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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 100/2019
[2020] NZSC Trans 10

BETWEEN **RANGITIRA DEVELOPMENTS LIMITED**
Appellant

AND **ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**
Respondent

Hearing:	19 May 2020
Coram:	Winkelmann CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	J E Hodder QC and J K Grimmer for the Appellant M C Smith and P D Anderson for the Respondent

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CIVIL APPEAL

MR HODDER QC:
May it please the Court. Hodder with my learned friend Mr Grimmer for the appellant.

WINKELMANN CJ:

Tēnā korua.

MR SMITH:

May it please the Court. Counsel's name is Smith and I appear with my learned friend Mr Anderson for the respondent, the Royal Forest and Bird Protection Society.

WINKELMANN CJ:

Tēnā korua. Mr Hodder.

MR HODDER QC:

Thank you Your Honour. As I am sure the Court appreciates this appeal is essentially about the relationship between two pieces of legislation, the Crown Minerals Act 1991 and the Reserves Act 1977. The answer to that relationship used to be easy because the Mining Act that preceded in part the Crown Minerals Act was held to be an exclusive code for reasons set out in the Court of Appeal's decision back in the *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) case some time ago. The 1991 Act is not on all fours, of course, with the Mining Act 1971, and the answer is more subtle, but the appeal for Rangitira is based on the submission that nevertheless one gets to the same result. That is to say the Crown Minerals Act is special legislation including relation to access and is not impaired or derogated from by the Reserves Act of 1977. That in part means that the submission for the appellant is that this Court should endorse the High Court decision in this litigation, and conversely should not accept the reasoning and the result from the Court of Appeal. I'll develop these matter, of course, but we respectfully submit that the Court of Appeal's approach was unduly influenced by the idea that earlier mining legislation had been broadly swept away by 1991 legislative changes. In the context of that underestimated, it is said the Court of Appeal underestimated the evidence of continuity which make the Crown Minerals Act special legislation like it's predecessors. The consequence of that which is of particular relevance here is that likely elevates the Reserves Act into a major impediment to mining on reserves as

from 1991. That makes it a conspicuous exception to the position regarding Crown land and any other private land. Among other things it also means that in relation to the particular reserve that this litigation is concerned with, it means that notwithstanding it's been a reserve for coalmining purposes since it was established in 1951, the Reserves Act is now potentially a major impediment to it.

So that's the broad outline of the argument. In terms of the background, I apprehend the Court will have some familiarity with that from the reading it will have done, but the reserve was created as a water conservation area in 1951 under the Land Act. It's about 4500 acres, or about 1825 hectares and of it's of assistance can I say that there are maps that are relevant to that in the case on appeal volume B at pages 201.133 and 201.134, that provided geographical context. The mine footprint is relatively small in relation to both the reserve and in relation to the overall mining permit area that we're concerned with. So as I say the reserve we're concerned with was subject to reservations in particular under section 8 of the Coal Mines Amendment Act 1950. That's in the, again can be seen from the bundle of authorities at tab 7, volume A, and that reserved both the coal itself as being the property of the Crown, and the power to grant coal mining rights. As I mentioned that remains the position, effectively recognised by section 5(2) of the Reserves Act.

In 1951 the reserve was vested in the then council, which has now morphed its way into the Buller District Council, in trust for water conservation purposes. In 2019, as the Court also knows, it was finally classified by the Council as a local purpose (water conservation) reserve, and that's in volume B in the case on appeal, 201.229. the appellant's interest in mining is related to its having obtained a mining permit, and this relates to about 120 hectares of the 1800 hectares of the reserve, plus an access road. The proposal for mining does have benefits for the Council. There are enhancement and environmental compensation measures. Those are discussed in the agreed facts, to be found in the case on appeal at tab 3, pages 101.018, paragraphs 42 to 44. That is to say that as part of the

conditions that were expected, and are in particular are the subject of the resource consent which has been granted, but which is subject to appeal, there will be remedial compensation work in relation to the environment, not just in the mine site but in the surrounding areas, and indeed just not in the reserve but in wider areas as well. Things that a Council of the ordinary course might have difficulty in financing. There are also social and economic effects that results from the mining of Crown owned minerals. Those social and economic effects are acknowledged in the agreed statement of fact, but as it says there is a dispute about exactly how significant they are. But for our purposes we draw attention to the fact that they were reflected in the original Council decision back in September 2018 to grant the access sought at the first stage. That was then a subject of a judicial review by the respondent and the Council backtracked and there has been this litigation going on pretty much ever since.

The argument that I wish to advance relies heavily on what maybe called the nicer features, as it were, of the Crown Minerals Act, and so what I propose to do, if the Court is content for that, is to spend a little bit of time going through the Crown Minerals Act. In the appellant's bundle of authorities at tab C it can be found – sorry, in volume C, it can be found at tab 2. If the Court bears with me I'll go through it in a certain amount of detail, but if I just focus on the table of contents for the moment you'll see Part 1 is preliminary provisions. Part 2 about minerals programmes. They were a new initiative in the 2013 amendment. Part 1B is about permits and access to land, which we are principally concerned with, and within that, the Court will see that as the table of contents shows from sections 47 through to 80 are effectively dealing with a question of access to land. So the obvious and simple point is it's a very detailed set of provisions about access to land. Then happily I think for most of the rests of it we're not too concerned about the balance of this particular legislation.

So if I can start at section 1A, inserted in 2013 but relevant at the time the first application was made by the appellant and acceded to by the Council in the first instance, at the time, of course, the litigation was followed. "The purpose

of this Act is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand." Then it talks about what the Act is providing for, "Efficient allocation of rights, effective management and regulation, carryout in accordance with good industry practice of activities, and a fair financial return to the Crown for its minerals." Now I understand it's not an issue that this is a case about Crown-owned minerals, this coal was reserved by the Crown at the time of the establishment of the reserve and it remains the case. So the coal that's sought to be mined is a Crown-owned minerals, it's squarely within the purpose of section 1A of the Act.

Turning to the definitions, we start of with access arrangement, which is what this is all about, the access arrangement having been sought under this Act by the appellant, and that's defined in terms of arrangements to permit access, "Entered into by way of arrangement or determined by an arbiter in accordance with the Act," between in effect the owner or occupier and the party who has the intention to carry out mineral-related activities, normally of course, as here, a person with a mining permit.

Over the page, the definition of "Crown owned mineral", fairly straightforward, moving into the definition of "good industry practice", I notice that merely because it makes it clear that what's covered by good industry practice, which will be a requirement of a work programme, doesn't include, "Activity regulated under environmental legislation." So again, there's no dispute between the parties that to carry on the activities proposed the appellant requires a resource consent. As I mentioned, it has it, but that is subject to a challenge in the Environment Court which is currently parked pending both this litigation and litigation in the High Court in relation to access to a small part of the conservation area adjacent to the water reserve.

Definitions of "minerals" is comprehensive, it covers coal. The definition of "mining" of course, as one would expect, and "mining operations", are extensive, likewise "permits", and then "right of access" is defined in relation of any, "Lawful activity under a permit or any mining operations." I'll come back to it, but we see "specified Act" is referred to in terms of health and safety at

work legislation and maritime transport legislation, which includes a safety component, the Resource Management Act and the exclusive economic zone and continental shelf insofar as mining might involve those areas of New Zealand. That, we say, has come significance in terms of the legislation that is contemplated as working in tandem with this Act, the Crown Minerals Act.

Section 2B, just briefly, Tier 1 and Tier 2 permits. Tier 1 permits are more expansive mining operations, the criteria for those is set out in the schedule, Schedule 5. What I think we need to be concerned with that, we are talking about a Tier 1 issue here.

Section 5, the functions of the Minister are framed in terms of exploitation of Crown minerals to attract permit applications, to promote informed investment decisions, to improve the working of related markets, et cetera.

Section 9 is of significance in the respondent's submissions. It says that is an indicator of a fundamental change between this legislation and the predecessor legislation which says, "Compliance with this Act or the regulations does not remove the need to comply with all other applicable Acts, regulations, bylaws and rules of law." I'll come back to that, but we say that refers to regulatory requirements and is not out to capture the Reserves Act.

Section 11 confirms the longstanding reservation of many minerals to the Crown under previous legislation, and in our case section 11(2), "For the avoidance of doubt," confirms that minerals, "Reserve in favour of the Crown under any enactment continue to be reserved in favour of the Crown," and that covers the coal we're concerned with in this particular reserve.

We don't need to spend time on the minerals programme for our purposes. But moving on then to section 23 at the beginning of the permits, Part 1B, the purpose of the permits is fairly self-evident, it's to get on and do things. Then how to get a permit and what is to be considered having regard to permits. There are some provisions that deal with those. So section 29A

for example and subsection (2) there's reference to the fact about what the Minister must be satisfied when considering an application for a permit under this provision, and then when we get down to (d) in the case of a Tier 1 permit, one of the considerations is the capacity and systems likely to meet the health and safety and environmental requirements of all specified Acts, and we recall the specified Acts were the Acts which included the RMA and the Maritime Safety Act, as in the definition provision. So there's provision for environmental and health and safety, those kind of regulatory requirements are recognised at various points in this Act. We find the same thing in subsection (4) of section 29A, making it clear that the fact that this is going to be taken into account, granting a permit, doesn't mean that the permit holder doesn't have to comply with those particular pieces of legislation. That's the effect of subsection (4)(a) and (b).

In terms of what the permit gives you, section 30 explains that. Subsection (3), "the holder of a mining permit shall have the rights of a… current exploration permit and, in addition, a right to mine the Crown owned mineral…" that's what the appellant is seeking, and likewise section 31, the right of the permit holder to the minerals is provided for there. The question of royalties and payments is dealt with elsewhere. Permit holder responsibilities identified in section 33 include compliance with the conditions of the permit. This Act and its regulations and the Health and Safety at Work Act 2015 and regulations made under that Act, and the requirement to submit royalty returns. The place of health and safety is reinforced in section 33B, an obligation to notify any breaches of it. Then a financial return to the Crown addressed in section 34 and elsewhere.

The fact that the purpose of this Act is to achieve economic benefits from getting minerals out of the ground is reinforced in various places but for example in section 36 in relation to changes to the permit required in subsection (5) "The duration of a mining permit may not be extended," unless the permit holder, "satisfies the Minister that the discovery…cannot be economically depleted before the expiry date." So conversely the object is to economically deplete the asset. Likewise in section 38 where this issues

about changes for permits finishes up being referred to an independent expert. One of those is referred to in subsection (6) of section 38, “Any change to a work programme… must be limited to what is reasonably required to ensure that the economic recovery of the resource is maximised.” Again, stating the obvious, but the point of the legislation is to achieve an economic objective in the national interest as section 1A tells us.

So that is probably sufficient for present purposes to take us to the access provisions, which start at section 47. As I mentioned they’re lengthy but I don’t think I need to deal with probably the second two-thirds of them. So the first part, sections 47 and 48 effectively clear the decks. The permit doesn’t give a right of access to land. Now that, of course, is a change to what was the place, situation under the Mining Act. Under the Mining Act a licence brought with it a right to access to land without question. That isn't the case now, we acknowledge that, and that’s a change. The question for this Court is how significant a change is that. Section 48 says, any rights of entry reserved by statute previously are no longer having any effect.

WINKELMANN CJ:
Which Mining Act are you referring to when you say it gave a right to access the land?

MR HODDER QC:
It was the Mining Act 1971, a mining licence gave a right of access.

WINKELMANN CJ:
I notice in that Act that there was a tiered sort of a response to that. So there was an obligation to try and make arrangements if there couldn’t then – section 27, coal mining rights where it coal but not service of land owned by Crown.

MR HODDER QC:

So the Mining Act didn't apply to coal. I'm using the Mining Act as a simple example, the simplest of examples. I mean this Crown Minerals Act is applied to all minerals so I'm using the Mining Act as an example of non-coal.

WINKELMANN CJ:

I was thinking of the Mining Act because it's coal mining.

MR HODDER QC:

Gold mining?

WINKELMANN CJ:

Coal mining we're dealing with, yes.

MR HODDER QC:

Coal mining, sorry. So there are two different regimes, as Your Honour, I think…

WINKELMANN CJ:

I understand that, yes.

MR HODDER QC:

So the Mining Act was a simple one, because it says if you have a mining licence you can go in. The coal mining legislation got more complicated and there was provision for, either that or an Order in Council, to declare that there could be access to the land, or under the 1979 Act there were various forms of access, although there was room for objection to the access and debate about access under it.

WINKELMANN CJ:

Yes, and then applied –

MR HODDER QC:

The 1979 Act came closer to the 1971 Act in terms of access going with licences.

WINKELMANN CJ:

Yes. I was just thinking you would be referring us to the Coal Mining Act because we're concerned with coal mining, but that's all right. You're making a different point, are you?

MR HODDER QC:

I'm making the point that this is a change, and so…

WINKELMANN CJ:

So what applied, other than this land? Because what applied to this land was section 27 of the Coal Mines Act, wasn't it?

MR HODDER QC:

Yes. I'm making a more generic proposition that sections 47 and 48 affect also land that was previously subject to or would previously have been subject to the more peremptory provisions of the Mining Act 1971. That's purely by way of illustration, not in relation to this particular reserve.

WINKELMANN CJ:

But they affect land that would have been subject to the Coal Mines Act as well?

MR HODDER QC:

Yes.

WINKELMANN CJ:

So what does section 48 mean then?

MR HODDER QC:

If there had – and I haven't studied exhaustively the Petroleum Demand Restraint Act 1981, for example, which was also a part of the previous regimes. But as far as I see it, if a person wants access to land because they hold a mining permit they can't say there used to be a right of access under some previous legislation, it just takes that away.

WINKELMANN CJ:
Would it take away rights of access under the Coal Mines Act?

MR HODDER QC:
If something had been reserved, if some right had been reserved which included a, like a statute, if there was some provision – and I haven't got a provision in mind for this – that said by virtual enactment there was a right to enter any land, then that no longer has effect, it's just drawn a line under that. And the purpose of the exercise is to channel any issue around access into the regime that's established by this Act in the sections that follow.

They were not concerned with a minimum impact activity but there are rights of entry onto land for minimum impact activities and they are, I should mention, not qualified by reference to very much, nothing that's particularly relevant here.

And then for land other than minimum impact activity access provisions we start at section 53, and there's a division in the legislation between petroleum and other minerals. So section 53 is in relation to access with petroleum, and you cannot under subsection 53(2), "Prospect, explore or mine otherwise in accordance of an access arrangement agreed in writing or determined by an arbitrator." And then there are exceptions: the continental shelf, land in the marine and coastal area, et cetera. And then for land other than, land which is sought for minerals to be mined other than petroleum, section 54, again the proposition is that you need an access arrangement agreed in writing between the permanent holder and each owner and occupier or determined by arbitrator in accordance with the Act, and it doesn't apply to land in the continental shelf, land in the marine and coastal area, and then there's also reference to Schedule 4, which I'll come to but which is a series of land, it's a series of classifications that are excluded from the access provisions here.

Section 55 then limits the scope for the arbitral arrangement. Subject to section 66 or to any agreement between the parties, "An arbitrator is not entitled to determine an access arrangement in respect of mining for minerals

other than petroleum." So on the face of it that means that the arbitration regime is limited to petroleum but not to other minerals, including coal. And then there's also a reference to what the arbitrator is limited from doing in relation to subsection (2), that's in relation to petroleum, there's exceptions for the Conservation Act, the Queen Elizabeth the Second National Trust Act 1977, land subject to covenant in terms of the Reserves Act 1977, and that appears to be one of the only two references to the Reserves Act in this Act at section 55(2)(c) et cetera.

WINKELMANN CJ:
So it's saying an arbitrator, the notion of an arbitrator is that they can impose ultimately impose –

MR HODDER QC:
Yes.

