ISSUED TO COUNSEL ONLY AND EMBARGOED UNTIL 4.00PM MONDAY, 19 OCTOBER 2020

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-237
[2020] NZHC 2712

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	GREYMOUTH GAS TURANGI LIMITED Applicant
AND	MINISTER OF ENERGY AND RESOURCES Respondent

Hearing:	24-26 August; 28 August 2020
Counsel:	J A Farmer QC, F J Cuncannon, P I Comrie-Thomson and R M Kós for applicant V E Casey QC, N C Anderson and S J Jensen for respondent
Judgment:	15 October 2020

RESERVED JUDGMENT OF DOBSON J

Contents

Introduction

[1] The applicant (Greymouth) is one of a group of companies that is active in the exploration of hydrocarbons in the Taranaki area, and the mining of such resources where they have been found in commercially exploitable quantities.

[2] Greymouth has brought this application for judicial review on eight grounds to challenge the lawfulness of the decision by a delegate of the respondent (the Minister)

to decline an uncontested bid for a petroleum exploration permit (PEP) off the northern Taranaki coast (the decision). Greymouth's bid was made in what was known as the 2017 block offer.

[3] Mr Joshua Adams (Mr Adams/the decision-maker) was the Minister's delegate who made the decision in her name. He was the official delegated to do so within New Zealand Petroleum and Minerals (NZP&M), the responsible division of the Ministry of Business, Innovation and Employment (MBIE). Mr Adams accepted a recommendation from an evaluation team comprising officials within NZP&M (the evaluation team) to decline the offer on 6 March 2018.

[4] On 12 April 2018, the Prime Minister announced that henceforth there would be a ban on issuing any permits for exploration or mining of petroleum products in all offshore regions of New Zealand (the ban). At the same time, the Minister announced the terms on which NZP&M would issue an invitation for bids in the 2018 block offer. In doing so, the ban was taken into account, so that potential offshore areas in Taranaki were excluded where such areas had been included in prior years' offers.

[5] A separate challenge brought under a ninth ground of review in this proceeding claims that the exclusion of offshore areas through the ban was illegal in these circumstances, namely where that year's process for inviting bids was undertaken before appropriate amendment to the Crown Minerals Act 1991 (the Act) had been passed to provide legislative authority for the ban. This challenge invites analogy with the judgment in *Fitzgerald v Muldoon* where executive action was undertaken anticipating legislative change, but inconsistently with the terms of the existing empowering Act.[1]

[6] The grounds for challenging the decision-maker's rejection of Greymouth's 2017 bid included eight allegations of errors of fact and law, including unreasonableness in the administrative law sense. In her statement of defence to those allegations, the Minister made limited admissions as to errors of fact and inadequacies

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1 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC). That case involved a post-election announcement by an incoming Prime Minister that employer contributions to superannuation schemes were to cease, despite an existing statutory obligation that they be paid.

in the process for assessing the bid. The Minister concedes that relief is appropriate to the extent that the decision be quashed, and NZP&M be directed to undertake the assessment of Greymouth's 2017 bid afresh. It is accepted that such reconsideration should occur on the terms of the law as it then stood.

[7] The Minister's concessions do not satisfy Greymouth. It has pursued its claims, seeking an order from the Court granting Greymouth the permit on the terms of its bid. In doing so, the Court would be using the powers of the decision-maker as authorised by the Judicial Review Procedure Act 2016. Alternatively, Greymouth seeks a direction that reconsideration by the decision-maker should occur on the basis of a number of positive factual findings which Greymouth contends reflect the position the decision-maker ought to have found to exist when assessing Greymouth's 2017 bid. Such findings would implicitly make it difficult for the decision-maker, applying the statutory criteria, to reject the bid on its reconsideration.

[8] Greymouth argues that such further forms of relief are warranted in circumstances where it has lost faith in the objectivity and competence of the evaluation team responsible for assessing the bid.

[9] The response for the Minister is, having made the extent of concessions that were pleaded, no further relief is appropriate. The Minister denied that any grounds could be made out for doubting the integrity or competence of the evaluation team,[2] and a decision on whether to accept a bid for such a permit involves complex technical analyses that the Court is not adequately equipped to deal with.

