IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-1897
[2012] NZHC 1422

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	GREENPEACE OF NEW ZEALAND INCORPORATED First Applicant
AND	TE RUNANGA O TE WHANAU-A-APANUI Second Applicant
AND	THE MINISTER OF ENERGY AND RESOURCES First Respondent
AND	PETROBRAS INTERNATIONAL BRASPETRO BV Second Respondent

Hearing: 5 and 6 June 2012

Counsel: D Salmon, I Hikaka and K Simcock for applicants
U Jagose and T Smith for first respondent
T C Stephens and N M Blomfield for second respondent

Judgment: 22 June 2012

RESERVED JUDGMENT OF GENDALL J

Contents

[1] Minerals and other resources, including gas and petroleum, contained in Crown-owned land, may only be prospected, explored, or mined by a person or body that holds a permit granted by the Minister under s 25 of the Crown Minerals Act 1991 (the Act). Within the exclusive economic zone (EEZ) of New Zealand, but beyond its territorial waters, the Crown had sovereign rights to own and explore natural resources beneath the seabed. The Minister of Energy, on 1 June 2010, issued a permit to Petrobras International Braspetro BV (Petrobras) granting to it exploration rights over an area of an offshore basin area (the Raukumara Basin) within the EEZ but mostly beyond the territorial sea, that is between the 12 mile and 200 mile limits.

[2] The first and second applicants challenge the lawfulness of the decision of the Minister, and seek by way of judicial review to quash his decision to grant the permit to Petrobras.

[3] This application for judicial review is acknowledged by counsel for the applicants not to be concerned with the merits of the decision or whether or not such exploration should take place, or on what conditions, but solely whether there was legal error in the process by which the Minister reached that decision and, if so, whether the Court should exercise its discretion to grant relief.

[4] Before dealing with some essential background facts not significantly in dispute, it is necessary to record the relevant statutory context in which the decision was made.

[5] There were in fact two decisions. The first was to call for bids or applications to offer "blocks" of territory for petroleum exploration in the Raukumara Basin. This call invited bids in December 2008 and is not the decision the subject of this challenge. Later, on 19 January 2010, Petrobras applied for a permit and, being the only bid received, an exploration permit was granted for a period of five years on 1 June 2010.

The statutory context

The Crown Minerals Act 1991

[6] The functions of the Minister of Energy are described in s 5 as:

> **5 Functions of Minister of Energy**
>
> The Minister shall have the following functions under this Act:
>
> (a) the preparation of minerals programmes:
>
> (b) the grant of minerals permits:
>
> (c) the monitoring of the effect and implementation of minerals programmes and minerals permits:
>
> (d) the collection and disclosure of information in connection with petroleum reserves and petroleum production in order to—
>
> (i) promote informed investment decisions; and
>
> (ii) improve security of supply in the gas and electricity markets.

[7] Section 8 provides that no person may prospect, explore or mine Crown owned minerals unless they hold a permit (and comply with sections relating to entry onto and access to land).

[8] The relevant programme under s 5(a) in this case is the Minerals Programme for Petroleum (2005) (MPP), which was issued after public notice and consultation. The purpose of a minerals programme is referred to in s 12:

> **12 Purpose of minerals programme**
>
> The purpose of a minerals programme is to establish policies, procedures, and provisions to be applied in respect of the management of any Crown owned mineral that is likely to be the subject of an application for a permit under this Part and, in particular, policies, procedures, and provisions which provide for—
>
> (a) the efficient allocation of rights in respect of Crown owned minerals; and
>
> (b) the obtaining by the Crown of a fair financial return from its minerals.

[9] Prospecting, exploration and mining permits may only be granted by the Minister under s 25, on such conditions as he/she thinks fit. Section 22 provides that the Minister shall carry out and exercise his/her functions and powers:

> …
>
> (a) in a manner that is consistent with the policies, procedures, and provisions in any relevant minerals programme, provided that where—
>
> (i) the relevant minerals programme differs from the current minerals programme in respect of the same mineral; and
>
> (ii) the permit holder or applicant for a permit desires that a policy, procedure, or provision in the current minerals programme apply to the holder's permit or the applicant's application in place of a policy, procedure, or provision in respect of the same matter in the relevant minerals programme; and
>
> (iii) the current minerals programme does not prohibit such application,—
>
> then the desired policy, procedure, or provision in the current minerals programme shall apply in respect of that particular matter; and
>
> (b) where there is no relevant minerals programme, having regard to the importance of—
>
> (i) the efficient allocation of rights in respect of Crown owned minerals; and

(ii) the Crown obtaining a fair financial return from its minerals.

…

[10] The MPP to take effect from January 2005 contains comprehensive provisions, with the purpose being:[1]

> … to establish the policies, procedures and provisions to be applied in respect of the allocation and management of petroleum permits.

[11] Paragraph 11 of the preamble states:

> The Act and this Minerals Programme for Petroleum do not address environmental and health and safety matters relating to petroleum prospecting, exploration and mining. These matters are provided for in the Resource Management Act 1991 and the Health and Safety in Employment Act 1992 which set the legislative requirements respectively on environmental and health and safety issues. Prior to undertaking prospecting, exploration or mining activities, a permit holder needs to ensure that any necessary consents under the Resource Management Act 1991 or the Health and Safety in Employment Act 1992 and the Maritime Transport Act 1994 (or any relevant regulations made in accordance with these Acts) are obtained. The permit holder must undertake prospecting, exploration or mining in accordance with the provisions of these Acts and the conditions of any consents obtained.

[12] The policy framework, and objective, is described in clause 2.2 as:

> … the desired outcome is to promote the responsible discovery and development of New Zealand's petroleum resources that contribute substantially to our economy.

And further:

> **Principal Reasons For and Against the Outcome of Promoting Responsible Discovery and Development of Petroleum Resources**
>
> 2.4. Promoting responsible discovery and development of petroleum resources is considered essential given the strategic importance to New Zealand of access to supplies of petroleum. Over the last two decades, some 50 to 65 percent of New Zealand's energy consumption requirements have been met by petroleum in the form of natural gas, oil, condensate or LPG. Indigenous natural gas (and LPG) meets some 15 percent of energy demand from the industrial, commercial and residential sectors, and has allowed choice in fuel use for many enterprises. It also fuels about 20 percent of electricity generation and is strategically critical for electricity generation during peak demand times and at times of low hydro generation

[1] Executive Summary at [1].

capacity. Over the last 15 years natural gas has also been extensively used in petrochemical production.

2.5. For the last 20 years New Zealand's petroleum industry has been dominated by the Maui field, accounting for about 75 percent of gas supplied. The Maui Redetermination Report has confirmed that reserves for the Maui field are declining sooner than expected. Active investment in petroleum exploration is needed to identify new sources of supply that are reliable and cost-competitive. To this end, New Zealand's seven prospective sedimentary basins are under-explored and all have excellent potential for discovery of world-class petroleum fields. Promoting exploration and discovery of new oil and gas fields provides for the nation to use its natural geological resources to best advantage.

2.6. Indigenous petroleum production is competitively priced and unsubsidised, and contributes significantly to the economy now and can continue to do so. The oil and gas exploration and production industry contributes approximately 1 percent to New Zealand's GDP and is estimated to earn about NZ$850 million/year. There are clear economic advantages in having a continuing and cost-effective supply of gas available for reticulation to industrial, commercial and domestic consumers and for electricity generation. New gas discoveries will maintain a diversity of available energy sources and assist businesses and domestic consumers in obtaining competitively priced energy. Oil and gas discoveries will contribute to national wealth, enabling the government to meet its other social, economic and environmental objectives.

2.7. The alternative to promoting responsible discovery and development of petroleum resources is to decline to allocate petroleum permits with the outcome of petroleum remaining in the ground. This approach is not considered in the interests of the economy.

2.8. It is not possible for New Zealand to meet its near term future energy demands without using hydrocarbons even with significant new investment in renewables. A proactive objective for indigenous petroleum is not inconsistent with the government's desire to reduce greenhouse gases. Natural gas provides a valuable option to assist as New Zealand advances towards a sustainable energy future.

Responsible Discovery and Development

2.9. The discovery and development of petroleum is not at any cost. The Crown Minerals Act land access provisions, Resource Management Act and the Health and Safety in Employment Act ensure that prospecting, exploration and mining are undertaken in a responsible manner with due regard to the interests of land owners, the community and wider environment.

Statutory Policy Requirements

2.10. Section 12 of the Act requires that the policies established in minerals programmes are to provide for the "efficient allocation of

rights in respect of Crown-owned minerals" and "the obtaining by the Crown of a fair financial return from its minerals". Section 4 of the Act provides that all persons exercising functions and powers under the Act shall have regard to the principles of the Treaty of Waitangi. These policy requirements of the Act are, accordingly, reflected in the fundamental policy objective.

[13] "Fair Financial Return" in relation to the Crown obtaining a financial return from its petroleum resource involves consideration of:[2]

- The Crown's role as owner of the resource;
- The non-renewable nature of petroleum as a resource;
- The attractiveness of the petroleum regime to investors;
- Ensuring access to sufficient supplies of petroleum in New Zealand to support economic and social development; and
- That any requirements to make payments for any petroleum obtained under a permit apply equitably to all permit holders.

