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Crown Obligations and Petroleum Mining Licences

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I. INTRODUCTION

The purpose of this paper is to critically examine the process of petroleum mining, and in particular, the aspect of licensing and the dual role the Crown has in its capacity as both licensee and licensor. From a broader perspective, many of the issues raised here can also be related to issues raised in the development off other natural resources. Naturally, because of the strategic and economic importance of this resource,[1] the legal, philosophical, and commercial aspects of petroleum mining makes institutional framework for dealing with this natural resource slightly different. The paper will outline the general substantive provisions of the Petroleum Act 1937 pertaining to the licensing regime, and in particular, look at those provisions in light of a case study of recent ministerial action in issuing a mining licence.

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[1] In terms of market share of energy resources for the year 1985 in industry and commerce, oil provides for 20.5 percent of New Zealand's needs, and similarly, for transport, 94.6 percent; with the total annual oil fuel expenditure for New Zealand in the year 1983 being $1.7 billion: New Zealand Official Yearbook (92e), Department of Statistics, Wellington, New Zealand, 1987.

With specific reference to the case study, the paper will then discuss some commercial issues raised in petroleum mining licensing particularly those consequent to the fact that the Crown may issue licences to itself, the effect the Commerce Act 1986 may have on that, and also the effect the laws of contractual and equity may have on the Crown in the particular circumstances. Focus will then be made on ascertaining the scope of Crown discretion under this particular regime, and again, the case study will provide a basis for discussion.

Finally, the above matters will provide the background for some possible reform, and to this end, there will be an examination of the Ministry of Energy Corporate Report (1987), and a brief look at the issues raised in the current process of resource management law reform.

II. THE CASE STUDY

On 21 July 1977, the Crown was granted a petroleum prospecting licence (PPL 38034) over an area in Taranaki. Various changes to the interests in PPL 38034 occurred over a period of time until 1986, when the then current holders were finally settled upon. The prospecting activities in licence area 38034 were carried out initially by Petrocorp

Exploration Limited,[2] and later, jointly with the Crown. From 1986 until the expiry of the extended licence on 21 July 1987, the prospecting activities were carried out by the joint venture comprising the Crown, Petrocorp Exploration Limited, Petrocorp Exploration (Taranaki) Limited, Payzone Exploration Limited, Southern Petroleum No Liability, Nomeco New Zealand Limited, Bligh Oil & Minerals (NZ) Limited, and Carpentaria Exploration Company (NZ) Limited. A result of these activities was the discovery of hydrocarbon deposits in the Waihapa, Tariki, and Ahuroa areas.

In September 1987, the Crown invited submissions of notification of interest in acquiring the Minister of Energy's joint venture shares in four petroleum mining licences (PML):

(1) 51.00 percent interest in PML 38137 at Stratford,

(2) 38.36 percent interest in PML 38138 at Tariki,

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[2] A wholly owned subsidiary of Petroleum Corporation of New Zealand Limited, the state owned corporation formed in 1978 to take responsibility for the government's interests in petroleum and gas. The subsidiary itself was formed for the purpose of holding the government's interest in offshore petroleum exploration and also to conduct its own onshore exploration programme. In 1987, Petroleum Corporation of New Zealand Limited "privatised" by issuing 15.38 percent of its issued share capital to the public. A further 15.38 percent was held by BIL Equities (No 2) Limited, and 69.23 was held by or on behalf of the Crown.

(3) 38.36 percent interest in PML 38139 at Ahuroa, and

(4) 38.36 percent interest in PML 38140 at Waihapa.

Bids for the Crown interests closed in January 1988. In February 1988, an oil discovery in Waihapa (PML 38140) was announced by Petrocorp. Based upon the technical data relating to the discovery, Petrocorp applied to enlarge the area to which PML 38140 applied. On 4 May 1988, the Minister of Energy announced a "new oil discovery" in a field called "Ngaere".[3] Significantly, Ngaere is adjacent to the PML areas offered for sale. The announcement contained notice that the Minister was granting to himself (acting on behalf of the Crown), a mining licence for the area of the discovery, and that bids made under the previous "sale" of Crown interests in the adjacent PML's were "declined". Finally, the announcement also expressed the Minister's intention to offer the Crown's interest in both the Ngaere and the adjacent PML's to the other joint venturers in the adjacent PML's.

III. THE PETROLEUM ACT 1937

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[3] See National Business Review, Wellington, New Zealand, 5 May 1988, p. 1; Evening Post, Wellington, New Zealand, 5 May 1988, at p.10; and Press Statement from the Minister of Energy, 4 May, 1988.

For the purposes of the discussion in this paper about petroleum mining licensing regime, the following is a summary of the salient features of the Petroleum Act 1937. The objective of the Act is derived from the long title - to encourage and regulate the mining of petroleum. Because of its variant forms,[4] and therefore its various physical attributes, aspects of ownership were not dealt with comfortably under common law.[5] From the legislative viewpoint, petroleum existing in its "natural condition" below the surface of land is declared the property of the Crown.[6] The Act then provides for an administrative framework under the aegis of the Minister of Energy ("the Minister") for prospecting,[7] extraction,[8] processing,[9] and distribution[10] of the mineral. There is a general

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[4] See the definition of petroleum in the Petroleum Act 1937, s. 2.

[5] See Petroleum development and New Zealand law, Essays prepared for the Faculty of Law, Victoria University of Wellington, Victoria University Press, Wellington, 1984, at p. 15.

[6] Petroleum Act 1937, s. 3.

[7] Ibid s. 5.

[8] Ibid s. 12.

[9] Ibid s. 19.

[10] Ibid s. 50.

prohibition against prospecting or mining without a licence.[11]

The Minister may grant prospecting licences upon terms and conditions as the Minister may in his discretion specify.[12] Section 6 of the Act provides for the term of the licence which is for a period not exceeding 5 years and deals with extension - one extension is available upon application by the licensee during the term of the licence, such extension to exceed neither the term of nor more than half the area of the original licence. The Minister must issue an extension if the licensee has substantially complied with the terms and conditions of the licence and the Minister is satisfied that both the work programme proposed will provide for the satisfactory exploration of the extended licence area, and that the land to which the extension is subject is not such that prospecting by a subsequent licensee in the residual area of the licence will not be hindered.[13] The original licensee may apply for a new licence in the area in the original licence which became residual as a result of the extension process.

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[11] Ibid s. 4.

[12] Ibid s. 5.

[13] Ibid s.6 (4).

Possession of a petroleum prospecting licence confers on the licensee the exclusive right to prospect and to that end, mine in the licence area, provided the operation does not interfere with the occupation and use of that land by another.[14] The licensee is required to abide by all other Acts and regulations which affect or apply to the activity,[15] and there is no proprietary right in any petroleum derived from the land except as a result of the licensee's operation.[16] There is also the requirement for the licensee to pay a deposit or bond prior to the acquisition of the licence,[17] and also payment of, during the currency of the licence, an annual fee.[18]

The Minister has broad discretion to modify or suspend the prospecting licence upon the application of the licensee.[19] Prior to the expiry of a prospecting licence, if the licensee satisfies the Minister that there has been a discovery and that if a mining licence is granted, the licensee would be able to satisfy the conditions of the

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[14] Ibid s. 7 (1) and (2).

[15] Ibid, s. 7 (3).

[16] Ibid, s. 7 (4).

[17] Ibid s. 8.

[18] Ibid s. 9.

[19] Ibid s. 10.

licence, the licensee has a right to surrender the prospecting licence in exchange for a mining licence over an area the Minister deems adequate for the purpose of mining that reservoir or field.[20]

Insofar as mining licences are concerned, the procedural regime is not too dissimilar to that applying to prospecting licences. The Minister has a discretion to grant a mining licence.[21] The term of the licence is fixed by the Minister, and is divided into "initial" and "specified" terms.[22] The maximum period for each term is 4 years for a initial term, and 40 years for a specified term. Generally speaking, the initial term is intended to cover the preparation and approval of the work programme. During this time, the licensee may not construct any permanent works or structures.[23]

The licensee has similar rights to the prospector in relation to the rights associated with the particular activity licensed, including a duty to respect other users of the land, a duty to comply with all other Acts and

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[20] Ibid s. 11.

[21] Ibid s. 12.

[22] Ibid s. 13.

[23] Ibid s. 14A.

regulations, and an obligation to be subject to an express denial of any proprietary rights in the petroleum.[24] There are powers available to the Minister to postpone the development of a petroleum discovery,[25] to reduce the area comprised in a prospecting licence or revoke the licence for failure to develop the discovery,[26] and to modify or suspend mining operations.[27] As with prospecting, there is a deposit or bond payable (as security for compliance to the terms and conditions of the licence),[28] and also an annual licence fee payable.[29]

Sections 20 to 27 of the Petroleum Act cover general provisions relating to licences of both types. Upon application by the licensee there is power for the Minister to amend a licence (subject to such conditions as thought fit) by adding adjoining land to that already comprised in the licence.[30] For the purpose of the performance and observance of the terms and conditions of the licence, if

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[24] Ibid s. 14.

[25] Ibid s. 14B.

[26] Ibid s. 14C.

[27] Ibid s. 15.

[28] Ibid s. 16.

[29] Ibid s. 17.

[30] Ibid s. 20.

there is more than one licensee, then liability for such obligations will be joint and several.[31] Licences cannot be transferred (except by way of mortgage or other charge) without the consent of the Minister.[32] Additionally, it is deemed unlawful for a licence holder to enter into, without the Minister's consent, any agreement which creates an interest in or affects any existing or future licence, assigns or deals with an interest in or affects any existing or future licence, or imposes an obligation upon the licensee relating to the production of the petroleum from the land comprised in the licence.[33] Section 24 of the Act then provides that "The Minister shall not be concerned with the effect in law of any contract, agreement, or arrangement consented to by him under the [previous provision]".

