IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA494/2022
[2024] NZCA 152

	BETWEEN	STUDENTS FOR CLIMATE SOLUTIONS INCORPORATED Appellant
	AND	MINISTER OF ENERGY AND RESOURCES Respondent
	AND	GREYMOUTH GAS TURANGI LIMITED Interested Party
	AND	RIVERSIDE ENERGY LIMITED Interested Party

Hearing:	24 May 2023 (further submissions received 18 July 2023)
Court:	French, Gilbert and Mallon JJ
Counsel:	J D Every-Palmer KC and E D Nilsson for Appellant A Boadita-Cormican, E G R Dowse and D Ranchhod for Respondent F J Cuncannon and P I C Comrie-Thomson for Interested Party (Greymouth Gas Turangi Limited) N J Russell for Interested Party (Riverside Energy Limited)
Judgment:	7 May 2024 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no award of costs.

REASONS

FRENCH AND GILBERT JJ

(Given by French J)

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Introduction

[1] Section 25(1) of the Crown Minerals Act 1991 empowers the Minister of Energy and Resources (the Minister) to grant exploration permits. In June 2021 the Minister, acting through a duly authorised delegate,[1] purported to exercise this power when granting two petroleum exploration permits, one to Greymouth Gas Turangi Ltd (Greymouth) and the other to Riverside Energy Ltd (Riverside). The permits grant the two companies exclusive rights to explore for petroleum deposits in specified areas in Taranaki. Each of the permits is for a term of ten years commencing 1 July 2021.

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1 Crown Minerals Act 1991, s 6(1).

[2] The lawfulness of the decision to grant the permits was challenged in the High Court in judicial review proceedings brought by the appellant. The appellant is an incorporated society established to enable students to address concerns about climate change by developing and supporting solutions.

[3] The appellant argued that the decision maker was obliged to consider the climate change implications of the decision either as a mandatory relevant consideration or through her statutory obligation to have proper regard to the principles of the Treaty of Waitangi | Te Tiriti o Waitangi. She failed to do so, rendering the decision unlawful and unreasonable.

[4] In the High Court, Cooke J rejected these arguments.[2] He accepted there were genuine climate change issues arising from continuing to grant permits allowing exploration for fossil fuels and that any success in the explorations would add to the availability and hence consumption of such fuels, thereby contributing to global warming.[3] However, he was satisfied having regard to the scheme and purpose of the Crown Minerals Act that climate change considerations were not relevant and that accordingly the decisions to grant the permits were not unreasonable for failing to take them into account.[4] The Judge acknowledged the existence of an obligation on the decision maker to take the principles of the Treaty of Waitangi into account, but held that on the evidence before him the obligation had been discharged.[5]

[5] The appellant now appeals that decision.

[6] Riverside and Greymouth did not attend the hearing before us.[6]

[7] The panel is agreed on the outcome. The only difference in opinion between panel members relates to the relevance of s 5ZN of the Climate Change Response Act 2002. Justices French and Gilbert prefer not to reach a concluded view on whether it was a permissive relevant consideration because that issue is not determinative of

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2 *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612 [judgment under appeal].
3 At [58].
4 At [115].
5 At [116].
6 Although they did file written submissions regarding relief.

the appeal, whereas Mallon J prefers to make a definitive finding for the reasons articulated in her separate judgment.

[8] We begin our analysis with a brief exposition of government policy relating to petroleum exploration and production, and the relevant legislative framework.

Government policy on petroleum exploration

[9] Fossil fuels are a primary cause of climate change.[7] In 2018, the New Zealand Government announced that as part of its policy of moving away from petroleum exploration and production, it was imposing a ban on allocating any new offshore exploration permits and limiting future onshore permits to the Taranaki region.[8] This new policy had the effect of substantially reducing the area available for new exploration.

[10] The exception created for Taranaki was justified by reference to the concept of just transition,[9] which is acknowledged both internationally and domestically as an essential element of climate change policies.[10] The term encapsulates the view that an immediate elimination of all activities producing harmful emissions would cause significant and unequal economic and social harm.[11] In order for the transition to a low-emissions society to be economically affordable and socially acceptable it has been said that it must be well paced, well planned, well signalled and co-designed.[12]

[11] In order to implement the new policies regarding petroleum exploration and production, the Crown Minerals Act was amended in two main tranches, the first in 2018 and the second in 2023.[13] The significance of these amendments is discussed later in the judgment.

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7 See Ministry for the Environment | Manatū Mō Te Taiao and Stats NZ | Taturanga Aotearoa *New Zealand's Environmental Reporting Series: Our atmosphere and climate 2020* (October 2020) at 11–25.

8 Crown Minerals (Petroleum) Amendment Bill 2018 (105–1).

9 (26 September 2018) 733 NZPD 7101.

10 See for example Paris Agreement 3156 UNTS 79 (opened for signature 22 April 2016, entered into force 4 November 2016), preamble; and He Pou a Rangi | Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (31 May 2021) at 340.

11 Will Allen and others *A guide to just transitions for communities in Aotearoa New Zealand* (Motu Economic and Public Policy Research, 2023) at 10.

12 He Pou a Rangi | Climate Change Commission, above n 10, at 14.

13 Crown Minerals (Petroleum) Amendment Act 2018; and Crown Minerals Amendment Act 2023.

The Crown Minerals Act 1991

[12] Much of the argument in the High Court, and again on appeal, focused on the interpretation of the purpose section in the Crown Minerals Act, s 1A. Section 1A first appeared in the Act in 2013.[14] The section was critical to the Judge's reasoning.[15] At the time the impugned decision to grant the permits was made, s 1A read as follows:

> **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
>
> (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.

[13] As noted by the Judge, the focus of the Act is mining.[16] In relation to the mining of petroleum, it contemplates three types of permits: prospecting, exploring and mining.[17] An exploration permit enables the holder to explore and drill in an area for the purpose of determining whether there is commercially extractable petroleum in any part of that area. As well as drilling, permitted activities of an exploration permit include conducting surveys, dredging and excavations, but not the mining/extraction or sale of petroleum, which requires a mining permit.[18]

[14] Section 24 empowers the Minister to offer permits for allocation by public tender.[19] According to the evidence before the High Court, since 2013 the allocation of petroleum exploration permits has been undertaken exclusively through annual

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14 Crown Minerals Amendment Act 2013, s 6.
15 See for example judgment under appeal, above n 2, at [115].
16 At [7].
17 Crown Minerals Act, ss 2 and 23.
18 Section 2.
19 Section 24(1).

"block offer" tenders. That is what occurred in this case. No issue is taken with that part of the process.

[15] As already mentioned, the source of the power to grant petroleum exploration permits is s 25. It confers a broad discretion, the exercise of which is subject to a number of other provisions, including in particular ss 4, 22 and 29A.

[16] Section 4 provides that "[a]ll persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

[17] Section 29A, which is headed "Process for considering application", details the information the Minister must be satisfied of before granting a permit. The matters listed are:

> (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 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 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 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 matters in subsection (2)(d), the Minister—

(a) is only required to undertake a high-level preliminary assessment; and

(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.

[18] It is accepted the decision maker properly considered all the factors listed. As will be apparent, the statutory list does not include climate change.

[19] Finally, there is a requirement under s 22(1) that the Minister and the Chief Executive of the Ministry of Business, Innovation and Employment "must act in accordance with a minerals programme", issued by the Governor General as an Order in Council.[20] In relation to exploration permits, the current minerals programme for petroleum provides detail regarding the allocation of exploration permits,

[20] Section 19(1). We note that, s 22(2) states "if there is any inconsistency between the actions required of [the Minister and chief executive] under a minerals programme … and the actions required of them under this Act or any of the regulations, they must act in accordance with the Act or the regulation".

consultation with iwi on block offer proposals, an assessment of the Act's purposes, and considerations relevant to decision making.[21]

The Climate Change Response Act 2002

[20] The Climate Change Response Act was enacted to create a legal framework for New Zealand to ratify the Kyoto Protocol and to meet its obligations under the United Nations Framework Convention on Climate Change.[22] It has since been amended several times and now makes express reference to the 2015 Paris Agreement.[23]

[21] In addition to the establishment of the Climate Change Commission,[24] the Act also provides for the setting of emissions reduction budgets.[25] In relation to emissions from greenhouse gases (which include fossil fuels), s 5Q relevantly sets a zero target for 2050.[26] The critical section for present purposes is s 5ZN, which we address later in the judgment.