WINKELMANN CJ:
– access arrangements where they're not able to be agreed.

MR HODDER QC:
Correct.

WINKELMANN CJ:
And that only applies to petroleum and it does not apply to land under the Reserves Act.

MR HODDER QC:
Doesn't apply to land that's subject to a covenant.

WINKELMANN CJ:
And what does that mean?

MR HODDER QC:
It doesn't tell us, but in terms of the way the Reserves Act works, the Reserves Act simply has things created. It maybe that there's a specific

covenant in an instrument that establishes a reserve that prohibits something like that, in which case that would be inappropriate, but in our reading it doesn't cover the Reserves Act as a whole. It requires something specific, a specific covenant. Covenant is not the right way to describe what the Reserves Act does. So it's looking for something exceptional –

WINKELMANN CJ:
Does the Reserves Act contemplate covenants?

WILLIAM YOUNG J:
Or land, what you're saying is just because land is a reserve it doesn't mean it's subject to a covenant.

MR HODDER QC:
Correct.

WINKELMANN CJ:
So it's subject to a covenant in terms of the Reserves Act?

MR HODDER QC:
Yes.

WINKELMANN CJ:
And you're not quite sure what that means?

MR HODDER QC:
I'm not sure precisely what it means, but I'm confident that it doesn't mean the Reserves Act as a whole. That it requires something express in the nature, in the implications and connotations that a covenant has, something explicit and distinguishing, not applying to any reserve. And that would be, make sense to some extent insofar as there can be utilitarian reserves, reserves for quarries, reserves for a range of non-environmental as it were propositions.

Now we said that we're subject to section 66, so I may as well deal with section 66 now. Section 66 says that if there's an occupier or owner of land which is subject to a permit and fails or refuses to enter into an access arrangement within 60 days, and the land is not Māori land, not land registered under the Waikato Raupatu Claims Settlement Act 1995, not land defined as private land by section 5(1) of the Mining Act 1971, which is land where the minerals were not reserved to the Crown, or a class of land to which any of paragraphs (a) to (g) of section 55(2) relate, then the permit holder can apply for a declaration that an arbitrator be appointed. Then subsection (3) enables the Minister, if they think there are sufficient public interest grounds, to cause a notice to be served that means that unless there's an access arrangement then there will be an arbitrator process. Now those are unqualified propositions. They're not qualified that in fact it's a reserve or otherwise except insofar as section 55 provides an exclusion.

WINKELMANN CJ:

The company, the Reserves Act refers to conservation covenants?

MR HODDER QC:

Yes. Returning to the process, section 59 requires a, "Notice of a request for grant of right of access." And once required is to specify the land affected, the purposes which required the proposed programme of work and the compensation and safeguards against any likely adverse effects proposed. Then if the land relates to Crown land then the direct net economic and other benefits. Then the grant of right by an access arrangement is dealt with in section 62. Subsection (1) sets out what sort of things an access arrangement will make provision for, including in section 60(1)(e) provision for protecting the environment. This goes to one of our themes, that is to say this Act does have a degree of environmental recognition in it, and that's section 60(1)(e) is one of them. We saw elsewhere references to the Resource Management Act being one of those prescribed statutes.

Then at subsection (2) of section 60, "In considering whether to agree to an access arrangement, an owner or occupier of land (other than Crown land)

may have regard to such matters as he or she considers relevant." So that's at the heart of our submission. We say within the context of a very comprehensive set of access arrangements section 60(2) is what applies to all applications and all owners except the Crown, and it entitles them to take into account such matters as they consider relevant and that includes the local authority that administers a reserve as is the case with the Buller District Council and the reserve we are concerned with here.

Now if things were to come adrift in terms of the discussions, then there is potential for section 60(6) to apply, notwithstanding the earlier provision about an arbitrator not normally being available for other than petroleum matters, and if section 66 applies there is no suggestion there that that's somehow or other qualified by anything to do with the Reserves Act, and that's what I mean by this being a detailed, specialist regime for access, and within that there's always the inherent or potential qualification of section 60(2) via section 66 and, of course, it requires a ministerial intervention in the public interest, but the Act is about the public interest in exploiting minerals.

The point I make is simply that to say that the Reserves Act provides some kind of veto to an access arrangement doesn't sit with the structure of these provisions.

Now as the Court, I think, will be aware, the parties take a different view in relation to the relevance of section 61 that deals with access arrangements in respect of Crown land and land in the common marine and coastal areas. My learned friends say for the respondent, "Well, this has got a whole lot of detail and if Parliament meant these sort of considerations to be taken into account in relation to reserves they could have said so." We say what this indicates is that even in relation to Crown land and conservation land there is a way of obtaining access in which one has regard to the direct economic benefits and other matters not limited to the terms of any particular – well, not designed to preserve the existing features of the land which is the theme of the respondent's case. And again one of the features of section 61 is its

reference to taking land completely out of the exercise. So, for example, in section 61(1A) there is reference to the ability to add to schedule 4.

WINKELMANN CJ:
Sorry, section 60?

GLAZEBROOK J:
Where are you?

MR HODDER QC:
I'm in section 61, subsection (1A), capital A.

WINKELMANN CJ:
Right down the bottom.

MR HODDER QC:
Capital A, I'm sorry. That takes us to schedule 4, and schedule 4 is headed, "Land to which access restrictions apply," and it starts off by reference to the national park, any reserve which is a nature reserve, any reserve which is a scientific reserve, any part of a reserve which is a wilderness area or any conservation area which is a wilderness area, a sanctuary area, et cetera. So certain – and this is the second kind of Reserves Act reference that we find in the Act. So where reserves are to be taken out of the access regime then that is done by schedule 4 and more can be done under section 61(1A).

So this concern that serious damage could be done by the mining access regime to important environmental areas is responded to by schedule 4 and the provisions related to it, and again we say that has a role in diminishing the significance of the Reserves Act provisions on which the Court of Appeal relied and on which the respondent relies.

So if we pause at that point, there's an access regime that applies to any land except where it's been taken out completely, for example, in schedule 4, broadly speaking. In relation to those areas of land, the statute broadly

distinguishes between Crown land and other land. For Crown land, access can be obtained in terms of a rational decision-making process that involves section 61. In terms of non-reserve land then it's a matter of negotiation and as our friends quote, cite in their written submissions, as Justice Kós said in the *Tui Trust Mining Ltd v Minister of Energy* (2011) 16 ELRNZ 505 (HC) decision, you have to turn up with your cheque book in your hand if you're the permit holder.

WINKELMANN CJ:
It specifically refers to payment in section 60, doesn't it?

MR HODDER QC:
Yes. The other thing that Justice Kós said in that *Tui Trust* case was that you can't say if you're a permit holder that being to able to get a permit is outside your control. It's inside your control, you just have to open the cheque book wider. And so for the private owner, the private land, access is there, it's just a matter of opening the cheque book up. So Crown land access is there if you're complying with section 61. That leaves reserve land, which somehow or other in terms of the approach taken by the respondent and adopted by the Court of Appeal is in some separate category.

GLAZEBROOK J:
Well, private land you can't just force somebody to accept a cheque book, can you?

MR HODDER QC:
You can't, but he way Justice Kós dealt with it was to say, "Well, it's in your control," in effect.

GLAZEBROOK J:
Well, it doesn't really.

WILLIAM YOUNG J:

You've got to make an offer sufficiently substantial that that owner would accept it.

MR HODDER QC:

Yes, well, there may be an unexpected decision of an owner not to accept for a variety of reasons, I accept that. But then you have the backstop, if it's a decision which impedes something of public interest then you're back to section 66 and the request for an Order in Council.

GLAZEBROOK J:

Well, I can't really imagine section 66 being used to force a landowner who doesn't want major mining on their land to take place, frankly.

MR HODDER QC:

But that's what section 66 is there for, we say.

GLAZEBROOK J:

Well, it might be, but can you imagine it actually being used in that way?

WINKELMANN CJ:

So how does section 66 relate to section 55?

MR HODDER QC:

Well, section 55 is subject to section 66.

WINKELMANN CJ:

Yes, well, are you saying that the arbitration applies to everything?

MR HODDER QC:

Yes.

WINKELMANN CJ:

All land?

MR HODDER QC:

Yes. So the prohibition on land where you're mining for non-petroleum minerals is in the section 55(1) but expressly subject to section 66, which is in general terms, which talks about any land and any permit holder.

WILLIAM YOUNG J:

So you say that section 66 applies to all minerals, no just petroleum?

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

I followed that actually, sorry. Subject to section 66.

WINKELMANN CJ:

It doesn't say that.

WILLIAM YOUNG J:

Section 55(1) says subject to section 66.

WINKELMANN CJ:

Yes, I know that, yes. I'm just trying to follow how you get to that point from there.

MR HODDER QC:

Section 66 sets up its own regime. "If the owner or occupier of any land which is subject to a permit fails or refuses to enter into an access arrangement with the holder of the permit," which is subject to a permit and the permit is not qualified by being a permit in relation to petroleum or any particular mineral, and then subject to the exceptions set out in (b) then the regime follows on from that.

WINKELMANN CJ:

So where is the arbitration regime that section 55 refers to? Because you're contemplating two arbitration regime there, aren't you? The petroleum one.

MR HODDER QC:

The petroleum regime means you have an arbitrator sort of as it were involuntarily as well as voluntarily.

WINKELMANN CJ:

So where's that regime?

MR HODDER QC:

That's really dealt with by what happens in terms of the detail from about paragraph 67 onwards, about rights of appearance and procedures and so on and so forth. Both feed into the regime and the procedures are set out from 68, 69, onwards. So in effect you have arbitration in three circumstances as we read the legislation. Firstly in relation to petroleum, secondly, where the parties agree to arbitrate because they can't reach an agreement and, thirdly, under section 66, where there's a refusal by the owner to negotiate and the permit holder asks for and receives a notice in terms of section 66 that says either you enter into an access arrangement or there'll be a determination by an arbitrator. And we say section 66 is not qualified in the sense it's not limited to petroleum, it applies to anything, including coal. Now I acknowledge Justice Glazebrook's point that it's going to be a strong thing for any Minister who's hoping to get re-elected to start saying to people, "You must accept mining that you don't want on your land," but the section is there.

GLAZEBROOK J:

Well, especially given section 60(2) which says the person can have regard to such matters as he or she considers relevant and if the matters are, ie, totally objective, somebody mining coal on my land because coal has climate change effects or I actually need this land in order to do whatever and I can't do anything on my land if I give you an access arrangement.

MR HODDER QC:

Yes. That is a matter of you might say political reality seems right. It may be, and I don't think there's anything particular that takes us to this in the legislative materials that I've seen, that section 66 is sort of, is the mineral

(inaudible 10:40:47) point, that if you're holding out for some outrageous return then this comes into play.

GLAZEBROOK J:

Absolutely. I can understand it in those circumstances.

MR HODDER QC:

So somebody says this is, whatever it is, and it's kind of an imposed incentive to be reasonable in negotiations, but to the extent there's an ethical or moral position, as Your Honour says, it's hard to see that Ministers will be brave enough to override that. But, as I say, section 66 is there in unqualified terms.

ELLEN FRANCE J:

Isn't that effected by the exclusion of land defined as private land?

MR HODDER QC:

Private land is defined in the Mining Act 1971 as land where the mineral was not reserved to the Crown.

ELLEN FRANCE J:

Yes, land owned in fee simple under title from the Crown the minerals, et cetera, which are not.

MR HODDER QC:

And our land is land where the mineral was reserved.

ELLEN FRANCE J:

Yes, I was just thinking in other cases if you didn't have that reservation.

MR HODDER QC:

Yes, there's no doubt that (6) and 66(1)(b) narrows it down, yes.

ELLEN FRANCE J:

So it's not quite as – there's a starting condition, ie, reservation of the minerals?

MR HODDER QC:

Yes.

WINKELMANN CJ:

So this is an access regime which replaces section 27 of the 1979 Coal Mines Act?

MR HODDER QC:

Yes, I believe so. I haven't talked too much of that, but yes.

WILLIAM YOUNG J:

So do you say that Rangitira could apply to them for a declaration under section 66 if unable to settle a deal with Council?

MR HODDER QC:

The right to apply for a notice?

WILLIAM YOUNG J:

Yes. A declaration by Order in Council that access arrangement be determined by arbitrator. You say that section 66 could apply here.

MR HODDER QC:

Yes, because the mineral was reserved from the outset under the Coal Mines Act.

WILLIAM YOUNG J:

So do you go back from that to say, "Well, look, if it can be compelled by arbitration then why can't it be agreed?"

MR HODDER QC:

Yes, and it's not answer, we say, to say, "Well, it's a reserve."

GLAZEBROOK J:

Well, I suppose it's to the extent that the Reserves Act doesn't apply because it couldn't be compelled if…

MR HODDER QC:

Schedule 4.

GLAZEBROOK J:

You could compel an arbitration but if you are stuck with exactly the same objection then you can't compel entry, so doesn't 66 depend on your argument about this Act being paramount? I mean it might add something to your argument but it doesn't…

WILLIAM YOUNG J:

It depends on what section 66(1A) means, if the land owner says, "I'm not going to do it because I'm not permitted by statute."

MR HODDER QC:

Yes, we say there's nothing in the generality of section 66. Your Honour is right. It fits in. This is part of the argument that we say this is a special piece of legislation, the whole Act generally but in particular the access regime. It's a special regime, and within that special regime these things are dealt with. Those reserves that are not to be touched by the regime are then specified in schedule 4. They don't include this reserve because it isn't a nature, scientific or wilderness reserve and it's within section 66 because it's not within the scope of private land under section 66(1)(b).

WINKELMANN CJ:

The reason I keep on taking you back to the Coal Mines Act 1979 is because this is the, from the coal mining point of view, that is the Act which has been substituted for by the Crown Minerals Act, isn't it?

MR HODDER QC:

Correct.

WINKELMANN CJ:

So we really – for your substitution exercise you need to compare what was with what is to make your case that's the substitution.

MR HODDER QC:

There are two strands to our argument, Ma'am. The first is that this is special legislation which covers the waterfront. Section 26 of the old Act did that by saying land is open for mining. That language no longer exists and we acknowledge that. So the second strand of our argument is that when you get to what was the difference between the previous legislation and the current legislation, that ties into our part of our argument about section 109 of the Reserves Act and section 22 of the Interpretation Act. That's a more specific argument than our general argument that says this is a very specific access regime and it covers all the bases, it isn't to be read down by reference to the Reserves Act.

WINKELMANN CJ:

All right. Well, it seems to me that it does mirror but changes section 27, the access regime created under the Coal Mines Act. It's obviously got its statutory origins there.

MR HODDER QC:

Yes.

WINKELMANN CJ:

But there wasn't an arbitrator there, it was the Governor-General – oh, the Minister actually, and the Governor-General.

MR HODDER QC:

So for completeness I think in relation to these provisions the only one that I wanted to draw attention to was section 17, that once the arbitrator is engaged under whichever channel one gets to get the arbitrator there then section 70(1) says, "As soon as practicable after conducting a hearing the arbitrator shall determine an access arrangement." So the consequence of the regime is that in certain circumstances for non-petroleum applications for access then one has a regime that enables a binding determination of an access arrangement by reference to section 66 and section 70. And we say in broad terms that it's difficult to reconcile with the idea that the Reserves Act

is the governing consideration which is at the heart of Court of Appeal judgment which we are contesting on this appeal.

So turning perhaps, before I come to the Reserves Act can I just spend a moment to make a small but not insignificant point? We say in terms of the local government legislation – and that's in volume C of the appellant's bundle of authorities at tab 4 – and this is really the point behind our submission that section 62 is the governing provision and, as such, it provides a discretion to a local authority which administers a reserve such as the one we're concerned with, and in doing so it can take into account the social and economic benefits and, indeed, we would submit that it would be expected to do so, given the nature of what local authorities are expected to do in terms of their empowering legislation, namely the 2002 Local Government Act. And again the backdrop to this particular case of course is this is an application to mine coal on the West Coast, which has a very long tradition of mining, as being available and undertaken for the economic and social benefits of the people who reside there.

