen as an inherent part of the measures in the Paris Agreement. It was referred to by the Climate Change Commission in its first report, including in the following way:[12]

> 33 A common thread through submissions was fairness – climate action or inaction should not entrench inequity or disadvantage some groups of society, or be at the expense of people's economic, social, and culture wellbeing. We heard support for a just transition. This is a transition that is equitable, fair, and inclusive. People said that the cost of the transition should fall on industries most responsible and not harm low-income communities.

[27] And later in the report the Climate Change Commission observed:

> 49 The transition to a low-emissions society will not lead to lasting change if it creates or exacerbates social inequities. However, the transition can be economically affordable and socially acceptable if it is well-paced, planned together with communities, and well-signalled. Society will benefit from improved health and wellbeing.

[28] The "just transition" concept recognises that human activities upon which economic and social wellbeing depend have involved the production of harmful emissions. The international instruments and domestic measures proceed on the basis that it is not appropriate to immediately eliminate such activities because of the harm that would arise from such action. A just transition is seen as an essential part of these measures. Whether the transition being implemented is fast enough is a matter of legitimate debate. But it is nevertheless the framework that has been adopted to address climate change.

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10 Climate Change Response Act 2002, s 5X.

11 Section 5W.

12 He Pou a Rangi the Climate Change Commission "Ināia tonu nei: a low emissions future for Aotearoa" (31 May 2021).

Overlap between climate change measures and the CMA

[29] As indicated above, this judicial review challenge ultimately turns on how climate change issues influence decisions made under the CMA.[13] There are two particular ways in which overlap directly occurs that are appropriately addressed in an introductory way.

[30] First, in 2018 the Government decided upon a policy to move away from petroleum exploration and production. As a first step a decision was made to place a ban on allocating new off-shore petroleum exploration permits, and to limit any new exploration to permits onshore in the Taranaki area by way of block offers only.

[31] This policy was given effect through the Crown Minerals (Petroleum) Amendment Act 2018. Section 23A of the CMA was amended to limit who could apply for permits. It also limited the availability of such permits to those allocated by public tender under s 24, and at the same time s 24 was amended to introduce s 24(5A). It implements the policy in the following way:

> **24 Allocation by public tender**
>
> (1) Unless a minerals programme expressly provides otherwise, the Minister may, from time to time, by notice in such publications as the Minister considers appropriate, offer permits for allocation by public tender.
>
> …
>
> (5A) The following provisions apply to offers of permits for petroleum under subsection (1):
>
> (a) an offer may be made in respect of any land in the onshore Taranaki region only:
>
> (b) the Minister must not accept a tender for a permit for petroleum in respect of any land outside the onshore Taranaki region:
>
> (c) a person may submit a tender for a permit for petroleum only in accordance with an offer (if any) made in accordance with this section:
>
> (d) this subsection applies despite anything to the contrary in this Act (including section 1A).

[13] Including in relation to the requirements in relation to the principles of the Treaty of Waitangi addressed at [88]–[113] below.

…

[32] No amendments were made to s 25, under which the permits are ultimately issued. But the effect of these amendments was to prevent any permits being issued other than in accordance with the block offer procedures, and only for onshore activities in the Taranaki area.

[33] The new s 24(5A)(d) makes express reference to the purpose provision of the CMA. I was referred to materials, including a Cabinet Paper recording that a decision was made not to amend the purpose provision of the CMA at this time as this would be a significant step that could have unintended consequences, including in relation to "… how the industry perceive New Zealand as an investment destination".[14] I do not consider that the Court can properly consider material such as a Cabinet Paper when undertaking the task of interpreting legislation. But it is relevant that the purpose provision in s 1A was not amended at this time, and that the "ring fencing" effect of the amendments were identified as operating notwithstanding the Act's purpose, which was otherwise to continue.

[34] A further significant change was then made to the CCRA by the Climate Change Response (Zero Carbon) Amendment Act 2019. A new s 5ZN was inserted in the following terms:

> **5ZN 2050 target and emissions budget are permissive considerations**
>
> If they think fit, a person or body may, in exercising or performing a public function, power, or duty conferred on that person or body by or under law, take into account—
>
> (a) the 2050 target; or
>
> (b) an emissions budget; or
>
> (c) an emissions reduction plan.

[35] In addition, s 5ZO was inserted permitting the responsible Minister to issue guidance to government departments on how to take the 2050 target or emissions budgets into account in the performance of their functions, powers and duties.

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[14] Cabinet Economic Development Committee "Proposed changes to the Crown Minerals Act 1991" (25 June 2018) at [42].

[36] One of the issues that I address below is how these provisions of the CCRA affect the exercise of discretionary powers under the CMA, particularly with respect to mandatory and permissive relevant considerations.

[37] Although not directly relevant to this legislative scheme it is noteworthy that Parliament adopted a motion declaring an emergency arising from climate change on 2 December 2020.[15] In supporting that motion the Prime Minister stated:

> This declaration is about our global responsibilities. As a nation, it is not our nature to turn our back on a problem, and it's certainly not in our DNA to ignore a sense of responsibility and obligation. On climate change we will only make progress if we absolutely accept that collective action is required. If any nation falls short, we all fall short. So, importantly, this is a declaration that records the formal importance of our intent as a nation and our intent on the global stage. It's a declaration that now serves as a directive to all aspects of the public service around the urgency that we as a Government require and the urgency that we require around action. It acts as a catalyst for change.

[38] This motion is a political rather than a legal act. But I mention it because the last sentences of the quoted paragraph appear related to the sentiments that underlie ss 5ZN and 5ZO.

The role of the Court in climate change judicial review

[39] Before addressing the specific grounds of review, I briefly address the submissions advanced by the parties directed to the role the Court should adopt in addressing claims for judicial review involving climate change.

[40] The applicant emphasised the profound adverse impacts of climate change and argued that this meant the Court should approach judicial review with heightened scrutiny, relying particularly on the observations of Palmer J in *Hauraki Coromandel Climate Action Inc v Thames- Coromandel District Council* where he said:[16]

> I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental human rights. Depending on their context, decisions about climate change deserve heightened scrutiny. That is so here.

