I Te Kōti Mana Nui o Aotearoa

In the Supreme Court of New Zealand

SC 55 / 2024

between

STUDENTS FOR CLIMATE SOLUTIONS INCORPORATED

Appellant

and

MINISTER OF ENERGY AND RESOURCES

Respondent

APPELLANT'S SYNOPSIS OF SUBMISSIONS ON APPEAL

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Counsel for the appellant certifies that, to the best of their knowledge, these submissions are suitable for publication and do not contain any information that is suppressed.

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APPELLANT'S SYNOPSIS OF SUBMISSIONS ON APPEAL

MAY IT PLEASE THE COURT

1. INTRODUCTION AND SUMMARY OF ARGUMENT

1.1 On 29 June 2021 petroleum exploration permits (**PEPs**) were granted to Greymouth Turangi Limited (**Greymouth**) and Riverside Energy Limited (**Riverside**) in respect of areas in Taranaki (**Permits**).[1] They were granted under the Crown Minerals Act 1991 (**CMA**) by Phillipa Fox, General Manager of the Energy and Resource Markets Branch at the Ministry of Business, Innovation and Employment (**MBIE**), acting on delegated authority by the Minister of Energy and Resources (**Minister**). Importantly, they were granted without a meaningful consideration of the climate change consequences of continuing to explore for and combust fossil fuels.

1.2 A PEP allows the permitholder to explore for petroleum deposits (essentially oil and gas). It is granted for a period of 10 years. It is a precursor to a petroleum *mining* permit (**PMP**). PMPs allow commercial petroleum mining operations, generally for a period of 10-40 years. The Crown grants PEPs in the hope that they will result in commercial, long-term, petroleum extraction (and royalties for the Crown).[2] There is no other point to PEPs.

1.3 The burning of fossil fuels is a significant contributor to global climate change. The combustion of fossil fuels releases carbon dioxide and other greenhouse gases (**GHGs**) which trap the sun's heat and cause average global surface temperatures to rise. As such, climate change poses a direct and immediate threat to human life. It is undisputed that the global community, including Aotearoa, must act fast to reduce GHG emissions to avoid the catastrophic impacts of global average warming above 1.5-2˚C (from pre-industrial levels). This is reflected in Aotearoa's domestic and international commitments.[3]

1.4 Despite this, the Minister (through Ms Fox but hereinafter referred to as the Minister's decision) did not consider climate change when granting the PEPs (other than a superficial consideration of the target of being net zero by 2050).

[1] Memorandum recording decisions on Block Offer 2019 **[305.2241]**.
[2] Affidavit of Dr John Edwin Decker, dated 10 June 2022 (**Decker**) at [53] **[201.0124]**.
[3] See **Appendix 1 (Climate Change)** and **Appendix 2 (Legislative Response)** below.

1.5 The appellant (**SFCS**) sought a review of the Minister's decision to grant the Permits. The purpose of the CMA at the time was to "promote prospecting for, exploration for, and mining of Crown owned minerals *for the benefit of New Zealand*."[4] The Act also required the Minster to have regard to the principles of Te Tiriti o Waitangi (**Te Tiriti**). The nub of this case is whether these assessments could be lawfully made without a meaningful consideration of the climate change implications of granting the Permits.

1.6 The application for review was dismissed by Cooke J. His Honour found that the Act's purpose deemed mining activities to be for the "benefit of New Zealand",[5] and that the Minster only had to consider climate implications under Te Tiriti if iwi whose rohe falls within the permit areas raise that concern.[6] SFCS's appeal was dismissed by French, Gilbert and Mallon JJ in a judgment dated 7 May 2024. It was dismissed on essentially the same grounds, although Mallon J considered "for the benefit of New Zealand" signalled an assessment should be made and that not all mining will necessarily benefit New Zealand.[7]

1.7 The question for this Court is "whether the Court of Appeal was correct to dismiss the appeal".[8] SFCS says that the answer to that question is no, because:

(a) The CMA provides that all "petroleum, gold, silver, and uranium existing in its natural condition in land" is owned by the Crown.[9] While giving the Minister the power to regulate the exploitation of Crown minerals, the Act also includes safeguards to ensure that the Minister acts in accordance with the public interest and consistently with Te Tiriti. This is entirely conventional and consistent with the common law concepts of the public trust doctrine,[10] and the tikanga concept of kaitiakitanga (the right to

[4] It was amended in 2023 to replace the word "promote" with "manage". The Crown Minerals Amendment Bill Amendment Bill (82—2) currently before Parliament proposes to reverse the amendment and replace "manage" with "promote": see below at [2.1].
[5] *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116 (**HC Judgment**) at [69]–[75] [**101.0059**]
[6] HC Judgment at [111] [**101.0071**].
[7] *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2024] NZCA 152 (**CA Judgment**) at [117]–[188] [**101.0124**] .
[8] *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2025] NZSC 4 [**05.0009**].
[9] Crown Minerals Act 1991, s 10.
[10] Consider, for example, a concept like *jus publici*: property affected with a public interest. See, for example, Michael Taggart, Private Property and Abuse of Rights in Victorian England (OUP, New York, 2002) at 202 and the works discussed therein. See also Nicola

govern the environment comes with a reciprocal obligation to care for it).

(b) Accordingly, where s 29A requires the Minister to be satisfied that a proposed work programme for a PEP is consistent with the purpose of the CMA – being to promote exploration and mining *for the benefit of New Zealand* – those words mean something. And whether a permit is "for the benefit of New Zealand" or not requires an assessment of the advantages and disadvantages of the proposed activity.

(c) PEPs are sought and granted in the hope that they will lead to long term commercial exploitation of petroleum reserves. That operation typically last 10-40 years, and may be extended.[11]

(d) Climate change considerations are so obviously relevant to decisions about whether to facilitate further fossil fuel extraction, that they must be mandatory considerations. This includes, but is not confined to, the specific matters referred to in s 5ZN of the Climate Change Response Act (**CCRA**).

(e) The Minister failed to undertake a meaningful assessment of the climate change implications of granting the permits both in terms of the specific climate considerations referred to in s 5ZN and climate change implications in a broader sense.

(f) The impact that catastrophic anthropogenic climate change will have on tangata whenua means that a failure to consider the wider climate impacts of fossil fuel extraction on Māori, amounts to a breach of the Minister's obligation to exercise their powers under the CMA in a manner that is consistent with the Te Tiriti. Such considerations cannot be confined to iwi proximate to the permit area.

(g) The Minister's consideration of the need for a "just transition" and other climate change workstreams across Government was not sufficient to discharge her statutory obligation to consider the climate change implications of her decision.

Hulley "New Zealand's Public Trust Doctrine" (LLM Thesis, Te Herenga Waka | Victoria University of Wellington, 2018).

[11] Decker at [48] **[201.0122]**.

2. THE LEGAL FRAMEWORK FOR DECISIONS REGARDING PEPS

The Crown Minerals Act 1991

2.1 The CMA regulates prospecting and extraction of Crown-owned minerals, including petroleum. At the time of the decision, the purpose of the CMA was "to promote prospecting for, exploration for, and mining of Crown owned minerals **for the benefit of New Zealand**."[12] It was amended on 31 August 2023 to replace the word "promote" with "manage".[13] The Crown Minerals Amendment Bill 2024 proposes to reverse the amendment and replace "manage" with "promote".[14] The Bill is currently before Parliament.

2.2 Section 4 of the CMA requires all persons exercising functions and powers under the CMA to have regard to the principles of Te Tiriti.

2.3 Exploration permits may only be granted by the Minister following a public tender process.[15] If the public tender process has been followed, and a tender complies with the requirements of the public tender notice, the Minister has a discretion under s 25 to grant an exploration permit.[16]

2.4 Section 29A governs the process for the Minster to consider and approve applications for permits under the CMA. Section 29A(2)(a)(i) provides that prior to granting a permit, the Minister must be satisfied that the proposed work programme provided by the applicant is consistent with the purposes of the CMA.

2.5 The CMA was amended in 2018 to limit the Minister's powers to grant petroleum related permits. The effect of the amendments was to restrict such permits to grants by way of public tender in relation to lands in the onshore Taranaki region.[17]

Minerals Programme

2.6 Part 1A of the CMA provides for the promulgation, by the Governor-General in Council, of minerals programmes.

[12] CMA, s 1A(1) (emphasis added).
[13] Crown Minerals Amendment Act 2023, s 4.
[14] Crown Minerals Amendment Bill (82—2), cl 4.
[15] CMA, ss 24 and 25.
[16] CMA, ss 24 and 25.
[17] CMA, ss 23A(2) 24(5A), inserted by the Crown Minerals (Petroleum) Amendment Act 2018.