[14] The policy objective for the management of petroleum is expanded by the following:

> 2.16 ...
>
> ***To promote the responsible discovery and development of New Zealand's petroleum resources that contribute substantially to our economy, consistent with:***
>
> - The efficient allocation of permits;
> - The Crown obtaining a fair financial return from the extraction of petroleum; and
> - Having due regard to the principles of the Treaty of Waitangi.
>
> 2.17. In addition, the Minister will take into consideration any international obligations which are relevant in managing the petroleum resource and in exercising the functions and powers prescribed under the Act.
>
> ***POLICIES FOR THE MANAGEMENT OF THE PETROLEUM RESOURCE***
>
> 2.18. The following policies which all contribute to achieving the objectives of efficient allocation of rights in respect of petroleum,

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[2] At cl 2.13.

and the obtaining by the Crown of a fair financial return from its petroleum, are also established:

- ***Petroleum prospecting, exploration or mining permits should be obtained by the person who is most likely to effectively and efficiently prospect or explore and develop the petroleum resource;***

- ***Permit areas should be prospected, explored or mined in accordance with an appropriate work programme which has the objective, either:***

  (a) In respect of prospecting and exploration permits, of assessing the petroleum resource potential of the permit area; or

  (b) In respect of mining permits, of achieving sound management of the petroleum resource through good mining practice, including the avoidance of wastage of petroleum;

- ***The conditions of the petroleum permit should be complied with;***

- ***Exploration and mining operations should result in increased knowledge of New Zealand's petroleum resource and petroleum potential;***

- ***The Crown, as owner of the petroleum resource, should obtain a guaranteed minimum royalty payment from the extraction of its petroleum;***

- ***The Crown, as owner of the petroleum resource, should benefit in sharing in any substantial profits arising from a petroleum development;***

- ***The royalty regime in place should be sufficiently internationally competitive to attract mobile and competitively driven investment;***

- ***The investor should perceive that sovereign risk is minimised (sovereign risk is defined as the risk that the government may change significant aspects of its policy and investment regime);***

- ***The allocation and royalty systems should be clearly outlined and easy to comply with and administer; and***

- ***The allocation and royalty systems should not impose unreasonable transaction costs and should not significantly deter investment.***

[15] Under s 4 of the Act, the Minister and Secretary, in exercising their powers and functions under the Act, are required to have regard to the principles of the Treaty of Waitangi. The Executive Summary to the MPP refers to this:

> ***REGARD TO THE PRINCIPLES OF THE TREATY OF WAITANGI***
>
> 7. In accordance with section 4 of the Crown Minerals Act 1991, the Minister and Secretary, in exercising their powers and functions under the Act, shall have regard to the principles of the Treaty of Waitangi. This requires that the Minister and Secretary must be sufficiently informed as to the relevant facts and law before making decisions. The Minister and Secretary, accordingly, are committed to a process of consultation with iwi and hapu on management of Crown-owned petroleum so that they are informed of the Maori perspective.
>
> 8. In summary, consultation must occur at three levels:
>
> (a) The preparation of the Minerals Programme;
>
> (b) The preparation of Petroleum Exploration Permit Block Offers; and
>
> (c) In respect of applications for petroleum permits not made in accordance with a block offer and applications for the extension of area of permits.

[16] This is expanded in cl 3.2, which records that in carrying out Treaty obligations, the following principles are applicable:

> - The Crown will act reasonably and in utmost good faith to its Treaty partner;
>
> - The Crown must make informed decisions;
>
> - The Crown must have regard to whether a decision will impede the prospect of redress of grievances under the Treaty (this will be more relevant where there is an application for a permit in respect of land or resources that is the subject of a claim before the Government or the Waitangi Tribunal); and
>
> - The Crown has responsibilities in relation to active protection and, as prospecting, exploration or mining may impact upon lands, waters or other properties protected by Article 2 of the Treaty, various mechanisms are available for excluding areas of particular importance to iwi from the operation of the Minerals Programme.
>
> 3.3. To make an informed decision, that is, one that takes into account all relevant considerations, the Minister and Secretary must be

sufficiently informed as to the relevant facts and law, to be able to show that they have had proper regard to the impact of the principles of the Treaty. The Minister and Secretary are, therefore, committed to a process of consultation with iwi and hapu on the management of the petroleum resource so that they are informed of the Maori perspective, including tikanga Maori. Decisions will be made taking into account the considerations raised in the course of that consultation.

3.4. In relation to the management of the petroleum resource under the Act, consultation is a process in which the Minister and Secretary are committed to meaningful discussion with iwi and hapu and are receptive to those Maori views and give those views full consideration. This process is seen as operating on three levels. These are:

(a) The preparation of the Minerals Programme for Petroleum. The consultation process with iwi and hapu on the preparation of this Minerals Programme is discussed in Appendix III;

(b) Planning in respect of Petroleum Exploration Permit Block Offers, which are the predominant form of petroleum permit allocation ...; and

(c) Decisions in relation to applications for petroleum permits (where the relevant issues have not already been addressed), and applications for amendments to petroleum permits to extend the land or minerals. The procedures for undertaking consultation on such applications are discussed in paragraph 3.14.

3.5. It is important to note that each decision will be made having regard to the considerations in relation to the principles of the Treaty that are raised as a result of the consultation, taking into account the circumstances of each case. The consultation principles that will be followed in each case, however, are:

(a) That there is early consultation with iwi and hapu at the onset of the decision making process aimed at informing the Secretary and the Minister of the Treaty implications of particular issues;

(b) That sufficient information is provided to the consulted party, so that they can make informed decisions and submissions;

(c) That sufficient time is given for both the participation of the consulted party and the consideration of the advice; and

(d) That the Secretary and the Minister genuinely consider the advice, and approach the consultation with open minds and a willingness to change.

BLOCK OFFER CONSULTATION

3.6. Most applications for petroleum permits are for petroleum exploration permits. These are mainly allocated following a Petroleum Exploration Permit Block Offer (refer section 5.2 for further details). Prior to recommending a block offer to the Minister, the Secretary must consult with appropriate hapu and iwi. There will be a period of no less than 20 working days given to iwi and hapu to comment on the proposal to hold a block offer and any of the proposed elements of the block offer. Hapu and iwi may request additional time for making comments. If additional time is required, iwi and hapu may request in writing up to an additional 20 working days for making comment.

3.7. The form of the consultation process is flexible. In all cases, the Secretary will consult with local representatives of iwi and hapu, and outline the proposals for holding a block offer. This process will include writing to iwi and hapu advising the area of the proposed block offer, outlining a map of the blocks defined, and giving an outline of the types of activities that may take place should a petroleum exploration permit be allocated, the timing of the block offer and any proposed conditions of the offer.

3.8. If iwi and hapu and the Crown think it is appropriate, there may be face-to-face (kanohi ki te kanohi) consultation or a hui held. Officials will be available to discuss and provide information on a proposed block offer if iwi and hapu require further information. If iwi and hapu have organisations established to foster consultation processes (for example, a committee which meets to consider permits under the Act and consents under the Resource Management Act 1991 or a governance entity established as part of a Treaty settlement), the Secretary would be pleased to work with these organisations.

3.9. To ensure that there is appropriate consultation, the Secretary will maintain an iwi and hapu contact list for the purposes of consultation and must endeavour to ensure that this list is up to date. Iwi and hapu are encouraged to advise the Secretary of any changes in contact names and addresses in order to facilitate the consultation process.

3.10. As part of the consultation process, iwi and hapu may request an amendment to the proposed block offer or that defined areas of land not be included in any permit (block).

3.11. In recommending a Petroleum Exploration Permit Block Offer to the Minister, the Secretary will report on iwi and hapu consultation in relation to the block offer and give an assessment of any relevant Treaty claims and settlements that may have implications for the management of the Crown-owned petroleum estate.

[17] Further detailed provisions relate to procedures to occur and matters the Minister must take into consideration if iwi and hapu request an amendment to a proposed block offer.[3]

Marine Protection Rules Part 200

[18] Part 200 of the Marine Protection Rules came into force on 1 April 2010, the objective being to prevent pollution of the marine environment from discharges of harmful substances associated with the operation of offshore installations used in mineral exploration and exploitation. The rules require that a Discharge Management Plan must be submitted and approved by the Director of Maritime New Zealand before an offshore installation can operate in the EEZ, or beyond but above the continental shelf. The rules include a requirement for environmental monitoring. Part 200 gives effect to the provisions of the International Convention for the Prevention of Pollution for Ships 1973/78 (MARPOL) and the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990 (OPRC) in respect of offshore installations.

[19] The matters required for "risk identification, assessment and prevention" to be included in a Discharge Management Plan are extensive,[4] and include:

- information on the likely fate of spilled produced oil taking into account weathering characteristics and the like movement of any oil spilled from the installation;
- a detailed description of all the processes and activities which present a risk of pollution from an oil spill, with a list of specific procedures to reduce the risk of an oil spill;
- a detailed description of all identified potential environmental impacts, including any possible social, cultural and economic implications that may result from any operational discharges or spill of oil or other substances from the installation.
- the discharge management plan for a controlled offshore installation must include a detailed description of the environmental monitoring programme to be undertaken in accordance with rule 200.25.

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3 MPP at paras 3.12 and 3.13.

4 Marine Protection Rules Part 200 2010, sch 1.

Factual background

[20] Successive governments of New Zealand own, and have exclusive right to, the mineral and other resources within its territory and the land subject to its jurisdiction. That includes the EEZ, which extends to the limits after which the international regime of the "high seas" operates. The anticipated benefits or wealth to be derived in New Zealand from exploration and mining or access to those mineral resources may be enormous. It would be rare for the government of New Zealand itself to engage in extensive exploration, or any mining activity to extract such resources. Consequently, the Minister is provided with the ability to issue permits to private or public corporations to undertake that task.

[21] The history of petroleum exploration and production in New Zealand is contained in an affidavit of Mr R N Robson, Manager of Minerals Strategy, Planning and Promotion in New Zealand Petroleum and Minerals, a branch of the Ministry of Economic Development, and is not in dispute.