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15 (2 December 2020) 749 NZPD (Declaration of Climate Emergency – Motion, Jacinda Arden).

16 *Hauraki Coromandel Climate Action Inc v Thames- Coromandel District Council* [2021] 3 NZLR 280 (HC) at [51].

[41] I do not find the concepts of heightened scrutiny, or variable intensity review of assistance, however. The role of the Court in judicial review is to ensure that decisions are made lawfully. The scope of the discretion given to decision-makers will vary — some discretions are closely controlled by legal requirements, and other discretions are not. It is the Court's function to identify the legal controls and limits, and ensure the powers are exercised as intended. When doing so the degree of scrutiny should not change. What varies is the nature and extent of the legal controls over discretions, not the intensity with which the Court undertakes its task. As Venning J recently said when addressing Palmer J's view, variable intensity review "is not subscribed to by all" and that "the focus should rather be on whether the decision-maker has acted in accordance with the power in issue and with any other requirements imposed by relevant legislation".[17]

[42] Palmer J is far from alone in advocating for variable intensity review either in New Zealand[18] or internationally.[19] But the concept has never finally taken root here. When faced with the arguments about intensity of review in *Minister for Justice v Kim* the Supreme Court declined to endorse a heightened scrutiny test, indicating that the validity of a variable intensity approach would need to await a case where its existence was in issue.[20] But it may be difficult to imagine a more likely situation for its application than that case, which concerned the exercise of discretionary power to extradite a person to a country which was alleged to engage in torture. In my view the Court's decision reflects the fact that adherence to the essential function of interpreting and applying the law to the circumstances of a case renders more generalised intensity of review analysis of little relevance.

[43] Counsel for the respondents advanced a similar submission, but to the opposite effect. They argued that there were constitutional constraints on judicial intervention in cases involving high public policy issues such as climate change. It was argued that "polycentric socio-economic policy problems are generally within the customary

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17 *All Board Aotearoa Inc v Auckland Transport* [2022] NZHC 1620 at [87].

18 See *Kim v Minister of Justice* [2019] NZCA 209, [2019] 3 NZLR 173 at [45]–[47]; *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [47]–[48].

19 For example in his most recent article Professor Paul Craig begins by saying "It is axiomatic that the intensity of judicial review varies …" Paul Craig "Varying Intensity of Judicial Review: a conceptual analysis" [2022] PL 442.

20 *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [51].

sphere of the executive and the Court should refrain from interfering on a merits basis … particularly … where the reasonableness of decisions by expert decision-makers within their area of expertise are challenged, especially for the contested scientific or technical issues".[21]

[44] This is also a submission I do not accept. Whether the Court should intervene by way of judicial review depends on whether, on the correct interpretation of the empowering instrument and any other legal requirements, the decision-maker has acted in accordance with law. That is so whether or not the questions of law involve "polycentric", or "socio-economic" issues. The role of the Court is more limited and specific than that undertaken by elected representatives, however. It is governments who decide whether to enter international obligations involving matters such as climate change, and then how those matters are to be addressed in domestic law. The Court considers the narrower questions of law arising from the measures so adopted. That is the Court's constitutional function. But that can require it to consider questions that can be said to have a high policy content when they arise as a matter of the legal requirements.[22]

[45] These more general points about the subject matter may become relevant when it comes to the discretion in relation to relief, but they should not alter the approach that is adopted to assessing compliance with the law. In *Thomson v Minister for Climate Change Issues* Mallon J comprehensively reviewed the international judicial review challenges to climate change decisions. She then concluded that "… justiciability concerns depend on the ground for review rather than its subject matter. The subject matter may make a review ground more difficult to establish, but it should not rule out any review by the Court".[23] I agree, and note that in that case Mallon J went on to conclude that the climate change targets set by the Minister under s 224 of the CCRA were legally required to be reviewed following an updated report from the

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21 Relying on *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) and *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] 1 NZLR 75 (HC) at [41]–[45] amongst other authorities.

22 See, for example, *Make It 16 Inc v Attorney-General* [2021] NZCA 681 at [51]–[53]; *R (Prolife Alliance) v British Broadcasting Corporation* [2002] UKHL 23, [2004] 1 AC 185 at [75]–[76] per Lord Hoffman.

23 *Thomson v Minister for Climate Change Issues*, above n 5, at [134].

Intergovernmental Panel on Climate Change.[24] This was required as a matter of law given the terms of the Act, and New Zealand's commitments in the international instruments. Similarly in *Friends of the Earth Ltd and others v Secretary of State for Business Energy and Industrial Strategy* the English and Welsh High Court recently overturned a decision by the Secretary of State as it failed to address how the shortfall in their target was to be addressed under the statutory requirements, and for failure to provide a quantitative explanation to Parliament as required by another statutory provision.[25] Holgate J addressed the role of the Court in a manner that I see as consistent with the way I have described it above.[26]

[46] Both of those decisions involve the Court finding that ministerial decisions involving climate change targets were unlawful because the targets were not addressing climate change as the statute required, and notwithstanding that the decisions can be said to involve polycentric or socio-economic issues. The key point is that the Court identifies and then ensures compliance with the requirements of the law. There is no shortage of legislative provisions, and accordingly legal requirements, relating to climate change measures. The rule of law requires the Courts to ensure these measures are implemented lawfully.

[47] Both of the arguments advanced by the parties seem to me to involve generalisations that are not ultimately helpful to the Court dealing with the particular case. Moreover it might be said that both involve an attempt to "screw the scrum" as they suggest that the Court should generally favour those seeking to challenge decisions, or the decision-maker. The role of the Court is to dispassionately ensure that the requirements of the law are met. The rule of law requires this. For these reasons I see a risk that such arguments invite the Court to adopt an unprincipled approach. Putting it another way they invite the referee itself to screw the scrum. I do not accept either approach for this reason.

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24 As indicated, s 224 has since been repealed.

25 *Friends of the Earth Ltd and others v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841.

26 At [22].

Failure to consider mandatory relevant considerations

[48] As explained the applicant and respondents took me through a wealth of material in advancing their arguments. I do not propose to describe those arguments extensively as this will unnecessarily lengthen this judgment, which ultimately turns on narrower questions of law.