There is a duty for the Secretary of Energy to keep a register of licences,[34] and provided the licensee gives 2 month's notice in writing in the case of a prospector and 6 months for a miner, then the licensee may surrender the licence.[35] Concerning the Minister's power to revoke a

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[31] Ibid s. 21.

[32] Ibid s. 22.

[33] Ibid s. 23.

[34] Ibid s. 25.

[35] Ibid s. 26.

licence, if the Minister has reason to believe that the licensee has failed to or is not making reasonable efforts to comply with the terms and conditions of the licence, the Minister may give the licensee notice to remedy such default within 90 days after the giving of the notice.[36] Failure by the licensee to satisfy the Minister that compliance has occurred gives the Minister the right to serve notice that within a month from service of notice the licence shall be revoked. The notice must state the reasons for the decision.[37] The licensee has the right to appeal the decision to the Administrative Division of the High Court,[38] and pending the determination of the appeal, the licence shall continue unless it would have expired otherwise by effluxion of time.[39] Naturally, the licensee is liable in respect of the licence up until the time of revocation.[40]

Concerning the rights of the Crown, the Minister, on behalf of the Crown, may

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[36] Ibid s. 27 (1).

[37] Ibid s. 27 (2).

[38] Ibid s. 27 (3).

[39] Ibid s. 27 (4).

[40] Ibid s. 27 (5).

(a) grant a licence to himself or otherwise purchase or acquire any licence,

(b) purchase or otherwise acquire any interest in any licence,

(c) sell or otherwise deal with any licence or any interest in any licence,

(d) carry on mining operations,[41]

(e) do any of the above jointly with any other person or persons.[42]

With regard to the right described in (b) above, the Minister may authorise the Secretary of Energy or other person or persons to act on behalf of the crown, and all of the Minister's powers and discretions are consequently delegated to such authorised person.[43]

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[41] Note the extended definition of the term "mining operations" in Petroleum Act 1937, s. 2.

[42] Petroleum Act 1937, s. 36 (1).

[43] Ibid s. 36 (2).

The Minister is prohibited from prospecting or mining on behalf of the Crown without a licence[44], and as far as the rights, benefits, and privileges of the Crown qua licensee are concerned, the Crown is given equivalent status as that of a private person holding such licence.[45] A transfer or mortgage to the Crown of any licence does not operate as a merger of the interest created by the licence[46] and a licence held by the Minister on behalf of the Crown is not subject to termination by effluxion of time[47] and continues in force until the Minister declares that the licence has been surrendered by means of notice published in the Gazette.[48] Finally, the Crown (and anyone holding a licence on behalf of the Crown) is bound by provisions of the Act only insofar as any particular provision expressly does so.[49] It seems that the only provisions specifically binding the Crown are sections 6, 13, 14A, 28, 29, 30, 31, and 32. Sections 28 through to 32 are part of a series of provisions denominated "Entry on Land", and are not significant for present purposes.

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[44] Ibid s. 36 (3) and also s. 4 (3).

[45] Ibid s. 36 (4).

[46] Idem.

[47] Ibid s. 36 (5).

[48] Idem.

[49] Ibid s. 36 (6).

IV. THE COMMERCE ACT 1986[50]

The Act introduced to New Zealand concepts of "fair" competitive trading. Other jurisdictions have long had such legislative schemes covering this aspect of commercial activity.[51] The long title of the Act reflects an intention to "... promote competition in markets within New Zealand ..." and the Act comprises seven parts:

(i) the Commerce Commission

(ii) restrictive trade practices

(iii) mergers and takeovers

(iv) control of prices

(v) authorisations and clearances

(vi) enforcement, remedies and appeals

(vii) miscellaneous provisions.

One of the definition provisions in the Act defines "goods" as including (inter alia) "animals (including fish); minerals, trees and crops, whether on, under, or attached to land or not; gas and electricity". The implication is that

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[50] Generally, see BM Hill & MR Jones Competitive Trading in New Zealand: The Commerce Act 1986 (Butterworths, Wellington, 1986), and Y van Roy Guidebook to New Zealand Competition Laws (Commerce Clearing House, Auckland, 1987).

[51] Sherman Act (1890) and Clayton Act (1914) in USA, Restrictive Trade Practices Act 1956 in England, and Trade Practices Act 1974 in Australia.

the Act is not necessarily limited to these, and by inference, it can be presumed that the Act would apply to personal property, and therefore, subject to the limitations contained in the Act, the jurisdiction could be extended to cover the "chose in action market".[52]

The introductory, jurisdictional provisions include section 5, called "Application of the Act to the Crown". Section 5 (1) provides that the Act binds the Crown only in so far as the Crown engages in trade. "Trade" is defined as "meaning" any trade, business, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of interest in land. "Services" is defined as including "any rights (including any rights in relation to, and interests in...personal property), privileges...granted, or conferred in trade[53]..." and "supply" is defined as

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[52] Quaere: Would the sale and purchase of other "natural resource rights" eg development rights under a district scheme, or water rights under the Water and Soil Conservation Act 1967 come under the Commerce Act 1986? For a theoretical look at possibilities under the latter, see TL Anderson A Market for New Zealand's Water (Unpublished Manuscript, Centre for Resource Management, University of Canterbury, Christchurch, 1988) and TL Anderson & B Sharp Ownership and Use Rights for Water and Soil Resources: An Analytical Framework (Unpublished Manuscript, Centre for Resource Management, University of Canterbury, Christchurch, 1988).

[53] Note the circularity of the definitions.

inclusive of providing, granting, and conferring, in the context of the supply of services.

Section 5 (3) specifies that the Crown cannot be prosecuted for an offence under the Act, although under section 5 (4) the Commission or a person "directly affected" by a contravention of a provision by the Crown can apply to the High Court for a declaration that the Crown has contravened the provision. Section 6 expressly applies the Act to "Crown corporations".

An interesting saving is contained in section 7. Section 7 (2) states "Nothing in this Act limits or affects any rule of law relating to breaches of confidence".

A. Restrictive Trade Practices

For the purposes of analysis of the issues focused upon in this paper, the most significant provisions of the Act are contained in Part II, called "Restrictive Trade Practices". Generally, this part provides for prohibitions on various activities that have the purpose or have or are likely to have the effect of substantially lessening competition in a market.

Section 27 relates to contracts, arrangements, or understandings substantially lessening competition. Section 28 relates to covenants substantially lessening competition. The specific reference to covenants is intended to prohibit section 27 activities in dealings of land which may not necessarily come within the ambit of "contract, arrangement or understanding".[54] Section 29 prohibits contracts, arrangements, or understandings containing exclusionary provisions. The mischief here is to prevent parties acting in collusion to prevent the supply or acquisition of goods or services from/to the contracting parties.

The rationale behind the use of the term "contracts, arrangements, and understandings" is to catch a wide range of commercial relationships. Obviously, "contracts" includes all lawfully enforceable agreements. The extent of "arrangements and understandings" would seem to be that "arrangements" cover explicit plans between parties where those plans do not necessarily create legal obligations, and it can be inferred that "understandings" cover similar circumstances, only the arrangements are less overt.[55]

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[54] Hill, op cit 62.

[55] van Roy, op cit 61.

The use of the term "purpose, [or effect or likely effect] of substantially lessening competition in a market" is evidence of rather vague statutory language. The threshold of the test for "purpose" does not seem to be very high: there is no defence that the outcome of the activity did not actually lessen competition, although the actual effect will have some bearing on the determination of the purpose of the particular activity in question.[56] The inclusion of the qualification "likely effect" means that practices diminishing potential competition are also prohibited.

"Substantial" is defined as meaning "real or of substance".[57] The implication must be that one looks at the effect on the market as a whole. For the legislature to have omitted this qualification would have made the test too wide: the nature of the perfect market is such that if one competitor is eliminated, then obviously, competition is lessened.

The heart of this part of the Act is manifest in the phrase "competition in a market". These two terms have a definition section devoted to them exclusively,[58] defining

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[56] Hill, op cit 54.

[57] Ibid, 56.

[58] Commerce Act 1986, s. 3 (8).

competition as meaning "workable or effective competition, and "market" as meaning "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense". In broad economic terms,[59] a market can be described as a formal or informal institution where suppliers of goods and services transact with buyers of goods and services, with the ultimate objective of all participants being the maximisation of both profit and market share. Competition can be simply described as the pursuit of maximising the profit and market share of the participant.

Economic theory states that the "perfect competitive market" exudes characteristics of substitution (no one participant is better than another); perfect information (the participants have all relevant knowledge of all products and prices); homogeneity of products (there is no qualitative choice between them); zero transport costs; and no barriers to entry (new buyers and sellers may enter the market at any time). The result of perfect competition in a perfect market is that the process of supply and demand determines that the most efficient products are offered at the lowest price with the highest profit. In determining the question of competition or market, a court would take cognizance of

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[59] See for example, SE Stiegler (ed) A Dictionary of Economics and Commerce (Pan, London, 1976).

these elements, and look at the facts in light of the theory.[60]

Sections 30 to 34 deal with price fixing and are considered extraneous to this inquiry, although there is a specific exemption of these sections to joint venture pricing. Section 35 allows activities coming within sections 27 to 29 when they are expressed as subject to authorisation by the Commerce Commission. Authorisation guarantees the parties that the Commission will not proceed against them. Generally, the authorisation is made on the basis that the public benefit outweighs the detriment of the restrictive practice.[61]

B. Monopolies[62]

Section 36 restricts persons in dominant positions in a market from using that dominance to restrict entry to that market, or to restrict competitive conduct in that (or other) market, or to eliminate another from that market.

