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THE CROWN MINERALS ACT 1991 AND THE
RESOURCE MANAGEMENT ACT 1991:
COMPREHENSIVE AND INTEGRATED MANAGEMENT
OF MINERAL RESOURCES?

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The Crown Minerals Act 1991 and the Resource Management Act 1991 were intended to provide a comprehensive and integrated regime for the management of natural and physical resources. Whether these two acts achieve this goal with respect to minerals is the subject of this thesis. Chapter one introduces this issue, and describes the nature and extent of New Zealand’s mineral resources. It also introduces the concepts of internal and external effects. This thesis focuses primarily on internal effects of mineral development.

Chapter two discusses the concept of comprehensive and integrated resource management. It identifies the need for, and defines, comprehensive and integrated resource management. The role of law in the management of resources and its function within a market-led economy is also discussed. Chapter two also describes a legislative model for giving effect to comprehensive and integrated resource management. This model demands the integration of legislation at the normative, strategic and operational levels of management.

Chapters three and four describe two normative principles central to comprehensive and integrated management of mineral resources. Chapter three deals with the concept of sustainable development. The three components of sustainable development; ecological, social and economic sustainability, are discussed. Sustainable development requires that the rate of use of minerals should not exceed the capacity to find new deposits, acceptable substitutes or to recycle. Chapter four deals with the Treaty of Waitangi. It is argued that the guarantee of rangatiratanga in article two of the Treaty should be recognised in resource management legislation.

Chapter five details the ownership structure for minerals in New Zealand. This is characterised by the severance of mineral title from land title and a high degree of Crown ownership. Reasons for and against Crown ownership of minerals and the possibility of aboriginal title to minerals are discussed. Chapter five also establishes
the principle that the Crown is entitled to a share of the economic rent from the minerals it owns. The last section of Chapter five discusses problems which arise from the severance of mineral title from land title.

Chapters six and seven describe the legislative regime which applies to minerals. The Resource Management Act 1991 is described in Chapter six and the Crown Minerals Act 1991 in Chapter seven. Both are examined in terms of the normative, strategic and operational levels of management described in Chapter two.

Chapter eight considers the extent to which the Crown Minerals Act 1991 and the Resource Management Act 1991 establish a comprehensive and integrated regime for the management of minerals. It is concluded that these two Acts fall short of achieving this goal in four major respects. First, they fail to give effect to the concept of sustainable development. Second, they fail to give adequate effect to the Treaty of Waitangi. Third, the Crown Minerals Act 1991 fails to adequately specify normative policies for the management of Crown owned minerals. Fourth, they fail to achieve integrated and comprehensive management of minerals at the strategic level.
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Bibliography
I have attempted to state the law as at the 27 February 1995. It should be noted that resource management law in New Zealand is in a period of transition and is developing rapidly, particularly in relation to Part II of the Resource Management Act 1991.

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CHAPTER 1

INTRODUCTION

Mining in New Zealand is now regulated principally by two acts, the Crown Minerals Act 1991 and the Resource Management Act 1991. These statutes were enacted together, following the completion of the Resource Management Law Reform process, and were intended to provide a comprehensive and integrated approach to environmental and resource management matters. This intention is clearly expressed by Sir Geoffrey Palmer, then Minister for the Environment:

"The conclusion of this review will affect the life of every New Zealander. In the past the rights of people to use water, air the land or minerals have been dealt with by a myriad of laws. Not only do all the things these govern relate to each other but all have an impact on the wider environment. We have to look at all the issues in an integrated way."¹

A comprehensive or integrated approach to environmental decision-making is required by the environment itself. Environmental problems, and the solutions to them, should be considered with regard to the interrelations and interconnections between them². Activities in one part of the environment may have repercussions in many other parts of the environment. The environment is inherently a broad all-encompassing concept and this needs to be recognised by legislation that deals with the environment. Whether the Crown Minerals Act 1991 and the Resource Management Act 1991 achieve this goal with respect to minerals is the subject of this thesis.


New Zealand has a very diverse range of mineral resources. Petroleum has been discovered in several locations and is produced from the Taranaki basin\(^5\). Although the other basins are under-explored they are considered to have considerable petroleum potential. There are over 15 billion tonnes of coal resources with most of this being lignite in Southland and Central Otago\(^4\). Substantial amounts of sub-bituminous coal can be found in both the North and South Islands, and lesser amounts of high-quality bituminous coal, mainly on the West Coast of the South Island.

Non-energy mineral resources are also widespread. Gold deposits are found in both the North and South Islands with the largest concentrations in the Hauraki Goldfield, Otago and the West Coast of the South Island\(^5\). Titanomagnetite is recovered from North Island beaches for steel manufacture and ilmenite is found in beach sands on the West Coast of the South Island. A wide range of industrial minerals are available and aggregate sources are widespread. Greenstone, serpentine and dunite can also be found, mainly in the South Island.

Minerals make a substantial contribution to New Zealand’s economy. Indigenous oil and synthetic fuel currently meets around 60% of New Zealand’s oil demand. Almost 70% of primary energy needs in New Zealand are met by petroleum\(^6\). Two thirds of coal produced in New Zealand is sold domestically (meeting approximately 10% of New Zealand’s primary energy needs) and a further third is exported. In 1991, over $130 million of gold was produced and since then gold production has increased with the opening of new open-cast mines\(^7\). Gold production is an important contributor to New Zealand’s economy.

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New Zealand's Gross Domestic Product and export earnings and is an important factor in regional growth. Aggregate production is also very significant: in 1991 over 12 million tonnes at a value of over $133.8 million dollars was produced. Mining provides a significant number of jobs and has other direct and indirect benefits. Over 3,900 people were employed directly in the non-petroleum mining sector in 1991. There are also a substantial number of other jobs created as an indirect result of mining operations.

The development and use of minerals has both internal and external effects. Internal effects are impacts to the mineral resource itself of mineral development and use. External effects are impacts on resources other than the mineral being explored for, extracted or used. Mineral exploration, extraction and use has significant impacts upon the stock of mineral resources. These resources are formed by geological processes that typically take millions of years and for practical purposes can be treated as having a fixed stock of reserves. There is therefore a finite amount available, which once removed cannot be replaced. This non-renewability characteristic means that their extraction necessarily results in a reduction in the total stock of that mineral, reducing the amount available for future use.

Exploration for minerals may result in small, localised effects upon flora, fauna, water and soil resources. In contrast, extraction often involves large scale excavations and discharges of waste and byproducts onto land, into water and into the air. Mineral extraction also utilises large amounts of water, results in considerable noise pollution, requires large supporting infrastructure and has major impacts upon the economies and quality of life of individuals, communities and countries. The use of minerals,

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9 Ministry of Commerce, supra n. 7, p. 44.

10 Ministry of Commerce, supra n. 7, p. 44.

11 Jardine, V. & Scobie, G.M., supra n. 8, p. 15.

particularly coal and oil, can result in air and water pollution and widespread environmental impacts including the release of greenhouse gases. On the other hand, minerals are a significant economic resource and their use and extraction is of considerable importance to the growth and development of national and international economies.

This thesis focuses on the resource management implications of the development of mineral resources, particularly the "internal" issues associated with minerals. It deals with the legislative regime established by the Crown Minerals Act 1991 and the Resource Management Act 1991. The Crown Minerals Act 1991 vests ownership of petroleum, gold, silver and uranium in the Crown and preserves all past reservations of minerals to the Crown made in the alienation of Crown land by any earlier statute. It also reserves all minerals in any future alienation of land to the Crown. Part I of the Act establishes a management regime for these minerals which, in particular, provides for their allocation and the obtaining of a fair financial return for the Crown. The Act also establishes a procedure for determining rights of access to land for mining purposes. Part II contains transitional provisions for the shift from the previous mining legislation.

The Resource Management Act 1991, by contrast, has a much broader focus. This Act applies not only to all minerals (i.e. Crown owned and privately owned) but to all natural and physical resources including land, water, air, soil, minerals and energy, all forms of plants and animals and all structures. It establishes a framework for regulating and controlling the environmental effects of mining. The purpose of the Act is to promote the sustainable management of natural and physical resources. It deals primarily with the external effects of mining.

Thus, the Crown Minerals Act 1991 and the Resource Management Act 1991 establish a regime for the management and allocation of Crown-owned minerals, a procedure for determining access to Crown-owned minerals and a regime for regulating and controlling the environmental effects of mining and mineral use. Does this legislative framework enable comprehensive and integrated decision making to be made with respect to mineral resources?
CHAPTER 2

COMPREHENSIVE AND INTEGRATED RESOURCE MANAGEMENT

1. The Need for Comprehensive and Integrated Resource Management

Integrated resource management was a key goal of the Resource Management Law Reform project. This intention was reflected in Directions for Change, in People. Environment and Decision-Making and in the subsequent proposals for the reform of resource management legislation. The explanatory note to the Resource Management Bill, for example, stated that:

"The objective of this Bill is to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources."

The Resource Management Bill repealed more than 75 acts and amended more than 150 others. As described by the Minister for the Environment at the third reading of the Bill, it brought together more than "15 major measures in an integrated process that deals with the management of our natural and physical or built resources."

The Resource Management Law Reform project also took a comprehensive approach to resource management. It took a wide view of resource management matters. The intention was to include as many different values and perspectives on the

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16 ibid. The bill read for the third time differed noticeably from that introduced in 1990. Most significantly, Crown minerals were removed from the Bill and placed in the Crown Minerals Bill.
environment as possible. Thus, in *People, Environment and Decision-Making*. Sir Geoffrey Palmer stated:

"This review has a number of aims: to balance individual rights and public welfare on environmental matters, to reduce conflicts over resource use, to maintain the quality of our environment, and to be always mindful of the economic and social factors in decision making. Resource management must protect the needs of future generations by recognising the concept of sustainable development. We need laws that help us to enjoy what we have without endangering or compromising quality of life for ourselves or future generations."\(^{17}\)

There is a strong need for resource management laws to be comprehensive and integrated. Comprehensive and integrated resource management is essential to achieving effective environmental policies. Lack of a comprehensive and integrated environmental policy is seen as one of the principal reasons why environmental policies fail\(^ {18}\). Comprehensive and integrated environmental policy is needed to deal with the complexity and interrelatedness of environmental problems\(^ {19}\).

The need for comprehensive and integrated resource management is well recognised. Calls for a comprehensive approach to environmental decision making have been traced back to a 1963 article by Lynton K. Caldwell\(^ {20}\). In his article, Caldwell used

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\(^{17}\) Ministry for the Environment, supra n. 1, p. 2.

\(^{18}\) Buhrs, T. and Bartlett, R.V., supra n. 2.


Bartlett, R.V., supra n. 2.


\(^{19}\) See supra n. 2 and Wilson, P.S. & Harris, T.K. "Integrated Pollution Control: A Prologue" (1992) 22 *Environmental Law* i.

"environment" as an integrating concept that suggests "an attempt to deal with environments comprehensively, as environments, in contrast to focusing upon their component parts."\(^{21}\) In Caldwell's view, environmental policy should focus upon the environment in its fullest practicable sense if environmental problems are to be effectively dealt with.

Comprehensive and integrated resource management has strong international support. The need for integrated and comprehensive environmental policy was recognised in the 1972 United Nations "Stockholm Declaration on the Human Environment". The declaration also linked the environment to wider development goals:

> "International co-operation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organisations in the common interest."\(^{22}\)

Principle 13 of the Declaration called for States to adopt an integrated and coordinated approach to their developmental planning to ensure that development is compatible with the need to protect and improve the human environment through the more rational management of resources.

International interest in making environmental policy more comprehensive and integrated became considerably more focused with the release of the report of the World Commission on Environment and Development (better known as the Bruntland Commission)\(^ {23}\). The Commission argued that governments must take a much broader

\(^{21}\) Caldwell, L.K., supra n. 20 quoted in Bartlett, R.V. supra n. 2, p. 237.


view of environmental problems and policies:

"The objective of sustainable development and the integrated nature of the global environment/development challenges pose problems for institutions... The challenges are both interdependent and interrelated, requiring comprehensive approaches and participation ... The ability to anticipate and prevent environmental damage requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural and other dimensions. They should be considered on the same agendas and in the same national and international institutions."24

In the Commission's view, economics and ecology must be completely integrated in decision making and law making processes not just to protect the environment, but also to protect and promote development. The Commission recommended many institutional and legal changes at the national and international levels. These changes were aimed at achieving the goal of sustainable development. In particular, these recommendations sought to include ecological dimensions within policy decisions. Their breadth and scope indicates strong support for an integrated and comprehensive approach to the environment.

The need for integrated and comprehensive environmental policies is commonly supported on three grounds: ecology, rational decision-making and economics. Ecological arguments for integration point to the complexity and interrelatedness of the natural world25. All the components of the environment are inextricably linked and interdependent26. Thus, human activities in one part of the biosphere may have serious repercussions for another part. These impacts may not be direct or become apparent immediately but their effect may be profound. The term "environment" itself conveys

24 ibid. pp. 11-12.

25 Buhrs and Bartlett, supra n. 2, p. 9.

notions of interdependence. This ecological interdependency, it is claimed, demands treatment of the environment in an holistic and integrated way27.

This argument receives particularly strong support from proponents of integrated pollution control. A cogent argument is made that fragmented decision-making that treats water, air and land as separate and distinct environmental media is unable to adequately deal with pollution and the resulting environmental degradation28. Instead it should be recognised that pollution can be transferred across media and that most pollution control measures based on a fragmented approach merely shift pollution to another medium.

A fragmented approach also ignores the different risks imposed by different types of environmental pollution. Dramatic examples are described to support these arguments29. It is claimed that an integrated approach to pollution control enables new problems to be identified, old problems to be more accurately assessed and solved and may, through recognition of the damage pollution cases, lead to efforts to prevent pollution occurring30. It also improves the ability to set priorities among environmental problems.

The notion that "everything is connected to everything" does not apply solely to the ecosystem but is also relevant in the context of human interaction31. The efficacy of environmental policies depends upon recognition of the interrelation of particular aspects of the human sphere. To rely on the premises of a single discipline or theory in the development of responses to societal problems raises the risk of failure and may


28 ibid, p. 83.

29 See Irwin, F.H. "An Integrated Framework for Preventing Pollution and Protecting the Environment" (1992) 22 Environmental Law 1, 6 and Guruswamy, L., supra n. 27.


31 Buhrs, T., 1993, supra n. 18, p. 11.
result in trying to force reality into inappropriate pre-conceived models. Further, ecosystems and human behaviour are closely intertwined. Human interaction in ecosystems does not take place in isolation, but is based on social, economic and political patterns of behaviour.

Arguments for comprehensive and integrated environmental policy based on theories of rational decision-making posits that decisions should be made by considering as many aspects or matters as possible in a rational, constructive way. This is particularly important where the environment is concerned, given the breadth and depth of environmental matters. This model is opposed by the idea that decisions are best made in small incremental steps, by trial and error with minimal reliance on theoretical knowledge. However, the impacts of activities on the environment are often irreversible and geographically or temporally dispersed. Incremental decision-making is inherently unsuited to such conditions and may result in unwanted, unforseen and irreparable consequences. On the other hand, decision-making which accounts for these factors and rationally constructs goals, considers and evaluates the methods of attaining them and selects the best alternative will lead to better environmental decisions.

Comprehensive and integrated decision making is also claimed to be economically efficient. Distributing waste among water, air and land, in a manner that optimizes the capacity of the environment and any individual media to absorb waste is a particularly efficient and cost-effective way of controlling pollution. Other benefits that may result include a simplified administrative system and more efficient co-operation with other policy sectors.

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32 Buhrs, T., 1993, supra n. 18, p. 16.
34 Krier, J.E. and Brownstein, M., supra n. 20, p. 123.
35 Bartlett, R.V., supra n. 2, p. 244.
36 Guruswamy, L., supra n. 27, p. 87.
37 Irwin, F., supra n. 29, pp. 12-18.
These arguments are summarised by Frances Irwin who identifies seven reasons for taking steps towards integrating environmental policy. In her view, the problems with a fragmented approach are:

1. Fragmentation encourages use of control methods that transfer problems to other parts of the environment.
2. Existing problems are often not accurately identified and therefore cannot be effectively managed.
3. What is often the best solution - prevention - is ignored.
4. Fragmentation decreases the likelihood that new and more complex problems will be identified and prevented or controlled.
5. Fragmentation makes it difficult to set priorities among problems.
6. Fragmented environmental problems hinder more effective integration of environmental policy into other policy sectors.
7. Fragmentation results in an excessively complex and inconsistent structure.

2. The Meaning of Comprehensive and Integrated Resource Management

Despite the strength of these arguments, there is strong opposition to a comprehensive and integrated approach to environmental decision-making. In particular, it is claimed that comprehensive and integrated decision-making is impossible. It is argued that comprehensiveness and integration are unachievable ideals. Buhrs and Bartlett attribute this objection to a misunderstanding of the meaning of "comprehensive" and "integrated". If "comprehensive" is taken to mean including everything and "integrated" to mean fully incorporated into an indivisible whole, the argument that both are unachievable is persuasive. However, Buhrs and Bartlett argue that "comprehensive"

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38 Haigh, H. and Irwin, F., supra n. 30, p. 6.
39 Krier, J.E. and Brownstein, M., supra n. 20, p. 125.
and "integrated" are far from absolute concepts.

In Buhrs' and Bartlett's view, an integrated and comprehensive environmental policy does not require the incorporation of policy or legislation into one indivisible whole. The concept of comprehensiveness and integration which they advance is far more realistic. The definition advanced by Buhrs and Bartlett begins with the definition of "environmental decision-making" and "policy making". They see these terms as referring to social processes involving many people over time and not to discrete decisions each trying to deal with everything at once\(^{41}\). Policy is thus described as a general approach to a broad set of problems. "Comprehensive" is seen as requiring greater degrees of consideration of matters of importance\(^{42}\). Similarly, integration means "thinking broadly and prospectively about consequences"\(^{43}\). Comprehensive and integrated environmental decision making, therefore, consists of the formulation and implementation of goals, principles and guidelines with respect to the ecological, economic and social dimensions of the environment in a coherent way\(^{44}\). Thus, by limiting the meanings of "comprehensive" and "integration" Buhrs and Bartlett formulate a concept which can be achieved.

As defined by Mitchell, comprehensive and integrated resource management consists of "the sharing and co-ordination of the values and inputs of a wide range of agencies, publics and other interests when conceiving, designing and implementing policies, programmes or projects."\(^{45}\) This is even closer to an operational definition than that provided by Buhrs and Bartlett. Moreover, Mitchell utilises dictionary definitions

\(^{41}\) Bartlett, R.V., supra n. 2, p. 245.


\(^{43}\) Wilson, P.S. & Harris, T.K., supra n. 19.

\(^{44}\) Buhrs, T., 1993, supra n. 18.


of integrated and comprehensive and believes that these definitions can be sensibly applied. He sees "comprehensive" as "including, much of large scope or extent: able to understand many things fully."46 "Integrated" is defined as "having all things combined into a harmonious whole; coordinating diverse elements; to put or bring together parts into a whole."47 In Mitchell's view, the search for integrated and comprehensive resource management can occur at normative, strategic or operational levels.

The normative, strategic and operational levels of resource management described by Mitchell are based on a hierarchy of planning levels developed by Ozbekhan48. The normative level of planning is the level at which decisions that determine what ought to be done are made. As described by Ozbekhan, it involves the establishment of new norms that will help define values which will be more consonant with the environment than those already in place49. In other words, normative planning involves a reconsideration of the value premises underlying decisions to ensure better environmental decision making50. It also includes the definition of desired ends and ideals for planning. The strategic level of planning is the level at which decisions that determine what can be done are made. Ozbekhan describes strategic planning as a process "wherein various alternative means of attaining the objectives of the normative plan are reduced to those which can be achieved given the range of feasibilities involved and the optimum allocation of available resources."51 The strategic level of integration involves the analysis and evaluation of alternative goals and objectives, and the selection and design of means to achieve these goals and objectives52. The operational level of planning is

46 ibid.

47 ibid.


52 Smith. L.G., supra n. 50. p. 562.
the level at which decisions that determine what will be done are made. In Ozbekhan’s hierarchy, it is the level at which changes in the environment are effected. The principal activity at the operational level is the implementation of strategic plans.

Common to both Mitchell’s formulation of the meaning of integrated and comprehensive resource management and that formulated by Buhrs and Bartlett is a sense of a search for, or an undertaking to achieve, greater degrees of comprehensiveness and integration in resource management. This requires a broad based approach to the environmental, economic and social spheres at the normative level. This must be coupled with an attempt to coordinate and integrate the diverse range of values that such an approach entails at the strategic and operational levels. What is important is that a broad approach is taken to environmental matters, that the environment is treated as a single unit and that effect is given to a wide range of principles, guidelines and goals.

3. The Role of Law in the Management of Resources

Law, and legislation in particular, is one of the most powerful means of implementing policy objectives. In so far as it is concerned with the recognition, creation, distribution and exercise of power or authority to make decisions, law is fundamental to the use, development and conservation of natural resources. The legal system is dominated by legislatures and administrative agencies. Legislation is

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44 Davies, J.C. "Some Thoughts on Implementing Integration" (1992) 22 Environmental Law 139.
46 Mushkat, R. "Environmental Sustainability: A Perspective from the Asia-Pacific Region" (1993) 27 Univ. of British Columbia Law Review 155, 184.
increasingly seen by politicians and policy makers as an instrument to achieve political, ideological and policy goals\textsuperscript{56}. In this model, the law is able to give effect to major policy initiatives designed to implement broad, comprehensive policies. Law is therefore an important, even essential, means of achieving comprehensive and integrated resource management.

Legislation is a very effective tool in formalising environmental policies and establishing processes for environmental management\textsuperscript{57}. It enables political power to be transferred to otherwise powerless groups, demands accountability from decision-makers and changes the ground rules about environmental rights to favour those which are otherwise impaired\textsuperscript{58}. The advantages of using law to protect the environment include perceived political impartiality, professional decision-making, private citizen initiatives, enabling affected persons to present their views, accountability of political and administrative decision-makers and increased public trust in the political and administrative process. Legal frameworks are crucial for giving effect to initiatives to solve environmental problems whether they are regulatory, economic or administrative in nature. Environmental laws that are comprehensive and integrated are essential for achieving comprehensive and environmental decision-making.

The Brundtland report recognized the importance of law in giving effect to environmental priorities. In the Commission's view legal regimes are being rapidly outdistanced by the accelerating pace and scale of impacts on the environment\textsuperscript{59}. The Commission felt that there is an urgent need and a responsibility in states to reformulate


\textsuperscript{58} Norris, M. "Law, policy and the environment" (1993) 5 \textit{Journal of Environmental Law} 185.

\textsuperscript{59} WCED. supra n. 23, p. 330.
laws to recognize and respect rights in respect of the environment: to establish new norms of state and interstate behaviour; to strengthen and extend the application of existing laws and to reinforce existing methods; and develop new procedures for avoiding and resolving environmental disputes. Law, and legislation in particular, is clearly identified in the report as a principal means of achieving sustainable development.

In describing a role for law in the management of resources it must be recognised that New Zealand has a market led economy\(^60\). If law is to operate effectively it must operate within this context. In the market system, the price mechanism determines what, how and for whom goods and services are produced\(^61\). The allocation of resources is determined by the operation of the free market. These principles are based upon neo-classical economics theory. According to this theory the market will operate to achieve the common good. The goal of neo-classical economics is to maximise the aggregate well-being of all members of society through the satisfaction of each individual’s preferences\(^62\). Often this goal is simplified to a formulation which is more easily achievable: the reallocation of existing uses of resources in a manner that makes some individuals better off without making anyone worse off\(^63\). However, economic preferences are very individualistic and cannot be compared. This problem is overcome by relaxing the strict principles of theoretical economics. As a result, principles capable of practical application can be derived\(^64\).

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\(^61\) ibid.


First, it is assumed that the value of all resources can be quantitatively measured and compared by a money price. Second, it is assumed that this money price reflects each individual's "willingness-to-pay" to have their preferences satisfied. The rational self-interested value that a consumer places on each resource will be reflected in the money price of the resource. If the total value of all resources is maximised, the aggregate well-being of society will be maximised and hence the goal of economic analysis reached. Third, the market system is assumed to be the best means of achieving this goal. It enables individuals to express their preferences for particular resources through their purchasing decisions. A competitive market is therefore presumed to result in a socially optimal allocation of resources.

In the ideal competitive market the initial assignment of a property right will not determine the ultimate use of the property. This is known as the Coase Theorem. According to the theorem, the optimal resource allocation will be reached regardless of the original allocation of property rights. To demonstrate this, suppose that A is given the right to pollute B's stream. This is worth $50 to A but B would pay $60 for A not to pollute. With no transaction costs both parties would agree not to pollute: A will accept $50 or more to cease polluting and B will pay $60 or less for A to stop polluting. However, if B was given the right to prevent the pollution there would be no pollution. A could offer B only $50 not to exercise this right and it is worth $60 to B to stop the pollution. In both instances the same result is achieved: no pollution occurs. It is immaterial whether A is given the right to pollute or B is given the right to prevent pollution.

The Coase theorem, however, ignores the question of justice and the initial distribution of wealth in society. If wealth is unevenly distributed then the ability or even desire of a party to pay for a certain result is affected. The initial determination

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of property rights is extremely important. Law, therefore, has a significant role to play in defining property rights to natural resources. In accordance with neo-classical economics the goal should be to establish an institutional framework in which the market will operate to allocate resources efficiently.\(^{68}\)

A second role for law described in the neo-classical economics model suggests that it should be addressed to correcting specific instances of market failure. A market failure is said to occur when the market exchange results in an allocation of resources that is not socially desirable. The most common kinds of market failure are collective goods and collective costs. A collective good is a commodity from which it is impossible to exclude the enjoyment of a large number of people.\(^{69}\) Conversely, a collective or external cost is one which cannot be limited to one person.

The problem with collective goods and collective costs is that there is no incentive upon individuals to use resources wisely to avoid degradation of the resource. This is especially problematic for natural resources, many of which are collective goods and collective costs. For example, mining operations may produce pollution to air and water sources. However, it is unlikely that a socially optimal level of pollution will be reached by the market alone because air and water are often collective goods. The benefits of clean air and clean water will accrue to everyone while the mine operator alone will have to bear the costs of controlling the pollution.\(^{70}\)

One obvious solution to the problem of collective goods and collective costs is for the individuals or firms in the market to agree among themselves to compensate those who incur costs as a result of undertaking socially desirable activities. However, prohibitive transaction costs often make such an agreement impossible. Where there are a large number of individuals involved in a transaction, which is common for environmental problems, the costs of communication and the risks of an agreement not

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68 Chapman, B., supra n. 60, p. 21.


70 Stewart, R.B. & Krier, J.E., supra n. 53, p. 108.
being made are high. In such situations, government intervention may be needed to overcome the market failure and "internalise" the benefits and costs.

There are four basic government responses to the problem of external goods and external costs. First, the government could change the legal rules relating to collective goods to allow producers to exclude others from the benefit of such goods. This will usually involve a redefinition of property rights. Theoretically, traditional property rights could be redefined to encourage greater production of clean air. For some resources, however, this will be difficult. Resources such as air, for example, are of such a nature that it is impossible to physically exclude others from enjoyment of the resource.

Second, the government could subsidise private activities that produce collective goods, pay firms to supply public goods, or subsidize the installation of measures to control collective costs. In the pollution example, Government could subsidize the installation of anti-pollution technology and recoup the cost of such a subsidy through taxation. Third, the government could exercise coercive powers to command firms to supply collective goods or stop the production of collective costs. In the case of clean air, firms could be ordered to install pollution controls or reduce emissions. Fourth, the government could impose financial penalties on firms that produce collective costs or fail to provide public goods. This could, for example, take the form of a fee based on pollutant emissions.

Thus, the role of law in the neo-classical economics model is limited to defining property rights and correcting sources of market failure. However, the market system fails to account for several values which are an essential part of a comprehensive and integrated approach to resource management. It excludes from consideration the principle of sustainable development, the interests of future generations, the Treaty of Waitangi and other cultural values. It is argued in the next two chapters that these

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71 Stewart, R.B. & Krier, J.E., supra n. 53, p. 107-117.
72 Grundy, K.J., supra n. 26, p. 48.
values should be considered as part of a comprehensive and integrated approach to the
management of mineral resources. The objective of sustainability, for example, is a
non-market objective because, in terms of economic efficiency, it may be better to
deplete an otherwise sustainable resource or deplete a finite resource faster than it can
be substituted for. These values are strongly held by the community as important. Law,
by requiring decision-makers to take these values into account and establishing
institutional frameworks which include these values, is a particularly powerful tool in
giving effect to them.

In addition to defining property rights, correcting market failures and giving effect
to non-market values, law has a significant role to play in describing how the Crown
should manage the minerals it owns. Through various statutes the Crown has reserved
ownership of a substantial number of New Zealand’s mineral resources. Legislation,
to the extent that it is concerned with the exercise of power or authority to make
decisions, can have a significant impact upon how these resources are owned. In the
past, the legislation relating to Crown owned minerals has served social, strategic and
economic goals and placed an emphasis on the development of these minerals. The
current legislation is far more neutral in its treatment of minerals although its supposed
objective is to maximise national welfare.


Resource management legislation, if it is to be effective, must be comprehensive
and integrated. In the model developed by Ozbekhan and utilized by Grinlinton, this
integration and comprehensiveness should occur on the normative, strategic and
operational levels. Properly designed legislation should formulate and enforce clear

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See infra. Chapters 3 and Chapter 4.

Chapman. B., supra n. 60. p. 16.

See infra. chapter 5.

statements of normative objectives and policies, and create a structure for effective strategic and operational implementation of such policies.

Thus, at the normative level, integrated and comprehensive resource management law should specify and implement higher level objectives and policies for natural resource use. These objectives and policies must recognise the global problems of diminishing resources and environmental degradation, and deal with the environmental, economic and social spheres. This is the level at which "comprehensive" has real meaning; it requires the inclusion of a wide range of perspectives and values. Resource management legislation should seek to assimilate international grundnorms, such as sustainable development; set minimum common property quality standards; and require consideration of a wide range of values.

In *People, Environment and Decision-Making* the Government identified a set of general purposes and objectives as a basis for the proposed Resource Management Bill. These included:

- recognition of the Treaty of Waitangi;
- balancing individual rights and public welfare;
- eliminating or minimising costs between uses;
- environmental quality;
- ecosystem values;
- needs of future generations; and
- economic and social factors.