[49] I deal first with the applicant's arguments that the Minister's decision-maker failed to adequately take into account mandatory relevant considerations in relation to climate change. The relevant matters referred to for this head of challenge are similar to those that are relied on for the unreasonableness ground. There is then a separate argument based upon the principles of the Treaty of Waitangi which is pleaded in relation to both the failure to take into account mandatory relevant considerations, and the unreasonableness grounds of review. As I see it, however, this is a separate ground as it relies on different legal principles. So I address it discretely below.

The argument

[50] The applicant took me through materials showing the seriousness of the risks arising from climate change, and the apparent failure of the international community and the New Zealand Government to properly address them through the implementation of effective climate change measures.

[51] It may capture the applicant's argument to refer to three formal reports relied on in oral submissions that emphasise why climate change, and the failure to adequately respond to climate change, gives rise to mandatory relevant considerations that the decision-maker did not properly address. All three reports were released shortly before the challenged decisions were made.

[52] First, the Climate Change Commission advised that New Zealand was failing to meet its emission reduction targets. Its report was tabled in Parliament on 9 June 2021, twenty days before the challenged decisions were made. The Commission said:[27]

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[27] He Pou a Rangi the Climate Change Commission "Ināia tonu nei: a low emissions future for Aotearoa" (31 May 2021) at [86]–[88].

We are not on track to meet our targets

Since acknowledging the need to act on climate change, successive governments have adopted a series of different emissions reduction targets. But while the targets changed, they all shared the same short-term focus on planting trees and purchasing offshore mitigation, rather than what was necessary to achieve actual emissions reductions at source.

Instead of putting policies in place to decarbonise the economy and develop low-emissions technologies, practices and behaviours, Aotearoa used forests planted in the 1990s to offset its emissions and meet its targets. The carbon removal benefits of these forests are now coming to an end. Gross emissions have increased by 26% since 1990 and Aotearoa is in a position that is more difficult than it might have been if it had started developing the structures, strategies and plans it needs to create a low emissions system earlier.

Our analysis shows that current government policies do not put Aotearoa on track to meet the Commission's recommended emissions budgets or the 2050 targets. Achieving the emissions reductions needed to get to 2050 will require our elected officials to move fast to implement a comprehensive plan.

[53] It included recommendations in relation to gas. The Commission advised:[28]

To get on a low-emissions path Aotearoa needs to:

- Avoid locking in new fossil gas assets; and
- Phase down how much fossil gas is used in existing residential, commercial and public buildings.

[54] The applicants also relied on the International Energy Agency (the IEA) report of May 2021 entitled "Net Zero by 2050 – A Roadmap for the Global Energy Sector".[29] This report was commissioned by the then President of the IEA because of the failure of the international community to meet the necessary targets to respond to global climate change. The forward to the report stated:[30]

> We are approaching a decisive moment for international efforts to tackle the climate crisis – a great challenge of our times. The number of countries that have pledged to meet net-zero emissions by mid-century or soon after continues to grow, but so do global greenhouse gas emissions. The gap between rhetoric and action needs to close if we are to have a fighting chance of reaching net-zero by 2050 and limiting the rise of global temperatures to 1.5^{O}C.

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28 At 92.

29 International Energy Agency "Net Zero by 2050 – A Roadmap for the Global Energy Sector" (May 2021).

30 At 3.

[55] The report then outlined a pathway by which this goal could, in fact, still be achieved.[31] That pathway included the requirement that:[32]

> No new oil and gas fields approved for development; no new coal mines or mine extensions

[56] Finally the applicants relied on the report from Concept Consulting entitled "Gas Demand and Supply Projections — 2021–2035" also dated May 2021.[33] This report was commissioned by Gas Industry Co, which is a co-governance body addressing questions for the overall gas industry in New Zealand. In reporting for the period beyond 2024 the report said:[34]

> Looking out further, there is sufficient gas 'in the ground' to meet mass market, industrial and power generation demand until at least 2035 (and likely significantly beyond). Out to 2027, that production could come largely from existing reserves but beyond then is likely to require development of contingent resources.

It explains later:[35]

> Contingent resources are also known accumulations of gas, but these are not currently assessed as commercially justified for production. This means there is more uncertainty about their future contribution to supply.

[57] So the applicants say there is no need for further gas exploration as New Zealand has enough gas in its existing known gas fields to address its own needs. The applicant also points out that a high percentage of New Zealand's oil and gas production is exported. The IEA has said that to meet the international targets no new gas fields should be approved for development. And the Climate Change Commission has advised that we should not lock in any new fossil gas assets as part of the pressing need for New Zealand to set revised targets. The applicant says that these reports, released shortly before the decisions, raised considerations that the decision-maker needed to take into account before approving yet more exploration permits for gas.

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31 At 26.
32 At 26; see figure for 2020.
33 Concept Consulting Group Ltd "Gas demand and supply projections – 2021 to 2035" (May 2021).
34 At 14.
35 At 15.

[58] The respondents outlined factual responses to these points: the IEA's report only demonstrated one pathway to achieving the international targets; the Concept Consulting report noted the uncertainty about current contingent resources and referred to the potential use of yet unidentified accumulations of gas; and the Climate Change Commission was referring to fossil gas assets that *used* fossil gas rather than making any recommendations in relation to mining for it. The Emissions Reduction Plan dated 16 May 2022 included plans for the energy sector, and it also recorded that New Zealand was on track to meet the energy sector sub-targets. But I accept that the applicant has established that there are genuine climate change issues arising from continuing to grant permits for the exploration for fossil fuels. Any success would contribute to the availability of such fuels, the consumption of which will contribute to global warming. There has been a recognised failure to address global warming. If climate change is relevant to the statutory decisions these could well be very important matters. The real question is whether they are relevant.

Relevant considerations — the principles

[59] The principles concerning relevant and irrelevant considerations, and when the Court may set aside decisions in relation to such considerations are well settled. In particular:

(a) Considerations that are irrelevant to the decision are to be ignored, and decisions may be set aside if they are not.

(b) Considerations that are expressly or impliedly mandatory must be taken into account, and a decisions may be set aside if they are not.