2.7 A minerals programme must set or describe how the Minister will have regard to the principles of Te Tiriti for the purposes of the programme,[18] and may set out or describe how the Minister is to exercise any specified powers conferred on her by the CMA in relation to the relevant minerals.[19]

2.8 Under s 22 of the CMA, the Minister is required to act in accordance with a valid minerals programme. A programme must not be inconsistent with the CMA and, consistently with the programme's status as subordinated legislation, to the extent that there is an inconsistency between the requirements of the CMA and the programme, the Minister must prefer the requirements of the CMA. [20]

2.9 The minerals programme applicable to the decisions is the Minerals Programme for Petroleum 2013 (**MPP**).

2.10 Part 1.3 of the MPP sets out the Minister's understanding of the purpose of the CMA as it relates to the prospecting, exploration, and mining of petroleum, as follows:[21]

> The Minister considers that, within the context and mandate of the Act, "the benefit of New Zealand" is best achieved by increasing New Zealand's economic wealth through maximising the economic recovery of New Zealand's petroleum resources.
>
> Other important components of "the benefit of New Zealand", including environmental considerations, are covered in other legislation…

2.11 The "other legislation" referred to in that passage expressly includes the CCRA in respect of "how New Zealand's greenhouse gas emissions are to be managed".[22]

2.12 Part 2 of the MPP addresses s 4 of the CMA. It sets out the Minister's view of the requirements of that section which, according to the MPP, are limited to consultation with local iwi and hapū. The primary focus of the consultation requirement is the identification of particular sites within exploration areas which may be excluded from exploration or mining activities, or where such activities may be subject to specific requirements. The MPP does not recognise any obligation on the Crown to actively consider the broader implications of the permitted activities, including any contribution to worsening climate change, on Māori, their rohe, and their

[18] CMA, s 14(1)(b).
[19] CMA, s 14(2)(a).
[20] CMA, s 14(4)-(5).
[21] Minerals Programme for Petroleum 2013 (**MPP**) at [1.3(7)–(8)] [**301.0023**].
[22] MPP at [1.4(2)(c)] [**301.0025**].

continued ability to effectively exercise the rights conferred on them under Article 2 of Te Tiriti.

3. THE PERMITS

The permits

3.1 PEPs enable permit holders to explore, including by way of drilling, dredging or excavation, in a specified area for the purposes of determining the existence of petroleum deposits that may sustain commercial extraction operations in any part of the exploration area.[23] PEPs are granted for a period of 10 years each.[24]

3.2 If a PEP holder discovers a petroleum deposit that can be commercially exploited it has a right, on application, to surrender its PEP in exchange for a PMP.[25] While a PEP permit holder is not statutorily guaranteed a PMP in those circumstances, they are generally granted if the application meets the relevant criteria.[26] A briefing paper to the Minister regarding potential reform of the CMA dated 25 June 2021, days before the Permits were granted, questioned whether the current petroleum permitting settings are "fit for purpose to achieve a managed transition away from fossil fuels" and noted that:[27]

> Granting a petroleum exploration permit creates a long-term commitment on the part of the Crown, including an expectation that subsequent mining permit will be granted in the event a commercial discovery is made.

3.3 The ultimate purpose of granting a PEP is to further the exploitation and combustion of fossil fuels,[28] and PEP holders are incentivised to apply for a PMP.[29]

3.4 The fact that a PEP comes with a clear expectation that a PMP will be granted means that a decision on whether to grant a PEP must be taken with a view to the likely consequences of commercial quantities of fossil fuels being found and exploited.

[23] See CMA, ss 30(2) and 32. Exploration as defined in s 2.
[24] CMA, s 35(5)(a).
[25] CMA, s 32(3).
[26] As set out at CMA, ss 32(3) and 29A.
[27] Affidavit of Phoebe Nikolaou, dated 2 May 2022 (**Nikolaou**), Exhibit T [**305.2169**].
[28] As the High Court recognised: HC Judgment at [80(b)] [**101.0062**], undisturbed on appeal.
[29] Decker at [50] [**201.0122**].

The decisions to grant the Permits and the Minister's evidence

3.5 The Permits were granted as part of the Government's "Block Offer 2019" tender process. In accordance with the 2018 amendments to the CMA, it was limited to onshore blocks in Taranaki.[30] The public tender process for Block Offer 2019 was launched on 27 July 2020.[31] Bidding closed on 4 November 2020.[32]

3.6 Shortly before the decisions in issue were made, the Climate Change Commission (**CCC**) published advice to the government on the first three emissions budgets.[33] The CCC's advice was that Aotearoa was *not* on track to meet the 2050 Target.[34] The CCC proposed emissions budgets to enable the 2050 Target to be met requiring near-complete decarbonisation where technically and economically possible,[35] and noted says that "gross emissions of long-lived GHGs need to be reduced *to the maximum extent possible* to set Aotearoa up to meet and sustain" the 2050 Target.[36]

3.7 The decisions to grant the Permits were made and announced on 29 June 2021. The decision-making process was described for the High Court in an affidavit by Ms Fox. In making the decisions to grant the Permits, Ms Fox almost exclusively relied on bid-specific recommendations prepared by Dr John Decker, Principal Exploration Geologist in the Petroleum and Minerals team of MBIE's Energy and Resources Markets branch and received by Ms Fox on 22 June 2021.[37] Ms Fox also says she was independently aware of the CCC's advice.[38] Ms Fox also did not provide any evidence that she considered the concept of a "just transition".

4. CLIMATE CHANGE IS A MANDATORY RELEVANT CONSIDERATION

4.1 The Court of Appeal was wrong to find that climate change implications are not mandatory relevant considerations for an evaluation of whether granting these Permits was "for the benefit of New Zealand".

[30] Affidavit of Phillippa Jane Fox, dated 1 June 2022 (**Fox**) at [25] **[201.0176]**. Crown Minerals (Petroleum) Amendment Act 2018.
[31] Fox at [28] **[201.0176]**.
[32] Fox at [28] **[201.0176]**.
[33] Climate Change Commission *Ināia tonu nei: A low emissions future for Aotearoa* (31 May 2021) (**CCC Advice**) **[304.1377]**.
[34] CCC Advice at 86 – 90 **[304.1478]**.
[35] CCC Advice at 65 [**304.1457**]
[36] CCC Advice at 76, emphasis added [**304.1468**].
[37] Fox at [69] **[201.0191]**.
[38] Fox at [50] [**201.0186**].

4.2 Mandatory relevant considerations are matters that a decision maker *must* have regard to when exercising their discretion;[39] a failure to weigh a mandatory relevant consideration will vitiate the decision-making.[40] They may be expressly prescribed by the statute itself or implied. Implied mandatory relevant considerations are "factors which are 'so plainly relevant' when assessed against the purpose of the legislation that Parliament would have intended them to have been taken into account by a reasonable decision maker."[41]

The High Court decision

4.3 Justice Cooke recognised the connection between mining and climate change as a matter of fact and common sense.[42] However, he went on to find that climate change was not a relevant consideration (either permissible or mandatory) in the administrative law sense, because:

(a) The purpose section effectively *deems* petroleum exploration and mining to be beneficial to Aotearoa, irrespective of potential harmful impacts.[43]

(b) Climate change considerations are addressed outside of the Crown minerals regime by other legislation and authorities.[44]

(c) The conflict between promotion of mineral extraction and the need to address climate change has been addressed through the 2018 amendments to the CMA, not by imposing mandatory considerations.[45]

(d) The CMA provides a "carefully crafted" roadmap that explains to a decision maker how they should take into account expressly mandatory considerations. No such no machinery exists for climate change considerations.[46]

4.4 The CCRA had no effect on this analysis. His Honour viewed the permissive language contained in s 5ZN as a "complete answer" to any

[39] Phillip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thompson Reuters, Wellington, 2021) (**Joseph**) at [23.2.3(2)].
[40] *Joseph* at [23.2.3(1)] and *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.
[41] *Vogel v Commissioner of Crown Lands* [2018] NZAR 942 (HC) at [81].
[42] HC Judgment at [58] **[101.0055]**. It has not been argued by the respondent that the impact of the permits on climate change can be ignored because it is small or uncertain.
[43] HC Judgment at [73] **[101.0060]**.
[44] HC Judgment at [66]–[68] [**101.0058**].
[45] HC Judgment at [73]–[74] **[101.0060]**.
[46] HC Judgment at [72] **[101.0059-101.0060]**.

suggestion that the Climate Change Response (Zero Carbon) Amendment Act 2019 (**Zero Carbon Act**)[47] may have influenced the importance of climate change considerations in the context of statutory decisions concerning fossil fuel extraction,[48] and that the generality of that provision cannot override the specificity of the CMA.[49]

The Court of Appeal decision

4.5 The Court of Appeal unanimously dismissed the appeal. However, the Court was divided on the effect of the phrase "for the benefit of New Zealand" and the relevance of s 5ZN of the CCRA.[50]

Majority judgment

4.6 Justices French and Gilbert agreed with Cooke J.[51] They considered s 1A deems petroleum extraction to be for the benefit of Aotearoa for the following reasons:

(a) The clear wording of the purpose provision–specifically its use of the word "promote"–demonstrates that the CMA is concerned with exploitation only, not managing environmental considerations.[52]

(b) The MPP supports their interpretation. It states that within the context of the CMA, the Minister considers "the benefit of New Zealand" is increasing wealth through petroleum mining. Other, non-financial, benefits such as environmental benefits are dealt with by other legislation and are therefore "carved out" of the CMA's ambit.[53]

(c) A series of High Court decisions–*Greenpeace of New Zealand Inc v Minister of Energy and Resources, Greymouth Petroleum Mining Group Ltd* and *Rangitira Developments Ltd v Sage*–also highlighted that the purpose of the CMA was exploitation and environmental considerations were to be dealt with elsewhere.[54]

(d) The legislative materials relating to the 2013 amendment (which inserted s 1A) and the 2023 amendment (which replaced

[47] See **Appendix 2 (Legislative Response)** below at [8.3].
[48] HC Judgment at [77] **[101.0061]**.
[49] HC Judgment at [78]–[79] **[101.0061-101.0062]** (footnotes omitted).
[50] CA Judgment at [7] [**101.0093**].
[51] CA Judgment at [39] and [64] [**101.0103**] and [**101.0110**].
[52] CA Judgment at [39] [**101.0103**].
[53] CA Judgment at [42] [**101.0104**], MPP at [1.3] [**301.0022**].
[54] CA Judgment at [45]–[47] [**101.0105**].

"promote" with "manage") reveal that the purpose of the CMA was exploitation of minerals.[55]

4.7 Their interpretation of s 1A, together with the following factors, led French and Gilbert JJ to the conclusion that climate change considerations were not mandatory relevant considerations.[56]

(a) The extractive purpose of the Act is not consistent with a requirement to consider climate change implications.[57]

(b) There is no reference to climate change considerations in the CMA, including s 29A which outlines factors the Minister must take into account when making a decision.[58]

(c) The MPP supports the extractive purpose of the Act and states that environmental considerations are dealt with outside the CMA.[59]

(d) The CMA does not contain any guidance or machinery to assist the decision maker in considering climate change.[60]

4.8 Justices French and Gilbert ostensibly left open the possibility the Minister may be permitted to consider Aotearoa's net-zero by 2050 Target, emissions budgets, or emissions reductions plans under s 5ZN of the CCRA when exercising powers under the CMA.[61] However, the logical conclusion of their reading of the purpose section is that the Minister is legally prevented from doing so.

Minority judgment

4.9 Justice Mallon held that the phrase "for the benefit of New Zealand" has substantive content. It is a "touchstone" for how the CMA is to be interpreted.[62] Her Honour held that Parliament included the phrase for a reason. It signals that not all mining will necessarily benefit New Zealand.[63]

4.10 Her Honour also considered s 5ZN was a permissive relevant consideration. Given the climate emergency in which "the combustion of

[55] CA Judgment at [40]–[41] [**101.0103**] and [52]–[63] [**101.0106**].
[56] CA Judgment at [65] and [66] [**101.0110**].
[57] CA Judgment at [64]–[65] [**101.0110**].
[58] CA Judgment at [65] [**101.0110**].
[59] CA Judgment at [42]-[44] [**101.0104**].
[60] CA Judgment at [66] [**101.0110**].
[61] CA Judgment at [88] [**101.0117**].
[62] CA Judgment at [121] [**101.0126**].
[63] CA Judgment at [117] [**101.0124**].

fossil fuels is the main cause of climate change", it would be "odd (and potentially contrary to the benefit of New Zealand)" if a decision maker was precluded from taking into account the s 5ZN considerations.[64] That is especially so given the explicitly permissive language of the section.[65] Her Honour considered that interpretation was not precluded by:

(a) Sections 4, 22 and 29A of the CMA: the mandatory relevant considerations provided for in those sections did not purport to be exhaustive.[66]

(b) The case law relied on by the Court of Appeal: none of the judgments established that the only relevant considerations under the CMA are those that promote mining or that environmental considerations were never to be considered under the Act.[67]

(c) The 2018 and 2023 legislative amendments: neither amendment illustrated that when the decision was made the CMA had a purely exploitation focus to the exclusion of other considerations.

4.11 Justice Mallon left open whether the matters were, or could be, mandatory.[68] The decision-maker, in Mallon J's judgment, had proper regard to the 2050 Target (the only factor listed in s 5ZN in existence at the time she made her decision).

Purpose statement requires consideration of whether proposed activity is *in fact* for the benefit of New Zealand

The appellant's interpretation of the purpose section

4.12 The purpose of the CMA is "to promote prospecting for, exploration for, and mining of Crown owned minerals *for the benefit of New Zealand*".[69] To grant a permit under s 29A, the decision maker must be satisfied that the proposed work programme is consistent with that purpose, bearing in mind the expectation noted above that a PEP will result in a PMP if sufficient petroleum deposits are found.

4.13 That purpose section is a qualifier on the type of mining the Act is intended to promote and facilitate, being extraction that is "for the benefit of New

[64] CA Judgment at [127] [**101.0128**].
[65] CA Judgment at [127] [**101.0128**].
[66] CA Judgment at [115] [**101.0124]**.
[67] CA Judgment at [131]–[137] [**101.0129**].
[68] CA Judgment at [112] [**101.0123**].
[69] CMA, s 1A(1) (emphasis added).

Zealand". This requires an assessment of advantages and disadvantages of each proposed extraction.

The Court of Appeal majority interpretation of the purpose section

4.14 Justices French and Gilbert rejected the appellant's interpretation. Instead, it preferred the narrower interpretation adopted by Cooke J, focusing exclusively on the potential economic return from commercial extraction of Crown owned minerals (and leaving other factors relevant to whether the permitted activity in fact benefits Aotearoa to be addressed by other statutes).[70] That is, "Parliament's assertion of a deemed fact rather than a qualifying touchstone".[71] The majority went on to determine Cooke J's interpretation was "undoubtedly correct".[72]

The Court of Appeal majority's interpretation is wrong

4.15 The Court of Appeal majority's interpretation of s 1A is wrong for a number of reasons. The Court's interpretation:

(a) sits uncomfortably with the wider context of the CMA;

(b) is inconsistent with fundamental common law principles, tikanga, the New Zealand Bill of rights Act (NZBORA) and Aotearoa's international obligations;

(c) would lead to perverse outcomes; and

(d) is not supported by the legislative history of the CMA.

4.16 The Court was also wrong to conclude that climate change considerations are sufficiently dealt with by legislation other than the CMA, and that a lack of guidance or machinery in the CMA prevents them from being considered.

Wording and context within the CMA

4.17 The starting point is that when Parliament uses words they are intended to mean something. Conversely, the Court of Appeal's interpretation of s 1A(1) has the effect of striking through the words "for the benefit of New Zealand". That also renders s 29A(2)(a)(i) redundant; a proposed work

[70] CA Judgment at [39] and [64] [**101.0103**] and [**101.0110**]; HC Judgment at [73] [**101.0060**].
[71] CA Judgment at [33] [**101.0101**].
[72] CA Judgment at [39] [**101.0103**].

programme could never be inconsistent with the purpose of the Act if that purpose is simply to promote mining activities come what may.

4.18 The interpretation of s 1A(1) also matches the approach recently taken by the Court of Appeal in *Movement.*[73] That case concerned the purpose of the Land Transport Management Act (**LTMA**) which is "to contribute to an effective, efficient, and safe land transport system *in the public interest*."[74] The Court held that even though social, economic, cultural, and environmental wellbeing was not explicitly provided for in the purpose provision, the concept of the "public interest" was wide enough to capture them (and all interests that require considerations in determining how to achieve an effective, efficient and safe transport system).[75] While that did not require the particular outcome sought by *Movement* – a reduction in emissions from land transport – the purpose statement requires these interests to be considered. [76]

4.19 While s 29A does not expressly refer to climate change, this does not further the interpretation issue. On the SFCS interpretation, the benefit of New Zealand requires substantive assessment (including with respect to climate change). Accordingly, the absence of climate change as a listed factor in s 29A is not germane. As Mallon J recognised, the considerations in s 29A are not exhaustive:[77]

> None of these provisions [ss 4, 22 and 29A] state that they are the only considerations relevant to the s 25 discretion. They are therefore not necessarily the only relevant (mandatory or otherwise) considerations. Ultimately, the scheme and purpose of the Crown Minerals Act provides the limits of the available discretion under s 25 in relation to a particular application under the Act.

Consistency with the common law, tikanga and NZBORA

4.20 The interpretation supported by SFCS is consonant with the common law principle of *jus publici* and with the public trust doctrine which recognise that certain resources are controlled by and protected by the State, and with the concept of kaitiakitanga.