So the purposes of, just briefly, so section 3 sets out the purpose of the Local Government Act in terms of stating a purpose and promoting accountability and, in paragraph (d), providing, "For local authorities to play a broad role in meeting the current and future needs of their communities for infrastructure, local services and performance of regulatory functions." All of that depends on an economic base, we submit, and so an authority is entitled to pursue, if it's able to do so, social and economic benefits of the kind that this proposal was intended to provide and which clearly the Council thought it did provide in originally acceding to the application.

In terms of section 10, it sets out the purpose, "Democratic local decision-making on behalf of communities," "Meeting the current and future needs of communities for good-quality infrastructure, public serves and regulatory functions," and that role is to be given effect to through the balance, including the powers in section 12.

In section 13 they also apply to, “A local authority performing a function under another enactment to the extent that the application of those provisions is not inconsistent with the other enactment.” So we say section 13 combined with section 60(2) of the Crown Minerals Act is relevant to the way in which the Council can undertake its role.

And then section 14 of the Local Government Act, section 14(1)(c), “When making decision a local authority should take account of the diversity of the community and the community’s interests,” and its interests in the future, all of which we say would justify the kind of decision the Council initially made on this application.

Now the other Act that we’re concerned with is of course the Reserves Act, that’s in the appellant’s bundle of authorities, volume B at tab 1. Now the Reserves Act has been in various forms around for much of the 20th century, and its current iteration comes from 1977. In broad terms we say that what the Reserves Act does is it sets up a regime for creating classifying and managing reserves and we say that makes it different from a regulatory regime such as health and safety or resource management or something of those kinds. So in terms of the Act in the definition provision, section 2, there’s a definition of “reserve” or “public reserve” which presumptively means any land set apart for any public purpose. It’s a very broad range of concepts, but it can be from the highest environmental level, the kind of things referred to in schedule 4 of the Crown Minerals Act, down to a reserve for quarrying purposes. It just has to be a public purpose.

Section 3, the general purpose of the Act. Defined by reference (2) being administered by the Department of Conservation and it has a focus on preservation and management for the enjoyment of the public.

Section 5, on the restriction of the application of the Act. The Act does not apply to any land that is subject to the Forests Act 1949, and it’s to be read subject to any Act which among other things authorises a setting apart of any reserve for any purpose, which means the legislation that initially set aside the

coal aspect of the reserves we're concerned with, it also covers section 11 of the current Crown Minerals Act, then subsection 5(2)(b) talks about any instrument creating the trust. You'll recall that the Order in Council in 1951 provided this land to the then council on trust for the purposes of water conservation. So the original instrument is relevant and the original instrument makes it clear that coal and coal mining rights weren't part of the vesting exercise of the reserve, they remained for at that time, and we say still, for consideration in their own terms.

Now part 3 of the Act starts at section 16, and there's a requirement for classification and purposes of reserves. It appears broadly speaking that classification of the purpose are somewhat interrelated concepts and then there's a general requirement to classify. Either the Minister classifies or local authorities in whom things are vested can be classified, which is what happened here last year after the first run of this appeal was derailed. Then subsection 16(8), a point relied on by our friends says, "When classified under this section, each reserve shall be held and administered for the purpose or purposes for which it is classified, and for no other purpose." Now at one level that would suggest that if mining is not a purpose, and it normally isn't going to be a purpose of a reserve, then you can't mind on reserves land, and we say well that's what it says but it can't be reconciled with the access regime that I've just been describing under the Crown Minerals Act.

The other provision that our friends in the Court of Appeal rely on, and the Court will be aware that once we get past section 16 there are a series of broad classifications of reserves set out. Section 16A talks about nature and scientific reserves. Section 17 about recreation reserves. Section 18, historic reserves. Section 19, scenic reserves. Section 20, nature reserves. Section 21, scientific reserves again. Section 22, Government purpose reserves, and section 23, local purpose reserves. And in there there is, in most of these provisions, there is a set of language that talks about the preservation of features. So for example in relation to Government purpose reserves we see section 22(4)(a) says, "Where scenic, historical,

archaeological, biological, cultural or scientific or natural features or wildlife are present on the reserve, those features or wildlife shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve." Now again it's conceivable that Crown land that's subject to, there's a reserve of these purposes, it's still available for a mining access arrangement under section 61 of the Crown Minerals Act.

But our friends in the Court of Appeal section 23 that deals with local purpose reserves. So, subsection (1), "Declare that the appropriate provisions of this Act have effect in relation to reserves classified as local purpose reserves for the purpose of providing and retaining areas for such local purposes as are specified in any classification." So here we have water conservation and catchment, and I think there's probably a language also used at various times and in earlier times.

Subsection (2), when a reserve has been classified it shall be , "Administered and maintained under the appropriate provisions so that where scenic, historic, archaeological, biological or natural features are present on the reserve, those features shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve." Now it's that proposition, protection of features, and "features" is not a defined term in terms of the Act, and this is not the occasion to debate and resolve exactly what it means but it's certainly open to an expanse of interpretation of the kind that the respondent wants to give to it, the actual parameters are for another day. But at least there's an argument there that it could be restrictive of, for example, mining.

WINKELMANN CJ:
Sorry, could be restricted?

MR HODDER QC:
It's open. The argument that the respondents have made and will continue to make is that the protection of features provides a strong constraint on mining any reserve, that's any reserve, because this provision about protecting

features is a theme throughout these various reserves, the classifications. And so I don't think – this is my language, not theirs –

WINKELMANN CJ:
But that issue is not before us, is it, how you interpret section 23 in terms of the issue that was abandoned, I think, on appeal?

MR HODDER QC:
No. It was abandoned in terms of the Court of Appeal exercise. But it's, in our submission, appropriate for the Court to take into account that what's contemplated is an argument that says that this is a severe constraint on the ability to have mining access in relation to this particular reserve, and it's very much a feature of both the Court of Appeal judgment and the submissions that have been made up to this point by the respondent.

So, section 23 is there, and if one assumes that it does impose a serious constraint what purpose has it, how does it work? And we say that if you take that together with section 16(8), which is the argument against this, that that does add up to potentially quite a severe constraint on getting access for mining purposes. And so that constraint certainly didn't exist, as both the High Court and Court of Appeal agreed, before 1991. The question is what happened in 1991 to suddenly make this and the reserve legislation a major constraint against mining? And I'll come to that in more detail. But we say nothing substantial happened. All that happened is that a new access regime that we'd been through was, a special access regime was enacted, and it covers the field, that these provisions do not impede it.

WINKELMANN CJ:
I suppose the question I have in my mind is how open was that regime before? Because when I take you to section 27 that really has a regime where people are entitled to refuse and then, if they refuse access, then it has to go to the Minister and if the Minister considers the access is being unreasonably denied then it goes to the Governor-General for making of an Order in Council.

MR HODDER QC:

Yes, so we don't for our purposes put it any higher than that there was a pre-existing regime which meant that all land was potentially available for mining with some limited exceptions. The proposition here is that this kind of land really isn't available for mining. That's what the argument effectively amounts to, and that the difference was brought about by the 1991 Act but before that the Reserves Act was recognised.

WINKELMANN CJ:

Well, I thought you were putting it higher because that's why you're trying to bring it within section 109(1) rather than 109(2).

MR HODDER QC:

I'm, of course, trying to do –

WINKELMANN CJ:

Because you're trying to side-step the sort of regime that existed even under section 27 of the Coal Mining Act.

MR HODDER QC:

I hope I'm not trying to side-step it, Your Honour, but I am acknowledging that there were minutes for the automatic rights to mine under the Coal Mines legislation under the 1979 Act.

WILLIAM YOUNG J:

How would this have been dealt with if the issue had arisen in 1990? What would the dominant legislative provision have been?

MR HODDER QC:

Under the 1979 Act ultimately be referred to a Minister. In the ordinary course you'd have certain rights to mine, to proceed. I'll just find my reference.

WILLIAM YOUNG J:

So under the current Act you would say it could be referred to the Governor-General in Council?

MR HODDER QC:

Yes, and you finish up with the same. Ultimately there is an ability to mine this land within the scope of the legislation.

WINKELMANN CJ:

But you're saying it's a prior step, that the Council's free – you're saying it's a different regime that applied under 1979, aren't you, because under the 1979 regime it will have gone straight to the Governor-General, I think, wouldn't it?

WILLIAM YOUNG J:

Sorry, just perhaps take a step back. Would it have been possible for the Council in 1990 to have agreed to grant access for coal mining purposes to a reserve?

MR HODDER QC:

We would say yes.

WILLIAM YOUNG J:

By reference to?

WINKELMANN CJ:

By reference to what, because you look at section 109.

MR HODDER QC:

But we would have to – I guess in that context we would have to deal with a section 23 argument contemplating it might have been raised.

WILLIAM YOUNG J:

Sorry, I didn't catch that.

MR HODDER QC:

We might have had to deal with a section 23 argument that might have been raised at that point. Section 23 of the Reserves Act was, of course, in existence.

WINKELMANN CJ:

Wouldn't you have been bound in 1990 by section 109(2) which would have required the Governor-General to declare that the land is subject – contrary to section 23?

MR HODDER QC:

By 1979…

WINKELMANN CJ:

I think Justice Young's postulating 1990 because it's just before the Mining Act.

WILLIAM YOUNG J:

Just before the Mining Act.

WINKELMANN CJ:

Yes.

MR HODDER QC:

So by that stage – my essential argument at the moment is about the general special regime. So far as we're talking about section 109 of the Reserves Act then by 1990 the reference is to the Coal-mines Act 1925, of course has been superseded –

WINKELMANN CJ:

By the 1979 Act.

MR HODDER QC:

By the 1979 Act.

WINKELMANN CJ:

Yes, but the 1979 Act – section 109(2) still governed the relationship between those Acts.

MR HODDER QC:

The principal provisions under the 1979 Act, as Your Honour I think said, is section 21.

WINKELMANN CJ:

Under the 1979 Act?

MR HODDER QC:

It's subject to public reserves. So that means that it's applicable to a few public reserves and then by Order in Council the land is available and requires consent by the Minister. That –

GLAZEBROOK J:

Sorry, which section are you looking at?

MR HODDER QC:

I'm looking at the 1979 Coal Mines Act, Ma'am, which is in the –

GLAZEBROOK J:

I realise that, I just wanted which section you were looking at?

MR HODDER QC:

I'm looking at section 21(2) and subsection (3). The package of sections, section 20 and 21.

GLAZEBROOK J:

Crown land.

WINKELMANN CJ:

I think 27 governs coal mining rights where coal – but not service of land owned by Crown.

MR HODDER QC:

Sorry? This is land, this is coal, land which the coal had been reserved to the Crown, and the coal mining rights had been reserved to the Crown by the original vesting.

WINKELMANN CJ:

Yes, but the land's not owned by the Crown.

MR HODDER QC:

Section 20 is more general on that. It says "any land whatsoever".

WINKELMANN CJ:

You said section 21.

MR HODDER QC:

Yes, and then in section 20 says that it's applying to public reserves.

WINKELMANN CJ:

Right so section 27 is, deals with coal mining rights where coal – and it deals with access.

MR HODDER QC:

Yes Your Honours I treated section 21(b) as referring to all reserves not reserves that are Crown land as such, but I may need to rethink that.

WINKELMANN CJ:

The heading is "… over certain Crown land".

GLAZEBROOK J:

Subsection (7) seems to – well 7 and 8.

MR HODDER QC:

Well section 21(8) is talking about land held by any local authority, the section 21 subsection of that 1979 Act.

WINKELMANN CJ:

Well controlled by any local authority but it can be controlled by local authority but owned by the Crown, can't it?

MR HODDER QC:

It says, the reference extends to "held by… any local authority."

WINKELMANN CJ:

But the heading is "Crown mining rights over certain Crown land." The following classed as a Crown land.

MR HODDER QC:

I think the heading maybe misleading. Public reserves is the language used for all reserves in the earlier reserves legislation. So what we now call "reserves" under the Reserves Act used to be called "public reserves" under the earlier versions of it. So public reserves as I read it in 21(b) means –

WINKELMANN CJ:

I just don't think you're right Mr Hodder because if you look at section 21(7), "In respect of land in a National Park or public reserve, the Minister of Lands shall, before giving his consent under this section," subsection (8), "If any land to which this section applies…" well the section applies in respect of grant of coal mining rights are the following classes of Crown land. Section 21(1).

MR HODDER QC:

Yes, the distinction between subsection (7) and subsection (8) still I think leaves section 8 with the work to do, which is to say it applies to land held by a local authority, which is what happens here.

WINKELMANN CJ:

It's the preface to subsection (8), "If any land to which this section applies." Section 21(1) tells us what land the section applies to, which is Crown land.

WILLIAM YOUNG J:
Also a regime under which Crown land, land vested in the Crown could at the same time be seen to be held by a local authority.

MR HODDER QC:
Yes.

WILLIAM YOUNG J:
What was that?

MR HODDER QC:
It's –

WINKELMANN CJ:
It's an administering authority under the Reserves Act.

WILLIAM YOUNG J:
Well that's held by or on behalf of, or is controlled wholly or on behalf.

WINKELMANN CJ:
But it's still governed by section 21(1) which said what the section applies to which is Crown land. Whereas section 27 governs land which is owned by someone other than the Crown, but the Crown has the rights to the coal.

MR HODDER QC:
The contemplation of (7) and (8) we would say also subsection (1) of section 21 is that there will be land held by a local authority, that's what we have here, land was held by the local authority.

WINKELMANN CJ:
It's owned by it?

MR HODDER QC:
Yes. Now it's –

ELLEN FRANCE J:

At this time you could've had Crown land that was a public reserve?

MR HODDER QC:

Yes.

WINKELMANN CJ:

You still can.

ELLEN FRANCE J:

Yes.

MR HODDER QC:

Yes, so we still have Government reserves.

ELLEN FRANCE J:

Isn't that then what 21(1)(b) is talking about?

MR HODDER QC:

Well it doesn't sit comfortably with – I mean we would rely on the idea that public reserves is a general concept which is wider than Crown land, and that section – that the only meaning that can be given to section 8 is that it does extend to land of the kind we're concerned with, which is owned by the local authority.

WILLIAM YOUNG J:

Well section 28 of the Reserves Act permitted the Ministers to appoint a local authority to control and manage a reserve, but I agree it doesn't follow from that that the local authority holds the reserve, which is in expression that denotes ownership. But on the other hand the starting point of section 21(1) is that it's only applying to classes of Crown land so it's got to be A, Crown land and B, one of the (a) to (l) lists which is then specified in (2) – is specified further down. It's a bit of an enigma though what the hold was.

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

But does it really matter? I mean isn't it section 27 which provided for the right of access to coal under land that wasn't owned by the Crown?

MR HODDER QC:

I wasn't conceding under section 21 but section 27 clearly focuses it more on the fact that the land, where the surface of the land is not owned by the Crown, I agree.

WINKELMANN CJ:

So that's why I've been taking you back to section 27 all the time, Mr Hodder and trying to work out how section 27 works under section 109.

WILLIAM YOUNG J:

I'm going to ask a stupid question. Why does section 109 refer to the Coal Mines Act 1925? There'll be a reason, I'm sure.

WINKELMANN CJ:

Is it because they didn't update it?

WILLIAM YOUNG J:

I suppose it was because the Reserves Act 1977 was passed before the Coal Mines Act.