[22] Exploration for petroleum and oil resources began in earnest in New Zealand in 1955. Exploration, with geological and offshore seismic surveying, led to discovery of the Maui gas condensate field in 1969. Since 1991, exploration and mining permits in the EEZ have been frequently granted in both onshore and offshore Taranaki, and more recently, other parts of New Zealand and the EEZ. Exploration has now moved into deeper water and government policy has been to encourage exploration through competitive tenders named block offers.

[23] A recent illustration of the importance successive governments have placed upon encouraging exploration of petroleum and oil resources, and the securing of producing fields, is in a speech by the present Energy and Resources Minister, the Hon Phil Heatley, to the Australian Petroleum Production and Exploration Annual Conference in Adelaide on 14 May 2012, reported in The Capital Letter,[5] where reference is made to New Zealand being ranked as one of the top five most attractive countries in the world for petroleum investment.

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5 *The Capital Letter* (2012) 35 TCL 21 at 8.

[24] Before promulgation of the MPP in 1995, there had been extensive consultation by the Crown to inform and listen to Māori interests and certain land areas, in particular in Taranaki, in recognition of their importance to some iwi, were made unavailable for the allocation of permits. Further consultation with Māori occurred prior to the review of the MPP in 2005 and the draft of the MPP was released for public and iwi consultation. A total of 26 submissions were received, most from petroleum interests, but four from iwi. Te Whanau-a-Apanui did not make a submission at that time.

[25] It was well understood that further exploration was envisaged. In 2007, exploration permits to explore in the deep sea of the Great South Basin were granted to two major groups of investors.

[26] The offshore basin known as the Raukumara Basin, which extends for many kilometres to the north and east of the East Cape and Eastern Bay of Plenty region, was largely unexplored. However there had been seismic surveys of a limited nature from about 1972, and the Crown had obtained seismic data in 2007 which was encouraging. Exploitation of the Crown's probable petroleum resources was envisaged.

[27] So, in September 2008, the then government issued a public release, advising that:

> Planned block offer releases for deep water acreage in the Raukumara (East Cape) and Northland Basins are also well advanced. These releases will be supported by significant Crown-funded data packs and are expected to be open for assessment before Christmas.

[28] The Crown had spent $3.7 million obtaining seismic data from a large area in the Raukumara Basin and a similar amount in respect of seismic data in the East Coast area, which identified a large area generally northeast of the Bay of Plenty as having the potential to offer significant benefits from the exploration and extraction of mineral resources in the seabed in an area known as the Raukumara Basin. The resources are essentially petroleum and petroleum gas, being a potential resource of immense benefit to New Zealand, but as has usually, indeed always, been the case, the task of exploration and extraction of resources had to fall to commercial entities.

[29] The "block" offer issued by the government was an "invitation" to seek competitive bids by groups interested in being permitted to explore and mine mineral resources within the Raukumara Basin.

[30] Prior to the commencement of the Raukumara block offer process, the Ministry of Justice had provided Te Whanau-a-Apanui and Ngati Porou, among others, advance notice of the block offer consultation and process. A Raukumara block offer consultation proposal and particulars, including a map, and other information and terms and conditions likely to be associated with any permit was sent to 69 iwi/hapu in the region. They were invited to provide comments and seek direct consultation if that was their wish.

[31] The Crown offered face to face consultation to give interested groups the opportunity to engage with the Crown. The Ministry anticipated a possibility of redrawing the boundaries of the block offers if Ngati Porou or Te Whanau-a-Apanui objected strongly to the blocks encroaching into the foreshore and seabed area in their rohe. There is evidence that both indicated that the proposal should not be within the territorial sea. Whilst Ngati Porou had indicated that they would engage in some consultation, Te Whanau-a-Apanui did not actively respond as it said it was focused on other issues, namely seabed and foreshore negotiations.

[32] The response of the negotiating representative of Te Whanau-a-Apanui was that:

> … our concern that this matter is being progressed at all while we are in negotiations regarding the recognition of our interests in the foreshore and seabed. We had asked that no actions would be taken by the Crown or its departments to affect our interests until after the negotiations had been completed. The Crown made this undertaking in the Terms of Negotiation. Instead we find that this is not the case, and we have to deal with different government ministries progressing their agenda while we are trying to protect the interests of the iwi.
>
> … I think that it [sic] consultation will likely inflame a rather fragile negotiation situation here on the coast. Therefore, in order to preserve the goodwill and good faith the iwi have in the negotiations we would like consultation with Te Whanau-a-Apanui managed through our negotiations team … The iwi have elected to have Rikirangi Gage and I deal with all foreshore and seabed matters for them while we are in negotiations with the Crown, and with this in mind we would like you to tailor your consultation with this iwi accordingly. We will invite the necessary hapu representatives

> if appropriate. We will also probably invite a representative from the Crown negotiating team to attend.

[33] Officers of the Ministry endeavoured to contact negotiating representatives of Te Whanau-a-Apanui, and on 19 August 2008 a representative sent an email which read in part:

> My manager (Rob Robson) and I have been trying to contact you by phone over the last few days as a courtesy call (unfortunately without success) to advise you that we are about to post out letters and information to relevant iwi to commence consultation on the Raukumara petroleum blocks offer. The letters will be posted out today and a copy of this material has also been forwarded directly to you. We value our relationship, so once you have had an opportunity to digest the information, we are happy to meet and discuss any concerns you may have should you so wish. Thank you for your time taken to consider this matter.

[34] One month later, on 17 September 2008, the Ministry said that when the information had been sent to all iwi/hapu on 19 August 2008, they had been requested to respond by 18 September 2008 or, if it was preferred, a face to face consultation arranged. Nothing was heard from it.

[35] So the Ministry's response to Te Whanau-a-Apanui was that:

> …while the 18 September 2008 is almost upon us, I am happy to receive your views on the proposal as soon as you are able to afford them. It was unclear from your email … whether you and Rikirangi Gage (the Te Whanau-a-Apanui negotiations team) wish to meet with us to discuss the proposal. Indeed at that time you would not have received the consultation package to consider whether meeting would be helpful. We have received a request from Te Runanga a Ngati Porou … for a meeting regarding the proposal in the week beginning 6 October, although that meeting time has yet to be finalised. If your negotiations team indeed wishes to meet with us in relation to the proposal I would be grateful if you could arrange such a meeting to be held in the week beginning 6 October, which would allow us to co-ordinate our travel to the region.

[36] Te Whanau-a-Apanui representatives did not reply. Attempts were made to contact the representatives by telephone, with messages being left, but no further response was forthcoming.

[37] The Minister was then provided with an "Iwi Consultation Report" on 28 November 2008. It advised him of outcomes of the iwi and hapu consultations on the proposed block offers over both the offshore Raukumara and Northland areas.

He is advised in that report that of 69 relevant iwi and hapu sent details of the block offer proposal, three responded, with Ngati Tuwharetoa (Bay of Plenty) advising officials they were fully supportive of the proposal, noting the potential economic benefits to the region and New Zealand. The report refers to nominal responses from Ngati Porou, which did not take up the offer to be present at a meeting because, essentially, the iwi was very busy with its Treaty negotiations and the foreshore and seabed settlement. The report refers to the initial response of Te Whanau-a-Apanui that no action be taken in the meantime.

[38] The report concludes, at para 31:

> Any interests in petroleum in terms of Māori customary property in the foreshore and seabed were extinguished in accordance with s 3 of the Petroleum Act 1937 – *petroleum declared to by property of the Crown.* In addition the granting of a permit does not constitute the creation of an interest in land. Accordingly, the holding of a petroleum permit under the Crown Minerals Act 1991 does not impact the resolution of such foreshore and seabed settlements, ie a petroleum [sic permit] will not impact on the territorial customary rights under the Foreshore and Seabed Act 2004 or be injurious to mechanisms that might give expression to the mana of Te Whanau-a-Apanui in the foreshore and seabed.

[39] The advice was that the block offer should be publicly released and promoted.

[40] As a consequence, the Minister publicly announced the block offer, inviting bids for petroleum exploration permits in the Raukumara Basin on 10 December 2008, the closing date to be 28 January 2010. Its purpose was to invite applicants through competitive bids to apply for the permit.

[41] The block offer notice was a comprehensive document outlining to prospective bidders and the public what was required to be provided, including details of company financial profiles, technical capabilities, work quantities and work programme correlation, together with details of understanding of geological matters and indicated exploration approaches. Applicants had to the comply with the Act and other relevant statutes, and commit to a work programme that could be fulfilled to the satisfaction of the Ministry.

[42] It transpired that the only applicant was Petrobras. It had been undertaking oil and gas exploration and production since about 1993 and is one of the world's largest integrated energy companies operating in 28 different countries. It is said to be the fifth largest energy company in the world.

[43] No other bid was received. No person, group or body then sought to challenge the mechanism and methods by which the Crown was seeking bids under the block offer.

[44] Petrobras's bid was submitted on 19 January 2010, having spent six months preparing it. It conducted technical analysis involving advice from geologists, geophysicists, engineers and others, prepared a detailed technical report on the geology of the Raukumara Basin, designed a three-stage work programme for exploration of the Basin and performed a detailed analysis of the oil and gas regulatory framework in New Zealand and other legal, political and economic issues relating to the oil and gas industry, and generally, in New Zealand. It had the benefit of preliminary optimistic seismic survey results already obtained by the Crown.

[45] The bid was analysed and a final recommendation to the Minister to grant to Petrobras an exploration permit was made on 1 June 2010. The recommendation upon which the Minister made his decision included advice that Petrobras was a leading deep water explorer, well-resourced, experienced in the world and contained precisely the international interest in investment and exploration that the government had sought to attract to New Zealand. The Minister was satisfied that Petrobras had all the capabilities, financial and technical, as well as experience, to significantly enhance the New Zealand petroleum industry. The permit was granted accordingly.