4.21 As this Court held in *Fitzgerald* clear language would be required to supersede these.[78] No such language is contained in the CMA. To the

[73] *Movement v Waka Kotahi New Zealand Transport Agency* [2025] NZCA 86 (**Movement**).
[74] Land Transport Management Act 2003, s 3.
[75] In doing so it rejected *All Aboard Aotearoa Inc v Auckland Transport* [2022] NZHC 1620 which adopted a narrow interpretation of s 3: *Movement* at [80]–[92] and [112].
[76] *Movement* at [82].
[77] CA Judgment at [115] [**101.0124**].
[78] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [210].

contrary, the CMA uses the language of guardianship and therefore recognises that exploitation of natural resources is not purely a political matter but should be for the benefit of New Zealand. As such, the legality of any decision made under the CMA depends on the decision-maker asking the right question, weighing up mandatory relevant considerations and obtaining suitable and sufficient information. If that does not occur, the decision maker is accountable to the Courts by way of judicial review. This is a fundamental protection for the public interest.

4.22 The Court of Appeal's interpretation is inconsistent with the New Zealand Bill of Rights Act (NZBORA). The NZBORA applies to the decision maker in determining whether to grant a PEP.[79] Climate change poses a real threat to the enjoyment of a number of rights under the NZBORA including s 20, the right to enjoy culture.

The "deeming" approach is inconsistent with Aotearoa's international obligations

4.23 Legislation should where possible be read consistently with Aotearoa's international obligations.[80] Aotearoa has accepted obligations under the UN Nations Framework Convention on Climate Change (**UNFCCC**) and the Paris Agreement to take steps to reduce GHG emissions for the purposes of keeping global warming at or below 1.5˚C.[81] These obligations are relevant to administrative decisions that directly affect Aotearoa's ability to comply with them – such as whether to promote and facilitate further long-term commercial petroleum mining operations. Accordingly, deeming activities which facilitate the extraction and combustion of fossil fuels to be for the benefit of New Zealand runs counter to our international commitments to address climate change.

The "deeming" approach would lead to perverse outcomes

4.24 An interpretation that deems exploration or mining to be for the benefit of New Zealand it would lead to perverse outcomes. If an application ticks the s 29A boxes, it must be approved, even if it is clear to the decision-maker that the proposed exploration and mining would, as a matter of fact, be of no economic or other benefit to Aotearoa. For

[79] New Zealand Bill of Rights Act 1990, s 3.
[80] *New Zealand Airlines Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Helu v Immigration and Protection Tribunal* [2016] 1 NZLR 298 (SC) at [143] and [144].
[81] These obligations require Aotearoa to anticipate, prevent, or minimise the causes of climate change and work toward reaching global peaking of GHG emissions as soon as possible and to enact rapid reductions thereafter: see Appendix 2 below at [8.1]–[8.2].

example, suppose that our trading partners introduce severe trade sanctions for ongoing exploration for petroleum. On the Court of Appeal majority's interpretation, the decision-maker would have no choice but to continue to grant permits despite the damage to New Zealand's interest in international trade.

The legislative history does not support the "deeming" approach

4.25 The amendments to the CMA also do not assist the Court of Appeal's interpretation. The Crown Minerals (Petroleum) Amendment Act 2018 limited potential petroleum extraction to on-shore Taranaki by providing that a person could not apply for a permit outside of onshore Taranaki "despite anything contrary in the Act (including section 1A, 25(1)(b)(i) and 32)".[82] Justices French and Gilbert were wrong to conclude that the inclusion of "despite" supports their interpretation.[83] As Mallon J stated, the reference to "despite" simply qualified the rights contained in ss 25(1)(b)(i) and 32 (namely those of a person to apply for a permit, and the right to exchange a permit for an exploration permit) outside the onshore Taranaki region.[84]

4.26 In 2023 Parliament replaced the word "promote" in s 1A(1) with "manage". Justice Mallon correctly identified that the replacement of "promote" with "manage" does not imply that the previous language deemed exploration and mining to be desirable. It does not imply anything more than that the previous wording contained a strong presumption in favour of that activity.[85]

4.27 In reaching their conclusion French and Gilbert JJ relied heavily on the legislative materials relating to the 2023 amendment. However as, Mallon J identified, while the Cabinet papers in question describe the Executive's views on the legislation, they "do not usurp the Court's role to interpret Parliament's intent as enacted".[86]

Climate change considerations are not sufficiently dealt with by other legislation

4.28 The Court of Appeal's assessment of the broader legislative framework and its impact on the interpretation of the CMA was based upon incorrect

[82] Crown Minerals (Petroleum) Amendment Act 2018, s 5.
[83] CA Judgment at [53] [**101.0107**].
[84] CA Judgment at [138(a)] [**101.0132**].
[85] CA Judgment at [138(b)] [**101.0132**].
[86] At fn 121 [**101.0132**].

assumptions that the climate change implications of commercial fossil fuel extraction are in fact addressed by other statutes.[87] That is not the case.

4.29 First, it is inconsistent with *Smith v Fonterra Co-Operative Group Ltd* in which this Court held that the CCRA does not purport to "cover the entire field" of Aotearoa's climate change response.[88] As outlined in **Appendix 1 (Climate Change),** while the CCRA provides a framework, it does not set out a comprehensive climate response, let alone one that specifically addresses the climate implications of petroleum.[89] No such legislative response exists in New Zealand.

4.30 The climate change implications of land based commercial fossil fuel extraction are also not addressed by any other statutes. Until recently, climate change implications were expressly excluded from being considered in the context of Resource Management Act (**RMA**) decisions, per s 104E of the RMA and this Court's decision in *West Coast ENT Inc v Buller Coal Ltd (Buller Coal)*.[90] While s 104E has since been repealed, a recent Court of Appeal decision employed the concepts of remoteness and tangibility from Buller Coal in assessing whether an environmental effect must be considered under s 104(1)(a).[91]

4.31 An appeal from this decision was heard by this Court in November 2023.[92] Accordingly, it is presently an open question whether a broad or narrow approach will be taken under the RMA to "scope 3"/"indirect"/"end use" emissions associated with petroleum exploration activity.[93] But, as the law currently stands, consideration of environmental effects under the RMA is unlikely to sufficiently grapple with climate change implications, particularly the impact of the combustion of exported fossil fuels.

4.32 In any event, regardless of the scope of climate issues under the RMA:

(a) future projects may avoid this scrutiny either as result of foreshadowed reforms of the resource management system or by being assessed under the Fast Track Approvals Act 2024;[94] and

[87] CA Judgment at [44], [68] and [71] [**101.0104**], [**101.0110**] and [**101.0111**]. See also MPP at [1.4] [**301.0025**].
[88] *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 (**Smith v Fonterra**) at [100].
[89] Appendix 2, below at [8.3]–[8.7].
[90] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.
[91] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 698.
[92] *Sustainable Otakiri Incorporated v Whakatāne District Council* [2023] NZSC 35.
[93] For a broad approach see *(R) Finch v Surrey County Council* [2024] UKSC 20.
[94] Fast Track Approvals Act 2024, s 42. It also applies to marine consents under the EEZ and land access arrangements under ss 61 or 61B of the CMA.

(b) if a PMP relates to a marine mining project that is beyond New Zealand's territorial limits, the project would not need a resource consent; [95]

(c) granting a PEP risks being, or being perceived as, inconsistent with New Zealand's international obligations and damaging its reputation particularly with Pacific island countries;[96] and

(d) exploration is potentially harmful in that the existence of known petroleum reserves creates a risk of departing from the commitment to transition to a low carbon economy for short term reasons even if it is worse for Aotearoa overall.

4.33 Additionally, New Zealand's environmental regulations do not apply to emissions from the combustion of petroleum products extracted in Aotearoa under the CMA, but burned in other jurisdictions. Nor is it safe to assume they will be dealt with appropriately by the laws of unknown destination states. However, because of the global nature of climate change, the environmental impacts will be felt equally here. As a result, interpreting the CMA to require consideration of climate change implications is the only way to guarantee that those matters will be considered in respect of the extraction and burning of fossil fuels resources owned by the New Zealand Crown.

Guidance or machinery

4.34 The Court of Appeal noted that a lack of machinery or guidance suggests climate change was not intended to be taken into account. The Court considered *Waratah Coal*, in which the governing legislation expressly required sustainable development to be considered, bolstered that conclusion.[97] That was incorrect.

4.35 It is not uncommon to have a broad statutory standard that requires consideration of multiple competing interests in the interests of, or for the

[95] For off-shore mining a marine consent, rather than an RMA consent, is required. Section 59(5) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 provides that in granting a marine consent a decision maker "must not have regard to … the effects on climate change of discharging greenhouse gases into the air".
[96] Ministry of Business, Innovation and Employment "Regulatory Impact Statement: Amendments to the Crown Minerals Act 1991" (15 May 2024) at [85]–[88].
[97] CA Judgment at [66]–[67] [**101.0110**].

benefit of, the public without guidance or machinery. Take, for example, both *Movement* and *NZME v Commerce Commission.*[98]

4.36 In the present context, there is no single correct way of addressing climate change issues, for Aotearoa to meet its emissions target. Scientific understanding of climate issues and what is needed to tackle them are continuously evolving.

