RECENT CASES:
Petrocorp Exploration Limited v. Minister of Energy

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INTRODUCTION

The decision of the Judicial Committee of the Privy Council in *Petrocorp Exploration Limited v. Minister of Energy* is a landmark decision on the contractual relationships between the private sector and government in the development of New Zealand's petroleum resources. A detailed understanding of the background to the case and the relevant legislation is essential for a full appreciation of the ramifications of the decision.

THE PETROLEUM ACT 1937 — THE STATUTORY SCHEME[1]

The promoters of the Petroleum Act 1937 were alert to the importance of petroleum to modern industrial society. In the hope that some oil in commercial quantities might be found in New Zealand, they sought to facilitate its discovery and encourage its exploitation, but maintain control over the ownership and the production of that oil for the general benefit of the community. Also important was the avoidance of any disputes as to its ownership from those who might own the freehold or other title to the land but could not claim ownership of any particular part of the reservoirs of oil which were unknown and unregarded in setting the value or other use of the land.

The long title to the Act declares that it is 'to make better provision for the encouragement and regulation of mining for petroleum, and to provide for matters incidental thereto'.

Section 3 of the Act provides that petroleum is the property of the Crown notwithstanding anything to the contrary in any Act, any Crown grants, certificate of title or any other instrument of title, and all alienations of land from the Crown after the Act came into force are deemed to be made subject to the reservation of all petroleum to the Crown. That, however, applied and applies only to petroleum *in situ*; once mined or recovered and brought to the surface, it is no longer subject to that pre-eminent right. Section 4 provides that no prospecting or mining for petroleum shall be made except pursuant to a prospecting licence or a mining licence granted under the Act. A prospecting licence under s.7 of the Act gives the licensee:

(a) The exclusive right to prospect for petroleum on the land comprised in the licence and the right for that purpose only to carry out mining operations; and
(b) Such other rights, not inconsistent with this Act or with the terms and conditions of the licence, as may be necessary for the effective carrying out of prospecting operations.

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1 The statutory analysis is taken largely from the decision of Greig J in *Petrocorp Exploration Ltd v. Minister of Energy* [1991] 1 NZLR 1, 10–14.

The holder has no proprietary or other rights in respect of any petroleum derived from the land in the licence except as a result of the licensee's mining operations under that licence. Mining operations are defined to mean mining for petroleum, but include prospecting for petroleum and extend to other ancillary operations for treatment or processing and other necessary works in relation to and in connection with such mining operations.

A prospecting licence is to be granted by the minister in his discretion and over the whole or any part of the land referred to in the application (s.5(1)). The minister may, on granting the licence, make a condition that she/he or any other person on behalf of the Crown shall participate in prospecting or in the mining of petroleum which may be granted under any consequential mining licence (s.5(2)). The term of a prospecting licence is fixed at five years with a right to extend that once for a further five years but over no more than one half of the area in the licence (s.6(1) and (3)). Sections 5 and 7 (grant of a prospecting licence and the rights of the licensee) are made subject to the provisions of the Act.

A mining licence ('PML') may be granted under either s.11 or s.12, the distinction being that, under the former, it shall be granted to the holder of a prospecting licence ('PPL') on the minister being satisfied that the licensee has discovered a deposit of petroleum within the land in the licence; whereas under s.12, it may be granted to anyone in the minister's discretion. Thus, on a discovery by a licensee under a PPL he shall have the right to the PML subject to the surrender of the PPL in respect of the land which may be particularised and granted under the licence. It is made clear in s.11 that the licence may be granted over the area of land surrendered or over such smaller area as the minister determines will be reasonably adequate to enable mining operations to be carried out in respect of the reservoir or field intended to be mined in accordance with 'good oilfield practice'. Any land which is not included in the mining licence will continue to be included in the prospecting licence until its expiry. The grant made under s.12 is at the discretion of the minister and again may be for the whole or any part of the land. By s.12(2) the minister may specify as a condition that the Crown shall be entitled to participate in mining under the licence. Section 12(5) provides that if a prospecting licence is in force in respect of any land, no mining licence shall be granted other than to the licensee of the PPL except with the consent in writing of that licensee. There is, then, a contemplation that more than one licence may be granted in respect of land.

The PML is granted for an initial term which is not more than four years but, subject to compliance with the terms and conditions imposed by the minister, may be converted into a specified term which shall not exceed a period of 40 years from the date of the approval of the work program (s.13). The specified term may be extended by the minister, in his discretion, where he or she is satisfied that the petroleum discovery to which the licence applies cannot be economically depleted during the specified term for reasons beyond the control of the licensee and a satis-

factory work program is submitted and approved. The rights of a PML licensee are as set out in s.14. These are:

> (a) The exclusive right to mine for petroleum on the land comprised in the licence, and the right for that purpose to carry out mining operations; and
> (b) Such other rights, not inconsistent with this Act or with the terms and conditions of the licence, as may be necessary for the effective carrying out of mining operations.

As with the rights granted to the licensee of a PPL, the holder of a mining licence shall not, by virtue of the Act, have any proprietary or other rights in respect of any petroleum derived from the land (s.14(4)). It will be seen that the holder of a PML is entitled not only to mine but also to carry out further prospecting as part of the defined term of mining operations. Like the provisions applying to a PPL, the provisions in ss.11 and 12 as to the grant of licences and as to the rights in s.14 are each expressed to be 'Subject to the provisions of this Act'.

There then follow certain provisions concerning the approval of work programs by the minister. These must be approved before the licensee under a PML commences the construction of any works, i.e. the permanent works or structures, including production facilities, pipelines and treatment, processing and storage facilities not capable of being moved without substantial dismantling and before the initial term was converted to a specified term. The duty imposed upon the licensee is, within the term of the initial term, to submit to the minister a proposed work program for the development of the petroleum discovery which will comprise a description of the proposed works, the location and use of them, a construction schedule, the types and quantities of petroleum to be produced, including particulars of that production program, together with a cost estimate and a plan for financing the work program.

The minister then has a number of alternatives as to approval or modification of the program, and there is a duty on the minister to afford the licensee a reasonable opportunity to make representations before withholding the approval for any work program. There is a right to refer the matter to arbitration, but the minister has the sole and exclusive right to determine if the work program is contrary to the national interest — in which event there is no right to arbitrate, to review or to set aside that decision. If no work program is approved by the minister within the initial term of the mining licence, the minister shall revoke the licence. If the minister exercises his rights in the national interest to refuse approval of a work program and consequentially revokes the licence, the licensee is entitled to be reimbursed for the necessary actual costs of the work undertaken in the review, exploration and evaluation of the prospecting work carried out during the initial term of the mining licence.

Under s.14B the minister is given a specific power to refuse to extend a mining licence to a specified term where he or she is satisfied that the rate at which it is proposed to produce petroleum would be contrary to the national interest. That is a separate independent power which is expressed to be 'Notwithstanding anything in this Act'. There is, furthermore, power to reduce the area comprised in a prospecting licence or to revoke the licence for failure to develop the petroleum discovery, and the

minister is empowered to modify or suspend mining operations in his or her discretion but on the application of the holder of the licence.