[46] The permit is for five years. A work programme has to be completed within two years or the permit lapses. Before embarking on the work programme under the permit, Petrobras met with various groups. It approached leaders of the Te Whanau-a-Apanui and Ngati Porou in November 2010, asking them to meet to discuss the project, and a meeting took place on 7 December 2010. A further meeting was held with Ngati Porou, who were also mandated to attend on behalf of Te Whanau-a-Apanui, on 14 December 2010. Matters discussed included the opportunities and

risks arising from the Petrobras intended exploration programme, and the parties talked about the importance of fishing to iwi in the region and how they could all work together.

[47] In February and March 2011, iwi leaders were advised by Petrobras of the commencement date in April for its forthcoming seismic survey in the Basin. It raised the possibility with iwi leaders for a further opportunity to speak with iwi and community groups. A wananga for Ngati Porou was held in Te Araroa on 10 April 2011. There had been attempts made by Petrobras to contact Mr Gage of Te Whanau-a-Apanui, both before and after that Ngati Porou wananga, but the evidence is he did not respond to their emails or messages.

[48] Later, on 11 April 2011, iwi leaders and Petrobras met again and there was encouragement to continue on-going dialogue.

[49] Earlier, in December 2010, Petrobras had met with Maritime New Zealand and the Department of Conservation to discuss the project and the seismic surveys to be performed. It undertook to comply with the Department's "Guidelines for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations".

[50] Petrobras had meetings with NIWA[6] relevant to working together in relation to the extent of fishery activities in the area. In April 2011, NIWA produced a report for Petrobras advising that most commercial fishing in the area occurs within 15 nautical miles of the coastline, at depths of less than 600 metres, and the level of recreational fishing was relatively light.

[51] During April and May 2011, Petrobras carried out seismic surveys in the Raukumara Basin. The 10-11 April 2011 Ngati Porou wananga held in Te Araroa was attended by 150 people, including representatives of Te Whanau-a-Apanui. At about that time, Petrobras had obtained a detailed technical report on the seismic survey from a consultant company and a report from a marine environmental

[6] National Institute for Water and Atmospheric Research.

research company (Blue Planet Marine), which had been engaged to provide marine mammal impact mitigation and monitoring during the seismic survey.

[52] Later in August 2011, Petrobras engaged a company to process the data that had been obtained from the seismic survey and to reprocess this with the old or original seismic data which had been acquired by the Crown.

[53] Greenpeace and Te Whanau-a-Apanui filed this proceeding in the High Court at Wellington on 19 September 2011.

[54] At this stage, I make it clear that the Minister acted responsibly and honestly, based upon the advice and reports he had received from senior officials in the Ministry upon which he was entitled to rely. In granting the permit, the Minister's intentions and actions are contained in his affidavit. He states that when he announced the block offer in Raukumara in a press release dated 10 December 2008, he made it clear that the previous government's policy of promoting deep water exploration was to continue. His release said:

> This is a unique combination of exploration blocks offering a variety of opportunities that will appeal to explorers. ... The current block offers keep up the momentum generated by previous block offer releases such as offshore Taranaki to realise gas reserves for our domestic market and to discover potentially large oil and gas reserves in our deep water basins. At this time of uncertainty in international financial markets, as well as the fall in oil prices, it is important for the government to maintain interest in New Zealand by providing new data to support block offers with attractive terms. The Crown Minerals Group has achieved considerable success with the data acquisition initiative which will continue over the next few years.

[55] In a later press release of 18 November 2009, he referred to the Crown commencing seismic surveys in unexplored basins. He said:

> Currently petroleum accounts for around $3 billion per annum of New Zealand's export revenue. Should the estimated resources in our unexplored basins be developed, this could increase to $30 billion per annum in export revenue by 2025. Crown receipts alone could increase to more than $10 billion per annum over the next 40 years. ... In the past week, the MV Bergen Resolution has commenced a seismic survey of New Zealand's frontier basins as an important part of the Government's $20 million data acquisition programme to improve knowledge of our petroleum resources.

[56] Clearly the Minister had been fully briefed as to consultation measures with 69 iwi/hapu before issue of the block offer, and knew that nothing in the proposal would adversely affect Foreshore and Seabed Act negotiations. He states that as required by the MPP, he:

> ...needed to consider whether this specific decision could impede redress of Treaty claims (which I treated as including foreshore and seabed negotiations).

and that:

> I was satisfied, based on the responses to the consultation and the advice given to me that the Block Offer process did not raise any other Treaty principles issues that I was required to consider.

[57] In later granting the permit, the Minister said:

> I did not consider matters relating to the protection of the marine environment, as they were not matters for me to consider, as Minister of Energy and Resources exercising a power under the Act.
>
> I understood that there were no international obligations relevant to the management of, and exploration in respect of, the petroleum resource that I should have taken into account, as required by the Minerals Programme.
>
> The advice paper (**GAB8**) made it clear to me that Petrobras was well resourced, and experienced, and to be precisely the sort of international interest and investment in exploration that the Government wants to attract to New Zealand. I was advised that Petrobras was one of the leading deepwater explorers in the world, comparable in size, resources and experience to ExxonMobil or BP.
>
> My officials had been through the process of assessing the bidder's capacity and capability. The advice lead [sic] me to be satisfied that Petrobras had the financial and technical capability, and the international experience, to be an important addition to the New Zealand petroleum industry, and accordingly I granted it [sic] the exploration permit.

The case as pleaded by the applicants

[58] In summary form, the applicants claim that the Minister failed to comply with the provisions of the MPP when granting the permit because he:

- failed to assess the potential environmental effects arising from operation of the permit;

- failed to assess potential effect on marine life;

- failed to assess potential effects of escape of petroleum or other substances during drilling;

all of which comprised failures to consider and promote the responsible discovery and development of New Zealand petroleum resources. Further, they plead that the Minister was required to take into account New Zealand's international obligations under UNCLOS,[7] the Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1986 (the Noumea Convention) and customary international law obligations, including those embodied in the United Nations Declaration on the Rights of Indigenous People.

[59] Secondly, the applicants plead that the Minister, in granting the permit, failed to consider New Zealand's international treaty obligations, pleaded separately to the allegation of failing to comply with the MPP.

[60] Thirdly, Te Whanau-a-Apanui pleads that the Minister failed to consult with it about the grant of the permit and potential effects upon its taonga, thereby failing to have regard to the principles of the Treaty of Waitangi (the Treaty).

[61] The fourth cause of action alleges that Te Whanau-a-Apanui rights in the area affected by the respondents, namely rights under the Ministry of Fisheries Quota Management System to fish in that area and its claims under Māori customary title and the Treaty to the area affected by the permit, have been or will be affected and were mandatory relevant considerations that the Minister was required to consider when deciding to grant the permit, but failed to do so.

Applicants' arguments/submissions

[62] The applicants say that the case is narrow and procedural in its scope, the only issue being whether the Minister followed the correct process under the Act when he issued the challenged permit. They acknowledge the case is not about the

[7] United National Convention on the Law of the Sea 1982.

merits of offshore petroleum exploration. But a lot of the argument touched upon the merits. The applicants have filed affidavits as to the dangers to marine life and the environment from seismic survey procedures and drilling activities. This evidence was introduced in the form of affidavit evidence from an expert in Spain, and opinion evidence from an American professor as to potential environmental impacts of offshore exploration, potentiality of oil spreads and the type of information necessary to carry out an environmental impact assessment in relation to offshore oil exploration and any differences he observed between legislative regimes in New Zealand and other nations.

[63] The Court has to be careful as to the manner in which it treats the evidence. I simply record at this stage that the respondents do not accept the validity of the opinions expressed in the evidence, and assert that it is not relevant in the Court's consideration of the essential issue in this judicial review application, namely whether the Minister erred in law in the process adopted in the issuing of the permit. The applicants say it is material that the Crown and Minister should have obtained to inform themselves of relevant environmental issues and made available to Te Whanau-a-Apanui to enable an "informed" consultation process to occur. That is, counsel says, Te Whanau-a-Apanui should have been told that "seismic survey kills fish".

[64] New Zealand has sovereignty rights to exploit natural resources in the seabed and sea within the EEZ, and may, by domestic law and without challenge, rule upon activities within the 12 nautical miles of New Zealand territorial waters. The area beyond 200 nautical miles is outside the jurisdiction and sovereignty of any nation. However, overshadowing the individual submissions made by counsel is the proposition that the New Zealand authorities are legally required to have regard to the risk of causing adverse environmental impact to activities carried out in the EEZ beyond territorial limits, which activities may have the impact of travelling beyond that zone into the high seas and potentially (and in this case Te Whanau-a-Apanui says directly relating to it) even within the EEZ and territorial domain of New Zealand. The applicants say the Minister was required to take into account relevant international obligations when granting a permit (para 2.17 MPP, as applicable by s 22(1) of the Act) and he failed to do so, so erred in law.

[65] The applicants argued that the international obligations arise from treaties signed and ratified by New Zealand, as well as customary international law, requiring general obligations to protect and preserve the marine environment. They say the Minister had to have regard to environmental issues. The right to exploit natural resources must be accompanied by the duty to protect and preserve the marine environment, with a duty on the State to take measures that are necessary to prevent or reduce harm to the marine environment.[8] Apart from those obligations, which the applicants say, on the evidence they have adduced, establish potential harm to the marine environment, the Minister was required, but failed, to take into account:

- the obligation to consider risk of trans-boundary harm arising from activities consequent to the permit;

- the obligation of New Zealand to conduct an environmental impact assessment; and

- the obligation to consider the potential harm to all the environment in relation to the activities allowed by the permit.