4.37 Additionally, concern about a lack of guidance in the s 25 context is inconsistent with the Court of Appeal's finding that a consideration climate change implications may be necessary under s 4. That section also does not provide any clear guidance as to how the Minister must approach the principles of Te Tiriti. Section 14(1)(b) of the CMA requires minerals programmes to set out or describe how the Minister and the chief executive will have regard to the principles of Te Tiriti for the purposes of the minerals programme. But the Act itself provides no guidance as to what is required in that regard. That is a matter that has been left to the courts to develop, including through litigation of this kind.[99]

The "benefit of New Zealand" is a broad concept and must involve a proper consideration of climate change

4.38 The concept of "the benefit of New Zealand" is an open one. As with the "public interest" in the LTMA, "for the benefit of New Zealand" is sufficiently wide to capture "the multiple and potentially competing interests that may need to be balanced in making decisions" under the CMA.[100] Similarly, in *NZME v Commerce Commission* the Court of Appeal has held that "benefit to the public" in the Commerce Act 1986 was not limited to economic and in market considerations. Instead, it may include "anything of importance to the community as a whole".[101]

4.39 What those interests are, and what is relevant to the benefit of New Zealand, will depend on the circumstances and may change over time.[102]

4.40 Presently, there is no more relevant consideration to a decision to grant a PEP than climate change. This follows from the undisputed facts that

[98] See also *Manawa Energy Ltd v Electricity Authority* [2022] NZHC 1444 at [71]. Other legislative examples include Marine Reserves Act 1971, s 5(6)(e); Immigration Act 2009, s 16(1)(a); and Public Works Act 1981, s 228.
[99] The CMA also allows for applications for extraction permits in respect of minerals that are not subject to a minerals programme. Such applications remain subject to s 4.
[100] *Movement* at [82] and [86].
[101] *NZME v Commerce Commission* [2018] NZCA 389, [2018] 3 NZLR 715 at [73].
[102] See also Legislation Act 2019, s 11

climate change is caused by the combustion of fossil fuels and poses a direct and immediate threat to human life, and the need to transition urgently to a low carbon economy. In the language of mandatory relevant considerations, climate change considerations are "so plainly relevant" to determining whether a PEP is for the benefit of New Zealand that no reasonable decision maker could fail to take them into account.

4.41 As we go onto explain, this includes, but is not limited to, the specific matters listed in s 5ZN and climate change in a broader sense.

Section 5ZN

4.42 Section 5ZN of the CCRA reads:

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

4.43 The Courts below have expressed a range of views on the legal status of s 5ZN:

(a) Justice Cooke considered the matters listed in s 5ZN were irrelevant considerations and could not lawfully be taken into account.

(b) The Court of Appeal majority left open the question whether the s 5ZN factors could be permissive relevant considerations. But their interpretation of s 1A implies that they are irrelevant considerations, following Cooke J's reasoning.

(c) Justice Mallon considered the factors were permissive relevant considerations, and left open whether they might be mandatory.

4.44 The appellant's position is that the factors in s 5ZN are mandatory relevant considerations but do not reflect the full scope of climate change considerations required to be assessed under the CMA.

4.45 The immediate effect of this provision is that the s 5ZN factors will never be irrelevant considerations in administrative decision making, unless explicitly excluded.

4.46 The permissive language was considered by the Select Committee reviewing the Bill. Specifically, the Committee considered:[103]

(a) The possibility of identifying statutory decisions in respect of which long-term climate objectives should be mandatory considerations. This was (unsurprisingly) considered to be impractical.

(b) A potential regulation-making power enabling the government of the day to identify specific statutory decisions where consideration of the emissions target should be mandatory. In this respect, the Committee urged a degree of caution, given the constitutional implications of what is in effect a Henry VIII clause.

4.47 However, the Committee also expressly recommended the removal of then proposed subsection (2) of (what was to become s 5ZN), which provided that a statutory decision would not be invalidated if the 2050 Target had not been taken into account. The express purpose of this recommendation, which was ultimately accepted by Parliament, was to "remove any restrictions it would have on how common law may develop regarding the status of the target".[104] In other words, in enacting s 5ZN, Parliament was directly concerned with avoiding any suggestion that the phrasing of the section prevented findings by the courts that the 2050 Target was a mandatory consideration in some circumstances.

4.48 The CCRA provides a framework that will guide the Government and private actors over time, it not the statute under which decisions that will determine the adequacy of Aotearoa's climate response are made. Section 5ZN should be read against this background. It recognises that responding to climate change will involve countless decisions by countless decision-makers. Its effect is to ensure no administrative decision can be invalidated because the decision-maker considered the 2050 Target.

4.49 Contrary to the finding of the High Court, this does not mean that the 2050 Target will only ever be a permissible consideration.[105] A mandatory relevant consideration can arise by implication even where a statute is permissive.[106]

[103] Climate Change Response (Zero Carbon) Amendment Bill 136—2 (**Select Committee Report**) at p 14.
[104] Select Committee Report at p 15.
[105] HC Judgment at [77] [**101.0061**].
[106] Joseph at [23.2.3(4)].

4.50 An outcome that a permissible consideration is *never* to be mandatory would require a specific provision to that effect. Such provision was proposed, but removed by the Select Committee to allow the courts to consider the status of the 2050 and wider climate change considerations depending on their relevance to each specific type of statutory decision-making power.

4.51 That means, depending on the context of a particular decision the 2050 Target may be a mandatory relevant consideration.

4.52 For the reasons set out above, based on SFCS's interpretation of the purpose provision, the s 5ZN factors are so plainly relevant that they are not merely permissible but were mandatory relevant considerations for the Minister in determining whether the Permits were for the benefit of New Zealand.

Insufficient consideration of s 5ZN and Aotearoa's 2050 Target

4.53 In making her decision, Ms Fox says she relied almost exclusively on MBIE's recommendations.[107] She was also independently aware of (a) the CCC's advice,[108] (b) ss 5ZN and 5ZO of the CCRA which enabled her to take climate change considerations into account[109] and (c) other workstreams within the government at that time relating to its general response to climate change.[110]

4.54 The recommendations did not address the climate change implications of the decision in any great detail. Climate change is included in Part 14 of the recommendations.[111] Part 14 begins by setting out s 5ZN and stating that "as a permissible consideration" the decision-maker was open to, but not required to, take the matters listed into account. Part 14 also summarised the CCC's 2021 advice as follows:[112]

(a) The speed at which New Zealand needs to reduce non-renewable gas use for generating electricity needs to be carefully managed to ensure reliability and affordability of electricity.

[107] Fox at [69] **[201.0191]**.
[108] Fox at [49]–[50] [**201.0186**].
[109] Fox at [43] [**201.0181**].
[110] Fox at [56] and [75] **[201.0188**] and [**201.0194]**.
[111] Memorandum – Bid 60742 under Block Offer 2019 at [14] [**305.1863**] (Riverside); Memorandum – Bid 60749 under Block Offer 2019 at [14] [**305.1915**] (Greymouth).
[112] [**305.1864**] at [14.8] (Riverside); [**305.1915**] at [14.8] (Greymouth).

(b) The Government should develop a National Energy Strategy that sets a renewable energy target that 50% of all energy consumed comes from renewable sources by the end of 2035.

4.55 It is not in dispute that Ms Fox did consider s 5ZN of the CCRA as she believed that the section was relevant to her decision. She did not understand it to be a mandatory relevant consideration. Instead, she took it into account as a "non-specific permissive consideration".[113] As the High Court found, consideration given to 5ZN was effectively notional.[114] That finding was not seriously challenged on appeal.

4.56 The recommendations' discussion of s 5ZN predominantly related to whether granting the permits would be conceptually inconsistent with the existence of the 2050 Target and the CCC's recommendation that 50% of energy consumed should be from renewable sources by the end of 2035.[115] The recommendations considered that the grant of the Permits was not inconsistent with the 2050 Target.[116]

4.57 However, the recommendations avoided any substantive analysis of the actual impact of the PEPs on the 2050 Target by simply noting that:

(a) The *majority* of combustion of petroleum produced from mining in Aotearoa New Zealand is combusted overseas. Emissions from that petroleum will therefore not be domestic to Aotearoa and will therefore not affect domestic net emissions.[117]

(b) Aotearoa's domestic target relates to net GHG emissions, and therefore allows for a degree of continued fossil fuel combustion. It therefore does not directly *require* complete and immediate cessation of non-renewable energy use.

(c) The National Energy Strategy recommended by the CCC had not yet been prepared, but the CCC had indicated that it should involve a smooth and appropriately sequenced phase down from fossil fuels and scale up of renewable electricity generation.