(c) Considerations that are permissible and not mandatory may be taken into account, with the weight to be given to them for the decision-maker.

[60] The distinction between mandatory and permissible considerations was outlined by the Court of Appeal in *CREEDNZ Inc v Governor-General* where Cooke J said:[36]

> A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228; [1947] 2 All ER 680, 682: "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters". More recently in *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014, 1065; [1976] 3 All ER 665, 695, Lord Diplock put it as regards the statutory powers of a Minister that ". . . it is for a court of law to determine whether it has been established that in reaching his decision . . . he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered . . .
>
> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. …
>
> Questions of degree can arise here and it would be dangerous to dogmatise. But it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be taken into account. … I think there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers collectively would not be in accordance with the intention of the Act.

[61] *CREEDNZ* is well established in New Zealand, and has also been followed in the United Kingdom, although most recently the United Kingdom Supreme Court added a complication by suggesting that Cooke J's reference to a consideration that was "so obviously material" involved "the familiar *Wednesbury* irrationality test".[37] The addition of *Wednesbury* is unnecessary.[38] The approach in New Zealand is more straightforward. A mandatory consideration must be taken into account. The

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36 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 182.

37 *Friends of the Earth Ltd and Others v Heathrow Airport Ltd* [2020] UKSC 52; [2021] 2 All ER 967 at [119]. It is possible that this was intended to be with respect to permissible rather than mandatory considerations.

38 And unlikely to have been welcomed – see *R (Daly) v Home Secretary* [2001] 2 AC 532 (HL) at 549 and *R v Chief Constable of Sussex ex parte International Traders Ferry Ltd* [1999] 1 All ER 129 (HL) at 157.

consideration must be genuine. So if a decision-maker refers to a mandatory relevant consideration but gives it no weight the consideration may not be adequate. Whether the consideration is sufficiently addressed is itself a matter of identifying whether the intention of Parliament has been complied with. It is not also necessary to establish that the lack of consideration was irrational.

Application to the present case

[62] The applicant argues that the climate change issues, including New Zealand's international obligations were mandatory relevant considerations that the decision-maker failed to take into account. I do not accept this. Indeed for the reasons set out below I conclude that on the correct interpretation of the legislation those matters were irrelevant considerations.

[63] The decisions were made under s 25 of the CMA. Section 29A of the CMA specifies the considerations that the decision-maker must have regard to. The stipulation of mandatory relevant considerations does not exclude the possibility of further implied mandatory considerations, but it goes some distance in identifying what the mandatory considerations are. Climate change, climate change targets, and compliance with such targets are not within the considerations specified in s 29A.

[64] Section 29A(2)(a)(ii) provides that the Minister must be satisfied that the applicant's proposed work programme is consistent with the purpose of the Act. More generally the purpose of the Act should be advanced by the decision. The purpose of the Act is set out in s 1A(1). It is "… to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand". This contemplates the exploitation of minerals, including fossil fuels. Such activity may be at the expense of climate change, but that is what the Act seeks to advance.

[65] It seems to me that a key word in s 1A(1) is "promote" — the Act seeks to encourage mining to take place. This is then reiterated by subs (2) which explains that "to this end" a number of other matters are provided for, including the "efficient allocation of rights" to prospect, explore and mine.

[66] This exploitation focus has been identified in a series High Court authorities. First, in *Greenpeace of New Zealand Inc v Minister of Energy and Resources* Gendall J addressed the CMA before the 2013 amendments when dealing with an argument that environmental concerns should have been considered. He said:[39]

> The short point advanced by the Crown in this regard is that all of these legislative provisions and guidelines illustrate that environmental protection measures, and provisions designed to meet New Zealand's international obligations, are to be dealt with by Ministers and authorities *other* than the Minister of Energy. They are not powers conferred upon him or functions envisaged that he would undertake under the Act, and the evidence is that he was aware of that.
>
> …
>
> The Minister cannot be required to re-examine the environmental issues that may apply generally to all deep water exploration and drilling, given that successive governments have enacted the legislation and [Minerals Programme] on the basis that, as matters of policy, there will be permits issued under the regime. …

[67] Then in *Greymouth Petroleum Mining Group Ltd v Minister of Energy and Resources* Dobson J found that this was reiterated by the 2013 amendments. He said:[40]

> Ms Casey QC accepted on behalf of the regulator that s 1A rendered explicit what had been the implicit purpose of the CMA prior to the 2013 amendments. The focus on exploitation of Crown-owned minerals means that decisions under the CMA are not to be influenced by other policy factors, such as environmental concerns at the consequences of production of hydrocarbons: those factors are to be reflected in decisions taken in other contexts. …

[68] Finally in *Rangitira Developments Ltd v Sage* Clark J addressed provisions dealing with an express overlap between the CMA and the Conservation Act 1987. She said:[41]

> It is not necessary to engage further with the legislative materials put before the Court to accept the accuracy of Mr Hodder's description of the 2013 legislative reforms as having an "explicitly commercial focus". Mr Hodder was also correct to suggest the purpose of the Act, together with other provisions that I will shortly turn to, create a strong presumption in favour of mining activity although [the applicant] accepts the mining imperative might be outweighed by other factors.

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39 *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422 at [111] and [116].

40 *Greymouth Petroleum Mining Group Ltd v Minister of Energy and Resources* [2019] NZHC 1222 at [12].

41 *Rangitira Developments Ltd v Sage* [2020] NZHC 1503 at [75].

[69] In seeking to argue that these authorities should not be relied upon, Mr Heard contended that climate change considerations fell within s 1A of the Act because it only promoted exploration and mining "for the benefit of New Zealand". It followed that evidence demonstrating allowing such mining would *not* be for the benefit of New Zealand because of climate change considerations needed to be taken into account in order to identify if the purposes of the Act were being achieved.

[70] I do not accept this argument. The concluding words in s 1A(1) are Parliament's indication that it desires this activity to take place precisely because it is for New Zealand's economic benefit. It is not contemplating a balancing exercise under the Act — it does not say that it is promoting prospecting exploration and mining "if" or "when" this is for the benefit of New Zealand.