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[60] Air New Zealand v. Commerce Commission (1985) 1 NZBCL 102, 262.

[61] van Roy, op cit 58.

[62] See J Land "Monopolisation: The Practical Implications of section 36 of the Commerce Act 1986" (1988) 18 VUWLR 51.

Comprehension of the ambit of this section requires an examination of the concepts "dominant position in a market". From the economic theory of perfect competition, it is not difficult to see that often in reality, all the requisite elements do not subsist simultaneously. An example of this is when infinite substitution is diminished to such an extent that certain participants in the market obtain market power sufficient to curtail the freedom of choice between supplier and consumer. For the purposes of the Act, it is probably correct to analyse the particular market in which dominance is supposed to exist. This analysis would need examination of the specific market in terms of its particular product, functional, and geographic characteristics.[63]

Section 3 (8) of the Act provides for a more comprehensive definition of the concept. Essentially, persons are in a dominant position in a market when they are a supplier or acquirer of goods or services and are in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market. Further, in determining the above, further matters must be taken into consideration, (generally) that of the market share, knowledge, or access to capital/materials of

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[63] van Roy, op cit 50.

the person; the extent the person is constrained by competitors (including potential ones) in that market; and the extent the person is constrained by the conduct of suppliers/acquirers of goods or services in that market.

The remainder of part two of the Act relates to resale price maintenance, and again, is not considered particularly relevant to this paper.

C. The Petroleum Act 1937 and the Commerce Act 1986

In examining the role of the Crown as licensor under the Petroleum Act in light of the Commerce Act, the first question must be that of jurisdiction of the latter. As discussed above, the first hurdle to overcome is that of showing that the Crown, in this role, is engaged in trade. The recent case of Auckland Regional Authority v. Mutual Rental Cars (Auckland Airport) Limited[64] provides an interesting analogy. The case involved the plaintiff bringing civil proceedings seeking a declaration in respect of ss 27, 29, and 36 of the Commerce Act. The plaintiff was under a statutory duty to operate and administer the Auckland International Airport, and they had issued licenses to two rental vehicle operators. The plaintiff also

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[64] [1987] 2 NZLR 647.

contracted with these two businesses to limit the number of similar concessions at the airport during the term of the licence. The defendant claimed that the passing of the Commerce Act 1986 had the effect that the plaintiff was now free to provide a concession to them because the contracts were in breach of s. 27 (2) of the Act; that the other concessionaires were in competition and therefore the effect of those contracts (or arrangements) was also in breach of s. 29 (1) of the Act; and that the plaintiff was in a dominant position in a market and was using that position to prevent a party from engaging in competitive conduct in that market thereby falling foul of s. 36 of the Act.

Barker J held that there was no breach of s. 29 because to succeed under this head it was necessary to show that the arrangement or understanding had a degree of mutuality amongst the three parties , and on the facts, this was not so. As far as s. 27 was concerned, the finding was that there was a market for rental car services at Auckland airport, and that the contracts had the effect of substantially lessening competition in that market.

The defendants were also successful in their argument in relation to s. 36 of the Act. The argument was along the lines of saying that where there is only one supplier of goods or services there is a monopoly, and based upon the

concept of the "bottleneck facility",[65] if a bottleneck facility was used to exclude others from competing, that exclusion should be eliminated. Reference was made to leading United States anti-trust cases, and dicta in Hecht v. Pro-Football Inc[66] was adopted for the proposition that "...where facilities cannot practicably be duplicated by would be competitors, those in possession of them must allow them to be shared on fair terms."[67] The Hecht case then noted that the principle should be carefully applied in that the essential facility need not be shared if such sharing was impractical or inhibited the operator's ability to adequately provide the goods or service.

The application of these principles to the case study seems quite apposite. The relevant market is the market for mining rights. As long as the rights are transferable (albeit subject to the Minister's consent), then trade in these rights must form a market. The right can be mortgaged, and essentially has all the characteristics of any other intangible personal property. The granting of a licence by the Crown to itself seems to be an act which

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[65] This is where a facility can neither be duplicated nor circumvented and through which competitors in a given market must have access: ibid, 679.

[66] 570 F 2d 982 (1977).

[67] Ibid, 992.

excludes all others from the market place. It can be argued, however, that the two cases are distinct in that the Auckland Regional Authority is required by the Airport Authorities Act 1966 to operate the airport as an activity of commerce, and therefore falls within the definition of "trade". This factor facilitates the application of the Commerce Act to the airport concessions situation.

On the other hand, it could well be argued that the Crown as licensor is engaged in trade. As outlined above, "trade" means any "undertaking relating to the supply of services" and "supply" in relation to services includes "grant". "Services" includes any rights (including rights in relation to personal property) that are granted in trade. Support can be gained from the extended definition of services in that it includes the rights, benefits, privileges or facilities conferred under a contract conferring rights for which remuneration is payable in the form of a royalty, tribute levy or similar extraction. In light of section 18 (2) of the Petroleum Act 1937, which requires the licensee under a mining or prospecting licence to pay to the Secretary of Energy a royalty in respect of all petroleum that is produced from the land comprised in the licence, there would be difficulty arguing that the jurisdiction of the Commerce Act does not extend to this situation.

Irrespective of the position of the Crown in its capacity as licensor, having issued the mining license to itself, the offer to sell the interest in the Ngaere licence must surely come within the scope of the restrictive trade practice provisions. It is clear the Minister is engaged in trade. Similarly, it is clear that if the interest is only being offered to the joint venture licensees in adjacent licence areas, then there is a prima facie case of restricting entry of other persons into a market contrary to s. 36 of the Commerce Act, and there is a strong possibility that the acceptance of the Minister's offer could be seen as a contract, arrangement, or understanding having the effect of lessening competition in a market thereby being in breach of s. 27 of that Act.

V. PETROLEUM MINING LICENCES AND RESTRICTIVE TRADE PRACTICES

A. The Political and Economic Environment

> "There is scope for improving efficiency in the public sector. This will increase our ability to reduce the Government deficit, lower taxes, and provide income support and social services for those least able to help themselves. In the case of trading operations inefficiency can represent a tax on their customers. The essence of the problem is that the public sector needs to be adapted to meet the management needs of a

modern economy. The present environment can be frustrating not only for those who have to deal with public sector organisations but also for those who work in them."[68]

The present Labour Government has set in train economic and public sector reform to a degree previously unknown.[69] With the introduction of the State-Owned Enterprises Act 1986, the government initiated the process of "corporatisation" - that of converting public sector trading operations into limited liability companies, trading in an environment of competitive neutrality.[70] Competitive neutrality is deemed to be attained by imposing private sector performance criteria upon the state-owned enterprise, as well as deregulating the particular industry so that the state-owned enterprise can no longer rely upon the advantages it enjoyed when it was a part of the Crown.[71] The corporatisation process has been restricted to converting into state-owned enterprises, state organs which produced goods and services capable of sale in the market place.

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[68] Hon RO Douglas, Minister of Finance, Economic Statement, House of Representatives, 12 December 1985.

[69] See P McKinlay, Corporatisation: the solution for state owned enterprise? (Institute of Policy Studies, Wellington, 1987).

[70] Ibid 3.

[71] Ibid 20.

The reform of the public sector has been paralleled with similarly vigorous reform in the private sector. Generally speaking, this could be described as "deregulation", and involves the creation of a competitively neutral environment domestically, and also the same environment for domestic industries vis-a-vis foreign markets. An example of this is the abolishing of certain industry specific subsidies and also many import tariffs. As the term implies, deregulation also embodies the concept of limited government intervention.

A particular tool of reform has been the Commerce Act 1986. This legislation has been described as "...to promote the forces of competition and business rivalry which are so important to the operation of effective markets... [and establishes] a general standard of competitive behaviour."[72] The Commerce Act 1986 applies to Crown corporations and also binds the Crown (albeit with some limitation, which is discussed below).[73]

As seen above, it can be argued that Crown participation in prospecting for and mining of petroleum falls within the

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[72] Hon DF Caygill, Minister of Trade and Industry, Foreword to BM Hill & MR Jones, Competitive trading in New Zealand: The Commerce Act 1986 (Butterworths, Wellington, 1987).

[73] Commerce Act 1986, s.5.

general category of a state trading activity. At the very least, it can be argued that the mining process, provided it is carried out lawfully - generally speaking, within the provisions of the licence - creates some sort of inchoate property right in the extracted product.[74] The inherent nature of a property right is transferability,[75] and a priori transferability implies trade.

Notwithstanding the privatisation of the Petroleum Corporation of New Zealand Limited, continued Crown participation in these activities represents a significant departure from the policy of improving efficiency in the public sector, unless perhaps, the Crown does not believe that efficiency can be improved in this area. On the basis that some of the Crown's activities in the mining of petroleum might possibly fall outside the established general standard of competitive behaviour, examination is required of the Commerce Act 1986 to establish how that legislation relates to activities undertaken pursuant to

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[74] DE Fisher The legal context of petroleum development in New Zealand in Petroleum Development and New Zealand law: essays prepared for the Faculty of Law, Victoria University of Wellington (Victoria University Press, Wellington, 1984).

[75] Insofar as the Petroleum Act 1937 is concerned, section 22 allows the transfer of a licence by way of mortgage or charge, albeit a rather limited right because any transfer by the mortgagee or chargee is subject to the consent of the Minister of Energy.

other legislation, and in this particular case, the Petroleum Act 1937.

B. The Commerce Act 1986 and Other Legislation

The general standards of behaviour established under the Act relate to restrictive trade practices, mergers and takeovers, and control of prices.[76] Of these, the most pertinent is that of restrictive trade practices. Part II of the Act is devoted to this standard, and provides for several categories within this standard: practices substantially lessening competition, use of dominant position in a market, and resale price maintenance.