The Act then goes on, in ss.18 and 18A, to provide for the payment of royalties in respect of all petroleum that is produced from the land, whether under a PML or a PPL, and sets out the basis on which the royalty is to be fixed. Section 19 gives the minister, after consultation with the licensee under a PML, the right to require that petroleum produced be processed and refined in New Zealand.

Section 20 provides for the extension of the area comprised in the licence. That section is as follows:

> Subject to the provisions of this Act, the Minister may from time to time, on the application of the licensee, and upon or subject to such conditions as the Minister thinks fit, amend any licence by adding any adjoining land to the land comprised in the licence.

It will be noted that, as with the grant of and the rights to a PPL and a PML, this is made expressly subject to the provisions of the Act. Any amendment is at the discretion of the minister.

The Act makes provision for the transfer of licences, subject to the consent of the Minister; and for the approval of the creation of any interest in licences, again subject to the approval of the minister. A licensee may surrender a licence and the minister may revoke the licence if he he or she has reason to believe that the licensee has failed to comply or is not making reasonable efforts to comply with any of the terms or conditions of the licence or the requirements of the Act. That requires notice and is subject to appeal.

Sections 28 to 33 of the Act provide for the right of entry on land, the restrictions and conditions thereupon and thereof, and the requirement that compensation be paid. Section 36 deals with the rights of the Crown to acquire licences and carry out mining. It states:

> (1) Subject to the provisions of this section, the Minister may, on behalf of the Crown —
> (a) grant any licence to himself or purchase or otherwise 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:
> (e) do any of those things jointly with any other person or persons.
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> (2) The Minister may in his discretion and on such terms and conditions as he thinks fit authorise the Secretary or any other person or persons on behalf of the Crown to acquire a licence or any interest in a licence. In any such case references to the Minister in this section shall be read as references to the Secretary or the other person or persons, and the Secretary or other person or persons may, subject to the terms and conditions of the authorisation, exercise all the powers and discretions granted to the Minister by this section.
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> (3) The Minister shall not prospect or mine for petroleum on any land unless a licence is held on behalf of the Crown in respect of that land.
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> (4) Subject to the provisions of this section, any licence acquired by the Minister or by any other person or persons on behalf of the Crown shall confer the same rights, benefits, and privileges as would be conferred on a private person holding the licence. No transfer or mortgage to the Crown of any licence shall operate as a merger of the interest created by the licence.
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> (5) A licence held solely by the Minister or by any other person or persons on behalf of the Crown shall not terminate by effluxion of time but shall continue in force notwithstanding the expiry of the term for which it was granted until the Minister, by notice in the Gazette, declares it to be surrendered.
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> (6) Nothing in this section shall be construed to impose any obligation on the Crown or

> on any person or persons holding a licence solely on behalf of the Crown or to render binding on the Crown any provisions of this Act that are not expressed to bind the Crown.

There then follows a number of ancillary and administrative provisions covering such matters as the right to compensation for any person who is injuriously affected and the appointment and rights and duties of inspectors under the Act. Section 47E provides for the keeping of records, and that these shall be open at all reasonable times to inspection or examination by the Secretary of Mines, the director of the New Zealand Geological Survey and any inspector or other person authorised in writing by the minister. Subsection (4) provides that, in every case where part of a PPL has been surrendered under s.11, the licensee shall furnish to the minister separate certified copies of all reports. Subsection (5) states no information furnished by any licensee under this section shall be made public or disclosed to any person other than a person employed by the Crown for the purpose of his official duties, before the expiry of five years after the date on which the information was obtained, or the expiry of the licence or any part of it in respect of which the information was furnished, whichever occurs first.

Included in these additional sections is s.40, which provides for unit development. This authorises the minister to require the licensees in two or more licences which form part of a single geological petroleum structure or field to work and develop the oil field as a unit, if that is in the national interest, to secure the best recovery of petroleum.

Summary of the Act

The central purpose and scheme of the Act is the control and the encouragement of the discovery and development of New Zealand's petroleum resources. That is founded upon the ownership of the Crown and the regulation by the minister on behalf of the Crown of exploration and all other mining operations in the exercise of his or her discretion. The right to participate by grant of PPL and PML and the rights given by them when granted are made subject to all the other provisions of the Act. Section 36 provides a parallel but superior authority in the Minister, on behalf of the Crown, to assume and to carry on any and all mining rights and operations whether prospecting, exploring or recovering by mining. That is not subject to the other provisions of the Act. There are only three provisions which bind the Crown:

(a) Section 4, that no prospecting or mining is to be undertaken without a licence;
(b) Section 33, that notice of entry is to be given to occupiers of land; and
(c) Section 39, that persons injuriously affected are entitled to compensation.

In all other respects, a Crown licence to prospect or to mine and any mining operations of the Crown are unaffected by any of the other restrictions or obligations imposed on licensees otherwise.

The wide unrestricted powers given to the minister by s.36 are a

consequence of the reserved right of Crown ownership. The exercise of the powers under s.36 is left to the discretion of the minister without any express or implied terms as to the principles or considerations which may be applicable in their exercise. This is the widest kind of ministerial discretion, which leaves, in the end, policy and general national interest as the underlying and overriding factors the minister must take into account. However, the minister cannot act in bad faith or for purposes which are not authorised by the Act.

THE FACTS[2]

In 1975 the minister was issued with PPL 38034 for a very substantial part of onshore Taranaki. That licence was extended and renewed to expire on 20 July 1987. In 1977 Petroleum Corporation (New Zealand) Ltd and its subsidiaries were formed, wholly owned by the Crown, the shares being held by two ministers, one being the Minister of Energy. PPL 38034, along with other rights and interests in petroleum exploration, was assigned to Petrocorp Exploration Ltd (Petrocorp). Petrocorp remained wholly in the ownership of the Crown until 1987. Between 1979 and 1985 exploration work was undertaken principally in discovering and developing the McKee and Kaimiro areas or fields in the northern part of PPL 38034. PML 38086 for the McKee field was first issued on 27 May 1983 and was extended and amalgamated with others from time to time until it covered the whole of the McKee field.

In February 1985 exploration work commenced on the Waihapa area, which is near the eastern extremity of PPL 38034. An exploration well, Waihapa 1, was drilled between 20 February and 18 August 1985. This was done to evaluate the hydrocarbon potential of the Kapuni Group in the overthrust Waihapa structure. Exploration and testing were carried out to below 4800 metres TVSS (true vertical sub sea). Gas was discovered in the Kapuni Group in the interval between 4664 and 4696 metres TVSS but it was thought that there was some potential in the Tariki formation, which overlies the Kapuni Group, and that there was also a possibility of some further potential in the Kaimiro formation, which is below the Kapuni Group.