It was also stated that these matters and objectives (apart from recognition of the Treaty of Waitangi) should include reference to the notion of sustainable development. Sustainable development, the Treaty of Waitangi and the needs of future generations are all normative principles crucial to comprehensive and integrated decision-making in

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78 Grinlinton, D.P., supra n. 44.

79 Ministry for the Environment, supra n. 1, p.5.
respect of the management of minerals. They should therefore be recognised in legislation. Resource management legislation also needs to provide for the resolution of conflicts between the mining and other resource uses, particularly where mineral ownership and land ownership is separate.

At the strategic level, legislation should implement frameworks, plans and management structures to achieve the normative policies and objectives. These plans and management structures must, themselves, be integrated. Resource management legislation should therefore provide for the integration of resource allocation and management regulation functions; the integration of natural resource allocation and management agencies; and "macro-planning" in terms of providing for the preparation and implementation of national and regional resource management plans. Legislation can also be used, at the strategic level, to require allocation and regulation agencies to formulate goals and objectives for resource management which give effect to the normative policies in respect of different resources and regions.

The need for integration at the strategic level was recognised in Directions for Change:

"Management of air, land and water including pollution control and management of activities such as mining should be better integrated."

However, it was recognised that this does not necessarily mean that there should be one all-encompassing statute. In People, Environment and Decision Making a hierarchial system of responsibilities was proposed. Central government was to be primarily responsible for the allocation of public resources and the establishment of national policies and environmental guidelines. The intention was that central government would

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80 Grinlinton, D.P., supra n. 44, p. 8.
82 Ministry for the Environment, supra n. 1, p. 3.
set policies and guidelines for rule making by regional and territorial government. Subject to these policies and guidelines, therefore, regional government was to be responsible for the preparation of regional resource and environmental plans. Territorial government was to be responsible for the preparation of local resource and environmental plans, subject to national and regional policies and guidelines.

The operational level of management involves the implementation of "nuts and bolts strategies, objectives and plans." At this level, legislation is very effective in implementing strategic and operational plans and strategies and ensuring integration is achieved. There are three elements to the operational level of management. First, legislation should assign detailed responsibilities for specific areas of resource management at the operational level. Second, legislation should establish plans, permits and consent structures for implementing strategic level objectives and policies. Third, legislation should provide for the enforcement of these plans, permits and consents.

Integration of management responsibilities enables coordination and cooperation in the implementation of normative and strategic policies, and in the preparation and administration of plans, permits and consents. This is particularly important where decisions are made for different resources which are intimately related to each other. Integration of plans, permits and consent structures should follow immediately from the integration of management responsibilities. Such integration is an important measure in avoiding unnecessary overlap, delay and cost in processing consent applications. Plans, permits and consents are the primary means of implementing normative and strategic policies. This element of operational management involves specific decision making on individual proposals by the agency with responsibility for the management of the resource. Law is ideally suited to ensuring that these decisions are fully integrated into the resource management structure. Effective enforcement of compliance with plans,

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84 Grinlinton, D.P., supra n. 44, p. 11.
85 Ministry for the Environment, supra n. 83, p. 23.
environmental standards and the conditions of permits and consents is essential to the operation of the entire resource management system.

There is a close link between the operational, strategic and normative levels in the area of management responsibilities.86 For example, some decisions may be made at the normative level to retain control of certain resources or aspects of their management with central government. Ownership of petroleum, gold, silver, uranium and other mineral resources is a good example of this.87 At the strategic level, plans and objectives may be prepared. The implementation of these plans and objectives may be delegated to a specific body within central government.

This thesis focuses primarily, but not exclusively, on the normative level of integration described by Grinlinton and Mitchell. Some attention is paid to the strategic and operational levels, principally in the context of integrating decisions regarding land use. However, the primary enquiry is whether the Resource Management Act 1991 and the Crown Minerals Act 1991 establish a comprehensive and integrated set of "higher level" principles and policies for the management of minerals.

5. Summary

This chapter has argued that comprehensive and integrated resource management is essential to achieving effective environmental policy. This argument is principally founded on the complexity and interrelatedness of environmental problems. It is claimed that only policies which are able to deal with the breadth and scope of the environment will be effective. The terms "comprehensive" and "integrated" are not absolute concepts. Comprehensive and integrated resource management does not require the incorporation of policy or legislation into one indivisible whole. Instead, it consists of the formulation and implementation of goals, principles and guidelines with respect to the ecological, economic and social dimensions of the environment in a rational and integrated way.

86 Grinlinton, D.P., supra n. 44, p. 12.

87 See infra Chapter 5.
Law, and legislation in particular, has been identified as a powerful means of giving effect to comprehensive and integrated resource management. In this respect, three levels of integration have been identified: normative, strategic and operational. This thesis focuses principally on the normative level. Comprehensive and integrated resource management requires assimilation and recognition of "meta-policies" in legislation to guide decision making. Mining legislation thus needs to take a rational approach to mineral development that gives effect to the principles of sustainable development, the needs of future generations and full recognition of the Treaty of Waitangi. It must also deal with minerals, and the effects of mining, in an integrated manner in relation to other resources.

In New Zealand, law must act within the context of a free market economy. Within this context there are four principal roles which law can serve. First, it defines property rights to natural resources and establishes the institutional framework within which the market operates. Second, it can be used to remedy sources of market failure. Third, it defines how the minerals owned by the Crown are to be managed. Fourth, it is an extremely useful tool for giving effect to values which the market system is unable to account for. These are commonly called non-market values. In the next three chapters it is argued that there are several non-market values which should be considered as part of the comprehensive and integrated management of mineral resources. Chapters three and four argue that the "higher level" policies that should be incorporated into resource management legislation as part of a comprehensive and integrated approach to environmental decision-making, in relation to minerals, include sustainable development, the needs of future generations, and the Treaty of Waitangi. Chapter five discusses Crown ownership of minerals and the problems this causes for the development of minerals. Legislation needs to resolve conflicts between mineral developers and other users of land, particularly where the ownership of minerals and land has become separated.
CHAPTER 3

SUSTAINABLE DEVELOPMENT

Sustainable development, with its emphasis on the needs of future generations, is a non-market objective. In neo-classical economics the needs and interests of future generations are discounted to reflect the fact of their futurity and uncertainty. As a result it may be efficient in economic terms to deplete all of a mineral resource even though the resource may no longer be available for future generations to use and no replacement resources are available. Sustainable development, however, does not discount the needs and interests of future generations so strongly. It demands an orderly transition to renewable resources. It is crucial to a comprehensive and integrated approach to resource management.

1. Sustainable Development and the Idea of Limits to Growth

Adoption of the principle of sustainable development as a basis for solving the environmental and economic crises threatening the earth was the central theme of Our Common Future, the report of the Brundtland Commission. This report suggested that a sustainable approach to economic growth is crucial for a secure human future. The Commission defined sustainable development as:

"... development that meets the needs of the present without compromising the ability of future generations to meet their own needs." 88

In the Commission’s view environmental concerns cannot be divorced from development policies. The two problems must be considered together; development cannot subsist upon a deteriorating environmental resource base and the environment cannot be protected when economic growth leaves out of account the costs of environmental

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88 WCED, supra n. 23, p. 43.
Sustainable development, as a means of providing for environmental protection, was supported by the World Conservation Strategy\(^{90}\) released in 1980. The Strategy identified sustainable development as central to ensuring that the life-supporting capacity of ecological systems is preserved. It stated:

"Humanity’s relationship with the biosphere (the thin covering of the planet that contains and sustains life) will continue to deteriorate until a new international economic order is achieved, a new environmental ethic adopted, human populations stabilize, and sustainable modes of development become the rule rather than the exception."\(^{91}\)

The Strategy suggested that the conservation of living resources is an essential prerequisite to sustainable development. This would require "the maintenance of essential ecological processes and life support systems, the preservation of genetic diversity, and the sustainable utilization of species and ecosystems."\(^{92}\)

Sustainable Development was also a key theme in the 1972 Stockholm Declaration. The Declaration argued that the contemporary economic order would result both in environmental degradation and widespread poverty. It advanced the concept of sustainable development as an alternative:

"We see instead the possibility of a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base."\(^{93}\)

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\(^{89}\) WCED, supra n. 23, p. 37.


\(^{91}\) IUCN, supra n. 90, p. 1.

\(^{92}\) IUCN, supra n. 90, p. 1.

\(^{93}\) United Nations Conference on the Human Environment, supra n. 22.
The Declaration based its support for sustainable development principally upon the needs of third world countries:

"... in the developing countries most of the environmental problems are caused by underdevelopment. Millions continue to live far below the minimum levels required for health and sanitation. Therefore the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment." 94

The belief that natural resources impose a finite limit upon economic growth is increasingly recognised in academia. Kenneth Boulding has suggested that limits to economic growth arise out of global pollution and the depletion of non-renewable natural resources95. Boulding was especially concerned with the stock of energy resources and compared the earth to a "spaceship" with a closed, circular economy. In his view, this closed system with fixed levels of mass and energy and fixed assimilative and regenerative capacity is incompatible with economic growth. Boulding predicted that, eventually, the ability of the earth to sustain life would be lost if current growth patterns continued.

Similar predictions have been made by Herman Daly, Georgescu-Roegen and Meadows. Herman Daly's prescription for survival is a severe restriction in use of minerals, a zero rate of production and minimum consumption rates96. Georgescu-Roegen has taken this even further and suggested that the human population actually needs to be reduced to ensure the maximum period of existence of the human

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94 United Nations Conference on the Human Environment, supra n. 22.


96 Daly, H. For the Common Good: Redirecting the Economy toward the Community, the Environment and a Sustainable Future. Beacon Press, Boston. 1989.

species. In *Limits to Growth*, Meadows et al. examined the problems caused by global pollution, agriculture, resource-use, industry, and pollution. *Limits to Growth* concluded that the ultimate determinants of the limits to growth on the planet are natural resources, particularly energy resources and non-renewable resources. It warned that the limits of economic growth would be reached within the next hundred years if the present trends in population, industrialization, pollution, food production, and resource depletion continued. It was stated that:

"Given present resource consumption rates and the projected increase in these rates, the great majority of the currently important non-renewable resources will be extremely costly 100 years from now."

The predicted result of this scenario is a sudden decline in population, living standards, industrial and food production. This pessimistic forecast can, however, be avoided if urgent action is taken to "alter these growth trends and to establish a condition of ecological and economic stability that is sustainable far into the future."

The strategy suggested by *Limits to Growth* to achieve ecological and environmental sustainability was based on reducing population growth rates and decreasing the use of natural resources. especially non-renewable resources such as energy and metals, to guarantee their availability in the future. These recommendations, and the predictions of resource exhaustion which support them, have been repeated in a further report by the same authors.

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99 ibid. p. 66.

100 ibid. p. 24.

This increase in scholarly support for environmentally compatible economic growth has been mirrored by the rise of the environmental movement in the late 60's. As Judith Rees describes it:

"... the environmental movement appeared to offer a new philosophy of life to those already questioning the rationality of consumerism and choosing to opt out of the economic rat race."102

The environmental movement rejected many of the precepts of the conventional economic philosophy and adopted a strong ethic of environmental protection. The environmental movement has a strong political voice. Many environmentalists argue that environmental problems are a manifestation of a more radical crisis and we need to radically change our dominant values and practices if we want to halt or reverse environmental degradation103. A belief has grown that the economic growth that has been experienced over the last two centuries cannot be supported.

The prediction that many non-renewable resources will be exhausted within one hundred years is alarming. The bases upon which this prediction has been made, however, have been strongly disputed by mainstream economists. It is claimed that it is impossible to forecast the likely date of exhaustion of non-renewable resources because their ultimate stock is unknown104. Proven reserves are continually revised upwards making any prediction based on currently known reserves unreliable. The model relied upon by Meadows is equally arbitrary; it multiplies the current level of consumption by a factor of 250105. Nevertheless, the basic assumption that physical exhaustion will occur and will have a profound effect on production is undeniable. Although the actual date at which exhaustion will occur is indeterminate the fact that it


104 Rees, J., supra n. 102, p. 36.

105 Rees, J., supra n. 102, p. 34.
will occur is a matter of great concern.

Sustainable development is an integrating concept. It is comprehensive in scope\textsuperscript{106} and provides a framework for the integration of environmental policies and development strategies\textsuperscript{107}. Sustainable development involves a holistic, "all-fronts" approach to environmental problems\textsuperscript{108}. There is a great deal of overlap between sustainable development and integrated and comprehensive resource management. Sustainable development requires a comprehensive and integrated approach to environment and to the economy\textsuperscript{109}. It is therefore a key normative principle for comprehensive and integrated resource management.

Sustainable development acknowledges the interrelatedness of the environment and the economy\textsuperscript{110}. The Stockholm Declaration recognised that development and the environment are mutually reinforcing:

"Conservation, like development, is for people; while development aims to achieve human goals largely through use of the biosphere, conservation aims to achieve them by ensuring that such use continues."	extsuperscript{111}

Similarly, the Brundtland Commission emphasised the importance of viewing environmental problems and economic issues together. It stated that:

"Environment and Development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource

\textsuperscript{106} Tisdell, C., supra n. 96, p. 4.
\textsuperscript{107} WCED, supra n. 23, p. 40.
\textsuperscript{108} Mushkat, R., supra n. 53, p. 186.
\textsuperscript{109} Buhrs, T. & Bartlett, R.V., supra n. 2, p. 141.
\textsuperscript{110} Buhrs, T., supra n. 18, p. 16.
\textsuperscript{111} IUCN, supra n. 90, p. 1.
base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect.¹¹²

Sustainable development is a multi-faceted concept. It involves consideration of the ecological, social and economic dimensions¹¹³. In the words of the World Conservation Strategy:

"For development to be sustainable it must take account of social and ecological factors as well as economic ones; of the living and non-living resource base; and of the long term as well as the short term advantages and disadvantages of alternative actions."¹¹⁴

Grundy explained the interaction of these three systems in the following way¹¹⁵. Ecological sustainability provides the overarching framework within which all activity must take place. It is concerned with the interdependencies of the natural world, the maintenance of essential ecological and life support systems, and the existence of an ecological "bottom line". The goal to which human activity strives is social sustainability. It is concerned with the growing inequalities between nations and within nations, and between generations. Economic sustainability provides the means of achieving social goals within the bounds of ecological limits. This tripartite concept provides a useful framework for exploring the demands of sustainable development.

¹¹² WCED, supra n. 23, p. 37.


¹¹⁵ IUCN, supra n. 90, p. 1.

2. Ecological Sustainability

In the tripartite sustainable development concept, ecological principles provide the basic framework within which social and economic processes occur. The ultimate ecological limits to growth are particularised in the laws of thermodynamics\textsuperscript{116}. These laws hold that energy is neither created nor destroyed, it is merely transformed from one form to another. Every time energy is transformed there is an increase in disorder until it is dissipated as heat. Thus, the world resources of energy, and therefore matter, are finite. Humans must recognise the limits of the biosphere and act within them. Further, as energy flows from low entropy to high entropy states it ultimately becomes so disorganized and widespread that it is unusable for human activity. Low entropy energy sources, in the form of fossil fuels, are finite and irreversible; once used they cannot be regenerated.

A basic condition of ecological sustainability is an enduring biosphere and, in particular, "the maintenance of essential ecological processes and life support systems upon which all life depends."\textsuperscript{117} The study of ecology demonstrates the interdependence and inseparableness of the natural world\textsuperscript{118}. It also emphasises that all activity, including human activity takes place within bio-physical constraints. These constraints are based on recognition that biophysical resources are finite. These ecological limits have been described by Meadows, \textit{et al.} as "sources" and "sinks"\textsuperscript{119}.

A source is the ability of biosphere to provide resources and a sink is the ability of the biosphere to accept wastes and pollutants. Both these are limited and are interlinked\textsuperscript{120}. There are short-term limits (the amount of oil currently producible) and

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\textsuperscript{116} Grundy, J.K., supra n. 26, pp. 33-34.

\textsuperscript{117} Grundy, J.K., supra n. 26, p. 33.

\textsuperscript{118} Grundy, J.K., supra n. 26, p. 36.

See also infra, Chapter 2.

\textsuperscript{119} Meadows, D.H. \textit{et al.}, supra n. 101, p. 45.

\textsuperscript{120} Meadows, D.H. \textit{et al.}, supra n. 101, p. 46.
long-term limits (the total amount of oil in the ground). Sources and sinks may interact and the same natural resource may serve as both a source and a sink. Human activity is therefore limited at both ends, by the ability of the biosphere to provide resources and the ability of the biosphere to accept wastes. We must learn to act within the assimilative and regenerative capacity of the natural environment. These limits have been formulated by Meadows et al. into three rules that provide a prescription for ecologically sustainable development:

(a) For a renewable resource, the sustainable rate of use can be no greater than the rate of regeneration.

(b) For a nonrenewable resource, the sustainable rate of use can be no greater than the rate at which a renewable resource can be substituted for it.

(c) For a pollutant, the sustainable rate of emission can be no greater than the rate at which a pollutant can be recycled, absorbed, or rendered harmless by the environment.

The World Conservation Strategy saw conservation of living resources as a key element in sustainable development. The Strategy’s support for conservation was motivated by a belief that the biosphere must be managed to maintain its potential to meet human needs. It was seen as a necessary consequence of the renewability and destructibility of living resources. Living resources are renewable if conserved and destructible if they are not. Living resource conservation was seen as having three principal objectives; the maintenance of essential ecological processes and life-support systems; the preservation of genetic diversity; and the sustainable utilization of species and ecosystems.

\[121\] Meadows, D.H. et al., supra n. 101, p. 46.

\[122\] Meadows, D.H. et al., supra n. 101, p. 46.

\[123\] IUCN, supra n. 90, p. 1.
3. Social Sustainability and the Needs of Future Generations

Social sustainability provides the goal to which sustainable development strives. The objective of the concept of sustainable development advanced by the Brundtland Commission is the satisfaction of human needs and aspirations. This involves consideration of both the needs of current generations and future generations. In the traditional economic approach the value of future human generations is heavily discounted. It is argued that the temporal location of future generations, the uncertainty of their existence, actual number and their needs, and the very contingency of future generations entitles us to downgrade their interests. As we cannot know what the actual wants, needs and numbers of future generations are, it is claimed that we should value their interests less. Further, it is asserted that because future people may not exist at all and their actual number is contingent on current and future actions they deserve less consideration.

Discounting the value of the needs and interests of future generations, however, is strongly opposed by some philosophers. Both Attfield and Kavka have argued that as long as some people will exist, who will be relatively similar to current people, they are worthy of equal consideration. Both argue that whatever the uncertainty about the extent of future preferences, it is clear that basic needs will not be substantially different from future ones. The satisfaction of these basic needs will be a prerequisite to the satisfaction of their other needs and desires, about which there may be more uncertainty.

124 WCED, supra n. 23, p. 43.
126 ibid. p. 143.
127 Attfield, R., supra n. 73.
Attfield also argues that we can be nearly certain that there will be a great number of future people. He does not believe that the contingency of future generations provides sufficient reason to subordinate their interests to the interests of current generations\textsuperscript{129}. In Attfield's opinion we have the power to both improve or irreversibly mar the future. These considerations led Attfield to conclude that:

"...there is the same obligation to future people as to the present'. Future people count, to speak morally as much as present ones. Our obligations in their regard are only lessened where special known factors supervene, for example, cases where efforts on their behalf are likely to miscarry. Our obligations to people are not lessened at all by the mere fact of their futurity."\textsuperscript{130}

In Attfield's view, the obligation on the current generation is not to definite people but to ensure that human existence continues at a fairly high level of intrinsic value. In the utilitarian approach that Attfield advocates this is achieved by maximising provision for everyone's basic needs\textsuperscript{131}.

Provision for the needs of future generations has also been justified on the basis of social contract theory. In particular Rawls' "Theory of Justice"\textsuperscript{132} has been utilised as the basis for claims to inter-generational equity\textsuperscript{133}. In Rawls' original formulation, representatives from contemporary society were imagined to negotiate the rules for a fair society from behind a 'veil of ignorance' so as not to know the part of society to which they belong. The result would, Rawls claimed, be a set of rational and just principles. In the inter-generational context this method is modified by allowing all generations to

\textsuperscript{129} Attfield, R., supra n. 73. p. 108.

\textsuperscript{130} Attfield, R., supra n. 73. p. 96.

\textsuperscript{131} Turner, R.K., supra n. 125. pp. 144.


\textsuperscript{133} Turner, R.K., supra n. 125, pp. 145.
be represented in the original negotiation\textsuperscript{134}. The "veil of ignorance" is extended so that the representatives in the imagined negotiation do not know the generation to which they belong. The result, it is argued, is an "agreement" to pass on intact an inheritance from one generation to the next.

It seems clear that the current generation has a responsibility to ensure that the basic needs of future generations are provided for\textsuperscript{135}. Kavka has suggested that this requirement ensures that resources are not wasted. In his view, although resources may be used, each generation must leave "enough and as good as for others" of the resource base, as they inherited\textsuperscript{136}. This will involve conservation of renewable resources and substitution and recycling of non-renewable resources\textsuperscript{137}. Thus, the use of a non-renewable resource should be compensated for by improved technology and increased capital investment to offset the impacts of depletion. Future generations are owed compensation for any reduction in the stock of natural resources. This is "paid" by the current generation through improved technology and increased capital investment to offset the impacts of depletion.

Such policies, however, will be successful only if population levels are stabilised at a level that is consistent with the requirement to provide for basic needs\textsuperscript{138}. Without this qualification, the standard of leaving "enough and as good" may be overly harsh on the current generation\textsuperscript{139}. It may mean that resources are drawn away from satisfying the basic needs of existing people. It is therefore acknowledged that the current generation is justified in using more than its otherwise fair share of resources to allow

\textsuperscript{134} Turner, R.K., supra n. 125, p. 236.

\textsuperscript{135} Turner, R.K., supra n. 125, p. 146.

\textsuperscript{136} Kavka, G., supra n. 127, p. 200.

\textsuperscript{137} Turner, R.K., supra n. 127, p. 146.

\textsuperscript{138} Attfield, R., supra n. 73, p. 188.

\textsuperscript{139} Kavka, G., supra n. 127, p. 200.
for the development of Third World countries and for world population to stabilise. The current generation should concentrate on determining and achieving population level that is sustainable over time. This result is remarkably similar to the requirements of sustainable development.

In the New Zealand context social sustainability has been described as:

"... demand(ing) the satisfaction of the basic needs for a healthy life, including food, shelter, health-care, employment and education. It requires an equitable access to resources and an equitable distribution of the benefits between nations and between generations. It advocates adequate representation, participation, and consultation in decision-making, and it calls for self determination in a democratic political system. Finally, it relies on an underlying social cohesion cemented together by a common interest, a common purpose, a feeling of belonging, and a sense of community service."

In a much wider context social sustainability has also been described as requiring cultural diversity, institutional sustainability, social justice and participation. Social ecology demands a highly developed form of citizen participation where citizens have at least an option to influence directly the policy and decision-making process.

4. Economic Sustainability

The third strand of the concept of sustainable development is economic sustainability. Economic sustainability involves the search for policies and approaches

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140 Turner, R.K., supra n. 127, p. 146.
141 Grundy, J.K., supra n. 26, p. 48.
142 Barbier, E.B., supra n. 113.
to economic growth that are sustainable\textsuperscript{144}. It recognises the social and ecological limits to growth and seeks to achieve economic development within these limits. This sustainability approach to economics has been described as:

"... the study of the allocation of finite resources amongst competing ends, to achieve a pre-determined socially agreed-upon end state without compromising the life-supporting capacity of the biosphere or the needs of future generations."\textsuperscript{145}

Sustainable development requires a change in the content of growth, to make it less material and energy-intensive and more equitable in its impact\textsuperscript{146}. It represents a major shift in the dominant economic theory. Neo-classical economics does not see the stock of natural resources as imposing limits on economic growth\textsuperscript{147}. Instead economies of scale, entrepreneurship, technological change and the quality of production, labour and capital are seen as the significant growth reducing factors\textsuperscript{148}. Moreover, it views economic development as an end in itself without reference to ecological constraints or guidance from society’s values\textsuperscript{149}.

In contrast, sustainable economics overtly serves social ends. Its principal goal is to ensure equitable access to resources and an equitable distribution of benefits from resource use. Simply stated, the primary aim of economic sustainability is "ensuring that the poor have access to sustainable and secure livelihoods"\textsuperscript{150}. At the same time economic sustainability serves ecological aims, principal among these is a commitment

\begin{itemize}
\item \textsuperscript{144} Tisdell, C., supra n. 96, p. 13.
\item \textsuperscript{145} Grundy, J.K., supra n. 26, p. 57.
\item \textsuperscript{146} WCED, supra n. 23, p. 52.
\item \textsuperscript{147} Tisdell, C., supra n. 96, p. 7.
\item \textsuperscript{149} Grundy, J.K., supra n. 26, p. 51.
\item \textsuperscript{150} Barbier, E.B. supra n. 113, p. 105.
\end{itemize}
to maintaining ecological diversity and stability\textsuperscript{151}.

Sustainable economics is also more soundly based on the realities of the stock of resources that sustains it than the neo-classical economics model\textsuperscript{152}. For example, income from forestry operations should be measured both in terms of the value of timber extracted and the costs of regenerating the forest. Economic development must take full account in its measurements of growth of the improvement or deterioration of the stock of natural resources\textsuperscript{153}.

Sustainable development requires a change in our approach to economic growth. It requires a focus on an increase in quality rather than quantity\textsuperscript{154}. This qualitative improvement is made to the structure, design and composition of physical stocks and flows. While there are limits to growth, there are thought to be no limits to development of a qualitative nature\textsuperscript{155}. Thus sustainable development favours qualitative development rather than quantitative growth. It calls for economic development that is directed spatially, structurally and operationally towards achieving a desired end.

Sustainable economics also recognises the interdependence of the economy, society and the environment. As Edward Barbier states:

"(sustainable economic development) is indistinguishable from the total development of society and cannot effectively be analysed separately as "sustainability" depends on the interaction of economic changes with social, cultural, and ecological transformations.\textsuperscript{156}"

\textsuperscript{151} Grundy, L.K., supra n. 26, p. 51.

\textsuperscript{152} WCED, supra n. 23, p. 52.

\textsuperscript{153} WCED, supra n. 23, p. 52.

\textsuperscript{154} Grundy, J.K., supra n. 26, pp. 51-52. WCED, supra n. 23, p. 53.

\textsuperscript{155} Meadows, D.H. et al., supra n. 101, p. xiv.

\textsuperscript{156} Barbier, E.B. supra n. 113, p. 103.
Barbier assigns a range of goals to the ecological, social and economic systems that reflects the value of each system to human society. The general objective of Barbier's concept of sustainable development is to maximise these goals across all three systems. This maximisation must be "sustainable" or, at least, non-decreasing over time. In Barbier's view, this can be achieved through a process of trade-offs among the various goals and across the ecological, social and economic systems.

Barbier's idea of "trading-off" values across the ecological, social and economic systems differs from the concept of sustainable development advanced by the Brundtland Commission. In the Commission's view, ecological constraints place a bottom line on economic development and, in some instances, will require a rejection of development projects. By contrast, Barbier's formulation may involve compromising some of the principles of ecological integrity to satisfy the demands of social and economic sustainability. It is submitted that the approach taken in "Our Common Future" is preferable from the viewpoint of environmental protection.

Despite this difference, however, Barbier arrives at very similar principles for resource use as those formulated by the Brundtland Commission. The key condition to achieving Barbier's maximising objective, in terms of the use of natural resources, is that natural capital stocks remain constant. In those countries where existing stocks are below the optimum, stocks of natural resources should be increased or, at least, held at present levels. Even where current stocks are above the optimum such a practice is a sound risk-adverse strategy. For exhaustible resources, sustainable development

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157 Barbier, E.B. supra n. 113.

158 Pearce, D., et. al., supra. n. 157, p. 3.

159 WCED, supra n. 23, pp. 55-56.


161 Pearce, D., et. al., supra. n. 157, pp. 4-19.
requires that "the rate of depletion should take into account the criticality of that resource, the availability of technologies for minimizing depletion, and the likelihood of substitutes being available."\textsuperscript{162}

Sustainable development is frequently criticised for being an ill defined concept\textsuperscript{163} and for taking on a wide range of meanings\textsuperscript{164}. This potential generality means that it is in danger of becoming a "thought stopping cliche"\textsuperscript{165}. However, the three dimensional concept advanced by Barbier and by Grundy does refine and substantiate the concept formulated in the World Conservation Strategy and by the Brundtland Commission. It is sufficiently well defined to enable the setting of coherent policies for the sustainable development of natural resources. Policies need to be formulated that provide for maintenance of the biosphere, the conservation of living resources and the use of natural resources within their limits as both sources and sinks. Renewable resources should be used at a rate which is no greater than the rate of regeneration, non-renewable resources at a rate no greater that the rate at which they can be substituted for and pollutants should be emitted at a rate no greater than the rate at which they can be recycled, absorbed, or rendered harmless.

5. \textbf{Sustainable Development of Minerals}

The concept of sustainable development has definite policy implications for minerals. The definition of sustainable development, as development that meets the needs of current generations without compromising the ability of future generations to meet their needs, can be applied to minerals. The continued supply of mineral resources, or conversely the exhaustion of minerals, will have a serious impact upon the ability of future generations to meet their needs. The Brundtland Commission, for example, stated

\textsuperscript{162} WCED, supra n. 23, p. 46.

\textsuperscript{163} Barbier, E.B., supra n. 113, p. 101.

\textsuperscript{164} Grundy, J.K., supra n. 26, p. 26.

\textsuperscript{165} Grundy, J.K., supra n. 26, p. 26.
"As for non-renewable resources, like fossil fuels and minerals, their use reduces the stock available for future generations. But this does not mean that such resources should not be used ... With minerals and fossil fuels, the rate of depletion and the emphasis on recycling and economy of use should be calibrated to ensure that the resource does not run out before acceptable substitutes are found."^166

For minerals, sustainable development requires that their rate of use should not exceed the capacity to find new deposits, acceptable substitutes or to recycle^167.