[71] The CMA does contemplate some balancing of other considerations in decision-making under the Act through s 29A. The good industry practices referred to in s 1A(2) is reflected in the requirement in s 29A(2)(d) for the decision-maker to assess whether the applicant has the "capability and systems that are likely to be required to meet the health and safety and environmental requirements of all specified Acts for the types of activities proposed under the permit". In s 29A(3) Parliament then makes it clear that all the decision-maker is required to do in this respect is to make a "high-level preliminary assessment" rather than the more extensive considerations required by other legislation. Section 29A(4) then makes it clear that this assessment does not limit or have an effect on the assessments required by other legislation.

[72] These are carefully crafted provisions that explain to a decision-maker how they should take into account other considerations which the legislation has told the decision-maker to address. The applicant's argument suggests that there are further matters — those concerning climate change, the international obligations, the targets that New Zealand has set to address climate change, and New Zealand's compliance with those targets — that the decision-maker must also address. But there is no machinery within the CMA that would explain to the decision-maker how they would take these matters into account and balance them against the advantages of granting such permits. If they were to take these matters into account as potential reasons to

decline, restrict or condition the permits issued under the Act some guidance would be needed, or would at least be expected.

[73] In any event the key point is that, looked at through the lens of the CMA, mining for fossil fuels is to be promoted. The applicant's ultimate point is that further mining for fossil fuels should stop as this causes climate change. So the applicant's argument is ultimately that the purpose of the CMA should not be advanced because it has become clear that it is damaging. But the decision-maker had no role to make such a decision. Decision-making under the Act must be consistent with its purpose, and the purpose of the CMA is to promote mining.

[74] The conflict between the promotion of mining for fossil fuels on the one hand, and the need to curtail such activities in the interests of climate change on the other, is not a conflict that is addressed by decision-makers under the CMA. It needs to be addressed at a policy level. Here such policy consideration led to the Crown Minerals (Petroleum) Amendment Act 2018 which prevented further permits being issued for off-shore activities, and constrained the on-shore activities to the Taranaki region by the introduction of ss 23A and 24(5A) of the CMA. I accept the respondents' submission that Parliament has made it apparent through ss 23A(d) and 24(5A)(d) that these restrictions limited what the purpose of the Act would otherwise have contemplated. That is why Parliament has specified that such restrictions apply "despite" s 1A. That language confirms the predominance that promotion of mining has in decision-making under the CMA.

[75] Moreover Parliament has spoken on the question of limiting the purpose of the Act in light of climate change issues. It has done so through the 2018 amendments. Parliament has confined that response to the restrictions imposed by those sections, with the Act to otherwise continue to promote mining, such as through the decisions under challenge. Climate change considerations are otherwise not relevant. The argument that not enough is being done to address climate change, and that no more mining for fossil fuels should take place, is an argument that the CMA requires further amendment by Parliament. Those matters will no doubt be considered when the CMA is further reviewed.

The impact of s 5ZN of the CCRA

[76] There is a final element of the argument that introduces more subtle, and more difficult questions. By s 5ZN of the CCRA (quoted at [34] above) the 2050 emissions reduction target and associated budgets and reduction plans are identified as permissible considerations for all public decision-makers if they think fit. The applicant argued that this made these matters relevant considerations for decisions under the CMA, and that they then became mandatory considerations because of the potency of those matters for these decisions given the climate crisis, and New Zealand's failings.

[77] I accept the respondents' submission that s 5ZN does not have this effect, however. Section 5ZN does no more than raise potentially permissible considerations. Parliament has not made the matters in s 5ZN mandatory considerations. It has made that clear by the initial words "if they think fit". That is a complete answer to the applicant's argument irrespective of the more difficult aspects of the effect of s 5ZN.

[78] The more difficult question is whether s 5ZN allows decision-makers under the CMA to take into account the targets, budgets and reduction plans under the CCRA. If so, that could encompass taking into account the failure to meet those targets, budgets and plans. Put in concrete terms, does s 5ZN authorise a decision-maker under the CMA to decline, limit, or condition permits issued under the CMA because of the targets, budgets and reduction plans? Could a CMA decision-maker decline a permit under s 25 for these reasons?

[79] It seems to me that the answer to that question involves the Court's normal approach to overlapping and potentially inconsistent statutory provisions in different enactments. The modern approach is less dependent on fixed principles — such as *generalia specialibus derogant* — and focusses more on a purposive interpretation that seeks to identify what Parliament must have intended, although the traditional maxims may still be of assistance.[42] For the reasons already outlined, climate change concerns are irrelevant to decision making under the CMA.[43] Given that, the "free

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42 *R v Pora* [2001] 2 NZLR 37 (CA) at [43] and [137]. See generally Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis NZ Ltd, Wellington, 2021) at 628–639.

43 Subject to s 4 of the CMA, and the principles of the Treaty addressed at [88]–[113] below.

floating" relevant considerations potentially arising from s 5ZN and s 5ZO of the CCRA do not displace the specific intention of Parliament expressed in the CMA. If Parliament wished to alter what the CMA provided, then it would do so more precisely, as it did when it amended its terms by the introduction of ss 23A and 24(5A). So, notwithstanding ss 5ZN and 5ZO, climate change considerations remain irrelevant to the CMA. If Parliament wishes to make such matters relevant to decisions under CMA, it needs to do so directly, and to explain how they are relevant.

[80] There are two final matters arising from the arguments of counsel that I should address:

(a) First, part of the respondents' response to the applicant's challenge involved pointing out that the decision-maker here *did* take into account the emissions targets and budgets established under the CCRA. Passages in the decision-papers sets such matters out, and the decision-maker has confirmed that she took these matters into account in making her decisions. I do not accept, however, that this involved taking climate change issues into account these matters in any substantive sense — they did not substantively influence the decision whether to grant the permits, or the terms of the permits so granted. The consideration given to those matters was effectively notional. The contention that they had a substantive influence on the decisions is artificial precisely because those considerations are not relevant under the CMA.

(b) Secondly, I do not accept that there is any significance in the respondents' point that prospecting of the kind permitted by these decisions is unlikely to lead to the successful exploitation of fossil fuels. That may well be generally true of exploration permits as a matter of fact. But had climate change been a mandatory relevant consideration it would not have been an answer to say that there was no harm in permitting the activity because it was unlikely to be ultimately successful. The whole purpose of granting the permits is to further the exploitation of fossil fuels.