The parties

Greymouth

[10] In an affidavit sworn in the proceedings, Mr Mark Dunphy, who is a director of the applicant and chair of its parent holding company, Greymouth Petroleum Mining Group Limited, describes Greymouth's participation in exploration for, and

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[2] Ms Casey QC took the preliminary point that no allegations of bad faith, bias or impropriety had been pleaded in respect of the conduct of officials dealing with Greymouth's bid, and that such serious matters ought not to be considered unless explicitly pleaded with adequate opportunity for response.

production of, petroleum in New Zealand. Since it commenced activities in 2000, Greymouth has been granted, or has otherwise acquired, 17 PEPs and eight petroleum mining permits (PMP). Currently, Greymouth companies hold three PEPs and six PMPs. Greymouth companies supply approximately 10 per cent of New Zealand's daily gas consumption and, in addition, crude and condensate are exported to overseas markets. The Greymouth group ranks as the second largest New Zealand-owned petroleum company measured in barrels of oil-equivalent produced per day.

[11] Mr Dunphy provides detail of the very significant sums spent by Greymouth on exploration activities and also provides details of the amount paid to the government by way of royalties and income tax, which amounts reflect a significant commitment to the industry. Mr Dunphy deposes that the only other company in New Zealand executing equivalent (and not necessarily greater) on-going programmes of work in recent years is the Todd mining group.

NZP&M and the decision-maker

[12] NZP&M is responsible for administering all aspects of various types of mining permit. It is described by Mr David Jeaffreson, the head of petroleum exploration and production within NZP&M,[3] as a brand name maintained within the energy and resource markets branch of MBIE. The work is undertaken by appropriately qualified officials within that branch of MBIE.

[13] The power to issue PEPs is vested in the Minister of Energy and Resources and, by the terms of the Act, that power is delegated to the chief executive of MBIE and then sub-delegated to the national manager, petroleum. Mr Adams was contracted to carry out that role throughout the relevant period.

The legal context

[14] The system for mining permits of various types is administered under the Act. The purpose of the Act is specified in s 1A as follows:

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[3] Mr Jeaffreson's role is known internally as the chief petroleum geologist.

1A Purpose

(1) The purpose of this Act is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand.

(2) To this end, this Act provides for—

(a) the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and

(b) the effective management and regulation of the exercise of those rights; and

(c) the carrying out, in accordance with good industry practice, of activities in respect of those rights; and

(d) a fair financial return to the Crown for its minerals.

[15] Section 24 of the Act authorises the Minister to offer permits for allocation by public tender from time to time, and as the Minister considers appropriate. Section 24 requires that notices of the offer of permits are to specify certain material details and that the Minister is not to accept any tender which does not comply in a material way with the requirements of the notice. The Minister is required to assess tenders in accordance with the procedure in s 24 and the criteria set out in s 29A of the Act.

[16] The provisions in s 29A are important to the contested issues in this case. It specifies:

29A Process for considering application

(1) An applicant for a permit must provide to the Minister—

(a) the name and contact details of the proposed permit participants and the proposed permit operator; and

(b) a proposed work programme for the proposed permit, which may comprise committed work, or committed and contingent work; and

(c) in the case of an exploration permit for minerals other than petroleum, an estimate of the expected total work programme expenditure in relation to the permit; and

(d) any other information prescribed in the regulations.

(2) Before granting a permit, the Minister must be satisfied—

(a) that the proposed work programme provided by the applicant is consistent with—

(i) the purpose of this Act; and

(ii) the purpose of the proposed permit; and

(iii) good industry practice in respect of the proposed activities; and

(b) that the applicant is likely to comply with, and give proper effect to, the proposed work programme, taking into account—

(i) the applicant's technical capability; and

(ii) the applicant's financial capability; and

(iii) any relevant information on the applicant's failure to comply with permits or rights, or conditions in respect of those permits or rights, to prospect, explore, or mine in New Zealand or internationally; and

(c) that the applicant is likely to comply with the relevant obligations under the Act or the regulations in respect of reporting and the payment of fees and royalties; and

(d) in the case of a Tier 1 permit for exploration or mining, that the proposed permit operator has, or is likely to have, by the time the relevant work in any granted permit is undertaken, the capability and systems that are likely to be required to meet the health and safety and environmental requirements of all specified Acts for the types of activities proposed under the permit.