Meadows et al. provide a similar prescription. They identify two energy options to deal with the non-sustainability of fossil fuels; greater energy efficiency and greater use of solar-based renewables^168. The potential for increased energy efficiency is immense. Some calculations suggest that worldwide energy throughput could be kept at or below current levels, with no reduction in productivity and with steady economic growth in poor countries^169. Conservative estimates predict reductions on the worldwide drain on oil by 14%, coal by 10%, gas by 15% could be made through greater energy efficiency. For non-energy minerals greater recycling, increased product lifetime and increased efficiency in the use of materials is prescribed^170.

The pressure of the exhaustion of minerals differs greatly. The ratio of oil and gas reserves to production, which provides an estimate of the number of years resources

^166 WCED, supra n. 23, p. 46.
^168 Meadows, D.H. et al., supra n. 101, p. 75.
^169 Meadows, D.H. et al., supra n. 101, p. 76.
^170 Meadows, D.H. et al., supra n. 101, p. 76.
will last if production continues at current rates. has increased from 1970\textsuperscript{171}. In 1970 these resources were predicted to last only a further 31 and 38 years, respectively. Oil reserves are now estimated to last approximately another 40 years, gas another 60 years and coal between 320 and 430 years at current levels of production. For major metals, the level of reserves also differs greatly. Iron ore and Bauxite are both estimated to have more than 200 years production remaining at current levels while the reserves of lead and zinc are estimated to last only a further 21-22 years\textsuperscript{172}. Most other minerals have a predicted reserve life of between 20 and 50 years\textsuperscript{173}. The pressure of the remaining reserves of some of these minerals differs in New Zealand. For example, domestic petroleum reserves are smaller. It is predicted that New Zealand's self sufficiency in liquid fuels will decline to very low levels by the early part of next century\textsuperscript{174}. This could have negative impact on economic growth.

Reserves, however, are only part of the picture. They measure only those deposits that have been sufficiently identified through the investment of exploration capital to be categorised as reserves\textsuperscript{175}. Within this category there are mineable reserves and economic reserves\textsuperscript{176}. Mineable reserves have been physically determined by drilling and have been technically and economically quantified. These are rarely delineated more than five to 10 years ahead. Economic reserves are based on reasonable expectations of resources that will be capable of mining at or near current commodity prices, in real terms. These are usually adequate for decades into the future.

\textsuperscript{171} Meadows, D.H. et al., supra n. 101, p. 68.


\textsuperscript{173} Gibbons, D., & O'Neil, D., supra n. 166, p. 2.


\textsuperscript{175} Meadows, D.H. et al., supra n. 101, p. 69.

\textsuperscript{176} Gibbons, D., & O'Neil, D., supra n. 166, p. 2.
Behind the stock of known reserves, are geological reserves and undiscovered reserves\textsuperscript{177}. Both do not figure in standard calculations of mineral reserves. Geological resources are unlikely to be mined either because of incomplete exploration or through lower grade or other technical or economic factors, unless they become better defined through exploration or made profitable as economic conditions improve\textsuperscript{178}. The nature of undiscovered reserves is self-explanatory. Obviously, their extent is unknown.

The estimates of reserves, therefore, do not accurately predict the total stock of minerals. The increase in the reserves to production ratio for oil and gas does not mean that there are more fossil fuels in 1990 than there were in 1970\textsuperscript{179}. In fact, there are less. This increase in reserves came from the stock of undiscovered petroleum. Although the total stock of minerals is larger, possibly considerably larger\textsuperscript{180}, than indicated by known reserves it is finite, non-renewable and declining\textsuperscript{181}. The continued extraction of this finite stock of minerals will result in increasing scarcity.

The crustal abundance of many common minerals is relied upon by Gibbons and O’Neil as proof that, in the longer term, these minerals will be abundant\textsuperscript{182}. They argue that the increasing price of minerals will make it economic to extract these minerals from the earth’s crust. For most minerals, however, there is an immense difference between their crustal abundance and their currently mineable cutoff grade\textsuperscript{183}. A huge increase in price would be required to make processing "plain rock" for these minerals economic.

\textsuperscript{177} Meadows, D.H. et al., supra n.101, p. 69.
Gibbons, D., & O’Neil, D., supra n. 149, p. 3.

\textsuperscript{178} Gibbons, D., & O’Neil, D., supra n. 166, p. 3.

\textsuperscript{179} Meadows, D.H. et al., supra n. 83, p. 69.

\textsuperscript{180} Gibbons, D., & O’Neil, D., supra n. 166, p. 3.

\textsuperscript{181} Meadows, D.H. et al., supra n. 101, p. 69.

\textsuperscript{182} Gibbons, D., & O’Neil, D., supra n. 166, p. 8.

\textsuperscript{183} Meadows, D.H. et al., supra n. 101, p. 84.
Only iron, aluminium and titanium are truly abundant in the earth’s crust. Other minerals are much more scarce and precious.

Theoretically, the price of minerals should rise in response to increasing scarcity. This increase in price will make previously uneconomic deposits economic and encourage exploration for new deposits and the development of new extraction technologies. The demand for resources will also be reduced as a result of price rises. Further, people will seek less expensive substitutes or move to more efficient uses of minerals. Increasing scarcity should lead to increasing prices thereby providing the mechanism to meet the requirements of the sustainable development of mineral resources.

The ability of the market to send the appropriate price signals in response to increasing scarcity is debatable. The market for minerals is characterised by a large degree of uncertainty, insufficient information and a significant lack of competition. These factors are all crucial to the functioning of the market. There is a severe lack of information regarding the remaining reserves of mineral resources and their location. The level of knowledge about New Zealand’s minerals varies considerably but, in general, reliable information of the remaining reserves is limited.

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184 The mineable cutoff grade for aluminium is only 2.2 times higher than its average crustal abundance, for iron only 3.4 times higher, and for titanium 16.4 times higher: Meadows, D.H. et al., supra n. 101, p. 85.

185 Rees, J., supra n. 102, p. 39.
Gibbons, D., & O’Neil, D., supra n. 166, p. 3.

186 Rees, J., supra n. 102, pp. 40-42.

187 Rees, J., supra n. 102, p. 42.
Pearce, D.W. & Turner, supra n. 160.

188 Rees, J., supra n. 102.

Uncertainty also arises from the lack of forward markets for mineral resources, the volatility of mineral prices and uncertainty about the cost and date of arrival of replacement technologies\textsuperscript{190}. Realistically, it is impossible to predict the future price of minerals and it may even be impossible to predict general trends in price. Trends in prices can be downward over time and jumps in prices are often observed as new information is obtained. The incentive to invest capital in exploration and development and the ability to predict future price paths is therefore much reduced\textsuperscript{191}.

Markets for minerals are frequently characterised by a monopoly structure or an oligopoly structure\textsuperscript{192}. Both structures are anti-competitive and prevent resources from moving in response to market signals\textsuperscript{193}. In New Zealand, for example, most of the economically important minerals are owned by the Crown. This problem is increased by the small number of large companies involved in exploration, prospecting and mining. On a world scale, the major petroleum reserves are situated in a small number of Middle East countries who have frequently exercised their power. In addition, it has been observed that the major private mineral companies do not behave competitively\textsuperscript{194}. They are highly adverse to risk and are inclined to act to reduce their exposure to uncertainty rather than to maximize profits. Many companies discount their potential future income at a very high rate and undertake excessive extraction.

In respect of minerals, therefore, comprehensive and integrated resource management law should provide for the implementation and enforcement of sustainable development as a normative principle. This principle is inadequately served by the

\textsuperscript{190} Hartwick, J.M. & Olewiler, N.D., supra n. 12, p. 119.
\textsuperscript{191} Rees. J., supra n. 102, p. 44.
\textsuperscript{192} Rees. J., supra n. 102, p. 44.
\textsuperscript{193} Rees. J., supra n. 102, p. 44.
\textsuperscript{195} Rees. J., supra n. 102, p. 44.
market because of its emphasis on the needs of the future generations and, in the context of minerals, the high potential for market failures. Legislative measures are therefore needed and are even essential to ensure that this principle is incorporated into the strategic and operational levels of management. Sustainable development of minerals requires that steps are taken to encourage the search for new supplies, greater recycling and the development of renewable alternatives. If necessary, their rate of use will also have to be controlled.
CHAPTER 4

THE TREATY OF WAITANGI

1. The Treaty of Waitangi as a Normative Principle for Resource Management

The Treaty of Waitangi has a strong claim to be recognised and enforced as a normative principle for resource management. It is central to the constitutional framework of New Zealand. The signing of the Treaty marked the beginning of constitutional government in New Zealand. It is government policy that the principles of the Treaty should be honoured. The Treaty is the instrument by which the British Crown obtained sovereignty over New Zealand and extended to Maori the status of British citizens and protected aboriginal rights. Much of the Treaty is concerned with the ownership and use of natural and physical resources. It is therefore appropriate that it have a central place in resource management legislation. Indeed, the Crown has an obligation to ensure that the Treaty of Waitangi is established as a normative principle for resource management.

There are some differences in meaning between the English and Maori texts of the Treaty. This has caused some difficulties and controversy in interpreting the Treaty.

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197 Ministry for the Environment. supra n. 195, p. 4.


199 Ministry for the Environment. supra n. 195, p. 4.
The basic terms of the Treaty, however, are clear. Justice Cooke, in New Zealand Maori Council v Attorney-General, described the basic bargain as:

"... the Queen was to govern and the Maoris were to be her subjects: in return their chieftainships were to be protected, but sales of land to the Crown could be negotiated."

Justice Cooke held that the Treaty signifies a "partnership between races" and that this relationship creates duties analogous to fiduciary duties between the Treaty partners. This gave rise to a duty on the Crown to actively protect Maori people in the use of their lands and waters to the fullest extent practicable.

The Treaty of Waitangi consists of three articles. The first article ceded sovereignty or, in the Maori version, "kawangatanga" to the Crown. There are some differences in meaning between the English and Maori texts but the first article is generally taken to mean that the Crown has sovereignty over New Zealand. It gives the Crown the power to make laws for New Zealand. This power has been described by the Waitangi Tribunal as:

"... the authority to make laws for the good and security of the country, but subject to the undertaking to protect particular Maori interests."

This undertaking is in the second article of the Treaty. The second article guarantees Maori the exercise of chieftainship or "rangatiratanga" over their lands, villages and "taonga" in the Maori version, and full and exclusive possession of their land, forests,

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200 [1987] 1 NZLR 64 at 663.
201 at 663.
202 at 664.
203 Keith. K., supra n. 198.
fisheries and other properties in the English version. Again there is a considerable
difference in meaning between the two texts. The authority conveyed by
"rangatiratanga" is much stronger than "full and exclusive possession". The term
"taonga" embodies a broader concept of value than the words "land, forests, fisheries and
other properties" used in the English text. The second article also gave the Crown the
exclusive right to purchase Maori land from its native owners at mutually agreed prices.
The third article extended royal protection and the rights and privileges of British
citizens to Maori.

2. Constitutional Status of the Treaty of Waitangi

The orthodox approach to the status of the Treaty is that, in accordance with the
general law relating to treaties, it has no legal effect except to the extent to which it may
be incorporated in statute. This view has recently been confirmed, in respect of the
Treaty of Waitangi, by the Court of Appeal in New Zealand Maori Council v Attorney-
General and by the House of Lords, in respect of treaties generally, in J. H. Rainer v
Department of Trade.

Despite the apparent strength of these principles there have been some attempts
to interpret the Treaty of Waitangi so as to give it a more substantive status in domestic
law. For example, there has been some recognition of circumstances in which legislation
should be interpreted in accordance with treaty obligations. In New Zealand Maori
Council Cooke P. suggested that the Treaty may be used as an extrinsic aid in

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205 Keith, K., supra n. 198.

206 Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590 (PC) at 596-597.

207 [1992] 2 NZLR 576 at 603 (CA).

208 [1983] 3 WLR 969 at 980.


210 supra n. 200 at 655-656.
interpreting ambiguous legislation. The President agreed with submissions that:

"... the Treaty is a document relating to fundamental rights: that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms: and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty."

In *Huakina Development Trust v Waikato Valley Authority*\(^{211}\) Justice Chilwell went even further and held that, as the Treaty is "part of the fabric of New Zealand society"\(^{212}\), legislation should be interpreted in light of the Treaty.

The opportunity for relying on either of these cases, however, to give the Treaty some force now seems rather limited as *New Zealand Maori Council*\(^{213}\) has reinforced the orthodox view. Unless incorporated in statute, the performance of the obligations under the Treaty is a matter of "conscience" for the Crown. The Treaty does not give rise to legal obligations unless it is given force of law by a statute. Where legal duties are imposed by Parliament, the nature and scope of such duties depends upon the words used in the statute\(^{214}\).

Legally, therefore, enforcement of the matters addressed in the Treaty depends entirely upon its recognition by statute. However the "honour" of the Crown as a Treaty partner does give rise to moral obligations which the Crown should comply with\(^{215}\). These include obligations to act in good faith to each other and a principle of active

\(^{211}\) [1987] NZLR 188.

\(^{212}\) at 210.

\(^{213}\) *supra* n. 200.

\(^{214}\) *New Zealand Maori Council* v *Attorney-General* [1994] 1 NZLR 513 (PC).

\(^{215}\) *New Zealand Maori Council*, *supra* n. 200 at 703, Casey J.
protection\textsuperscript{216}. To give effect to these obligations it is submitted that the Treaty should be incorporated in resource management legislation. The Treaty of Waitangi is a key constitutional document that should act as a fetter on parliamentary sovereignty.\textsuperscript{217} It is the mechanism which enabled the Crown to acquire sovereignty over New Zealand but this acquisition was subject to the guarantee to protect rangatiratanga. As the Treaty relates to the use and control of resources there are particularly strong grounds for requiring resource management legislation to give effect to the guarantee of rangatiratanga. Further, it may be relevant, particularly where claims are before the Waitangi Tribunal, to test whether resource management laws are consistent with the Treaty.\textsuperscript{218}

3. The Treaty of Waitangi and Resource Management Law

The Treaty of Waitangi deals with natural resources. It requires the Crown to protect the exercise of rangatiratanga or chieftainship by Maori over land, fisheries, forests and other taonga. As expressed by the Court of Appeal the Crown has the right to govern, subject to the obligation to protect Maori interests. Thus, in the Motonui Report\textsuperscript{219} the Tribunal characterised the Treaty as:

"an exchange of gifts ... the gift to make laws, and the promise to do so as to accord Maori interests an absolute priority."

\textsuperscript{216} New Zealand Maori Council supra n. 200 at 664, Cooke P.


Similarly, in the Manukau Report\textsuperscript{220} the Tribunal defined kawangatanga as "the right to make laws for the peace and good order of the country and the security of the realm". This was seen to be subject to an undertaking to protect particular Maori interests.

This relationship was explored in more depth in the context of resource management laws in the Muriwhenua Fishing Report\textsuperscript{221}. There the Tribunal said:

"The cession of sovereignty or kawangatanga gives power to the Crown to legislate for all matters relating to "peace and good order" and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise control. Sovereignty is limited by the rights reserved by article the second."

The limitation on the law making power, that it is for "peace and good order", appears to be derived from the preamble to the Treaty. This limitation has not been recognised by the courts. The law making power should, therefore, be treated as subject only to the principle of rangatiratanga. Thus, the Crown cannot make laws which override rangatiratanga. The principle of rangatiratanga does not, however, allow unreasonable limits on the right of governments to govern\textsuperscript{222}. It can be displaced, for example, in the making of laws for conservation control\textsuperscript{223}. The Treaty should therefore act as a fetter on Parliament’s ability to legislate\textsuperscript{224}.

\begin{itemize}
\item \textsuperscript{220} supra n. 204 at p. 94.
\item \textsuperscript{221} Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim Wai 22, 1988 at p. 232.
\item \textsuperscript{222} New Zealand Maori Council supra n. 200 at 665. Cooke P.
\item \textsuperscript{223} Boast, R.P., supra n. 217, p. 6.
\item \textsuperscript{224} Boast, R.P., supra n. 217, p. 205.
\end{itemize}
This analysis suggests a framework which could be used to incorporate the Treaty into resource management legislation. The Tribunal’s characterisation of the obligations of the Treaty partners appears to involve a hierarchy of rights and interests. At the apex is the Crown’s right to make conservation laws of general application. The guarantee of rangatiratanga is next. On the lowest level are the rights and privileges of individuals. This hierarchy places conservation ahead of treaty rights, which in turn rank ahead of the rights of individuals. The Crown is entitled to regulate the use of resources for conservation purposes. If state regulation is necessary, individuals should be regulated first and Maori regulated last. Maori are generally entitled to regulate themselves as to the use or conservation of the natural resources to which they are entitled.

Thus, the Treaty of Waitangi has two important implications for the management of minerals. First, it requires the recognition of tribal rangatiratanga over land and fisheries and other taonga such as water, forests and burial sites which may be affected by mining operations. This may include the recognition of Maori customary laws and beliefs, including the spiritual and metaphysical dimensions of Maori customary laws, in resource management legislation. Second, it may demand the recognition of Maori tribal rangatiratanga over those minerals to which they have a claim under the Treaty of Waitangi.

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225 Boast, R. & Edmunds, D., supra n. 218, p. 9.
226 Boast, R. & Edmunds, D., supra n. 218, p. 10.
228 Boast, R.P., supra n. 217, p. 15.
229 Boast, R.P., supra n. 217, p. 43.
4. Maori Claims to Minerals under The Treaty of Waitangi

Under the Treaty, Maori ownership claims can be founded on two bases. First, it could be argued that Maori are entitled to the ownership of taonga minerals. Second, it could be argued that Maori are entitled to ownership of minerals as an incident of the ownership of their land as guaranteed by article two of the Treaty. Where these minerals have been confiscated or taken in a manner inconsistent with the principles of the Treaty, it is possible for Maori to bring claims before the Waitangi Tribunal for the return of these minerals or for compensation under the Treaty of Waitangi Act 1975.230 It is upon the honour of the Crown, as a Treaty partner to recognise these claims.

According to article two of the Maori version of the Treaty, Maori were guaranteed rangatiratanga over their taonga or "prized possessions". "Taonga" means more than just objects of tangible value and includes anything of cultural or spiritual significance to a tribal group.231 Minerals such as greenstone, obsidian, basalt, argillite, greywacke and andesite were used and traded by Maori in pre-European times.232 Greenstone in particular was treated as a prized possession. In the Manukau Report the Waitangi Tribunal held that a river could be a taonga as a valuable resource and its "mauri" or "life-force" another taonga. Thus, the mauri of both the Waikato River and the Manukau Harbour were taonga. In the Te Reo Maori Language Claim the Tribunal held that the Maori language is a taonga. It is therefore possible that mineral resources could be treated as taonga. For example, in Tainui Maori Trust Board v Attorney-General234 Cooke P. observed, in an obiter comment, that coal could be classified as a taonga on the basis of limited Maori use of it before the Treaty, and the Maori contribution to the coal-mining industry since the signing of the Treaty.

230 s. 6(1) Treaty of Waitangi Act 1975.
232 Boast, R.P., supra n. 217, p. 43.
233 Finding of the Waitangi Tribunal relating to Te Reo Maori and a Claim lodged Wai 11, 1986.
234 [1989] 2 NZLR 513 (CA) at 529.
Article two of the Treaty of Waitangi also guarantees Maori rangatiratanga over their lands. It is therefore possible for Maori to claim ownership of minerals as an incident of the ownership of lands, according to the common law maxim that an owner of land owns everything on or below the surface, including minerals. Thus, claims under the Treaty of Waitangi Act 1975 have been made for the coal resources of the Waikato region and for petroleum in the Taranaki region. The Taranaki Raupatu claim involves a claim for compensation for the taking of land and for petroleum, gas and other minerals as a natural incident of the land. This claim has not yet been heard by the Waitangi Tribunal.

The Waikato claim involved a claim by Tainui for compensation for the confiscation of 1.2 million acres of land only 314,000 acres of which was later returned. The claim includes the coal underlying the land. In Tainui Maori Trust Board case Tainui brought proceedings to prevent the transfer of coal-mining rights out of the Government’s control. Tainui contended that this transfer would compromise the ability of the Crown to meet their claim for compensation. The Court of Appeal agreed with Tainui and prevented the Crown from transferring the coal-mining rights. The President of the Court noted that, in his opinion, Maori were entitled to a significant share of the coal reserves of the Waikato. This claim has subsequently been settled by the Crown although the final settlement does not include any rights to coal.

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236 at 529.

237 Dominion Newspaper (Wellington) Thursday December 22 1994, p. 3.
CHAPTER 5

OWNERSHIP OF MINERALS

1. The Ownership of Minerals in New Zealand

The ownership of resources has major implications for the nature and structure of resource management legislation. It is a normative question that is a strong determinant of the mechanisms used at the strategic and operational levels of management. The ownership of minerals in New Zealand is characterised by the severance of mineral title from ownership of the land and by Crown ownership of a significant number of minerals. Under common law, mineral ownership was determined in accordance with the maxim: *cuius est solum eius est usque ad coelum et ad inferos* (To whom belongs the soil it is his. even to Heaven. and to the middle of the earth)\(^2\). In other words, the owner of land is entitled to all that lies above or below the surface, including minerals\(^2\). This rule, however, is more notable for the exceptions to it rather than as an accurate picture of mineral ownership.

The common law allows considerable fragmentation of interests in land. In particular it is possible to reserve the rights to all or any specified minerals in any disposition of land\(^2\). Thus the ownership of minerals may be severed from ownership of the surface. In a more complicated manner, particular stratum may be dealt with separately or a variety of rights may be disposed of without transferring an entire

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stratum. Examples of the later include a lease of minerals, a profit a prendre, a licence to search for minerals not conferring any rights to discovered minerals and a licence to prospect for minerals coupled with a right to win and work minerals found. The result is considerable potential for fragmented ownership and for a complicated ownership system.

The Crown owns mineral resources both as an incident of ownership of land and severed from land ownership. Crown ownership of minerals, as an incident of the ownership of land, includes those minerals which the Crown owns through ownership of the beds of rivers and of the seabed. Under the common law, the Crown owns the beds of all tidal rivers up to the mean high water mark and the beds of all navigable rivers. Non-navigable non-tidal rivers are owned by the owner of the adjoining land, up to the centre line of the stream.

Crown ownership of river beds under the common law is complimented by section 261 of the Coal Mines Act 1979 which deems the beds of all navigable rivers to have always been vested in the Crown and declares the minerals within such beds to be the absolute property of the Crown. The definition of navigable under the Coal mines Act 1971 is wider than under the common law; this section therefore reserves wider Crown ownership of river beds than the common law. Although this section has been revoked its effect is preserved, in respect of all rivers navigable up to 31 October 1991, by section 354 of the Resource Management Act 1991. Further, section 24F of the Conservation Act 1987 provides that where the Crown owns part of the bed of a non-navigable river or stream adjoining any land and disposes of that land, that part of the bed of the river or stream shall remain owned by the Crown. Crown ownership of the seabed and subsoil of the coast up to the low water mark is reserved by section 7 of the

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Crown ownership of minerals separate from the ownership of land has its origins in the assertion of a royal prerogative over gold and silver. This assertion was first made in the Case of Mines:

"... by the law all mines of gold and silver within the realm, whether they be in the hands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with such other incidents thereto as are necessary to be used for the getting of the ore."

Thus, gold and silver have always been vested in the Crown. This vesting was confirmed by section 6 of the Mining Act 1971 and is continued by section 10 of the Crown Minerals Act 1991. Section 10 of the Crown Minerals Act 1991 also reserves ownership of petroleum and uranium to the Crown. Petroleum was first vested in the Crown by section 3 of the Petroleum Act 1937. Uranium was first vested in the Crown by section 8 of the Atomic Energy Act 1945. All minerals in the beds of navigable rivers were declared the property of the Crown by section 206(1) of the Coal Mines Act 1925. This reservation was repeated in section 261 of the Coal Mines Act 1979.

In addition to the reservation of gold, silver, petroleum and uranium, numerous other minerals have been reserved to the Crown where land has been alienated from the Crown. This practice was begun in a limited way in the Land Act 1892, which provided that if minerals were found next to Crown land that Crown land could be withdrawn from sale and leased subject to a reservation of minerals and of a right of access. Section 121 of the same Act provided for the cancellation of leases and licences of

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243 (1568) 1 Plow 310; 75 ER 472.

244 at 336.

245 This reservation is saved by s. 11(1) of the Crown Minerals Act 1991 despite the repeal of the Coal Mines Act 1979.

246 s. 120 Land Act 1892.
Crown lands if minerals were discovered. This later section repeated similar provisions in earlier legislation\(^{247}\). The subsequent grant of freehold of leased land where the minerals have been reserved to the Crown was also subject to the same reservation\(^{248}\). Both the power to resume Crown land held under lease or licence and the power to withdraw Crown land from sale and lease it subject to a reservation of minerals and a right of access were repeated in the Land Act 1924\(^{249}\).

More complete reservation of minerals was achieved in the Land Act 1924. Section 315 of that Act provided that any acquisition of fee-simple in a mining district under section 314 did not include any minerals. Further, the land was to be open for mining as if it were Crown land. This reservation was extended by section 59 of the Land Act 1948 so that every sale, grant, lease, licence or other disposition of Crown land under the 1988 Act was subject to a reservation of mineral rights and a right of access to the Crown. The right of access was subject to the payment of compensation for damage to improvements caused by mining. Coal was reserved to the Crown in any alienation of Crown land not subject to the Land Act 1948 by section 8 of the Coal Mines Amendment Act 1950. There have also been numerous statutory reservations of minerals in instances where legislation has provided for the alienation of specific land\(^{250}\).

Complete reservation of minerals in the alienation of land from the Crown was not achieved until the Mining Act 1971. Section 8 of this Act reserved all minerals on

\(^{247}\) See for example s. 10 Gold Fields Act 1862.

\(^{248}\) *Brighton v McClure* (1913) 32 NZLR 1073 (CA).

\(^{249}\) ss. 135 and 153 Lands Act 1924. Section 153 provides a right of compensation to lessees for any substantive improvements to the land.

\(^{250}\) See for example the Crown Lands (Nelson) Leasing Acts 1865 and 1867 (land in Nelson); Thames Harbour Board Acts 1876 and 1878 (land near Thames); ss. 28, 29 Land Laws Amendment Act 1913 (freeholding of licences to occupy pastoral lands granted under the 1892 and 1908 in the Hauraki Mining District); s. 20 Land Laws Amendment Act 1915 (freeholding of licences to occupy pastoral lands granted under the 1892 and 1908 Land Acts in the Westland and Karamea Districts); s. 19 Land Laws Amendment Act 1915 (freeholding of leases granted in mining districts under the Land Act 1908 and leases under the Mining Districts Land Occupation Act 1894); s. 10 Land Laws Amendment Act 1921 (freeholding of pastoral leases with a term greater than 14 years); ss. 314-316 Land Act 1924 (perpetuating the same reservations).
or under the surface of land to the Crown and a right of access in favour of the Crown in any alienation of land from the Crown. The Mining Act 1971 did not apply to coal and was initially complemented by section 168A of the Coal Mines Act 1925 and by section 5 of the Coal Mines Act 1979. These provisions reserved all coal and access rights, in land alienated from the Crown. Both these Acts were repealed by the Crown Minerals Act 1991 and section 11(1) of that Act provides for the reservation of minerals in favour of the Crown. Section 11(2) of the Crown Minerals Act 1991 continues the reservation of any mineral reserved to the Crown by any enactment notwithstanding the repeal of that enactment.

The statutory reservation of minerals shows a trend towards increasing reservation of mineral title to the Crown both in terms of particular minerals and in the alienation of land from the Crown. The resulting picture of mineral ownership is complicated. All gold, silver, petroleum and uranium is Crown-owned. Approximately 40% of coal and a large percentage of other minerals are owned by the Crown, both through statutory reservation and ownership of the overlying land. "Privately-owned" minerals may be owned by the landowner or someone other than the landowner, through a separate Certificate of Title. The extent of private ownership of minerals is unknown but it tends to be greatest in the areas that were settled first, and in areas with extensive Maori land. The extent of private ownership of minerals in the Coromandel peninsula is estimated at 40-50%, and in the rest of the South Auckland Land District at between 94-96%. In other parts of New Zealand the extent of private ownership of minerals is generally much less.

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251 The right of access did not apply to land under crop etc. (s. 5(5) Crown Minerals Act 1991).


253 ibid. p. 3.2.
2. Rationale for Crown Ownership of Minerals

The reservation of mineral title to the Crown and the repeated attempts to reserve preferential access to minerals and gold and silver in particular, through last century and the early part of this, have been based on arguments that mining should be facilitated and encouraged\(^\text{254}\). In the *Case of Mines*, for example, reservation of the royal minerals was justified on the grounds that the King needed money to raise and enforce laws, mint coin and, in any case, was entitled to the most excellent products of the soil\(^\text{255}\). Mining was seen as an important source of Crown revenue and a crucial factor in the strength of the New Zealand economy. This reasoning now seems rather outdated. With the growth of other sectors of the economy this presumed preeminence can no longer be justified. Gold mining does not have the same economic importance which it used to have. Further, an integrated and a sustainable approach to the environment requires that no single value should be considered overriding.

Crown ownership of petroleum and uranium may be more easily justified. The principal reason advanced for reserving petroleum to the Crown in the Petroleum Act 1937 was a need to overcome the problems caused by a multitude of small landowners and the "pool" resource nature of petroleum\(^\text{256}\). These features were seen to create barriers to systematic prospecting by requiring oil companies to negotiate with a large number of landowners and making it difficult to determine the true owner of a petroleum deposit. Development of a petroleum industry was seen as important both strategically and economically. This legislation was modelled on the English legislation which also vested ownership in the Crown and provided for access over private land\(^\text{257}\).


\(^{255}\) Ackroyd, P., supra n. 254.

\(^{256}\) Webb, P.C. (1937) 249 *New Zealand Parliamentary Debates* 1036.

\(^{257}\) ibid. p. 1036.
These arguments are still valid today; domestic production of petroleum is an important contributor to economic growth and Crown ownership enables the pool resource nature of petroleum to be dealt with. The pool resource nature of petroleum creates technical problems for its extraction. Petroleum is fluid in nature and exists in reservoirs under pressure. The disturbance of a reservoir can cause the petroleum to flow through any permeable strata to the area of least pressure. A large petroleum deposit can therefore be extracted from one point. Further, the extraction of petroleum from a reservoir causes a decline in reservoir pressure affecting the recovery of remaining petroleum. Where a petroleum deposit is owned by several individuals, it is possible that one owner could "take" petroleum from another owner or reduce the ability of other owners to obtain their entitlement by reducing the productivity of the reservoir. Crown ownership of petroleum avoids this problem. Petroleum is also of great strategic and economic value as an energy source and it has the potential to earn the Crown substantial revenue. It is a high value product; over the 1993 financial year over $35 million was collected by the Crown in royalties and over $89 million in the Energy Resources Levy on gas.