[22] Finally, for completeness, in this section of the judgment, we record that issues raised in the High Court about the role of the courts in judicial reviews when climate change issues are involved — the competing positions being whether there should be greater deference afforded the decision maker or a heightened level of scrutiny — did not form part of the appeal.[27]

[23] We turn now to the two key issues that are for our determination.

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21 Petroleum Programme (Minerals Programme for Petroleum 2013) 2013.

22 Climate Change Response Act 2002, s 3. See Kyoto Protocol 2303 UNTS 162 (opened for signature 11 December 1997, entered into force 16 February 2005); and United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

23 See for example Climate Change Response Act, ss 3, 4, 5M, 5O and 5W. For a detailed account of New Zealand's international obligations and its response, see *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [19]–[71]

24 Climate Change Response Act, s 5A.

25 Part 1B, subpt 2.

26 Excluding biogenic methane.

27 Both approaches were rejected by Cooke J. See judgment under appeal, above n 2, at [39]–[44]. and [47].

Were the climate change implications of granting the permits a mandatory relevant consideration?

The arguments on appeal

[24] On appeal, the appellant did not pursue the issue of reasonableness. Rather, the focus of the appeal was on the issue of mandatory relevant considerations which in the statement of claim were pleaded as including the scientific consensus that:

> (i) achieving net-zero Greenhouse Gas emissions by 2050 is required in order to keep global warming under 1.5°C and avoid catastrophic climate change with significant effects on Aotearoa New Zealand, its environment, its peoples and its economy; and
>
> (ii) an immediate stop on new oil and gas extractions is required to reach that goal.

[25] It is common ground that the Judge correctly articulated the relevant legal principles regarding the distinction between mandatory and permissive considerations. As noted by the Judge,[28] the leading authority is the decision of this Court in *CREEDNZ Inc v Governor-General* where the distinction was explained in the following terms:[29]

> 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 that 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.

[26] What is disputed on appeal however is the application of those principles to the circumstances of this case.

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28 At [60]–[61].

29 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

[27] In his submissions, counsel for the appellant, Mr Every-Palmer KC, emphasised the critical importance of climate change issues. He referred us to material on the causes and impact of climate change, and the international and domestic responses to it including the New Zealand Parliament's passing of a motion declaring a climate emergency in 2020.[30] He drew particular attention to the concluding words of the then Prime Minister in proposing the declaration, which were that the declaration:[31]

> …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.

[28] Against that background, Mr Every-Palmer submitted the role of the courts was to exercise oversight of important public decisions which have climate consequences, and to ensure current legislation is interpreted in a way that is effective to ensure public decisions are made in a climate-conscious way.

[29] Turning to the specific case at hand, Mr Every-Palmer submitted that the High Court decision was based on a misinterpretation of the Crown Minerals Act and its interaction with the Climate Change Response Act. He further submitted the decision was inconsistent with New Zealand's international obligations to reduce greenhouse gas emissions and contrary to common sense. In his submission, given the existential threat posed by climate change and given that fossil fuels are a primary cause of climate change, it was difficult to imagine any consideration that could possibly be more relevant than climate change in relation to the granting of permits for petroleum exploration.

[30] Mr Every-Palmer acknowledged that the list of considerations which s 29A of the Crown Minerals Act required the decision maker to take into account does not include climate change, emissions targets or compliance with those targets. However, he pointed out — as was accepted by the Judge — that the stipulation of mandatory relevant considerations does not exclude the possibility of additional implied

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30 (2 December 2020) 749 NZPD 237–250.
31 At 239.

mandatory considerations derived from the overarching purpose of the legislation.[32] The absence of any reference to climate change in s 29A is therefore not determinative.

[31] This in turn led Mr Every-Palmer to the purpose section in force at the time the impugned decision was made, which for convenience we again set out.

> **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
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> (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.

[32] The Judge held that under s 1A the purpose of the Act was to promote mining, and that the phrase "for the benefit of" was simply Parliament's indication that it desired these activities to take place precisely because they were for New Zealand's economic benefit.[33] The Judge went on to say that an argument that climate change considerations should be a mandatory relevant consideration was in effect an argument that further mining for fossil fuels should stop altogether because it was so harmful. But that was inconsistent with the purpose of the Act which was to promote mining not curtail it, and decision making under the Act was required to be consistent with that purpose.[34]

[33] Although the Judge did not put it this way, he essentially regarded the phrase "for the benefit of" as Parliament's assertion of a deemed fact rather than a qualifying touchstone.

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32 Judgment under appeal, above n 2, at [63].
33 At [70]
34 At [73].

[34] Before us, Mr Every-Palmer argued that, correctly interpreted, s 1A means the purpose of the Act is to promote exploration and mining if and only if it is for the benefit of New Zealand. Accordingly, if there is evidence suggesting that a proposed exploration permit would not be for the benefit of New Zealand due to climate change considerations, then clearly those considerations are highly relevant in order to determine whether the purpose of the Act is or is not being achieved. Mr Every-Palmer further supported this interpretation by reference to the principle that, where possible, legislation should be construed consistently with New Zealand's international obligations, including in this case its obligations under the Paris Agreement.

[35] Mr Every-Palmer also derived support for his interpretation from what he termed the "public trust doctrine". He explained that this is the idea that natural resources which are held by the Crown are held in a quasi-fiduciary capacity for the benefit of the people.

[36] Mr Every-Palmer eschewed the suggestion that the inevitable outcome of adopting his interpretation of s 1A would be no permits ever being granted in relation to petroleum and that the immediate cessation of all petroleum exploration was the real purpose of the judicial review proceeding. Although that might not appear from the statement of claim, he said he could not exclude the possibility of a scenario where it was beneficial for New Zealand to have further petroleum exploration permits. All that the appellant was saying should have happened was for the decision maker to have undertaken a balancing exercise involving an assessment of the advantages and disadvantages of each proposed exploration.

[37] In support of his contention that a balancing exercise was doable in the climate change context, Mr Every-Palmer referred us to a decision of the Queensland Land Court in *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)*.[35] It concerned an application for a licence to mine coal. In deciding whether to grant the licence, the Judge undertook a comprehensive balancing exercise which balanced climate change factors and human rights factors, against the social and economic benefits of continued mining.

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35 *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21.

Discussion

[38] The points raised by Mr Every-Palmer about the seriousness of climate change and the causes of it are well documented and beyond argument. They are not however an automatic trump card. In holding the Government to account through the judicial review process, the court is still required to be true to its constitutional role. The court cannot strain legislation to the point that it is no longer giving effect to Parliament's intention but is instead effectively subverting that intention and substituting its own policy views.

[39] In our view, the interpretation of s 1A adopted by the Judge was undoubtedly correct. It is supported by the clear wording of the provision, the minerals programme for petroleum, the previous case law and, importantly, the background legislative materials relating both to the introduction of s 1A in 2013 and its subsequent amendment in 2023.

[40] Section 1A was added to the Crown Minerals Act in 2013 by the then National Government. The legislative materials reveal that the purpose of adding an explicit promotional intent was to give effect to the policy objectives of the time, which were to increase investment in New Zealand's petroleum and minerals sectors.

[41] For example, the explanatory note to the relevant Bill stated that the amendments proposed had the aim of encouraging the development of Crown owned minerals so that they contributed more to New Zealand's economic development.[36] New powers were also granted to the Minister of Conservation to allow access for mining activities on Crown land.[37] Noteworthy too is the statement made by the Minister when introducing the Bill at the first reading that it formed part of the Government's Business Growth Agenda and an action plan "which aims to ensure New Zealand is able to maximise the gains from the responsible development of our oil and gas resources".[38]

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36 Crown Minerals (Permitting and Crown Land) Bill 2013 (70-1) (explanatory note) at 2. The Bill was subsequently divided into two parts, one of which formed the precursor to the Crown Minerals Amendment Act 2013.

37 Crown Minerals Amendment Act 2013, ss 41–42.

38 (25 September 2012) 684 NZPD 5641.