(3) For the purposes of the Minister satisfying himself or herself of the matter in subsection (2)(d), the Minister—

(a) is only required to undertake a high-level preliminary assessment; and

(b) must seek the views of the health and safety regulator and may, but is not required to, obtain the views of any other regulatory agency; and

(c) may, but is not required to, rely on the views of the regulatory agencies; and

(d) is not required to duplicate any assessment process that a regulatory agency may be required to undertake in accordance with a specified Act.

(4) To avoid doubt, subsection (2)(d) does not limit, have any effect on, or have any bearing on—

(a) whether the permit holder or permit operator is required to obtain any permit, consent, or other permission under any health and safety or environmental legislation:

(b) the granting to the permit holder or permit operator of any permit, consent, or other permission necessary under any health and safety or environmental legislation by any government agency, consent authority, or Minister responsible for the administration of that legislation.

(5) This section is subject to section 29B.

[17] Part 1A of the Act provides for the promulgation of minerals programmes. These are statutory instruments that are, in their final terms, issued by the Governor-General by Order in Council. By s 14(2) of the Act they may describe how the Minister or the chief executive will exercise any specified powers or discretions under the Act in relation to any minerals that are subject to the programme. Minerals programmes may include any other information the Minister considers likely to be of assistance to any person wishing to use or understand the Act, including how the Minister or the chief executive will interpret and apply specified provisions in relation to any Crown-owned minerals. Section 14(4) stipulates that a minerals programme must not be inconsistent with the Act or regulations under it and s 18 provides for the making of submissions by interested persons on any draft of a minerals programme before it is settled in final form. Section 22 of the Act requires the Minister and chief executive to act in accordance with a minerals programme.

[18] Separate minerals programmes are contemplated for petroleum, and for other Crown minerals.

The 2013 minerals programme for petroleum

[19] The current minerals programme for petroleum (MPP) came into force on 24 May 2013.[4] The document contains information and guidance for those who may have an interest in the management of the regime under the Act in relation to prospecting, exploration and mining of petroleum. In commenting on the purpose statement in s 1A of the Act, the MPP states:

[4] Issued by the Minerals Programme for Petroleum 2013 Order (No 2) 2013.

1.3 Interpretation of the purpose statement in relation to petroleum

…

(4) An underlying premise in the Act is that the government wants other parties, such as public and private corporations, to undertake prospecting for, exploring for and mining of Crown-owned minerals, including petroleum. The government does not wish to undertake these activities itself, although it may from time to time undertake seismic survey or other prospecting activities for the purpose of providing information to promote interest in New Zealand's petroleum estate.

[20] The same section of the MPP on the interpretation of the purpose statement acknowledges that:

(6) An important component of promoting prospecting, exploration and mining is minimising sovereign risk for investors by providing for a stable and coherent regulatory regime for petroleum.

[21] A definition of the expression "sovereign risk" specifies that it is the risk that the government may unexpectedly change significant aspects of its policy and investment regime and the legal rights applying to investors to the detriment of investors.

[22] The reference in s 1A of the Act to the purpose being exploration and mining "for the benefit of New Zealand" is defined in the MPP as:[5]

… best achieved by increasing New Zealand's economic wealth through maximising the economic recovery of New Zealand's petroleum resources.

[23] That section notes that other components of "the benefit of New Zealand" including environmental considerations are covered by other legislation. That point is amplified in the following paragraphs:

1.4 Broader statutory framework

…

(3) The Minister and the Chief Executive, in administering the Act, do not have powers and functions (except where and to the extent specifically provided for in the Act) relating to matters covered by other legislation. In particular, the Minister and the Chief Executive are not required (except where and to the extent specifically provided

5 MPP, clause 1.3(7).

for in the Act) to duplicate the activities and requirements of ministers and departments responsible for administering other legislation.

…

(5) The clear separation in the statutory framework between powers and functions (and rights and obligations) under the Act on the one hand and under other legislation on the other is designed to ensure clear accountability and avoid conflicting interests and objectives on the part of ministers and departments responsible for administering relevant legislation.