Consistent with the overall intent of the Act, as noted above, these provisions are to be of general application. For some reason or other, however, there might arise the need for the endorsement of a standard of behaviour that is lower than that required in general circumstance. These might be based upon a social, economic, or technological goal which might not be attainable by means of competition. Apart from both abuse of dominant position and resale price maintenance, under Part V of the Act, the Commerce

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[76] Refer n. 50.

Commission has the power to authorise all trade practices falling within Part II of the Act.[77] In exercising its power under Part V, the Commission must have regard to the economic policies of the Government when such policies are transmitted to it in writing by the Minister of Trade and Industry.[78]

Another exception is provided by section 43 of the Act.[79] This section provides:

> (1) Nothing in this Part [II] of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.
>
> (2) For the purposes of subsection (1) of this section, an enactment or Order in Council does not provide specific authority for any act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory

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[77] Commerce Act 1986, s.58.

[78] Ibid s.26.

[79] See Hill, op cit 94, and van Roy, op cit 18.

body or a person holding any particular office, or in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.

For present purposes, section 43(3) of the Act, which relates to legislation covering sharebrokers and real estate agents, will be regarded as being irrelevant.

Firstly, note should be taken of the phrase "act, matter, or thing" which seems to indicate that activities wider than that of "engaging in conduct" (this latter term being generally the operative phrase used in Part II of the Act) require "specific authority". Further, the term "enactment or Order in Council" excludes other instruments of the Legislature or the Executive and also excludes Ministerial acts of authority.

The exact scope of the expression "specific authority" has yet to be judicially defined in New Zealand. The equivalent legislation existing prior to the Act, The Commerce Act 1975, contained some provisions from which some activities were exempt if so "expressly authorised" by any other Act. The application of this term was raised in His Master's

Voice (NZ) Limited v. Simmons.[80] In that case, the Plaintiff sought to justify a certain resale price maintenance scheme because such a practice was possible under a statutory right to acquire a compulsory copyright on payment of a royalty when a gramophone record had been manufactured. It was held that the "other" legislation (Copyright Act 1962) did not expressly authorise an agreement or arrangement between wholesalers of gramophone records to fix resale prices: there was not even authority by necessary implication let alone express authority.[81] Even although the "necessary implication" test was clearly obiter dicta, Haslam J suggested that this test required an inquiry into the nature and purpose of the "other" legislation.

Two further cases on this point arose in 1980. The first, ABC Containerline NV v. New Zealand Wool Board[81] dealt with a situation where in consideration for a reduced rate, the Defendant ("NZWB"), agreed with a third party to give the third party the exclusive right to ship all wool from New Zealand to Europe. After examination of the legislation under which NZWB purported to exercise the power to enter

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[80] [1960] NZLR 25.

[81] Ibid at 29.

[81] [1980] 1 NZLR 327.

such an arrangement, Davison CJ took the view that despite there being no express authority for NZWB to restrict shipment through a particular organisation, there was sufficient authority for NZWB to do so in order for it to carry out its functions.[82] The upshot of this decision is that greater weight was to be placed on the word "authority" as opposed to the word "express".

The second case, Stock Exchange Association of New Zealand v. Commerce Commission[83] involved the Stock Exchange making a rule that no member should have a branch office. It was conceded that such a prohibition came within the ambit of a restricted trade practice as defined in the Commerce Act 1975. White J held firstly that the word "Act" in the phrase "expressly authorised by any Act" included rules validly made under a particular enactment[84] and secondly that the phrase required that a trade practice needs to be merely expressly authorised by the other Act, as opposed to being expressly stated, so as to be exempt[85]. This case obviously supports the view of the Chief Justice in ABC Containerline NV (supra).

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[82] Ibid 385.

[83] [1980] 1 NZLR 663.

[84] Ibid 665.

[85] Ibid 668.

The effect of such an interpretation as that referred to above was that authority to indulge in otherwise restricted trade practices was capricious in effect, and offered the government little flexibility in terms of allowing certain practices to continue in accordance with any particular policy for non-competition. A possible solution to the latter would have been to include a general dispensing power within the Act. The capricious effect came about because many statutory bodies may not have been able to refer their specific trade practice to an express statutory power, particularly in a heavily regulated economic climate.

A further by-product of such reasoning is that the scope of the Commerce Commission's jurisdiction and power to authorise particular practices in specific cases was severely limited. It can be well argued that the Commission is the appropriate forum for determining these matters, particularly in light of the provision for the Minister to direct the Commission to have regard to the economic policies of the Government. A countervailing argument might be that the Minister's power could be too narrowly stated, as there might be some other matters which he might want the Commission to have regard to, and not necessarily limit the advice to that of economic matters only.

The Act, when passed in 1986, seemed to cover these matters by substituting the word "expressly" in the phrase

"expressly authorised" with the word "specifically". As stated above, the scope of the provision has had no judicial consideration in New Zealand. In Australia, an equivalent provision can be found in The Trade Practices Act 1974, and the Federal Court of Australia was called upon to determine this issue in Re Ku-ring-gai Co-operative Building Society (No.12) Limited Anor[86]. This case involved two building societies wanting to impose (by rule) upon its members, where members were borrowers whom had secured their loans with mortgages, a condition that the mortgaged property had to be insured with a particular nominated insurer. By regulation, a building society was required to include certain matters in its rules, two of which were the manner in which insurance of any premises the subject of a mortgage to the society is to be effected, and whether it is required to be effected with an insurance body specified by the society. It was held that even although there might be legislative power to do something which would include a restricted trade practice, that is insufficient power to legitimate an activity which is otherwise something which is done under that authority but nevertheless amounts to a restricted trade practice:

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[86] 22 ALR 621.

"...the laws of a State do not usually trouble to give legislative affirmation of the lawfulness of acts or things which are not otherwise proscribed, but a legislative assumption of the lawfulness of an act or thing is not tantamount to a specific authorization or approval of that act or thing: What is necessary is that the State law should exhibit a specific legislative intention to authorize or approve the act or thing, even though that act or thing would not - but for the provisions of the Trade Practices Act - be unlawful."[87]

It could be said that this decision is too harsh, and that where the legislature wishes to legitimate a practice for some reason other than to fulfill economic policies, then specific (in the strict sense of the word) legislation would have to be promulgated.

C. Specific Authority and the Petroleum Act 1937

Taking a view that the application of the Commerce Act 1986 is limited in relation to the Petroleum Act 1937 to the extent that it only applies to situations where the Crown is a participant as a licensee, there seems to be little area

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[87] Per Brennan J, ibid at 636.

where the Crown would be subject to the statutory imposed standards of good behaviour. The areas most likely to be at risk are in the post-discovery period.

Under the Petroleum Act, the Minister has power to postpone the development of a petroleum discovery if he is satisfied that the rate at which the petroleum to be be produced from that discovery is contrary to the national interest[88]. A licensee may elect to have the licence deferred or to have the licence surrendered. Where the licence is held by more than one holder, the Minister may require a holder who elects to surrender the right to transfer the interest in the surrendered portion to another person who is approved by the Minister and the other holders of the licence.

A similar power exists for the Minister to reduce the area comprised in a prospecting area[89]. This may be exercised if the Minister is satisfied that there has been a discovery, and the licensee is not carrying out appraisal work or applied for a mining licence, and failure to develop the discovery would be contrary to the national interest. Having exercised that discretion, the Minister must give notice to the licensee that unless the licensee applies for

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[88] Petroleum Act 1937, s.14B.

[89] Ibid s.14C.

a mining license, and makes every endeavour to complete a work programme, the Minister may reduce the area of land comprised in the licence or revoke the licence. Where the Minister is satisfied that some but not all of the holders of a licence are prepared to comply with the requirement of making a mining licence application and implementing a work programme, the Minister can require a holder deemed not prepared to comply to transfer that holder's interest in the licence to another who is approved by the Minister and the other holders of the licence.

It seems quite clear that where the Crown is one of the "other holders" of a license subject to one of these powers, then the process of approving the transferee would be subject to the Commerce Act standards. In applying the reasoning of the Ku-ring-gai case, there is certainly no specific provision in the Petroleum Act for a licensee to approve a transferee in such a manner so as to (for example) prevent a person from engaging in competitive conduct, or for the purpose of restricting the acquisition of goods or services by someone.

Another area of concern could possibly arise under sections 22 and 23 of the Petroleum Act. These provisions restrict the transfer of licences and creation of interests in licences by licensees insofar as such actions must be subject to the consent of the Minister, and the Minister in

giving such consent may impose any terms and conditions as the Minister thinks fit. Upon the assumption that the exercise of discretion by the Minister may not necessarily be a case of the Minister being "engaged in trade", if the effect of the decision is a breach of a trade practice, then the question arises as to what is the effect of such a breach upon other persons party to that practice: does the fact that the Crown is immune from the breach mean that the other persons would be also?

The answer must be that a Court would be able to grant relief against the persons party to the practice. Section 5 of the Commerce Act exempts the Crown, not the practice it may be involved in. Further, it appears that in terms of sanctioning under the exemptions and authorisation provisions of the Act, the practice rather than the person involved, is the object of the legislation. Notwithstanding this, given the width of section 43 (2) of the Commerce Act, participation in an activity which would breach the imposed standard irrespective of Ministerial approval would still taint all parties.