[42] The interpretation of s 1A is also addressed in the 2013 minerals programme relating to petroleum. Under the heading "Interpretation of the purpose statement in relation to petroleum" the following is stated:[39]

> (a) An underlying premise in the Act is that the Government wants other parties, such as public and private corporations, to undertake prospecting for, exploring for and mining of Crown-owned minerals, including petroleum, and that it does not generally wish to undertake these activities itself.
>
> (b) The Minister sees "for the benefit of New Zealand" as the overarching objective of the purpose statement and as the touchstone for interpreting the rest of the purpose statement and the provisions of the Act.
>
> (c) Within the context and mandate of the Act, the Minister considers "the benefit of New Zealand" is best achieved by increasing New Zealand's economic wealth through maximising the economic recovery of New Zealand's petroleum resources.
>
> (d) Other components of "the benefit of New Zealand", including environmental considerations, are covered in other legislation.

[43] In the following section, headed "Broader statutory framework", it is noted that the Minister and the Chief Executive, in administering the Crown Minerals Act, do not have powers and functions (except where and to the extent specifically provided for in the Act) relating to matters covered by other legislation.[40]

[44] This carving out of environmental considerations and decisions relating to them from the scope of the Crown Minerals Act reflects ss 22, 29A(2)(d) and 29A(4), as quoted above.[41] Like s 1A, s 29A was part of the 2013 amendments.[42]

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39 Petroleum Programme, cl 1.3.
40 At 9–10.
41 See [17]–[19].
42 Crown Minerals Amendment Act 2013, s 24.

[45] In addition, as pointed out by the Judge,[43] the exploitation focus of the Crown Minerals Act has been identified in a series of High Court decisions, *Greenpeace of New Zealand Inc v Minister of Energy and Resources*, *Greymouth Petroleum Mining Group Ltd v Minister of Energy* and *Rangitira Developments Ltd v Sage*.[44]

[46] In *Greenpeace of New Zealand Inc*, Gendall J stated:[45]

> [111] 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.
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> …
>
> [116] 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 for Petroleum] on the basis that, as matters of policy, there will be permits issued under the regime. …

[47] To similar effect in *Greymouth Petroleum Mining Group Ltd*, Dobson J said:[46]

> [12] Ms Casey QC accepted on behalf of the regulator that s 1A rendered explicit what had been the implicit purpose of the [Crown Minerals Act] prior to the 2013 amendments. The focus on exploitation of Crown-owned minerals means that decisions under the [Crown Minerals Act] 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. …

[48] Undaunted, Mr Every-Palmer submitted the Judge's reliance on these cases was misplaced because they were either wrong or, in the case of *Greenpeace of New Zealand Inc*, distinguishable. *Greenpeace of New Zealand Inc* was, he argued, distinguishable because it concerned the potential impacts on marine life, a subject

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43 Judgment under appeal, above n 2, at [66]–[68].

44 *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422; *Greymouth Petroleum Mining Group Ltd v Minister of Energy and Resources* [2019] NZHC 1222; and *Rangitira Developments Ltd v Sage* [2020] NZHC 1503 at [75].

45 *Greenpeace of New Zealand Inc*, above n 44.

46 *Greymouth Petroleum Mining Group Ltd*, above n 44.

matter that, unlike climate change, already has sufficiently protective legislative or regulatory provisions.

[49] Mr Every-Palmer further submitted that in any event there are other High Court decisions not cited by the Judge that are inconsistent with the Judge's interpretation, namely the case law regarding other statutes such as the Commerce Act 1986 and the Electricity Industry Act 2010. Those statutes contain similar "benefit purpose" clauses to that in the Crown Minerals Act and have been interpreted as requiring a qualitative assessment of benefit.[47] For example, under the Commerce Act the benefit of New Zealand does not always require promoting competition, sometimes it may require a lessening of competition.[48]

[50] The statutory regimes in question are not however comparable and their legislative history is quite different. We are not persuaded that the cases decided under them establish some general and invariable principle. A different approach again was for example taken in *Movement v Waka Kotahi*, a recent High Court decision concerning the Land Transport Management Act 2003, cited to us by Ms Boadita-Cormican for the respondent.[49] In that case, the relevant purpose section used the phrase "in the public interest".[50] It made no mention of climate change issues and the Court held that climate change issues should not be read in or implied into the Act's purpose.[51]

[51] In short, it all depends on the specific legislation in question.

[52] Significantly, as regards this case, when in 2018 the Labour Government announced its ban on granting any further petroleum permits, subject only to the limited Taranaki exception, it also proposed two tranches of a legislative review of the Crown Minerals Act. The first tranche resulted in the Crown Minerals (Petroleum) Amendment Act 2018.

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47 Citing *Manawa Energy Ltd v Electricity Authority* [2022] NZHC 1444 at [71], which was appealed to and subsequently dismissed by this Court in *Nova Energy Ltd v Electricity Authority* [2023] NZCA 275.

48 Commerce Act 1986, ss 58 and 67.

49 *Movement v Waka Kotahi* [2023] NZHC 342.

50 Land Transport Management Act 2003, s 3.

51 *Movement v Waka Kotahi*, above n 49, at [181].

[53] In the lead up to this 2018 amendment, there was discussion about amending s 1A because of a perceived inconsistency between it and the ban on further offshore permits.[52] In the end s 1A was not amended, but for present purposes what is significant is that the three amended sections ending offshore permits and confining onshore permits to Taranaki were expressly stated to be "despite" s 1A.[53] If Mr Every-Palmer's interpretation of s 1A were correct, that would not have been necessary.

[54] The judicial interpretation of the purpose clause is presumed to be known by Parliament. Accordingly, the fact that Parliament considered the Crown Minerals Act in the specific context of climate change and nevertheless left the wording of that section unchanged also leaves no room for the ambulatory approach to statutory interpretation as advocated by Mr Every-Palmer.

[55] Tranche two of the review of the Crown Minerals Act involved a reassessment of the Act's underlying policy settings and this did in 2023 result in an amendment to the purpose section.[54] Although this 2023 amendment took place after the decision to grant the permits in this case, it is nevertheless significant because of the light it sheds on the meaning of s 1A as it was worded in 2021.

[56] The 2023 Amendment Act amended s 1A(1) by removing the word "promote" and replacing it with "manage".[55]

[57] When introducing the Bill with this amendment to the House for its first reading, Hon Carmel Sepuloni MP said on behalf of the Minister:[56]

> The Crown Minerals Act was amended in 2013 to reflect the policy at the time, which was to attract investment in our petroleum and minerals sector. Among other changes, the amendments added the Crown Minerals Act current purpose statement, which is to "promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand". Since 2013, the strategic and wider regulatory environment in which the

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52 See for example Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Proposed changes to the Crown Minerals Act 1991* (25 September 2018) at 21–22.

53 Crown Minerals Act, ss 23A, 24 and 25; and Crown Minerals (Petroleum) Amendment Act 2018, ss 5, 6 and 7.

54 Crown Minerals Amendment Act 2023, s 4.

55 Section 4.

56 (22 November 2022) 764 NZPD 14230.

> Crown Minerals Act operates has evolved. Climate change is an increasing focus, as is the use of an intergenerational lens in decision making that considers the longer-term and wider dimensions of wellbeing such as environment, social, and cultural outcomes. …
>
> …
>
> While fossil fuels continue to play an important role in keeping the lights on today, we know the future will look different. In this context, the Crown Minerals Act's current focus on promoting the development of petroleum and minerals does not enable enough flexibility in the choices available to the Crown as resource owner. While it is important that the Crown Minerals Act is able to sustain investor confidence to continue the development of Crown-owned minerals where required, the current focus of the Act limits the scope of decisions to achieve a managed and equitable transition away from fossil fuels.
>
> The bill proposes to neutralise the promotional intent of the Crown Minerals Act to increase flexibility in the management of Crown-owned resources. We propose changing the word "promote" in the purpose statement to more neutral language that neither requires nor inhibits development of Crown-owned minerals. Associated provisions in the Crown Minerals Act would also be amended to make neutral their promotional intent. One intended effect of the removal of this promotional intent will be to increase flexibility in relation to when and how often future public tenders for petroleum exploration permits take place.

[58] During the subsequent debate in the House, a Green Party MP speaking in support of the amendment replacing "promote" with "manage" stated:[57]

> … the reality is that we need to act very urgently as a species to end our use of fossil fuels. So it doesn't make any sense whatsoever to have a piece of legislation arguing that we have a responsibility to promote exploration of fossil fuels, when we know that we actually have to stop our use of fossil fuels and we have to stop looking for more fossil fuels …

[59] In the subsequent Select Committee report, s 1A in its 2013 form was described as a "promotional purpose clause" and reference made to the Act's "promotional intent".[58] It was also stated that the Act's focus on promotion allowed limited flexibility in the allocation and management choices available to the Crown, particularly in the context of a transition away from fossil fuels.[59]

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57 At 14234.
58 Crown Minerals Amendment Bill 2023 (198–2) (Select Committee report) at 1.
59 At 1.