[24] The section of the MPP providing guidelines for applications for exploration permits included:

7.7 Processes for staged work programme bidding and grant of permits

(1) The Minister may, among other things:

(a) decide not to award any permits (the Minister is not required to accept the best bid or any bids)

(b) ask an applicant to clarify an aspect of their bid or provide further information or a technical presentation. However, no applicant will be given the opportunity to modify or improve a bid (except if there is only one bid and the bid is not acceptable: see paragraph (1)(d) below)

(c) if there are no acceptable bids, invite all applicants to re-submit modified bids within a specified period. The modified bids will then be considered as if they were the original bids.

(d) if there is only one bid but it is not acceptable, request the bidder to improve its bid.

…

(6) The Minister may invite a bidder to accept a work programme proposed by the Minister where, as a result of deciding to grant permits to other bidders, blocks that were part of the bidder's bid remain available. The Minister may consult with the bidder on the proposed invitation before making the invitation.

(7) Where there is only one acceptable work programme bid for a block or blocks and where that bid has been submitted under section 29A but the Minister is not satisfied that the bidder meets the requirements of section 29A, the Minister may invite the bidder to amend its bid to state that it is to be considered under section 29B.

(8) The processing of staged work programme bids will usually be completed within five months after the closing date for applications. Applicants will be notified if processing will take longer than this.

(9) As far as possible, applicants will be notified of the outcome of their bids before any statements are made to the media about the outcome of the Permit Round. Details of unsuccessful applicants and applications will not be given to the media or disclosed to other parties (unless required under the Official Information Act 1982 or otherwise required by law).

(10) The granting of a PEP will be subject to the conditions of grant that were advertised in the Notice for the Round, unless those conditions are modified by agreement with the applicant. The Minister will not agree to any modifications that the Minister considers to be substantial.

The factual background

[25] The events that are immediately relevant to the decision began on 22 March 2017 when NZP&M published an invitation for bids (IFB) for the 2017 block offer. Obviously, before that date, there was an on-going relationship between NZP&M personnel and Greymouth in relation to Greymouth's other permitted activities.

[26] The IFB posted on the NZP&M website was a 52 page document describing the process and setting a timetable, with bids required to be submitted by 6 September 2017. It included an indicative date of 1 April 2018 for announcing decisions on granting permits. Inviting bids for exploration permits by this means was a settled practice for NZP&M and one which Greymouth was familiar with by 2017.

[27] On 6 September 2017, Greymouth submitted its bid for a total of 358.7 square kilometres within two of the offshore blocks north of New Plymouth that had been identified as available for offers in the IFB (the bid area). A key component of the bid was Greymouth's proposed work programme, which was required to comply with minimum levels of exploratory work as stipulated in the IFB.

[28] On 21 September 2017, NZP&M advised Greymouth that its bid did not comply with the IFB requirements and invited Greymouth to submit a revised work programme. Greymouth duly submitted a revised work programme for its bid on 25 September 2017. The following day, NZP&M confirmed that the proposed work programme now complied with the minimum requirements and the bid would proceed to a substantial evaluation.

[29] On 1 December 2017, the evaluation team provided a draft of its report to Mr Adams in his capacity as the delegated decision-maker. The draft report recommended that Greymouth's bid be declined. On 8 December 2017, Mr Jeaffreson, the chair of the evaluation team, wrote to Greymouth advising that the decision on Greymouth's bid was likely to be made on or about 14 December 2017 and that the evaluation team's intention was to recommend that the decision-maker decline the bid. Mr Jeaffreson's letter cited consideration of matters listed in s 29A(2)(a) and (b)(iii) of the Act as influencing the team's recommendation.

[30] On 11 December 2017, Mr James Willis, external counsel for Greymouth, wrote to Mr Jeaffreson seeking particulars of alleged non-compliance with permit conditions that the evaluation team considered to be inconsistent with good industry practice. Mr Willis's letter included an offer to meet and he had a telephone discussion with Mr Jeaffreson on that day.

[31] On 13 December 2017, Mr Jeaffreson set out in appendices to a reply to Mr Willis the instances of alleged non-compliance that had been focused on by the evaluation team. He also responded to Mr Willis's contention that NZP&M had an explicit obligation to raise concerns about non-compliance with a bidder and afford an opportunity for the bidder to comment on them.