In the Waihapa area and within the lateral dimensions of PML 38140 there is a number of formations and groups. In order of descent, there is the Tikorangi formation, the Tariki formation and then, within the Kapuni Group, the Mangahewa, Omata and the Kaimiro formations. These are all recognised, accepted and defined stratigraphic units. The Tikorangi formation is distinct from the Kapuni Group. There is no litho-stratigraphic unit which includes the word 'Waihapa' in its name; that is a name chosen by Petrocorp to describe and name the area in which its operations took place and its licence was to be granted. It has geographic significance as a placename which has been used to name the exploration area and the licence then issued.

There was no further field work done for some time. During 1986 Petrocorp conducted feasibility studies to see if the discovery made could

2 The factual position is taken largely from the decision of Greig J, *supra* n.1.

be considered economic and whether further testing in the field was warranted. During 1986, however, further wells were drilled at Tariki and Ahuroa, both somewhat further north than the Waihapa area but well within the same general vicinity. Discoveries were made at both of these points. Tariki is to be distinguished from the formation of the same name.

In July 1986, the official Waihapa Well Completion Report was furnished by Petrocorp to the ministry in accordance with the requirements of the Act and the regulations. As an appendix to that report Mr W.L. Lammerink, the petroleum engineering manager, provided a report concerning the Tikorangi formation in which he assessed the potential of that formation as ascertained from the work done in the Waihapa well. This was dated 18 December 1985 and reflected an earlier internal report in 1983 which had given some consideration to that Tikorangi formation in the drilling of a well elsewhere.

In the early part of 1987 Petrocorp began discussions with ministry officials as to the grant of PMLs over the Tariki, Ahuroa and Waihapa areas on the basis of the discoveries that had then been made in the exploration wells drilled earlier and on the basis of the appraisal and assessment that had been undertaken thereafter. A number of discussions were held. Petrocorp had, at first, proposed a wide area which would incorporate all three sites of the wells and the connecting areas between. The ministry's view, after discussion with the officers of the New Zealand Geological Survey, was that licences should be limited to the particular discovered areas only. There were various applications and considerations, and finally agreement was reached generally on the basis of the ministry's views.

On 19 May 1987 Petrocorp, on behalf of the joint venture, submitted the formal application for the Waihapa PML. There was a considerable urgency about this application and about similar applications lodged shortly afterwards for a Tariki PML and an Ahuroa PML. The urgency was that the PPL, which had been renewed once, was to expire in July 1987. It was no longer renewable and there would be no continuing rights on the termination of the licence. In other words, the area, on expiry of the term, would become unlicensed. The terms of the application and the description in it of the nature, extent and commercial significance of the gas condensate discovery referred to the hydrocarbon potential of the Kapuni Group, in particular within the Kaimiro formation. It was also suggested that there could be further possible hydrocarbons in the deeper Kaimiro formation sands and additional possible reserves in what was described as a Tariki sandstone member of the Otaraoa formation. The latter was described as an upstructure from Waihapa 1.

The application, in its description of the area for the interim or initial mining licence, depicted it as comprising 'the smallest possible area that adequately encloses the Waihapa structure, as defined by contours on top Kapuni Group'. The structure, so called, was said to lie at the southern end of 'the Taranaki overthrust trend'. It is described as a broad elongated north–south dome and is bounded to the west by a steep reverse fault. The area of the application was approximately 22.36 square kilometres. A

work program was proposed which was to analyse the prospects of hydraulic fracture stimulation of the Kaimiro formation and appraise commercial production from the Tariki sandstone member or formation.

Discussions as to the terms of these licences took place between the ministry officers, Dr Cook of the New Zealand Geological Survey[3] and the officers of Petrocorp on behalf of the joint venture. Various amendments were made to the draft terms of the licence, including some proposed by Petrocorp itself. Reference was made to a possibility of a floor to the licence by a lower limitation being imposed, but no further action was taken in that regard. During these discussions there occurred a telephone conversation between Mr Lammerink of Petrocorp and a Mr C. Connell of the ministry to which a Mr A. Bewley of Petrocorp was an authorised listener. Mr Connell was, at that time, an investigating officer of the petroleum unit in the ministry. He had been employed there since 2 February 1987 and was responsible for providing technical advice and general administrative support in respect of petroleum prospecting and mining.

The issue then was whether, in the event that upon further drilling, testing and appraisal it was shown that accumulations of gas or oil extended beyond the licence boundaries, there would be any prospect of an extension of the PML. It was Mr Connell's response that any such application for extension would have to be made before 29 April 1988, the day on which the tender round for a PPL for onshore Taranaki was to close. Mr Lammerink's understanding from the conversation was that if Petrocorp did 'sufficient work to show with reasonable certainty that the accumulation extended beyond the boundaries of the PML areas we had applied for we could apply for an extension and would have no real problem with getting one'. On 17 November 1987 the minister approved the grant of the PMLs for Tariki, Ahuroa and Waihapa and these were granted with effect from 22 July 1987.

On 22 September 1987 the Crown interest in the Stratford, Ahuroa, Tariki and Waihapa licences was advertised for sale, and in November 1987 the government invited interested parties to submit tenders for the 70 per cent of Petrocorp remaining in Crown ownership and also gazetted the onshore Taranaki block on offer for prospective PPL licensing. The area concerned included all those parts of Taranaki which were formerly

3 The New Zealand Geological Survey is a division of the Department of Scientific and Industrial Research and carries out research in petroleum geology, geochemistry and basin studies and provides consultant and advisory services to the Ministry of Energy and to the petroleum industry. It acts, as well, as curator of a petroleum report library on behalf of the ministry, maintaining all confidential and open-file (publicly available) material which has been provided to the ministry by licensees under the Act and regulations. There is also a library or collection of core samples, side-wall samples and drill cuttings which are the pieces of material taken on site from well and drill cuttings. In effect, the NZGS maintains a technical file on all exploration and mining work undertaken in New Zealand, as is reported under the regulations by licensees. In its consultancy role it provided advice and took part in various discussions between the ministry and Petrocorp in the definition and description of the Waihapa licence PML 38140 and in other aspects of the events occurring after the major discovery in February 1988.

in PPL 38034 and which surrounded the three PMLs just granted for Tariki, Ahuroa and Waihapa.

By the end of 1987 the joint venture had completed detailed petroleum engineering studies of the possible further field work to appraise the potential of the Kaimiro formation in the Kapuni Group, and concluded that there was no commercial development potential but chose rather to undertake a further drill program using the original well but with a side track in which there would be further exploration carried out. In January 1988, in accordance with the provisions of the regulations, an application was made for consent to re-enter the Waihapa well and sidetrack it. The primary objective, as recorded in the application, was to test the hydrocarbon potential of the Tariki sandstone member, and a separate secondary objective was to test sands within the top of the Kapuni Group. It was proposed, as a further exercise, to perform a test on the Tikorangi limestone in the first few days before proceeding to the lower depths. That application was referred to the New Zealand Geological Survey and was noted by Mr Cook. On 26 February 1988 there was a flow of oil from the Tikorangi formation.