The reservation of uranium to the Crown was seen as of vital importance in the development of New Zealand and important for reasons of national security. As stated rather poetically by the Leader of the Legislative Council:

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259 The Crown may still have to deal with these problems if licences are subsequently given to different developers over the same reservoir. Section 46 of the Crown Minerals Act 1991 enables the Minister of Energy to insist upon the unit development of the reservoir in such a situation.


"Uranium because of its tremendous possibilities for good or for evil should be controlled by the state." 262

This supposed importance may not now be so critical. New Zealand governments have not shown an inclination to develop nuclear energy and there is great public opposition to such an energy source. In any case, our reserves of uranium are small.

The most common criticism of Crown ownership is that it is an inefficient way of managing mineral resources. It has been argued that diverse and widespread ownership of minerals (i.e. private ownership) will create the correct conditions for a competitive market for minerals and, therefore the correct conditions to achieve a socially optimal allocation of mineral resources 263. Ackroyd and Hide have also argued that private ownership of minerals, particularly through combining ownership of minerals and ownership of land, will enable conflicts over competing uses to be resolved more equitably and the environmental costs of mining to be internalised by mineral owners, thereby improving environmental protection 264. Their solution is to combine mineral title and land title.

The ability of this proposal to meet these goals, however, has been opposed by Barton 265. Barton’s argument is that private ownership of minerals leads to mineral title becoming highly fragmented. Further problems are caused by untraceable owners and instruments reserving minerals that are ambiguous. It is claimed that the increased transaction costs that result from fragmented title may be so prohibitive as to prevent market mechanisms from achieving efficient exchanges 266. Mining companies may face

263 ACIL, supra n. 252, p. 3.2.
264 Ackroyd, P., supra n. 254.; Ackroyd, P. and Hide, R.H. "The ownership and control of mineral and other natural resources" (1990) NZLJ 133.
266 ibid. p. 102.
huge, prohibitive costs in trying to negotiate with a large number of mineral owners. These costs could prevent mining from even occurring. For economically important resources such as petroleum this could have a significant impact on the economy.

However, the existence of transaction costs does not necessarily justify Crown ownership\textsuperscript{267} and the effect of these costs depends largely upon the access regime\textsuperscript{269}. Where the access regime itself creates high transaction costs, as is the case where the owner of the surface has a veto on mining, the increase in transaction costs associated with diversifying ownership of the subsurface is likely to be significant. In this respect, it is submitted that Ackroyd and Hide are confusing Crown ownership with problems that arise from the severance of mineral title from land title permitted by the common law. The problems associated with reconciling the interests of land owners and mineral owners arise not from Crown ownership but from the separation of surface and subsurface rights. Divesting the Crown of ownership will not solve these problems; a change to the common law rules that allow the severance of title would be required. These rules are, however, at the foundation of property law and should be altered only with extreme caution\textsuperscript{269}.

Barton also argues that Crown ownership of minerals gives greater flexibility in managing the resource and achieving environmental goals\textsuperscript{270}. Environmental protection, however, does not necessarily follow from Crown ownership. Implementing environmental controls only in respect of Crown owned minerals is an extremely fragmented approach that ignores the need to apply the same policies to other resources and to privately owned minerals. On the other hand, privatisation of minerals will not necessarily result in environmental values being "internalised" as Ackroyd and Hide.

\textsuperscript{267} Ackroyd, P. and Hide, R.H., supra n. 264, p. 134.

\textsuperscript{268} ACIL, supra n. 252, p. 3.3.

\textsuperscript{269} Barton, B., supra n. 265, p. 101.

\textsuperscript{270} Barton, B., supra n. 265.
The main argument that can therefore be raised against Crown ownership is that it is an inefficient way of managing mineral resources. Any change to this structure, however, has its own problems. Further, it is possible to create incentives and structures through legislation to ensure the efficient management of Crown owned minerals.

Barton also argues that Crown ownership of minerals should be retained because of the potential to obtain royalties and meet claims by Maori under the Treaty of Waitangi. As an owner, the Crown is entitled to a share of the economic rent from minerals. This could represent a significant amount of revenue that could not be obtained if the Crown was divested of ownership. The retention of Crown ownership of minerals will also provide the opportunity to meet outstanding claims under the Treaty of Waitangi Act 1975. There is considerable potential for such claims be made. Privatisation of minerals may compromise the ability of the Crown to meet such claims. In this respect, the Court of Appeal has acted to prevent state assets, including coal mining rights, from being transferred out of government control. However, the recent settlement of the Tainui Treaty of Waitangi claim shows that the government is unwilling to use its mineral estate in the settlement of treaty claims.

In summary, there do not appear to be strong reasons for continued Crown ownership of gold, silver and other non-energy mineral resources apart from those related to the Treaty of Waitangi and the obtaining of a financial return. There are, however, many problems with divesting the Crown of ownership. These arise mainly from the severance of mineral title and land title allowed by the common law. It is not suggested that this principle be changed. It appears then that the status quo of Crown

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271 Ackroyd, P. and Hide, R.H., supra n. 264, p. 135. See the discussions of the "free" market theory in chapters 2 and 3.

272 Barton, B, supra n. 265.

273 See infra. pp. 74-75.

274 ACIL supra n. 252, p. 3.4.

275 See New Zealand Maori Council supra n. 200 and Tainui Maori Trust Board.

276 Dominion Newspaper, supra n. 238, p. 3.
ownership will remain. Those inefficiencies which are associated with Crown ownership can also be dealt with by establishing efficient management frameworks aimed at achieving socially desirable goals. Crown ownership of energy minerals, in particular of petroleum, is more easily justified. Crown ownership enables some of the problems associated with the pool resource nature of petroleum to be overcome. In addition, petroleum production is an important contributor to the national economy and to government revenue.

3. Aboriginal Title to Minerals

A further basis for Maori ownership of minerals, apart from claims founded on the Treaty of Waitangi, is the doctrine of aboriginal title. The doctrine of aboriginal title holds that the property interests of aboriginal populations survive and remain enforceable after a transfer of sovereignty. This doctrine has been recognised by the New Zealand Courts in R v Symonds and Kapura v Haimona. In the first case the Court held that the assertion of sovereignty by the British Crown was subject to existing aboriginal customary or native rights. This principle has recently been confirmed by courts in Australia and Canada. In assuming sovereignty over New Zealand, therefore, the Crown acquired the underlying, paramount, legal title to land. This radical title, however, is subject to or "burdened" by the native.

277 McHugh, P., supra n. 195.
Amodu Tijani v Secretary, Southern Nigeria [1921] AC 399 (PC).

278 (1847) NZPCC 387.

279 (1913) NZPCC 413, 416.


282 McHugh, P., supra n. 195, p. 103.

283 Kapura v Haimona (1913) NZPCC 413, 416.
Aboriginal title is a "unique interest" which gives the native owners a legal right to occupy and possess the lands although ultimate title to the land remains with the Crown\textsuperscript{284}. It is proven by continuing customary use\textsuperscript{285}. Aboriginal title can be extinguished only by the Crown either with the consent of the native owners or through statute\textsuperscript{286}. Legal title to land can only be obtained from the Crown: a private purchase of land directly from Maori will have no legal status. Article two of the Treaty of Waitangi, in providing for an exclusive right in the Crown to purchase Maori land was, therefore, essentially declaratory of the common law\textsuperscript{287}. 

Aboriginal title has many of the characteristics of common law freehold title to land. Natural incidents of land ownership are covered by the doctrine\textsuperscript{288}. Thus aboriginal title will extend to everything on or below the surface, including minerals and fisheries\textsuperscript{289}. In this respect, aboriginal title does not depend upon showing that the Maori used or even knew about minerals such as gold, coal and silver; ownership proceeds from ownership of the land. Minerals should properly be seen as a constituent element of the land\textsuperscript{290}. Further, it is possible for aboriginal title to "incidents" of land to be separated from ownership of the land. Thus, in \textit{Te Weehi v Regional Fisheries Officer}\textsuperscript{291} the High Court recognised the existence of non-territorial aboriginal title over a traditional fishery. Although the land in which the fishery was situated had been sold by its native owners, a right to take shellfish was held to exist independently of ownership of the foreshore. This right was proven through extensive oral evidence of

\textsuperscript{284} Amodu Tijani at 403.

\textsuperscript{285} Eddie Mabo.

\textsuperscript{286} McHugh, P., supra n. 195, p. 135.

\textsuperscript{287} McHugh, P., supra n. 195, p. 97.

\textsuperscript{288} Boast, R.P., supra n. 217, p. 475.

\textsuperscript{289} McHugh, P., supra n. 195, p. 133 and p. 141.

\textsuperscript{290} McHugh, P., supra n. 195, p. 133. There is, however, some evidence that Maori knew and even utilised coal and petroleum and it is well proven that greenstone, obsidian and other precious stones were utilised; see Boast, R.P., supra n. 255.

\textsuperscript{291} [1986] NZLR 682.
continuing Maori use of the fishery since the sale of the land.

In *Te Runanga O Muriwhenua Inc v Attorney-General*\(^2^9^2\) Cooke P. made several observations on the subject of aboriginal title to fisheries. His Honour stated that, in principle, the extinction of customary title to land does not automatically mean the extinction of fishing rights. This had been recognised, his Honour, noted, in the *Kawuwaeranga Judgement* of 1870\(^2^9^3\) and nothing had been decided to the contrary in *Re the Ninety-Mile Beach*.\(^2^9^4\) Further, his Honour stated that section 88(2) of the Fisheries Act 1983 may be a statutory preservation and protection of tribal sea fishing rights.\(^2^9^5\) The President also observed that the Treaty may be an assurance of customary title to fisheries. Therefore, for all practical purposes, present day Treaty rights and customary rights in respect of fisheries are identical. This may be the same for minerals.

It may therefore be possible for Maori to claim aboriginal title to minerals as an incident of title to land or independently of title to land. The possibility of a claim to aboriginal title to petroleum as an incident of ownership of land or the sea, arising from traditional use of fishing reefs, has been identified.\(^2^9^6\) To establish non-territorial title to minerals it will have to be shown, as in *Te Weehi*, that the minerals have continued to be used in a customary manner since the extinguishment of title to the overlying land. For minerals such as coal and petroleum it may be difficult to prove such continuing use. For minerals such as greenstone, this task is likely to be considerably easier.

\(^2^9^2\) [1990] 2 NZLR 641 (CA).


\(^2^9^5\) Section 88(2) of the Fisheries Act 1983 was repealed by s. 33 of the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992. This Act gives effect to a settlement of all claims relating to Maori fishing rights, provides for Maori non-commercial traditional and customary fishing rights and interests, and provides for Maori participation in the management and conservation of New Zealand's fisheries.

\(^2^9^6\) Boast, R.P., supra n. 217, p. 475.
Most aboriginal title to land has been extinguished. Almost all land in New Zealand is now publicly or privately owned, in the later case granted pursuant to an act of Parliament. Privately owned land is protected under the Torrens system. In addition, Maori are prevented from bringing any action to recover Maori customary land from the Crown more than 12 years from the date on which the right of action accrued. Thus, the ability to claim aboriginal title to land is limited.

Even if non-territorial aboriginal title to certain minerals has survived the alienation of native lands such title may, itself, have been subsequently extinguished. Petroleum, gold, silver and uranium have all been reserved to the Crown by section 10 of the Crown Minerals Act 1991. These ownership rights exist "notwithstanding anything to the contrary in any Act or in any Crown grant of title lease, or other instrument of title". Section 11 of the same Act reserves every mineral in land alienated from the Crown following the commencement of the Act. Similar provisions have appeared in earlier legislation as far back as 1895 and many titles to land must be read subject to a reservation of minerals to the Crown. Certainly, any alienation of land from the Crown since 1948 will be subject to such a reservation. As these reservations were made under statutory authority they extinguish any residual aboriginal title. It appears then that aboriginal title to minerals in New Zealand has been extinguished, except to the extent that Maori may be able to claim aboriginal title to land. However, the ability to make such claims is now very limited and there is virtually

297 McHugh, P., supra n. 195, p. 140.
298 McHugh, P., supra n. 195, p. 140.
301 Ackroyd, P., supra n. 254, p. 41. See also supra. pp. 60-62.
no customary land left in New Zealand\textsuperscript{305}.

The extinguishment of aboriginal title raises the question of compensation\textsuperscript{304}. The Petroleum Act 1937 contained a statutory bar to claims for compensation in respect of petroleum. No similar provision is repeated in the Crown Minerals Act 1991. On the other hand, there is no statutory authorisation to make compensation payable and the provisions of the Treaty of Waitangi Act 1975 only apply to claims made under the Treaty itself. A claim for compensation would have to be made under the common law. In the United States, where this issue has been explored in the most depth, the courts have held that statutory extinguishment carries no right of compensation\textsuperscript{305}. In Canada this question has been left open. It is submitted that, in the absence of statutory authority, there is little opportunity for Maori to claim compensation for the extinguishment of aboriginal title to minerals.

4. The Crown as an Owner of Minerals

Crown ownership of minerals obviously enough raises the question of how these resources should be managed. It must be stressed that this enquiry only relates to ownership. The Crown does not own all minerals in New Zealand. The normative policies suggested in this section are only intended to apply to Crown owned minerals. Those discussed in the previous two chapters, sustainable development and the Treaty of Waitangi, are intended to apply to all minerals. This distinction needs to be recognised in resource management legislation at the strategic and operational levels.

The Hotelling theorem suggests that in a competitive industry, where each mineral owner decides whether and how much mineral ore to mine, a socially optimal

\begin{footnotesize}
\begin{enumerate}
\item McHugh, supra n. 195, p. 140.
\item Boast, R.P., supra n. 217, p. 475.
\item Boast, R.P., supra n. 217, p. 476.
\end{enumerate}
\end{footnotesize}
extraction rate will be achieved\textsuperscript{306}. The rule states that the present value of a unit of a non-renewable resource is identical regardless of when it is extracted. To maximise social welfare, therefore, the net benefit to society of the last unit of mineral ore extracted in each time period, must be exactly equal in present value terms. This will enable the maximum benefit to be obtained from the mineral resource. The optimal rate of extraction of a resource occurs when the rate of growth of price of the extracted mineral equals the interest rate\textsuperscript{307}. Hotelling was able to show that this result could be achieved in a decentralized, competitive industry by the free market.

This model of rising prices keeping pace with interest rates essentially treats resources in the ground as capital assets. By leaving resources in the ground the resource owner can expect capital gains as the resource price rises through time. If the price is higher than the discount rate, extraction is encouraged and there are likely to be more profits to be made. If the price is lower than the discount rate, extraction is discouraged and there are likely to be less profits for the mine owner. The price at which the mine-owners profits are maximised coincides with the price at which the benefits to society are maximised. Although the actual relationships between extraction, price and profit are far more complicated Hotelling’s analysis is a useful simplification of the market in operation. Theoretically, the socially optimal path of extraction can be achieved by a fully competitive market.

In arriving at this conclusion, Hotelling made a number of important assumptions\textsuperscript{308}. He assumed that the exact amount of reserves of the mineral in the mine before extraction were known to all the mine owners and that the mineral ore was of uniform quality. He also assumed that there was perfect foresight of the future price of the minerals and perfect competition in the market. Unfortunately, many of these characteristics do not actually exist in the minerals market. This may seriously limit the

\textsuperscript{306} Hotelling, H. "The Economics of Exhaustible Resources" (1931) 39 Journal of Political Economy 137.

\textsuperscript{307} ibid. p. 62.

ability of the market to achieve a socially optimal extraction path.

Hotelling's theorem requires the owners of minerals continually to reevaluate the rate of extraction in light of market conditions. This model is therefore ideally suited to markets where ownership of minerals is diversified and widespread. In such a market, it is relatively straightforward for mineral owners, who may only be concerned with one or two mines, to adjust their extraction rates. This is extremely difficult for the Crown to do, given the large number of minerals it owns and the day by day and deposit by deposit decisions this theory requires. To overcome this difficulty a market can be created by offering rights to minerals and allowing individual entrepreneurs to decide whether to extract. This can be achieved through a licensing system.

As a natural resource owner the Crown has a right to receive a payment for the resource that reflects this ownership. Such a payment, called the economic rent, is over and above what is necessary to get that resource to perform its function. It is a residual payment to the owner of a factor of production after variable resources have been paid their opportunity costs. The amount of this payment varies. It depends on the quality of the resource, the degree of scarcity and supply, the number of actual and potential buyers and the extent of demand. The lower end of economic rent is determined by the opportunity cost of developing a resource. It is a real component of revenue to which an owner is entitled.

The simplest means of collecting economic rent is through the outright sale of mineral rights. However, the relevant markets are non-competitive and there is, in

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111 ibid. p. 8.

112 Dowell, R. "Resources Rent Taxation" (1978) 3(2) Australian Journal of Management 127.
general, a comparative lack of information regarding the value of these minerals.\textsuperscript{315} As a result, a "lump sum" auction of mineral rights will only leave the mineral owner with a fraction of the economic rent of the minerals. Instead, some form of rent collection that compensates for monopolies, the governments lack of information and the risk aversion of companies is needed. This is best achieved through a royalty on production or revenue.

The development of state owned minerals is commonly achieved through some kind of licensing system. A licensing system also provides a means for recovering economic rent, usually through a royalty.\textsuperscript{314} It establishes a link between the Crown as owner of the mineral and the entrepreneurs who wish to engage in mineral exploitation; provides the means through which ownership of minerals is transmitted on production; and provides the basis for continuing control and regulation of the ongoing mineral development process. A licensing system typically encourages entrepreneurs to explore for minerals by offering them rights to mine the minerals which they discover. The Crown gains through the increase in information of its mineral resources and through the recovery of a royalty from the mining operations. Mining legislation in New Zealand has traditionally taken a licensing-type approach to facilitating the development of Crown owned minerals.\textsuperscript{315} This approach has continued in the Crown Minerals Act 1991.

5. Reconciling the Interests of Mineral Owners and Landowners

An immediate problem caused by the severance of mineral title and land title is the potential for conflict between the interests of the mineral owners and land owners. Resource management legislation needs to establish strategic level policies for dealing

\textsuperscript{315} See supra chapter 3 and Dowell, R., supra n. 312.

\textsuperscript{314} Fisher, D., supra n. 55, p. 440.

\textsuperscript{315} See for example the Petroleum Act 1937, the Mining Act 1971 and the Coal Mines Act 1979.
with the relative rights of mineral owners and land owners. Where minerals underlying land are held by a different person than the owner of the land there is potential for their interests to conflict. The mineral owner will want to extract the mineral for economic benefit. Extraction, however, is likely to cause major detriment to the value of the overlying land. Conversely, protecting the landowner’s rights may mean cutting across the interests of the mineral owner. Such conflict often occurs between mining and land uses such as forestry and farming. As part of a comprehensive and integrated resource management regime, it is submitted that these different land uses should be valued equally.

In the past, mining law has tended to treat mining as a predominant land use. There has been a general presumption that development of minerals should take precedence over other land uses. Under the common law, as a matter of general principle, a grant or reservation of minerals implied a right to do all things necessary to win or work the minerals from an underground mine. This included the right of entry upon the surface with machinery, the digging of pits to get and carry away the minerals, driving shafts vertically through an upper seam and tunnelling horizontally through expected mines. Whether a similar right of entry is attached to the royal minerals is unclear.

The rights attached to open cast mining were far less generous. Clear words were required before the surface could be destroyed or permanently injured. Thus the various rights to mine and extract minerals, and any provisions relating to compensation, were usually set out in the documents conferring such entitlement. The common law.

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316 Ministry for the Environment, supra n. 1, p. 42.
317 Ministry for the Environment, supra n. 83, p. 57.
318 Forbes, J.R.S. & Lang, A., supra n. 239, p. 15.
319 In the Case of Mines at 336 it was held that the Crown did have a right of access and a right to do all things necessary to obtain the royal minerals but Forbes, J.R.S. & Lang, A., supra n. 239, p. 17 note that this issue has not been resolved in Australia.
320 Forbes, J.R.S. & Lang, A., supra n. 239, p. 15.
in respect of underground mining, takes a permissive approach, but, in respect of open
cast mining, leaves it up to the instrument setting out the terms of the mineral reservation
to determine the relative rights of the landowner and the mineral owner. Where the
instrument reserving the minerals did not reserve access rights, and the common law
rights were insufficient, the mineral owner would be left to negotiate with the current
landowner.

These common law principles have been considerably modified in New Zealand
as mining law has developed. Nevertheless, mining legislation has continued to favour
the interests of mineral owners over land owners. Through the later part of the
eighteenth century the legislature found it difficult to deal with the separation of minerals
and surface rights\textsuperscript{321}. Consequently, early mining legislation was directed to facilitating
mining in respect of Crown land only. For such land, mining was viewed as a
preeminent land use. Limited expropriation of private property was permitted\textsuperscript{322}. Compensation for expropriated land was not permitted until the Land Act 1924\textsuperscript{323}. The
statutory reservation of access rights to accompany the reservation of minerals first
occurred in the Lands Act 1892\textsuperscript{324}. It was repeated in subsequent Land Acts and mining
legislation\textsuperscript{325} but was not included in the Crown Minerals Act 1991. Compensation for
damage to land was not allowed until the enactment of the Land Act 1948\textsuperscript{326}.

The Petroleum Act 1937, the Mining Act 1971 and the Coal Mines Act 1979
seem to go even further in abrogating the rights of landowners to those of mineral
owners. These statutes have specific provisions authorising entry onto land even where
the land is privately owned. This is considerably different from the earlier legislation

\textsuperscript{321} Ackroyd. P., supra n. 254, p. 41.

\textsuperscript{322} s. 120 Land Act 1892.

\textsuperscript{323} s. 135 Lands Act 1924.

\textsuperscript{324} s. 121 Lands Act 1892.

\textsuperscript{325} See s. 153 Land Act 1924, s. 153 Land Act 1948, s. 8 Mining Act 1971, s168A Coal
Mines Act 1925, s. 5 Coal Mines Act 1979.

\textsuperscript{326} s. 59 Land Act 1948.
where access to privately owned land for mining was left to the mineral owner and land
owner to negotiate. Thus, section 28 of the Petroleum Act 1937 authorised all licence
holders to enter on any land comprised in the licence and exercise the powers conferred
by the licence. The Coal Mines Act provided for a right of entry over Crown land and a right of entry over private land whether the coal is Crown owned or privately
owned, with the consent of the owner. The refusal by a landowner to give consent could
be overridden by the Minister of Energy.

The Mining Act 1971 took a different approach. It gave all licensees under the
Act a right to enter onto the land described in the licence. For mining and prospecting,
the crucial question was whether land was open to mining. Only land open to mining
could be licensed. Under section 21 of the Act all Crown land was open to mining. All Maori land and all privately owned land where the minerals were Crown owned was,
with the written consent of the owners and occupiers, declared open for mining. Privately owned land where the minerals were not Crown owned was, with the written
consent of the landowner, also declared open to mining subject to the terms of any
agreement relating to mining to the extent to which the agreement is consistent with the
provisions of the Act. If the owner or occupier of private land or Maori land refused
counsel the holder of a mining privilege could apply to have the land declared open as

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327 The consent of the appropriate Minister was required in respect of certain classes of land
(s. 29(1)) and of the owner or occupier for land under crop, within 50 metres of a building, yard,
garden etc. (s.30(1)).

328 s. 20 Coal Mines Act 1979. Under s. 21 a coal mining right could not be granted over
certain Crown lands without the consent of the appropriate Minister.

329 s. 27 Coal Mines Act 1979. The Minister could not make such a declaration in respect of
land under crop etc. (s. 27(6)).

330 ss. 47 and 69 Mining Act 1971. Section 59 of the Mining Act 1971 authorised the grant
of exploration licences in respect of any land, whether or not it was open to mining.

331 The consent of the appropriate Minister was required in respect of certain classes of Crown
land (s. 26 Mining Act 1971).

332 ss. 30 and 36 Mining Act 1971.

333 s. 35 Mining Act 1971. The consent of the owner of the privately owned minerals was
required to the grant of a licence.
if it were Crown land\textsuperscript{334}.

The Petroleum Act 1937, the Mining Act 1971 and the Coal Mines Act 1979 appear almost completely to abrogate the rights of landowners to those of mineral owners, particularly where Crown owned minerals were concerned. However, the provisions in these acts relating to land access are only part of the picture. All three Acts gave considerable recognition to the rights of landowners through compensation for injury to land\textsuperscript{335} and through regulation of the effects of mining on the surface. Licensees under the Petroleum Act 1937 and the Coal Mines Act 1979 were also required to comply with the provisions of the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967. Both these statutes provided significant protection for the rights of landowners.

Although the Mining Act 1971 was excepted from the provisions of the Town and Country Planning Act 1977, and possibly the provisions of the Water and Soil Conservation Act 1967\textsuperscript{336}, the Act itself contained extensive provisions for the protection of land. Applicants for mining licences were required to submit an environmental assessment\textsuperscript{337}. The Minister of Energy was required to have regard to any environmental factors in the development of a mineral resource before granting a licence\textsuperscript{338} and could

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\textsuperscript{334} s. 37 Mining Act 1971. Private land under crop; within 30 metres of a building, burial ground, waterworks, yard, garden or horticultural plantation; within an urban area and with an area less than 2,025 metres; and land set apart as a Maori reservation could not be opened to mining without the consent of the landowner (s.37(7)).

\textsuperscript{335} s. 39 Petroleum Act 1937; ss. 216, 220 & 221 Mining Act 1971; s. 83 Coal Mines Act 1979.

\textsuperscript{336} In Stewart v Grev County Council [1978] 2 NZLR 577 it was held that the Mining Act 1971 establishes an exclusive code for mining and the Town and Country Planning Act 1977 does not apply to licences granted under the 1971 Act. Arguably, therefore, the 1971 Act should be treated as if it were also excepted from the provisions of the Water and Soil Conservation Act 1967. Section 4A of the Mining Act 1971 confirmed that the 1977 Act did not apply.

\textsuperscript{337} s. 70(1)(ba) Mining Act 1971.

\textsuperscript{338} s. 69(4) Mining Act 1971.
impose conditions for preventing, reducing or making good injury to the surface of land. The Minister was also required to forward applications to local authorities and could impose conditions preventing damage to the surface of land and requiring restoration of land or could refuse to grant the licence.

Despite these provisions the Mining Act 1971, and certainly the Petroleum Act 1937 and Coal Mines Act 1979, demonstrate a clear bias in favour of mining and the interests of the mineral owner particularly where the mineral owner is the Crown. This strategic level policy merely reflected similar policies at the normative level. These Acts were clearly directed at facilitating mining through removing, as far as possible, the barriers to mining created through separate ownership of the surface and the subsurface. This philosophy is particularly evident in the long titles to these acts; the long title to the Petroleum Act 1937 for instance states that it is:

"An Act to make Better Provision for the Encouragement and Regulation of Mining for Petroleum, and to Provide for Matters incidental thereto."

Similarly, the long title to the Mining Act 1971 states, inter alia, that it is an Act "to provide improved facilities for the development of mineral resources".

It is submitted, however, that this preeminence is no longer justified. Mining does not deserve, for economic or social reasons, the emphasis that has placed on it over and above other land uses in the past. Mining should be dealt with on the same level as any other land use. Resource management legislation, if it is to provide for the integrated management of minerals resources, should treat the interests of minerals

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339 s. 103A Mining Act 1971.
340 s. 103B Mining Act 1971.
341 s. 103C Mining Act 1971.
342 Ackroyd, P., supra n. 254, p. 35.
343 Ministry for the Environment, supra n. 1, pp. 42-43.
owners and land owners equally. By placing the rights of mineral owners ahead of land owners, mining legislation in the past has distorted the true value of mining.
CHAPTER 6

THE RESOURCE MANAGEMENT ACT 1991

1. Introduction

The Crown Minerals Act 1991 and the Resource Management Act 1991 are the principal Acts regulating mining in New Zealand. These two Acts were enacted following the Resource Management Law Reform process and built upon an existing set of environmental management statutes. Initially, the two Acts were introduced as one Bill. The Crown Minerals Act 1991 was simply Part IX of the Resource Management Bill and subject to the purpose of sustainable management. This included the statutory purpose of sustainable management.

Following the change to a National government in 1990, a review group was established to review the Bill. The review group recommended that Part IX be separated out into a separate Bill. The clauses that this recommendation related to dealt with the allocation of Crown owned minerals, the grant of mineral permits and the issue of land access. The Review Group advanced two reasons for this. First, it was felt that the Bill unnecessarily duplicated the regulatory framework in respect of policies, plans and resource consents by making Crown owned minerals subject to sustainable management. Part V and VI of the Bill already required consideration of sustainable management of both Crown and privately owned minerals.

Second, the Review Group believed that the Bill inappropriately mixed the Minister of Energy's regulatory and allocation functions. On the one hand the Minister was responsible for regulating the use of minerals in order to promote sustainable management.

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344 See also the Health and Safety in Employment Act 1992.
development, and on the other was responsible, as the agent of the Crown, for the obtaining of a fair financial return from the Crown mineral estate. It was felt that this was inappropriate and the regulatory and allocation functions should be separated. Accordingly, Part IX was separated out into a separate Crown Minerals Bill and the references to sustainable management of minerals were deleted. The resulting legislative framework consists of the Crown Minerals Act 1991, which deals with Crown owned minerals, the Resource Management Act 1991, which deals with all natural resources including minerals, and the Health and Safety in Employment Act 1992, which deals with health and safety aspects of mining. Only the Crown Minerals Act 1991 and the Resource Management Act 1991 are dealt with in this thesis.

The Resource Management Act 1991 applies not just to Crown owned minerals, or even to all minerals, but to all natural and physical resources. The Act establishes a wide ranging resource management regime that applies to minerals, regardless of whether they are Crown owned or privately owned. The relevance of the Resource Management Act 1991 to Crown owned minerals is made clear by section 9 of the Crown Minerals Act 1991. This section states that "compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws and rules of law." The Resource Management Act 1991 forms a key part of the management regime for minerals and its effect on mining operations is likely to be more significant than the Crown Minerals Act 1991. The long title to the Resource Management Act 1991 gives an indication of its scope. It is "An Act to restate and reform the law relating to the use of land, air and water". This scope is even clearer in section 5(1) of the Act:

"The purpose of this Act is to promote the sustainable management of natural and physical resources."