[60] In the second reading, Hon Duncan Webb MP, on behalf of the responsible Minister, referred to the need to replace the promotional intent of the existing legislation stating:[60]

> An updated Crown Minerals Act that no longer promotes the extraction of fossil fuels will sit better alongside Government policy that is moving New Zealand towards a greener, low-emissions future, but the Crown Minerals Act will continue to play an important role.

[61] On the third reading, the Minister, Hon Dr Megan Woods MP, had this to say:[61]

> Part 1 of the bill proposes changes to enhance flexibility in the way we manage our petroleum and minerals. It would remove that promotional intent to make the Crown Minerals Act neutral so that the development can be promoted where there is a need and minimised where there is not. With these changes in place, the Crown Minerals Act would be better aligned with wider policy settings and this would no longer be in conflict with the wider settings for a net zero transition.

[62] In relying as we do on the legislative materials leading up to these amendments, we have not overlooked the general principle of statutory interpretation that nothing that happens after an Act has passed can affect the intention of the Parliament that enacted it.[62] However, one of the exceptions to that general rule is the principle that if Parliament drafts legislation on the assumption that an earlier Act had a particular meaning, the court should assume the later Parliament is not mistaken and, in the absence of clear words, seek to construe the earlier Act so as to accord with Parliament's understanding of its effect.[63]

[63] Another exception which would appear applicable is that if there are competing interpretations, one of which would mean later legislation was unnecessary, the other interpretation should be preferred.[64]

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60 (8 June 2023) 768 NZPD 17268.

61 (22 August 2023) 771 NZPD 19179.

62 *R v Central Criminal Court, ex parte Francis and Francis* [1989] AC 346 (HL) at 395; *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC) at 393 per Lord McKay LC, Lord Brandon, Lord Templeman and Lord Lowry; *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66 at [22]; and *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [193].

63 *Terranova Homes & Care Ltd*, above n 62, at [196], citing *Re Billson's Settlement Trusts* [1985] Ch 409 (CA) at 418.

64 *Terranova Homes & Care Ltd*, above n 63, at [195].

[64] For all these reasons, we agree with the Judge's interpretation of the version of s 1A that was in force at the time the impugned decision was made.

[65] The purpose section, the absence of any reference to climate change considerations elsewhere in the Crown Minerals Act (including in the provision dealing specifically with the factors decision makers are required to take into account) and the minerals programme all point strongly towards climate change considerations not being mandatory.

[66] So too in our assessment does the absence of any guidance or machinery to assist the decision maker in considering climate change which, as the Judge pointed out would be needed or at least expected if Parliament had intended climate change considerations to be taken into account. The absence of any guidance relating to climate change stands in stark contrast to the guidance that is provided in the Crown Minerals Act regarding the express mandatory considerations. Mr Every-Palmer's response that "for the benefit of New Zealand is all the machinery you need" is in our view untenable.

[67] We acknowledge that unlike Cooke J, we have had the benefit of considering the Australian decision *Waratah Coal.*[65] However, if anything, that decision tends to underscore the significance attached by the Judge to the absence of any guidance regarding climate change considerations in the Crown Minerals Act.[66] In *Waratah Coal*, the decision maker (a Land Court judge) was operating under legislation that required him to hear and assess not only the application but also objections from a range of submitters in accordance with prescribed criteria regarding which there was comprehensive and wide-ranging evidence. The express criteria included issues relating to ecologically sustainable development.[67]

[68] The Crown Minerals Act which both focuses decision making on the promotion of mining, and also expressly reserves decision making on issues about

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65 *Waratah Coal Pty Ltd,* above n 35.
66 Judgment under appeal, above n 2, at [72].
67 *Waratah Coal Pty Ltd*, above n 35, at [72]–[74].

environmental consents to decision makers under other legislation, is markedly different.

[69] As regards Mr Every-Palmer's invocation of the public trust doctrine, that was rather unsatisfactorily raised for the first time at the oral hearing in this Court, never having been raised in the High Court nor in the written submissions filed for the appeal. In any event, we are not persuaded it adds to the analysis. The only authorities cited are two academic writings, neither of which supports the appellant's assertion that it is one of New Zealand's three sources of law.[68] In addition, as Ms Boadita-Cormican points out, one of the articles rejected the suggestion the doctrine was useful for addressing the implications of climate change.[69]

[70] As regards New Zealand's international obligations, it is correct, as submitted by Mr Every-Palmer, that Parliament is presumed not to empower statutory decision makers to make decisions that are inconsistent with those obligations.[70] However, granting a petroleum exploration permit is not of itself a breach of those obligations, there being no evidence the two permits mean that New Zealand will fail to meet the 2050 target. As mentioned, the international instruments also expressly recognise the importance of a just transition.[71] In any event, the presumption does not mean that international obligations can be invoked to defeat the scheme and purpose of an Act where those are clear and unambiguous, as in our view they are in this case.

[71] That said, although the Crown Minerals Act as it stood in 2021 was not intended as a vehicle for compliance with international obligations to reduce greenhouse gas emissions, that was unquestionably the role of the Climate Change Response Act. It is therefore necessary to consider what implications (if any) it may have in relation to the issues in this case.

[72] The purpose of the Climate Change Response Act is stated to be as follows:

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68 Joseph L Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Mich L Rev 471; and Nicola Hulley "New Zealand's Public Trust Doctrine" (LLM Thesis, Te Herenga Waka|Victoria University of Wellington, 2018).

69 Nicola Hulley, above n 68, at 36, n 122.

70 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143]–[144].

71 See Paris Agreement, preamble.

3 Purpose

(1) The purpose of this Act is to—

(aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that—

(i) contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and

(ii) allow New Zealand to prepare for, and adapt to, the effects of climate change:

(a) enable New Zealand to meet its international obligations under the [United Nations Framework Convention on Climate Change], the [Kyoto] Protocol, and the Paris Agreement, including (but not limited to)—

(i) its obligation under Article 3.1 of the [Kyoto] Protocol to retire Kyoto units equal to the number of tonnes of carbon dioxide equivalent of human-induced greenhouse gases emitted from the sources listed in Annex A of the [Kyoto] Protocol in New Zealand in the first commitment period starting on 1 January 2008 and ending on 31 December 2012; and

(ii) its obligation to report to the Conference of the Parties via the Secretariat under Article 12 of the [United Nations Framework Convention on Climate Change], Article 7 of the [Kyoto] Protocol, and Article 13 of the Paris Agreement:

(b) provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—

(i) assisting New Zealand to meet its international obligations under the [United Nations Framework Convention on Climate Change], the [Kyoto] Protocol, and the Paris Agreement; and

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

(c) provide for the imposition, operation, and administration of a levy on specified synthetic greenhouse gases contained in motor vehicles and also another levy on other goods to support and encourage global efforts to reduce the emission of those gases by—

(i) assisting New Zealand to meet its international obligations under the [United Nations Framework

Convention on Climate Change], the Protocol, and the Paris Agreement; and

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

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

[73] For present purposes the key section is s 5ZN which states:

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.

[74] Section 5ZO states that the responsible minister may issue guidance for departments on how to take the 2050 target or an emissions budget into account in the performance of their functions, powers and duties.

[75] Prior to making a decision whether to grant the permits, the decision maker in this case was provided with a recommendations paper prepared by officials for each permit. The papers were the product of a wide-ranging evaluation of the permit applications undertaken by a specialist team.

[76] The papers identified what were mandatory considerations and then under the heading "Any other relevant factors" referred the decision maker to ss 5ZN and 5ZO, describing s 5ZN as a "permissive consideration" which she was entitled to take into account but not required to. It was also noted that of the three matters listed for consideration in s 5ZN, only one, namely the 2050 emissions target reduction, was actually in existence at the time the decision was to be made. It was further noted that the Minister had not yet issued any guidance under s 5ZO about how officials were to take the target into account in the performance of their roles.