[81] Nevertheless, for these reasons I dismiss the challenge to the decisions based on a failure to take into account mandatory relevant considerations.

Unreasonableness

[82] The applicant also challenges the decisions on the basis that they are unreasonable and ought to be set aside by the Court. The factors relied upon are same as those advanced in relation to a failure to take into account relevant considerations. I can accordingly address the position more briefly.

[83] The submissions of the parties addressed the continuing arguments concerning the test for unreasonableness as a ground of judicial review. I agree with the criticism of *Wednesbury* unreasonableness summarised by Palmer J in *Hu v Immigration and Protection Tribunal*.[44] Part of the difficulty with the *Wednesbury* formula is that it contains inbuilt deference as part of the test, and it only appears to allow review when the decision is capricious or absurd. That standard is not consistent with the rule of law. Neither is the *Wednesbury* test an overall standard of judicial review. It has never been necessary to show that a decision is irrational as well as unlawful on the traditional grounds.

[84] I also agree with Palmer J that the *Hu* formulation based on *Edwards v Bairstow* provides a clearer test when a decision is inconsistent with the evidence before the decision-maker.[45] But a decision might still be unreasonable in other circumstances. I see unreasonableness as a residual ground of review. The other more precise grounds of review properly address the vast majority of successful judicial review challenges. If a decision survives those grounds the Court may nevertheless set it aside if the outcome does not appear to be consistent with the empowering instrument. It may not be possible to apply the other more specific grounds of review because of the inadequacy of the reasoning. The more surprising the decision is, the more it would need to be explained in reasoning. Unreasonableness also covers that kind of case — where what has been decided is not consistent with what Parliament would have intended.

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44 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [27].

45 At [28]–[31]; see also *Edwards v Bairstow* [1956] AC 14 (HL) at [36], *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

[85] The simpler formulation — that a decision can be set aside if it was not reasonably open to the decision-maker — accurately captures this residual ground. That is the formulation which I understand to have been identified by the Supreme Court in *Minister of Justice v Kim*.[46] It is also the standard that applies to the Court reviewing the decision of trustees, which is analogous.[47]

[86] The present case is an illustration of these points of principle. I have found that climate change issues are not mandatory relevant considerations on the proper interpretation of the CMA and that they are, in fact, irrelevant considerations. There can accordingly be no room for setting the decision aside as unreasonable because of such considerations. Indeed I understood Mr Heard to accept that the unreasonableness ground could not be sustained if I found the considerations to be irrelevant. But in any event that must be so. This is an example of the more precise ground of judicial review being the appropriate, and primary ground to apply with a challenge of this kind. There is no place for the residual ground of unreasonableness. The more precise ground of challenge provides the more accurate framework for addressing the arguments advanced.

[87] For these reasons I dismiss the applicant's ground of challenge based on unreasonableness.

Compliance with the principles of the Treaty

[88] As indicated the applicant's arguments in relation to relevant considerations, and unreasonableness include allegations that the decision-maker had not adequately taken into account the principles of the Treaty when reaching the decisions, and that the decisions were unreasonable for this reason. I see this as involving a separate line of analysis that needs to be addressed.

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46 *Minister of Justice v Kim*, above n 20, at [14].
47 See Trusts Act 2019, s 126.

The relevant requirement

[89] Section 4 of the CMA provides:

> **4 Treaty of Waitangi**
>
> All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[90] Associate Professor Dean Knight has argued that the Supreme Court's decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* holds that the principles of the Treaty must be complied with when discretionary power is discharged unless the empowering legislation clearly says otherwise.[48] It is true that the Court said that "an intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless the intention is made quite clear".[49] But that does not expressly say that discretionary decision-makers are *obliged* to comply with the principles absent express provision.

[91] This may nevertheless be the ultimate effect of the judgment. This approach would also recognise that Treaty principles have the significance described in other cases.[50] Parliament is presumed not to empower statutory decision-makers to make decisions that are inconsistent with the rights in the New Zealand Bill of Rights Act 1990, other accepted fundamental common law principles, or New Zealand's international obligations.[51] These requirements are collectively referred to as the principle of legality. Given the Treaty's constitutional significance, a similar presumption should arise in relation to its principles. They are also part of the principle of legality in New Zealand.

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48 D R Knight *New Zealand: Te Tiriti o Waitangi Norms, Discretionary Power and the Principle of Legality (At Last)* [2022] PL (forthcoming).

49 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 108 at [151], [137], [296] and [332].

50 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 656; *Huakina Development Trust v Waikato Valley Authority & Bowater* [1987] 2 NZLR 188 (HC) at 210.

51 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [119], [203] and [218]; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948; *Ye v Minister of Immigration* [2010] 1 NZLR 104 (SC); *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 (HL).

[92] That should clearly be so in relation to legislation that contains a Treaty clause such as the CMA. Previous cases have focused on the particular verbal formulation used in such clauses, with differences turning on whether the clause has a strong injunction such as "give effect to", or a weaker injunction such as "have regard to".[52] But when Parliament requires the decision-maker to take into account the principles of the Treaty the natural inference is that it does so to ensure that the principles are not infringed. For that reason I do not agree that the particular verbal formulation is necessarily of decisive importance. What matters is the legislative indication that the principles need to be addressed, with the natural inference that they should be honoured unless Parliament provides otherwise. Anything less than this would fail to respect the constitutional significance of the Treaty.

[93] This is not an onerous requirement. It should also be remembered that the Treaty principles themselves involve questions of evaluation, and of judgment. Issues may often involve an apparent contest between rangatiratanga and kāwanatanga. Respect for both concepts is necessary to give effect to the principles. But discretionary decision-makers only have statutory power to make decisions that are shown to be in conflict with the principles when Parliament has expressly provided for this.

The argument

[94] The applicant argued that the decision-maker had not engaged with the principles of the Treaty in a meaningful way. Reliance was placed on the description of the required consideration in *Greenpeace of New Zealand Inc v The Minister of Energy and Resources*.[53] But it was emphasised that the obligations extended beyond a duty to consult.