[113] Fox at [47] [**201.0186**].
[114] HC Judgment at [80(a)] [**101.0062**].
[115] [**305.1863**] (Riverside) and [**305.1915**] (Greymouth). Significant passages are reproduced in Fox at [45] [**201.0182**].
[116] Fox at [45] [**201.0182**]. See also [**305.1863**] at [14.11] (Riverside); [**305.1916**] at [14.11] (Greymouth).
[117] Fox at [45] [**201.0182**].

4.58 That analysis was inadequate.[118] In particular, Ms Fox failed to appreciate or grapple with the clash between MBIE's advice and the CCC's advice – of which Ms Fox was aware – that "[g]ross emissions of long-lived greenhouse gases need to be reduced to the maximum extent possible to set Aotearoa up to meet and sustain the target of net zero by 2050".[119] That is, the 2050 Target (despite its name) is not just a point year target for 2050, but applies to "each subsequent calendar year".[120] As emphasised by the CCC, this requires transitioning to a low carbon economy as rapidly as possible. The conflict between this requirement and the ongoing exploration for petroleum is left unaddressed.

No consideration of broader climate implications

4.59 In order to be satisfied that the permits were for the benefit of New Zealand, per ss 29A(2)(a)(i) and 1A, Ms Fox needed to consider the wider climate change implications of her decision.

4.60 In particular, and in addition to Aotearoa's 2050 Target, she was required to turn her mind to Aotearoa's obligations under the UNFCCC and the Paris Agreement and the effect of the activities permitted under the Permits on its ability to comply with those obligations, and the scientific consensus that:

(a) achieving net-zero GHG emissions by 2050 is required in order to keep global warming under 1.5 degrees and avoid catastrophic climate change with significant effects on Aotearoa New Zealand, its environment, its peoples, and its economy; and

(b) an immediate stop of new oil and gas extraction projects is required to reach that goal including the International Energy Association's advice.[121]

4.61 The MBIE recommendations, on which Ms Fox relied, did not address these factors.

4.62 To the extent Ms Fox says she was aware of other climate change related workstreams within the government at that time, there is no evidence that

[118] *New Zealand Fishing Industry Assoc Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 566.
[119] CCC Advice at 76, emphasis added [**304.1468**]. See also Climate Change Commission *Advice on the direction of policy for the Government's second emissions reduction plan* (22 November 2023) at pp 40 and 163.
[120] CCRA, s 5Q(1)(a).
[121] International Energy Agency *Net Zero by 2050: A Roadmap for the Global Energy Sector* (4th rev, IEA, October 2021) at 20, 21 (**IEA*, Net Zero by 2050***) [**303.1105**].

she considered these in making her decision. Her consideration of climate change was therefore solely focused on the domestic position and insufficient even in that context.

4.63 The recommendations also did not engage with the climate change implications of the particular decision being made. What was required was, at least, a substantive consideration of the potential volume of GHG emissions generated by both the exploration permitted under the Permits, and the commercial mining operations that may ensue, over the likely duration of those operations.

4.64 It is possible that in taking the above into consideration, the Minister could have been satisfied that granting the PEPs was for the benefit of New Zealand. However, the point is that she did not consider them at all.

References to a "just transition" and other workstreams are insufficient to support the Permits

4.65 The Court of Appeal considered the Ms Fox had regard to the need for a just transition.[122] The Court did not accept that the Minister had provided *ex-post facto* justifications for, or "backfilled" her decision with respect to considerations of a just transition.[123]

4.66 That is contrary to the evidence. All evidence about just transitions and the Government's related workstreams is from witnesses who did not have any involvement in the decisions at issue here.[124] Whatever the merits of that work, it was not considered as part of the decision-making process in respect of the Permits.

4.67 Neither the workstreams, nor the need for a just transition were not referred to in the primary evidence of what the decision-maker took into account when she made the decisions, being the recommendation memoranda[125] and the decision-makers notes.[126] The need for a just transition is not addressed in Ms Fox's affidavit.

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[122] CA Judgment at [90] [**101.0117**].
[123] CA Judgment at [89] and [90] [**101.0117**].
[124] For example, Affidavit of Justine Elizabeth Cannon, dated 13 June 2022 **(Cannon**) at [60.2] [**201.0089**]; and Affidavit of James Paul Soligo, dated 13 June 2022 (**Soligo**) at [5] [**201.0149**].
[125] **[305.1837]** (Riverside); **[305.1891]** (Greymouth).
[126] **[305.2161]**. These notes refer to "smooth transition". This is a reference the need to manage the phase down of fossil fuels to ensure that "electricity and other energy remains reliable and affordable throughout the transition" (Fox affidavit at [18] **[201.0174]**). It is not a reference to the concept of a "just transition".

4.68 Even if Ms Fox did consider the need for a just transition (which is not accepted) that is not sufficient. It is not enough to note that climate change implications are being dealt with elsewhere. If they are being addressed elsewhere, the Minister is required to engage with what is being done, by whom and in what context. Further, the concept of a just transition does not represent a comprehensive consideration of climate change implications. It is an aspect of climate change implications, but one to be considered alongside wider implications.

5. THE MINISTER FAILED TO HAVE PROPER REGARD TO TE TIRITI

Section 4 of the CMA

5.1 The principles of Te Tiriti are an express mandatory relevant consideration under s 4 of the CMA, which provides that persons exercising functions and powers under the CMA "shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".

Te Tiriti consideration in this case

5.2 It is not in dispute that the Minister attempted to consider Te Tiriti obligations. MBIE carried out a series of consultation with local iwi in respect of Block Offer 2019.[127] Iwi responses and MBIE's recommendations in respect of those responses were presented to Ms Fox for consideration, and were considered when the decisions were made.[128]

5.3 It is also not in dispute that this *did not* include consideration of the climate change implications of the proposed activity (or the mining that may follow), and how those may impact on Māori, their cultural practices and well-being, and their familial and spiritual relationships.

5.4 Instead, MBIE's consultation was limited to the steps described by the MPP.[129] It was primarily focused on seeking iwi input on specific areas for potential exclusion from any PEPs, or which may be subject to specific conditions.[130] As the Court of Appeal summarised, the Minister focussed on "localised issues associated with the particular bids and engagement with the directly affected iwi".[131]

[127] Decker at [73]-[76] **[201.0127].**
[128] Fox at [38]-[42] **[201.0180-201.0181]**.
[129] Decker at [75] **[201.0128]**.
[130] MPP at [2.4] and [2.6] [**301.0029**] and [**301.0030**]; HC Judgment at [101] **[101.0069]**.
[131] CA Judgment at [108] [**101.0122**].

5.5 The question for this Court is whether the required consideration of Te Tiriti principles in exercising power under the CMA is limited to localised impacts. The appellant says it is not.

High Court decision

5.6 Justice Cooke recognised that Te Tiriti *could* engage climate change issues, and that the Minister did not consider those issues in her Te Tiriti analysis.[132] However, he concluded that no error had been committed because no iwi with ancestral land in the Permit areas directly participated in the proceeding challenging the permits,[133] and it had not been suggested that there was a breach of Te Tiriti principles associated with the views of those iwi who were "directly affected" (in the sense that exploration would occur on their rohe).[134] The one iwi who had raised general climate concerns that iwi's rohe did not overlap with the Permit areas. Additionally, the wider impacts of climate change on Māori were being addressed through other government programmes and processes.[135]

Court of Appeal decision

5.7 The Court of Appeal largely adopted Cooke J's reasoning. The Court accepted that climate change could be relevant to decisions under the CMA via s 4, because Māori are particularly vulnerable to the impacts of climate change. However, the Court held that s 4 did not require the Minister to consider the wider impacts of climate change on Māori. Agreeing with Cooke J, the Court considered such implications "are being addressed elsewhere" and the Minister was therefore not required to "readdress" them.[136] Her focus on localised issues was sufficient to discharge her obligation under s 4.

5.8 While the Court of Appeal recognised that climate change considerations may be relevant under s 4, the effect of its decision is that they will only be relevant if raised by "directly affected" iwi.

What the principles of Te Tiriti requires in this context

5.9 The Crown's obligations under s 4 of the CMA were specifically considered in *Greenpeace*. As a starting point, in assessing compliance with s 4, the

[132] HC Judgment at [99] and [101] **[101.0068-101.0069]**.
[133] HC Judgment at [103]-[104] **[101.0069]**.
[134] HC Judgment at [106] **[101.0070]**.
[135] See also HC Judgment at [108]-[112] and [116] **[101.0070].**
[136] CA Judgment at [108] [**101.0122**].

Court must assess "whether, assessed on an objective basis, there has been meaningful good faith consultation and compliance by the Crown with Treaty obligations".[137] The Court also noted that:[138]

(a) Te Tiriti is a partnership between the government and Māori, which requires each to act towards the other "reasonably and with utmost good faith".