[66] Paraphrasing counsel's arguments, he relied upon the proposition that the United Nations Convention on the Law of the Sea (UNCLOS) articles require consideration of environmental effects of activities in particular, and the completion of an environmental impact assessment, before the granting the permit, which has been confirmed by the Seabed Disputes Tribunal of the International Tribunal for the Law of the Sea (ITLOS).[9]

[67] The Crown response was that the Minister, in taking into account any international obligations which are relevant in the managing of petroleum resources, and exercising the functions and powers under the Act, was in fact entitled to have regard to the fact that any such international obligations were aimed at being met

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8 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), arts 192, 193 and 194.

9 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* (1 February 2011) at [45].

through other legislation. So the Minister was not obliged to turn his mind to that area of consideration, and to duplicate what had already been the result of such consideration, as international obligations had already been dealt with and were relevant within other statutory provisions and regimes which applied to the activity. This was whether, under the Resource Management Act (although it could not be the case as it did not extend beyond the 12 nautical mile limit), or the Maritime Transport Act 1994 and the other legislative provisions which relate to protection of the environment for later oil or other environmental spills or disasters. Secondly (and perhaps importantly), protection of the marine environment is governed not just by the Maritime Transport Act (concerning the later remedial measures for maritime problems) but also the Marine Mammals Protection Act 1978 which provides regulation, protection and guidelines in the area of acoustic disturbance to marine mammals from seismic survey operations, and other all-encompassing legislation.[10]

[68] The essential question is whether these existing legislative and regulatory provisions are sufficient to cover the protection of the environment so that their existence meant that the Minister, in granting the permit, did not have to have restrictions or limitations on the exercise of his statutory functions.

[69] In written submissions, Mr Salmon outlined the statutory requirements in the Act, accepting that the Resource Management Act 1990 is not applicable because the permit is primarily for activities outside New Zealand's territorial sea limit, although if they were to be within the limit, resource consent would be required for the activities such as permitted in the permit.

[70] The written submissions cover what counsel says are international law obligations which the Minister failed to take into account, being:

- to consider the risk of trans-boundary harm from the activities allowed by the permit;

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[10] Wildlife Act 1953, New Zealand Import Health Standard for Ballast Water from all countries under the Biosecurity Act 1993, Biosecurity Act 1993, *Environmental Best Practice Guidelines for the Offshore Petroleum Industry* (Ministry for the Environment/Maritime New Zealand, March 2006) and *Impact Assessment Guidance* (Ministry for the Environment/Environmental Protection Authority (EPA), 2002).

- to conduct an environmental impact assessment in relation to the activities allowed by the permit;

- to consider the potential harm to all the environment in relation to the activities allowed by the permit.

[71] Mr Salmon also referred to the Noumea Convention which, counsel says, requires an environmental impact assessment to be carried out in relation to an activity which might harm the marine environment.[11] That obligation to consider the risk of trans-boundary harm is clear from the advisory opinion of International Court of Justice on the *Threat or Use of Nuclear Weapons*:[12]

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

[72] Mr Salmon had earlier referred to one of the treaties to which New Zealand is bound, namely UNCLOS, which imposes a general obligation on States to protect and preserve the marine environment, and requires that they take measures to prevent, reduce and control pollution and harm to the marine environment. Mr Salmon referred to art 206 which required the completion of an environmental impact assessment before granting any permit, saying that that had been confirmed by ITLOS,[13] referring to the obligation to conduct an environmental impact assessment as a direct obligation under the law, and general obligation under the customary international law. Mr Salmon accepted that the expert evidence was that there were grounds for believing significant harm to the marine environment and:

> Accordingly, the potential effects of the required activity should have been assessed and reported on. They were not. Accordingly, the Minister has erred in law.

[73] At this stage, it is necessary to record that when oral submissions were being made, Mr Salmon appeared to adopt a different stance, submitting that the Minister was not required to obtain an environmental impact assessment.

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11 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 26 ILM 25 (signed 24 November 1986, entered into force 1990), art 16.

12 *Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 29.

13 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, ITLOS Seabed Dispute Chamber Case No 17 (1 February 2011).

[74] There appeared to be a conflict between written and oral submissions, leaving me confused, so I asked counsel to confirm in his reply what the actual position was. Mr Salmon made it clear that:

> The applicants do not and never have contended that the Minister was obliged to obtain an environmental impact assessment.

[75] In an endeavour to reconcile what was being said, I think it may be that the submission was that the Minister was not, under domestic law, required to obtain such assessment, but was required to be informed at some basic level as to relevant matters which might have an effect upon the environment. That is, to inform himself of possible risks or harm to the environment. In the end, the difference may not matter because it is accepted by the Crown that no environmental matters were taken into consideration on the basis that the Minister was advised that they were not relevant. The Minister says in his affidavit that when he considered the bid by Petrobras:

> I did not consider matters relating to the protection of the marine environment, as they were not matters for me to consider, as Minister of Energy and Resources exercising a power under the Act.

[76] It is the applicants' contention that that advice, and thus the stance adopted by the Minister, was wrong.

[77] I keep in mind, however, that Mr Salmon also pitched his "informed of harm" argument on a separate level as to adequacy of consultation because he argued that risk to taonga of Te Whanau-a-Apanui through seismic testing and (later) drilling had to be communicated to the iwi in order for any consultation to be informed. But there is no evidence filed by Te Whanau-a-Apanui or other iwi as to what Māori interests were told, or not told, as to possible harm from seismic testing. They would have been aware of seismic surveys that had occurred, and were to occur.

[78] Counsel argued that as a matter of customary international law, the obligation stems from the precautionary principle that where there are threats of serious or irreversible damage, lack of full scientific certainty is not a reason for postponing cost-effective measures to prevent environmental degradation. In this case, counsel submits the Minister did not consider those obligations and accordingly erred in law.

[79] Mr Salmon then dealt with what was pleaded namely that the fundamental policy objective of the MPP was to promote "responsible discovery". He argued that the word "responsible" implicitly meant that risks of exploitation and exploration be assessed when considering whether or not to grant a permit. As the Minister ignored them he could not have acted responsibly. Mr Salmon submitted that that part of the MPP's policy objective imposed on the Minister a requirement to have carried out those obligations referred to in [72] above, before he issued the permit.

Obligations owed to Māori

[80] Counsel submitted the Minister's decision was reviewable because it was made in a manner inconsistent with the provisions of Part 3 of the MPP, that is:

> The Minister exercising any function under the Act shall have regard to the principles of the Treaty of Waitangi and that they must be considered and carefully weighed.

[81] Counsel emphasises the Treaty requires the parties to the partnership to act reasonably and with utmost good faith and with duties akin to fiduciary duties. He submitted that active protection is not merely passive, but extends to the active protection of Māori people and the use of their land and water and taonga to the fullest extent practicable.[14] Counsel submits that the Minister therefore had a duty to consult with Māori in a "legally required manner, and to the legally required standard", and further to consider whether the activities under the permit would impact upon rangatiratanga of Māori including impact upon taonga and the use of resources by Māori. The argument is that the Minister failed to do this, so failed to comply with the requirements of s 4 of the Act.

[82] Active protection involves concepts of reasonableness, mutual co-operation and trust. Counsel refers to the protection of rangatiratanga and its role in relation to resources and taonga as discussed in *New Zealand Māori Council v Attorney-General*, *Attorney-General v Ngati Apa*[15] and in the Privy Council decision in *New Zealand Māori Council v Attorney-General*.[16]

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14 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 644.
15 *Ngati Apa* v *Attorney-General* [2003] 3 NZLR 643 at [177].
16 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513.

[83] The line of reasoning arising out of those cases provides the link, counsel says, to the rights of indigenous people and the environment in the United Nations Declaration on the Rights of Indigenous Peoples.[17] That is, indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories or resources and the State shall consult and co-operate in good faith with them on such issues.

[84] Counsel emphasises the duty of active protection goes well beyond the requirement to simply consult.[18] So, in advancing this argument, counsel referred to the extensive affidavit of Mr Gage filed on behalf of Te Whanau-a-Apanui which, in summary, expresses a concern from that iwi that petroleum exploration and exploitation will impact upon its kaitiakitanga, its rangatiratanga and its mana so as to directly impact upon its taonga, including fish, marine life and marine environment as a whole. It was submitted that the concerns are well-founded and because the Minister failed to consider the potential impacts of the activities on Te Whanau-a-Apanui's rangatiratanga, taonga and duty of kaitiakitanga, he failed to have the required regard to the principles of the Treaty. Counsel says that, in any event, there was no genuine good faith attempts at consultation so as to comply with Treaty requirements to enable Te Whanau-a-Apanui to make an informed decision.

[85] Counsel submits that para 3.2 of the MPP provides an obligation to make informed decisions and ensure active protection, and for the Minister to be sufficiently informed as to the relevant facts and law to be able to show that proper regard was had to the impact of the principles of the Treaty. He says the obligation to consult with iwi and hapu was not geographically limited and sufficient information was not provided to the parties consulted so they could make informed decisions, and an open mind and a willingness to change was necessary. He argues that from the outset environmental impacts were considered irrelevant to the obligations under para 3.2, so the Minister was not sufficiently informed, insufficient iwi and hapu were consulted, insufficient information was provided to Te Whanau-a-

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17 *United Nations Declaration on the Rights of Indigenous Peoples* GARes 61/296, A/RES61/296 (2007).

18 *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 560.

Apanui and no information was provided about potential impacts on the environment.