[77] The papers then made reference to the advice given by the Climate Change Commission on the first three proposed emissions budgets and the direction of its reduction plan. The papers' overview of the Commission's advice, to which the Minister had not yet responded, was as follows:[72]

> (a) The [Commission] notes that the speed at which New Zealand reduces non-renewable gas use for generating electricity needs to be carefully managed to ensure electricity remains reliable and affordable. The [Commission] notes that the supply of gas from non-renewable sources could reduce over time as gas fields reach the end of their economic life. In particular, the current role of Methanex in incentivising gas production to supply all users, and providing flexibility (by reducing its demand and methanol production when there is an interruption in supply or in dry years when the hydro lakes are low) is acknowledged.
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> (b) The [Commission] recommends that the Government develops a National Energy Strategy. The [Commission] recommends that as part of that Strategy, the Government sets a renewable energy target that 50% of all energy consumed comes from renewable sources by 31 December 2035 (the [Commission] does not recommend an energy generation target). The purpose of the National Energy Strategy includes ensuring a smooth and appropriately sequenced phase down of fossil fuel use. The [Commission] also recommends a fair, inclusive and equitable transition.

[78] The papers went on to say that officials considered the granting of petroleum exploration permits in relation to the bids at issue was not inconsistent with New Zealand's 2050 target because:

(a) it is a domestic target and petroleum produced from petroleum permits in New Zealand is processed/and or combusted offshore as well as in New Zealand;

(b) the 2050 target relates to net greenhouse gas emissions and does not prohibit the use of petroleum as an energy source;

(c) an exploration permit does not confer a right to produce petroleum, a further application is required and during that process it would be open to the Minister to consider the matters under s 5ZN;

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72 Footnotes omitted.

(d) the probability of commercial success for petroleum exploration projects is low; and

(e) the grant of a permit would be consistent with the purpose of the Crown Minerals Act.

[79] In her affidavit evidence, the decision maker said she considered that climate change considerations were relevant and that s 5ZN was a non-specific permissive consideration she could, and did, take into account. She further deposed that the discussion sections of the recommendation papers were broadly consistent with her own understanding of the 2050 emissions reduction target, including that the target did not require an immediate cessation of non-renewable energy use.

[80] Ultimately, she agreed with the overall recommendation.

[81] In the High Court, the appellant appears to have argued that the matters listed in s 5ZN were mandatory considerations. That was rejected by the Judge on account of the opening words of s 5ZN "if they think fit".[73]

[82] The Judge then turned to "[t]he more difficult question" of whether s 5ZN allowed decision makers under the Crown Minerals Act to take the target, budgets and reduction plans into account and therefore potentially empower a decision maker to decline a permit application for those reasons.[74]

[83] In the Judge's view, the answer to that question involved the Court's normal approach to overlapping and potentially inconsistent statutory provisions, including the maxim that the specific overrides the general. In his view the "free floating" relevant considerations potentially arising from ss 5ZN and 5ZO did not displace the specific intention of Parliament expressed in the Crown Minerals Act that climate change considerations were irrelevant to decisions under that Act. Had that been the intention, Parliament would have amended the Crown Minerals Act to make that explicit and give guidance as to how they were relevant.[75]

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73 Judgment under appeal, above n 2, at [77].
74 At [78].
75 At [79].

[84] In coming to this conclusion, the Judge acknowledged that, contrary to his analysis, the decision maker had in fact taken the Climate Change Response Act into account. However, he considered that the consideration was nominal and had not substantively influenced the decision whether to grant the permits or their terms.[76]

[85] On appeal, the appellant's argument on the significance of s 5ZN appears to have shifted or at least changed in emphasis from that run in the High Court. It was no longer asserted that under s 5ZN the matters listed were mandatory considerations. And, although it was argued that the Judge got it wrong when he held the section did not even create a discretionary consideration, it was also stated that from a climate perspective, it was wholly unsatisfactory to look at the emissions target alone. Section 5ZN was not seen as providing the framework for the type of wide-ranging analysis of climate change the appellant was advocating should have occurred. Rather, the significance of s 5ZN to this case was said to be that it should encourage the Court to find the broader issue of climate change was a mandatory consideration under the Crown Minerals Act.

[86] For her part, Ms Boadita-Cormican also appeared to disagree with the Judge's finding that the matters listed in s 5ZN were irrelevant. She described the three matters listed in s 5ZN as high policy matters that were the product of a democratic process involving considerable stakeholder consultation where the complexities of the polycentric issue of climate change had been addressed and evaluated. In her submission, the approach taken by the decision maker in this case was entirely appropriate. The decision maker had considered the material relating to the 2050 emissions target (being the only one of the three matters in existence at the time) and decided there was nothing that suggested she should decline the permit or impose special conditions, and therefore it was not relevant to her decision.

[87] There is some tension between these submissions and the respondent's interpretation of the purpose clause in the Crown Minerals Act. The fundamental principle is that a power should be exercised in accordance with the purpose of the

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[76] At [80(a)].

empowering legislation and it was not suggested that the effect of s 5ZN was to change the purpose of the Crown Minerals Act.

[88] It is however unnecessary for us to decide whether or not the Judge was wrong to find the matters listed in s 5ZN were irrelevant and so ought not to have been addressed at all because ultimately it has made no difference to the outcome. What is in our view unarguable is that the matters in s 5ZN and other general climate change implications of the decision to grant the permits were not mandatory relevant considerations.

[89] Finally, for completeness we address a further argument raised by Mr Every-Palmer regarding "backfilling". It is a well-established principle of administrative law that a decision maker cannot provide an ex post facto justification of a decision in an attempt to improve on it.[77] Mr Every-Palmer submitted that this was exactly what the respondent was attempting to do by emphasising the importance of a just transition.

[90] This submission was made for the first time on appeal and therefore not considered by the High Court Judge, prompting the respondent to argue that we should not address it. However, we have considered the point and decided any argument based on backfilling does not have merit. We say that for two reasons. First, the concept of a just transition is relevant in interpreting the legislation and, secondly, as regards the lawfulness of the decision to grant the permits there is evidence the decision maker did in fact have regard to the need for a just transition.

Did the decision maker fail to have proper regard to the principles of the Treaty of Waitangi?

The approach taken by the decision maker

[91] As mentioned, s 4 of the Crown Minerals Act states that all persons exercising functions and powers under the Act must have regard to the principles of the Treaty of Waitangi | Te Tiriti o Waitangi.

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[77] *Hanna v Whanganui District Council* [2013] NZHC 1360, (2013) 17 ELRNZ 314 at [14]–[15]; and *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [33].

[92] The decision maker in this case was mindful of this obligation. In the recommendations papers, which she accepted, the relevant principles of Te Tiriti were identified as partnership (dealing with each other reasonably and in good faith), active protection and redress for past wrongs.

[93] As to how those principles should be applied, the recommendations papers stated that in order to act consistently with the minerals programme[78] and the Treaty, consultation with affected iwi and hapū had been undertaken ahead of the block offer round. The papers provided the decision maker with details of the submissions received from iwi during the consultation process which included requests for exclusion of certain cultural or historic sites of significance from the block offers and requests for the imposition of conditions to protect other sites. There was also a request for early engagement and active involvement in decision making around the activities to be undertaken, as well as more active involvement during the evaluation of bids, and continuing engagement.

[94] The papers then detailed the actions taken in response to iwi submissions. The existing exclusion of one area had been confirmed as continuing and an "iwi engagement condition" had been added to each permit offer, with the aim of ensuring that the expectations of iwi would be met by successful bidders. In accordance with the principle of partnership, officials also subsequently engaged with iwi to discuss whether the involvement and consultation with iwi had been appropriate.

[95] As will be apparent, the assessment was limited to matters associated with sites of cultural significance to local iwi whose rohe were directly affected. It did not include any assessment of whether exploration should be taking place at all because of the disproportionately adverse impacts of climate change on Māori.

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[78] Clause 2.4 of the Petroleum Programme provides relevant iwi and hapū must be given written notice of, and 40 working days to comment on, the details, activity types, timing and conditions of every proposed Petroleum Exploration Permit Round. Iwi and hapū must also be told they can request: certain areas not be included in the Round and certain areas be subject to additional requirements recognising the particular characteristics of those areas.

The High Court decision

[96] In the High Court, the Judge found that if climate change issues had been raised by the relevant hapū and iwi during the consultation period, then the decision maker would have been required to consider them, but without any particular outcome being mandated.[79] As it was, climate change issues were not raised by the directly affected iwi.