The ministry was advised almost immediately, a press release was made and notice was given to the stock exchange. The press release included the statement that 'a significant quantity of crude oil flowed during a successful test of the Waihapa 1C well eight kilometres south-east of Stratford during the weekend'. The flow was described as '5 hours on a ½ inch choke at a rate equivalent to 2465 barrels of oil per day and 2.5 million standard cubic feet per day of natural gas'. The matter was almost immediately referred to Mr Cook at the New Zealand Geological Survey and he phoned Mr P.B. Andrews, manager of joint venture operations of Petrocorp, to find out more about it. At that stage Mr Andrews informed Mr Cook of the test level of the well; that is, of the point below sea level which was now flowing oil. This was given to him in confidence, as it had not yet been disclosed to the public from what formations or where the oil discovery had been made.

Meetings and discussion were held between the officers of Petrocorp and of the ministry. The latter was kept fully advised of all work and progress and, at the same time, of the indications as to the extent of the new discovery in relation to the Tikorangi formation. Mr Cook was asked by Mr Connell to consider and assess the area of the discovery and the extent of the accumulation using the material available at the New Zealand Geological Survey. Apart from the information from Mr Andrews, Mr Cook was not informed of any other details about the matter. According to the evidence, Mr Cook undertook the mapping and the calculation of the extent of the accumulation by using open-file material from the research library. That material included the Waihapa Well Completion Report, which had become open-file material on the termination of the PPL.

On 9 March 1988 the joint venture made its application for an extension of the PML. It was described as being part of the current open acreage that formed parts of Block 6 and Block 7 of the November 1987 onshore Taranaki Block offer and fell entirely within the former pros-

pecting licence PPL 38034. It again was said to comprise 'the smallest possible area that encloses the Waihapa oil accumulation, as defined by the depth contours at top Tikorangi Limestone'. The area of the proposed extension was approximately 100 square kilometres.

The application was received by the ministry and was given close consideration, At an early stage reservations were expressed by officials as to the application, and proposals were formulated for Crown intervention. These were refined over the next few weeks, drafted, and presented to the cabinet policy committee. In the meantime on 30 March 1988, Petrocorp wrote directly to the minister in support of the application, sending a copy of the application and urging the grant as sought. It was recorded in the letter, which was signed by Mr Patek, the chief executive, that there was an understanding by Petrocorp that there might be some reluctance on the part of the officials to recommend the grant of the extension. The application was supported, in Petrocorp's submission, on the basis of equity and on practical and economic considerations. Reference was made to the large expenditure in exploring and discovering the field, the common contiguity of the field with the licence granted and its area, and the understanding from earlier discussions that adjustments could be made if the investigations showed that the field extended beyond the original licence areas. The practical problems suggested were the difficulties of having either a unit development under s.40 of the Act or licence-holders for different parts of the field. It was noted that the joint venture was 91 per cent New Zealand-owned, with the Crown a substantial participant.

The question of timing was important as the block offer tender expired on 29 April. There continued to be discussions between the officers of Petrocorp and those of the ministry which addressed, among other things, the extent and value of the oil field. On 12 April 1988 a draft memorandum was prepared for the cabinet policy committee and forwarded to the principal officers of the ministry for approval. This draft set out the proposals that were ultimately agreed to.

Petrocorp was anxiously awaiting a response to a letter of 30 March to the minister, and on 15 April 1988 there was a telephone discussion between principal officers on both sides about that. Mr B.J. Fowke, then Group Manager Resource Allocation of the operations division of the ministry, was the principal spokesman and had prime responsibility for the proposals then being made to the cabinet committee. He was careful and guarded in his comments and suggested that the joint venture should make a bid for the tender blocks on the understanding that no decision would be made on the extension application prior to the crucial date. He indicated his personal view, that the joint venture partners would develop the oil field together. This was understood by the Petrocorp auditors to mean that the extension was likely to be granted. It was a statement that had been prepared and was deliberately worded to avoid disclosure to Petrocorp as to what was proposed or intended. It had been determined that ministry and ministerial proposals should be kept secret from all possible interested parties until decisions were made. Even on 27 April 1988, when the minister replied to Mr Patek's letter of 30 March, he

commented on some of the matters that had arisen but indicated that there would be some time before a decision would be given. That letter was written after the cabinet policy committee approved what became the final decisions. It was not until 4 May 1988 that the various decisions were promulgated and Petrocorp was made aware that it had not been granted the extension, and that the Ngaere licence had been granted to the Crown.

The Joint Venture

The joint venture is governed by a joint venture operating agreement dated 14 April 1986. The parties and their respective shares in the licences held by the joint venture are as follows:[4]

The Minister of Energy	38.36 per cent
Petrocorp Exploration Ltd	28.34 per cent
Petrocorp Exploration (Taranaki) Ltd	1.7 per cent
Southern Petroleum NL	5.1 per cent
Payzone Exploration Ltd	17.5 per cent
Nomeco New Zealand Exploration Company	5.0 per cent
Mark Nichols Ltd	2.0 per cent
Carpentaria Exploration Co. (NZ) Ltd	2.0 per cent

The joint venture was formed for the purpose of petroleum prospecting, exploration and mining in the area of the prospecting licence. Petrocorp is the operator of the joint venture. Further, by a deed of agency dated 29 March 1985 the minister appointed Petrocorp the Crown's agent to act for it in relation to, *inter alia,* any joint venture operating agreements which had been entered into in respect of certain licences, including the relevant prospecting licence. The agency was terminated on 12 May 1988 but subsisted at all times material to the case.

As noted, PPL 38034 was granted by the minister on 21 July 1977 for exploration over the greater part of onshore Taranaki. It was initially for five years but was renewed by the minister for a further five years, expiring on 21 July 1987. That made up the maximum total period for prospecting licences permitted by s.6 of the Act. In accordance with s.6(3)(a), on the extension the area was reduced to not more than one-half of the original area. It was from relatively small parts of this that the Waihapa licence and certain other mining licences (notably Tariki and Ahuroa) were later granted to the joint venture.

The prospecting licence was originally granted to the Crown and then assigned by the Crown to Petrocorp. In 1985 Petrocorp reassigned a 51 per cent interest to the Crown. Later, as a result of a policy attracting new capital to finance oil exploration in New Zealand, new parties were

4 Until June 1987 Petrocorp was wholly owned by the Crown, but thereafter, under a policy of selling Crown assets, sales of the Crown's shareholding were made in stages: 15 per cent to Brierley Investments Ltd, 15 per cent to the public, 70 per cent to Fletcher Challenge Ltd. The sale to Fletcher was apparently not made, or the arrangements were not finalised, until March 1988, after the Tikorangi discovery.

introduced under a series of farm-in deeds. So it was that the shares of Petrocorp and the minister were reduced to the respective proportions listed above. The joint venture spent $45 million on oil exploration; $75 million had been outlaid previously, when Petrocorp was wholly owned by the Crown. Under the prospecting licence, discoveries were made not only at Waihapa, Tariki and Ahuroa, but also in areas known as McKee, Kaimiro (to be distinguished from the Kaimiro formation within Waihapa) and Stratford.