[86] Counsel submitted that environmental impacts were plainly protected under the Treaty so the Crown's duty of active protection required that they be considered and regard be had to these impacts.

[87] Quite separately, counsel submits that attempts to consult with Te Whanau-a-Apanui were not adequate because, whilst the proposal was received by the iwi, they made it clear that they had fundamental concerns about the proposal needing to deal with foreshore and seabed issues generally, and that messages left with the negotiators were not adequate steps to address those issues. Counsel says that the Ministry did not hear the concerns expressed by the iwi and the Ministry was not consulting on these concerns in good faith.

[88] On the issue of relief, counsel has submitted that this should not be declined simply on the basis of delay, that being rare where error of law is established.[19] He says that if the permit is quashed, no prejudice would arise because if it is later granted after reconsideration, resources and work already carried out would not be nullified as data processing and studies will still be available. He said the only way in which Petrobras would be prejudiced is if the decision is quashed and the Minister later declines to re-issue the permit. That would be simply the inevitable consequence that requirements ignored by the Minister the first time around should have been considered and, if they had been, the permit would not have been granted. Counsel said that time calculations, for the purpose of considering delay as relevant to the exercise of the Court's discretion, should only be seen to commence after the solicitors for the applicants received a response to their Official Information Act request might need to outline when they did this in the narrative. That is because, he said from the bar, they only then knew of the manner in which the Minister's decision was made.

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[19] *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26.

Discussion

[89] In the course of discussion, I will of necessity refer to some of the answering arguments made on behalf of the Minister and Petrobras.

[90] The starting point in any assessment of the legality of the process by which public officials such as the Minister exercise powers and perform functions is this empowering act. That is the Crown Minerals Act 1991 and the Minister's functions are contained in s 5, set out at [6] above. In the exercise of those functions, the Minister has the power to grant permits, and must exercise his powers in a manner consistent with the MPP.

[91] A critical question is whether the Minister's actions failed to promote "the responsible discovery and development of petroleum resources" because he was required to take into consideration any international obligations which are relevant in managing the petroleum resource and in the exercise of his powers,[20] and he failed to do so by (as is acknowledged) not assessing potential effects on the environment.

[92] I do not think that it is proper to analyse the application or performance of the Minister's functions and powers within the empowering legislation in isolation from the total statutory regime relevant to the exercise of those powers within the subject matter of the legislation. A Minister cannot purport to act under a delegated authority of one statute which would lead him to making decisions which are invalid or open to question when viewed against other statutes. The decision-making process of a Minister under delegated legislation ought not be compartmentalised so as to ignore a wider statutory framework in which the particular activity is designed to be governed. Text, purpose and context are crucial.

[93] In determining the scope of the Minister's functions and his obligations under the Act, and interpreting the true import and meaning of those words, it is well-established that:[21]

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[20] MPP at para 2.17.

[21] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

> … text and purpose [are] the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from the text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against the purpose in order to observe the dual requirements of s 5 [Interpretation Act]. In determining the purpose the Court must obviously have regard to both the immediate and general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

Text

[94] The words "responsible discovery and development" and "international obligations which are relevant to managing the petroleum resource" are general and framed broadly. Their meaning may be limited by reference to other parts of the text of the Act and MPP. For example, s 61 of the Act limits the powers or functions of the Minister in relation to access arrangements to Crown land, or common marine and coastal area, that being the function of the Minister of Conservation. A further example is contained in s 108 relating to the powers of consent authorities under the Resource Management Act and of an inspector under the Health and Safety in Employment Act 1992.

[95] The preamble to the MPP, set out at [11] above, states that the Act and MPP do not address environmental and health and safety matters relating to petroleum prospecting, exploration and mining.

[96] I repeat that because this permit related to an area in the EEZ but outside New Zealand territorial waters, the Resource Management Act 1991 does not apply and it is acknowledged by the Crown that a gap apparently exists in the legislative framework. The Court is told that it is intended that this be remedied by a bill which is presently before Parliament. But the Crown asserts that at the time for exploration drilling (which may never occur) within the EEZ it will be governed by guidelines promulgated by the Ministry for the Environment and the Environmental Protection Authority. The Crown said that the Marine Protection Rules, especially r 200.4, provide the final "gateway" requiring a Discharge Management Plan approved by another Minister.

[97] Paragraph 2.9 of the MPP is part of the "text". It refers to "responsible discovery and development", and states:

> The discovery and development of petroleum is not at any cost. The Crown Minerals Act land access provisions, Resource Management Act and the Health and Safety in Employment Act ensure that prospecting, exploration and mining are undertaken in a responsible manner with due regard to the interests of land owners, the community and wider environment.

[98] The reference to international obligations within policy objectives in the MPP[22] is qualified in the text "which are relevant in managing the petroleum resource and in exercising the functions and powers" of the Minister. The Crown has pointed to some international obligations which are clearly relevant in managing a petroleum resource, including art 82 of UNCLOS concerning payments that New Zealand may be required to make to the International Seabed Authority.[23] There is a further reference in the MPP to international obligations at para 5.4.38, which provides grounds for declining a permit application:

> … An application may also be declined taking into consideration the Government's international obligations, if they are relevant to the particular permit in question.

[99] This relates to an international obligation that is of significance to a particular permit. This may be different to what the applicants have argued, namely that the international obligations relevant to deep sea oil exploration permits generally require that consideration.

[100] But it seems obvious that minimising risk or harm to the environment falls within international obligations. The issue is whether the Minister is bound to himself consider the likely risk, if the international obligation is met through other legislative or regulatory measures with the mandate of different Ministers, and whether this Minister was aware of that.

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22 MPP, para 2.17.

23 As recognised in the Continental Shelf Act 1964.

Purpose

[101] The Crown says there is a package of legislation which is called the "Crown Minerals Regime", which includes the Act, the MPP and the Crown Minerals (Petroleum) Regulations. From an early stage in February 1991, a review group, when advising the government on the then Resource Management Bill, emphasised that there was a need for separation of regulatory and allocation functions. In its report it said:[24]

> The review group has stressed that regulatory and allocation functions should be carefully segregated unless there are compelling reasons to keep them together. There appear to be no such reasons in this case. On the other hand, the mixing of regulatory and allocation regimes in respect of Crown owned minerals creates the following adverse effects:
>
> (1) The Minister of Energy is given a multiple-objective mandate, including the conflicting roles of, on the one hand, acting as regulator on behalf of the community in respect of the community's interests in sustainable management of minerals and, on the other hand, acting as agent for the Crown's commercial interest in obtaining a fair financial return on its mineral estate. Such dual-objective management arrangements provide a formula for loss of accountability. This is because one of the objectives tends to provide an excuse for failure to perform the other, and vice versa. Such arrangements therefore lead to deterioration of management performance. In this case, the dangers are, first, that the responsibility of safeguarding the sustainable management of minerals may be poorly performed because of a pre-occupation with obtaining financial results, and second, the sustainable management objective provides an excuse for delivering poor financial performance. Separating such conflicting roles and giving them to different people has been a fundamental part of the recent reform in the State sector;
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> …

[102] As a consequence, sections relating to Crown-owned minerals were removed from the Resource Management Bill and proposed as separate legislation. The Crown Minerals legislation was passed simultaneously with the Resource Management legislation in July 1991.

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[24] *Report of the Review Group on the Resource Management Bill* (11 February 1991) at 56.

[103] Hansard reports on the Crown Minerals Bill record the then Minister of Energy stating:[25]

> The intention of this Bill is to separate Part IX and Part XIV of the Resource Management Bill to form a separate Crown Minerals Bill. The separation is achieved with very little change to the substance or the effect of either piece of legislation. It does reinforce the separation of the Crown's regulatory and commercial functions in respect of the mining industry – an issue that was of great concern recently in relation to the Ngaere and Waihapa oil fields.
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> …
>
> … We now need to look at the issue of the sustainable approach to resource use, because this is something that has been changed with the separation of this Bill. Sustainable management is more likely to be achieved through ensuring that there are as few barriers as possible to invest in exploration. It is also more likely to be achieved with as few Government interventions as possible, consistent with the Crown's role as the owner of the resources in achieving their efficient development.

[104] Further, the Minister for the Environment is recorded as saying:[26]

> The Crown Minerals Bill has been split off from the Resource Management Bill to emphasise the clear distinction that exists between controlling the environmental impacts of mining and dealing with the Crown's ownership interest in those minerals that it happens to own. The environmental impacts of extracting and using minerals are controlled under the Resource Management Bill in the same way as all other activities are controlled.

[105] The Resource Management Act does not apply to activities outside the territorial waters. If questions arise as to the extent to which New Zealand – as a State – met its international obligations that must be a matter upon which Parliament might choose to legislate. It is not a matter upon which the Court can direct Parliament. Nor could it be for the Minister to "plug any gap" because, in the end, the regulatory and statutory functions designed to deal with risks of harm, general to the environment, have by deliberate policy been entrusted to fall within the ambit of powers vested in other authorities.

[106] The Maritime Transport Act 1994 provides that the functions of the Minister of Maritime Transport include not only to promote safety of maritime transport, but under s 5A:

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[25] (4 July 1991) 516 NZPD 3040-3041.
[26] At 3048.

…

(b) to promote protection of the marine environment:

(c) to administer New Zealand's participation in the conventions and any other international maritime or marine protection convention, agreement, or understanding to which the Government of New Zealand is a party:

(d) to ensure New Zealand's preparedness for, and ability to respond to, marine oil pollution spills:

…

[107] Under Part 27, the Minister may make marine protection rules and regulations and take other measures to protect the marine environment, including:

386 Marine protection rules to implement international standards

…

(a) to implement New Zealand's obligations under any marine protection convention:

(b) to make such rules as may be necessary to enable New Zealand to become a party to any international convention, protocol, or agreement relating to the protection of the marine environment:

(c) to implement such international practices or standards relating to the protection of the marine environment as may from time to time be recommended by the International Maritime Organisation.