MR HODDER QC:

Yes, the 1979 Act comes after the Reserves Act. There was complications because the 1950 Amendment Act is the key Act under the coal mines regime which was to some extent the denationalisation of coal which had been nationalised earlier by the previous Government, but the 1925 Act deemed to incorporate the amendments picks up the 1950 amendment which is the key, has the key provisions.

WINKELMANN CJ:

So under section 109(2) under the 1979 Act what would have to have happened was first that the Governor-General would have to have by Order in Council declare the land subject to the Coal Mines Act 1925. We substitute in "1979". If it was declared to be subject to Coal Mines Act you would then go to section 27.

MR HODDER QC:

Yes, and section 27(5) will then follow. They have a right to have a coal mining right granted to them and the coal mining right would carry with it as it says is the right to actually mine, and then the exceptions specified in subsection (6).

WINKELMANN CJ:

Subsection – I think you might have to go through the earlier bits, wouldn't you, which is get consent and if this consent is not agreeable then if the arrangements aren't satisfactory to the Minister, then the Governor-General…

MR HODDER QC:

Again national interest criteria. So my point remains that the land was always potentially available for mining irrespective whether it was a reserve or not and therefore the reserve can't be the determining factor.

WILLIAM YOUNG J:

So in 1978, which is probably one pausing point we could look at because the 1925 Act's still in place, have we got that or not?

GLAZEBROOK J:

Yes, we do under tab 4 of volume A.

WINKELMANN CJ:

And it was even more open in that time. So that's section 3 I think. Or subsection – sorry, section 4.

MR HODDER QC:

Sorry, I am trying to find a ready reference. I had notes for working my way around the 1925 Act.

WINKELMANN CJ:

Section 4 I think.

MR HODDER QC:

Of the 1925 Act Ma'am?

WINKELMANN CJ:

Yes.

MR HODDER QC:

Yes, well section 14 provides for coal mining leases, which are a demise of the land entitling the lessee to raise and dispose of coal from that land.

WINKELMANN CJ:

Sorry, what section are you referring to?

WINKELMANN CJ:

Section 14 of the 1925 Act, and that appears to have been operative through the period from when this reserve was established in 1951 through until 1979. Then in 1979 it switches to section 27, possibly section 21.

WINKELMANN CJ:

So I think that the answer is 4(b) perhaps, "Other lands over which the power to grant such rights is vested in or reserved to the Crown under any statutory or other authority."

MR HODDER QC:

Yes.

WINKELMANN CJ:

And that's 4(b) yes, so it was effectively outside the scope of the Act unless there was an Order in Council declaring it to be under the scope of the Act. So it wasn't available for mining unless there was an Order in Council, and then if it was available for mining it then had to pass through this.

MR HODDER QC:

Yes.

WINKELMANN CJ:

So the High Court and the Court of Appeal might have been wrong on that point, or did they cover that off?

MR HODDER QC:

Well the point on which I think they accepted was that there was a ranking between the mining legislation in the Reserves Act and ultimately the mining legislation prevailed over the Reserves Act.

WINKELMANN CJ:

Well only if there was an Order in Council made.

MR HODDER QC:

Yes, but that's the potential that's there for any particular area of land. There is no ability to say no to the Order in Council, and that's become – there's a lower level of that now required in terms of the arbitration regime under the Crown Minerals Act 1991 as we saw before.

WINKELMANN CJ:

So you're suggesting that the Crown Minerals Act lowered the threshold still further? Because it did away with a requirement for an Order in Council to bring the land under the Act?

MR HODDER QC:

Yes. Well we say it's designed to create a comprehensive regime so you're not chasing around different statutes the way you might be doing here between coal mines, possibly petroleum or the mining Acts. I mean it's all in one place and the general assumption is that arrangements will be reached across all land apart from that that's expressly excluded, for example schedule 4, and if there's something unreasonable going on then there's the ability to seek an Order in Council. But potentially it's all there. In the case of the backstop Order in Council it's there too and in those circumstances there's no suggestion that somehow or other the Reserves Act is an impediment if the reserves is not one of those listed in schedule 4.

WINKELMANN CJ:

So under the 1925 Act once that Order in Council was made it was just dealt with as if it was Crown land and there weren't the complex arrangements, then we have the 1979 Act which created a different regime.

MR HODDER QC:

Yes.

WINKELMANN CJ:

And that didn't seem, I don't think any case ever considered, addressed how that operated with section 109? It's not an easy fit under section 109.

MR HODDER QC:

I agree. Section – certainly the 1979 Act doesn't fit easily with section 109(2) as a general proposition, it creates a different kind of regime.

WINKELMANN CJ:

Nor does it fit easy with section 109(1) because, well it certainly doesn't fit easily with 109(2) because that contemplated that it would have to be brought into the Act under something like section 4 of the 1925 Act and there wasn't the equivalent was there?

MR HODDER QC:

Yes, and again in our proposition it's always the ultimate proposition that the ownership or the vesting of it as a reserve isn't the answer to the ultimate proposition.

WILLIAM YOUNG J:

Sorry, I'm struggling with the narrative. Under section 3 of the 1925 Act, sorry, section 4 of the 1925 Act, there's a list of the categories of land over which mining rights might be granted, so is that what we're talking about?

WINKELMANN CJ:

Yes, and 4(b) would –

MR HODDER QC:

And section 4(1)(b) describes this reserve as it was vested in 1951.

WINKELMANN CJ:

And it fits quite nicely with section 109(2) which effectively makes it Crown, if there's an Order in Council, makes it Crown land for the purposes of this.

WILLIAM YOUNG J:

I see, but there are a series of reserves which are – types of reserve which are seen as subject to mining but obviously none that encompass water conservation which may not have been a thing at the time of the 1925 Act.

MR HODDER QC:

That seems right but the references in paragraphs (d), (e) and two reserves.

WINKELMANN CJ:

(c), (d), (e), (f) and (g). But you have to read subsection (2) as well because that then further limits that, and then (5).

MR HODDER QC:

But the point that we rely on is that as is the case in the 1991 Crown Minerals Act the exception, for example, for forestry and the specification of certain

reserves where this cannot go, where mining cannot go, is dealt with in some care, and so there was special things about kauri-gum reserves and scenic reserves here. There were special provisions as we've seen in schedule 4 of the 1991 Act. Kind of the architecture is broadly similar. The detail has changed. As Justice Young said, different perceptions at different times about where one might draw the line, but the line, we say, has been drawn for the 1991 Act's purposes by schedule 4.

WINKELMANN CJ:

What happens if Parliament is just really not ready to turn their minds to something they needed to turn their mind to?

MR HODDER QC:

We would say that what Parliament has done in 1991 is it's turned its mind to a specific access regime in some considerable detail which covers pretty much all the scenarios and it's done it with some reference to reserves but with no suggestion that reserves aren't generally available. That's the essence of our "this is a special regime" argument and that's before we get to section 109. Section 109 has some semantic issues which I'll come back to but in terms of the general proposition we say that's what we've been discussing, all adds up to the proposition that this is a specialised access regime. Previous regimes were untidy in various ways because they were fractured depending on the kind of mineral involved. This is a conscious attempt to bring this together.

WILLIAM YOUNG J:

Even section 109(2) is not the easiest sort of section to follow.

MR HODDER QC:

Well, if I can deal with section 109 as a whole, I'll come to that shortly, if I may.

WILLIAM YOUNG J:

All right, well, I'll leave what my puzzlement over it till then.

MR HODDER QC:

But I enthusiastically endorse what Your Honour just said, that not being the easiest of sections to follow for our present purposes.

GLAZEBROOK J:

Can I, just to clear, you mentioned something and I think I missed it about the Coal-mines Act 1925 having a similar regime of exclusions or did I not understand you correctly?

MR HODDER QC:

Well, limitations. So there's a reference. What I was referring to, I think, were the provisions in section 4(1), and so what it does it sort of says in 4(1)(d), (e) and (f) that kauri-gum reserves, scenic reserves or State Forests Act may be subject to the grant of mining rights, and then those are qualified in subsection (2) in various ways. I think that's what I was referring to.

GLAZEBROOK J:

Yes, I think you were.

MR HODDER QC:

So (h), 2(h), 2(i), 2(j), have various qualifications. More generally by requiring additional consent and additional procedural aspect to them.

WILLIAM YOUNG J:

And what was the provision in the Coal-mines Act 1925 that gave the holder of a mining right the ability to go onto someone else's land?

MR HODDER QC:

That reserved the rights? That was done under the…

WINKELMANN CJ:

I don't think it was that complicated under the 1925 Act because it's only Crown land and those other pieces of land that they could grant mining rights over, isn't it? It's not really an open-access regime at all.

MR HODDER QC:

Coal, no. There's an open-access arrangement in the sense that it was under the Mining Act 1971 which was quite different.

WILLIAM YOUNG J:

I see, so it's open access for Crown land, as it were?

WINKELMANN CJ:

Yes.

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

Okay, so was it the correlative of getting a mining right that you could go onto the Crown land and do what you could?

MR HODDER QC:

I'm not sure if, Justice Young, you're asking me where the reservation of coal and coal mining rights was in relation to this reserve?

WILLIAM YOUNG J:

No, what I'm saying is under the 1925 Act someone gets a mining right. What did that carry with it in terms of access to the land under which the coal was situated?

MR HODDER QC:

As I understand it it's implicit in section 14(1) that if you get a coal mining lease then it's a demise of the land entitling the lessee to raise and dispose of coal from that area.

GLAZEBROOK J:

I think it's probably implicit in licence and lease. You have a licence to prospect and a lease to take the coal which implies the licence – which implies an ability to enter.

WINKELMANN CJ:

Ancillary to – so the regime actually, if you look at it, was 1925 and really just Crown land, quite a limited regime. It was open access but only in the sense that once the Crown said yes, you could have a licence, then what was ancillary to it naturally flowed. Then the 1979 Act contemplated, because over time the Crown had been selling land but reserving to itself prospecting rights, et cetera, it contemplated the extraction of coal from private lands and therefore it created an access regime.

MR HODDER QC:

That sounds a fair summary.

WINKELMANN CJ:

So it's 11.27, Mr Hodder, so are you taking us on to a new topic or perhaps section 109?

MR HODDER QC:

Just I think I've said all I was going to say about what's in the Reserves Act and we finished up with sort of a more archaeological exploration of the coal mines are. So just, if I may, kind of perhaps the point that is underpinning this is that the special regime for access and under the Crown Minerals Act deals with a whole series of elements. It deals with ownership, for example, confirming section 11, it deals with mining permits, it deals with a public interest in exploiting minerals, then it deals with access. Those are things that you could find in the previous regimes as well, in different forms but they are what I would describe as the elements of continuity. There is a regime that touches on and deals with those features.

WINKELMANN CJ:

So what they are and what are – sorry, can you just run through them again, Mr Hodder? Access.

MR HODDER QC:

Ownership.

WINKELMANN CJ:

Ownership.

MR HODDER QC:

Mining permits. The public interest in exploitation, and access.

WINKELMANN CJ:

So in a way it's complete discontinuity with the 1925 Act?

MR HODDER QC:

I'm simply suggesting these are elements that are there. There is an access aspect to it. The public importance is dealt with in part by having various requirements for Ministers Orders in Councils to provide consents or decisions.

WINKELMANN CJ:

That's the 1991 Act you're talking about?

MR HODDER QC:

It goes back before that.

WINKELMANN CJ:

To the 1925 Act?

MR HODDER QC:

Each of these Acts has those elements in it.

WINKELMANN CJ:

The 1925 Act?

MR HODDER QC:

Yes.

WINKELMANN CJ:

In respect of Crown land? I suppose it does, yes.

MR HODDER QC:

So the point is that these elements have to be dealt with and they are dealt with in special legislation. That's the position before 1979. It's the position before 1981, 1991, and we say it's the position after 1991, and that, we say, is the key to the proposition.

WINKELMANN CJ:

So after the break we're going to move on to what, Mr Hodder?

MR HODDER QC:

I will move on to section 109 after the adjournment, if Your Honour pleases.

WINKELMANN CJ:

We'll take the morning adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

MR HODDER QC:

Thank you, Your Honour. One back-track, if I may, just to clarify a point. You'll recall that when we were looking at the Crown Minerals Act in section 55(2)(c) there's a reference to covenants in terms of the Reserves Act. What I haven't done to this point is draw your attention to section 77 of the Reserves Act which is headed, "Conservation covenants."

WINKELMANN CJ:

It's about conservation covenants, and so that's privately owned land which is subject to a conservation covenant?

MR HODDER QC:

It's a specific aspect of the Act. It's not the reserves as a whole that are dealt with or excluded by section 55(2).

So in the remaining time, and I anticipate being relatively brief, I'll deal with the section 109 point. The same logic underpins the arguments for the appellant on both aspects. The first argument is that it's special legislation, a special regime for access and it excludes an impediment from the Reserves Act and we say that it also carries into 109(2). But one of the premises of it is in effect the disagreement we would have with the way things are put in paragraph 45 of the Court of Appeal's judgment, it's 101.74 of the case on appeal, where it said, "The Crown Minerals Act therefore swept away Crown control of access to minerals, and gave control of access to the owner or occupier of the land to be mined. That owner would be subject to all the laws that applied to the use of the land. The mining permit-holder would require consents under the Resource Management Act. The old coal mines regime ceased to apply," and we respectfully submit that that overstates the case and disregards the special and comprehensive nature of the access regime that's created by the Crown Minerals Act, and that, as I say, is the premise also for the section 109 argument.

WINKELMANN CJ:
Sorry, can you just repeat that submission?

MR HODDER QC:
I'm sorry, that's paragraph 45 of the Court of Appeal's judgment.

WINKELMANN CJ:
Yes, and you said that overstates? That overstates the position and understates the effect of the specific and broad-ranging access regime under the Crown Minerals Act.

But the most direct answer to the Court of Appeal's approach would be to find that section 109(1) is operative and not redundant as the Court of Appeal considered it was and that would confirm that the Reserves Act yields to the Crown Minerals Act. So clearly the Mining Act 1971 has been replaced by or corresponds to the Crown Minerals Act 1991 with modification which is the language of section 22 of the Interpretation Act which –

WINKELMANN CJ:

So why are you at section 109(1) when it deals with the Mining Act which doesn't deal with coal and not at section 109(2)?

MR HODDER QC:

I'm suggesting that the simplest way forward is to say that Mining Act applies in both its categories. It's clearly that the Mining Act 1971 has been replaced by the Crown Minerals Act and therefore section 109(1) works perfectly well reading Crown Minerals Act there. The question is whether you read half the Crown Minerals Act only as applying and only in relation to that or not, and we say that's –

WINKELMANN CJ:

The problem with your – it's set against you in relation to that that section 109(2) is the logical place and section 109(2) only makes reserves subject to coal mining when an Order is Council is issued saying that they are.

MR HODDER QC:

Yes, and the question that the Court has before it is the question of the level of abstraction with which you approach these matters. So we say it's a more structural level effectively, that what section 109 as a whole was doing was making it clear about that priority as between the mining regime and the reserves regime, and we say it still does that because that's what the Acts still contemplate. Nothing happened in the Crown Minerals Act to change that. And so the simplest way to say it is that the reference to the Mining Act in 109(1) refers to the Crown Minerals Act as a whole, and partly because it would be odd for it to only refer to half the Crown Minerals Act. There is no easy division within the Crown Minerals Act.

WINKELMANN CJ:

You might say though, mightn't you, that coal mining is quite a different order of mining than other mineral extractions because historically, people know how coal mining occurs, it's a very large-scale thing, whereas other mineral

extraction might be a far less frequent and less large-scale thing, so different regimes might be appropriate.