(b) The duty of the Crown is "not simply passive, but extends to active protection of Māori in the use of their land and water to the fullest extent practicable".

5.10 That is no different in the context of the CMA. The Waitangi Tribunal has examined the law that regulates the exploitation of petroleum and the corresponding effects on Māori interests.[139] In that context, the principle of active protection translates to a duty on the Crown to "protect Māori property rights and interests to *the fullest extent practicable*".[140]

5.11 The principles of Te Tiriti require more than consultation. The Crown has a duty of "active protection of Māori interests"[141] protected under Te Tiriti. That is particularly important if taonga are in a vulnerable state.[142] It may require the Crown to take "especially vigorous action" for the protection of vulnerable taonga.[143] This includes a duty to engage meaningfully with the potential impacts on core Māori cultural practices, interests, and understandings, including whanaungatanga and kaitiakitanga relationships between iwi and the natural environment.

5.12 Māori are particularly vulnerable to the effects of climate change.[144] Taonga are already in a vulnerable state. Large amounts of Māori land are already suffering high rates of erosion.[145] Marae and urupā near the coast or in floodplains are at increasing risk of flooding from sea-level rise and erosion. Taonga species are declining and mahinga kai areas are

[137] *Greenpeace of New Zealand Inc v The Minister of Energy and Resources* [2012] NZHC 1422 at [130].
[138] *Greenpeace* at [119]
[139] Waitangi Tribunal *The Report on the Management of the Petroleum Resources* (Wai 796, 2011).
[140] Waitangi Tribunal at [8.2.1].
[141] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2019] 1 NZLR 368 (SC) at [50].
[142] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (CA) at 517.
[143] *New Zealand Maori Council* at 517.
[144] See also **Appendix 1 (Climate Change)**, below at [7.6]–[7.7].
[145] Pörtner *et al* at [11.4.2].

disappearing.[146] Mātauranga relating to traditional practice is at risk of being lost forever.[147]

5.13 There is a direct relationship between commercial fossil fuel extraction and worsening climate change. Worsening climate change, in turn, directly affects Māori interests protected under Te Tiriti. The duty of active protection therefore requires those who make decisions about further fossil fuel extraction to actively consider them, including whether they are adequately addressed. This can be done in a multitude of ways, either as part of the relevant decision, processes under other statutes, or through means grounded in the tikanga, such as rāhui. However, ensuring that the particular decision does not infringe the principles of Te Tiriti requires the decision maker to turn their mind to it.

5.14 The Minister should have considered, at least, the effects that a failure to keep global warning under 1.5°C and avoid catastrophic climate change will have on the ability of tangata whenua to exercise the rights conferred under Article 2 of Te Tiriti.

Misapplication of Te Tiriti principles

5.15 Here, there was no consideration of the climate implications of the consented activities and the mining that may follow, or the catastrophic effects that worsening climate change has on Māori interests protected by Te Tiriti. Nor was any consideration given to what active protection meant in the context of those effects. The s 4 process was doomed to fail by following an MPP process that was blind to impacts of fossil fuel extraction beyond the immediate location of the activity and on Māori te katoa.

5.16 Climate change issues were not only not investigated, they were actively disregarded. One iwi actively opposed any PEPs being granted because of "serious concerns about the environmental impacts [of] exploration and mining" and that continued allocation of PEPs "goes against the commitment to move to a low emissions economy".[148] MBIE did not to seek to understand how these concerns were potentially addressed through the other government processes discussed in the Crown's evidence. MBIE simply ignored the concern, noting that it did not align with the CMA and what the Minister was required to consider.[149]

[146] MfE Report at 54 [**302.0730**].
[147] MfE Report at 54 [**302.0730**].
[148] **[302.0561]**.
[149] **[302.0562]**.

5.17 It is not enough for the Minister to note that climate change had been dealt with elsewhere.[150] What was required was a process under which the meeting of other statutory or non-statutory objectives in the CMA is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the Te Tiriti principles.[151] This is a substantial obligation and cannot be met simply by making, without proper analysis, an assumption that Te Tiriti implications of climate change are being adequately addressed somewhere else. If they are being addressed elsewhere, the Minister is required to engage with what is being done, by whom and in what context.

5.18 Segregating climate change from fossil fuel exploitation is highly artificial. It is inconsistent with the Supreme Court's approach to s 4 of the Conservation Act where Māori commercial tourism has been taken into account in decision-making under the Marine Mammals Protection Act 1978 and the Reserves Act 1977.[152]

5.19 The need to synthesise Te Tiriti principles together with the promotion of mining also tells strongly against the High Court's interpretation that the CMA is intended to promote mining come what may and regardless of the pros and cons of a particular project.

Climate change affects all Māori

5.20 It does not matter that the rohe of the iwi that raised the concern does not overlap with the eventual Permit areas. On the contrary, the principles of Te Tiriti must be upheld irrespective of where and when the impacts of a decision are felt.[153]

5.21 Restricting consideration of climate change impacts to those raised by local iwi is inconsistent with climate change being a relevant issue under s 4.[154] Climate change does not stop at rohe lines. Nor is it confined to areas in which the fossil fuels that contributed to it were mined.[155] It affects the interests of all Māori. The impact of GHG emissions caused by the mining does not depend on where the mining takes place. There can therefore be no justification for limiting the scope of active protection under Te Tiriti to

[150] CA Judgment at [108] [**101.0122**]..
[151] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* at [54].
[152] See *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation.*
[153] *R (Finch) v Surrey County Council* [2024] UKSC 20 at [93].
[154] See above at [5.7]–[5.8]
[155] *Finch* at [96].

interference with protected rights and interests which are expected to occur at or near the site of the mining. They are still effects of the decision.[156]

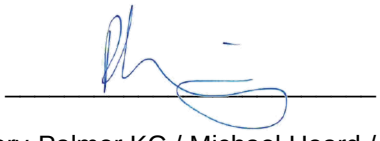
5.22 In *Waratah Coal* the Land Court held that the requirement to exercise its power consistently with the Human Rights Act 2019 (Qld) (**HRA**) involved a specific consideration of climate implications for First Nations peoples in Queensland.[157] It undertook a broad assessment and, given the universal nature of the protected right and the diffuse nature of climate change, it did not confine its assessment to the immediate impacts arising at or near the site of the project. The cultural rights protected by s 28 of the HRA are materially similar to the rights guaranteed to Māori under art 2 of Te Tiriti. The Art 2 rights therefore require similar consideration here.

5.23 If, as the Courts below recognised, climate change considerations become relevant to CMA decisions if raised by Māori whose traditional lands are subject to the decision,[158] then it is equally relevant when raised by other iwi, who are equally affected by it, or not specifically raised by *any* iwi during consultation. The Minister is required to proactively consider climate change impacts on Māori regardless of whether it is directly raised and regardless of whether an iwi's rohe is inside a proposed permit area.

6. COSTS

6.1 If the appeal is dismissed, no costs order should be made. The appellant brings this appeal in good faith and has been represented throughout on a pro-bono basis. It is in the public interest to test matters relating to the operation of s 5ZN, the relevance of climate change to the CMA and the geographical application of principles of Te Tiriti, which have not previously been addressed by appellate courts.[159] If the appellant is successful, the appellant abides the Court's decision whether to grant costs in its favour.

Dated 3 April 2025



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[156] *Finch* at [93], [97] and [102].
[157] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21 at [1514]–[1568].
[158] HC Judgment at [99] **[101.0068]**
[159] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.

7. APPENDIX 1: CLIMATE CHANGE

Climate change is a direct and immediate threat to human life

7.1 The causes and impacts of climate change are well-documented and agreed amongst the international scientific community.[160] The consensus is set out in the reports of the Intergovernmental Panel on Climate Change (**IPCC**).[161] As this Court held in *Smith v Fonterra,* it is "indisputable" that "climate change threatens human well-being and planetary health".[162]

Need for rapid and deep reductions in GHG emissions

7.2 It is "unequivocal" that the principal contribution to human induced climate change is the emission of GHGs.[163] The most significant contributor to global carbon dioxide emissions is fossil fuels.[164]

7.3 There has been a near linear relationship between cumulative emissions from long-lived GHGs (such as carbon dioxide) and global warming – each additional tonne of gas emitted contributes to additional global warming.[165] Any new carbon dioxide emissions from fossil fuel use will exacerbate the impacts of climate change for many decades.[166] If "tipping points" are breached, the outcomes may be far worse than the linear relationship suggests.[167] This means that for global temperatures to stabilise, net emissions from long-lived GHG must first reduce to zero.[168]

7.4 Unless deep reductions in carbon dioxide and other GHGs occur in the coming decades, global warming of 1.5°C and 2°C will be exceeded during the 21st century.[169] As this Court held in *Smith v Fonterra:*[170]

> … the window of opportunity to ensure a liveable and sustainable future for all is rapidly closing. The choices made, and actions implemented, in this decade will have impacts both now and for thousands of years.