The mining licences for Waihapa, Tariki and Ahuroa were granted to the joint venture on applications made shortly before the expiry of the prospecting licence. As noted, a policy of the Act, reflected in s.11, is that a mining licence may be granted as of right over a limited area of land within the area of a prospecting licence: it is to be 'reasonably adequate to enable mining operations to be carried out in respect of the reservoir or field intended to be mined in accordance with recognised good oil field practice'. The joint venture would have preferred one mining licence for an area including the three discrete areas and more, but the ministry required three separate licences.

On 17 May 1989 the minister swore an affidavit explaining the decisions in question in the case. The central paragraph in it is para.5. The reference to three decisions with which it begins is to his decisions to grant the Ngaere licence to himself, to decline the joint venture application for an extension of the Waihapa licence area, and to indicate that the Crown would like to enter into negotiations with Petrocorp and the joint venture 'partners' (the minister's word) concerning the sale of the Crown's interests in five onshore Taranaki mining licences: Ngaere, Waihapa, Ahuroa, Tariki and Stratford.

> In making the various decisions including the three in issue in this proceeding, the ultimate question in my mind was how best to deal in the interests of the nation, with what was clearly a valuable Crown-owned resource. The principal matters to which I had regard in making these decisions are contained in the papers referred to in para.4 above and can be summarised as follows:
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> 5.1 The significance of the discovery in both value and extent (such as this was known at the time);
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> 5.2 The fact that the area for which the award of the Ngaere PML was recommended was not subject to any existing rights;
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> 5.3 The history of prospecting in the region including the involvement of the Crown and the joint venture in that activity and expenditure by those parties;
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> 5.4 The objectives and various provisions of the legislation;
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> 5.5 The fact that the significance of the new discovery was confirmed by the evaluation of data held on open file;
>
> 5.6 The basis for the award of the Waihapa PML to the joint venture being a small gas discovery in a different formation from that in which the new oil discovery was located;
>
> 5.7 The implications for the prospecting licence tender round in the area;
>
> 5.8 The implications for the bids received for the Crown's equity in onshore Taranaki mining licences in that area;
>
> 5.9 The need for a full economic evaluation of the discovery; and
>
> 5.10 The appropriateness of negotiating exclusively with the joint venture.

THE HIGH COURT DECISION

The main issue in the case was whether in the circumstances the minister's grant of a sole licence to himself on behalf of the Crown was a proper exercise of his statutory licensing powers. Greig J held that it was. In relation to the propriety of the minister's purpose, his Honour stated:

> I hold that there is an important if not primary element of national interest in the decision that has to be made and that was made by the Minister in this matter. It was, in any event, a matter of policy under the general purposes and duties of the legislative scheme. It is clear that the Minister did not rely simply on his own views but took into account the views of his officers and their proposals and recommendations, and consulted and took advice from his Cabinet colleagues. Whatever may be the descriptive qualifiers for the decision made the decision was not one which was contrary to the principles of the law or to the policy and the proper administration of the purposes and scheme of the statute. The opprobrious connotations put on the decision and the motivation of the Minister by the plaintiff by the use of such words as 'opportunistic', 'trafficking in the licence' and 'naked capital gain' I entirely reject. These are the words of advocacy which may reflect the resentment and disappointment of the plaintiff but are not appropriate or accurate to describe in truth the reasons for the decision. I accept that the national interest was at the heart of the decision and I am satisfied that that was a principal, if not primary, consideration which the law required. I do not think that the actions of the Minister and the decisions that he made were illegal or outside his powers and are not therefore subject to review on this occasion on these grounds.[5]

On the issue of the propriety of the procedure adopted by the minister, Greig J said:

> I think that there would have been a public outcry if the Minister had made his decision on the joint venture's application for extension without considering the overall public interest and his other options and powers under the Act. To have made the decision intentionally, ignoring that information as to the potentiality of the field and its importance in the general public interest, would have been wrong and a dereliction of the Minister's duty.[6]
>
> On this matter of relevance and irrelevance and as part of the general view as to what considerations ought to have been taken into account by the Minister, it is I think necessary to stand back and to consider the matter overall in a broad way but having regard to the whole of the circumstances pertaining to the issues before the Minister at the relevant time. It is then a question to consider, in light of the overall principles and the lack of any particular considerations expressed in the Act, whether the decision of the Minister can be said to have been made without the consideration of matters which ought to have been taken into account or in the consideration of matters which ought not to have been taken into account. I have reflected on this and have concluded that, on that broad basis as well as on the detailed basis which I have already dealt with, there can be no proper grounds for criticism of the Minister or the way he reached his decision.[7]

The learned judge also held that the minister had fairly considered the joint venture partners' application and that there was no unfairness on the matter overall:

> In a sense it is unfair that persons who have undertaken the work and made the actual discovery should not obtain the full benefit of that, at least without having to renegotiate their rights and exploitations of the discovery anew. This is all the more so when the tenor of the Government and the Minister's policies up till than had been to divest the Crown of any direct interests in the exploration and exploitation of the petroleum resources in New

5 *Petrocorp Exploration Ltd v. Minister of Energy* [1991] 1 NZLR 1, 16.
6 Ibid. 22.
7 Ibid. 24–25.

> Zealand and leave them to private enterprise. But this was a very substantial and a quite different kind of discovery, unprecedented and therefore creating a new scenario. That must necessarily have required the Minister to reconsider the policies hitherto pursued and to apply anew the principles and the purposes of the legislation to the Crown's rights and interests in the prevailing circumstances. To have treated the new discovery in the same way as the further developments of the McKee and other fields would have been entirely wrong and in disregard of the fundamental obligation to the general national and public interest.[8]

There was a secondary issue, as to the scope of the Waihapa licence. That licence had been granted on 17 November 1987 primarily to enable appraisal and development of a deposit of gas condensate which had been discovered at Waihapa in what is known as the Kaimiro sandstone formation. The major discovery which led to the litigation was made in a higher and separate formation, the Tikorangi formation, while carrying out (with the consent of the ministry) a drillstem test in a side track from the main Waihapa well. The plaintiffs claimed that the Waihapa licence entitled the joint venture to mine the Tikorangi formation, subject to a work program to be approved by the minister. His Honour held that the effect of the licence was that the joint venture had the exclusive right to prospect within the Waihapa lateral or graticular boundaries, but that in the event of a further discovery such as the Tikorangi one a further application for a mining licence would be necessary to acquire the right to mine it. That view was the same as or approximate to the view entertained by the ministry when the Tikorangi discovery was made and until after the commencement of the litigation in August 1988.

THE COURT OF APPEAL

Subsequent to the High Court litigation, without prejudice to the claims of the joint venture under the Waihapa licence 38140, the minister granted the joint venture PML 38143 (dated 9 January 1990), limited to the petroleum discovery identified in the Tikorangi formation. This licence provides for a royalty to the Secretary for Energy of 12.5 per cent of the value of any petroleum produced, whereas the royalty rate under the Waihpa licence 38140 is 10 per cent.