MR HODDER QC:

I'm not sure I would fully subscribe to that, Your Honour. Clearly, there'll be massive, there can be massive gold-mining operations, as we know. There can be small coal mining operations or – it's not obvious from anything under the legislative material that says that's the reason for the distinction. It's more, as I understand it, that there was a maintaining of ownership of coal mines throughout the history of the Coal Mines legislation pretty much.

WINKELMANN CJ:

Yes, but the Mining Act just as applies under section 109 whereas the Coal Mining Act had to be brought into effect by an Order of Council.

MR HODDER QC:

Yes.

WINKELMANN CJ:

So why was that distinction? Why was one simply applying and one being brought in by an Order in Council?

MR HODDER QC:

Because where the conflict might come is at the point at which it's made clear which one is available for mining and so the Mining Act makes it clear enough by itself that it has priority. The Coal Mines Act only becomes relevant, as we've been discussing before the break, at the point where it's brought into play by some other action, normally by the Minister, and that's the point at which there has to be a decision made or a judgment made about which of the legislative regimes has priority.

GLAZEBROOK J:

But the Order in Council is made under, as far as I could see, under the Reserves Act. I couldn't see anything in the 1925 Act about an Order in

Council but is there something in there? Does the Order in Council happen under the Reserves Act, in which case the Reserves Act is being overridden by the Order in Council rather than automatically the coal mining legislation being the dominant legislation?

MR HODDER QC:
Yes, I was under the impression that the Order in Council we were talking about in terms of section 14, not section 14, that under the 1925 Act and the 1950 amendment.

GLAZEBROOK J:
I couldn't immediately see it but you might be able to point me to…

MR HODDER QC:
I might need to rummage –

WINKELMANN CJ:
There's no provision for Order in Council, I don't think, in the 1925 Act. It's so peculiar that they have the 1925 Act referred to in a 1977 piece of legislation. Have you compared those different things that they tell you to compare, Mr Hodder? Compared 1953 number 69?

MR HODDER QC:
So Justice Glazebrook, I acknowledge Justice Glazebrook is right. This is providing a power under the Reserves Act to make an Order in Council, I agree.

GLAZEBROOK J:
That's what I thought because I certainly couldn't find it in the 1925 Act.

MR HODDER QC:
I agree. It's an exception, and it makes it subject to the 1925 Act. No, I accept that. So then we come as part of the regime for access…

WINKELMANN CJ:

Mr Hodder, it's quite useful often to look at what it says at the bottom of the section. It says compares 1953 section 96. Have we got that? And 1971.

GLAZEBROOK J:

What is it? The Reserves Act 1952. I can get it.

MR HODDER QC:

I think we have the 1953 legislation at tab 8 in volume A – volume D, sorry.

WINKELMANN CJ:

It's from 245.

MR HODDER QC:

Volume A, correction.

WINKELMANN CJ:

Volume A?

MR HODDER QC:

Yes. Tab 8 is the Reserves and Domains Act 1953.

GLAZEBROOK J:

Was that section 97, was it? That's very much more general. It's just a notice in *The Gazette*. 97 or?

ELLEN FRANCE J:

96.

O'REGAN J:

96.

ELLEN FRANCE J:

1953, section 96.

MR HODDER QC:

We have addressed that in the written submissions from pages 18 and 19. It sets out the narrative for section 109. So the approach that we are submitting the Court should adopt is to take a relatively simple approach and simply treat the Mining Act 1971 reference as now being the Coal Mines Act 1991 reference as a whole. The question that raises is can section 22(2) of the Interpretation Act apply when there appears to be an expansion of the replaced statute. We say again that depends on the level of abstraction one is talking about and we say that this is really a matter about the structural and continuous elements of the regime, and as we say in our written submissions, and this is really at pages 16 and paragraph 55 onwards, there's a purposive and pragmatic approach that's reflected in the appellant authority in relation to these provisions, and so coming back to the purpose, the purpose of the 1991 Act is to create a single statutory regime for Crown-owned minerals and the availability for mining or access to mining is modified from the provision under both the '71 Act and the coal mines legislation essentially in two aspects. First, the general assumption that there can be agreement to achieve access and, secondly, that there will be a need for things like resource consents and regulatory requirements that are required. That's section 11. And we say that purpose is unchanged by those particular changes, and on the basis that section 109 was operative through until 1991 nothing happened to change that particular position. The legislation was replaced by the Coal Mines Act with modifications, although the Court of Appeal seems to have overlooked the "with modifications" aspect in its paragraph 67 and, with respect, didn't spend any time discussing the elements of continuing which we have been focusing on.

Conversely, the survey of the 1991 Crown Minerals Act provides no basis for finding that somehow or other the Reserves Act itself was to be regarded as having operated from 1991 as a separate impediment to the mining of Crown-owned minerals.

Now I've been through the reasons for that. The only one I haven't mentioned is that if one looks at the Parliamentary history, and again that's always

problematic, but the various steps in it are set out in our friends' supplementary bundle of authorities, but just one looks at the third reading debate, for example, on the Crown Minerals Bill which is in I think tab 10 of the respondent's bundle of authorities, there are three separate Ministers emphasising that what they're doing is taking out the Crown Minerals Act from the rest of the resource management package because it's different. It's dealing with a different concept. It's dealing with ownership and exploitation of minerals and it's not really compatible with what the Resource Management Act is all about. It's made the Resource Management Act applicable but the general structure and purpose of the Act is different and it's that continuity of the mining regime rather than being simply a footnote to the rest of the Resource Management Act that we draw attention to.

And so we would say that in relation to that and at the level of access regimes and where they are rather than their specific content, if we apply section 22(2) to section 109(1) of the reserves, we're not in fact expanding the scope of section 109 but serving the same general function and confirming the continuity of the general elements that are continuing, not least the primacy of mining legislation over reserves legislation where the two are in conflict. And that approach, we say, is confirmed by the full Court of the Court of Appeal's decision in *McGrory v Ansett New Zealand Ltd* [1999] 2 NZLR 328 (CA). The passages I think at 348 and 349 cover that in some detail with reference to context and also using on page 339 the language about measuring changes against the major elements of continuity there in relation to the Accident Compensation legislation, and then those material points talk about the architecture of the two pieces of legislation to be compared, and as I've said that depends on the level of abstraction but in our submission the architecture is broadly – the elements of the architecture are essentially the same.

So the short point in relation to that is that there is a continuity of legislative policy, firstly, prior to the Crown Minerals Act. The Reserves Act didn't restrict other statutory provisions about mining dealings except insofar as the mining legislation allowed for that. Secondly, the Crown Minerals Act wasn't intended

to change that. There's no indication anywhere that that was its purpose and that's the only change we see in the regime, and, secondly, section 109, if one reads it in the way that we contend for, would simply confirm that general prioritising intention. Now we've got a bit more detail on that in the written submissions but I don't think I need –

WINKELMANN CJ:

Well, you say there's no indication the CMA was intended to change the general approach but you accepted from me earlier that your argument entails lowering the threshold for access to the reserves estate because it removes the requirement that there's no longer a requirement for an Order in Council to make the reserves subject to mining.

MR HODDER QC:

Well, it's at the same level as everybody else that ultimately if there is a problem one finishes up retreating back to section 66 which does require a Ministerial directive which is roughly the same level and ultimately an Order in Council declaring what the terms of the access arrangement are, so –

WINKELMANN CJ:

So why shouldn't then section 60 operate, as the respondents say, leaving section 66 to be the equivalent of what used to be the situation under section 109(1) in the – (2), when consent is not granted.

MR HODDER QC:

It would be the anomaly, we would say, of having section 60(2) operating in a way the respondent says, that is to say that it can't go outside the metes and bounds of the Reserves Act but if section 66 were to be applied then the legislation, that wouldn't be a constraint, but we're still talking about the same two Acts.

WINKELMANN CJ:

We're not really talking about what section 66 allows because that's a different issue, but under section 60 there's nothing wrong with that scheme, is there,

that the Council is just like any owner and is entitled to take into account the interests which are – its own legal obligations, for instance? Any owner is entitled to do that, so why can't it just do that and there's no anomaly in the regime on your analysis if section 66 is available.

MR HODDER QC:

Well, I'm maybe not taking it any further than my previous remark, Ma'am, but the basic proposition is that section 66 doesn't change the legal aspect as between the Acts. It simply creates the opportunity to exercise an Order in Council and Ministerial power. So if it's a relevant consideration or mandatory relevant consideration under section 60, which is the argument against section 60(2), that they have to have regard and apply, give effect to section 23 of the Reserves Act, then it's curious why it wouldn't be applicable under the regime that can be imposed under section 66. The legislation hasn't changed in those two scenarios and the more consistent approach we say is the reverse of what Your Honour is putting to me which is that section 66 indicates that there is no impediment in the Reserves Act. The ultimate question is simply about what the access arrangement can be agreed on.

WINKELMANN CJ:

It might still be –

GLAZEBROOK J:

I was going to say it may or may not but it does put the decision-maker when you have to look at that over-riding public interest as being the Minister in the same way that section 109(2) did, and so it may be exactly consistent with 109, and I'm not saying necessarily that under section 66 the Minister didn't, wouldn't have to take into account the reserves but that's not before us. But if he didn't or she didn't then it's effectively putting the decision at the Ministerial and national level instead of a local level, which is what 109(2) did with coal anyway.

MR HODDER QC:

Yes, again my impression from the earlier legislation is that there was room for an agreement but it was the backstop was the Order in Council. Here again that's the regime that we have, it's just that it's a wider, more comprehensive, more detailed regime about access, and so we say that there are coherent themes through it but they're not consistent with the Reserves Act being a dominant factor.

WINKELMANN CJ:

They may not be.

GLAZEBROOK J:

Although the non-consistent part was in the Reserves Act rather than in the Mining Act or the Coal Mining Act..

MR HODDER QC:

Yes, and in the end that's the prioritisation point that underpins the entire appeal. The arguments I make will enable, we say, a coherent justification for the Crown Minerals Act and the minerals regime continuing to have priority over the reserves regime where they come into conflict. Now clearly the access regime under the Crown Minerals Act contemplates there will be agreement in most cases, but there is the backstop under the Order in Council. Previously there was effectively a backstop under the Order in Council under previous legislation.

Your Honours, there's more in the written submissions but I suspect that in terms of the main points I have probably dealt with those, so any further questions Your Honours have.

WILLIAM YOUNG J:

How was ownership of coal reserved when the land was vested in the Council?

MR HODDER QC:

By the original grant that was empowered under the…

WILLIAM YOUNG J:

I'm just sort of looking at the Gazette notice. Is it something else?

MR HODDER QC:

Because that notice gives effect or is reliant on the legislation that permits that.

WILLIAM YOUNG J:

But where's the reservation of the right to coal?

MR HODDER QC:

It's in the Gazette notice.

WINKELMANN CJ:

Can you refer us to where that is?

WILLIAM YOUNG J:

I was sort of assuming – and I haven't sort of checked this – that it's at 201.094, that's volume B exhibits at tab 9.

MR HODDER QC:

Yes, I was looking at 201.093, Your Honour, the previous tab.

WILLIAM YOUNG J:

All right. And so, sorry, just where does it reserve coal?

MR HODDER QC:

So in the first of those Gazette notices at tab 8 or page 201.093, it's under the Land Act 1948 and the last part of the first paragraph beginning, "Whereas," and there's an internal paragraph, the Governor-General then says that the reserve, "Subject to the reservations and conditions imposed by section 59 of the Land Act –

WILLIAM YOUNG J:

Oh, I see, so it's section 59 of the Land Act.

MR HODDER QC:

– and subject also to the reservations imposed by section 8 of the Coal Mines Amendment Act 1950"…

WILLIAM YOUNG J:

Okay.

MR HODDER QC:

And then that is in volume A of the authorities at tab 7, and Your Honour will find on page 272 of the statute, section 8, "All alienations of land from the Crown made on or after the first day of April 1948 shall be deemed to be made subject to the reservation of all coal existing on or under the surface and subject to the reservation of the power to grant coal mining rights," and that's what I've been referring to when I talked about this legislation reserving both coal and coal mining rights from the outset.

WILLIAM YOUNG J:

So you say the reserve was always subject to the entitlement to the Crown to grant coal mining rights?

MR HODDER QC:

Yes. And that this carried forward in the reference in section 5 of the Reserves Act.

WILLIAM YOUNG J:

So section 5 of the Reserves Act is…

MR HODDER QC:

Section 5 of the Reserves Act is the one that refers to the instrument under which the Trust was created, and the Trust is referred to in the second Order in Council.

WILLIAM YOUNG J:

Yes. Is it the same land that's in the second Order?

MR HODDER QC:

Yes. So it's set apart first and then vested second. So section 5(2)(b) talks about, "The provisions of any will, deed, or other instrument creating the trusts," and the second Order in Council declares that the land is being conveyed on a trust for water conservation purposes. But it's relevant that the grant includes the reservations under the Coal Mines Amendment Act 1950.

WILLIAM YOUNG J:

So I'm trying to work this out in my mind. So the reserve was, or was when created, subject to the right of the Crown to grant mining licences?

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

Which would carry through the right to have access to the land. Is that right or not?

MR HODDER QC:

Well, the rights to the reserve from anybody else, I think if a third party wants the rights conveyed by the Crown under the legislation they have to comply with the later legislation.

WILLIAM YOUNG J:

So what I'm not quite sure is what goes with a retention of ownership of the coal. Does it extend to the right to win it?

MR HODDER QC:

I read it is primarily taking the ownership issue away from the Council, that's not part of it, and declaring that the coal mining rights remain to be granted by the Crown and according with the prevailing legislation.

WILLIAM YOUNG J:

Okay, I understand that, thank you.

GLAZEBROOK J:

Can I just – have we finished? And you've finished subject to questions, is that right?

MR HODDER QC:

I have, yes.

GLAZEBROOK J:

Sorry, can I just take you back to section 48 of the Crown Minerals Act, whereby you say that that took away – well, really my question is I can't imagine it taking away rights of access that had already been granted. Were there transitional provisions in respect of this? So say somebody had a mining permit or a mining licence under the previous legislation, I was thinking of the Coal Mining legislation, or a right of access under the 1979 Act. I think he said, "From now on," from 1991 or whenever the Act came into force, access arrangements came under that. But it would be surprising if that took away existing rights of access. I'm not saying it didn't, I'm just saying it would be surprising.

MR HODDER QC:

Existing rights of access vested in somebody else or vested in the Crown, Your Honour? I see this has taken away rights reserved to the Crown.

GLAZEBROOK J:

So just to the Crown?

MR HODDER QC:

Yes.

GLAZEBROOK J:

So effectively rights are going to be available?

MR HODDER QC:

If there's a vested right in a third party it's not affected by section 48 as I read that.

GLAZEBROOK J:

Right, no, that's what I've assumed.

MR HODDER QC:

And I haven't researched it…

GLAZEBROOK J:

Well, it's just that if you're looking at why 109 remains in the Act, would it remain in the Reserves Act to deal with those earlier access rights that are already there?

MR HODDER QC:

I think they're separate issues, Your Honour, would be my response.

GLAZEBROOK J:

Well, I think the Court of Appeal said they forgot to get rid of it.

MR HODDER QC:

Yes, that's always a – but that's what they said and we say that's a fairly bold proposition.

GLAZEBROOK J:

Well, they mightn't have forgotten to get rid of it if it had a function in respect of those earlier rights.

MR HODDER QC:

I don't think I can check the matter any further about rights vested in other parties, in third parties. It did seem to me, and the only thing that comes to mind, is when the old Ironsands Industry Act, that I have some familiarity with, the Crown had rights of access under that statute, it could go onto land and look for ironsands when it was enacted, and it looks to me as if it takes those

away. Now those rights, the Ironsand Industry Act has been repealed, but it's been kept alive by a series of savings provisions. This looks like it would terminate that, but beyond that I'm not sure what focus it has.