[97] The Judge acknowledged that during the consultation process, and again at the hearing before him, climate change concerns had been raised on behalf of an iwi (Ngāruahine) which opposed any further petroleum and mineral exploitation within the Taranaki region.[80] However, the Judge held that because the permits at issue were not within the rohe of that iwi, it was understandable the decision maker did not address the submission.[81] He also noted there was no suggestion there had been any breach of Treaty principles associated with the views of the iwi who were directly affected.[82]

[98] Insofar as the appellant was seeking to raise questions that were relevant to all Māori, the Judge said that was an argument involving alleged non-compliance with the principles of the Treaty at a higher level, and that higher level assessments of that sort were not assessments to be made by the decision maker under s 25 of the Crown Minerals Act. They were assessments that required consideration not only of the adverse implications of climate change but also the adverse economic impact of measures taken to respond to climate change, which also disproportionately affect Māori.[83]

[99] The Judge concluded by saying:

> [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

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79 Judgment under appeal, above n 2, at [99]–[100].
80 At [97].
81 At [106].
82 At [106].
83 At [107]–[108].

> 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.
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> [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 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.

Arguments on appeal

[100] On appeal, Mr Every-Palmer challenged the Judge's finding that the consultation with the local iwi was sufficient compliance with the principles of the Treaty.

[101] Mr Every-Palmer emphasised the particular vulnerability of Māori to the effects of climate change and that any worsening of climate change created by fossil fuel extraction directly affects Māori interests protected under Te Tiriti. It followed in his submission that the duty of active protection required those who made decisions about further fossil fuel extraction to actively consider climate change.

[102] Mr Every-Palmer further noted that in this case, climate change had in fact been actively disregarded. He drew our attention to a 2019 briefing paper prepared for the block offer decision. The briefing paper referred to Ngāruahine's submission that there should not be any permits, and advised the Minister that this did not align with the Crown Minerals Act and the considerations she was required to consider.

[103] In Mr Every-Palmer's submission, the failure to give any consideration to climate change issues was not good enough. The obligation imposed by s 4 was a substantial one and could not, he said, be met simply by making an assumption, as the Judge did, that the Treaty implications were being adequately addressed elsewhere.

[104] He further contended that reliance on these other work streams amounted to backfilling.

[105] In disputing these criticisms, Ms Boadita-Cormican argued that the material before the decision maker was sufficient to support a Treaty-consistent decision. She contended the appellant was seeking to impose on the s 25 decision maker the responsibility for meeting all of the Crown's obligations of active protection and partnership under the Treaty. In her submission, that was an incorrect siloed approach and was contrary to authority because the Crown meets its obligations across the statute book. Ms Boadita-Cormican drew our attention to affidavit evidence detailing system-wide climate change work programmes including:

(a) hui and consultation on climate change and energy policies;

(b) consultation during reviews of the emissions trading scheme;

(c) the Just Transition Unit coordinating cross-government work and leading engagement with Māori/iwi and social partners;

(d) consultation on the proposed Crown Minerals Act amendments and proposals for Māori engagement/involvement in Crown-owned minerals;

(e) the Climate Change Commission's consultation with Māori to develop its recommendations on the policy direction for an equitable transition; and

(f) consultation on New Zealand's Emissions Reduction Plan and National Adaptation Plan on climate change.

[106] Ms Boadita-Cormican further submitted the decision maker was aware of the other initiatives in place and the need for a just transition. But it was not the decision maker's role to manage the just transition for Māori. Declining the permits in the absence of a just transition policy to cease all petroleum permitting would arguably have run counter to the principle of partnership.

Discussion

[107] As the respondent acknowledges, the impact of climate change on Māori generally is relevant to the Crown's Treaty obligations. That includes the impact of climate change mitigation measures.

[108] We also accept, as did the Judge,[84] that climate change considerations can be become relevant to decisions under the Crown Minerals Act as a consequence of the obligation under s 4 and the principle of legality. However for the same reasons articulated by the Judge,[85] we are not persuaded that s 4 required the decision maker to conduct the type of wide-ranging inquiry into the broader potential impact of climate change and mitigation measures on Māori advocated for by Mr Every-Palmer. Such an inquiry would involve a balancing of considerations that have been and are being addressed elsewhere and, as the Judge put it, the decision maker was not required to readdress them.[86] Rather, she was entitled to focus on the localised issues associated with the particular bids and the engagement with the directly affected iwi, and she did so in a meaningful way.

[109] We are also not persuaded the respondent can be accused of "backfilling" the decision to grant the permits by reference to other work streams concerning the impact of climate change on Māori. The relevance of the existence of those other work streams is that it bears on the scope of the decision maker's obligation under s 4 as a matter of interpretation.

Outcome

[110] The appeal is dismissed.

[111] The respondent does not seek costs against the appellant and we therefore make no award of costs.

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84 Judgment under appeal, above n 2, at [99].
85 At [116].
86 At [116].

MALLON J

[112] I agree that the appeal should be dismissed. I write separately because I consider the Minister (through her delegate) was acting lawfully by considering the matters listed in s 5ZN of the Climate Change Response Act when exercising her discretion under s 25 of the Crown Minerals Act. As the matters listed in s 5ZN were considered, I prefer not to express a view on whether those matters were mandatory or whether there are circumstances in which they would be mandatory. However, in common with the reasons of French J, I consider that the Minister was not required to do a *Waratah*-type analysis of the climate change implications of her decision when exercising that discretion which was the focus of the appeal before us.[87]

[113] Section 25 provides the Minister's power to grant a permit. It is expressed in general terms — the Minister "may" grant a permit, but "is not obliged to" grant a permit,[88] and "must not" grant a permit for petroleum in respect of any land outside the onshore Taranaki region. It is a discretionary power and the section conferring the statutory power does not purport to set out the limits on the discretion conferred.

[114] Mandatory considerations are those that the Crown Minerals Act expressly or impliedly requires to be taken into account. The Crown Minerals Act includes express mandatory considerations:

(a) Section 29A sets out matters on which the Minister must be satisfied before a permit can be granted. They are conditions directed to the particular applicant and the applicant's work programme, and are concerned with the suitability of the applicant and its work programme for the grant of a permit.

(b) Section 4 provides that all persons exercising powers "shall" have regard to the principles of the Treaty of Waitangi | Te Tiriti o Waitangi.

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87 *Waratah Coal Pty Ltd v Youth Verdicts Ltd (No 6)*, above n 35.

88 Unless they are expressly required to do so under s 32 of the Crown Minerals Act.

(c) Section 22 provides that the Minister "must" act in accordance with a mineral programme.

[115] None of these provisions state that they are the only considerations relevant to the s 25 discretion. They are therefore not necessarily the only relevant (mandatory or otherwise) considerations. Ultimately, the scheme and purpose of the Crown Minerals Act provides the limits of the available discretion under s 25 in relation to a particular application under the Act.

[116] As noted in the minerals programme for petroleum, the underlying premise of the Crown Minerals Act is that the Government wants other parties, rather than the Government itself, to undertake prospecting or exploring for, or mining of Crown-owned minerals, including petroleum.[89] On that premise, the Act's purpose is to promote prospecting, exploration and mining for the benefit of New Zealand. This reflects that, if the Government is not to carry out the prospecting, exploration or mining itself, it is necessary to promote those activities to third parties so that New Zealand may benefit from Crown-owned minerals. The Crown Minerals Act seeks to ensure that parties are who are interested in these activities are aware of investment opportunities that are made available and are encouraged to do so, including by having a stable and coherent regime for such investment.[90] Contribution to the economy from promoting such investment is seen as of benefit to New Zealand.[91]

[117] The purpose is not, however, simply to promote this investment. It can be inferred that "for the benefit of New Zealand" was included by Parliament for a reason. While promoting prospecting, exploration and mining may encourage investment, not all such investment will necessarily benefit New Zealand economically. The Act recognises this by a scheme intended to efficiently allocate rights, effectively manage

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89 Petroleum Programme, cl 1.3(4). As noted in the reasons of French J, above at [42]–[43], the minerals programme for petroleum is applicable.