[160] Affidavit of Luke James Harrington affirmed 2 May 2022 at [11] **[201.0019]**.
[161] Harrington at [15] **[201.0020].**
[162] *Smith v Fonterra Co-Operative Group Ltd* at [14]. See also Harrington at [45]–[64] [**201.0025**]
[163] *Smith v Fonterra* at [16].
[164] Harrington at [12] **[201.0019].**
[165] Harrington at [99] – [100] **[201.0039]**.
[166] Harrington at [12] **[201.0019]**.
[167] David I. Armstrong McKay "Exceeding 1.5°C global warming could trigger multiple climate tipping points" (2022) 377 6611, Science.
[168] Harrington at [101] **[201.0039]**.
[169] Harrington at [81] **[201.0034]**.
[170] *Smith v Fonterra* at [14].

7.5 Approving new oil and gas exploration and exploitation is contradictory to the scientific consensus that a rapid reduction of all GHG emissions is required to avoid the catastrophic effects of climate change.[171]

Disproportionate impact on Māori

7.6 Māori are particularly vulnerable to the impacts of climate change given the strong interconnection between Māori economic, social, and cultural systems and the natural environment. Māori have significant investments in climate vulnerable sectors such as forestry, fishing, agriculture, and tourism.[172] Māori-owned land is already suffering from high rates of erosion, projected to be exacerbated by extreme rainfalls induced by climate change.[173]

7.7 The impacts of climate change also affect Māori cultural identity. Many Māori communities are based in coastal areas susceptible to sea level rise and extreme weather events, and use coastal land for recreation, hunting and fishing, as sources of identity, or as places to connect the living with the past. Climate change is expected to result in a loss of inter-tidal food gathering areas and sacred places such as coastal urupā and marae.[174]

[171] See *Smith v Fonterra* at [24].
[172] King *et al* at pp p 102 **[301.0004]**.
[173] Pörtner *et al* at [11.4.2].
[174] King *et al* at pp 107-108 **[301.0007]**.

8. APPENDIX 2: LEGISLATIVE RESPONSE TO CLIMATE CHANGE IN AOTEAROA

International obligations

8.1 The UNFCCC aims to stabilise of GHG concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.[175] Parties are to take precautionary measures to anticipate, prevent, or minimise the causes of climate change.[176] Aotearoa is an Annex I (developed) country under the UNFCCC, which means that it has committed itself to taking the lead in modifying longer-term trends in emissions.[177]

8.2 Aotearoa is also a party to the Paris Agreement, which aims to strengthen the global response to the threat of climate change, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[178] To achieve that goal, the parties to the Paris Agreement aim to reach global peaking of GHG emissions as soon as possible and to enact rapid reductions thereafter.[179]

Domestic legal framework and response to climate change

8.3 The national legislative framework is set out in the CCRA as amended by the Climate Change Response (Zero Carbon) Amendment Act 2019.

8.4 The Zero Carbon Act set a target for Aotearoa to reduce net emissions of all GHGs (except biogenic methane) to zero by 2050 (**2050 Target**)[180] and required the Minister for Climate Change to set a series of emissions budgets to meet the 2050 Target and contribute to the global effort under the Paris Agreement to limit warming to 1.5°C.[181] One of the purposes of the CCRA is to provide a framework and various processes to facilitate meeting Aotearoa's international climate change obligations.[182]

[175] United Nations Framework Convention on Climate Change (opened for signature on 4 June 1992 and entered into force on 21 March 1994) (**UNFCCC**) art 2.
[176] UNFCCC art 3(3).
[177] UNFCCC art 4(2)(a).
[178] Paris Agreement (opened for signature on 22 April 2016 and entered into force on 4 November 2016), art 2(1)(a).
[179] Paris Agreement, art 4(1).
[180] CCRA, s 5Q.
[181] CCRA, s 5W.
[182] CCRA, s 3(1)(a). The UNFCCC and Paris Agreement are schedules.

8.5 The actual decisions that will determine the adequacy of Aotearoa's climate response are spread across the whole economy with a concentration in transportation and fossil fuel extraction, and made under a variety of statutes, including the CMA. They are not made under the CCRA.

8.6 The CCRA does not provide a comprehensive statutory mechanism through which climate change considerations related to activities such as mining will be assessed. What the CCRA does do is:

(a) Provide a framework by which Aotearoa (as a whole) can develop and implement clear policies that contribute to the global effort under the Paris Agreement.[183]

(b) Provides for the setting of national five-year net emission budgets covering all GHGs.

(c) Provides for the preparation of emissions reductions plans for each five-year emissions budget period. While these plans will include sector-specific policies as well las multi-sector strategies, they do not control specific administrative decisions within specific sectors.

(d) Govern Aotearoa's emissions trading scheme, which provides price signals for GHG emissions, but does not provide any direct mechanism for reducing them or any binding quantity cap. It also fails to tackle emissions at source as it allows unlimited forestry offsets, and does not apply to mining petroleum for export.[184]

8.7 No other legislation provides for the assessment of the climate change impacts of prospecting, exploration, and mining of petroleum.

[183] CCRA, s 3(1)(aa) (introduced by the Zero Carbon Act).
[184] CCRA, Schedule 3, Part 2.

9. LIST OF AUTHORITIES

Legislation

1. Climate Change Response Act 2002
2. Climate Change Response (Zero Carbon) Amendment Act 2019
3. Commerce Act 1986
4. Crown Minerals Act 1991
5. Crown Minerals Amendment Act 2013
6. Crown Minerals Amendment Act 2023
7. Crown Minerals (Petroleum) Amendment Act 2018
8. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
9. Fast Track Approvals Act 2024
10. Immigration Act 2009
11. Land Transport Management Act 2003
12. Legislation Act 2019
13. Marine Reserves Act 1971
14. New Zealand Bill of Rights Act 1990
15. Public Works Act 1981

Cases

16. *All Aboard Aotearoa Inc v Auckland Transport* [2022] NZHC 1620
17. *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA)
18. *R (Finch) v Surrey County Council* [2024] UKSC 20
19. *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551
20. *Greenpeace of New Zealand Inc v The Minister of Energy and Resources* [2012] NZHC 1422
21. *Greymouth Petroleum Mining Group Ltd v Minister of Energy* [2019] NZHC 1222
22. *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298
23. *Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA)
24. *Manawa Energy Ltd v Electricity Authority* [2022] NZHC 1444
25. *Movement v Waka Kotahi New Zealand Transport Agency* [2025] NZCA 86
26. *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533
27. *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368
28. *New Zealand Airlines Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA)

29. *New Zealand Fishing Industry Assoc Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA)

30. *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC)

31. *NZME Ltd v Commerce Commission* [2018] NZCA 389, [2018] 3 NZLR 715

32. *Rangitira Developments Ltd v Sage* [2020] NZHC 1503

33. *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, [2023] NZRMA 28

34. *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134

35. *Sustainable Otakiri Incorporated v Whakatāne District Council* [2023] NZSC 35

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

37. *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32

Treaties

38. Paris Agreement (opened for signature on 22 April 2016 and entered into force on 4 November 2016)

39. United Nations Framework Convention on Climate Change (opened for signature on 4 June 1992 and entered into force on 21 March 1994) (UNFCCC)

Parliamentary Materials

40. Climate Change Response (Zero Carbon) Amendment Bill (136—2)

41. Crown Minerals Amendment Bill Amendment Bill (82—2)

42. He Pou a Rangi Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* 31 May 2021 (CCC Advice)

43. Climate Change Commission *Advice on the direction of policy for the Government's second emissions reduction plan* (22 November 2023)

44. Minerals Programme for Petroleum 2013 (MPP)

45. Ministry of Business, Innovation and Employment "Regulatory Impact Statement: Amendments to the Crown Minerals Act 1991" (15 May 2024)

46. Ministry for the Environment *New Zealand's Environmental Reporting Series: Our atmosphere and climate 2020* (MfE Report)

Secondary Materials

47. David I. Armstrong McKay "Exceeding 1.5°C global warming could trigger multiple climate tipping points" (2022) 377 6611, Science

48. Nicola Hulley "New Zealand's Public Trust Doctrine" (LLM Thesis, Te Herenga Waka | Victoria University of Wellington, 2018)

49. H-O Pörtner, DC Roberts, M Tignor, ES Poloczanska, K Mintenbeck, A Alegría, M Craig, S Langsdorf, S Löschke, V Möller, A Okem, B Rama (eds) IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge, Cambridge University Press, 2022)

50. International Energy Agency, Net Zero by 2050: A Roadmap for the Global Energy Sector (4th rev, IEA, October 2021)

51. Philip Joseph *Joseph on Constitutional and Administrative* Law (5th ed, Thompson Reuters, Wellington, 2021)

52. Michael Taggart, Private Property and Abuse of Rights in Victorian England (OUP, New York, 2002)

53. Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, online, LexisNexis, Wellington, 2018)

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