GLAZEBROOK J:
Yes, I suppose I was looking at section 48 if you, anything reserved to the Crown which has then been granted to someone else, but that wasn't what you were arguing.

MR HODDER QC:
No.

GLAZEBROOK J:
No.

MR HODDER QC:
I'm just simply saying that section 47 and 48 clear the decks in terms of the statutory regimes to enable this specialist regime to apply. Thank you, Your Honour. If Your Honour pleases.

WINKELMANN CJ:
Thank you, Mr Hodder. Mr Smith.

MR SMITH:
Good afternoon, Your Honours. If I could begin by picking up on one of the points that had some quite considerable discussion between my learned friend and the Bench this morning, which is the arbitration regime in sections 55 and 66 of the Crown Minerals Act, in particular section 55? So section 55(2) of the Act is the one I'd like to begin with, and in particular section 55(2)(a), because that excludes from the scope of the arbitration regime land held or managed under the Conservation Act 1987 or any other Act specified in schedule 1 of the Conservation Act 1987, and one of the Acts that is specified in schedule 1 of the Conservation Act is the Reserves Act. So that part of the Conservation Act is not in the hard copy bundle but in the

electronic casebook there is a set of full versions of all the enactments referred to which includes the Conservation Act, which is CC001 is the reference in the electronic –

WILLIAM YOUNG J:
Sorry, I'm just finding it. So are we talking about schedule 1 of the Conservation Act?

MR SMITH:
Yes.

WILLIAM YOUNG J:
And does that include any reserve?

MR SMITH:
Yes. So one of the enactments listed there is the Reserves Act 1977.

WILLIAM YOUNG J:
Yes, but it does rather, I suppose, it sort of contemplates that the owner of a reserve might agree.

MR SMITH:
Well, it contemplates that access to reserve cannot be determined by arbitration and therefore it brings us back, in my submission, to the question under section 60(2) which is –

WILLIAM YOUNG J:
Unless the owner agrees.

MR SMITH:
And what are the criteria for determining whether the owner agrees, and we don't say in our submission that the fact that a property is a reserve is a blanket exclusion. What we say is that the constraints that apply on decision-making by the owner under the Reserves Act apply to this decision and that might in particular circumstances allow or not allow mining. Now, of

course, it's correct, as my learned friend says, that in this particular case for this particular mine on this particular land, the next stage of the argument for the respondent will be that a hundred hectare open-cast coal mine in the middle of this land can't be reconciled with section 23 of the Reserves Act.

WILLIAM YOUNG J:
Just pause there. I agree the Reserves Act is listed in schedule 1 but does that make it land held or managed under the Conservation Act? I mean enactments…

GLAZEBROOK J:
Or any other Act.

O'REGAN J:
It says, "Or any other Act specified in schedule 1."

MR SMITH:
Yes, so any land.

O'REGAN J:
So it's managed under the Reserves Act, that's all.

WILLIAM YOUNG J:
Well, I suppose, yes.

MR SMITH:
And, of course, that is also consistent in our submission with section 55(2)(c) which says that the arbitration mechanism also doesn't apply where there is a covenant in terms of the Reserves Act which, as Your Honours heard, is a specific construction under section 77 of the Reserves Act by which effectively a covenant is made that land, although not a reserve, will be treated as though it is one.

WINKELMANN CJ:
Wouldn't it be caught under section 55(2)(a) or is it not?

MR SMITH:

It is not a reserve, so it's not held or – well… So section 77.

WINKELMANN CJ:

It's not held under the Reserves Act.

MR SMITH:

It's not held. It's an alternative mechanism to holding under the Reserves Act to achieve similar protections.

WINKELMANN CJ:

It might not be managed under – it won't be managed under either, yes.

MR SMITH:

Won't be managed under either save I suppose to the extent of section 77 but the drafting technique used in section 55(2) assumes that there's the distinction, and that then carried through to section 66 of the Act. Section 66(1)(a) and (b) set out exclusions from the right of the permit holder to ask the Chief Executive to ask the Governor-General for an access arrangement and one of those at the end of subparagraph (b) is a class of land to which any of paragraphs (a) to (g) of section 55(2) relate.

WINKELMANN CJ:

What provision are you at?

MR SMITH:

Section 66(1)(b). So the point being that the final words of that section (b) carry forward the list of exclusions in section 55(2) directly under section 66 as well.

WILLIAM YOUNG J:

Sorry, I'm finding this a little hard to follow. Section 55(1) is subject to the effect of section 66.

MR SMITH:

Yes.

WILLIAM YOUNG J:

So by what provisions other than section 66 can an arbitrator determine an access arrangement?

MR SMITH:

Well, section 54(2)(b) provides that access to land for minerals other than petroleum may be determined by an arbitrator in accordance with the Act and then section 55 restricts that in the case of a mineral other than petroleum. So there are only two mechanisms by which access to a mineral other petroleum may be determined by an arbitrator. One is section 66 and the other is agreement, and so then section 66…

WILLIAM YOUNG J:

Sorry, but say I want to access for gold.

MR SMITH:

Yes.

WILLIAM YOUNG J:

And the owner doesn't agree, do I go, what can I, do I – is section 66 my only option?

MR SMITH:

Yes.

WILLIAM YOUNG J:

This is a pretty weird provision. It would be simpler because you don't need to provide – the statute doesn't need to deal with arbitration by agreement because the parties can deal with that.

MR SMITH:

Arguably but it does and then there are –

WILLIAM YOUNG J:

You say everything can be dealt with by agreement. But what's the exclusion for petroleum if it doesn't apply – if section 66 wipes it out?

MR SMITH:

The exclusion for petroleum is an exclusion from the restriction so that access for mining for petroleum is available –

WILLIAM YOUNG J:

Sorry, I should –

MR SMITH:

Access for mining for minerals other than petroleum is available only by agreement or by specific Order in Council which –

WILLIAM YOUNG J:

I'm missing this. If it's available by agreement it doesn't need to be in the statute and there's also almost a double-negative issue here. Why don't they simply say for petroleum you can have an arbitrated access agreement? Is that what the section means?

GLAZEBROOK J:

No, I think the arbitration is, isn't it available whether you want it or not for petroleum?

WILLIAM YOUNG J:

Yes, that's what I mean.

MR SMITH:

Yes.

WILLIAM YOUNG J:

So that the non-land owner can insist on an arbitrated access agreement in relation to petroleum.

MR SMITH:

Yes, so, sorry, I should have begun –

WILLIAM YOUNG J:

Sorry, but where's that? Is that right?

MR SMITH:

Yes, it is. I should have begun with section 53 on petroleum.

WINKELMANN CJ:

And if everybody else said they want an arbitrated determination have to get an Order in Council to that effect?

MR SMITH:

Yes, or an agreement to submit.

WINKELMANN CJ:

So I was asking Mr Hodder where is the regime for the arbitration for petroleum. Is it the section 66 regime, because it's just quite silent on that, isn't it?

MR SMITH:

It is. Section 53(2)(b) refers to access for petroleum being determined by an arbitrator.

WINKELMANN CJ:

In accordance with this Act?

MR SMITH:

In accordance with this Act.

WILLIAM YOUNG J:

Where are the provisions about that?

WINKELMANN CJ:

Mr Hodder said they were just the section 66 ones.

O'REGAN J:

Section 67 and so on I think.

MR SMITH:

There are –

WILLIAM YOUNG J:

That's for a declaration that's been made, isn't it?

O'REGAN J:

No, 67 is any hearing by an arbitrator. This doesn't specify under 66.

WILLIAM YOUNG J:

Oh I see.

O'REGAN J:

Presumably it's any arbitration.

WILLIAM YOUNG J:

Okay.

MR SMITH:

So there are technical, there are provisions at 69, limited provisions for the arbitral procedure, and then following on for 71, the effect of the arrangement. That it runs with the land –

WINKELMANN CJ:

So your point is that section 66 doesn't apply to reserves, to land held and managed under the Reserves Act.

MR SMITH:

That it cannot be made to apply by Order in Council.

WINKELMANN CJ:

Yes, other than by consent.

MR SMITH:

So, by consent remains an available mechanism. But then that brings us back to the argument about what the decision-making criteria are for the owner under section 60 subsection (2). One point, further point before we leave section 55, just as a matter of legislative history, is to compare it so section 27 of the Coal Mines Act 1979 which Your Honours spent some time on with my learned friend. Section 27 subsection (6) of the Coal Mines Act 1979, so it's tab 2 of volume B of the green bundle, contains a list of exclusions from their mechanism, which Your Honours will recognise picks up the back end of the list in section 55(2), but not (a), (b) and (c) which are new introductions.

WILLIAM YOUNG J:

Can you speak up please. I'm finding it quite hard to hear you I'm sorry.

MR SMITH:

My apologies Your Honour. The point I was making was to compare section 27(6) of the Coal Mines Act 1979 to section 55(2) of the Crown Minerals Act 1991, and to note that the exclusions from the arbitral regime under sections 55(2)(d) to (g) correspond either directly in kind to restrictions under section 27(6) of the Coal Mines Act, whereas there are exclusions in section 55(2)(a) to (c) for conservation land and reserves land are new under the Crown Minerals Act.

WINKELMANN CJ:

And you say the addition of them makes clear that there is an intention that it not be a compulsory…

MR SMITH:

Yes Your Honour.

WINKELMANN CJ:

Imposition of it, of terms whereas under the Coal Mines Act 1979 there could be compulsory imposition of terms.

MR SMITH:

Yes Your Honour, and that's consistent with section 48 of the Crown Minerals Act.

WINKELMANN CJ:

Can you just pause for a moment. Carry on.

MR SMITH:

That's consistent, we submit, with section 48 of the Crown Minerals Act which revoked the previous reservations under , in particular section 8 of the Coal Mines Amendment Act 1950 and section 59 of the Land Act 1948.

WINKELMANN CJ:

Okay so can you just take us through section 48 more slowly because your questions follow about that. So you're saying that the addition of those terms, those new carveouts, is consistent with section 48 of the CMA.

MR SMITH:

Well, it's consistent because under section 48, and I'll come – this is a theme that's picked up in some of the parliamentary material and I'll take Your Honours directly to one piece of that shortly, that the revocation of the existing reservations under section 48 of the Act was in fact one of the most significant aspects of the limitation on access that was affected by the enactment of the Crown Minerals Act 1991 so what I say is that both sections 48 and the new carve-out of reserves land and conservation land from the arbitration regime are consistent with a direction of travel which is restricting the Crown's previous rights of access.

WILLIAM YOUNG J:

It's only a restriction related to petroleum, isn't it? Sorry, I may have missed it again. Section 55(2)?

WINKELMANN CJ:

48, section 48.

WILLIAM YOUNG J:

No, I thought you mentioned section 55 again.

WINKELMANN CJ:

Section 48 is consistent with section 55(2).

WILLIAM YOUNG J:

Sorry, it was just that in section 55(2), you said that it was consistent with section 55(2) in carving out from the arbitral arrangements land held as reserves.

MR SMITH:

I apologise for the misunderstanding, Your Honour. The submission I was making was that the further restriction of access, of Crown access rights envisaged in their different ways by section 55(2) and section 48 are consistent with a legislative policy choice which we see in the parliamentary materials to restrict the Crown's previous wide rights of access and to give land owners generally a choice and also under section 9 of the Crown Minerals Act to make the – well, not to displace otherwise applicable the statutory requirements and the focus of that was on planning requirements and environmental legislation. As we see when we look at section 9 it's cast in broad terms. I'll come to section 9 shortly but it's cast in broad terms, not limited to, for example, the Resource Management Act 1991. So section 48, well, the predecessor regimes as we saw under section 8 of the Coal Mines Amendment Act 1950, section 59 of the Land Act 1948 and indeed under section 5 of the Coal Mines Act 1979 which Your Honours haven't been taken to but which is to similar effect –

WINKELMANN CJ:

Can you go through that list again, sorry?

MR SMITH:

So section 8 of the Coal Mines Amendment Act 1950, which is in volume A, tab 7. Volume A of my learned friend's authorities, the purple one.

GLAZEBROOK J:

Tab what, sorry?

MR SMITH:

Tab 7. And then section 8, and this is one of the reservations that is expressly referred to in the Gazette notice that my learned friend took Your Honours to in his discussion with Justice Young, and there is an equivalent provision under section 5 of the Coal Mines Act 1979 which I won't take Your Honours to now unless it's useful. The other major reservation is the one under section 59 of the Land Act 1948. That is unfortunately not in the authorities. Section 59(1), on every sale, grant, lease, licence or other disposition of Crown land under this Act the recipient shall have no right, title or claim whatsoever to any minerals on or under the surface of the soil and all such minerals shall be deemed to be reserved to His Majesty," as was then right.

In subsection (2), "In every such disposition of Crown land there shall be deemed to be reserved a free right of way over the land in favour of the Commissioner or of any person authorised by him and of all persons lawfully engaged in the working, extraction or removal of any mineral on or under the surface of the land or any other adjacent land of the Crown."

WILLIAM YOUNG J:

So that's in the Land Act?

MR SMITH:

That's in the Land Act, that's section 59 of the Land Act.

WILLIAM YOUNG J:

So that's how before 1991 access to coal under this land could have been obtained?

O'REGAN J:

This is minerals, it's not – does this include coal or just other minerals?

WILLIAM YOUNG J:

The thing does contain that reservation.

MR SMITH:

"Any minerals…

WILLIAM YOUNG J:

Right.

GLAZEBROOK J:

We might have to look back at the predecessor because the 1925 Act has coal – but then it does refer to lease or licence and only Crown land anyway.

MR SMITH:

I apologise, I have put Your Honours astray. "Minerals" as defined under the Land Act relates essentially to all minerals other than petroleum or coal. So the distinction drawn through the statutory regime up until the Crown Minerals Act prevails. So the section 59 reservation applies to other minerals and the section 8 –

WINKELMANN CJ:

So the land access is still section 27 then of the '79 Act?

MR SMITH:

Section 27 of the 1979 Act, subject to the question of what the relevance of the reservation made on vesting of the land under section 8 of the Coal Mines Amendment Act was. So Gazette notice says it's vested subject to

reservation in section 8 of the Coal Mines Amendment Act, which is the provision that I took Your Honours to previously, that –

ELLEN FRANCE J:

Yes, but doesn't section 27 contemplate that? It contemplates the coals as reserved by Act or…

MR SMITH:

Yes. So my submission on that is that the Order in Council is required to bring the, or was required to bring the particular reserve within the coal mines regime and that's the reason for section 109(2) and its equivalent predecessors in the 1953 and 1928 Acts, which are the provisions referred to in the comparative marginal note.

WILLIAM YOUNG J:

If this issue had arisen in 1978, how would it be determined? That is under the Coal-mines Act 1925 and the Reserve Act 1977.

MR SMITH:

Well, it would be determined by section 109(2), which is that an Order in Council could be made, bringing the land within the coal mines regime. So that section 109(2) of the Reserves Act, so, "The Governor-General may from time to time by Order in Council declare to be subject to the Coal Mines Act any reserve that is vested in the Crown or alienated from the Crown as a reserve which contains coal." Now it's a slightly elliptical way of referring to the section 8 Coal Mines Act reservation, but the ability to use the Order in Council power there for a reserve that is not still vested in the Crown is conditional on it having been alienated as a reserve which contains coal and, relevantly, my submission would be that that an elliptical reference to the reservation under section 8.

ELLEN FRANCE J:

So on your approach 109(2) has no meaning at all now, is that right?

MR SMITH:

Yes.

WINKELMANN CJ:

There's nothing left of that regime that might bite on?