[32] The next day, 14 December 2017, Mr Dunphy wrote to Mr Jeaffreson, with copies to the Minister and the general manager of NZP&M, providing an interim response to the matters of concern that had been raised in Mr Jeaffreson's 13 December 2017 letter. Mr Dunphy expressed concern at having to respond so quickly against what was then perceived to be the timeline for a decision on Greymouth's bid.

[33] The following day, 15 December 2017, the acting national manager of petroleum at NZP&M replied to Mr Dunphy's letter, inviting a full response to the matters that had been raised in Mr Jeaffreson's 13 December 2017 letter, and affording more time in which to do so.

[34] In a further 10 page letter dated 12 February 2018, addressed to the national manager of petroleum at NZP&M, Mr Dunphy provided a detailed submission as to why the bid ought to be accepted. His letter was copied to the Minister and to the Minister for Economic Development and the general manager of NZP&M. It contained outlines of many of the arguments now advanced in the judicial review for challenging the grounds cited by Mr Jeaffreson as those on which the evaluation team was recommending the decision-maker should decline the bid.

[35] On 1 and 6 March 2018, the evaluation team provided to Mr Adams respectively a draft and the final version of its block offer evaluation report.[6] In each of the draft and in the final report, the evaluation team adhered to two views that supported the recommendation that the Greymouth bid should be declined. First, the evaluation team perceived deficiencies in the proposed work programme so the decision-maker should not be satisfied, on the criteria in s 29A(2)(a), that Greymouth's proposed work programme was indeed consistent with the purposes of the Act and the proposed permit, or that it constituted good industry practice. Secondly, the evaluation team considered that previous instances of non-compliance with the conditions of other permits meant that the decision-maker should not be satisfied, on the criteria in s 29A(2)(b)(iii), that Greymouth was likely to comply and give proper effect to the terms of its proposed work programme.

[36] On 6 March 2018, the decision-maker accepted the evaluation team's recommendation and declined Greymouth's bid. In a letter despatched by the decision-maker on the same day, Mr Adams offered to meet with Greymouth's representatives to discuss queries they might have about the 2017 block offer bid evaluation process.

[37] Greymouth promptly objected to the decision and accepted the offer to meet. After an exchange as to the terms on which the proposed meeting might occur, it took place on 10 April 2018. The attendees were Mr Adams, Mr Stevenson-Wallace (the general manager of NZP&M), Mr Mathieson (solicitor at NZP&M), Mr Dunphy and Mr Missingham (internal counsel at Greymouth).

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6 Ministry of Business, Innovation and Employment, Block Offer 2017: Evaluation Chair Report and Permit Recommendations: Bid 60403.

[38] This proceeding was commenced on 16 April 2018.

The evidence

Greymouth deponents

[39] Mr Dunphy's affidavit reviewed the history of the Greymouth group to sustain his claim that its overall record of substantial work in the exploration and mining businesses, plus its financial capacity (which was not in any event questioned) should be seen positively when assessing the relevant bid. He also deposed to his involvement in the dialogue between Greymouth and the evaluation team on Greymouth's bid. In addition, he provided factual details about the circumstances of the Prime Minister's 12 April 2018 announcement of the ban on issuing exploration permits for any offshore areas.

[40] Mr Harry Crighton is the chief operating officer for the Greymouth group. He deposes that he has worked in the oil and gas industry for around 35 years as a geologist, petrophysical engineer, provider of advisory services to the oil and gas industry and, since December 2010, in a range of senior roles at Greymouth. Mr Crighton is the principal point of contact between Greymouth companies and NZP&M as well as other regulators. His affidavit provides details of Greymouth's response to the concerns of non-compliance with other permits that were raised by Mr Jeaffreson when assessing the likelihood of Greymouth complying with the provisions of a work programme for its 2017 bid. Mr Crighton deposed that a number of the allegations of non-compliance were factually incorrect, some were reasonably justified and some were not deserving of the seriousness attributed to them by NZP&M. He deposed that some of the concerns of non-compliance were raised for a first time in Mr Jeaffreson's explanation for the evaluation team's recommendation.