A clear application of the Commerce Act is where the Minister acts pursuant to section 36(1)(c) of the Petroleum Act whereby the Minister, on behalf of the Crown, may "sell or otherwise deal with any licence or any interest in any licence". There is no express provision authorising the

Minister to sell or otherwise deal in a manner in breach of a prohibited trade practice, although again, the Minister may authorise the Secretary of Energy or any other person to acquire the licence or interest in the licence on such terms as he thinks fit. Obviously, the operative words being "sell or otherwise deal with" must immediately raise the inference that the Minister is "engaged in trade".

D. Consequences

Even taking a narrow view of the question as to whether a Minister in exercising a discretion under the petroleum mining licensing regime might or might not fall within the scope of the necessary qualifying activity under the Commerce Act (engaging in trade), if one were to accept the reasoning of the Federal Court of Australia in the Ku-ring-gai case, then there is ample scope for the proposition that the Petroleum Act gives little "specific authority" exempting the Crown from the operation Part II of the Commerce Act whenever the Minister acts pursuant to section 36 of the Petroleum Act. Taking the matter further, it follows that the wider the stance taken on whether or not the Minister is engaged in trade, the greater becomes the application of the Commerce Act to the petroleum mining licensing regime. A logical extension of this is that the Commerce Act applies to bind the Minister even when the

Minister is not only acting as a licensee, but also when the Minister is acting as a licensor.

The result of the above is that there is a convenient balance between the the Minister's power to determine matters pertaining to the encouragement and regulation of mining for petroleum within the discretions available under the Petroleum Act, on the one hand, and the authority of the Commerce Commission to sanction certain activities which would otherwise be prohibited under the Commerce Act on the other. Each decision maker will be competent to make a decision on that particular subject matter and that particular forum is, in this case, appropriate. The only fetter upon the Commerce Commission is when the Minister of Trade and Industry gives written notice of a particular economic policy of which the Commission must have regard to, and depending upon the view point (interventionists would argue other policies should also be the subject of such notices), this seems a far more flexible mechanism to exempt activities inconsistent with competition which the Government may wish to subsist and preferable to that of ad hoc legislation on a level of specificity sufficient to overcome the Ku-ring-gai test.

In terms of the broad economic and public sector reform, it may be that given both the size of the economy and the strategic importance of petroleum, the current situation in

respect of a continued dual role by the Crown as both licensee and licensor mostly subject to the prohibitions under the Commerce Act enables the pursuit of efficiency. With regard to the trading of rights in other resources, the Commission's jurisdiction to authorise activities may well require reduction in the sense that the Commission may well be required to have regard to other matters, eg the rights of existing holders, the obligations of the Crown and the principles of the Treaty of Waitangi.

VI. LEGAL AND EQUITABLE OBLIGATIONS

A. The Crown, Petroleum Mining, and Contract Law

To the extent that the Crown may participate as a licensee in both prospecting and mining as provided for in s. 36 of the Petroleum Act, inevitably, from both the high risk and the huge capital outlay involved in this type of activity, when exercising its rights under this provision, the Crown usually enters joint venture agreements with others, as would be the case for most other parties wishing to partake in prospecting or mining. Leaving aside the role contract law plays in the licensing aspect of petroleum mining, the privileged position of the Crown raises some interesting issues. Firstly, there is the question as to the extent to which the Crown may contract, and secondly, to what effect the law gives to such contracts on the assumption that the

courts wish to give effect to such principles as sanctity of contract. Closely related to these questions is a third area of concern, that of the issue related to the role equitable principles apply where the (traditional) common law principles and remedies become inappropriate.

Notwithstanding some views to the effect that the Crown might not possess a common law power to enter into contract,[90] the scope of the Crown's contractual powers are nevertheless often derived from statute. In the context of petroleum mining, provision is given by section 15 of the Ministry of Energy Act 1977 for the Minister of Energy (on behalf of the Crown) to "carry on any business relating to (inter alia) exploration",[91] and in so doing for the purposes of that provision, may enter "agreements, contracts or arrangements"[92]. Further, the Crown may, acting through any Department of State, enter contracts or arrangements to provide goods and services "at the request of any undertaking" referred to in subsection (1) (which refers to various general activities related to energy exploration, development, and use).[93] This statutory origin gives rise

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[90] See n. 5 at p. 75ff.

[91] Ministry of Energy Act 1977, s. 15 (1).

[92] Ibid, s. 15 (11).

[93] It is interesting to note that the Crown does not directly enter into any contract.

to conflict as to the principle of the freedom to contract on the one hand, and the extent to which such a legislative derived power is subject to judicial review on the other.

When the Crown exercises its statutory power to enter a contract, that power is necessarily limited by the enabling legislation. In the petroleum mining arena then, the Crown might find itself in a rather difficult position if the contract being entered was not to "carry on a business" within the ambit of section 15 of the Ministry of Energy Act, or similarly, if the agreement, contract, or deed entered into is not for the purposes of section 15 of that Act, then in the absence of any common law power to contract, the contract might well be void ab initio.

Additional problems arise, the first of which is that of the principle in administrative law to the effect that the Crown may not enter into a contract which in any way fetters the powers bestowed upon it.[94] The application of this principle might (for example) result in a court not implying a term which has this effect.[95] A second problem is that of the status of the Crown as a contracting party. In view of

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[94] Birkdale District Electricity Supply Company v. Southport Corporation [1926] AC 355.

[95] See for example, Cory (William) & Son Limited v. London Corporation [1951] 2 KB 476.

section 5 (k) of the Acts Interpretation Act 1924 to the effect that rights of the Crown may not be affected by any provision or any enactment in any Act unless expressly stated has the consequence that any other party to a contract with the Crown will be disadvantaged to the extent that legislation not expressly affecting the rights of the Crown impinges upon the performance of the contract some way. A third matter for consideration is the rule of construction that in the interpretation of grants from the Crown, the pro proferentum rule applies and therefore the grant is to be construed in favour of the Crown with the consequence that a grant could not be made unless without ambiguity.[96]

All these matters certainly weigh against equality of bargaining powers, and in a commercial (or "business", to use the argot of the Ministry of Energy Act) environment, a party contracting with the Crown would, as a matter of prudence, factor into the consideration this added risk element. The overall effect then, is that from a commercial perspective, the Crown might be actually disadvantaged by parties contracting with it adopting such a strategy to the extent that the "privileges" and the uncertainties

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[96] Viscountess Rhondda's Claim [1922] 2 AC 339.

associated with the Crown's contractual position might impede rather than facilitate commercial enterprise.

B. Joint Ventures

As stated earlier, the most common modus operandi in petroleum mining is by way of joint venture. The main characteristic of joint ventures[97] is that by way of an agreement between two or more parties, there is (a) amongst the participants, common ownership of the asset to be exploited, (b) an operator is appointed to incur expenditure on behalf of the participants, and only the operator may bind the joint venture, (c) provision is made for the sharing of expenditure and participation in the benefits accrued from the venture, (d) a denial of any partnership amongst the participants (thereby overcoming liability for other participants as in partnership law), and (e) confirmation that the purpose of the association is to produce a "product".

The practical benefits of this vehicle are several. It goes without saying that the spreading of the (high) risk is of utmost importance. The party (or a third party in some

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[97] See EM Kelly (ed), Mineral and Petroleum Development in New Zealand: The Commercial Framework (A series of papers), Energy and Natural Resources Law Association of New Zealand Inc, Wellington, 1987, at p.1.

cases) with the greatest expertise in such matters can carry out the administrative functions of the venture (eg preparation and implementation of budgets, disseminating information, planning and provision of all services and materials etc).

The concept of the joint venture is not without difficulty however.[98] One of the basic concepts behind the joint venture is the denial of partnership. To begin with, judicial authority to the effect that there is a difference between the two beasts is sparse. Further, even if there is valid concept, the drafting of the joint venture agreement will require a great deal of care to avoid a finding that the relationship between the parties is in fact a joint venture in that there should be no expression of joint profits or the profits of the joint venture. There are also practical difficulties with the joint venture mode, especially in the (later) development stage, particularly with regard to financing and taxation. Lastly, there are also issues in relationship to the principles of agency and how they apply to the extent to which the operator may bind the joint venturers.

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[98] Ibid at p. 9.

To ascertain the validity of the proposition that an unincorporated association in the form a joint venture is not a partnership, an examination first must be directed to the Partnership Act 1908, which ascribes to the relationship which subsists between persons carrying on a business in common with a view to profit, the status of a partnership.[99] It seems then, that the prime elements for a partnership are (a) contractual obligations between the parties, (b) a business purpose, (c) an enterprise carried on in common (each party is able to bind the other), and (d) a view to profit.[100]

At first blush, it would seem that the concept of joint ventures falls squarely within this formula. In a recent Australian case, United Dominion Corporation Limited v. Bryan Pty Limited & Others[101] obiter dicta indicated that a differentiation could be made between a joint venture and a partnership insofar as a joint venture might survive the partnership net (particularly the aspect of profit) if the objective of the joint venture is to simply generate a product to be shared amongst the parties to the joint venture. The logic proceeds along the lines that (in a

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[99] Partnership Act 1908, s. 4.

[100] See National Insurance Company of New Zealand Ltd v. Bray [1934] GLR 185.

[101] (1985) ALJR 676.

petroleum mining context) the parties share expenses arising from an activity undertaken in common to exploit a particular opportunity (privilege to prospect or mine) with a view to individually deriving a portion of the outcome from the (prospecting or mining) activity, and therefore because the profit (or loss or whatever - this is entirely up to the individual party) accrues to the individual participant, there is no collective view to profit sharing.

As far as the position of the Crown goes, especially in respect of its role as a joint venturer partaking in a prospecting or mining licence, the above analysis might present some impediment. It should be recalled that in the context of petroleum mining, the Crown may contract for the purpose of carrying on any business relating to (inter alia) exploration of energy.[102] It must be concluded that the term "business" implies at the very least, recovery of expenses, and more than likely, the objective of attaining "normal profit". "Normal profit" can be described as a term used by economists to reflect the concept of the amount required for an entrepreneur to continue in a particular activity in much the same way profit in relation to the enterprise is similar to the relationship interest has to capital.