[95] Mr Heard took me through a number of passages of the report of the Waitangi Tribunal on the Management of the Petroleum Resource.[54] The Tribunal found that Māori interests were not limited to protecting wāhi tapu but included broader

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52 Compare *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 558 and *Bleakley v Environment Risk Management Authority* [2001] 3 NZLR 213 (HC) at [73] and [157].

53 *Greenpeace of New Zealand Inc v The Minister of Energy and Resources*, above n 39.

54 Waitangi Tribunal *The report on the Management of the Petroleum Resource* (Wai 796, 2011).

considerations involving their role as kaitiaki over their tribal domains, the exercise of rangatiratanga, and the Māori world view — te ao Māori — concerning the exploitation of natural resources. That included the close cultural connection between Māori and their lands and other resources through whakapapa. It accordingly involved whanaungatanga as well as kaitiakitanga. The concern was that such greater interests had not been properly considered under the CMA as they were seen as "… either contrived and superstitious or insufficiently credible to justify consideration beyond box-ticking consultation."[55]

[96] The applicant argued that Māori were particularly vulnerable to the devastating effects of climate change. Taonga were already in a vulnerable state, large amounts of Māori land had already suffered high rates of erosion, marae and urupā situated near the coast or in flood lands were at increasing risk of flooding or from sea level rise erosion, and some urupā had already had to be relocated. The abundance and size of taonga species were also declining and mahinga kai areas were disappearing. Yet the decisions under challenge had not assessed the impacts of climate change on Māori, but had been limited to a consideration of whether particular areas should be excluded from the permit area because of their particular importance.

[97] The applicant relied on submissions that had been provided by Te Korowai o Ngā Ruahine Trust (TKONT) which had opposed any permits being granted, including for the following reasons:

> There are serious concerns about the environmental impacts caused by exploration and mining. These include, and are not limited to, impact on aquatic life, birdlife, natural biodiversity and quality of the waterways.
>
> The on-going allocation of Block Offers for minerals exploration goes against the commitment to move to a low emissions economy, that is low impact and renewable. TKONT sees the need to take a stand against oil and gas explorations in favour of leadership and investment in solar, wave, renewable electricity and hydrogen. Transitioning to a low-emissions economy requires leadership and commitment, and in doing so hard decisions need to be made that may not work in the interests of the traditional energy producers that have dominated our economy and our policy focus thus far.

[98] There had been no analysis of issues of this kind in the decisions. Indeed a briefing paper prepared for the block offer decision advised with respect to TKONT's

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55 At 23.

submissions that "This does not align with the CMA and consideration the Minister must consider." Yet the submission raised aspects of the principles of the Treaty of Waitangi that had been emphasised by the Tribunal as matters that needed fuller, and proper assessment.

Analysis

[99] For the reasons addressed above I have concluded that climate change considerations are not relevant considerations for the purpose of making decisions on mining permits under s 25 of the CMA. But the principles of the Treaty are made relevant by s 4, and also by the principle of legality. If the principles of the Treaty engage climate change issues then they become relevant to the decision. That much is apparent from *Greenpeace New Zealand Inc v The Minister of Energy and Resources*.[56] For example, if Māori whose traditional lands are subject to the decision oppose the grant of the permit because of a concern about climate change this would need to be addressed by the decision-maker. Such views may be an expression of rangatiratanga which the principles of the Treaty recognise and which must be balanced in the decision-making. So s 4 of the CMA and the principle of legality can have the effect of making climate change issues indirectly relevant.

[100] That would not mandate a particular outcome, however. The Treaty principles involve a balancing of considerations, including those involving both rangatiratanga and kāwanatanga. As the Tribunal said in its Report:[57]

> … the grievances of the past are then acerbated when iwi and hapū struggle to protect the taonga while watching the benefits of the petroleum industry travel out-side the region. Māori do not expect to always win, but it should not be usual, and, from their perspective, seemingly inevitable, that they should lose. That is why they seek participation in the decision-making process that is more than the consultation that is currently conducted, particularly where their interests are at greatest risk of damage or harm.

[101] Here the decision-maker assessed Treaty principles. That included a summary of the views of iwi that had been provided during consultation in relation to the proposed block offer round as required by the minerals programme and s 14(1)(b) of

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56 *Greenpeace New Zealand Inc v The Minister of Energy and Resources*, above n 39.
57 *The report on the Management of the Petroleum Resource*, above n 54, at 165.

the CMA. But the assessment did not include any consideration of whether mining should not take place at all because of the adverse impacts of climate change on Māori. Rather the advice to the decision-maker said that the consultation "… aims to identify any areas that are considered culturally significant to iwi and hapū." The analysis then undertaken limited the assessment to such matters.

[102] For a number of related reasons I do not accept that the principles of the Treaty required the decision-maker to engage in a broader assessment of this kind, or required the permits to be declined, however.

[103] A preliminary issue arises from the applicant's ability to raise arguments on behalf of local iwi. The reliance on the views expressed by TKONT on behalf of Ngā Ruahine is problematic. Ngā Ruahine is not a party to, or otherwise involved in these proceedings. Marylinda Brooks, whose evidence was at the forefront of this ground of challenge does not purport to speak on Ngā Ruahine's behalf. The principles of the Treaty are for the benefit of all, and I am not suggesting a lack of standing in any technical sense. But the Court should be careful to not itself act inconsistently with the principles of the Treaty by reaching decisions based on the views expressed by a particular iwi (or other recognised body) without having them formally before it. To do so might by itself be considered inconsistent with rangatiratanga, and tikanga.

[104] The second related issue is that I accept the respondents' point that reliance on the views of Ngā Ruahine is misguided. The permits in issue here do not cover areas involving their rohe. Based on the documents made available to me the directly affected iwi were Ngāti Ruanui for the Riverside permit, and Te Ātiawa and Te Kāhui o Tarankai for the Greymouth permit, neither of whom have played a role in this proceeding.