Ministry for the Environment, supra n. 83, p. 56.

The Mining Act 1971 established an exclusive code for the management of the internal and external effects of mining. See supra pp. 79-80.
The term "natural and physical resources" is defined in the Act as including "land, water, air, soil, minerals, and energy, all forms of plants and animals ... and all structures."\textsuperscript{348}

The Resource Management Act 1991 gives effect to the normative, strategic and operational levels of management in a tightly organised structure. At the normative level it directly incorporates a statement about the substantive direction of resource management to which it relates and establishes a number of other values for decision makers to establish. At the strategic level, it establishes a "macro-planning" structure of management plans and provides for decision makers to establish strategic policies and objectives. At the operational level it establishes a system of resource consents and rules; provides for the enforcement of these mechanisms; and assigns responsibility for specific areas of resource management to central, regional and territorial government. For the most part it establishes a comprehensive and highly integrated resource management regime. In respect of minerals, however, this goal is not achieved.

2. Normative Level of Management: Sustainable Management and the other Principles in Part II

The Resource Management Act 1991 establishes a normative statement of purpose in section 5(1). The purpose of the Act is to promote the sustainable management of natural and physical resources. The direction "to promote" is a positive statement requiring affirmative action to be taken. The object of this duty is wide; "natural and physical resources" are defined in section 2(1) as "including land, water, air, soil, minerals and energy, all forms of plants and animals (whether native to New Zealand or introduced) and all structures." Sustainable management is defined in section 5(2) as follows:

"In this Act, "sustainable management" means managing the use, development and protection of natural and physical resources in a way, or at a rate, which

\textsuperscript{348} s. 2(1) Resource Management Act 1991.
enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while -

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) Avoiding, remedying or mitigating any adverse effects of activities on the environment.

Thus, the function of sustainable management is "to manage the use, development and protection of natural and physical resources." Manage is used in its widest sense and does not import any particular values and priorities. This neutrality is preserved in the words "use, development and protection" which are given equal priority. Natural and physical resources are to be used, developed and protected simultaneously. The use, development and protection of natural and physical resources must be "in a way, or at a rate, which enables peoples and communities to provide for their social, economic and cultural well-being and for their health and safety." The management of resources, including "protection" is therefore given a very anthropocentric object. Natural and physical resources are to be used, developed and protected for human purposes. This involves a weighing of social, economic and cultural factors. For example, in Cash v Queenstown Lakes District Council the Planning Tribunal upheld the Council's refusal of a resource consent application on the basis that the proposed operation would affect the safety of other river users although it would advance social and economic well-being.

This anthropocentric function is qualified by the matters in paragraphs (a)-(c). Paragraph (a) acknowledges the reasonably foreseeable needs of future generations, paragraph (b) recognises the life-supporting capacity of the ecosystem, and paragraph (c) requires adverse effects to be avoided, remedied or mitigated. These paragraphs contemplate longer term considerations than the matters in the first part of the definition.

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349 Fisher, D., supra n. 345, p. 12.

Some are clearly directed towards ecological considerations. In this context it is worth noting the definition of environment in section 2(a):

"Environment" includes -

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and

(c) Amenity values; and

(d) The social, economic, aesthetic and cultural conditions which affect the matters stated in definitions (a) to (c) of this definition or which are affected by these definitions."

This definition is inclusive; it includes items in the "environment" which we may not immediately think of as being part of the environment. The environment is not limited to the matters in the definition. It is a very broad concept and encourages a broad approach to the definition of sustainable management. The Board of Inquiry into the New Zealand Coastal Policy Statement, for example, described the environment as "the surroundings in which some person or thing lives or exists".351

The general approach to be taken to the interpretation of section 5 is described by Justice Creig in New Zealand Rail Ltd v Marlborough District Council352:

"This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subject to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way."


352 [1994] NZRMA 70 (HC) at 87.
Sustainable management is very similar to the concept of sustainable development. It incorporates consideration of the needs of current generations, ecological considerations and consideration of the needs of future generations. Thus, in Marlborough District Council v Southern Ocean Seafoods\textsuperscript{353} the Planning Tribunal held that the overriding intention of the Resource Management Act 1991 is "to ensure that successive generations husband the available resources and pass them onto the next in no lesser state." These comments, however, must be qualified. First, sustainable management does not entail any change to the nature of economic growth, as demanded by sustainable development. The Resource Management Act 1991 still appears to treat the economy and the environment as separate entities. Sustainable management does not achieve the change in economic organisation demanded by sustainable development. Sustainable development encompasses the "total development of society"\textsuperscript{354}. It requires changes in economic activity and political, social and cultural transformations. Sustainable management, in giving expression to social and ecological factors, expresses some of the components of sustainable development but it fails to give effect to the full concept.

This limitation may be beneficial. The concept of sustainable development has been criticised as being a "thought stopping cliche"\textsuperscript{355}. Incorporating it into legislation without providing a definite definition may be meaningless. There is a real danger that if decision makers are referred to a broad, "all-encompassing", concept they will be able to use it for their own ends, and that the courts will be unable to consistently interpret a purpose clause so as to give it real meaning. By being restricted to the lesser concept of sustainable management and providing a definition for that term, the Resource Management Act 1991 sets out a purpose section capable of application, despite uncertainty as to the meaning of the word "while". Moreover, the Resource Management Act 1991 only applies to the use of natural resources. It is not intended to prescribe an

\textsuperscript{353} (1995) BRM Gazette 17 (PT, 7/2/95).

\textsuperscript{354} Barbier, E. B., supra n. 113.

Second, there is some doubt over the interpretation of the word "while" in the definition of sustainable management in section 5 of the Resource Management Act 1991. The debate is over whether "while" as used in section 5 is a subordinating or a co-ordinating conjunction. The sub-ordinating conjunction interpretation would enable paragraphs (a), (b) and (c) to take precedence over the first part of section 5. This interpretation gives priority to ecological and environmental sustainability and gives better effect to sustainable development than the co-ordinating conjunction interpretation.

Third, minerals are excluded in the definition of sustainable development from the principles of "sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations."

Thus, as far as minerals are concerned, the use, development and protection of natural and physical resources (which includes minerals) is qualified only by paragraphs (b) and (c) of section 5. The definition of sustainable management of minerals therefore reads:

"Sustainable development" means managing the use, development or protection of minerals in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while -

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357 In the co-ordinating conjunction interpretation paragraphs (a), (b) and (c) carry the same weight as the first part of the definition. This interpretation would require a balancing of the anthropocentric and ecological functions. It is submitted that the Planning Tribunal approach to section 5(2) favours the subordinating conjunction interpretation: Shell Oil NZ Ltd v Auckland City Council PT W8/94; Foxley Engineering Ltd v Wellington City Council PT W12/94; Plastic and Leathergoods Company Ltd v Horowhenua District Council PT W26/94. See also Ministry of Conservation, supra n. 459, p. 111. A broad policy approach to section 5 as suggested by Justice Creig in the New Zealand Rail case favours the co-ordinating conjunction interpretation.
(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The amended definition of sustainable management for minerals excludes the issue of the depletion of minerals, with its implications for the needs of future generations, from consideration under the Resource Management Act 1991. At the same time, any other natural and physical resources that are utilised in mining operations must meet the full definition of sustainable management. The external effects of mining on the life-supporting capacity of ecosystems must be safeguarded; any adverse effects it may cause on the environment must be avoided, remedied or mitigated; and the potential of other natural and physical resources, which may be used in the course of mining, to meet the reasonably foreseeable needs of future generations must be sustained.

This creates some paradoxes within section 5, particularly in the use of the word "environment" in paragraph (c). Paragraph (c) requires that the adverse effects of mining on the environment be avoided, remedied or mitigated. "Environment" is a wide, all-encompassing term that certainly includes minerals and thereby requires decision makers to avoid, remedy or mitigate the effects of mining on minerals. This conceivably could include consideration of the adverse effects of the depletion of mineral resources, namely their unavailability for use in the future. Yet such consideration is excluded by paragraph (a) of section 5. It is submitted that, in light of the direction of Justice Greig in the New Zealand Railways case, this is taking too literal an approach to section 5. It also seems very circular to argue that an effect of mineral extraction is the depletion of mineral resources. The correct approach to section 5 is to view exclusion of minerals from the principle of the interests of future generations as a deliberate policy decision to exclude the issue of the sustainability of minerals from consideration under the Resource Management Act 1991. This interpretation is supported by the words of the Hon John Luxton, Minister of Energy in moving that the Crown Minerals Bill be read for the third time:
"(An) issue of some note in the Bill is the issue of "sustainability of the mineral resources" being moved out of the resource management legislation. In fact, any form of an extractive industry is essentially not sustainable in the pure sustainable definition, so that definition has been shifted also."\textsuperscript{358}

The exclusion of minerals from the principle of sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations means that the Resource Management Act 1991 fails to give effect to the principle of sustainable development in respect of minerals. Although the Resource Management Act 1991 applies to minerals, the sustainability element of sustainable development does not apply. As a result, the policy, planning and regulatory instruments available under the Act may be limited to controlling the environmental effects associated with prospecting, exploration and mining. It seems unlikely that they can be used to manage mineral resources themselves. This means that there is no statutory direction to plan or even consider the implications of mineral resource depletion under the Resource Management Act 1991.

The purpose of the Act is integrated into the strategic and operational levels of management by direct reference to it in the sections of the Act which establish planning and consent instruments at these levels\textsuperscript{359}. Where a section of the Act refers specifically to section 5, section 5 must be given weight according to the words of that section\textsuperscript{360}. Where a section of the Act that deals with a discretion does not refer to section 5 the position is less clear. It is arguable that section 5 should arguably be used as an aid to construction of the Act. It may be therefore be possible to refer to the stated purpose of the Act to inform the exercise of a discretion, particularly in the absence of express statutory authority and when interpreting an ambiguous provision\textsuperscript{361}. In \textit{Batchelor} v

\textsuperscript{358} (1991) \textit{New Zealand Parliamentary Debates} 3040.

\textsuperscript{359} See for example ss. 45, 56, 59, 63, 104 and infra pp. 100-117.

\textsuperscript{360} \textit{Batchelor} v \textit{Tauranga District Council} (1992) 1 NZRMA 266 (PT).

\textsuperscript{361} \textit{Batchelor} at 265-266.
the High Court remarked, with approval, that "it is implicit in the Tribunal’s finding that overall regard was had to section 5, in that the weighing of the section 104 considerations which resulted in consent being refused was found not to offend against the general dictates of section 5. This approach would enable greater integration of sustainable management into the strategic and operational levels than would be allowed if only those sections which directly refer to section 5 were used.

Similarly, the Planning Tribunal held in Minister of Conservation v Kapiti Coast District Council\(^{363}\) that exercise of the discretion under section 105(1)(c), which does not refer to section 5, must be informed by the statutory purpose in section 5 and, as a function and a power under the Act, must also be subject to the duty imposed by section 6. Further, the wording of sections 6, 7 and 8 implies that persons exercising functions and policies under the Act have a broad obligation to achieve the purpose of the Act\(^{364}\). Arguably, therefore, section 5 should be used to assist in interpretation of the Act in addition to any particular reference to it by a section of the Act. This would allow widespread integration of the principle of sustainable management into the operational and strategic levels.

In addition to establishing sustainable development as a normative principle for resource management, Part II of the Resource Management Act 1991 gives effect to the Treaty of Waitangi and a wide range of other normative values. Section 6 of the Act requires "all persons exercising functions and powers under (the Act), in relation to managing the use, development and protection of natural and physical resources" to recognise and provide for a number of matters of national importance in achieving the purpose of the Act. These matters include the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers; the protection of outstanding natural features and landscapes; the protection of areas of significant indigenous vegetation and significant habitats of indigenous vegetation; and the relationship of

\(^{362}\) Tauranga District Council\(^{362}\)

\(^{363}\) Minister of Conservation v Kapiti Coast District Council\(^{363}\)

\(^{364}\) Arguably, therefore, section 5 should be used to assist in interpretation of the Act in addition to any particular reference to it by a section of the Act. This would allow widespread integration of the principle of sustainable management into the operational and strategic levels.

\(^{365}\) Minister of Conservation v Kapiti Coast District Council\(^{365}\).
Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other tapu. Similarly, section 7 directs all decision makers to have particular regard to a number of factors in achieving the purpose of the Act. These factors include kaitiakitanga; the efficient use and development of natural and physical resources; the maintenance and enhancement of amenity values; intrinsic values of ecosystems; maintenance and enhancement of the quality of the environment; and any finite characteristics of natural and physical resources. Section 8 of the Act states:

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti O Waitangi)."365

The purpose of the Act, sustainable management, is thus established at the apex of the Act and the principles in sections 6, 7 and 8 set out in greater detail some of the criteria that are likely to be relevant to the achievement of this purpose366. This was recognised by Justice Creig in the New Zealand Rail case367:

"The recognition and provision for the preservation of the natural character of the coastal environment in the words of s6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is necessary to the principal purpose."

The purpose of the Act is, in effect, the object or goal of the consideration of the principles in sections 6, 7 and 8. These principles are ancillary to the promotion of sustainable management; sustainable management is the primary goal of the statute.

365 See the discussion of the principles of the Treaty of Waitangi infra. pp. 95-100.


367 at 85.
Every instrument in the Act is dependent upon it, driven by it, prescribed by it, or otherwise founded upon it.\textsuperscript{368}

The Act also provides for the integration of the values in sections 6, 7, and 8 by establishing priorities between them. Those in section 6 are matters of national importance which "shall be recognised and provided for". Decision makers must "have particular regard to" the matters in section 7. The principles of the Treaty of Waitangi must be taken into account. The content of each of these obligations is important. The principles in section 6 are matters of national importance. They must be specifically recognised and provided for by all decision makers within the context of the purpose of the Act.\textsuperscript{369} They must be accorded greater relative weight than regional or district goals\textsuperscript{370} and cannot be just an equal part of a general balancing exercise.\textsuperscript{371}

The phrase "recognise and provide for" in section 6 is stronger than the words "shall have particular regard to", used in section 7. The principles in section 7 must be given "particular" consideration. In \textit{Gill v Rotorua District Council}\textsuperscript{372} the Planning Tribunal held that section 7 imposes a duty to be on enquiry. The Tribunal criticised the Council for taking a passive approach and not inquiring further why the Maori people had supported a proposal to designate the land in question a scenic reserve. However, in \textit{Marlborough District Council v Southern Ocean Seafoods} the Planning Tribunal held that the duty in section 7 requires more than just an enquiry. Instead it requires decision makers to recognise the matters in section 7 as important to the particular decision and therefore to be carefully weighed in coming to a conclusion.

\textsuperscript{368} Fisher, D., supra n. 345, p. 11.

\textsuperscript{369} In \textit{Environmental Defence Society v Mangonui County Council} [1989] 3 NZLR 357 (CA) it was held that every regional scheme must clearly identify and provide for the matters in s. 3(j) of the Town and Country Planning Act 1977.


\textsuperscript{371} \textit{Harrison v Tasman District Council} [1994] NZRMA 193 (PT).

\textsuperscript{372} (1993) 2 NZRMA 604 (PT).
In contrast, the obligation imposed by section 8 can be more easily fulfilled. This section requires decision makers to "take into account" the principles of the Treaty of Waitangi. In *Haddon v Auckland Regional Council* the Planning Tribunal held that the duty "to take into account" indicates that a decision maker must weigh the matter with other matters being considered. In making a decision, a balance between the matters at issue must be effected and the decision maker must be able to show that he or she has done so. The principles of the Treaty must necessarily affect the discretion of the decision maker. This least requirement is drawn from *R v CD* where Somers J observed that the words "shall take into account" mean that the appropriate matters must necessarily affect the discretion of the decision maker.

*Haddon* involved an inquiry into the extraction of sand from the seabed, which was a restricted coastal activity in the regional plan. The inquiry was made at the request of the tangata whenua of the district, under section 118(6) of the Resource Management Act 1991. It was claimed that the Regional Council had failed to give adequate notice of the resource consent application. The Tribunal held that consultation and the duty of decision makers to be adequately informed were both Treaty principles. These had not been sufficiently complied with early enough in the consent process by the Regional Council. However, the Tribunal did not hold that this invalidated the consent process; instead it recommended that the local iwi be involved in the monitoring process and, in the longer term, in the preparation of coastal plans.

The exclusion of minerals from the principle of the needs of future generations, however, brings into doubt the application of some of the principles in sections 6 and 7 in the context of minerals. For example, section 7(b) to the efficient use and development of natural and physical resources and section 7(g) to any finite characteristics of natural and physical resources. Both of these principles are incapable of consideration in the context of minerals, so far as they relate to the needs to future

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373 (1994) NZRMA 49.

generations. This may severely limit their application. Section 7(g), which appears to relate solely to the needs of future generations, has no meaning for and cannot be applied to the management of minerals.

In respect of the external effects of mining, the Resource Management Act 1991 is a big step toward comprehensive and integrated resource management. The promotion of sustainable development is the guiding purpose of the Act and the overriding provision in Part II. Sections 6, 7 and 8 are to be interpreted and applied as an integral part of achieving the overall statutory purpose and are themselves given a clear order of priority. The matters of national importance in section 6 are the most significant, they must be specifically recognised and provided for, while the matters in sections 7 and 8 must respectively be given "particular regard" and "taken into account". These sections provide for the consideration of a wide range of values and perspectives in the management of natural and physical resources. The Act, in general, establishes a comprehensive and integrated resource management regime at the normative level. With the qualification attached to minerals, it applies to all natural and physical resources and requires consideration of the principle of sustainable management, the Treaty of Waitangi and a wide range of other values.

3. The Principles of the Treaty of Waitangi

The phrase "principles of the Treaty of Waitangi" is becoming a common form of Treaty reference. It is also used in section 8 of the Resource Management Act 1991, section 9 of the State-Owned Enterprises Act 1986, the Long Title to the Environment Act 1986 and section 4 of the Conservation Act 1987. By referring to the principles of the Treaty of Waitangi rather than the Treaty itself, Parliament is able to avoid the controversy arising from the differences in the English and Maori versions of the Treaty.

Some indication of the government's understanding of what the principles of the Treaty of Waitangi are is provided by *Principles for Crown Action on the Treaty of*
This document lists five principles for Crown action on the Treaty. These are:

1. The principle of government. The government has a right to govern.
2. The principle of self-management. The iwi have the right to organise as iwi and, under the law, to control their resources as their own.
3. The principle of equality. All New Zealanders are equal before the law.
4. The principle of reasonable cooperation. Both the government and iwi are obliged to accord each other reasonable cooperation on major issues of concern.
5. The principle of redress. The government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.

Ultimately, of course, the question of what the principles of the Treaty are is a matter of interpretation for the courts. In *New Zealand Maori Council v Attorney-General* the Court of Appeal took a positive approach to interpreting the Treaty, seeing it as a living and enduring document. The President of the Court, Justice Cooke, accepted as correct, a submission of course: for the applicant that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms. In a similar vein Justice Richardson stated:

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375 *New Zealand. Department of Justice, Wellington, 1989.*


378 at 656.
"whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order require a broad interpretation and one which recognises that the Treaty must be capable of adaption to new and changing circumstances."\(^{379}\)

This concern with fundamental concepts is shared by the judgments of all members of the Court. Justice Casey, for example, defined a principle as "a fundamental motive or reason of action."\(^{380}\) In his opinion, the statutory direction to consider principles demanded consideration of the "Treaty's actual terms understood in the light of fundamental concepts underlying them."\(^{381}\) Similarly, the President of the Court sought to identify the basic terms or spirit of the Treaty\(^{382}\).

In the opinion of all five members of the Court of Appeal the relationship contemplated by the Treaty reflected the concept of partnership\(^{383}\). As such, the partners owed obligations analogous to fiduciary duties to each other\(^{384}\). This led to the conclusion that the Crown owed a duty of active protection to Maori people in the use of their land and water to the fullest extent practicable. In return, the Maori people had undertaken a duty of loyalty to the Queen, full acceptance of her government, and reasonable cooperation. The Court, however, did not attempt to list a general set of principles, holding instead that the relevant principles could only be determined having regard to the context in which their identification arises\(^{385}\). In this case, the principle of partnership and the duty of active protection were relevant.

\(^{379}\) at 673.
\(^{380}\) at 702.
\(^{381}\) at 702.
\(^{382}\) at 663.
\(^{383}\) Cooke, P at 664; Richardson, J. at 682; Somers, J. at 693; Casey, J. at 702-704 and Bisson, J. at 715.
\(^{384}\) at 664.
\(^{385}\) at 673, Richardson J.
The Privy Council has also come to similar conclusions in *New Zealand Maori Council v Attorney-General*[^386^]. The Privy Council saw the "principles of the Treaty as being underlying moral obligations and responsibilities placed on the parties by the Treaty."[^387^] In their Lordships' opinion, the most important principles related to the obligation of the Crown to protect and preserve Maori property in return for being recognised as the legitimate government of New Zealand by Maori. However, the Privy Council noted that this obligation was not absolute. Instead, it saw the relationship between Maori and the Crown envisaged by the Treaty as being founded on reasonableness, mutual cooperation and trust. It was accepted that, in discharging its obligation to protect and preserve Maori property, the Crown did not need to go beyond taking such action as was reasonable in the circumstances.

The Waitangi Tribunal takes a similar approach to interpreting the principles of the Treaty. In the *Muriwhenua Fishing Report* the Tribunal drew upon the Court of Appeal's analysis in *New Zealand Maori Council* [1987]. The Tribunal stated:

"the key to defining the principles of the Treaty is to be found in the idea of a partnership between Pakeha and Maori and that cooperation is at the heart of the agreed relationship of the two parties."[^388^]

The Tribunal followed the Court of Appeal approach and identified only those principles relevant to the claim. In this case, it saw as relevant a principle of protection, a principle of mutual benefit and a principle of options.

Subsequent Tribunal reports have retained the notion of reciprocity advanced in the *Muriwhenua Fishing Report*[^389^]. In two recent reports the Tribunal identifies two


[^387^]: at 517.

[^388^]: at 190.

[^389^]: Boast, R. & Edmunds, D., supra n. 218, p. 47.
basic principles. First, the cession of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. Second, the concept of partnership\textsuperscript{390}. These basic principles are seen to give rise to a number of rights and duties that were relevant to the claims being considered. These are a duty of active protection, a duty on the Crown to redress past breaches, a duty to consult and a right of tribal self-regulation\textsuperscript{391}.

Thus, it appears that the notion of partnership, with obligations similar to those owed in fiduciary relationships, is central to the principles of Treaty of Waitangi\textsuperscript{392}. From this a set of principles is derived that includes a principle of respect, mutual cooperation, reasonableness and trust. These give rise to obligations of active protection, loyalty and consultation. These obligations are reciprocal. The basic terms of the Treaty are also important. As stated in the 1987 Court of Appeal decision, these are that the Crown was given the right to govern and Maori were to be subjects, in return their chieftainships and possessions were to be protected, but sales of land could be negotiated\textsuperscript{393}. The Crown Minerals Act 1991 and Resource Management Act 1991 do therefore recognise the guarantee of rangatiratanga made in article two of the Treaty of Waitangi.

The Waitangi Tribunal have been sharply critical of the manner in which the Treaty has been incorporated into the Resource Management Act 1991. In the \textit{Ngawha Geothermal Resource Report}\textsuperscript{394} and the \textit{Te Arawa Geothermal Report}\textsuperscript{395} the Tribunal


\textsuperscript{391} Boast, R. & Edmunds, D., supra n. 218, p. 48

\textsuperscript{392} Boast, R. & Edmunds, D., supra n. 218, p. 44.

\textsuperscript{393} New Zealand Maori Council supra n. 200 at 663, Cooke P.

\textsuperscript{394} at p. 154.

\textsuperscript{395} at 34.
concluded that the Crown had not properly discharged its Treaty duty of active protection of Maori interests in the Resource Management Act 1991. The Tribunal found that, in delegating extensive powers to local and regional authorities under the Resource Management Act 1991, the Crown had acted inconsistently with this duty. In the Tribunal's opinion, if the obligation of protection is to be fulfilled such delegation must ensure that decision makers are required to act in conformity with the principles of the Treaty. A second concern was that Part II of the Resource Management Act 1991 requires only that the Treaty be weighed against other matters of similar importance. The Tribunal felt that the duty of active protection would only be met by a statutory obligation to act consistently with the Treaty principles. These comments can also be applied to section 4 of the Crown Minerals Act 1991.

It appears, then, that the requirement in section 8 of the Resource Management Act 1991 to take into account the principles of the Treaty of Waitangi, and most likely that in section 5 of the Crown Minerals Act 1991 to have regard to these principles, is inadequate. These words do not attach sufficient importance to the Treaty. The Treaty is a solemn and fundamental compact between the Crown and Maori. It guarantees Maori rangatiratanga over their taonga. By requiring those who make decisions in relation to natural resources to do no more than take into account or have regard to the principles of the Treaty the Crown has not met this obligation.

4. Strategic Level of Management: Policy Statements and Plans

At the strategic level of management the Resource Management Act 1991 assigns management and regulatory functions among central government, regional councils and territorial authorities. Central government, through the Minister for the Environment and the Minister of Conservation, are given responsibility for the preparation of national

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396 Ngawha Geothermal Resource Report supra n. 390, p. 154, Te Arawa Representative Geothermal Claims supra n. 390, p. 34.
397 Te Arawa Representative Geothermal Claims supra n. 390, p. 28.
398 Te Arawa Representative Geothermal Claims p. 28.
policies and national environmental standards\textsuperscript{599}. Regional councils are given general responsibility for the integrated management of the natural and physical resources of their region and for the preparation of objectives and policies in relation to the effects of the use, development, or protection of land which are of regional significance\textsuperscript{400}. Territorial authorities are given responsibility for the integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district\textsuperscript{401}. The functions of regional councils and territorial authorities are subject to giving effect to the purpose of the Act. Thus, the Act establishes a highly integrated and comprehensive set of responsibilities for resource management. This integration, however, is not achieved in respect of minerals because of the treatment of minerals in section 5 of the Act. As a result there is no agency, under the Resource Management Act 1991, charged with responsibility for overseeing the depletion of minerals.

In terms of "macro-planning" the Resource Management Act establishes a highly integrated and comprehensive set of resource management plans at the strategic level. At the national level, there are national environmental standards, national policy statements, and New Zealand coastal policy statements. At the regional level, there are regional policy statements, regional plans and regional coastal plans. At the district level, there are district plans. Policy statements are generally used to establish strategic level objectives and plans in accordance with the normative principles\textsuperscript{402}. Plans and policy statements are prepared through a public consultation process involving the preparation and release of proposed policy statements and plans and the making of public submissions\textsuperscript{403}.

\textsuperscript{599} ss. 24 & 28 Resource Management Act 1991.
\textsuperscript{400} s. 30 Resource Management Act 1991.
\textsuperscript{401} s. 31 Resource Management Act 1991.
\textsuperscript{402} Fisher, D., supra n. 345, p. 8.
\textsuperscript{403} First Schedule, Resource Management Act 1991.
National policy statements, national environmental standards and New Zealand coastal policy statements are prepared by central government\textsuperscript{404}. The purpose of a national policy statement is "to state policies on matters of national significance that are relevant to achieving the purpose of this Act."\textsuperscript{405} The purpose of a New Zealand coastal policy statement is identical, except to the extent that these policies must relate to the coastal environment of New Zealand.\textsuperscript{406} National environmental standards are aimed at either prescribing technical standards relating to the use, development, and protection of natural and physical resources or prescribing the methods of implementing such standards. These instruments are therefore directed strongly towards implementing the normative principles. Integration of the provisions of these national level planning instruments into regional and district policy statements and plans is achieved under section 55 of the Act. This section requires regional councils and territorial authorities to make any changes to their policy statements and plans needed to remove any inconsistency or conflict with a national level instrument. They must also take any other action which is necessary to implement the national policy statement or New Zealand coastal policy statement.

Regional policy statements and regional plans are prepared and issued by regional councils\textsuperscript{407}. The purpose of a regional policy statement is "to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region."\textsuperscript{408} The purpose of a regional plan is "to assist a regional

\textsuperscript{404} National policy statements are issued by the Minister for the Environment with the approval of the Governor-General in Council (s. 53); national environmental standards are regulations made by the Governor-General by Order in Council (s. 43); and New Zealand coastal policy statements are issued by the Minister of Conservation with the approval of the Governor-General in Council (s. 57).

\textsuperscript{405} s. 45 Resource Management Act 1991.

\textsuperscript{406} s. 56 Resource Management Act 1991.

\textsuperscript{407} ss. 60, 64 and 65 Resource Management Act 1991.

\textsuperscript{408} s. 59 Resource Management Act 1991.
council to carry out any of its functions to achieve the purpose of this Act." Regional policy statements are policy instruments which set out the significant resource management issues, objectives, policies and methods for implementing these matters for a region, while regional plans are the principal planning or implementation instrument. The regional council must prepare at least one regional policy statement. The preparation of a regional coastal plan for the region is also mandatory but the preparation of other plans is optional.

Incorporation of the normative principles for resource management into the regional policy statements and plans is assured by the stated purpose of policy statements and plans and by sections 61(1) and 66(1) of the Resource Management Act 1991. These two sections require regional councils, inter alia, to prepare and change its policy statements and plans in accordance with the provisions of Part II of the Act (i.e. sections 5, 6, 7). Regional councils must also have regard to the extent to which the policy statement needs to be consistent with the policy statements and plans of adjacent regional councils.

Integration of regional plans with regional policy statements is achieved through section 67(1)(a) of the Act. This section provides that a regional plan may not be inconsistent with any national policy statement, any water conservation order or the regional policy statement or any other regional plan of the region concerned. In addition, the regional council must have regard to, inter alia, any management plans and strategies prepared under other Acts. This includes minerals programmes prepared under the Crown Minerals Act 1991.
District plans are prepared and issued by territorial authorities for the purpose of assisting them to carry out their functions in order to achieve the purpose of the Act. The district plan sets out the significant resource management issues of the district, the objectives to be achieved, the policies in regard to the issues and objectives, and the methods for implementing these policies. As with the regional level instruments, integration of the normative level policies is achieved through the stated purpose of district plans and the requirement that territorial authorities prepare and change their district plans in accordance with, inter alia, the provisions of Part II of the Act.