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[102] See n. 91.

If the Crown may only enter an agreement, contract or deed for the purpose of carrying on any "business", then it might be said that the Crown cannot participate in a joint venture because the whole purpose of the joint venture is to not make profit. Incongruously, section 15 (1) (b) of the Ministry of Energy Act 1977 specifically allows the Minister of Energy to acquire interests in and participate in any joint venture, despite the general requirement that this should be in pursuit of carrying on a business. The maxim generalia specialibus non derogant must provide some comfort to the Crown under these circumstances.

Some concern must be raised in relation to the effect of a court finding a joint venture in which the Crown had acquired an interest or was otherwise participating in was not a joint venture at all, but was in fact a partnership. In terms of the Ministry of Energy Act, there is provision in section 15 (1) (a) for the Minister to participate, on behalf of the Crown, in or acquire interests in any partnership, so at least in such a case the Crown would be prima facie acting intra vires its statutory powers. The Crown would then (like its fellow joint venturers) be faced with the unanticipated (in fact deliberate provision for the avoidance thereof) possibility of assuming the liability of its partners and the operator, and any other consequences flowing from the relationship of partnership.

No doubt, there would be an argument for relief under the Contractual Mistakes Act 1977 or at least reliance upon the equitable remedy of rectification[103] however, it is difficult to conceive of exactly what it is that a court could rectify in such a circumstance. Analogously, the Contractual Mistakes Act 1977 can hardly be relied upon to create a legal entity which has had no prior legal recognition. The Illegal Contracts Act 1970 would be of equal assistance. There would be few obstacles to finding a joint venture agreement to be "illegal" merely because it is an attempt to create a corporate being which is neither partnership nor company.

All in all, it is not difficult to see the great likelihood of the joint ventures concept remaining without lawful recognition, and the consequences that this may have on the parties attempting to rely upon its legitimacy seem to remain unanticipated.[104] Surprisingly, there is little litigation on this matter, the more so when one considers the large outlays involved.

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103 See Dundee Farm Limited v. Banbury Holdings Limited [1978] 1 NZLR 647.

104 Perhaps the parties should expressly provide for contingent liabilities in the event the "no partnership" clause is deemed invalid.

In terms of the case study, it is difficult to make any definitive statements about the contractual liability of the parties without perusing the joint venture agreement itself. Like much of the technical data associated with this industry, the actual agreements seem to attract a high level of sensitivity to disclosure. One can assume that the agreement would be based upon the British National Oil Corporation standard operating agreement.[105]

As far as confidential information is concerned, it can be assumed that there is provision for the participants to share data and information amongst themselves, perhaps with the qualification that the sharing only occur if that data and information relates to the particular licence area and particular operation. There would probably be an obligation upon the parties to not divulge any of this data and information to any third party, and this obligation would probably survive for a set period (eg five years) the discontinuance of the contractual term. The exceptions to this duty to not disclose would most likely be (a) where disclosure is otherwise required by law, (b) by consensual decision in accordance with whatever procedure there is for decision making, (c) to affiliates, possible transferees of any interest in the venture, consultants and advisors, and

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[105] See n. 5 at p. 85ff.

financiers (although disclosure under each of these circumstances would probably require a prior undertaking by the recipient to similar effect as this duty), and (d) where the data and information have lawfully come into the public domain.

In terms of the contractual exception to the obligation to maintain confidence on the grounds of "disclosure otherwise by law", one must conclude that the Plaintiffs would fail on this ground. Even if it could be argued that the Crown (by way of the Minister) qua joint venturer and licensee was a separate entity to that of the Crown (by way of the Minister) qua regulatory body, then the disclosure might well be said to be required by law: Regulation 7, Petroleum Regulation 1978, SR 1978/255. It would seem illogical, however, that there has been any disclosure in the literal, ordinary sense of the word. No information has passed to any third party.

C. The Doctrines of Equity

As far as any equitable doctrines applying to the situation, one outcome of a court ascertaining that the joint venture is actually a partnership is the spectre of a fiduciary duty being imposed upon each partner towards each of the other partners. Even although the relationship amongst partners might not always be one such that a fiduciary relationship

can be founded,[106] nonetheless, it is more than trite to say it is established law that on the basis of good faith, a partner will be restrained from making personal profit at the expense of the firm.[107]

1. Fiduciary duty

As a general proposition, it can be stated that where there is a relationship between people such that it would be reasonable to discern that one party places substantial trust or confidence in any other party in the relationship, then a fiduciary duty between the parties will be recognised.[108] It has been acknowledged that in many cases, the scope of a fiduciary's obligation may not be easily delineated, but within that scope, the nature of the obligations is clear.[109] One of the most elementary obligations of a fiduciary is that if, by reason of his fiduciary position, he acquires an interest in property, he

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106 See Aas v. Benham [1891] 2 Ch 244 holding a partner is not accountable to the partnership for profit derived from a personal business which is outside the scope of the business in which the partnership is involved.

107 Thomson's trustee v. Heaton Anors [1974] 1 All ER 1239.

108 Coleman v. Myers [1977] 2 NZLR 255.

109 RP Meagher, WMC Gummow, JRF Lehane, Equity, doctrines and remedies (2 ed, Butterworths, Sydney, 1984), at p. 125.

must hold that interest on trust for the beneficiaries.[110] This duty was further expanded into general principles in Boardman v. Phipps[111] where the House of Lords held (inter alia) that the trustee in such a situation must disgorge any benefit derived from acquiring that interest, irrespective of bona fide intent, and even though the trust could not have obtained the benefit. In the event of breach, the beneficiaries are entitled to recover not only the exploited property, but also any gains derived therefrom, and gives the beneficiary priority over the fiduciary's creditors. Further, it was clear in Boardman that information per se is capable of being trust property for the purpose of a constructive trust. There is also "overwhelming mass of authority"[112] for the principle that a purchase of trust property by a trustee from himself or himself and other trustees is voidable at the instance of the beneficiaries.

In the case study, the joint venture obviously went to considerable expense and undertook high levels of risk to prospect the land, thereby producing the "property" of great commercial potential and the information associated with that was the most tangible manifestation of that potential.

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[110] Keech v. Sandford (1726) EqCasAbr 741.

[111] [1967] 2 AC 46.

[112] Meagher, op cit 140, citing Ex parte James (1803) 8 Ves 337.

It would not be hard to envisage the imposition of a fiduciary duty in relation to the use of that "property". There would be most likely a clear contractual obligation creating a fiduciary relationship between the joint venturers in relation to confidential information. By issuing a mining licence to himself, the Minister was obviously acquiring an interest in the trust property (ie the knowledge of and the extent of the discovery). As far as any "purchase" of trust property by a trustee, there was none, and the acquisition is almost tantamount to misappropriation. The probability of equitable intervention is high.

2. Breach of confidence

Even if there can be no fiduciary duty construed, there is an obvious situation where the joint venturers will have an equitable duty to each other, and that is in respect of confidential information. Broadly stated, the principle is that "a person who has confidential information belonging to another may be restrained by injunction from using it without the owner's consent".[113]

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[113] Halsbury's Laws of England (4 ed, Butterworths, London, 1980) vol. 16. Equity, para. 1455, p. 979.

The distinction between any equitable duty of confidence owed by a person holding confidential information as a opposed to that owed under fiduciary duties arising from a trust (albeit under construction), basically, is that the two areas have into developed into separate fields. The former duty has developed as a particular branch of the law relating to the latter, and that the technical limitations of the latter are less applicable.[114] The diversion arose as a result of the separate jurisdictions within the law of equity. The jurisdictions were three in all. The first, exclusive jurisdiction, was whereby the matter was something only a court of equity could issue remedy. Secondly, there was concurrent jurisdiction, which covered matters able to be dealt with by both courts of equity and common law. Auxiliary jurisdiction was the third, under which the Court of Equity exercised jurisdiction to facilitate a claim of legal rights.[115] The law pertaining to breach of confidence has its origins in the exclusive jurisdiction, but has evolved so that, depending upon the remedy sought, it can now be seen to also operate in the auxiliary jurisdiction.

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[114] Meagher, op. cit. 825.

[115] Ibid. 9.

The parameters of the duty were expressed by Megarry J in Coco v AN Clark (Engineers) Limited[116] in that there are three prerequisites: (a) the information had to have some characteristic implying confidence, (b) the information must have been communicated in circumstances "importing an obligation of confidence"; and (c) the information is not to be used without authorisation.

In terms of the intrinsic confidential quality of the information, information which is not in the public domain would fall within the category of protected information.[117] Other information falling under this head is information which is used by the recipient as a "springboard" for activities detrimental to the confidant, even after the information is public: the recipient was not allowed a "head start".[118] Secrecy alone, however, may not give information sufficient quality of confidentiality to come within this prescription, and examples have been "know-how" in the form of sales methods which did not amount to "trade secrets",[119]

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116 [1969] RPC 41.

117 Saltman Engineering Co v. Campbell Engineering Co [1963] RPC 203, and AB Consolidated Limited v. Europe Strength Food Co [1978] NZLR 595 (CA).

118 Terrapin Limited v. Builders Supply Co (Hayes) Limited [1967] RPC 375, Aquaculture Corporation v. NZ Green Mussel Company Limited Anors (1986) 1 NZBCL 102,567.