90 See Petroleum Programme, cl 1.3(5)–(6).

91 See above at [39]–[40]. See also cl 1.3(7) of the Petroleum Programme.

and regulate those rights, have those rights carried out in accordance with good industry practice and provide a fair return to the Crown for its minerals.[92]

[118] The Crown Minerals Act recognises that there are other potentially important considerations in that it requires all persons exercising powers under the Act (a term that includes the power under s 25) to have regard to the principles of the Treaty.[93] Climate change considerations may become relevant in this way.[94] This indicates that Parliament did not intend promotion of investment "for the benefit of New Zealand" necessarily to be solely about economic benefits.

[119] As it is put in the minerals programme for petroleum, the Minister sees "for the benefit of New Zealand" as the overarching "touchstone for interpreting the rest of the purpose statement and the provisions of the Act governing various activities and processes".[95] The minerals programme for petroleum recognises that there are "[o]ther important components of 'the benefit of New Zealand', including environmental considerations, [which] are covered in other legislation".[96]

[120] The minerals programme for petroleum goes on to explain that the Act is about the development of the Crown's mineral estate and that there is a wide range of other legislation that affects or relates to prospecting, exploration and mining. It gives the examples of the Resource Management Act 1991, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the Climate Change Response Act.[97] It further goes on:[98]

> (3) The Minister and the Chief Executive, in administering the Act, do not have powers and functions (except where and to the extent specifically provided for in the Act) relating to matters covered by other legislation. In particular, the Minister and the Chief Executive are not required (except where and to the extent specifically provided for in the Act) to duplicate the activities and requirements of ministers and departments responsible for administering other legislation.

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92 Crown Minerals Act, s 1A(2). See also the Minister's statement, quoted above at [41], in introducing the Bill which referred to maximising gains from the "responsible" development of New Zealand's oil and gas resources.
93 Crown Minerals Act, s 4.
94 As discussed in the reasons of French J at [108].
95 Petroleum Programme, cl 1.3(7).
96 Clause 1.3(8).
97 Clause 1.4(2)(a)–(c).
98 Clause 1.4.

> (4) Applicants for permits … must meet the requirements of other legislation as applicable. …
>
> (5) The clear separation in the statutory framework between powers and functions (and rights and obligations) under the Act on the one hand and under other legislation on the other is designed to ensure clear accountability and avoid conflicting interests and objectives on the part of ministers and departments responsible for administering relevant legislation.

[121] I consider the Minister's interpretation of "for the benefit of New Zealand" in the s 1A of the Crown Minerals Act, as set out in the minerals programme for petroleum, correctly reflects Parliament's intention in s 1A.[99] The "for the benefit of New Zealand" in s 1A is intended to be a touchstone relevant to how other provisions of the Act are to be interpreted. This includes the s 25 discretion.

[122] The minerals programme for petroleum also correctly recognises that "for the benefit of New Zealand" may include considerations other than maximising economic returns from Crown minerals. It also correctly recognises that the Minister is not to duplicate the functions of other ministers and departments responsible for administering other legislation. This is explicitly given effect in s 29A(3) of the Crown Minerals Act in relation to specified Acts.

[123] But that is not to say that other legislation (environmental or otherwise) cannot be relevant to the assessment of whether to grant a permit as a result of an application or a tender process under s 25. Whether such legislation may be relevant depends on a consideration of the text of the s 25 discretion, in light of its purpose, and the immediate and general legislative context.[100]

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99 Section 1A was introduced in May 2013, at the same time as the Petroleum Programme came into force by Order in Council. The cautious use of secondary legislation to guide interpretation of primary legislation is permitted, particularly where the meaning of the Act is ambiguous and where "the Act provides a framework built on by contemporaneously prepared regulations": *Hanlon v Law Society* [1981] AC 124 (HL) at 193–194 per Lord Lowry. See generally: Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 349–351; Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at [24.17]–[24.18]; and *Off Road New Zealand (1992) Ltd v Machinery Inspector* [2019] NZHC 1996 at [59]–[61].

100 Legislation Act 2019, s 10(1). See also *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[124] The appellant's submission of a *Waratah*-type analysis would be contrary to the scheme of the Crown Minerals Act and the Climate Change Response Act.[101] It would be beyond the scope of the Minister's responsibilities under the Crown Minerals Act, in managing and regulating rights to prospect, explore or mine, to attempt to carry out the in-depth analysis and advice provided by the Climate Change Commission to the Minister responsible under the Climate Change Response Act in exercising the s 25 discretion.[102] The Climate Change Response Act has been enacted to provide the framework for this necessary analysis across the entire economy.[103]

[125] However, in my view it would not be contrary to the scheme of those Acts if the Minister were to take into account the matters specified in s 5ZN of the Climate Change Response Act. The 2050 target, emissions budgets and emissions reduction plans are key components of the framework under that Act. The framework is intended to: enable New Zealand to develop and implement clear and stable climate change policies that contribute to the global effort to limit global average temperature rise to 1.5 degrees Celsius above pre-industrial levels; allow New Zealand to prepare for, and adapt to, the effects of climate change; and to give effect to New Zealand's international obligations in relation to climate change.[104]

[126] Section 5ZN is broad in its application — it makes the 2050 target, emissions budgets and emissions reduction plans permissibly relevant to "a person or body … exercising or performing a public function, power, or duty conferred on that person or body by or under law". That broad framing on its face extends to a person exercising the power under s 25 of the Crown Minerals Act. I accept that a statute under which a power is exercised may nevertheless preclude that consideration despite the broad framing of s 5ZN. However, I am unpersuaded that the Crown Minerals Act does so.

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101 *Waratah Coal Pty Ltd,* above n 35.

102 The same point can be made in relation to the discretion as to whether to offer a block for tender under s 24.

103 That is not to say the Climate Change Response Act is designed to "cover the entire field" of New Zealand's climate change response, but in this context it serves as the appropriate framework: see *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [100].

104 Climate Change Response Act, s 3(1)(aa)–(a).

[127] Given the accepted climate emergency, and that the combustion of fossil fuels is the main cause of climate change, it would be odd if the Minister responsible for petroleum exploration was precluded from taking into account these key components of New Zealand's response to climate change, when Parliament has said in the Climate Change Response Act that those exercising powers may do so. For example, if an emissions budget was on course to be significantly exceeded, it would be odd (and potentially contrary to the benefit of New Zealand) if the Minister was precluded from taking into account any published advice from the Climate Change Commission about this in determining whether to grant a permit in furtherance of the purpose of the Act to promote further exploration or prospecting of petroleum "for the benefit of New Zealand".

[128] I note that the officials advising the Minister's delegate did not take that view, nor did the Minister's delegate, and this was not the position that counsel for the Minister took in her submissions. In my view it was open to the Minister exercising her power under s 25, in light of the scheme and purpose of the Crown Minerals Act, to take into account the s 5ZN matters.

[129] In this case, officials advised the Minister's delegate that the matters in s 5ZN were matters that the Minister could take into account. Officials referred to the Climate Change Commission's advice that it was necessary to have a smooth and appropriately sequenced phase down of fossil fuel use. Information was provided about the current ability of supply to meet demand. Officials advised that granting the permit was not inconsistent with the 2050 target and that there were, at that stage, no emissions budgets nor an emissions reduction plan. Amongst other things, the advice of officials said that relevant matters included that the grant of an exploration permit did not confer a right to produce petroleum and it would be open to the Minister to consider the matters under s 5ZN when evaluating any such application to produce petroleum.

[130] The evidence of the Minister's delegate is that she was independently aware of the Climate Change Commission's advice, as well as concerns raised by Lawyers for Climate Action NZ Inc about any further grants of permits and the response to those concerns. She was also aware of the decarbonisation policy work

happening in the Energy and Resource Markets branch of the Ministry, of which she was the General Manager. She turned her mind to s 5ZN and took into account the advice of her officials that granting the permits was not inconsistent with the matters in s 5ZN. In my view the Minister, through her delegate, did not take into account irrelevant considerations in her exercising her discretion under s 25 when she took into account the s 5ZN matters.