Section 75(2) of the Act prohibits any district plan from being inconsistent with the national level instruments or with regional policy statements or plans for the region, in respect of any matter of regional significance or for which the regional council has primary responsibility. There is also a requirement to have regard to the provisions of any proposed regional policy statement or plan. Integration of the district plan with the regional instruments is thereby achieved. In addition, the territorial authority must have regard to, inter alia, any management plans and strategies prepared under any other Act and the extent to which the district plan needs to be consistent with the plans of adjacent territorial authorities.

In preparing and changing regional policy statements and plans and district plans, regional councils and district councils must act in accordance with their obligations under section 32 of the Act. Section 32 requires a deliberate and rational approach at the

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strategic level to the exercise of functions under the Act\(^\text{421}\). It places a duty on the Minister for the Environment, the Minister of Conservation and every local authority, in relation to the preparation of policy statements and plans, to have regard to alternate means of achieving the purpose of the Act and consider whether they have chosen the most effective and efficient means. This includes the provision of information, services, or incentives, and the levying of charges. There is also a duty to consider the extent to which the proposed objective, policy, rule or other method is necessary for achieving the purpose of the Act; the reasons for and against selecting the chosen mechanism; the principal alternative means available; and to evaluate the likely benefits and costs of the principal alternative means, including the extent to which they are likely to be effective in achieving the objective or policy and the likely implementation and compliance costs.

Thus, the Resource Management Act 1991 establishes a hierarchy of planning instruments at the strategic level which can all be used to establish policies and objectives for the management of minerals. These instruments are highly integrated, both in terms of giving effect to normative principles, and in being integrated with planning instruments at a higher level or with instruments at the same level. There is also some provision for integration with strategic level management instruments established under other Acts, for example, minerals programmes prepared under the Crown Minerals Act 1991. However, because of the exclusion of minerals from the principle of the interests of future generations these instruments apply only to the external effects of mining. They cannot be used to establish policies in respect of the internal issues associated with minerals. In particular, these "macro-planning" instruments cannot be used to establish a depletion policy for minerals. This is a task for which national policy statements especially would otherwise be ideally suited.

5. Operational Level of Management: Local Authorities, Resource Consents and Rules

At the operational level the Resource Management Act 1991 assigns detailed

\(^{421}\) Randerson, T., supra n. 370. p. 451.
responsibilities for specific areas of resource management to central, regional and territorial government. These functions clarify the division of responsibilities made at the strategic level. Due to the exclusion of minerals from the principle of the needs of future generations these functions are unable to be exercised in respect of the internal management of minerals. They apply only to the external effects of mining. The functions of the Minister for the Environment and the Minister of Conservation are set out in sections 24 and 28 of the Act. Most of the policy making functions at the national level are given to the Minister for the Environment. The functions of the Minister of Conservation largely relate to the coastal marine area.

Sections 30 and 31 of the Act set out specific responsibilities for regional councils and territorial authorities. Regional councils have specific responsibility for developing integrated policies and plans for land, water, and soil, and also for pollution control. They are also responsible for the direct control of water resources and control land use for certain limited purposes, mainly relating to soil conservation and water quality and quantity. In addition, regional councils have responsibility for the coastal marine area, including control of land and associated natural and physical resources in the coastal marine area and control of the extraction of sand, shingle or other natural material from the coastal marine area. They are also responsible for the control of the introduction or planting of any plant in the bed of a water body for a number of specific purposes. Territorial authorities are empowered to control the subdivision of land, noise emissions and any actual or potential effects of the use, development or protection of land, including the implementation of rules for the avoidance or mitigation of natural hazards and the prevention and mitigation of any adverse effects of the storage, disposal or transportation of hazardous substances. They are also given jurisdiction to control the effects of activities in relation to the surface of water in rivers and lakes.\footnote{As the definition of land includes land covered by water presumably the jurisdiction of territorial authorities will extend to river and lake beds.}

The external effects of mining will therefore be predominantly dealt with by regional councils and territorial authorities. This represents a significant change from the Mining Act 1971, where the external effects of mining were regulated at the same...
time as the internal effects by the Minister of Energy in a "one-stop" licensing process. Under the Resource Management Act 1991 regional councils will oversee air quality, water quality and quantity, waste rock embankments, tailing ponds and other major land clearance operations and the rehabilitation of areas affected by mining. Territorial authorities are responsible for regulating the construction of buildings, road traffic, lighting, the use of hazardous substances, noise and dust control, blasting and vibration.

The Planning Tribunal is charged with overseeing the strategic and operational levels of management. Any person may refer a regional policy statement or plan or district plan to the Tribunal under clause 14 of the First Schedule. Such a reference is treated as an appeal. The Planning Tribunal is also the appeal body for resource consent applications. An appeal to the Planning Tribunal involves a rehearing of the issue. In terms of enforcement, the Resource Management Act 1991 provides for the making of declarations, enforcement orders, abatement notices, excessive noise directions and a range of offences against the Act.

The principal means of implementing strategic level plans and objectives are resource consents and district and regional rules. The role of resource consents and regional and district rules as operational instruments is founded on sections 9 to 17 of the Resource Management Act 1991. These sections also relate the operational instruments back to the local government authority responsible for management of that particular aspect of the environment. They place restrictions on the use of resources and impose duties in relation to discharges, noise and adverse effects. The most important sections are sections 9, 12, 13, 14 and 15. Section 9 prevents any person from using land in a manner that contravenes a rule in a district or regional plan or proposed district or regional plan unless the activity is expressly allowed by a resource consent granted.

421 Sommerville, R.J., supra n. 302, p. 16.
423 s. 120 Resource Management Act 1991.
by the territorial authority responsible for the relevant plan or is an existing use. Sections 12 and 13 place stronger restrictions on use of the coastal marine area and of river and lake beds. Section 13(1) provides that:

"No person may, in relation to the bed of any lake or river—
(a) Use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under or over the bed; or
(b) Excavate, drill, tunnel, or otherwise disturb the bed; or
(c) Introduce or plant any plant (whether exotic or indigenous) in, on, or under the bed; or
(d) Deposit any substance in, on, or under the bed; or
(e) Reclaim or drain the bed—unless expressly allowed by a rule in a regional plan or a resource consent."

In addition, no person may enter or pass across the bed of a river or lake or disturb or remove any plant in the bed of a lake or river in a manner that contravenes a rule in a regional plan or proposed regional plan unless that activity is expressly allowed by a resource consent granted by the relevant territorial authority. Section 12 imposes similar restrictions upon activities in the coastal marine area. Section 14 imposes restrictions that relate to water. Section 14(1) provides that:

"No person may take, use, dam, or divert any—
(a) Water (other than open coastal water); or
(b) Heat or energy from water (other than open coastal water); or
(c) Heat or energy from the material surrounding any geothermal water—unless the taking, use, damming, or diversion is allowed by subsection (3)."

Subsection (3) of section 14 enables any person to take, use, dam, or divert any water, heat or energy if it is expressly allowed by a regional rule or a resource consent; is fresh water required for domestic or stock needs and no adverse effect on the environment will result; is geothermal water that is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua and no adverse effect on the environment will
result; is coastal water required for domestic or recreational needs and no adverse effect on the environment will result; or water is required for fire-fighting purposes.

Section 15 relates to the discharge of contaminants into the environment. It provides that no person may discharge any contaminant or water into water, air or land unless the discharge is expressly allowed by a regional rule, a resource consent or regulation. In addition, no person may discharge any contaminant into the air, or into or onto land in a manner that contravenes a rule in a regional plan or proposed regional plan, unless the discharge is expressly allowed by a resource consent or is an existing lawful activity under section 20.

These sections thus place restrictions upon the use of air, land and water, and restrictions on activities in the coastal marine area and in relation to the beds of rivers or lakes. They also make rules and resource consents crucial instruments in the management of these resources. Regional and district rules are found in regional and district plans, respectively. Their purpose is to assist councils in carrying out their functions under. and achieving. regional and district objectives and policies. Both regional rules and district rules have the force and effect of a regulation and are critical to implementing strategic policies and objectives at the operational level. The object of a rule is to prohibit, regulate or allow activities. They therefore lie at the foundation of the ability of local authorities to achieve the purpose of the Act.

Rules may provide that an activity is permitted, controlled, discretionary, non-complying or prohibited, and regional rules may also provide that an activity is a restricted coastal activity. Each of these terms is defined in section 2(1). The

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428 Fisher, D., supra n. 345, p. 10.
429 Fisher, D., supra n. 345, p. 10.
431 A restricted coastal activity may be so specified only at the direction of the Minister for the Environment.
classification of an activity can be very significant; for example, under section 88 a resource consent application cannot be made for a prohibited activity. In determining whether an activity should be classified as a permitted, controlled, discretionary, non-complying or prohibited activity, the local authority shall have regard to the actual and potential effects on the environment of the activity including, in particular any adverse effects. "Effect" is defined very widely in section 3:

"In this Act, unless the context otherwise requires, the term "effect" ... includes-

(a) Any positive or adverse effect; and
(b) Any temporary or permanent effect; and
(c) Any past, present or future effect; and
(d) Any cumulative effect which arises over time or in combination with other effects-
regardless of the scale, intensity, duration or frequency of the effect and also includes-
(e) Any potential of high probability; and
(f) Any potential of low probability which has a high potential impact."

The classification of the activities associated with mining as either permitted activities, prohibited activities, controlled activities, discretionary activities, non-complying activities, prohibited activities or restricted coastal activities will therefore be crucial. This classification is made with regard to the actual or potential effect of an activity on the environment, particularly any adverse effects of the activity. As a result all activities are treated equally. This means that the environmental significance of mining is measured on the same basis as any other activity.

It is submitted that the effects of prospecting activities will be minor and should be treated as permitted or discretionary activities. Exploration activities have a far wider range of impacts from low impact geophysical surveys to the removal of vegetation and

\[\text{45}^2\] s. 68(3) Resource Management Act 1991.

\[\text{45}^1\] ss. 68 & 76 Resource Management Act 1991.
samples, drilling and excavations. Each separate activity associated with exploration will have to be evaluated in terms of its effect upon the environment. The impact of mining activities are generally of a large scale and may include large excavations, air and water discharges, roading developments and high volume water use. It is likely that they will be seen as discretionary or non-complying activities, or even prohibited or restricted coastal activities.

Resource consents may be granted for any activity which contravenes sections 9, 11, 12, 13, 14 or 15 that is not expressly prohibited by a rule in a regional plan. An application for a resource consent is made to the relevant local authority. It is decided by the "consent authority" which, in most cases, is the relevant local authority. Where the application is in respect of a restricted coastal activity the Minister of Conservation is the consent authority and where the Minister for the Environment has "called in" a resource consent application then he or she is the consent authority. The matters which consent authorities are required to have regard to are set out in section 104(1) of the Act. These matters include the actual and potential effects on the environment of allowing the activity: any relevant national or regional policy instrument; any relevant objectives. policies, rules, or other provisions of a plan or proposed plan; and any relevant district plan or regional plan. Integration of consents with the strategic level management instruments is thus achieved. There is also provision in section 102 for joint hearings and decisions by two or more consent authorities in respect of the same proposal. This allows integration of decisions at the operational level, and simplifies and shortens the process of obtaining multiple resource consents for a single project.

436 s. 117 Resource Management Act 1991. On 1 October 1991 the Minister of Conservation directed that a specified list of activities were restricted coastal activities in accordance with s. 372(1).
437 Under s. 140 Resource Management Act 1991 the Minister for the Environment is able to call in proposals of national significance for his or her decision. To date, only one such "call-in" has been made (discharge permit applications for a gas-fired power station).
Integration of resource consents with the normative policies is also achieved under section 104(1). This section requires consent authorities to consider resource consent applications "subject to Part II." The consideration to be given to the normative principles, as demanded by these words is important. In Environmental Defence Society v Mangonui County Council Cooke P. said

"The qualification "Subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict."

These words were addressed to the question of what weighting to give to sections 4 and 36 of the Town and Country Planning Act 1977 and section 3 of that Act. Both the earlier sections were expressed to be subject to section 3. Section 3 declared that, in the preparation of district schemes, certain matters were declared to be of national importance and should be recognised and provided for. Cooke P. noted that, in considering any particular proposed provision of a district scheme, the question whether "national matters of the categories listed in section 3 can properly be seen as having a significant bearing is partly a question of degree." However, "the general rule made clear by Parliament ... is that in the end matters of national importance must carry greater weight, or primacy than other relevant considerations."

This approach was followed in Reith v Ashburton District Council and Minister of Conservation v Kapiti Coast District Council. In Reith the Planning Tribunal held that, in considering a resource consent application under section 104, the matters in Part II are to be given a measure of primacy. In Minister of Conservation the

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439 at 260.
440 at 261.
442 PT A24/94.
Planning Tribunal referred to Justice Cooke's judgment in Environmental Defence Society. The Tribunal held that the words "subject to" indicate that the provisions referred to were to prevail in the event of a conflict and that the matters referred to were to be given greater weight, or primacy, than other relevant considerations.

A different approach was taken, however, by the Planning Tribunal in Glentanner Park (Mount Cook Limited) v MacKenzie District Council. In that case, the Tribunal saw a difference in judicial opinion between the Reith and Minister of Conservation cases. The Tribunal held that Part II should be used as an aid in construing section 104 in much the same way as the head-note to the Water and Soil Conservation Act 1961 was used as an aid in construction of that Act. The Tribunal relied upon the following words in Minister of Conservation:

"It is possible that by prefacing section 104(1) with the phrase "Subject to Part II", Parliament intended to convey, indirectly, that it was not only the process of having regard to the various matters listed in that section, but also the weighing of them to make the discretionary judgement enabled by section 105(1)(b) and (c), that was to be subject to Part II."

The Tribunal preferred this construction on the basis that it would best achieve the purposes of the Act. The Tribunal held that the exercise of the discretion under section 105(1)(c) must be informed by the statutory purposes declared by section 5 and being a function and a power under the Act is also subject to the duty imposed by section 13. However, in the Minister of Conservation case, the Court was not debating the meaning of the words "subject to" but was exploring whether section 105, which does not have a similar qualification to section 104, could be read subject to Part II. This is clear in the passages immediately preceding the one quoted by the Tribunal:

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44 PT W50/94.
444 Glentanner Park (Mount Cook Limited) v MacKenzie District Council p. 8.
445 at p. 10.
"If one or other of the threshold tests in section 105(2)(b) is met, we have a discretionary judgement under section 105(1)(c) to grant or refuse consent. Unlike section 3(1) (of the former Town and Country Planning Act 1977) that was the subject of the Environmental Defence Society case, and in the Resource Management Act unlike section 104(1), section 105(1) is not expressed to be subject to Part II."[446]

With respect, it is submitted that the Tribunal in the MacKenzie case incorrectly interpreted the decision in the Minister of Conservation. The correct interpretation of the phase "subject to" is that advanced in Reith by the Court of Appeal, in accordance with the judgment in Environmental Defence Society. Accordingly, it is submitted, that the matters in Part II of the Act are to be given greater weight, or primacy than the other matters listed in section 104(1) and are to prevail in the event of a conflict[447]. This interpretation attaches more importance to the normative principles than to the strategic level objectives. In particular, it allows sustainable management to have practical effect at the operational level. The provisions of regional and district plans, however, will still be very important. Sustainable management is a very broad purpose and the more detailed provisions of plans are likely to have a more profound effect on operational decisions.

An important feature of the Resource Management Act is the ability to grant resource consents subject to conditions. The principal source of the power to impose conditions is section 108. This section confers a general power to impose any conditions "that the consent authority considers appropriate under subsection (2)." Subsection (1) specifically authorises conditions requiring financial contributions, bonds, registered covenants, and payment of special administrative charges. There is also power to impose special provisions on discharge consents and subdivision consents. Subsections 108(3)

[446] at p. 10.

and (4) enable the consent authority to impose conditions requiring consent holders to supply information and to monitor their consents. In setting conditions, the consent authority must have regard to the matters listed in section 104, and any special requirements of section 108 or section 220. The consent authority must also ensure that the conditions fairly and reasonably relate to the subject matter of the approval, do not invoke unlawful delegations of discretion and are not unreasonable in the Wednesbury sense.\textsuperscript{448}

The actual and potential effects on the environment of an activity is an important criterion in the consideration of resource consent applications and the setting of conditions for resource consents.\textsuperscript{449} This focus on effects as a criteria for the making of decisions at the operational level is significant for minerals. It means that mining activities will be evaluated on the same basis as other activities. It is the effect of activities on the environment that will be considered, not the nature of the activity. This enables mining, at least in respect of its external effects, to be treated on an integrated basis with other activities.

This focus on external effects is evident in two cases before the Planning Tribunal: Nelson Creek Reserve Board v Grev District Council and West Coast Regional Council\textsuperscript{450} and Peninsula Watchdog Group v Waikato Regional Council.\textsuperscript{451} The first case involved an appeal from a land use consent granted by the West Coast Regional Council to enable a mining partnership to disturb the bed of four creeks in association with mining. The appellants sought better protection for the water quality of a stream flowing through the Nelson Creek Reserve downstream of the proposed mining area. The Planning Tribunal accordingly treated the case as an appeal against the water take consents and discharge consents granted by the West Coast Regional Council. The proposed taking and discharges of water were discretionary activities under the Regional

\textsuperscript{448} Randerson, T., supra n. 370, p. 464.

\textsuperscript{449} Sommerville, R.J., supra n. 302, p. 16.

\textsuperscript{450} PT C99/93.

\textsuperscript{451} PT A52/94.
Plan and were decided under section 104(1) and section 105(1)(b).

Section 105(1) gives councils the discretion to grant or refuse the consent and the power to impose conditions if the consent is granted. In the Tribunal’s view, the only matter of relevance in section 104(1) was paragraph (a): "any actual and potential effect on the environment of allowing the activity." The regional council had imposed conditions detailing required water quality levels upon the original consents. In determining the appeal, the Tribunal noted the precautions to be taken by the applicant to reduce turbidity in the stream and, in particular, the likely effect on water quality in the stream flowing through the reserve. The applicant intended using a system of settling ponds downstream of its workings and diverter boxes to direct stream flows away from the site. In the Tribunal’s opinion, the increase in turbidity levels and suspended solids in the stream would be minor and have no adverse effect upon water quality in the reserve area. Accordingly, the Tribunal disallowed the appeal although it amended some of the consents to identify the creeks to which the specified water quality levels related.

The Peninsula Watchdog case involved an appeal by the Watchdog group against the council’s consent to variations in a discharge consent for treated water from mine tailings. The proposed change of conditions, which related to the concentrations of trace metals and ammonia in the discharged water, was considered under section 104 of the Resource Management Act 1991. The Tribunal found that the proposed change would not have any effect on the receiving environment and would be consistent with Part II of the Act. In particular, the Tribunal held that the changed conditions would recognise and provide for the preservation of the natural character of the Waitekauri River, would be consistent with the maintenance and enhancement of amenity values, intrinsic values of ecosystems, the maintenance and enhancement of the quality of the environment, and the protection of the habitat of trout.

In the Peninsula Watchdog case, the Tribunal was asked to address the meaning of the word 'while' but, following the approach in the New Zealand Rail case, felt that it would be inappropriate to do so. Nevertheless, the Tribunal did venture its opinion
as to how sustainable development would be promoted:

"We have also concluded that the changes to the conditions would be consistent with management of the natural and physical resources involved in a way which would enable the people and community affected to provide for their economic and other well-being and for their health and safety. The changed conditions would sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; would safeguard the life-supporting capacity of the water and ecosystems involved; and would avoid any adverse effects of the discharge on the environment." 452

The Tribunal judged that granting the appeal subject to a revised condition relating to monitoring would serve the statutory purpose. The appeal was therefore disallowed.

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452 at p. 29-30.
CHAPTER 7

THE CROWN MINERALS ACT 1991

1. Introduction

The Crown Minerals Act 1991 is more limited in scope than the Resource Management Act 1991; it applies only to Crown owned minerals. The long title to the Crown Minerals Act 1991 states that it is:

"An Act to restate and reform the law relating to the management of Crown owned minerals."

In this respect the Crown Minerals Act 1991 reserves Crown ownership of certain minerals, provides for the registration of mineral rights on land titles, provides for the transition from the legislative regime which it repeals, establishes a regime for the management and allocation of Crown owned minerals and a regime for obtaining access to Crown owned minerals.

The Resource Management Act 1991 and the Crown Minerals Act 1991 are in a sense complementary. The external issues associated with mineral development, such as environmental effects, are dealt with in the Resource Management Act 1991. It applies to all natural resources, not just Crown owned minerals, regardless of ownership. The Crown Minerals Act 1991, in contrast, deals only with "internal" issues relating to Crown minerals. It principally deals with the allocation of rights to mine Crown


452 The registration system and the transitional provisions of the Act are not discussed in this thesis. Essentially the transitional provisions provide for the division of responsibilities in respect of existing licences between central and local government and for the translation of existing licences into the new regime.

minerals, the recovery of a share of the economic rent from Crown owned minerals and the obtaining of access to Crown owned minerals. The Act does not contain any instruments to deal with the externalities associated with mineral development. Given their origin in the Resource Management Law Reform process and their subsequent treatment by the Review team on the Resource Management Bill\textsuperscript{456} it is submitted that such an interpretative approach, which reads the two Acts as complementary, is appropriate.

Sections 10 to 46 of the Crown Minerals Act 1991 provide for the management and allocation of Crown owned minerals, and for the obtaining of a financial return from them. Sections 47 to 80 of the Act establish a system for obtaining access to Crown owned minerals. These two regimes are dealt with separately in this chapter. At the normative level both these regimes are subject to section 4 of the Act which requires consideration of the Treaty of Waitangi. This normative principle is therefore dealt with first.


Both the management and allocation regime and the land access regime are subject to the obligation in section 4 of the Crown Minerals Act 1991. This section provides:

"All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

Thus, decision makers must have regard to the principles of the Treaty when exercising functions and powers in respect of both allocation and management regime and the land access regime. The nature of the principles of the Treaty of Waitangi has been discussed above in relation to section 8 of the Resource Management Act 1991\textsuperscript{457}. The nature of

\textsuperscript{456} See supra p. 82.

\textsuperscript{457} See supra pp. 95-100.
the obligation the words "to have regard to" impose on decision makers is similar to that imposed by section 8 of the Resource Management Act 1991. Decision makers must give genuine thought and attention to the principles of the Treaty of Waitangi under the Crown Minerals Act 1991, but are nevertheless free to give them whatever weight they consider appropriate. This includes finding that the principles are outweighed by other legitimate considerations\textsuperscript{458}. These comments are based upon the findings of Justice Wylie in \textit{New Zealand Co-operative Dairy Ltd v Commerce Commission}\textsuperscript{459} in the context of section 26(1) of the Commerce Act 1986. This case involved the appeal of a decision of the Commission refusing to authorise a merger proposal. Section 26(1) required the Commission, in deciding whether to approve merger proposals, to have regard to statements of the Government’s economic policies by the Minister of Commerce. Justice Wylie held that the words "to have regard to" required that:

"(The statement) must be given genuine attention and thought, and such weight as the Tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations, which it must take into account in accordance with its statutory function."\textsuperscript{460}

Decision-makers therefore have the ultimate discretion as to what weight to give to the principles of the Treaty\textsuperscript{461}. The conclusions in the \textit{Commerce Commission} case were based on the judgment of the Court of Appeal in \textit{New Zealand Fishing Industry Association Inc. v Minister of Agriculture and Fisheries}\textsuperscript{462} and of the Privy Council in \textit{Ishak v Thowfeek}\textsuperscript{463}.

\textsuperscript{458} \textit{New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries} \textit{[1988]} 1 NZLR 544, 546 (CA).

\textsuperscript{459} \textit{[1992]} 1 NZLR 601.

\textsuperscript{460} at 612.

\textsuperscript{461} \textit{Ishak v Thowfeek} \textit{[1968]} 1 WLR 1718, 1725 (PC).

\textsuperscript{462} \textit{[1988]} 1 NZLR 544.

\textsuperscript{463} \textit{[1968]} 1 WLR 1718.
Maori values are also recognised by other sections of the Crown Minerals Act 1991. The special significance of specific areas of land to Maori is recognised in section 15(2). This section provides that, on the request of an iwi, a minerals programme may provide that defined areas of land of particular importance to its mana are to be excluded from the operation of the programme or not included in any permit. This section is aimed at protecting waahi tapu and other areas of land to which spiritual significance is attached by Maori. Section 17(7) enables requests for information under the Official Information Act 1982 to be refused, if necessary to avoid the disclosure of the location of waahi tapu or serious offence to tikiaangi Maori, provided these considerations outweigh the public interest in making the information available.


The management and allocation regime relies upon two instruments: minerals programmes and mineral permits. Minerals programmes set out policies, procedures and provisions for the management of Crown owned minerals. They operate at both the normative and strategic levels of management. The first minerals programme, The Minerals Programme for Petroleum, was issued by notice on 19 December 1994 with effect from 1 January 1995. Notice has also been given of the preparation of minerals programmes for all metallic minerals, all non-metallic minerals, coal, industrial rocks and building stones, and prescribed substances within the meaning of the Atomic Energy Act 1945. Mineral permits operate at the operational level of management. They are the instruments through which the development of Crown owned minerals is licensed. All prospecting, exploration or mining in respect of Crown owned minerals requires a permit.

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466 Dominion Newspaper (Wellington) 30 November 1991.

467 s. 8 Crown Minerals Act 1991. There are some exceptions to this, see infra p. 137.
a. **Normative Level of Management**

The management and allocation regime established by the Crown Minerals Act 1991 is poorly structured at the normative level. The Act enables normative policies to be stated in minerals programmes and, at the same time, itself specifies normative principles. The purpose of minerals programmes is set out in section 12 of the Act:

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

In preparing minerals programmes the Minister of Energy is to have regard to this purpose\(^{468}\).

Thus, the primary purpose of minerals programmes is to establish policies, procedures and provisions in respect of the management of Crown owned minerals. In particular, these policies, procedures and provisions must provide for the matters in paragraph (a) and (b).

Management is a neutral term; it does not presuppose that minerals should be developed or otherwise. It is defined in *The New Shorter Oxford English Dictionary*\(^{469}\) as:

"The action of managing; the manner of managing; the application of skill or care in the manipulation, use, treatment or control of things or persons or in the


conduct of an enterprise, operation etc.."\(^{470}\)

In *Tainui Maori Trust Board v Attorney-General*\(^{471}\) the President of the Court of Appeal, Justice Cooke, considered the meaning of the word "managing" in section 23(1)(b) of the State-Owned Enterprises Act 1986. That section empowered share-holding Ministers of a State Enterprise to authorise the enterprise to act on behalf of the Crown in managing the assets of the Crown. Justice Cooke noted that manage has a very general meaning. Although management may include sale. Justice Cooke observed that "there is no reason to impose any more limited interpretation on "managing"."\(^{472}\) It is submitted that management is used in section 12 of the Crown Minerals Act 1991 in a similarly broad and general sense. In other words; it involves the administration, care or control of the Crown’s mineral estate.

Paragraphs (a) and (b) of section 12 give more substance to the purpose of minerals programmes. They establish normative principles for minerals programmes and. as such. will have a strong influence on the contents of minerals programmes. Paragraph (a) provides that, in particular. the purpose of minerals programmes is to establish policies, procedures and provisions which provide for the efficient allocation of rights in respect of Crown owned minerals. Paragraph (b) of section 12 provides that. in particular. the purpose of minerals programmes is to establish policies. procedures and provisions which provide for the obtaining by the Crown of a fair financial return from its minerals. Section 22(1) of the Act also establishes efficient allocation and fair financial return as normative principles that apply. in the absence of a minerals programme. This section states:

"... the Minister shall carry out and exercise his or her functions and powers ... in respect of permits and applications for permits-

\(^{470}\) ibid at p. 1682.

\(^{471}\) [1989] 2 NZLR 513 (CA).

\(^{472}\) at 526.
(b) Where there is no relevant minerals programme, having regard to the importance of-

(i) The efficient allocation of rights in respect of Crown owned minerals; and

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

This section does not prevent the Minister from exercising his or her functions and powers in respect of permits and applications for permits in accordance with other, albeit unspecified, normative principles. The obligation imposed by the words "to have regard to the importance of" are not particularly onerous. They do not exclude the consideration of other matters.

The meaning of fair financial return is reasonably clear; it requires the establishment of policies, procedures and provisions which enable the Crown to share in the economic rent from the minerals it owns. This is qualified by the requirement that the financial return that is obtained be fair. The meaning of efficient allocation requires closer attention. The use of the word "efficient" in sections 7(b) and 104(1) of the Resource Management Act 1991 has been considered by the High Court in New Zealand Rail Ltd v Marlborough District Council. In that case, the Court held that the reference to efficiency in these two sections requires the consideration of broad aspects of economics. Section 12(b) of the Crown Minerals Act 1991 is similar in nature to sections 7 and 101 of the Resource Management Act 1991. It is a broad "principle" provision. It is therefore submitted that it should be interpreted in a similarly general manner taking into consideration the broad aspects of economics. According to economic theory, efficiency is achieved when resources are allocated so as to maximise human welfare. However, this principle provides little practical guidance for the allocation of mineral resources. As noted above, the strict assumptions of theoretical

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474 See supra. p. 16; Veljanovski, C., supra n. 62 and Stewart, R.B., & Krier, J.E., supra n. 53.
economics are often relaxed to obtain principles capable of general application. It is therefore said that economic efficiency is achieved when resources are allocated to the person who values them the most. To paraphrase section 12(a) minerals programmes must, in particular, establish policies, procedures and provisions which provide for the allocation of minerals permits to the person who values them the most.

The Crown Minerals Act 1991 also expresses a number of other normative principles. These principles are not explicitly stated but are implied in various sections of the Act. For example, section 43 of the Act provides that the Minister shall withhold approval of a work programme if he or she considers that it is contrary to recognised good exploration and mining practice. Section 36 allows the duration of mining permits to be extended to enable the economic depletion of a deposit. Section 46 enables the Minister to order the unit development of a deposit in order to prevent waste, avoid unnecessary competitive extraction and secure the ultimate recovery of the mineral. These sections express a concern for the optimal extraction of Crown owned minerals. Other sections of the Act are aimed at ensuring the effective collection of information in respect of mineral resources. Section 28 of the Act, for example, prohibits the grant of prospecting permits if the prospecting proposed is unlikely to materially add to the existing knowledge of the mineral in the area.