The Court of Appeal (Richardson J dissenting) allowed the appeal, vacating the order of the High Court. The majority found that s.36 of the Petroleum Act 1937 and s.15 of the Ministry of Energy Act 1977 indicate that Parliament clearly conferred on the minister not only a controlling or regulatory role but also, to the extent that he saw fit, a commercial one. A number of his powers could not be effectively carried on unless he could commit himself to binding contracts.[9]

Cooke P, in delivering the leading decision, held[10] that Parliament must have intended that the exercise of any significant commercial or proprietorial obligation already undertaken by the minister would be an essential consideration for him before granting himself a licence. Treating

8 Ibid. 26–27.
9 Ibid. 31–33.
10 Ibid. 33.

the national interest as overriding everything else might well be consistent with the purposes in spirit of the Act in some cases.[11]

However, the national-interest considerations taken into account by the minister were essentially pecuniary and could not override any legal or moral obligation to his fellow joint venture partners. To assert that he could not fetter his future executive action was not in the circumstances consistent with the purposes of this section. He could not be allowed to defend or set aside his obligations for predominantly commercial reasons. Cooke P stated:

> So in this case there can be no doubt that the national interest considerations were essentially pecuniary. The Minister immediately offered to negotiate with the other joint venturers for the total sale of the new licence: the hoped-for disposition to them was part-and-parcel of the planned course of action. It was a step in a programme of asset sales. Of course, in a simplistic sense it can be said to be in the national interest for the Government to make as much money as possible. The question is, however, whether the Act of Parliament, fairly interpreted, allows the Minister to be guided predominantly by that consideration in disregard of his lawful obligations also undertaken under powers conferred by Parliament. For the reasons already given, I think that the answer is 'No' and cannot think that the value which the oil field is now thought to have can make any difference in principle. Any suggestion that Parliament can have meant the Minister to be free to disregard commercial obligations if only the stakes were high enough does not seem to me convincing.[12]

The learned president was of the opinion[13] that the other joint venturers were entitled to expect that the minister would be bound in matters connected with the joint venture not to promote the Crown's commercial advantage to their commercial disadvantage. To say that the minister's statutory powers were not affected by that obligation would be largely to destroy it.[14]

Cooke P found[15] it strictly unnecessary to rely on the doctrine of unfairness, when the dominant consideration was simply money, as there was no reason why a minister or other authority should not be required to act fairly and in accordance with the legitimate expectations. The other joint venturers were entitled to notification in advance of the proposal to grant the Ngaere licence to the minister only, and were entitled to an opportunity to make representations against that course before it became a *fait accompli*. In conclusion, his Honour stated:

> This may be summarised by saying two things. First, the Minister acted under a major mistake of law, as to the combined effect of s.36 and the joint venture contract, when he decided that for essentially financial reasons he was entitled to grant a licence to himself and consequently decline the application of the joint venture of which he was a member. It would be enough to decide the case to say that, on any view, the Minister cannot have been free in making his discretionary decision simply to ignore his obligations to the joint venture as something about which he need not even bother. If necessary I would decide the case on that short ground. But, as a matter of realistic statutory interpretation, I think that the

11 Ibid. 34. (An example of such a case might be a period of crisis such as after the invasion of Kuwait by Iraq.)
12 Ibid. 34.
13 Ibid. 35.
14 Ibid. 36. (The Court felt that an interpretation preventing one joint venturer from appropriating an important discovery for himself alone would be consistent with the trend of authority throughout the common law world.)
15 Ibid. 37.

point goes further and that the Minister was not free to grant himself a sole licence with a view to sale to the joint venture and contrary to his obligations as a joint venturer.

Secondly, the procedure of withholding information of the existence of the plan to grant a licence to the Minister only was unfair, in that it was contrary to natural justice and the legitimate expectations of reasonable business people in the position of the joint venturers.

In administrative law it is of first importance that the Courts keep within the proper limits of their functions and competence, recognising that there are wide areas of decision where a political judgment of the national interest must prevail. But it is no less important that the Courts should not abdicate responsibility for ensuring that Acts of Parliament conferring Ministerial powers are complied with both in the letter and in the spirit. A Minister's claim to be the sole judge of the national interest must at least be open to scrutiny as to the grounds on which it is based. When, in a case under an Act such as this, his grounds turn out to be essentially commercial or pecuniary, it would be to deny the rule of law and the existence of constitutional government if the Courts were unwilling to hold that his actions must be consistent with his commercial obligations and the elementary principles of fair play.[16]

Richardson J, dissenting, considered that the identification and determination of the national interest in this case was for the minister alone and was not reviewable by the courts.[17] His Honour recorded that in determining the national interest, and in having done so in deciding to grant the licence to himself and to decline the other application, the minister was clearly doing neither more nor less than exercising the range of choices which the legislation intended he should have.[18]

With respect to the relationship between the minister and the joint venture partners, the learned judge said:

It was suggested by Mr Farmer, more however in the later course of argument than in the initial development of the case for the appellants, that the Minister had a particular duty to take account of the interests of the joint venture and not to withhold advising the joint venture of the proposal to grant a licence to the Minister. This, it was said, stemmed from the obligations and reasonable expectations arising from the joint venture contract. I am unable to agree and for two reasons. The first concerns the nature of the statutory powers exercised by the Minister in relation to s.36(1)(a) and s.20. Such decisions must be made on his assessment of where the national interest then lies. It is elementary that the holder of such a statutory power cannot by contract fetter the future exercise of that power.[19] The Minister could not lawfully enter into obligations under the joint venture which would constrain the future exercise of his powers under s.36 (or s.20 or s.5). The other joint venturers should have appreciated that the Minister would exercise his responsibilities under s.20 and s.36 in the national interest untrammelled by his participation in the joint venture.

The second is that in any event, as I read the joint venture agreement, it does not purport to impose any such fetter. Section 2.0.1(b) which is relied on provides:

'2.0.1(b) All activities and operations of the joint venture shall be carried on in accordance with the laws of New Zealand but subject thereto all activities and decisions of each joint venturer in connection with the joint venture, including the licence, any mining licence or the licence area shall be directed to secure the maximum commercial advantage of the joint venture and shall conform with good oil and gas field practice.'

The short answer is that the decisions made by the Minister under ss.20 and 36 were his statutory assessments as to where the national interest lay. The decision by the Minister to grant himself a mining licence was not one made 'in connection with the joint venture' at

16 Ibid. 38.
17 Ibid. 46.
18 Ibid. 43.
19 *Cudgen Rutile (No 2) Pty Ltd v. Chalk* [1975] AC 520, 533–534 and *R W Miller & Co Pty Ltd v. Shortland County Council* (1988) 83 ALR 225, 232

> all. It was made in the exercise of a statutory power expressly reposed in the Minister. So, too, the decision under s.20 not to extend the Waihapa licence was a discretionary decision taken in the national interest under that statutory power. And the expressions 'the licence, any mining licence or the licence area' in s.2.0.1(b) were all then confined as to area to the lateral boundaries of the Waihapa licence. The new licence which the Minister granted to himself was the product of his decision under s.36: it was never part of the joint venture.[20]

As to the scope of the Waihapa mining licence, the Court *per total curian* held that the general trend of the Act, which referred to the 'land in relation to the licences', showed that it contemplated licences being issued for 'land' in its ordinary legal meaning without restriction of depth below the surface. Although it was open to the minister to issue a licence restricted to a particular stratum, that had not been done in this case. Therefore the Waihapa mining licence authorised mining and prospecting at any depth below the surface.