119 Slimquik Bodi Design Limited v. AT Pargeter Anor (Unreported) Auckland Registry, CP43//86.

and in the form of formulae for and application of cleaning chemicals (insofar as the chemicals were readily available and the application was commonsense).[120] At the other end of the spectrum, information which is conceptually simple might still be worthy of protection, and ideas in relation to proposed television programs[121] exemplify this.

The second requirement relates to the circumstances in which the information was acquired. The test adopted was that of the "reasonable man"[122] and in Coco (supra), Megarry J expressed (at page 48) it to mean

> "...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

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120 Ceiling Care (NZ) Limited Anor v. Russell Smith (Unreported) Auckland Registry, CP1337/83.

121 Talbot v. General Television Corporation Pty Limited [1981] RPC 1, and Fraser Anors v. Thames Television Limited Anors [1983] 2 All ER 101.

122 A rather strange concept given the equitable nature of the action, particularly in view of the common law origins of the concept.

This requirement has since been found to apply in situations where the information is given pursuant to a contract, as in Saltman (supra). The third element, unauthorised use, is self explanatory, save the question as to whether the supplier of the information has suffered any detriment is within the scope of this requirement, although, naturally, in most cases, proceedings brought by the owner of the information would be unlikely if there has been no detriment suffered.

Reviewing the case study on the above analytical framework, there seems to be a clear breach. The information regarding the discovery of hydrocarbons could not be anything less than of confidential in nature, especially if the information had not entered the public domain. The information was acquired by the Crown initially as a joint venturer, and it is likely that the joint venture agreement would have raised the obligation to retain such information in confidence. The fact that the Crown issued a licence to itself based upon the information may not in itself be necessarily a case of unauthorised use, however,it could be argued that the information, being the property of the joint venture, required the authorisation of the joint venture prior to any other use.

VII. PETROLEUM MINING LICENCES AND JUDICIAL REVIEW

As seen above, the Minister of Energy may grant licences at his discretion. In respect of the case study, the joint venturers[123] holding interests in PML 38140 (Waihapa) have filed proceedings in the High Court (Wellington)[124] seeking judicial review of the Minister's decisions (a) to deny an application by the joint venture to extend the then current licence to encompass the Ngaere field, (b) to grant himself a mining licence over a licence area almost identical to the area which the joint venture wished to extend PML 38140, and (c) to sell the Minister's PML, and in doing so, inviting the joint venturers to negotiate with him to this end. The relief sought is a declaration that the decisions are invalid and that the Minister ought not implement them.

As far as the grounds for review are concerned, the Plaintiffs are relying upon the bases that (a) the decisions were made for an improper purpose, (b) the Minister had regard to irrelevant consideration, (c) the Minister failed to have regard to or give due weight to relevant considerations, (d) the joint venture's legitimate expectation that an extension would be granted was not

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[123] Petrocorp Exploration Limited, Petrocorp Exploration (Taranaki) Limited, Payzone Exploration Limited, Southern Petroleum No Liability, Nomeco New Zealand Exploration Company, Bligh Oil & Minerals (NZ) Limited, and Carpentaria Exploration Company (NZ) Limited.

[124] Reference CP No 613/88.

fulfilled, and (e) the decisions were unfair or unreasonable. Without knowing the specific facts, a cursory assessment of the issues can provide some conclusions.

A. Improper Purpose.

Under the rubric of improper purpose, if an entity with statutory powers uses that power for a purpose for which the statute has not authorised, then a court may review such a decision and find such use as invalid: Padfield v. Minister of Agriculture[125]. In order to establish exactly for what purpose the Minister may use his discretion in granting mining licences to himself under the Petroleum Act, a return to the analysis of that Act reveals that a mining licence is granted to authorise the licensee to "mine for petroleum on whole or any part or parts of the land referred to in the application".[126] The licence may be granted upon such terms and conditions as the Minister may in his discretion specify.[127]

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[125] [1968] AC 997, also see Rowling Anor v. Takaro Properties Limited [1975] 2 NZLR 62 (CA), and Spectrum Resources Limited v. Clark (1987) Unreported, Wellington Registry, 84/88.

[126] Petroleum Act 1937, s. 12.

[127] Idem.

Given the fact that immediately upon announcing the grant to himself, the Crown was extending an invitation to the joint venture partners in Tariki, Ahuroa, and Waihapa in the Ngaere licence,[128] it must be deduced that in exercising his discretion, the terms and conditions of the grant as prescribed by the Minister must have encompassed a condition to the effect that even although the Minister qua licensee was authorised to mine, the requirement that the Minister actually undertake a work programme must have been waived. It is difficult to see how the Minister exercised his discretion for the purpose of granting a mining licence to authorise himself to mine for petroleum. It seems that there was no intention whatsoever to undertake the operation at all. It would be interesting to view the Minister's application for the licence and see to what extent the requirements for the provision of certain information[129] have been satisfied. The plaintiffs in the case also assert that the Minister's main objective in exercising his discretion was to obtain for the government a large lump sum payment, and that such an objective is not contemplated by the Act. It must be conceded that such an outcome must be within the ambit of the Act, as there is a power for the Minister to sell licences, and it would not be unusual for

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[128] See n. [press statement 5 May].

[129] The Petroleum Regulations SR 1978/225, Reg. 7.

the licences to be extremely valuable, especially if the licence area contains a discovery.

Even if these arguments could not prevail, there is a conspicuous absence of specific indicia in that particular part of the Petroleum Act pointing to the purposes for which a discretion may be exercised, and thus reliance must be placed on the long title. It is arguable whether or not the act of granting himself a licence for immediate resale comes within the ambit of "encouraging mining for petroleum". If the short term consèquence of the decision was to place a licence in the hands of the joint venturers in the adjacent fields (thereby encouraging mining in the Ngaere field), then the process of making himself an intermediate licensee is otiose. In fact, in the long run, if potential miners are given to believe that mining licences could possibly be subject to a sale and purchase regime as opposed to a licensing (albeit with wide discretions) regime, then those potential miners might in fact be discouraged: at least the licensing regime is subject to judicial review.[130]

B. Relevant and Irrelevant Considerations

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[130] See Webster v. Auckland Harbour Board [1983] NZLR 646.

The classic case relating to judicial review of discretionary powers is Associated Provincial Houses v. Wednesbury Corporation,[131] wherein Lord Green MR enunciated the duties of a decision maker entrusted with a statutory discretion, amongst which was the duty to take into account all considerations which the statute expressly or implicitly makes relevant. The distinction between this duty and that of exercising a discretion for improper purposes is that in the latter case the power might be exercised for a purpose inconsistent with the purposes of the enabling statute, and yet all the considerations might have been relevant to the exercise of that power, so that even although the relevant considerations were accounted for, the intended result was not within the scope of the Act. In the former case, the correct purpose for which the power is given may have been intended in the use of that power, but the incorrect considerations or criteria might have been the basis for that exercise. The relevant considerations can be divided into mandatory considerations (those expressed in the statute), and permissible considerations (those matters which the decision maker may take into consideration without the decision being struck down upon the basis that irrelevant considerations were accounted for).[132] There is

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[131] [1948] 1 KB 223.

[132] CREEDNZ v. Governor-General [1981] 1 NZLR 172, and Ashby v. Minister of Immigration [1981] 1 NZLR 222.

a further aspect to these principles and that is having discerned the relevant criteria, and disregarded the irrelevant considerations, the decision maker must give not give undue weight to any one of the relevant criteria. The converse is where the Minister must not take into consideration criteria which is not relevant to the exercise of the discretion.

As far as the case study goes, the Petroleum Act 1937 offers little in terms of overt considerations to be accounted for. The requirement that the Minister's discretion be consistent with the purpose of the Act aside, it has been stated that the Act places only three main limitations upon the Minister's discretion: "the term of a licence, the prior claim of the holder of a prospecting licence to a mining licence and the right of a holder of a prospecting licence to prohibit the grant of a mining licence to another person".[133] There is little encouragement in the Ministry of Energy Act 1977, either, as that enactment provides for criteria which the Ministry (as opposed to the Minister) of Energy must consider.[134] Given these factors, it would be most difficult for the plaintiffs to succeed on the ground of failure to have regard to relevant considerations. As

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[133] See n. 5 at p. 21.

[134] Ibid, pp. 22, 23.

far as the contention that the Minister had regard to irrelevant considerations, this question will turn on the evidence presented. If the evidence did show that the Minister was actually exercising the discretion on the basis of some extraneous consideration (like that of making the greatest advantage of the opportunity to use the licensing regime as a means of raising revenue) then there would be no question of mistaken consideration.

All in all, given the lack of express criteria, the remaining argument for the plaintiffs would be that, on construction of the statute as a whole, the exercise of discretion was such that it defeated the spirit of the Act conferring that discretion.[135] The long title of the Petroleum Act 1937 includes as a part of the stated purpose of the Act, provision for the regulation of mining for petroleum. The Act then stipulates a prohibition upon prospecting and mining without a licence, and then provides for an elaborate licensing system. It goes without saying that had the legislature contemplated the regulation of mining in the manner of the Crown issuing licences to itself for sale to interested parties, then (a) the licensing regime would not be so elaborately expressed, and (b) the provisions in the Act allowing the method adopted in the

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[135] Education Secretary v. Tameside Borough Council [1977] AC 1014.

instance would have had more features included relating to the regulation of the activities. On balance, without reliance upon any special facts, this argument presents the Crown with great difficulty.

C. Breach of Legitimate Expectation

This ground of judicial review, as a subset of the principles espoused under the subject of natural justice, is one of the most recently developed. Although not entirely static as to its dimensions, to date it embraces either expectation of a fair hearing,[136] or expectation of a favourable state of affairs when a licence or other benefit is being sought.[137] It is clear that the exercise of a discretion can affect an individual where that individual might only have an interest, liberty, or expectation - something less than a legal right. The applicant for a licence is usually allowed a fair hearing to enable the applicant to negate any allegation raised. The scope of application also extends to revocation, suspension, and non-renewal of licences granted.[138] Although the number of times licensing situations arisen whereby any hearing of any

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136 Cinnamond v. British Airports Authority [1980] 1 WLR 582.