Thus, section 12 of the Crown Minerals Act 1991 establishes efficient allocation and fair financial return as normative principles for minerals programmes. However, the primary purpose of minerals programmes is to establish polices, procedures and provisions for the management of Crown owned minerals. Efficient allocation and fair financial return are prominent in this purpose but they are not overriding. "Management" is wider than efficient allocation and fair financial return. This is clear in other provisions of the Act. For example, access to Crown land may be prohibited; land of particular importance to the mana of iwi may be excluded from the operation of

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475 See supra, p. 16.

476 Ministry of Commerce, supra n. 189, p. i.

a minerals programme or from any permit; the Minister of Energy may order that petroleum be processed and refined in New Zealand; and the prohibition of prospecting, exploration or mining under other Acts may be recognised in minerals programmes. All these matters are outside the scope of efficient allocation and fair financial return.

Minerals programmes are therefore able to establish policies, procedures and provisions which provide for matters other than those in sections 12(a) and (b). This includes the ability to specify additional normative principles for the management of Crown owned minerals. Indeed section 21 directs the Minister, in preparing a minerals programme, only to have regard to the purpose of a minerals programme. Similarly, the Minister is able to apply other normative policies in addition to those specified in section 22(1)(b) due to the breadth of the discretion in that section. In this respect, the Crown Minerals Act 1991 does not indicate whether the instruments in the Act should be used to facilitate the development of Crown owned minerals or otherwise. In fact, the Act is neutral as to whether or not Crown minerals should be developed. This function is left to minerals programmes. The principles in sections 12(a) and (b) become relevant after this decision is made.

To some extent, therefore, mineral programmes appear almost to be legislation "after the fact". They establish normative policies for the management of minerals which will determine the application of many sections of the Crown Minerals Act 1991, particularly the normative principles in sections 12 and 22. If the mineral or minerals to which a minerals programme applies are to be developed, the minerals programmes must then, in particular, provide for the efficient allocation of Crown owned minerals and the obtaining of a fair financial return from these minerals.


Thus, normative principles for the management and allocation of Crown owned minerals are specified in the Crown Minerals Act 1991 and may also be specified in minerals programmes. As a result, there is considerable potential for fragmentation at the normative level. It is possible for minerals programmes to specify different normative policies for different minerals. While the flexibility that this provides may be useful in responding to different physical, economic and political conditions for different minerals it may cause confusion. There may be considerable inconsistency and uncertainty as to the application of many provisions of the Act. It has the potential to cause fragmentation and contradiction in the management of Crown owned minerals at the strategic and operational levels. Further, the coherency of the allocation and management regime depends on the manner in which, and the extent to which, minerals programmes integrate the normative principles established by the Act with the normative principles which they themselves establish. In this respect the Minerals Programme for Petroleum establishes as its fundamental policy objective;

"To allow continuing investment in petroleum prospecting, exploration and mining which is in accordance with good exploration and mining practice, always provided that-

. There is efficient allocation of petroleum prospecting, exploration and mining permits;
. The Crown obtains a fair financial return from the extraction of petroleum by a permit holder under a permit; and
. There is due regard to the principles of the Treaty of Waitangi."

This policy objective displays a high degree of integration. It establishes a primary policy goal for the management of petroleum; namely to allow continuing investment in petroleum prospecting, exploration and mining. At the same time, the management of minerals must give effect to the normative policies established by the Act.

\[481\] at p. 5.
b. **Strategic Level of Management**

The strategic level of management in the Crown Minerals Act 1991 is much more straightforward than the normative level. In terms of management responsibilities, the Act assigns responsibility for the management of Crown owned minerals to the Minister of Energy. Section 4 of the Act makes the Minister responsible for the preparation of minerals programmes, the grant of minerals permits, and the monitoring of the effect and implementation of programmes and permits. At the operational level these functions are supported by a wide range of more specific responsibilities. Most of the Minister's functions can be delegated to the Secretary of Commerce.\(^{482}\)

In terms of "macro-planning" the Crown Minerals Act 1991 establishes minerals programmes as the sole planning instrument for the management of Crown owned minerals. Minerals Programmes establish management, allocation and rent recovery regimes for specific minerals. Minerals Programmes must be prepared for all minerals which are or, in the opinion of the Minister of Energy, are likely to be the subject of an application for a permit.\(^{483}\) They may apply to more than one mineral but there may not be more than one programme for each miner.\(^{484}\) The process for the preparation of minerals programmes includes the release of draft programmes and the making of public submissions.\(^{485}\) They are issued by the Governor-General, by Order in Council, on the recommendation of the Minister of Energy.\(^{486}\) Minerals programmes therefore have the same status as regulations. Once issued, changes may be made to minerals programmes.

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\(^{482}\) s. 5(1) Crown Minerals Act 1991. The making of decisions on submissions on a draft minerals programme under s. 17, the recommendation of a minerals programme to the Governor-General and the power of delegation cannot be delegated.


extraction of its petroleum and should benefit in any substantial profits arising from a petroleum development.\(^{489}\)

Procedures provide the detail of how these policies and objectives will be achieved. In particular, they set out the procedure for obtaining permits. Thus, the Minerals Programme for Petroleum sets out procedures for the allocation of prospecting, exploration and mining permits. These procedures give effect to the strategic level objectives. Prospecting permits are to be granted in limited circumstances only and do not carry a right to a subsequent permit. The basic form of allocation for petroleum exploration permits is "Staged Work Programme Bidding". This is a competitive allocation process whereby permits are offered for tender and allocated to the bidder who submits the best and most appropriate programme of proposed exploration work.\(^{490}\) In some circumstances, exploration permits will be offered for tender by "Cash Bonus Bidding". This is also a competitive form of allocation whereby permits are granted to the applicant who submits the highest cash bid for a permit.\(^{491}\) In addition to this payment, the Crown reserves the right to charge a royalty on any petroleum produced. Exploration permits may also be allocated by "Acceptable Frontier Offer". This is a priority in time or first past the post system. It is available only over areas which are considered frontier and is subject to minimum work programme criteria. Mining permits are principally allocated subsequent to an exploration permit under which a discovery has been made. There is provision, in limited circumstances, for priority in time allocation of mining permits.

Provisions are more difficult to describe, they "provide for" or describe how something will be achieved. As such, they may be used to provide for the obtaining of a financial return from Crown owned minerals. Thus, the Minerals Programme for Petroleum establishes a "hybrid" regime which consists of an ad valorem royalty and an accounting profits royalty is established. The highest of these two are paid in any one

\(^{489}\) pp. 5-6.

\(^{490}\) Ministry of Commerce, supra n. 189, p. 15.

\(^{491}\) Ministry of Commerce, supra n. 189, p. 12-13.
year. The ad valorem component of the royalty is charged on 5% of the value of production from a mining permit and, in some cases, an exploration permit. The accounting profits component of the royalty is charged on 20% of the accounting profits from a mining permit. These are implemented through permit conditions.\(^{492}\)

In addition to providing for the establishment of strategic level objectives and policies in minerals programmes, the Crown Minerals Act 1991, as at the normative level, establishes its own strategic level objectives. In several instances the Act even establishes exclusive criteria for the exercise of the Minister’s discretions in respect of permits. For example, section 32 of the Act specifies exclusive criteria for the grant of subsequent exploration and mining permits, and sections 43 and 44 establish a procedure for the approval of work programmes. The only discretion allowed to the Minister by the Act, in relation to applications for subsequent permits, is in respect of the area and duration of permits and the approval of work programmes.\(^{493}\) The discretion of the Minister in relation to the grant of exploration permits is even more limited. Section 37 of the Act sets out exclusive criteria for the consideration of applications for extensions of duration of exploration permits.\(^{494}\) Where these criteria are met the Minister must grant an extension to the permit.

Most of the sections of the Act which set out criteria for decisions of the Minister in relation to permits are not so restrictive. They do allow the Minister a discretion to consider other matters including the policies, procedures and provisions of minerals programmes. For example, section 36 of the Act establishes a non-exclusive set of

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\(^{492}\) s. 34 of the Crown Minerals Act 1991 provides:
"The Minister may-
(a) Require, in return for any permit granted under this Part, the payment of money to the Crown:
(b) Include in any permit granted under this Part a condition requiring payments to the Crown by the permit holder for-
   (i) The rights given by the permit and this Part; and
   (ii) Any minerals obtained by the permit holder under the permit."


\(^{494}\) This section applies to extensions to duration of exploration permits in addition to s. 36, which is more general in its application: see infra p. 115.
criteria for the consideration of applications for changes to permits. Nevertheless, these sections do establish strategic level objectives and policies for the management of minerals. Thus, under section 36(2) the Minister must have regard to whether or not an extension to the minerals or land to which a permit relates will facilitate a more rational carrying out of activities under the permit.

There is no formal requirement in the Crown Minerals Act 1991 to integrate these strategic level objectives and policies into minerals programmes. The only restriction which applies in this regard is the doctrine of ultra vires. This doctrine has a varied effect depending on the breadth of the discretion allowed to the Minister by each section of the Act. The sections which set out exclusive criteria for the exercise of some of the Minister’s discretions preclude minerals programmes from expressing strategic level policies in respect of these areas. These sections therefore complicate the position of minerals programmes as macro-planning instruments. The provisions of the Crown Minerals Act 1991 are to prevail in the event of a conflict. Where minerals programmes do specify procedures and provisions which apply to these discretions, these procedures and provisions may be null and void to the extent to which they conflict with or attempt to replace the provisions of the Act.

The other more permissive sections of the Act enable minerals programmes to specify a wide range of strategic objectives and policies. Thus, the Minerals Programme for Petroleum sets out a long list of criteria for the consideration of applications to change work programme conditions, including those established by the Act\textsuperscript{495}. The Minerals Programme for Petroleum takes a similar approach to the incorporation of the strategic level policies established by the Act into its own policy framework. Thus, petroleum prospecting, exploration and mining should be in accordance with good exploration and mining\textsuperscript{496}. In the same vein, the work programme for a prospecting or exploration permit should have the objective of assessing the petroleum resource potential of the permit area. The objective of a mining permit work programme should

\textsuperscript{495} Minerals Programme for Petroleum, pp. 35, 50.

\textsuperscript{496} p. 5.
be to achieve sound management of the petroleum resource through good mining practice.

Nevertheless, the doctrine of ultra vires requires that, where minerals programmes specify criteria in respect of the functions and powers of the Minister under the Act, these criteria must be intra vires the policy and objects of the empowering Act. The policy and objects of the Crown Minerals Act 1991, however, are very vague. It is aimed at establishing a regime for the management of Crown owned minerals. It does not specify how they should be managed. The only normative principles clearly established by the Act are those in section 12; the obtaining of a fair financial return and the efficient allocation of permits. However, the direction in sections 21 and 22 to have regard to these principles is reasonably weak and these principles are, in any case, subject to the normative principles established in minerals programmes. Further, most of the provisions of the Act which apply to the Minister’s discretions in respect of permits and thereby establish strategic level objectives are permissive. Therefore, the doctrine of ultra vires does not provide a sufficient restriction to ensure integration of the strategic level policies and objectives in the Crown Minerals Act 1991 with those which may be specified in minerals programmes.

As a result, it is possible that minerals programmes may specify strategic policies at odds with those in the Act. It is even possible for minerals programmes to specify that some of the powers of the Minister under the Act will not be exercised, provided the relevant section of the Act allows. This can be illustrated in relation to section 25(2) of the Act. This section allows the Minister to specify, as a condition of the permit the terms on which the Minister, or any other person acting on behalf of the Crown, shall be entitled to participate in prospecting, exploration, or mining under the permit or any subsequent permit. In the regime which existed under the Petroleum Act 1937 this was one of the means by which the Crown obtained a financial return. However, the Minerals Programme for Petroleum provides for a financial return to be obtained through Cash Bonus Bidding or the payment of a royalty. The Minerals Programme for Petroleum therefore provides that the Minister will not exercise this power in respect of petroleum. It is submitted that this provision is valid. The Minister has a sufficiently
wide discretion under section 25(2) to enable minerals programmes to make such provision.

The requirement to integrate minerals programmes with strategic level plans or policies outside the Crown Minerals Act 1991 is even more limited. In addition to requiring the Minister of Energy to have regard to the purpose of minerals programmes in preparing a minerals programmes, section 21 of the Crown Minerals Act 1991 requires consideration of the prohibition of a right of access to Crown land under section 62 and the prohibition of prospecting or exploring for or mining of Crown owned minerals under any other Act. Thus, the Minerals Programme for Petroleum recognises the prohibition in respect of petroleum mining operations imposed by the Sugar Loaf Islands Marine Protected Area Act 1991. Beyond this, however, there is no requirement to recognise matters outside of the Crown Minerals Act 1991.

On the other hand, section 21 of the Act does give the Minister a wide discretion as to what should be provided for in a minerals programme. Provided that the matters listed in section 21 are given due consideration, the Minister may consider other matters which he or she considers relevant. It is therefore possible that minerals programmes could recognise and seek to integrate the policies and provisions of policy statements and plans prepared under the Resource Management Act 1991. However, the Act does not impose any obligation on the Minister to do so, or even consider the need for such integration. Such a measure will depend entirely upon the will of the Minister.

The Minerals Programme for Petroleum therefore does provide for the integration of the strategic policies and objectives of the Act into its own provisions. However, this structure is not ideal. It overly relies on the discretion of the Minister as to what to include in minerals programmes. The failure of the Act to formally provide for the

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498 p. 12.

499 See supra, p. 124.
integration of its own strategic level objectives and criteria into minerals programmes, at the normative level, has the potential to create uncertainty and confusion as to the application of minerals programmes. Thus, rather than providing for integration, the ability to establish strategic level objectives and policies in minerals programmes and the enumeration in the Act of a number of strategic objectives and policies has the potential to create dissonance and contradiction at the strategic level. In turn this may lead to a lack of integration at the operational level. Minerals programmes will therefore need to be designed carefully to ensure the integration of strategic level policies and objectives specified in the Act.

c. Operational Level of Management

Management of Crown owned minerals at the operational level is achieved through minerals permits. Permits provide the means of licensing the development of Crown owned minerals, transferring ownership of minerals upon production, recovering economic rent and regulating some aspects of the development process. Such a licensing system is common overseas and was utilised in the mining legislation which preceded the Crown Minerals Act 1991.

The Crown Minerals Act 1991 establishes a three tiered structure of minerals permits. Section 32 of the Act provides permit holders with the right to progress to the next stage permit, subject to meeting certain criteria and submitting an acceptable work programme. Permits may also be applied for at any time, without the need to progress through the structure established by the Act. The first stage is a prospecting permit, which gives the holder the right to prospect for the mineral. They may be granted

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500 Licensing systems are in place in Australia, in the USA for offshore petroleum, and in England for petroleum.


for a duration of up to 2 years from their commencement date\textsuperscript{504}. Prospecting involves an initial evaluation of a mineral resource over a wide generalised area\textsuperscript{505}. The aim at this stage is to identify any smaller areas which may warrant closer investigation. Prospecting permits may be granted in respect of both Crown owned and privately owned minerals.

Closer investigation of mineral deposits is undertaken at the exploration stage, for which an exploration permit is required. An exploration permit gives the holder the right to both prospect and explore for the mineral. They may be granted for a duration of up to 5 years\textsuperscript{506}. The aim at this stage is to identify the scale and composition of a mineral deposit, and assess the commercial viability of the deposit\textsuperscript{507}. To progress from a prospecting permit to an exploration permit, the permit holder must show that the results of the prospecting justifies the granting of an exploration permit\textsuperscript{508}.

Should a deposit prove viable the mineral is extracted at the mining stage, for which a mining permit is required\textsuperscript{509}. A mining permit carries the same rights as prospecting and exploration permits, and the right to mine the mineral. They may be granted for a duration of up to 40 years. However, it appears to be common practice to grant mining permits for shorter terms as appropriate to the work proposed to be undertaken\textsuperscript{510}. Exploration and mining permits may be granted only for Crown owned minerals. To progress from an exploration permit to a mining permit the permit holder must show that a deposit or occurrence of a mineral to which the exploration permit

\textsuperscript{504} s. 35 Crown Minerals Act 1991.

\textsuperscript{505} s. 2(1) Crown Minerals Act 1991.

\textsuperscript{506} s. 35 Crown Minerals Act 1991.

\textsuperscript{507} s. 2(1) Crown Minerals Act 1991.

\textsuperscript{508} s. 32(1) Crown Minerals Act 1991.

\textsuperscript{509} s. 2(1) Crown Minerals Act 1991.

\textsuperscript{510} See Ministry of Commerce, supra n. 189, p. 7 and Minerals Programme for Petroleum.
relates has been found as a result of exploration activities\(^{511}\).

The central role of permits in regulating the development of Crown owned minerals is established by section 8(1) of the Act. This section provides:

"No person may prospect or explore for, or mine, Crown owned minerals in land unless that person-
(a) Is the holder of a permit granted under this Act which authorises the holder to do so, or is authorised to do so by the holder of such a permit in accordance with the permit, or is otherwise authorised to do so under this Act; and
(b) Complies with sections 49, 50, 51, 53 and 54\(^{512}\)."

The "other authorisations" referred to in section 8 include section 49(1) which enables any person employed by the Crown and authorised either specially or generally for that purpose, and any person authorised specially in writing by the Minister for that purpose to enter onto any land during the daytime and carry out a minimum impact activity. Presumably, this section is intended to authorise general research activities undertaken by government bodies such as the Crown Research Institutes and other organisations and individuals. For, the most part however, all prospecting, exploration or mining of Crown owned minerals requires a minerals permit\(^{513}\).

Section 25 of the Act gives the Minister of Energy an apparently wide discretion to grant permits and set conditions on permits. It states:

"... the Minister may grant to any person a permit in respect of any specified minerals and land, on such conditions as the Minister thinks fit."


\(^{512}\) These sections relate to the requirement to obtain an access arrangement. See infra, pp. 141-146.

\(^{513}\) Sections 8(2) and (3) of the Crown Minerals Act 1991 establish three limited exceptions to this requirement.
The Minister’s discretion under this section, however, is subject to a number of restrictions imposed by other sections of the Act. Mandatory considerations are imposed on section 25 by sections 4, 22(1) and 27 of the Crown Minerals Act 1991. Section 4 has already been discussed; it requires decision makers to have regard to the principles of the Treaty of Waitangi. Section 27 provides that the Minister may grant a permit only where he or she is satisfied that the applicant will comply with the conditions of, and give proper effect to, the permit.

The most significant constraint upon the Minister’s power is contained in section 22(1). This section gives affect to minerals programmes and provides for the integration of normative principles and strategic plans and objectives into the operational level of management. It states that:

"... the Minister shall carry out and exercise his or her functions and powers under this Part in respect of permits and applications for permits-
(a) In a manner that is consistent with the policies, procedures, and provisions in any relevant minerals programme...
(b) Where there is no relevant minerals programme, having regard to the importance of-
   (i) The efficient allocation of rights in respect of Crown owned minerals; and
   (ii) The Crown obtaining a fair financial return from its minerals."

Thus, in granting minerals permits the Minister is required do so consistent with the normative and strategic policies, objectives and plans expressed in minerals programmes and, in the absence of minerals programmes, with regard to the importance of efficient allocation and a fair financial return.

The content of the duty to act in a manner that is consistent with the policies, procedures and provisions of minerals programmes is therefore very important. In New
Zealand Maori Council\textsuperscript{514} Casey J noted that the words "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi"\textsuperscript{515} in section 9 of the State-Owned Enterprises Act 1986 were strong and unambiguous. His Honour agreed with the submissions of the applicant that it applied to every power of the Crown under the State-Owned Enterprises Act 1986, and that it restricts their use only to those actions which can be affected without inconsistency. The obligations of the Minister under section 22(1) are similar, although that section is framed in positive terms. The Minister, in granting permits and carrying out other functions in respect of permits, must act in a manner that is consistent with the provisions of the applicable minerals programme. This is an onerous obligation. Moreover, the greater detail to which Minerals Programmes specify policies, procedures and provisions the greater their impact upon the exercise of the Minister's discretions in respect of minerals permits will be. In this respect, the Minerals Programme for Petroleum sets out in great detail procedures and provisions relating to the grant of permits and the setting of conditions on permits. It is anticipated that this programme will prove to be a significant restraint on the powers of the Minister.

The Crown Minerals Act 1991 thus enables a high degree of integration between the strategic and operational levels of management. Furthermore, section 22 applies not only to the Minister's discretion to grant permits and set conditions on permits but to all of the Minister's other discretions in respect of permits under Part I of the Act. It therefore allows the integration of normative and strategic policies and objectives into many aspects of the administration of permits. This includes the making of changes to permits; the ongoing monitoring of permits; the revocation, surrender and transfer of permits; the power of the Minister to require a survey; the approval of work programmes; and the power of the Minister to direct that petroleum be refined and processed in New Zealand and to direct the unit development of permits. The ability to integrate the policies, procedures and provisions of minerals programmes into operational decisions, however, is complicated by the provisions of the Act which set out their own

\textsuperscript{514} Supra n. 200 at 701.

\textsuperscript{515} s. 9 State-Owned Enterprises Act 1987.
criteria for the making of decisions.\textsuperscript{516} The Crown Minerals Act 1991 also makes some provision, in an indirect way, for the integration of other operational level instruments with the permit allocation process. This could include resource consent applications under the Resource Management Act 1991 and land access arrangements under the Crown Minerals Act 1991. Section 27(1) of the Act provides that:

"The Minister may grant a permit under this Part only where the Minister is satisfied that the applicant will comply with the conditions of, and give proper effect to, the permit."

It is submitted that "proper", as used in this section, means being able to give effect to the permit for its purpose, namely prospecting, exploration or mining, and also means proper legal effect. The Minister must be satisfied that the applicant has the physical means, ability and intention to give effect to the permit and will do so in compliance with all legal requirements. This enables the Minister to consider the likelihood of the applicant obtaining any necessary resource consents and land access arrangements. If the Minister believes that the applicant will be unable to obtain a resource consent, or, more likely, an access arrangement, the Minister may be entitled to refuse a permit under section 27.

Enforcement of minerals permits, the provisions of the Act and the provisions of minerals programmes is achieved through permit conditions, the use of bonds or monetary deposits and the use of statutory offences. Conditions are used to impose work programme requirements on permit holders\textsuperscript{517} and obtain a financial return\textsuperscript{518}. Bonds and monetary deposits are imposed under section 27(2) of the Act. Their purpose is as security for compliance with the provisions of the Act and with the conditions of the

\textsuperscript{516} See supra, pp. 131-133.

\textsuperscript{517} See Minerals Programme for Petroleum.

\textsuperscript{518} s. 34 Crown Minerals Act 1991.
permit. This deposit or bond, if called upon, may be applied against any outstanding debts of the permit holder\textsuperscript{519}. On the termination or transfer of the permit, the deposit or bond may be similarly applied against outstanding debts, if the permit holder has not substantially complied with the permit. It should be noted, however, that these sections do not allow the application of bonds for non-compliance with conditions. Instead, non-compliance with permit conditions is an offence for which a penalty can be imposed\textsuperscript{520}. Section 100 of the Act also makes it an offence to mine illegally or enter onto land without an access arrangement, other than for minimum impact activities.

4. The Access Regime for Crown owned Minerals

The land access regime established by the Crown Minerals Act 1991 is not easily divided into normative, strategic and operational levels. It is not really amenable to this kind of analysis. The Act does not express a clear normative policy in respect of access to land. Instead, it merely establishes access arrangements as the key instrument for determining access to land. From these provisions it is possible to discern an underlying normative policy. In general, the Act places more emphasis on the rights of landowners and occupiers than the previous legislation. However, it still favours mining as a predominant land use.

The Act relies upon access arrangements entered into between the land owner and occupier and the permit holder\textsuperscript{521}. These are required for any prospecting, exploration or mining other than minimum impact activities\textsuperscript{522}. The Crown Minerals Act 1991, therefore, enables the land owner and occupier to weigh up the value of different land uses. Access to land is made a matter of private law or contract that, for the most part

\textsuperscript{519} s. 97 Crown Minerals Act 1991.

\textsuperscript{520} s. 100 Crown Minerals Act 1991.


\textsuperscript{522} "Minimum impact activity" is defined in s. 2(1) of the Crown Minerals Act 1991. Essentially, it covers activities where the impacts on land and the environment are of minimum scale.
does not involve the state. The Act does not provide any rights of access for privately owned minerals; the mineral owner has to negotiate directly with the land owner and occupier.

An access arrangement is also required for Crown owned land. This is entered into by the Minister responsible for administering the land. This requirement is similar to provisions of the Mining Act 1971 and the Coal Mines Act 1979 which required consent of the appropriate Minister to the grant of a licence, and of the Petroleum Act 1937, which required consent of the appropriate Minister for entry onto land, in respect of certain Crown lands. The criteria which the Minister must have regard to in considering whether to enter into an access arrangement are set out in section 61(2) of the Crown Minerals Act 1991. These criteria include the objectives of any Act under which the land is administered. In addition, the Minister may have to consider the policy objectives of the Crown Minerals Act 1991. This submission is based on the decision in Spectrum Resources Ltd v Clark. In that case, Justice Heron held that the Minister of Conservation was required to have positive regard to the policy of the Mining Act 1971, in considering whether to consent to the grant of a licence, apart from the considerations imported by the Conservation Act 1987. This was because the Minister’s power of consent was left in the Mining Act 1971. Accordingly, in considering whether to grant consent in respect of the grant of a licence the Minister could not ignore the purpose of the Act.

In addition, the Minister responsible for administering the land and the Minister of Energy may recommend to the Governor-General that he or she prohibit access to specific Crown land. The only similar provision to this section in earlier legislation

524 s. 26 Mining Act 1971, s. 29(1) Petroleum Act 1937, s. 21 Coal Mines Act 1979. The later provision relates to whether land is available for coal mining and is not strictly a consent to access.
525 (unreported, CP No. 84/88, 30/8/88, Wellington).
was section 24 of the Mining Act 1971 which allowed the Minister to exempt Crown land from mining.

If an access arrangement is not determined between the land owner and occupier and the permit holder in respect of a permit for petroleum the permit holder may apply to have an arbitrator appointed. The arbitrator must determine an access arrangement giving access to the permit holder "on reasonable grounds" and providing compensation to each owner or occupier. The automatic appointment of an arbitrator, and the requirement that the arbitrator determine an access arrangement reflects the value placed on petroleum as an economically important resource. The terms of compensation provided by the Crown Minerals Act 1991, however, are far more generous than in earlier legislation. Land owners and occupiers are entitled to compensation for injurious affection and all other loss or damage suffered including the costs and expenses in negotiating and determining an access arrangement, loss of income, loss of privacy and amenities and reimbursement for all costs incurred in complying with, and monitoring the access arrangement. An access arrangement cannot be determined by an arbitrator, without the consent of each owner and occupier, for, inter alia, land under crop; land within 30 metres of any building, yard, garden, horticultural plantation, or indigenous forest; and land of 4.05 hectares area or less.

In respect of Crown owned minerals other than petroleum and for other than minimum impact activities, the land owner or occupier has almost complete freedom to enter into an access arrangement with the permit holder as he or she sees fit. This is qualified only by the power of the Governor-General to declare, on the grounds of the

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public interest, that an access arrangement should be determined by an arbitrator\textsuperscript{532}. The term "public interest" may be akin to the term "national interest" used in s. 37(5) of the Mining Act 1971. In \textit{Stewart v Grey County Council}\textsuperscript{533} the High Court held that ultimately it is the Minister who will determine whether it is in the national interest to declare land open for mining\textsuperscript{534}. It is submitted that it will be difficult to establish that a mining proposal in respect of non-petroleum minerals, which is typically only of regional significance, is in the public interest if the land owner or occupier has refused to enter into an access arrangement. In effect, therefore, land owners and occupiers are given an absolute right to refuse access to miners for all minerals other than petroleum.

Thus, the access provisions in the Crown Minerals Act 1991, in respect of non-petroleum minerals and any activity other than a minimum impact activity, give land owners and occupiers considerably more power to determine whether mining should proceed or whether another land use would be more desirable than the earlier legislation. The nature of this balancing exercise was discussed by the Planning Tribunal in \textit{Re Placer Gold}\textsuperscript{535}. Although this case involved a mining licence granted under the Mining Act 1971 and the Planning Tribunal were weighing up whether mining should proceed in accordance with the provisions of the 1971 Act, the Tribunal made a number of observations on the Crown Minerals Act 1991. In \textit{Re Placer Gold} mining was proposed on high quality farmland. The Tribunal compared the productivity of this farmland with the likely yield of gold from the land and the long time period it would take to restore the land to full productivity. It recommended that mining should not occur. The Tribunal also attached considerable importance to the lack of landowner's consent to the proposed mining, observing that if the Crown Minerals Act 1991 did apply the applicant would not have been able to obtain access to the land.

\textsuperscript{532} s. 66 Crown Minerals Act 1991.
\textsuperscript{533} [1978] 2 NZLR 577.
\textsuperscript{534} at 581.
\textsuperscript{535} PT C96/93.
The power that these access provisions give to land owners and occupiers has been sharply criticised. It has been claimed that the land access framework in the Crown Minerals Act 1991 will increase the costs of mining. In particular, it is claimed that the Crown Minerals Act 1991 will enable landowners to veto mining for non-petroleum minerals\textsuperscript{536}. Although the Minister is able to order an arbitrator to determine an access arrangement under section 66, it is unlikely that this power will be exercised for most permit holders. For non-petroleum minerals, therefore, land owners and occupiers do in effect have a veto over access to land. This may increase uncertainty as to whether a permit can be used and it does give land owners and occupiers the opportunity to appropriate some of the economic rent for the minerals underlying the ground. It is also possible that the access regime relating to petroleum will increase the costs to permit holders of obtaining access to land, thereby reducing their share of the economic rent.

The access provisions will also have a big impact upon obtaining access to Crown owned land. Between 30\% and 35\% of the land in New Zealand is reserved for conservation purposes\textsuperscript{537}. This land is administered by the Department of Conservation under the Conservation Act 1987. Under section 61 of the Crown Minerals Act 1991 the Minister of Conservation must consider whether to enter into an access arrangement in respect of such land having regard to, inter alia, the objectives of any Act under which the land is administered and the purpose for which the land is held by the Crown. Thus, the Minister must have regard to the purpose of conservation in deciding whether to enter into an access arrangement. It has been claimed that this imposes a barrier to mineral development and a significant decline in exploration on Conservation land has been noted\textsuperscript{538}.