MR SMITH:

No, in my submission. There are transitional provisions under the Act which are under section 107 of the – sorry, under the Act, under the Crown Minerals Act. So section 107 of the Crown Minerals Act existing privileges, which refer to the situation where either a mining permit had been granted under the predecessor regime or an application for one had been made, effectively the predecessor regimes remained in force to that extent, and there are two examples as it happens in the bundle of authorities of that situation. The *Solid Energy New Zealand Ltd v Buller District Council* [1998] NZRMA 385 (HC) case at tab 8 of volume D of my learned friend's authorities, and the *Powelliphanta Augustus Inc v Solid Energy New Zealand Ltd* (2007) 13 ELRNZ 200 (HC) case at tab 11, both of which concern decisions made in the 90s relating to rights that the miner had under either the Mining Act 1971 or the Coal Mines regime. I made that point to pick up the question Your Honour Justice Glazebrook asked my learned friend about whether section 109 has some transitional function, even after the repeal of the Mining Act and the Coal Mines Act. In my submission the answer to that is no because save as expressly reserved in the way that I've described by section 107 of the Crown Minerals Act where at least an application had been made, the previous regime is swept away. So someone applying to mine –

GLAZEBROOK J:

But wouldn't it save it for those ones where it does apply under the transitional provisions?

MR SMITH:

The difficulty with that for subsection (2) in particular is that by the time –

GLAZEBROOK J:

That might already have gone, just because it went as soon as you got rid of the 1925 Act.

MR SMITH:

Yes. Because as –

GLAZEBROOK J:

And then there was nothing there for coal.

MR SMITH:

Yes. Because as soon as you get to the stage of the process at which the transitional provisions under section 107 of the Crown Minerals Act kick in, you're well past the point at which there would have had to have been an Order in Council declaring it subject to the Coal Mines Act, because you've got to have been able to get to the next step, which is making an application under the Coal Mines Act for section 107 to kick in.

GLAZEBROOK J:

Yes, I was really asking about 109(1) because I see subsection (2) probably has gone already.

MR SMITH:

Yes.

GLAZEBROOK J:

Once the 1925 Act has gone. It's provisionally, I'm not…

MR SMITH:

Our submission has been it's enough that, certainly as a backstop to that the proposition that at least subsection (1) is in there because it may have continuing work to do in relation to applications that are preserved by section 107 of the Crown Minerals Act is a submission I'm happy to adopt.

Earlier I said I'd take Your Honours to just one piece of the Parliamentary materials on really the Crown Minerals Act or the Resource Management Bill as it then was. The material I want to take Your Honours to is the report that is under tab 6 of our authorities, which is the slim white spiral bound volume. So this is a report of a review group appointed by the incoming National Government which came in in 1990 while the Resource Management Bill was before Parliament, but then it was re-introduced with some amendments. The paragraph that I wanted to refer to as context really is 7.1.

"A fundamental aspect of the Bill… is the revocation in clause 254," so that's what becomes section 48 of the Crown Minerals Act, "… of the Crown's traditional property right of access to its minerals for prospecting, exploration or mining, a right reserved by the Crown to itself during the land disposal process over many years." So from 1949/1950 there was that deeming provision that we've been referring to, but before that obviously individual instruments reservations could and were made.

"At issue now are some residual adjudicatory procedures…To take the incremental step of removing the power of override altogether is not, from the point of view of the Crown's interest, nearly as significant a step as that already taken by the cancelling of the reserved rights in clause 254."

So the reason for taking Your Honours to that provision in particular is just really to make the point of context, that one ought not to see the access regime as limited to the statutory provisions, or Order in Councils. That actually the much greater proportion of it was through these reservations that were imposed by the Crown when it alienated land, and that the doing away with those was a very significant change, and one which we say is consistent also, and this is the point I was attempting to make in an inelegant way to comparing section 48 and section 55 in saying they indicate a direction of travel, which is to restrict the unilateral rights of Crown access, and both the removal of the reserved rights by section 48, and the restrictions on the compulsory arbitration mechanism in section 55, are consistent with that same direction of travel, and there are arguments being pressed upon Your Honours

by my learned friend, in our submission, go directly against that direction of travel.

So I was then proposing to move directly to section 109 of the Reserves Act and how it ought to be interpreted in accordance with section 22 of the Interpretation Act, or rather whether it can be updated utilising the combination of section 22 and section 4 of that Act.

Before moving to the submission on section 109 I take Your Honours to one authority which is the decision of this Court in *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505 under tab 1 of my learned friend's case law authorities, the substantial yellow volume. This was primarily a Bill of Rights case about a prisoner whose phone calls with his lawyer were monitored while in prison, but part of the argument was about whether the prisoner might have litigation privilege in phone calls with persons other than his lawyer and a prerequisite for that was that the communication had been an occasion of confidence and the obstacle to that was that there were clear notices given to the prisoner using the prison phone that the recordings were monitored, the calls were monitored and recorded, and so counsel for the prisoner sought to rely on section 122 of the Corrections Act 2004 which said that evidence obtained by monitoring of a prison call that would, but for the monitoring, have been privileged, remained privileged, and this Court's judgment deals with the point at paragraphs 95 and following. The reason it is relevant for us today is that unfortunately, as the Court put it in paragraph 96, the reference in the Corrections Act was still to the Evidence Amendment Act 1980, not to the Evidence Act 2006, and so the question for the Court, which was dealt with briefly at paragraphs 97 and 98, is how section 22(2) and implicitly section 4 of the Interpretation Act applied in that context, and the significance was that litigation privilege was not a recognised statutory privilege under the Evidence Amendment Act whereas it had become one under the Evidence Act. So if the reference in the Corrections Act to Evidence Amendment Act could be substituted simply with a reference to the Evidence Act, that would allow the prisoner to rely on the saving for litigation privilege. And what the Court said was that it would not be appropriate to treat the whole of the relevant part of

the Evidence Act as the replacement for Part 3 of the 1980 Act and the Court was not bound to do so because the definition of enactment in the Interpretation Act referred to a portion of an enactment so that what the Court could and did do was to take the – to update the reference in section 122 of the Corrections Act to refer to the provisions of the Evidence Act 2006 that corresponded with provisions that were in Part 3 of the Evidence Amendment Act 1980 and on the particular facts that meant that provisions in the Evidence Act that related to litigation privilege and therefore did not correspond to provisions that were in the predecessor Evidence Amendment Act were not brought in but the provisions relating to solicitor/client privilege which did correspond were brought in.

So the short submission on section 109, and in particular section 109(1) on which my learned friends place primary reliance, is that there are no provisions in the Crown Minerals Act that correspond to the provisions of the Mining Act 1971 that dealt with reserves and that, in any event, that reference there could only be to – updated to refer to the provisions of the Crown Minerals Act as they applied to minerals formerly regulated by the Mining Act 1971.

I would propose to elaborate on that relatively briefly after the luncheon adjournment but I think we're probably at a point where we won't finish this morning.

WINKELMANN CJ:
Yes, thank you, Mr Smith. We'll take the luncheon adjournment.

COURT ADJOURNS: 12.49 PM

COURT RESUMES: 2.17 PM

MR SMITH:
Good afternoon, Your Honours. Before the lunch break I was addressing the interpretation of section 109(1) of the Reserves Act in accordance with section

22 of the Interpretation Act. That provision refers to the provisions of the Mining Act 1971 with respect to dealings under that Act with reserves. Your Honours covered with my learned friend this morning the proposition that the Mining Act did not extend to the mining of coal, which was governed by a separate legislative regime. There is also the point, which is the point I want to make briefly now, as to what the nature of the provisions of Mining Act which dealt with reserves were and then to compare those with the provisions of the Crown Minerals Act in order to make the submission that the two do not correspond or, alternatively, that the context of the respective enactments is such that the presumption under section 22 is effectively rebutted, to use some slightly imprecise language.

The operation of the Mining Act provisions is dealt with and explained in detail in the judgment of the Court of Appeal in the *Stewart* case, which is in my learned friend's bundle of authorities, volume D at tab 7, that's the yellow one. So the core facts there are set out on page 578 of the report at line 20. So this was a case concerning private land and by the time of the hearing of this, of the judgment, an Order in Council had been passed under section 37 of the Mining Act declaring the appellant's freehold land open for mining as if it were Crown land and the Minister had then, that step having been taken, granted a mining licence to the mining company granting it the exclusive right to occupy the appellant's freehold land for a term of 10 years for the purpose of mining minerals.

Carrying over to 579, how the provisions underlying that state of affairs are set out in some detail by the Court but then over to page 581 is where I would like to pick up, which is that under the Mining Act, and this is at line 25, "Mining is not a matter of private bargain between the owner of the land and the miner. Section 69(1) provides that the granting of a mining licence is in the discretion of the Minister," and then section 87 set out in the report describes the rights that a mining licence gives a holder which include to work and mine the land.

So the question then in the case was whether, as the appellant was contending as a last resort measure, notwithstanding that a mining licence

had been granted, the mining company was still required to apply for a consent under the Town and Country Planning Act, and the Court at page 584 in the paragraph that runs over from the previous page says, picking up at line 7, “On our analysis, the Mining Act 1971 was intended to be an exclusive code in respect of the use of land for mining purposes under mining licences granted under that Act.” Whatever may have been the case under previous provisions, “The 1971 Act must be taken to have pre-empted the field and not to be subject to the land use control provisions of the Town and Country Planning Act. So that proposition that the planning legislation or that the mining legislation was an exclusive code and that the planning legislation and, indeed, implicitly any other legislation that contained constraints did not apply was something that was done away with with the passage of the Crown Minerals Act.

So under – it’s not just the access arrangements that both my learned friend and I have spent some time discussing with the Court earlier but the provision of the general application of other statutory and regulatory constraints which was changed under the Crown Minerals Act. So under section 9 of the Crown Minerals Act, which is volume C of the authorities, tab 2, “Other legal requirements are not affected,” and, “Compliance with this Act or with the regulations does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.” So the Crown Minerals Act is expressly not an exclusive code and in that respect is very different to the regime that was applicable under the Mining Act 1971 as interpreted by the Court of Appeal in *Stewart*, and there’s a decision in the bundle of the High Court in a Solid Energy case adopting the same approach as that adopted by the Court of Appeal in *Stewart* to the Mining Act. The High Court in that case applies the same approach to the pre-Crown Minerals Act coal mining legislation.

WINKELMANN CJ:

So how do you say section 109(1) is to be read now then?

MR SMITH:

Our submission is that it's an artefact that regrettably it is to be read as it is printed but it now has no work to do.

WINKELMANN CJ:

Because the Crown Minerals Act is effectively is this – is a code. It can stand on its own without that bringing in.

MR SMITH:

Yes, and that there are – well, yes, it can stand on its own and that in the language of section 22 of the Interpretation Act if the task to update is to identify the provisions of the Crown Minerals Act that replace or correspond to these provisions that are referenced in section 109(1) of the Reserves Act, being the provision in section 26 of the Mining Act, to declare a public reserve open for mining, there is no corresponding provision under the Crown Minerals Act because that concept has gone, the Crown Minerals Act, as Your Honour alludes to, has its own internal regime for how it deals with matters of allocation of the Crown's right to minerals, access and the applicability of other statutory regimes which are not equivalent to those that applied under the predecessor legislation.

So the other provision relied on by Rangitira is section 60(2) of the Crown Minerals Act, simply the general provision which governs decisions about an access arrangement in relation to land other than Crown land, largely forest. I don't have much to add to our written submissions on that, which in turn draw heavily on the reasoning at paragraph 46 to 50 of the Court of Appeal judgment, which is to the effect that this general reference in subsection (2) of section 6 isn't sufficient to displace otherwise applicable legal constraints on decisions made under that provision, whether their made by local authorities or private landowners, and that section 23 of the Reserves Act is an example of one such constraint that is the one that we are concerned with in this case. But as a general proposition we also would not accept the submission of the respondent that decisions in relation to private land are unconstrained as a

result of section 60(2). If there are otherwise applicable legal constraints those continue to apply to decisionmakers also.

The point I would add to what is in the written submissions or, indeed, the Court of Appeal judgment, is by reference to the scope of the arbitration regime as explored in questioning this morning and the point that in arbitration access the arbitration regime to grant an access arrangement does not apply to land managed or held under the Reserves Act and –

WILLIAM YOUNG J:
I've actually lost you on that point. I thought that section 55(2), is that what that submission's based on?

MR SMITH:
Yes.

WILLIAM YOUNG J:
I may have misunderstood the submission. Whereabouts is the Reserves Act?

WINKELMANN CJ:
The Reserves Act or the…

MR SMITH:
The Crown Minerals Act is the one that contains section 55.

WILLIAM YOUNG J:
Crown Minerals Act, sorry.

MR SMITH:
That's volume C, tab 2.

WINKELMANN CJ:
Section 55(2) is carried forward into section 60 – 66 rather.

WILLIAM YOUNG J:

Okay. No, sorry, I do understand. So it's not subject to the predominance of section 6.

MR SMITH:

Yes, that is the submission. And it's submitted that it is consistent with that and, indeed, I would go further and say it would be anomalous, if it were otherwise, that in making the decision under section 60 on an access arrangement the landowner remains subject to the Reserves Act constraint. Because the contrary outcome would be that a landowner, who might be a private person, or a local authority could by agreement give access to a public reserve for mining, notwithstanding that the arbitration provision allowing such access to be directed if it was in the national interest doesn't apply, and I submit that would be an anomalous result. If anything one might expect the ordering to operate in the opposite direction. That is to say that it will not be open to the landowner to effectively weigh the public interests in mining versus the public interest in preserving the reserve, but that it might be given to an independent decision maker such as the arbitrator under section 66 to make that decision is the Act contemplated such a decision being made.

WINKELMANN CJ:

After the administer has ordered it to be subject to the arbitration.

MR SMITH:

Indeed so –

WINKELMANN CJ:

Which is the point that Justice Glazebrook was making, which you might think it would be better if it was sitting at a national level under section 66, and your point is it's not sitting there so it certainly shouldn't sit locally.

MR SMITH:

Your Honour has the point.

WILLIAM YOUNG J:

Sorry, I just want to point out, section 55(2), isn't it confined to petroleum?

WINKELMANN CJ:

Section 66.

GLAZEBROOK J:

55 isn't it, other than petroleum.

WINKELMANN CJ:

It is confined to petroleum. It is dealing with petroleum –

GLAZEBROOK J:

Petroleum has an automatic arbitration regime under 54 and 55 deals with other than petroleum.

WINKELMANN CJ:

If you look at section 66(1)(b).

WILLIAM YOUNG J:

I see.

GLAZEBROOK J:

And if you go back to 54 it has an automatic one for petroleum.

WINKELMANN CJ:

The thing that takes reserve land out of the compulsory arbitration is section 66(1)(b), isn't it?

MR SMITH:

Yes Your Honour, incorporated by reference to the exclusions in 55(2)(a) to (g) for petroleum.

WILLIAM YOUNG J:

Okay, now I follow it.

MR SMITH:

Unless I can be of any further assistance?

WINKELMANN CJ:

Thank you Mr Smith. Mr Hodder, if you have matters in reply, you will have to wait while we do the podium wipe.

MR HODDER QC:

A few points which will take about two minutes Your Honour. Maybe three.

WINKELMANN CJ:

You can just deliver them from there, I think, rather than putting anyone to trouble.

MR HODDER QC:

Happy to do that Your Honour. The first point is that I acknowledge my learned friend has picked up an omission on my part, the compulsory regime for arbitration does have the exception in section 66(1)(b) that's been referred to. That, I acknowledge, and that's because schedule 1 that's referred in the relevant provisions lists all Acts administered by the Conservation Department, and it happens that the Reserves Act is administered by the Conservation Department. We say that nevertheless leaves the fact that there is a special and detailed access regime. That point rather emphasises that it is a special and detailed access regime. There is one matter that remains of the argument that I was putting to the Court before. As the Court will recall, section 55(2), which has the exceptions referred to in section 66 says, "Unless otherwise agreed between each owner… and the person desiring access." The implication of the argument for the respondent is that no administering authority could ever agree to arbitration. But we say that isn't the case. That there's still a contemplation that an arbitration regime would apply here, and the if the arbitration applies here that it wouldn't be constrained by section 23.