THE PRIVY COUNCIL

The decision of the Privy Council was delivered by Lord Bridge of Harwich. His Lordship noted[21] that the decision of the Court of Appeal was essentially founded on the basis that the joint venture operating agreement ('JVOA') placed the minister under a contractual obligation which precluded him from granting the Ngaere licence to himself on behalf of the Crown. Lord Bridge discussed the procedural foundation of the proceedings, noting that the litigation was based in judicial review. However, in order to resolve the matter, the Privy Council considered both the private and the public law issues.

Contractual Obligations — The JVOA

The Privy Council placed special emphasis on the distinction between the minister's statutory functions and his commercial functions as agent for the Crown. Lord Bridge stated:

> The essence of the reasoning of the Court of Appeal leading to the conclusion that the JVOA prevented the Minister from granting the Ngaere licence to himself on behalf of the Crown is expressed in the following passage from the judgment of Cooke P:
>
> 'The Ngaere licence must fall within the definition of "Mining Licence". It is certainly within the "Licence Area" and was certainly issued to one of the joint venturers, namely the Minister; and expiry of the prospecting licence should not on any realistic interpretation be held to diminish the area. By section 2.0.1(a)(i) of the joint venture operating agreement the first of the purposes of the joint venture are stated to be exploring, prospecting and mining for petroleum in the licence area. Section 2.0.1(b) is of major importance: [the President then quotes the subsection] ... Thus each joint venturer, including the Minister, has agreed that all his or its activities and decisions in connection with the joint venture, including on the foregoing interpretation any Ngaere licence, shall be directed to secure the maximum commercial advantage of the joint venture. As his Ngaere licensing decision was intended to secure the maximum commercial advantage of one joint venturer only, at the expense of the others, the Minister was in my view in breach of his obligations. The Minister's decision was not the less "in connection with the Joint Venture" because he invoked statutory powers.
>
> All the Minister's activities and decisions in connection with the joint venture were

20 Ibid. 47–48.
21 *Petrocorp Exptoration Ltd v. Minister of Energy* [1991] 1 NZLR 641.

necessarily carried out and made under statutory powers. The other joint venturers were entitled to expect that, subject to compliance with the laws of New Zealand, the Minister would be bound in matters connected with the joint venture not to promote the Crown's commercial advantage to their commercial disadvantage, just as they would be reciprocally bound to the Crown and one another to act for the maximum commercial advantage of the joint venture as a whole. To say that the Minister's statutory powers, such as his powers to grant or extend licences, were not affected by that obligation would be largely to destroy it.'

Their Lordships, with respect, are quite unable to agree with this reasoning. It appears to them to be erroneous in two respects. First, it wholly ignores the distinction drawn in the JVOA between the position of the Crown as a joint venturer and the position of the Minister, as defined, 'acting in that capacity and not as a joint venturer'. Secondly, it misconstrues the definition of 'Licence Area'. So long as PPL 38034 continued in force it embraced the whole of the original 2310 square kilometres less the small areas covered by mining licences granted before 1986. But after PPL 38034 expired in July 1987 the only areas falling within the definition of 'Licence Area' were the areas of the three mining licences which were granted to the joint venturers.

Cooke P supported his construction by reference to section 2.0.2(b) which provides that 'this agreement shall remain in force and the joint venture shall continue so long as the Licence and any Mining Licence issued pursuant thereto in respect of any discovery made by the joint venture remain in force'. So far from supporting the construction adopted, this seems to their Lordships to point against it, since it emphasises that the ambit of the joint venture is limited to the exploitation of PPL 38034 and of any mining licence 'issued pursuant thereto'. But in any event if the 'Licence Area', as defined, is construed as including the area of more than 2000 square kilometres, which was originally within PPL 38034 but became available in July 1987 for the grant of fresh prospecting licences, for the period of 40 years or more during which the mining licences granted to the joint venturers might remain in force, this leads to extravagant consequences which clearly could not have been intended. Cooke P's construction would mean that for 40 years the Minister, while at liberty to grant licences to prospect and mine for petroleum in this area exceeding 2000 square kilometres to anyone else under ss.5 and 12 of the Act would nevertheless be inhibited by the JVOA from exercising his power under section 36 to grant a licence to himself on behalf of the Crown. It is clear to their Lordships that the JVOA did not, on its true construction, impose any such contractual fetter on the Minister's exercise of his statutory powers. But, even if it had purported to do so, the contractual fetter would have been ineffective, because it would have been quite incompatible with the proper exercise of the Minister's statutory powers in the national interest.[22]

In the face of these considerations, Sir Patrick Neil QC, on behalf of the respondents, submitted that Petrocorp was the authorised agent of the Crown, until the agency was terminated (12 May 1988). Accordingly, the minister's decision, as grantee, to accept the Ngaere licence was a decision required 'to be directed to secure the maximum commercial advantage of the joint venture', thus requiring the minister to hold that licence in trust for all the joint venture parties. The Privy Council, in rejecting the submission, held[23] that an extension of the contract which had the purported effect of precluding the exercise by the minister of the option for granting a licence to himself on behalf of the Crown for the sole benefit of the Crown would impose an indirect fetter on his statutory powers, which would be equally invalid as incompatible with the purpose and policy of the statute.

22 Ibid. 651–652.
23 Ibid. 652.

Judicial Review

Having rejected the relevancy of any contractual obligations, Lord Bridge noted[24] that the only alleged flaw in the decision-making process on which the majority of the Court of Appeal relied was that the joint venture partners had a legitimate expectation that when the minister contemplated the possibility of granting the Ngaere licence to himself on behalf of the Crown, they would be specifically consulted and given the opportunity of making representations against his taking that course of action. The Privy Council rejected any basis for such an expectation.[25]

In relation to irrelevant considerations, Lord Bridge determined that there was nothing in this point.[26]

On the issue of unfairness, the Privy Council again found in favour of the minister. Lord Bridge stated:

> Finally there is complaint of unfairness. This has appeared in many guises at different stages in this litigation. But at the conclusion of the argument before their Lordships there appear to be only two aspects of the alleged unfairness which require to be considered. The first can be dealt with very shortly. It is said that the Minister, or more accurately his officials, acted unfairly in making use of confidential information relating to the newly discovered oil field, particularly with respect to its depth, extent and potential value, supplied to the Minister as a joint venturer under the JVOA. The short answer is that, whatever detailed information was necessary to supplement much that was already public knowledge, in order that the Minister should be in a position to appraise the potential of the new field as fully and accurately as was possible at that stage, was supplied to him by the joint venturers, not only as a fellow joint venturer, but also in discharge of their statutory obligation to furnish all relevant information in support of the joint venturers' application for the extension of the Waihapa mining licence.
>
> The other outstanding complaint of unfairness arises from a telephone conference held on 15th April 1983 between Mr Fowke and Miss Cole, two senior officials of the Ministry on the one side and three representatives of Petrocorp on the other. The Petrocorp representatives were seeking reassurance as to the prospects of success of the Petrocorp application for an extension of the Waihapa licence. Mr Fowke, who was on friendly terms with these representatives, was in no position to disclose what advice had been given to the Minister, but was anxious to give them what comfort he could. Realising that he must be extremely careful what he said, Mr Fowke made a note in advance of what he intended to say and invited Miss Cole to join the conference as a witness of what he did say. The note records:
>
> '1. That we did not expect to have a decision on the extended licence application prior to 29 April 1988
> 2. That on that basis they should therefore consider submitting an application for the prospecting licence bids which close 29 April 1988
> 3. A strictly personal viewpoint of mine is that I envisage that the present joint venture partners will develop the oil field together.'
>
> What Mr Fowke had in mind, he explains, was that the Minister would, after granting a licence to himself, negotiate with the joint venturers for them to exploit the field. The Petrocorp representatives made affidavits to the effect that Mr Fowke had assured them that he would recommend the grant of their extension application and that this lulled them into a false sense of security. In the light of Mr Fowke's contemporary note, it is clear that whatever was said was expressed as a personal view and, even if the Petrocorp representatives misunderstood what was said, they could not have supposed that Mr Fowke was in any position to pre-empt the Minister's decision. Their complaint that they were lulled into a false sense of security is hardly consistent with their acceptance of Mr Fowke's advice that

24 Ibid. 655.
25 Ibid. 655.
26 Ibid. 651.

> they should enter a bid for a new prospecting licence over Block 7 rather than relying exclusively on their extension application. This is all of a piece with what was said in the Chief Executive's letter of 30 March and all goes to show that Petrocorp were perfectly well aware that the Minister was at liberty to exercise his statutory discretion as he thought fit. Much has been made in argument of the telephone conversation on 15 April 1988 but their Lordships do not see how it could possibly afford any ground on which to impugn the legality of the Minister's decisions.[27]

In conclusion, the Privy Council found[28] that once it is appreciated that the contractual obligations of the Crown under the JVOA were irrelevant to the minister's exercise of his statutory powers, it becomes clear that the application for judicial review was misconceived.

CONCLUSION

This litigation had caused considerable consternation to the Crown's private sector partners in the petroleum context — the Crown being involved in many exploration and production ventures.

Broadly stated, and litigation procedure aside, this case concerned, on the one hand, the obligations of the joint venture partners (the JVOA requiring the partners to act 'in accordance with the laws of New Zealand' and all activities/decisions to be directed to secure the maximum commercial advantage of the joint venture) and, on the other, the minister's powers under s.36 to grant himself the licence (to the Crown's pecuniary advantage over that of the joint venture as a whole). The issue to be decided then by the courts was whether or not the minister's power could override that obligation. This arose only because the state has conflicting roles. First, it acts as licensing and regulatory authority; and second, the minister acts as the Crown's commercial agent operating in the petroleum business.

The divergent approach of the Privy Council and the majority of the Court of Appeal is perhaps demonstrated by the following extracts:

Privy Council

> In the result their Lordships conclude that the Minister was right to take the view, which seems initially to have been shared by all the other parties, that the contractual obligations of the Crown under the JVOA were of no relevance to the decisions he made in refusing the joint venturers' application for the extension of the Waihapa licence and in granting the Ngaere licence to himself on behalf of the Crown. Their Lordships have felt it necessary to address the contractual issue at some length, but they can hardly hope to improve on the dissenting judgment of Richardson J which sums the matter up effectively and concisely in the following passage . . .
>
> > 'The short answer is that decisions made by the Minister under ss.20 and 36 were his statutory assessments as to where the national interest lay. The decision by the Minister to grant himself a mining licence was not one made "in connection with the joint venture at all". It was made in the exercise of a statutory power expressly reposed in the Minister. So, too, the decision under s.20 not to extend the Waihapa licence was a discretionary decision taken in the national interest under that statutory power. And the expression "the Licence, any Mining Licence or the Licence Area" in section 2.0.1(b) were all then confined as to area to the lateral boundaries of the Waihapa licence. The new licence

27 Ibid. 654–655.
28 Ibid. 652.

which the Minister granted to himself was the product of his decision under s.36: it was never part of the joint venture.'[29]

Court of Appeal

But in any event I do not think that emphasis on such paramountcy as there truly is in s.36 advances the argument. The section includes commercial powers as well as the licensing one and the Minister's power to grant a licence to himself or otherwise acquire a licence is obviously intended to enable him to play an active part, not merely a controlling part, in petroleum mining. A number of the powers conferred by the section, such as the powers of purchasing or selling interests in licences or carrying on mining operations jointly with other persons, could not effectively be exercised unless the Minister could commit himself to binding contracts. Parliament cannot have intended that he could play a commercial role without the capacity to enter into effective commercial obligations. *Business people would not be willing or would at least be reluctant to deal with him if he lacked that capacity.* [emphasis added] So to hold would be to frustrate the purpose of the section.[30]

Given the fact, however, that the Minister's power under s. 36 to grant any licence to himself is accompanied in the same section by, and indeed is in one aspect itself part of, a series of commercial or proprietorial powers, one can have no doubt that Parliament must have intended that the existence of any significant commercial or proprietorial obligation already undertaken by the Minister would be an essential consideration for him before granting himself a licence. Again I think that this interpretation is necessary to make the statute work, an objective to which this Court has given weight, chiefly as it happens with results advantageous to the Government, in a series of cases. The latest is *Ports of Auckland Ltd v. Kensington Swan* (CA 84/90, 12 April 1990) although the Government was not a party to that case; an example of an earlier case is *Northland Milk Vendors Association Inc v. Northern Milk Ltd* [1988] 1 NZLR 530. *Investors are presumably unlikely to be attracted to join with the New Zealand Government in exploring for oil if they apprehend that any major discovery will be appropriated to the Government only. At least it seems a reasonable assumption that they may be deterred by such a prospect.*[31] [emphasis added]

Clearly, the merits of the respective decisions aside, the Court of Appeal has correctly articulated the commercial ramifications of the Privy Council's decision. Business interests cannot but be cautious of future joint ventures with the government including the provision of commercially sensitive information, given the Court's dismissal of contractual obligations *vis-à-vis* the exercise of the minister's statutory power.

29 Ibid. 652–653.
30 *Petrocorp Exploration Ltd v. Minister of Energy* [1991] 1 NZLR 1,33
31 Ibid. 33.