…

[108] Matters to be taken into account by that Minister in making marine protection rules in terms of s 392 include the need to:

…

(i) protect the marine environment:

(ii) maintain and improve maritime safety:

[109] Parliament has entrusted the Minister of Maritime Transport with the power and task of promulgating such rules. The Marine Protection Rules (Part 200 relating to offshore installations) referred to at [18] and [19] above have the objective to prevent pollution of the marine environment. There is the mandatory requirement of

an operator providing a Discharge Management Plan in advance in order to obtain approval of the Director. Although Mr Salmon argues that those rules are "responsive" in the sense of dealing with untoward events after they happen, I do not accept that is the purpose. The whole point of the rules is to prevent oil spills. The rules require consultation, a plan which provides for risk identification, assessment and prevention, and an advisory circular from Maritime New Zealand with guidance as to how the rules would work in practice at an operational level.

[110] The Crown says that this legislation is the response of the New Zealand Government to international requirements for environment impact assessment reports. The Crown points also to the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999 which require operation and maintenance of standards, duties on employers to provide a "safety case" before the commencement of operation of any installation (with installation including a fixed or mobile structure or vessel used or intended to be used in an offshore petroleum operation). These are requirements administered by the Department of Labour and none are part of the mandate of the Minister of Energy. The Crown also referred to a raft of other legislation which illustrates the wider public policy, namely:

- the Marine Mammals Protection Act 1978;
- the Wildlife Act 1953;
- the New Zealand Import Health Standard for Ballast Water from All Countries under the Biosecurity Act 1993;
- the Biosecurity Act 1993;
- Guidelines for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations (Department of Conservation, Wellington 2006);
- the Installation and Protection of Subsea Pipelines under the Submarine Cables and Pipelines Protection Act 1996;

- the Environmental Best Practice Guidelines for the Offshore Petroleum Industry;[27] and

- the Impact Assessment Guidance, prepared by the Ministry for the Environment and the Environmental Protection Authority (EPA).[28]

[111] The short point advanced by the Crown in this regard is that all of these legislative provisions and guidelines illustrate that environmental protection measures, and provisions designed to meet New Zealand's international obligations, are to be dealt with by Ministers and authorities *other* than the Minister of Energy. They are not powers conferred upon him or functions envisaged that he would undertake under the Act, and the evidence is that he was aware of that.

[112] Mr Salmon argued that at the time of enactment of the Act in 1991, the Maritime Transport Act 1994, Part 200 of the Maritime Protection Rules and the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999 had not been promulgated, so he said that Parliament could not have been able to predict what might come. Therefore, he submitted, consideration of those legislative provisions cannot be used in the interpretation of the Act and the MPP. I do not accept that submission. Where legislative provisions form part of a comprehensive statutory scheme, they may, in some instances, be considered together.

[113] Commencing at para 5.4.21, the MPP sets out the provisions which guide the Minister in evaluating applications for permits. Paragraph 5.4.32 provides that once the Minister has determined the application:

> … containing the best staged work programme is acceptable following a technical evaluation, then the Minister must also be satisfied that the applicant will comply with the conditions of, and give proper effect to, the permit (section 27 of the Act). In this respect, the matters that the Minister will take into consideration as relevant include, but are not limited to, the following:
>
> (a) The applicant's financial capability to carry out the proposed work programme and to pay prescribed fees;

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27 Above n 10.
28 Ibid.

(b) The applicant's technical capability, which may include proposed use of technical experts; and

(c) Other prospecting, exploration or mining activities both in New Zealand and internationally that the applicant (or any related company) has been involved with, to the extent that these activities impact on the applicant's ability to comply with the conditions of the proposed permit.

[114] In terms of para 5.438, an application may be declined, taking into account the government's international obligations "if they are *relevant* to the particular permit in question" (emphasis mine), which is confined to the specific case and not generally.

[115] The Minister would have known of the possibility that offshore oil exploration and drilling might have an impact on the environment. He was entitled to conclude that those were not matters for him to consider in the exercise of his mandated function and powers. He knew they fell within the province of others. Further, there existed a clear statutory scheme and regime, which provided functional separation. I accept the argument of the Crown that cl 2.17 of the MPP, viewed in the context of the preamble (set out at [11] above) and r 2.9 of the Maritime Protection Rules, does not impose a mandatory requirement upon the Minister to take into consideration environmental issues arising from international obligations. Provided, as here, he turned his mind to the fact that those issues were within the mandate of others, he did not err. His function was limited to considering other international obligations relevant to the management of the petroleum resource owned by the Crown.

[116] The Minister cannot be required to re-examine the environmental issues that may apply generally to all deep water exploration and drilling, given that successive governments have enacted the legislation and MPP on the basis that, as matters of policy, there will be permits issue under the regime. Paragraphs 2.16, 2.17 and 5.4.36, read in the context of the Crown Minerals Regime as a whole, and other regulatory provisions, cannot require the Minister to either call for an environmental impact assessment (now not claimed by the applicants to be the case) or to undertake inquiry into and give consideration to international environmental obligations. They are dealt with elsewhere, and fall outside his powers. Indeed, if he chose to do so

and made a decision adverse to, for example, a competitive bidder, he might well be challenged on the basis of acting outside his powers.

[117] The applicants fail on their first cause of action that the Minister failed to comply with the MPP.

[118] Although separately pleaded to the alleged failure to comply with the MPP, the cause of action pleading failure to consider international treaty obligations, as it relates to environmental matters, must also fail. The manner in which the Minister is required to evaluate applications for permits (and they may be competitive, although that was not the case here) is set out in cl 5.4.32 of the MPP. An example of how international obligations that may be relevant to management of the Crown resource are dealt with in the Continental Shelf Act 1964 and the United Nations Convention of Law of the Sea. Mr Salmon's oral argument was that "the only reason we contend that New Zealand owed international obligations which were relevant was because cl 2.17 says they were, and they were mandatory considerations". But as already discussed, the proper interpretation and application of cl 2.17, in the total context, is that it does not impose a mandatory obligation upon the Minister to take account of environmental obligations, as these are dealt with elsewhere.

Treaty of Waitangi principles

[119] These are well known and are essentially recorded in para 3 of the MPP.[29] The Treaty is a partnership between the government and Māori, requiring each to act towards the other reasonably and with utmost good faith, with the partners having responsibilities analogous to fiduciary duties. 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. There is a duty to act in the utmost good faith and that must depend upon the circumstances of the particular case, and further:[30]

> There is, too, the further question as to the form and content of the consultation. In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as

[29] Set out at [16] above.

[30] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 682–683, per Richardson J.

> implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

[120] In the later *New Zealand Māori Council v Attorney-General*, Cooke P, in delivering the judgment of the Court of Appeal, said:[31]

> We think it right to say that the good faith owned [sic] to each other by the parties to the Treaty must extend to consultation on truly major issues.

[121] And Lord Woolf, in delivering the judgment of the Privy Council in *New Zealand Māori Council v Attorney-General*:[32]

> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

[122] "Consultation" in order to be meaningful requires that there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.[33] Whether or not

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[31] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152. (Forestry Assets)

[32] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517. (Broadcasting)

[33] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676.

there has been consultation is to be judged on an objective basis. McKay J, in delivering the judgment of the Court of Appeal in that case said:[34]

> If the party having the power to make a decision after consultation holds meetings with the parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation. It is immaterial that those parties may have had other concerns which for their own reasons they chose not to put forward.

[123] In the present case, it is accepted there was no consultation before the decision challenged in the application for judicial review (the decision to grant the permit) was made. The applicants' case is that such consultation should have occurred. At a different level, Te Whanau-a-Apanui says that any consultation at the earlier block offer stage was inadequate because it was not given the opportunity of being heard and expressing its views, and it was not informed in good faith by the Ministry of matters that were relevant to the issue of the block offer, such as interference with marine environment so as to effect its taonga as now advanced.

[124] A third possibly relevant level of consultation may be that which was undertaken at the stage of the Ministry formulating the MPP.

[125] In assessing whether the Minister complied with the Treaty obligations, I do not consider the Court can simply look at the permit granting stage in isolation. The entire history has to be taken into account in determining whether, objectively speaking, sufficient consultation occurred.

[126] The Crown agrees that consultation did not occur at the permit stage, but contends that there was full consultation, or the opportunity for Te Whanau-a-Apanui to engage in this, at both earlier stages:

- first, when the MPP was formulated in 1995, and the later revised version;

- second, at the block offer stage.

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[34] At 683-684.

[127] If there had been no proper consultation at the block offer stage, the Crown, in my view, could not point to the first consultation as being sufficient. But it does not do so. Rather, it contends that, as part of the historical narrative, it is quite clear that the Crown, acting under its obligations under s 4 of the Act, consulted with iwi and hapu and, recognising those obligations, later consulted at the block offer stage.

[128] What is in issue is the contention by Mr Salmon that:

- this was insufficient to meet the Crown's responsibilities;

- meaningful consultation and active protection of iwi interests did not occur then, or at the permit application stage.

[129] The contention of Te Whanau-a-Apanui is that no consultation occurred at the granting of the permit stage. But consultation then presupposes, first, a right to that, and secondly, that issues relevant to the specific permit were required to be consulted upon. It seems to me that the true complaint of Te Whanau-a-Apanui is to the general issue of offshore exploration for, and production of, petroleum. That is, concern for its taonga as related to marine life and waters, is general to **all** such activity, and not simply to the grant of this permit.