WINKELMANN CJ:

Well, Mr Smith's point I think is that it's not, there is no absolute rule that there may never be any mining on a reserve and that the Reserves Act doesn't direct that there be no consent to access, it's just that when you take into account the considerations under the Reserves Act it's unlikely, so if there were in some unlikely scenario consent given to access the mining, it might be that the arbitration provisions would be necessary.

MR HODDER QC:

Yes, my point is slightly different. I accept that. My point is simply that if a local authority, in this case administering authority, agreed to arbitration, the arbitrator would not be bound by the terms of the Reserves Act.

WINKELMANN CJ:

Well, they might stipulate a clause that they are bound by it. It's consensual.

MR HODDER QC:

They might but on the face of it there's nothing to constrain it to that. The second point, if I may, is mostly clarification rather than reply but there's been discussion about how the 1925 and 1950 Acts operate and I confess that I probably have a simpler way of explaining what was going on than I did before. If the Court is interested I am happy to offer that. So in terms of what could have happened before –

GLAZEBROOK J:

Can I just go back to that previous point?

MR HODDER QC:

Certainly.

GLAZEBROOK J:

Why would you say they wouldn't be bound by the Reserves Act if one of the parties is bound by the Reserves Act?

MR HODDER QC:

Because the chance it's being given is to determine the terms of access.

GLAZEBROOK J:

But that assumes there can be access and, of course, as the Chief Justice said, there can be access on reserve land.

MR HODDER QC:

Yes.

GLAZEBROOK J:

But if there can't be access because of the Reserves Act then I don't see how the arbitrator could override that.

MR HODDER QC:

That's my initial proposition. Unless one says that it's –

GLAZEBROOK J:

Well, but where does it say that the arbitrator can override that, or you just say that's part of the…

MR HODDER QC:

There's nothing –

GLAZEBROOK J:

Because let's assume that the local authority would be bound by the Reserves Act.

MR HODDER QC:

Yes.

GLAZEBROOK J:

I can't see why the arbitrator wouldn't be equally bound by that.

MR HODDER QC:

My argument is the other way. I don't know if you – it's confirmation that the Crown Minerals Act prevails over the Reserves Act because –

GLAZEBROOK J:

So it's not that they wouldn't be bound. It just said it wouldn't make any sense for them to be bound, so it's just part of your argument that this is a regime in itself.

MR HODDER QC:

That's part of the general special overriding argument that there is –

GLAZEBROOK J:

I understand.

MR HODDER QC:

There is scope for an arbitrator to operate and it's not fair that either that that would be an unlawful act by the administering authority to enter an arbitration agreement nor that the arbitrator would be bound by the Reserves Act. It doesn't consist of the idea that there could be an agreement to arbitrate. It's no more than that.

In terms of mining coal before the 1979 Act, which I have managed to confuse myself on, I hope it didn't too badly confuse the Court, there are two statutes involved which are relevant. If we ignore what happened before 1950, but at that stage the 1925 Act is still in force, so under section 8 of the 1950 Act, which is at tab 7 of volume A, there is reservation of coal ownership and coal mining rights.

WINKELMANN CJ:

This is an amending Act but it left the 1925 Act in force?

MR HODDER QC:

Yes, and then in terms of what –

GLAZEBROOK J:
Could you just start from the beginning again, that…

MR HODDER QC:
Certainly. So I'm using 1950 as a cut-off because the 1950 Amendment Act is in place and we haven't yet got the vesting of this particular reserve. So at that point the Crown has the right, if it makes a reservation or it alienates land, it reserves to itself the ownership of coal and the right to mine coal. Those both come from section 8 of the 1950 Act.

So then the question is how do you actually exploit the coal in those circumstances, and that does take us to the 1925 Act and the section, there's a missing section in my analysis before, so we looked earlier in the 1925 Act which is at tab 4 of volume A, and we looked at sections 3 and 4. So section 3 says that the warden, et cetera, can grant coal mining leases. That's section 3(b). Section 4(b) says that those coal mining rights can be granted over, (b), "Other lands over which the power to grant such rights is vested in or is reserved to the Crown under any statutory or other authority," which is section 8 of the 1950 amendment for our purposes.

But then section 14 was the one I didn't refer the Court to which says, "Subject to the provisions of this Act, a coal-mining lease shall, with respect to the land over which it is granted, be a demise of such land entitling the lessee to raise and dispose of coal therefrom," and we say implicit in that is the right to take coal.

WINKELMANN CJ:
You did refer us to it.

MR HODDER QC:
Sir?

WINKELMANN CJ:
You did refer us to it.

MR HODDER QC:

Well, in that case I managed to forget that I had done so, but the point of that is that there's a regime that doesn't depend on Orders in Council, so the mining of coal doesn't depend on an Order in Council. This is the, as it were, the norm. The Orders in Council that can be done under section 109(2) of the Reserves Act are rather exceptional, and it's that is the kind of the balance or the before and after we're looking at.

The third point just briefly in relation to the *Stewart* decision, as I think I mentioned at the outset –

WINKELMANN CJ:

Can I just pause you there? But the effect of section 109 was that it put additional step in.

MR HODDER QC:

Not in the process we've just described. What that was designed to do was to take land where the coal wasn't owned by the Crown and bring it under the Coal Mines Act.

WINKELMANN CJ:

Well, section 109 actually deals with…

MR HODDER QC:

Section 109 effectively brings under 1925 Act land where the coal is not owned by the Crown already, whereas our land with the coal has always been owned by the Crown by virtue of the reservation. I think the relevant points for us are in subsection (2) at the end of the first paragraph –

WINKELMANN CJ:

All right. So you're saying that Mr Smith had said those last words were an oblique reference to section 8, "Or alienated from the Crown as a reserve which contains coal"?

MR HODDER QC:

That's right. Which is not our case.

WINKELMANN CJ:

You're saying it's not?

MR HODDER QC:

That's not our case at all.

WINKELMANN CJ:

No, okay.

MR HODDER QC:

So our case is one where the reserve as it were vested did not contain coal, the coal was retained by the Crown. So as we read this, this gives you a power to take privately owned coal, as it were, and bring it back under by Order in Council, subject to the other bits of the section 109(2).

So the third of my four points was in relation to the *Stewart* –

WINKELMANN CJ:

So you're saying – well, don't you have a difficulty then that the Reserves Act would be a gazumping Act, coming in as it did after it, and making only reference, provision for that, or do you say that continues in some way? How's that reflected in the Reserves Act? The section 8 and section 14 arrangement.

MR HODDER QC:

We say that the arrangements that I was talking about in terms of section 8 of the 1950 Act and section 14 of the 1925 Act are untouched by section 109(2).

WINKELMANN CJ:

Or anything else in the Act?

MR HODDER QC:
In the Reserves Act?

WINKELMANN CJ:
Yes.

MR HODDER QC:
Yes. They simply stand alone as part of the special regime.

So in terms of the *Stewart* decision, as I mentioned, in a sense that was much easier because there, as the Court analysed it, the Mining Act was intended to be an exclusive code, and my learned friend has taken you to the passage where that applies. But what we have been relying on is that it's an exclusive code, that is to say the Crown Minerals is an exclusive code, although it is detailed, but we rely on the preceding page where the Court cites from the Privy Council decision in *Barker v Edger (1898)* NZPCC 422, 427; [1898] AC 748, 754,– this is at page 583 line 11 or thereabouts – to explain what special legislation is. Now this is discussed in the various interpretation textbooks, including *Burrows and Carter*, but the general proposition is that if the legislature's given its attention to a separate subject and made provision for it the presumption is its subsequent general enactment is not intended to interfere. Now the "subsequent" doesn't matter too much. The point is that there's attention given to a separate subject and made provision for it and we'd say that is precisely what has happened, and that defines the special legislation that is created by the access regime in the Crown Minerals Act.

GLAZEBROOK J:
Except coal was never part of that special regime that you're asking us to slot it in to. So we've got a special regime for other minerals but that wasn't a special regime for coal mining.

MR HODDER QC:
Yes. So this goes back to my principal point, which is that we have now the special regime. We would say that there were special regimes under –

GLAZEBROOK J:

Well, don't you have to have had the special regime before and then the slotting on of the new special regime? You can't say well here's a whole different special regime that I've got and…

MR HODDER QC:

But that's for my section –

GLAZEBROOK J:

I mean isn't that going the other way?

MR HODDER QC:

That's the section 109 argument. The underlying argument has been that this is special legislation irrespective of section 109. Section 109 just recognises –

GLAZEBROOK J:

Sorry, I can understand that one, but I can't understand how you can slot – because it's a special regime for coal and/or minerals you slot it back under section 22, so that wasn't the argument?

MR HODDER QC:

I'm simply referring to *Stewart* for the proposition that putting aside section 109 we say this is special legislation looking at the Crown Minerals Act on its own, and the detailed regime, and comparing it, or assessing it against the Reserves Act. That's all.

GLAZEBROOK J:

Sorry, I thought you were back on 109.

MR HODDER QC:

That's all.

WINKELMANN CJ:

Can I just take you back to your submission about section 8 and section 14 of the 1950 Act. What happens to them in 1979?

MR HODDER QC:
1979 that's…

WINKELMANN CJ:
They're subsumed by section 27 are they?

MR HODDER QC:
Yes, so that's section 14 of the 1925 Act, let me just get myself back to the 1979 Act.

WINKELMANN CJ:
Because at the moment you have section 109 not applying to your case.

MR HODDER QC:
Under section, under 1979 we have the general section 20.

WINKELMANN CJ:
No but I'm saying that you're arguing that you're relying on section 109, your submission about section 8 and 14 is that section 109 didn't apply anyway. Is there a contradiction in your argument?

MR HODDER QC:
My argument is that the level of extraction that says there's a regime for access provided by the preceding legislation, and that what we have carried through, and what we can carry through into section 109(1) is the regime for access provided by now the Crown Minerals Act.

WINKELMANN CJ:
So on your submission neither section 109(1) nor (2) applied to your case, but now this Crown Minerals Act has been enacted it should apply through section 109(1) or (2), 101, I'm just finding it hard to follow that argument.

MR HODDER QC:
Prior to the Crown Minerals Act had we looked at this issue then neither section 109 nor section 1 nor 109(2) would have applied to our specific case,

because firstly it was about coal, therefore section 109(1) wouldn't apply and it certainly wasn't about coal owned by somebody other than the Crown, therefore section 109(2) wouldn't apply. I accept that. I'm looking for a general interpretive substitution of language in section 109 by virtue of what has happened since.

WINKELMANN CJ:
Is that a valid use of section 22? It seems an unusual use.

MR HODDER QC:
The submission is that section 22 enables, as a matter of function, to be able to carry through aspects of continuity, and aspects of continuity include the fact that there is an access regime. Now Your Honour was asking me about the 1979 Act, and we draw that from section 20 and section 27, although I still carry a torch for section 21, but that's, happy to rely on sections 20 and 27 for the purposes of this reply. Ultimately, as we discussed earlier on, section 27 has the ultimate backstop of an Order in Council to create access where that hasn't been provided.

WINKELMANN CJ:
So the 1979 Act basically got rid of section 8 and 14, and that's what you've relied on for your access?

MR HODDER QC:
Yes. So section 14 of the 1925 Act, and section 8 of the 1950 Act.

WINKELMANN CJ:
Yes.

MR HODDER QC:
Yes, and then sections 20 and 27 of the 1979 Act for that period at that point. But in the end what we're saying is that the point about section 109 at a high level, and indeed the argument that we're making generally, is that it recognised a ranking between the minerals regimes and the reserves regime,

and we say that remains intact notwithstanding the enactment of the 1981 Crown Minerals Act.

WINKELMANN CJ:
Is that your fundamental submission really?

MR HODDER QC:
Yes, it is, and we say that in response to my friend's reliance on section 9 of the Crown Minerals Act is that that is confined to truly regulatory requirements that the person seeking to exploit the minerals has to comply with. It doesn't deal with the Reserves Act which is concerned with the creation, classification and management of reserves.

Those was the points I was wishing to reply on, Your Honours.

GLAZEBROOK J:
Is there anything other than assertion about section 9? It's pretty broad terms, isn't it? So why would you say it's just regulatory requirements?

MR HODDER QC:
Because of the references to specific regulatory requirements elsewhere in the Act but nothing –

GLAZEBROOK J:
To what, sorry?

MR HODDER QC:
To some specific regulatory statutes in the Act. You recall we went to the definition of specified Acts, the Maritime Transport Act, the Resource Management Act and so on and so forth, and there were several references to the idea of environmental legislation or health and safety legislation and that's section 29A and section 33 and in –

GLAZEBROOK J:

So basically you're saying it only – if it's not referred to in the Act then it's not part of the section 9?

WINKELMANN CJ:

What section 9 are we talking about?

MR HODDER QC:

Yes, they were indicating what the purpose of section 9 is.

GLAZEBROOK J:

The one that says you have to comply with any other rule of law, et cetera.

ELLEN FRANCE J:

Crown Minerals Act.

GLAZEBROOK J:

Crown Minerals Act, sorry.

MR HODDER QC:

Yes, well, that would cover things such as trespass or the right to support the land. It doesn't say you can't be in breach of contract or that you have got a parking ticket. It's really about something that's relevant in the context which we say is a regulation of the activities.

WINKELMANN CJ:

So your submission is that section 109, prior to the enactment of the Crown Minerals Act, section 109 would not have applied to assist anyone who wanted to mine on this particular land?

MR HODDER QC:

They didn't need it.

WINKELMANN CJ:

But after the enactment of the Crown Minerals Act there's an overall regime and what section 109 can now be read as doing is preserving that overall regime for access?

MR HODDER QC:

Yes, so there's the specific and the general.

WINKELMANN CJ:

So the relationship.

MR HODDER QC:

Your Honour is quite right to say in the specific before 1981 we didn't need section 109 had we been looking at this exercise. We'd be there under either the 1925/1950 regime or the 1979 regime with backstops ultimately in Orders in Council. At the general level we're saying that the prioritisation given in section 109(1) by reference to the Minerals Act 1971 can now be read as a general prioritisation given to the Crown Minerals Act as a whole. That's the submission on that. But that reflects the core proposition that this is really a special access regime not constrained by the Reserves Act in its own terms.

GLAZEBROOK J:

In fact you are relying on it, contrary to what you said to me before, to say that now there's a general regime that deals with both coal and other minerals, that that then slots itself into 109, even though beforehand there wasn't a general regime that dealt with coal.

MR HODDER QC:

I apologise if I have misstated my answer to you, Ma'am. I hope that what I've just said is clear. That's what I was intending to say, that at the specific level we didn't need it as it were in prior to 1991, but the general level, the 1971 Act wasn't applicable to us but it was an indicator of prioritisation. It's still an indicator of prioritisation but that now extends to the broader Act.

GLAZEBROOK J:

"Didn't need it" isn't right, is it? Didn't apply. I mean you might not have needed it either but it actually didn't apply.

MR HODDER QC:

The section 109(1) did apply in general terms to create a priority.

GLAZEBROOK J:

But not to coal.

MR HODDER QC:

Not to coal. I agree. That's the specific of it. In our particular case concerned with coal it didn't apply specifically. As a matter of general prioritisation between mining legislation and reserves legislation it was relevant and is relevant.

WINKELMANN CJ:

Are those your submissions, Mr Hodder?

MR HODDER QC:

If Your Honour pleases.

WINKELMANN CJ:

Thank you, counsel, for your very helpful submissions. We will reserve our decision and let you have it in due course. Thank you.

COURT ADJOURNS: 2.55 PM