[131] I am also unpersuaded that case law precludes consideration of s 5ZN when exercising the s 25 discretion. None of the cases we were referred relate directly to this point. The main cases of possible relevance are High Court decisions.[105] Of them, the first in time, is *Greenpeace of New Zealand Inc v Minister of Energy and Resources*.[106] In that case, the Minister's decision to grant a permit was made under the Crown Minerals Act as it stood before the 2013 amendments which, amongst other things, brought in the s 1A purpose. It was also made when the 2005 minerals programme was in force rather than the 2013 minerals programme that applied to the decision in the present case.[107] The 2005 minerals programme referred to the "desired outcome" as "to promote the responsible discovery and development of New Zealand's petroleum resources that contribute substantially to our economy".[108]

[132] In discussing whether responsible discovery required consideration of international obligations that relate to the petroleum resource, Gendall J said:[109]

> [92] I do not think that it is proper to analyse the application or performance of the Minister's functions and powers within the empowering legislation in isolation from the total statutory regime relevant to the exercise of those powers within the subject matter of the legislation. A Minister cannot

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105 See above at [45]–[48].

106 *Greenpeace of New Zealand Inc*, above n 44. The case concerned whether, in issuing an exploration permit in the exclusive economic zone of New Zealand, the Minister was required to take into account the potential impacts on the environment and marine life, New Zealand's international obligations relating to the sea and its natural resources as well as in relation to indigenous people, and Te Tiriti issues. As explained in the judgment, at [96], the Resource Management Act was not applicable to the extent that most of the permit area was outside New Zealand's territorial sea limit.

107 Minerals Programme for Petroleum 2005.

108 Clause 2.2.

109 *Greenpeace of New Zealand Inc*, above n 44. The Judge went on, at [93], to quote the key passage on the approach to statutory interpretation set out in *Commerce Commission v Fonterra Cooperative Group*, above n 100, at [22] that "text and purpose" are the key drivers of statutory interpretation, that "[i]n determining the purpose the Court must obviously have regard to both the immediate and general legislative context" and that "the social, commercial or other objective of the enactment" may also be relevant.

> purport to act under a delegated authority of one statute which would lead him to making decisions which are invalid or open to question when viewed against other statutes. The decision making process of a Minister under delegated legislation ought not be compartmentalised so as to ignore a wider statutory framework in which the particular activity is designed to be governed. Text, purpose and context are crucial.

[133] In my view, the Judge correctly considered that the scope of the Minister's discretion to grant a permit was to be assessed in the broader legislative setting. In this broader setting, the Judge found it was clear that international environmental obligations were to be dealt with by authorities other than the Minister of Energy and Resources. He further found that the Minster had correctly turned to his mind to whether this was so in granting the permit.[110]

[134] Accordingly, in my view, it does not follow from the decision in that case that the only relevant considerations are necessarily those that promote prospecting, exploration and mining so as to increase investment in New Zealand's petroleum and mineral sectors. Rather, in the *Greenpeace of New Zealand Inc* context, it was found that international obligations were dealt with elsewhere. Further, and importantly, this decision predated the significant amendments made to the Climate Change Response Act in 2019.[111] Those amendments included adding a new purpose of that Act, establishing the Climate Change Commission, bringing in the key components referred to above (namely, the 2050 Target, emissions budgets and emissions reductions plan) and inserting s 5ZN.[112] Those amendments are part of the broader statutory context in which the discretion under s 25 of the Crown Minerals Act is to be exercised in line with the touchstone provided by s 1A.

[135] The High Court decision of *Greymouth Petroleum Mining Group Ltd v Minister of Energy and Resources* is also not on point.[113] In setting out the statutory scheme, Dobson J recorded counsel for the Minister as accepting that s 1A rendered explicit what had been the implicit purpose of the Crown Minerals Act prior to the 2013 amendments.[114] The Judge went on to state that the focus on exploitation of

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110 *Greenpeace of New Zealand Inc*, above n 44, at [115]–[118].
111 Climate Change Response (Zero Carbon) Amendment Act 2019.
112 This framework is discussed in more detail in *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064 at [38]–[55].
113 *Greymouth Petroleum Mining Group Ltd*, above n 44.
114 At [12].

Crown-owned minerals is not to be influenced by other policy factors such as environmental concerns.[115] However, there is nothing to indicate that this comment was the subject of dispute or argument, or was relevant to the issues before the High Court.[116] Environmental issues were not discussed beyond the mention in the background discussion of the statutory scheme. Further, as with *Greenpeace of New Zealand Inc*, the case was decided before the 2019 amendments to the Climate Change Response Act, that included the introduction of s 5ZN. Although in any event the amendments would have had no bearing on the issue before the Court.

[136] The High Court decision in *Rangitira Developments Ltd v Sage* concerned access to land within a mining permit area which included land held for conservation purposes.[117] This engaged ss 61(2) and 61C(3) of the Crown Minerals Act pursuant to which the Minister of Energy and Resources and the Minister of Conservation were involved in the decision. The applicant contended that the Ministers did not make their decision for the purpose of the Crown Minerals Act as the access would provide substantial benefits to New Zealand.[118] In this context, Clark J accepted that s 1A had an "explicitly commercial focus" with a "strong presumption in favour of mining activity".[119] But these features did not give the Crown Minerals Act priority or dominance over the Conservation Act 1987 in the context of an application for an access arrangement.[120] The Judge concluded that:

> [106] … The evidence does not justify an inference much less a conclusion that Ministers failed to take into account the purpose of the Crown Minerals Act, or the benefit to New Zealand even if that is to be measured in purely economic terms.

[137] In short, the Judge did not find that mining was always to be promoted over other matters, nor did she definitively conclude that economic interests were the only

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115 At [12].

116 The issue was whether the Minister could lawfully impose a condition of a work programme that would require a surrender of part of the permit area and enforce consequences of breaches of that condition. The Minister's concern was that the discovery of commercially producible hydrocarbons in the south-eastern corner of the proposed permit area could not justify a claim to the applicants' presence across the whole of the permitted area. The challenged condition addressed this concern. For their part, the applicants saw the condition as "antithetical to the efficient allocation of rights to mine Crown-owned minerals and the effective management of those rights". See at [2]–[3], [12], [25] and [28]–[31].

117 *Rangitira Developments Ltd v Sage*, above n 44.

118 At [62]–[63].

119 At [75].

120 At [76].

relevant interests under s 1A of the Crown Mineral Act. Section 5ZN did not feature because it was not relevant to the issues before the Court.

[138] Finally, I am unpersuaded that the later amendments made to the Crown Minerals Act require a different conclusion than the one I have reached:[121]

(a) The amendments introduced in 2018 provided that a person could not apply for a permit outside of the onshore Taranaki "despite anything to the contrary in [the] Act (including sections 1A, 25(1)(b)(i) and 32)".[122] Section 25(1)(b)(i) provided that a Minister may grant a permit as a result of an application under s 23A (an application process that is initiated by a person rather than as part of an offer for allocation by public tender under s 24). The "despite" in this context made it clear that the broadly framed discretion under s 25 was qualified in that a grant could not be made in response to an application for a permit under s 23A. Section 32 enabled prospecting permit holders to apply under s 23A to surrender that permit in exchange for an exploration mineral where the results of prospecting justify this. Again, the "despite" in this context made it clear that this right was qualified in relation to permits outside the onshore Taranaki region.

(b) The subsequent amendment in 2023 to s 1A that replaced "promote" with "manage" reflected the increasing focus of climate change and therefore the need to "neutralise" the promotional purpose.[123] That amendment does not illustrate that s 1A was solely focussed on promoting prospecting, exploration or mining for the economic benefit of New Zealand to the necessary exclusion of other factors not

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121 Cabinet papers included in the materials put before us describe the Executive's views and thinking but do not usurp the Court's role to interpret Parliament's intent as enacted. See, for example *Burrows and Carter Statute Law in New Zealand*, above n 99, at 380; *Bennion*, *Bailey and Norbury on Statutory Interpretation*, above n 99, at [24.9]; *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [40]; *B v Chief Executive of the Ministry of Social Development* [2013] NZCA 410, [2013] NZAR 1309 at [33]; and *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 at [98]–[99] per Miller J dissenting.

122 Crown Minerals (Petroleum) Amendment Act, s 5. Section 5 amended s 23A of the Crown Minerals Act.

123 Crown Minerals Amendment Act 2023, s 4; and (22 November 2022) 764 NZPD 14230.

addressed in the wider legislative scheme. It is consistent only with the view accepted by Clark J in *Rangitira Developments Ltd* of a strong presumption in favour of this activity.

[139] For these reasons, I conclude that s 5ZN was a permissible consideration in this case and the Minister's delegate correctly turned her mind to this. My view on s 5ZN does not affect the outcome of the appeal.

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