137 Schmidt v. Home Secretary [1969] 2 Ch 149.

138 McInnes v. Onslow-Fane [1978] 1 WLR 1520.

nature has not occurred are numerous, it has been submitted that this alone does not deprive administrative procedure of the application of natural justice nor judicial review.[139] The only limitation would be "administrative exigencies" and any contrary indications implicit in the scheme of the legislation.

The most recent refinement of the relevant law in new Zealand was by the Court of Appeal in Fowler & Roderique Limited v. Attorney-General[140] where Somers J stated that the exercise of of power (to limit the number of licences) does not necessarily entail the calling for submissions in every case, that the giving of a person the opportunity to be heard is dependent upon the circumstances. One circumstance in which the decision maker must have regard to the interest of persons affected prior to exercising a discretion is where :

> "...the exercise of the power is likely to affect the interests of an individual in a way that is significantly different from the way in which it is

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[139] HWR Wade, Administrative Law (5 ed, Oxford University Press, Oxford, 1984), at p. 497.

[140] [1987] 2 NZLR 56, applied in Gallagher v. Attorney-General (Unreported) Wellington Registry, CP 402/88.

likely to affect the interests of the public generally..."[141]

The rule was further stated to include the proposition that:

"Where a person having no legal right to the renewal of the licence or permit has a reasonable and legitimate expectation of renewal the Court will normally intervene to protect that expectation by judicial review."[142]

The consequence of these rules is that decisions falling within the above category are subject to consultation, that the outcome of that consultative process is not necessarily fulfilment of that expectation, nor provision for a formal hearing with the attendant judicial consideration of submissions. A recent decision revealed a further aspect of the rule, an aspect akin to that of estoppel.[143] The essence of this concept is that statements of intent, assurances, or promises made by the decision maker prior to making the decision to the effect that the decision would be made in accordance with certain criteria would be sufficient

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[141] Ibid, at 74.

[142] Idem.

[143] Bradley v. Attorney-General 7 NZAR 193.

to raise a legitimate expectation within the mind of the person affected that the criteria would be followed.[144]

On the facts of the case study, the plaintiffs have relied on the fact that the joint venture had already carried out significant prospecting and mining in adjacent areas, and the discovery at Waihapa indicated that the field might extend beyond the area comprised in the Waihapa licence area. A crucial assertion on the part of the plaintiffs is that Ministry officials gave the joint venturers the impression that if appraisal work indicated the accumulations did extend beyond the licence area, then there would be no obstacle to extending the licence area accordingly.

It is clear the plaintiffs would be affected by the decision in a manner which was significantly different from that of the public in general. The activity is highly specialised, and the plaintiffs are entrepreneurs dedicated to this type of undertaking: no ordinary member of the public would be able to partake in the same manner. Discussions with officials indicated a decision would be made in a certain way. The actual decision did not involve any consultation. The fact that the Minister's interest is being offered for

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[144] See also, R. v. Secretary of State for the Home Department Ex Parte Kahn [1985] 1 All ER 40.

sale back to the joint venturers seems to support the implication that the Minister, as decision maker, did not have regard to the person affected by the decision. In terms of the two "limbs" of legitimate expectation, the facts seem to point towards them both being breached. The expectation raised by the Ministry's assurances, and the lack of consultation appear to be fatal to the defendant.

The only possible argument in defence would be that the decision involved a high degree of policy and therefore the rules of natural justice need not be complied with. On the facts, this would be difficult to sustain. The situation is well outside the range of "national security" cases. Exactly what is the policy and objective arising from issuing a licence then selling the interest in that licence to the persons who had applied for a similar licence anyway is not easy to discover. It does not appear to be an "urgent" situation, thus ruling out the "administrative exigencies" exception. It is doubtful that any exclusions can be relied upon.

D. Unfairness or unreasonableness

A parallel duty to that of avoiding "unreasonableness" in the sense of a general category of abuse of discretionary power was enunciated by Lord Greene MR in Wednesbury (supra), that duty being restraint from doing "...something

so absurd that no sensible person could ever dream that it lay within the powers of the authority."[145] The classic example given is that of dismissing a red haired teacher on the grounds of hair colour. The extent of this principle was explored in Council for Civil Service Unions v. Minister for Civil Service[146] where Lord Diplock opined that this ground for judicial review (renamed "irrationality")would apply to

> "...a decision which is so outrageous in its defiance of logic or moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at."[147]

It could be that this statement might be stating the principle in too harsh terms, that very few plaintiffs would succeed if this was the definitive test. Be that as it may, the principle has been applied in cases where the exercise of a discretion was for financial motives. An example of this was where an elaborate licensing systems established to issue licences in respect of public houses destroyed during war time was run in such a way that a condition of obtaining

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[145] See n. 131 at p. 229.

[146] [1985] AC 374.

[147] Ibid, at 951.

a licence was to purchase sufficient outstanding licences to cover the estimated sales of the licenced premises with the result that there was relief from payment of compensation otherwise payable to the outstanding licensees.[148]

Irrespective of the stringency of the test prescribed in Council for Civil Service Unions case (supra), there is reasonable support for the application of this test in New Zealand[149] notwithstanding the tide of decisions attempting to widen the availability of judicial review on the ground of irrationality.[150] Accepting the stronger test, success by the plaintiffs on the grounds of the breach of confidence would suffice to come within the bounds of "outrageous defiance of moral standards". There could be no lesser moral standard than that imposed by equity. On the facts, it would seem that the "financial motive" is also relevant.

VII. CONCLUSIONS

A. Resource Management Law Reform

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[148] R. v. Birmingham Licensing Planning Committee ex parte Kennedy [1972] 2 QB 140.

[149] See n. 130 at p. 145.

[150] R. v. Inland Revenue Commissioners ex parte Preston [1985] AC 835 and Wheeler v. Leicester City Council [1985] AC 1054.

"The Government is committed to the reform of our resource management laws. By the end of 1989 we aim to have in place a clear and effective legislative basis for the future management of New Zealand's natural resources."[151]

The scope of the reform described above covers a review of legislation in the areas of town and country planning, water and soil use, minerals, as well as environmental enhancement and protection procedures.

One of the problems confronting this area of law has been it's fragmented format: in some cases, legislation may present conflicts to resource use by, for example, appearing to overlap in certain circumstances. The process of the reform then, involves looking at the values that are placed on resources, ascertaining and giving recognition to Maori cultural and spiritual values (including the application of the principles of the Treaty of Waitangi), examining the ownership of the rights to resources, and assessing the extent of the ideal amount of public participation in decision making.[152] The desired outcome of the process is therefore to enable the distribution of rights in a just

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[151] Speech Rt Hon G Palmer, Deputy Prime Minister and Minister for the Environment, Greymouth, 4 May 1988.

[152] Idem.

manner (including consideration of existing holders' rights, the Crown's obligations, and the principles of the Treaty of Waitangi), to ensure that resources provide the greatest benefit to society and to that end are transferable to where they are most valued, provide a fair and consistent dispute resolution process, and an environmental management system which will enable respect for ecosystems as well as sustaining resources for future generations.[153]

In terms of the issues raised in this paper, there is no doubt as to the importance of petroleum in any modern society. To this end, it is probably quite right that the Crown retain full ownership of this resource. As far as the distribution of this resource in a "just manner" is concerned, then clearly, the present distribution and allocation framework requires some change. In respect of the Crown being the final distributor of rights and access to the resource, there appears to be sufficient bases for potential conflict. As licensor, the discretions available to it are narrow insofar as they are subject to judicial review, notwithstanding the lack of explicit criteria laid down in the legislation as to how the resource should be allocated. This matter alone should be sufficient for concern. By participating as a developer of the resource,

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[153] Speech by Rt Hon G Palmer, Minister for the Environment, Wellington, 23 May 1988.

the distribution in a "just manner" becomes even more difficult. The rights to resources of existing (and potential) holders are in conflict with the obligations of the Crown from the outset. The Crown is in an enormously advantaged position in relation to resolution of disputes.

B. Ministry of Energy Policy

The espoused policy of the Ministry of Energy is that market forces alone will not necessarily produce efficient supply of energy, nor ensure adequate consideration to long term needs, nor wise management of energy resources.[154] Ironically, the Ministry is "committed to the promotion of competitive and open market as the primary means of enabling society's goals for energy and mining to be achieved".[155] The Resource Management and Mining Group aim to promote, develop and maintain an environment for the effective contribution of development and mining to the benefit of New Zealand, and see their function as that of the Crown's representative in ownership of "most" of New Zealand's energy and minerals and thus, their role is to allocate property rights to mineral and energy resources. The consequence to this is that there is an aim of obtaining for

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[154] Ministry of Energy Corporate Report 1987.

[155] Idem.

the Crown a return for the use of the energy and minerals owned by the Crown "in the best interests of New Zealand".

With respect, it must be quite clear that as long as the Crown is able to participate in petroleum development, the dual nature of its role does not facilitate the objectives stated. The temptation for the Ministry to take advantage of situations arising to obtain the highest return for the Crown will impede the confidence of those willing to partake in this high risk industry. This can only be detrimental in the long run. Like so many state industries "rationalised" by the Crown in the coporatisation process, it is submitted that the Crown clearly delineate between its regulatory function and its operating function, and opt only for the former.

Lum, I. N
Crown
obligations and
petroleum mining
licences