[105] It is also important to understand the process that has been followed. The consultation with iwi arose out of the minerals programme which included consultation obligations when block offers were made. This led to the decision under s 24(1) of the CMA on 27 July 2020 to make the block offer. This decision is not challenged in these proceedings. The challenged decisions concern the consequential decisions under s 25 on 29 June 2021 to issue exploration permits. It is only the iwi

whose ancestral areas are involved whose views have been explicitly addressed in the decisions under s 25, and then for the more limited purpose of identifying more particular questions that arise in respect of the permits. For example, the permits include obligations on the permit holders to engage with these iwi.

[106] I accept that any breach of the Treaty principles in relation to the block offer decision under s 24 may have the consequence that a decision under s 25 is also unlawful for being inconsistent with the principles of the Treaty. But it is understandable that the decision-maker here did not address TKONT's submission. The permits did not relate to their ancestral lands. And it is not suggested that there was any breach of Treaty principles associated with the views of the iwi who were directly affected.

[107] Mr Heard sought to respond to these points by arguing that the applicant was raising questions that were relevant to all Māori, with the problems in terms of the impact on Māori as outlined by Ms Brooks evidence. In effect this involves alleged non-compliance with the principles of the Treaty at a higher level.

[108] The difficulty with this argument is that the higher level assessments in issue were not assessments to be made by the decision-maker under s 25 of the CMA. Climate change issues clearly have a significant impact for Māori. But that is not just because of the adverse implications of climate change. It also arises because of the economic impact of measures taken to respond to climate change. The potentially disproportionate adverse impacts on Māori from such measures are recognised as matters that require careful examination. This is part of the just transition that underlies the international obligations, and New Zealand's legislation.

[109] The evidence filed by the respondents demonstrates that the views of Māori on climate change, and the measures taken to address its adverse effects, have been taken into account in a number of ways, and through a number of overlapping procedures. These were outlined by Ms Boadita-Cormican, and I also gave leave for a document to be filed after the hearing summarising the evidence of engagement. There is also other engagement that is not addressed in the evidence before the Court. I have no

basis to doubt this involved meaningful consideration of the issues in accordance with the principles of the Treaty.

[110] An important example of this is the Climate Change Commission's report of May 2021. Chapter 19 of that report is devoted to the policy direction for an equitable transition for iwi/Māori. The Commission reported that they had received significant feedback on these issues during consultation. It said:[58]

> **Achieving an equitable transition for Iwi/Māori**
>
> The transition to a low-emissions society in Aotearoa must be equitable for tangata whenua and all New Zealanders. To achieve this, the impacts of the transition on Iwi/Māori need to be understood from a te ao Māori view.
>
> The Commission has looked closely at the direction of policy needed to ensure government can support proactive partnership with Iwi/Māori and advance a Māori-led approach to an equitable transition for Iwi/ Māori. Part of this is providing for the recognition of Iwi/Māori perspectives, including recognising tikanga and mātauranga Māori alongside Western science.
>
> Central and local government must ensure emissions reduction plans comply with the Treaty and do not compound historic grievances and further disadvantage Iwi/Māori. Climate action that does not support Iwi/Māori to exercise rangatiratanga, kaitiakitanga and mana motuhake over their whenua, and other cultural assets will exacerbate inequity for Iwi/Māori.

[111] The decision to issue these two exploration permits is not inconsistent with the principles of the Treaty simply because there are climate change issues that affect Māori. Climate change mitigation measures do so as well. A balance must be struck. A balance between rangatiratanga and kāwanatanga also arises under the Treaty principles. The necessary assessments have taken place in other ways, including under other statutory provisions. Iwi have been consulted as part of these processes. There is nothing before the Court to indicate that the consultation has been inadequate, or that the principles have not been properly addressed.

[112] In my view the applicant's arguments are not well-founded. The higher level issues have been addressed in other ways, and there are no materials before the Court to show a difficulty with those assessments. The more local issues that arise in relation to these particular permits necessitated the input of the affected iwi. But the applicant

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[58] He Pou a Rangi the Climate Change Commission "Ināia tonu nei: a low emissions future for Aotearoa", above n 12, at 325.

does not represent those iwi, and neither has any point been made about the more localised issues in the challenge. Nor could it be without the involvement of the relevant iwi.

[113] For these reasons I dismiss this aspect of the challenge as well.

Conclusion

[114] No one can doubt the importance of climate change issues. They may be the most significant issues of our time. The applicant represents those who are greatly concerned that not enough is being done. It is significant that they seek to represent those who are part of the next generation.

[115] But the issues for the Court are necessarily narrower ones. The Court's role is limited to ensuring that discretionary powers are lawfully exercised. The discretionary power in issue here is the power under s 25 of the CMA to issue permits for the exploration for gas. When doing so the relevant decision-maker was required to act in accordance with the provisions of the CMA and the relevant minerals programme. She was also required to act in accordance with the purpose of the Act. The purpose of the Act is to promote such mining. The decision to issue the permits was consistent with the CMA, the minerals programme, and the purpose of the Act. Climate change considerations were not relevant to the decisions. Indeed, if she had substantively taken them into account she would have been acting unlawfully as these matters were irrelevant to what the Act required her to do. For the same reason her decisions were not unreasonable for a failure to address these considerations.

[116] Climate change considerations can become relevant to decisions under the CMA as a consequence of the requirement for decisions to be consistent with the principles of the Treaty of Waitangi. That obligation arises under s 4 of the CMA and the principle of legality. But the broader potential impacts of climate change on Māori, and the potential effects of measures taken to limit the effects of climate change, involve a balancing of considerations that have been addressed in other ways, and through other processes. The decision-maker making the decisions under s 25 was not required to re-address them. Her decisions focused on more localised issues associated with the issuing of the permits, and engagement with the particular affected

iwi. There is nothing before the Court to demonstrate that this did not occur as required.

[117] The significant issues about climate change were accordingly not for this decision-maker to address. They arise to be addressed in other ways, including in relation to other statutory powers.

[118] The function of the Court is limited to ensuring that the challenged decisions have been lawfully made. I am satisfied that they were. For these reasons the application for judicial review is dismissed. If there is any issue in relation to costs the respondents may file and serve a memorandum within 10 working days which is to be responded to by the applicant within 10 working days. Each memorandum should be no more than five pages plus a schedule.

Cooke J

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