\textsuperscript{536} ACIL, supra n. 252.
Ministry of Commerce, supra n. 189, p. 8.

\textsuperscript{537} ACIL, n. 252, p. 2.12.

\textsuperscript{538} ACIL, supra n. 252, p. 2.12.
While these criticisms are valid it is submitted that the greater emphasis placed on the rights of land owners and occupiers by the access provisions of the Crown Minerals Act 1991 are justified. This change in emphasis is a conscious decision that was made during the Resource Management Law Reform to place more emphasis on the rights of land owners. It is a direct result of placing mining on a more equal footing with other land uses. Access to land for mining, and the compensation to be paid to the land owner and occupier, is largely left to the landowner and the permit holder to determine. It is no longer seen as the concern of government.

The Act, however, does not place the rights of land owners and occupiers and mineral owners on an equal footing. It provides for the mandatory arbitration of access arrangements for petroleum. For non-petroleum minerals, where the permit holder and the owner and occupier have been unable to agree on an access arrangement, the Minister of Energy may direct that an access arrangement should be determined. In addition, permit holders who are undertaking minimum impact activities are able to enter onto land without an access arrangement. The automatic reference to arbitration in the later case, and the authorisation to enter onto land for minimum impact activities preserves preferential treatment for mining operations. In some respects, therefore, the access provisions of the Crown Minerals Act 1991 demonstrate a clear preference for mining as a land use.

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539 Ministry for the Environment, supra n. 1, p. 42.
CHAPTER 8


1. Comprehensive and Integrated Resource Management

The Crown Minerals Act 1991 and the Resource Management Act 1991 were enacted following the Resource Management Law Reform process, the object of which was to integrate the laws relating to resource management and to establish a resource management system that promotes sustainable management of natural and physical resources.\(^{540}\) Comprehensive and integrated decision making enables efficient and rational decisions to be made that account for the interrelatedness of environmental resources. It is required by the very scope of the environment itself. It also enables efficient and rational decision-making.

Comprehensiveness and integration are not absolute concepts. They do not demand incorporation of policy or legislation into an indivisible whole. Instead, the aim of comprehensive and integrated resource management in a rational way to formulate and implement goals, principles, and guidelines with respect to the ecological and social dimensions of the environment. This thesis explores the extent to which the Resource Management Act 1991 and the Crown Minerals Act 1991 give effect to this goal.

Law, and particularly legislation, is a very effective means of giving effect to comprehensive and integrated resource management. Legislation must operate on three levels if it is to achieve comprehensive and integrated resource management. These three levels are the normative, strategic and operational levels. If legislation is to be

effective in managing environmental resources it must seek to integrate normative objectives, strategic plans and operational policies. A legislative framework can be very effective in formulating and enforcing clear statements of normative objectives and policies and ensuring a structure for effective strategic and operational implementation of such objectives and policies.

2. Comprehensiveness and Integration at the Normative Level of Management

The normative level of management involves the consideration of the value premises and priorities underlying resource management systems and decision-making processes; the definition of desired goals and ideals; and the setting of higher level objectives and policies for natural resource use and management. This is the level at which the guiding principles and priorities for resource management are set. It involves the formulation and articulation of norms or higher level values consonant with the environment. Comprehensive resource management requires consideration of the economic, ecological and social spheres and the incorporation of a wide range of values into resource management decision making.

a. Ownership of Minerals

One of the most important functions of law at the normative level is to establish the ownership structure for natural resources. This has major implications for the nature of the resource management system. In this respect, the Crown Minerals Act 1991 reserves Crown ownership of gold, silver, petroleum, uranium and all minerals in any alienation of land from the Crown. At the same time, a significant number of minerals remain in private ownership. The management regime for minerals must therefore deal with both Crown ownership and private ownership of minerals. The approach taken by the Crown Minerals Act 1991 and the Resource Management Act 1991 is to deal with the internal issues related to Crown owned minerals separately from the external effects of mining for both Crown owned and privately owned minerals. Thus, the Crown Minerals Act 1991 establishes a regime for obtaining access to Crown owned minerals, thereby resolving conflicts between land owners and permit holder, and a regime for the
management and allocation of Crown owned minerals. Decisions in respect of the development of privately owned minerals are left to the mineral owner. The Resource Management Act 1991 establishes a regime for regulating the environmental effects of mining. This separation of functions creates considerable potential for fragmentation, overlap, redundancy and a lack of coordination at the strategic and operational levels. Particular care is therefore required at these levels to ensure the integration of resource management policies.

b. Sustainable Development

Sustainable development is an integrating concept. It is comprehensive in scope and provides a framework for the integration of environmental policies and development strategies. It requires consideration of the ecological, social and economic dimensions. Sustainable development is particularly concerned with the needs of future generations. It provides a means of dealing with the complicated and interrelated nature of the environment in a rational way. Sustainable development of mineral resources requires that they should not be used at a rate which exceeds the capacity to find new deposits, acceptable substitutes or to recycle.

At the normative level the legislative regime established by the Resource Management Act 1991 and the Crown Minerals Act 1991 for the management of minerals fails to give effect to the principle of sustainable development. Instead, the Resource Management Act 1991 gives effect to sustainable management as its central purpose. Sustainable management is very similar to the principle of sustainable development, especially if the word "while" in the definition of sustainable management is interpreted as a subordinating conjunction. The Act represents a significant step towards the implementation of sustainable development as a normative principle for resource management. However, it fails to implement all the elements of sustainable development.

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Moreover, the definition of sustainable management in section 5 of the Resource Management Act 1991 fails altogether to give effect to the principle of sustainable development in respect of minerals. Section 5(2)(a) of the Act excludes minerals from the principle of sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations. Minerals are therefore excluded from the principal concern of the concept of sustainable development; the needs of future generations.

As a result it seems unlikely that the internal effects of mining can be considered under the Resource Management Act 1991. There is certainly no room to consider a depletion policy for minerals or to utilise the instruments under the Act to implement such a policy. This may be particularly serious in planning for the exhaustion of energy minerals such as petroleum, for which a depletion policy is especially important\(^\text{542}\), and for industrial minerals such as ironsand. Despite this, it may still be possible to implement elements of a depletion policy in respect of energy under the Resource Management Act 1991, insofar as it does not relate to minerals. Such a policy, however, will be ultra vires the Resource Management Act 1991 to the extent to which it is concerned with sustaining the potential for minerals to meet the needs of future generations.

The Crown Minerals Act 1991 also fails to implement the concept of sustainable development. Despite the breadth of the management function under section 12 of the Crown Minerals Act 1991, the Act does not enable minerals programmes to implement the principle of sustainability. The discretions of the Minister under the Act are broad, particularly in relation to the contents of minerals programmes. However, the scope of the management function is restricted by the provisions of the Act. Paragraphs (a) and (b) of section 12 give that section a commercial flavour. Management is principally directed at the allocation and pricing of minerals. The ability of the Minister to consider other matters is limited to such things as whether to refine and process petroleum

domestically, or to exclude land because of its importance to iwi. Thus, it may be possible to manage extraction rates in order to maximise the financial return but not to do so in order to sustain the potential of minerals to meet the needs of future generations.

In addition, it would be inappropriate to imply a sustainability objective into section 12 of the Crown Minerals Act 1991 if the Resource Management Act 1991 and the Crown Minerals Act 1991 are read as complementary, an interpretative approach argued for above\(^543\). The exclusion of the interests of future generations from the definition of sustainable management, in respect of minerals, was a deliberate and considered measure. To introduce consideration of the interests of future generations through the Crown Minerals Act 1991 would frustrate this clear intention. Parliament has demonstrated a clear policy decision to exclude consideration of the sustainability of minerals.

Even if the management function under section 12 is wide enough to extend to a depletion policy, implementing such a policy under the Crown Minerals Act 1991 does not make practical sense. A depletion policy needs to be applied on a broad basis if it is to be successful. The Crown Minerals Act 1991 applies only to Crown owned minerals. The only minerals wholly owned by the Crown, and for which a depletion policy could be achieved, are gold, silver, petroleum and uranium. Even for these minerals it may be impractical to consider a depletion policy. For example, the demand for domestic petroleum depends on a wide range of factors including the economic costs of other energy sources and the world price for petroleum. A depletion policy needs to be applied at a national, resource-wide level rather than just to a specific mineral.

Minerals were excluded from the principle of the needs of future generations when the Resource Management Bill was at the Select Committee stage. At this point, Part IX of the Resource Management Bill had already been separated out into its own Crown Minerals Bill on the recommendation of the Review Group. This separation was

\(^{543}\) See supra, p. 118.
justified on the ground that it was inappropriate to mix regulatory and allocation functions under the same statute. The reason advanced for excluding minerals from the future generations principle is given in the Minister of Energy’s speech at the Third Reading of the Bill:

"(An) issue of some note is the issue of the sustainability of mineral resources being moved out of the resource management legislation. In fact, any form of an extractive industry is essentially not sustainable in the pure sustainability definition, so that has shifted also."544

The exclusion of minerals from the principle of sustainability appears to have been motivated by a belief that, being a finite resource, minerals are inherently unsustainable. However, it has been demonstrated that sustainable development does have definite policy implications for minerals545. Sustainable development of minerals demands the formulation and implementation of policies that ensure their rate of use does not exceed the capacity to find new deposits, acceptable substitutes or to recycle. It is therefore a concept which should be given effect to in mining legislation. The failure of the Crown Minerals Act 1991 and the Resource Management Act 1991 to do so is serious. It means that the legislative regime in respect of minerals falls short of providing for the integrated and comprehensive management of minerals resources at the normative level.

The exclusion of minerals from the principle of sustaining the potential of natural and physical resources casts doubt on the application of some of the principles established by sections 6, 7 and 8 of the Resource Management Act 1991. In particular, the direction in section 7 to have regard to the finite characteristics of natural and physical resources cannot be sensibly applied to minerals if they are excluded from the sustainability part of the definition of sustainable management. Apart from this, however, these principles enable a comprehensive approach to be taken to the

544 Luxton, J., supra n. 540, p. 3040.
545 Supra, pp. 42-48.
management of the environmental effects of mining. They allow the consideration of a wide range of values and perspectives. Further, the focus of the Act upon the effects of activities, rather than the activities themselves, enables the external effects of mining to be considered on the same basis as any other activity. On the other hand, minerals are given special treatment under the Resource Management Act 1991 through their exclusion from the principle of sustainability. It is only the external effects of mining which will be considered, while for other resources, both internal and external effects can be considered.

c. The Treaty of Waitangi

Both the Crown Minerals Act 1991 and the Resource Management Act 1991 incorporate the Treaty of Waitangi as a normative principle. The Treaty of Waitangi is central to the constitutional framework of New Zealand. Under the Treaty the Crown has an obligation to protect and respect the right of Maori to control and regulate the resources to which they are entitled. It is submitted that the requirement in the Crown Minerals Act 1991 to have regard to the principles of the Treaty of Waitangi and, in the Resource Management Act 1991, to take these principles into account, require recognition of the guarantee of rangatiratanga made in article two of the Treaty. However, the reference to the Treaty in these two Acts does not adequately discharge this obligation. In the opinion of the Waitangi Tribunal the requirement to take into account the principles of the Treaty, imposed by section 8 of the Resource Management Act 1991, does not provide adequate protection of Maori interests. Further, the Resource Management Act 1991 requires only that the Treaty be weighed against other matters of similar importance. It also seems likely that the requirement in the Crown Minerals Act 1991 to take into account the principles of the Treaty of Waitangi is inadequate. The Treaty is a solemn and fundamental compact between the Crown and Maori. It guarantees Maori rangatiratanga over their taonga. At the very least these Acts should require decision makers to act consistently with the principles of the Treaty.

This raises the question of the recognition of Maori ownership of minerals. Although aboriginal title has largely been extinguished, it is possible that Maori do have
title to some minerals as "taonga". Greenstone is an example. Further, it is likely that Maori are owed compensation for the appropriation of minerals by the Crown. These concerns are not addressed in the Crown Minerals Act 1991; it is based on the presumption of Crown ownership of minerals. This presents a major conundrum; how can a management regime be established for minerals when the Crown may not have a legal, or at least a moral, right to own these minerals? This issue must be settled. The recently proposed "fiscal envelope" provides a possibility that this may be achieved. However, the exclusion of coal rights from the settlement with Tainui displays a willingness on the part of the Crown to hold onto mineral assets.


The structure of the Crown Minerals Act 1991 at the normative level is very complicated. The access regime established by the Act demonstrates a bias towards mining. In respect of the management and allocation of minerals, the Act is neutral as to whether or not minerals should be developed. It does not describe how Crown owned minerals should be managed. Instead, the Act enables minerals programmes to state normative principles in relation to the management of Crown owned minerals. However, the Crown Minerals Act 1991 also establishes efficient allocation and fair financial return as normative principles for minerals programmes and, in the absence of minerals programmes, for the grant of minerals permits. It is submitted that this structure creates several problems.

First, the setting of normative policies, which determine the manner in which Crown owned minerals will be managed, is carried out by delegated legislation. This function and these policies are not exposed to the full legislative process. Rather they are specified by the executive government without the oversight of parliament. There is therefore a danger that normative policies will be influenced by political motives and even pressure groups. Hopefully this will be precluded by the public consultation process set out in the Crown Minerals Act 1991 for the preparation of minerals programmes.
Second, there is a risk that normative principles for the development of minerals will become fragmented. There is considerable potential for fragmentation between the normative principles expressed in different minerals programmes. In particular, there is a real risk that the normative principles expressed in minerals programmes will conflict with or contradict the normative principles expressed by the Act. This could lead to fragmentation, lack of coordination or overlap in the management of minerals at the strategic and operational levels. The Crown Minerals Act 1991 does not impose any requirement on the Minister to ensure the integration of different minerals programmes with each other. Integration of minerals programmes therefore depends to a large degree on the proficiency and approach of officials to the drafting of minerals programmes.

Third, the application of the normative principles established by the Act is uncertain. The Act requires minerals programmes to establish policies, procedures and provisions which, in particular, provide for the efficient allocation of permits and the obtaining of a fair financial return from Crown owned minerals. These principles, however, do not apply until after the decision as to whether or not to develop Crown owned minerals is made.

3. Integration at the Strategic Level of Management

Legislation can be particularly effective at this level through providing legal and administrative frameworks, plans and management structures capable of implementing the normative objectives. The strategic level of management involves the detailed analysis and evaluation of alternative goals and objectives, and the selection and design of means to achieve these desired objectives. Two practical measures which can be taken at this level are the integration of natural resource management and allocation agencies, and "macro-planning" in terms of providing for the preparation and implementation of national and regional resource management plans.
a. Integration of Management and Allocation Agencies

In terms of management and allocation agencies for minerals, the level of integration under the Crown Minerals Act 1991 and the Resource Management Act 1991 is limited. Allocation of Crown owned minerals is achieved under the Crown Minerals Act 1991 and is carried out by the Ministry of Commerce, under the direction of the Minister of Energy. Private owners of minerals allocate their minerals as they wish. Regulation of the environmental effects of mining is achieved under the Resource Management Act 1991. This is carried out mainly by regional councils and territorial authorities. There is thus a complete separation of allocation and regulatory functions. This structure noticeably differs from resources such as water and air where allocation and regulatory functions are vested in the same body. On the other hand there are many other resources, such as land and native forests, where allocation functions are separated from regulatory functions.

Integration of allocation and regulatory agencies does not necessarily require that these functions be placed in a single agency. Indeed, it is possible that the separation of allocation and regulatory functions effected by the Crown Minerals Act 1991 and the Resource Management Act 1991 may be beneficial. It enables Crown minerals to be managed for commercial and economic purposes while imposing environmental controls in respect of all minerals. The Crown Minerals Act 1991 is focused principally on obtaining a fair financial return from Crown minerals and efficiently allocating rights to minerals. These are commercial functions. The Act deals solely with Crown owned minerals. It tries to manage these minerals in the same way a private owner of minerals would. In contrast, the purpose of the Resource Management Act 1991 serves much more social and environmentally conscious goals; its purpose is sustainable management. Placing allocation and regulatory functions in one agency or statute may result in a confusing, and possibly conflicting mix of values. There is a danger that either of these

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546 It should be noted that the level of integration of allocation and regulatory agencies in respect of the external effects of mining established by the Resource Management Act 1991 is high: see supra, chapter 6.

547 Ministry of Commerce, supra n. 189, p. 3.
objectives may be compromised in achieving the other. The separation of allocation and regulatory functions in respect of minerals enables a clear definition of responsibilities and objectives in respect of minerals.

In Mitchell's definition of integration, what is important is "the sharing and coordination of the values and inputs of a wide range of agencies, publics and other interests."\textsuperscript{548} Therefore, in establishing a legislative framework for integrated and comprehensive resource management, the aim should be to ensure that all aspects of resource management are provided for. There should also be provision for administrative and legal links between the allocation and regulatory agencies to ensure integrated and coordinated resource management. Unfortunately, neither of these two measures are adequately achieved in the Resource Management Act 1991 or the Crown Minerals Act 1991. In particular, there is no agency, under either of the Acts, charged with responsibility for monitoring the depletion of minerals or implementing a depletion policy. This is a serious deficiency. In addition, there are few linkages between the allocation and regulatory agencies. Although the provisions of minerals programmes may be considered in the preparation of policy statements and plans under the Resource Management Act 1991, the scope for formal coordination and integration between regulatory and allocation agencies is limited.


In terms of "macro-planning" the level of integration in the legislative regime is varied. The Resource Management Act 1991 provides for a high degree of macro-planning in respect of the external effects of mining. National policy statements and national environmental standards enable resource priorities to be set and resource planning to occur at the national level\textsuperscript{549}. Regional policy statements and regional plans

\textsuperscript{548} Mitchell, B., supra n. 45, p. 5. See supra p. 14.

\textsuperscript{549} Unfortunately these instruments are yet to be made use of, except for the New Zealand Coastal Policy Statement, the preparation of which is compulsory.
are directed at matters of regional significance. District plans are similarly directed at matters of district significance. Each instrument must be consistent with the instruments above it in the hierarchy. By requiring consideration of sustainable management and the other values in Part II of the Act in the formulation of policy statements and plans, the Resource Management Act 1991 provides for the integration of normative principles into the strategic level. In addition, as policy statements and plans are prepared through a process of public consultation, there is an opportunity for integration at the outset of more localised perspectives and aspirations into higher level policies.\textsuperscript{550} 

The Crown Minerals Act 1991 provides a significant opportunity for macro-planning in respect of Crown owned minerals through minerals programmes. Minerals programmes provide for the expression of policies in respect of the management of Crown owned minerals and the integration of these policies into procedures and provisions. They represent a major step towards establishing a rational and transparent management and allocation regime for Crown owned minerals. In addition, minerals programmes allow for public input into the policies, procedures and provisions to be established for the management of Crown owned minerals.

The Crown Minerals Act 1991, however, is unclear as to how minerals programmes are to interact with the provisions of the Act. In addition to expressing the normative principles of fair financial return and efficient allocation, the Act implies a number of different strategic objectives in regard to the development of Crown owned minerals. It also provides for the establishment of strategic policies and objectives in minerals programmes. There is no formal direction in the Act to ensure the compatibility of the policies, procedures and provisions of minerals programmes with the provisions of the Act. The only restriction which applies to minerals programmes in this regard is that they be intra vires the policy and objects of the Act. However, the policy and objects of the Crown Minerals Act 1991 are very vague and most of the discretions of the Minister under the Act enable minerals programmes to specify a wide range of strategic level objectives and policies. The doctrine of ultra vires therefore does little

\textsuperscript{550} Grinlinton, D.P., supra n. 44, p. 8.
to ensure the integration of the strategic level objectives specified by minerals programmes with those which may be specified, in accordance with the normative principles, in a minerals programme. It is possible that the policies expressed in minerals programmes could differ from, and even conflict with, the strategic objectives implicit in the Crown Minerals Act 1991.

Integration of the strategic objectives of the Crown Minerals Act 1991 into the provisions of minerals programmes depends entirely on the exercise of the Minister’s discretion in respect of minerals programmes. The extent to which the provisions of the Act will direct the grant and administration of permits over the procedures and provisions of minerals programmes depends on the detail of Minerals Programmes. In this respect the Minerals Programme for Petroleum specifies procedures and provisions for the management of minerals in great detail and attempts to integrate the provisions of the Act into these procedures and provisions. Nevertheless, the potential for fragmentation and complexity is undesirable.

Furthermore, the provision for integration between the macro-planing instruments established by the Resource Management Act 1991 and minerals programmes established under the Crown Minerals Act 1991 is limited. In preparing and changing policy statements and plans, regional councils and territorial authorities are required to have regard to any management plans and strategies prepared under other Acts. This will enable the integration of the provisions of policy statements and plans with minerals programmes. There is no direction, however, as to how the provisions of other management plans and strategies should be dealt with. Nor does the Resource Management Act 1991 prohibit policy statements or plans from being in conflict or inconsistent with these other management plans or strategies. The direction in sections 61(2), 66(2) and 74(2) of the Resource Management Act 1991 is merely to have regard to the provisions of other management plans. The ability to integrate the provisions of policy statements and plans, or other matters, into minerals programmes is even more limited. The only recognition of other strategic level policies in the Act is in section 21.

\[551\] ss. 61(2), 66(2) & 74(2) Resource Management Act 1991.
This section requires the Minister of Energy, in preparing minerals programmes, to have regard to the prohibition of prospecting or exploring for or mining of Crown owned minerals under any other Act.

As a result, the potential for duplication, confusion or fragmentation in the management of mineral resources is considerable. The "macro-planning" regime that applies to minerals consists of plans and policy statements prepared under the Resource Management Act 1991 and minerals programmes prepared under the Crown Minerals Act 1991. There is little provision for integration between these instruments. Those wishing to engage in mining, or those opposed to it, must operate under two possibly incompatible regimes. It is quite possible, even likely, that minerals programmes will provide for or encourage mining whereas the provisions of some policy statements or plans may prohibit mining from occurring because of its effect on the environment.

However, the most significant respect in which the macro-planning regime for minerals fails to achieve integrated and comprehensive resource management results from the failure to establish sustainable development as a normative principle. The exclusion of minerals from the principle of sustainability in section 5 of the Resource Management Act 1991 means that the strategic instruments established by that Act are unable to provide for a depletion policy. Minerals programmes are similarly unable to implement the principle of sustainability. This is a major impediment to overcoming the problems of resource exhaustion. National policy statements in particular, given their status as a national planning instrument and their ability to apply to a wide range of resources, would be extremely useful in this respect. There is no provision in the legislative regime for sustainability to be implemented at the strategic level.

4. **Integration at the Operational Level of Management**

The operational level of resource management is concerned with the nuts and bolts of implementing normative and strategic policies, objectives and plans. The operational level is the level at which individual divisions are made with respect to specific resources. Specific measures which could be implemented in resource
management legislation at this level include the allocation of specific responsibility for various elements of resource management; the implementation of detailed plans, permit and consent structures for natural resource development; and the establishment of provisions for the enforcement of compliance with the legislative requirements.

The legislative regime for minerals establishes a highly integrated regime in respect of the environmental effects of mining. The Resource Management Act 1991 assigns specific resource management responsibilities to central government, regional authorities and territorial authorities and provides for the integration of these responsibilities. The Act establishes a standardised resource consent procedure that applies to any proposed use of land, or water, or a discharge onto land or into or onto air or water which is otherwise not allowed as of right. The requirement to obtain a resource consent for activities other than those allowed as of right is linked to regional and district plans through the use of rules. In considering whether to grant resource consents, the consent authority is directed by section 104 of the Act to consider the normative principles in Part II and the provisions of strategic level plans and policy statements. There is therefore a high degree of integration between the normative, strategic and operational levels of management in respect of the environmental effects of mining. Problems that could be caused by the multiplicity of resource consents established by the Act, or the division of responsibilities between regional and district councils, are avoided by allowing joint resource consent hearings in respect of the same project.

The Crown Minerals Act 1991 to some extent also establishes an integrated regime at the operational level. The principal operational instruments are minerals permits. These must be granted by the Minister of Energy in a manner that is consistent with any relevant minerals programme. In the absence of a minerals programme the Minister must have regard to the importance of the efficient allocation of rights in respect of Crown owned minerals and the obtaining by the Crown of a fair financial return from its minerals. There is thus a strong requirement to integrate the policies, procedures and provisions expressed in minerals programmes, at the strategic level, or alternatively the normative principles established by the Act, into the operational level
of management.

On the other hand, there is a real lack of integration between the access provisions and the permitting provisions of the Crown Minerals Act 1991, and between the Crown Minerals Act 1991 and the Resource Management Act 1991 at the operational level. This lack of integration means that there is considerable room for duplication and redundancy in the management regime for minerals. Intending developers will have to obtain a minerals permit and an access arrangement under the Crown Minerals Act 1991 and are likely to need a resource consent under the Resource Management Act 1991. These three separate consents may prove an obstruction to the effective management of minerals. For example, a minerals permit could be granted for an area of land but the permit holder may be unable to obtain an access arrangement to enter onto that land. This would make the exercise of the permit impractical and would make that area of land unavailable for permitting to any other person. A similar scenario could occur if a permit was granted but the permit holder could not obtain the necessary resource consents.

In both cases, it may be possible for the Minister of Energy not to grant the permit on the grounds that the permit holder would be unable to give proper effect to the permit under section 27 of the Act. The Minister could do so if it appeared that the permit holder will be unable to obtain an access arrangement or resource consents. However, the Minister would have to be nearly certain that the necessary consents would not be secured so as not to act unfairly to the permit holder. The Minister may be on very uncertain ground if he or she attempts to refuse a permit on this basis. It is always possible for permit holders to argue that they do have a chance of obtaining the necessary consents. The ability of the Minister to integrate decisions on minerals permits with other consent procedures is very limited.

In the case of a resource consent application, section 104(1)(i) allows consent authorities to have regard to "any other matters the consent authority considers relevant and reasonably necessary to determine the application". Thus, the consent authority could consider whether or not the applicant has been granted a minerals permit, and
could refuse the resource consent if it had not been granted. It is, however, up to the consent authority to determine whether this would be a relevant and reasonably necessary requirement. There is no requirement in the Act to make this linkage between the Resource Management Act 1991 and the Crown Minerals Act 1991.

A second example of the problems caused by the lack of integration in the management regime for minerals is the number of different consents or approvals developers require to undertake mining operations. It is likely that most operations will require an access arrangement, a minerals permit and a resource consent.\(^{552}\) The opportunity for coordination of these three approval processes is limited. There are no formal requirements for the sharing of information or decisions between landowners, the Minister of Energy, and regional and district councils. The result is a very complicated regime that places substantive and procedural burdens upon developers that do not apply to other natural resources\(^ {553}\). It may significantly distort the costs of mineral development.

The Resource Management Act 1991 establishes fairly comprehensive provisions for the enforcement of the legislative requirements. The enforcement provisions established by the Crown Minerals Act 1991 are not so comprehensive. In particular, they fail to achieve effective enforcement of the conditions of permits. The bond or deposit which is lodged with the Secretary as security for compliance with the conditions of the permit may only be applied against monies owing to the Crown\(^ {554}\). They cannot be used, for example, to penalise the permit holder for non-compliance with the work programme conditions of the permit. This deficiency may affect the ability of the Minister to enforce permit conditions.

\(^{552}\) Other approvals may be needed, for example, under the Health and Safety in Employment Act 1992.

\(^{553}\) Fisher, D., supra n. 345, p. 30.


The Resource Management Act 1991 and the Crown Minerals Act 1991 to some extent do achieve integrated and comprehensive management of mineral resources. There are, however, four major respects in which these two Acts fall short of achieving a comprehensive and integrated management regime.

First, the legislative regime fails to give effect to the principle of sustainable development. The Resource Management Act 1991 implements a wide range of values including the purpose of sustainable management. This purpose is very similar to the concept of sustainable development. The definition of sustainable management, however, excludes minerals from a very important part of sustainable development; the needs of future generations. This is a serious deficiency. It has major implications for the ability of the Resource Management Act 1991 and the Crown Minerals Act 1991 to provide for the integrated and comprehensive management of mineral resources at the strategic and operational levels.

Second, the management regime fails to adequately give effect to the Treaty of Waitangi as a normative principle. The reference in both the Crown Minerals Act 1991 and the Resource Management Act 1991 to the principles of the Treaty of Waitangi does not discharge the duty to actively protect Maori interests. What is required, in the very least, is a statutory obligation to act consistently with the principles of the Treaty.

Third, the management and allocation regime for Crown minerals set out in the Crown Minerals Act 1991 is poorly structured at the normative level. The Act does not set out whether or not Crown owned minerals should be mined or whether or not the management system should seek to encourage the development of these minerals, or otherwise. Instead, it delegates this function to minerals programmes. At the same time, the Act specifies efficient allocation and fair financial return as normative policies. The result is a very complicated set of normative principles. There is considerable potential
for confusion and complication between minerals programmes and the Act at the normative level, and at the strategic and operational levels. Additionally, there is a risk that normative policies will become fragmented because of the ability to specify different normative policies in different minerals programmes.

Fourth, the management regime fails to achieve integrated and comprehensive management of mineral resources at the operational level. Developers are also faced with a complicated and potentially expensive management regime. Most mining proposals will need to obtain a minerals permit from the Crown, an access arrangement from the land owner and occupier and at least one resource consent. There are few links between the access provisions of the Crown Minerals Act 1991, the permitting provisions of the Crown Minerals Act 1991 and the resource consent provisions of the Resource Management Act 1991. As a result there are many opportunities for inconsistencies and conflict between the these regimes. There is also considerable opportunity for conflict and redundancy between the provisions of the Crown Minerals Act 1991 and the policies, procedures and provisions of minerals programmes.

Despite these deficiencies, the Crown Minerals Act 1991 and the Resource Management Act 1991 are a major step towards achieving comprehensive and integrated management of mineral resources. In respect of the external effects of mining, this goal is almost achieved. The challenge is to establish a resource management system that provides for more complete integration and comprehension in the management of mineral resources. This can be achieved through the making of rather minor amendments to the resource management system. Three measures which can be taken are: the provision of more linkages between the agencies responsible for the management of minerals, and between these agencies and land owners and occupiers; a simplified process for obtaining the necessary consents; and the revocation of the exclusion of minerals from the principle of the needs of future generations in the definition of sustainable management. This last measure will be a big step towards achieving comprehensive and integrated management of mineral resources.
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