[130] It is necessary to look, therefore, at what actually happened and when, to determine whether, assessed on an objective basis, there has been meaningful good faith consultation and compliance by the Crown with Treaty obligations.

[131] The only evidence before the Court is that in developing the MPP in 1995, and later in 2005, extensive consultation with iwi and hapu occurred. Even before then, some iwi raised taonga issues specific to them during consultation, so areas of land were excluded from being made available for permits. Public and iwi submissions were made as to the draft MPP in 2005. Te Whanau-a-Apanui could have, but did not, make any submission as to concern for its taonga. Before the decision was made to release the Raukumara block offer, Te Whanau-a-Apanui and Ngati Porou were given advance notice and there was clear communication and an offer of face-to-face meeting and discussion with 69 iwi/hapu. Three iwi responded.

Te Whanau-a-Apanui did not actively engage with the Ministry. I have already recorded the factual circumstances.[35] Te Whanau-a-Apanui did not then, or after the block offer was announced, raise the taonga concern it now advances. It could, if aggrieved, have challenged that decision.

[132] Mr Salmon said that iwi were not told that "seismic testing kills fish", but there is no evidence from Te Whanau-a-Apanui or other iwi as to that.

[133] Consultation, and good faith listening to concerns, are a two-way street, with obligations on Māori interests and the Crown. Each have obligations to the other. Mr Salmon argued that good faith on, and active protection by, the Crown required it to:

- fairly inform itself and obtain basic information as to how offshore exploratory and drilling activities might affect taonga of an iwi; and

- convey this to the iwi so that it (and the Crown) could make informed decisions as to protection of taonga.

[134] Mr Salmon said without the Crown doing so, there could not be meaningful consultation.

[135] Yet from the other perspective, an iwi might be expected to raise with the Ministry taonga concerns unique to it. As mentioned, Taranaki iwi raised with the Crown taonga issues relating to areas of land, which resulted in some being removed from exploration. Likewise, Ngati Tuwharetoa raised concerns for its taonga. So the Ministry has listened and responded to concerns.

[136] No other iwi/hapu has raised the argument that it should have been consulted and heard over this aspect of its taonga. Te Whanau-a-Apanui, if it wanted to be heard on it, was afforded ample opportunity. There was some obligation on it to point to its concerns over taonga. The Crown, of course, must actively participate in good faith, but it cannot be expected to always know what particular taonga may be

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[35] At [20]-[57] above.

important to any iwi/hapu. And here, there is no evidence that any one of the 69 iwi/hapu consulted – as well as Te Whanau-a-Apanui – raised the concerns now argued in this case.

[137] I do not accept counsel's argument that the Crown did not act in good faith or responsibly. I reject his argument that the attempts by the Ministry to contact Te Whanau-a-Apanui by "perfunctory" phone messages were insufficient. The evidence is clear that it went much further than that.

[138] It is perhaps significant that even after the permit was granted to Petrobras, that company met with Te Whanau-a-Apanui and Ngati Porou leaders on 7 December 2010 and 14 December 2010, and later. This is referred to earlier in [46] and [47]. Of course, this did not replace the Crown's obligations, but there is no evidence that Te Whanau-a-Apanui raised the taonga then, or if it did, why it did not then seek to challenge the permit decision. Just as Te Whanau-a-Apanui and the first applicant had the ability to secure the expert opinion evidence it now tenders, it would have had the same ability then.

[139] The argument that active participation required the Crown to inform itself of environmental issues cannot be looked at in isolation. Counsel now says an environmental impact assessment was not required. Without being told by an individual iwi/hapu – or by a number of them – of a particular taonga concern, it is unrealistic to expect the Crown to make informed decisions relevant to that concern. As the MPP says:[36]

> The Minister and Secretary are ... committed to a process of consultation with iwi and hapu on the management of the petroleum resources so that they are informed of the Maori perspective, including tikanga Maori. Decisions will be made taking into account *the considerations raised in the course of that consultation*. (emphasis mine)

[140] I am satisfied on all the evidence that the Crown did not breach any of its obligations to Te Whanau-a-Apanui. Viewed objectively, it acted reasonably. It also acted in good faith, hoping to engage with Te Whanau-a-Apanui – and with other iwi – to fulfil its responsibilities. It had discussions at the earlier stage when the MPP

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[36] MPP, cl 3.3.

was promulgated, and it did as much as could reasonably be expected of it at the block offer stage. If Te Whanau-a-Apanui had the concerns it now puts forward, on the basis of later opinion advice, it would have raised them then. In choosing not to actively participate substantively or respond to the request to consult, it cannot complain now.

Declaration of United Nations as to the Rights of Indigenous People

[141] I do not accept counsel's argument that this requires the Crown to have regard to the impact of its activities on taonga without it being informed of Māori concerns during a consultation process or otherwise. The Crown does not contend that it has no duty to protect taonga. But the declaration does not create binding legal obligations, although the New Zealand Government supports it as an affirmation of international human rights. Yet it cannot impinge upon the exercise by the Minister of his obligations and powers under the Act, when viewed in the broad statutory context.

Fourth cause of action – customary title or Treaty claims to permit area

[142] Counsel contended that Te Whanau-a-Apanui rights under its Māori customary title or Treaty of Waitangi claims to the permit area and resources were mandatory relevant considerations which the Minister failed to take into account.

[143] Petroleum resources are vested in the Crown up to the limits of the territorial sea, and at the time of the granting of the permit all the foreshore and seabed (within the territorial sea) vested in the Crown.[37] No common law or customary title could be recognised through the available statutory provision of the Foreshore and Seabed Act 2004.

[144] But the Minister still turned his mind to this as he was aware of Te Whanau-a-Apanui's claims, whether through foreshore and seabed negotiations, or Treaty of Waitangi claims. He knew of previous government decisions rejecting recommendations of the Waitangi Tribunal regarding petroleum.

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[37] Crown Minerals Act 1991, s 10.

[145] Furthermore, the Minister's evidence is that he was satisfied that the grant of this permit would not affect any foreshore and seabed, or Treaty claims settlements, of Te Whanau-a-Apanui.

Fishing rights of Te Whanau-a-Apanui

[146] Counsel argued that the Minister failed to turn his mind to, as a mandatory relevant consideration, Te Whanau-a-Apanui's rights to fish in the permit area. But fishing quota, under the Quota Management System, is not made a mandatory relevant consideration in the Crown Minerals Regime. Customary fishing rights:

- have been settled by s 9 Treaty of Waitangi (Fisheries Settlement) Act 1992 for commercial customary fishing claims;

- that are non-commercial have no legal effect except if given effect through regulations under the Fisheries Act 1983;[38] and

- that are non-commercial cannot be relied upon in this proceeding.[39]

[147] The fourth cause of action of Te Whanau-a-Apanui cannot succeed.

Conclusion

[148] It follows from the foregoing reasons that I do not find for either applicant under any of their pleaded causes of action. There was no reviewable error of law on the part of the Minister in making his decision to grant Petrobras the permit.

Obiter – Delay

[149] It is not necessary for me to deal with issues of "delay" as a basis for the exercise of a discretion to refuse relief. But I add that if it had been necessary to do so, the delay relevant in this case might well be from 10 December 2008 when the

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38 *Samuels v Ministry of Fisheries* [2003] 1 NZLR 552.
39 Treaty of Waitangi (Fisheries Settlement) Act 1992, s 10(d).

block offer was notified. Because it is really from then that the applicants actually knew, or would have known, all the facts about which they complain – although they frame this challenge only to the later operative decision to grant a permit.

[150] The MPP makes it clear, in para 11 of the preamble, that environmental matters are not addressed in the Act or programme. The applicants must have known of that provision – and especially Māori interests which were involved in consultations at the time of the review of the MPP in 2005.[40]

[151] At the very least, the delay is since the permit was granted. Counsel says (although there is no evidence given by the parties as to reasons for delay) it was not until counsel received a response to his Official Information Act request that it was known that the Minister did not consider environmental factors. But the applicants must have known that the permit was going to enable the activities, that they now challenge to occur.

[152] Because of meetings and discussions between Petrobras and iwi groups between 7 December 2010 and 10 April 2010, they knew of the expected seismic survey. Discussions included the importance of fishing to iwi in the region. Te Whanau-a-Apanui were represented at these, apart from the last wananga because it did not respond to emails or messages sent to it by Petrobras.

[153] The time from notification of the block offer until issue of proceedings is two years 9 months; from issue of the permit is fifteen months.

[154] Even giving weight to counsel's submission, the delay from the time of granting the permit to his making an Official Information Act request was 10 months, over which time Petrobras had the meetings with iwi groups and has spent up to $8 million on its exploratory programme which it has to complete within two years. In my view, prejudice to it over the delay is significant. I acknowledge that it is rare to exercise the discretion to refuse relief, if reviewable error exists.[41]

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40 See [11] above.

41 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [59]–[61].

[155] Because of all the circumstances, and in the absence of evidence as to reasons for the delay, including why the applicants were not aware of the clear statement in the MPP, as well as clear prejudice to Petrobras, I would have exercised the discretion, rare as it may be, and declined relief. All of the foregoing is naturally obiter and I express those views because of the depth of argument advanced by all counsel on this point.

Result

[156] The application for judicial review by both applicants is dismissed.

[157] The Minister and Petrobras are entitled to costs, which are fixed on a category 2B basis. If necessary, counsel can submit memoranda. I certify for second counsel for both respondents. Disbursements are to be fixed by the Registrar but are to include counsel's reasonable travel and accommodation costs.

J W Gendall J

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