[41] An affidavit was completed by Mr Allan Bulte, the manager of geology and geophysics for the Greymouth group. He has been working in the oil and gas industry since 1982 and his evidence described the proposed exploration target and work programme that Greymouth developed for its 2017 bid. Mr Bulte explained Greymouth's view that a two year period between completing the proposed initial technical analysis and a commitment to either surrender the permit or proceed with

drilling an exploration well was necessary to provide an adequate time for the work involved at that point.[7] Mr Bulte rejected other concerns that had been cited in the NZP&M evaluation report, expressing his views about the adequacy and appropriateness of the work programme Greymouth had proposed.

[42] Greymouth also filed four affidavits from deponents expressing opinions as experts. One of these was from Mr Adam Feeley, who is qualified as a lawyer and has held numerous management positions in central and local government, including as national manager of a number of business registries and as director of the Serious Fraud Office. Relevantly to the opinions expressed in his affidavit, he was group manager of Crown Minerals between 2003 and 2007, which was the predecessor of the business unit within MBIE now identified as NZP&M. Mr Feeley opined about the importance he attributes to New Zealand maintaining a reputation for very low sovereign risk in the administration of its regulatory framework.

[43] Mr Feeley was critical of the approach to, and adequacy of, the evaluation undertaken by NZP&M of Greymouth's bid, in particular contrasting the unfavourable treatment of Greymouth's bid against the decision by NZP&M to grant a permit in the 2017 block offer to Westside New Zealand Limited (Westside), a subsidiary of an ultimate parent company based in China. Mr Feeley concluded that it was difficult to treat NZP&M as having observed good, let alone best, practices because of a range of concerns, including the paucity of information NZP&M provided to Greymouth and its lack of willingness to meaningfully engage on the substantive matters in dispute. He described a degree of rigour and harshness applied to considering the Greymouth bid, which he considered to be inconsistent with the more relaxed approach to the Westside bid.

[44] Greymouth also filed an affidavit from Mr Mark Aliprantis who was the petroleum group manager for Crown Minerals from 2003 to 2009. Mr Aliprantis is a geologist now in business on his own account as a consultant. He opines that low sovereign risk is a key pillar for encouraging investment in New Zealand. He cites a claim in an MBIE 2017 publication in terms:

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[7] This responded to NZP&M's concern that a period of 24 months was a year too long between those two milestones.

> New Zealand has a reputation for honesty. Transparency International's 2017 corruption perception index ranks its public sector the least corrupt on the planet.

[45] From a perspective that fairness is important in dealing with matters such as Greymouth's bid, Mr Aliprantis explained concerns that NZP&M had not communicated Greymouth's reported non-compliance to it in a timely manner. Further, that NZP&M had insisted on compliance with a work programme, even where the course of action required was not supported by data. He also opined that NZP&M's refusal to award Greymouth's bid disproportionately penalised non-compliances that he considered to have been justified.

[46] Mr Aliprantis also undertook a comparison of NZP&M's assessment of Greymouth's and Westside's bids, opining that the level of substantive evaluation was disproportionate as between those two bids. His view was that financial pressures are more likely to lead to material non-compliance than any lack of a "compliance culture". Accordingly, he considered it was wrong, both as a matter of logic and fairness, that Greymouth should be treated as unlikely to fulfil its proposed work programme, whereas Westside's financial capacity was not the subject of any rigorous assessment. Mr Aliprantis's conclusion was that Greymouth's uncompeted and compliant bid, given his assessment that Greymouth had a satisfactory record of regulatory compliance overall, rendered NZP&M's decision to decline the bid as one made without a reasonable basis.

[47] Greymouth also filed an affidavit from Mr Alan Dent, who is the leader of the financial advisory services practice within Deloitte New Zealand. Mr Dent's chartered accountancy practice involves financial viability reviews of entities and he cites experience with evaluation processes involving businesses in the oil and gas sector, including in the Taranaki region. Mr Dent was given access, on a confidential basis, to the detail of Westside's bid and was requested, on behalf of Greymouth, to compare its content with the content of Greymouth's own bid in the 2017 block offer.

[48] Mr Dent treated the financial capability of any firm applying for a permit as being a critical test, given the focus on it in the Act and the IFB.[8] On the basis of his

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[8] Crown Minerals Act 1991, s 29A(2)(b)(ii).

analysis of confidential details, Mr Dent raised a number of grounds for concern at the extent of Westside's financial capability to carry out the obligations it was committed to in its bid. In contrast, Mr Dent opined that there could be no reasonable grounds for concern at the extent of Greymouth's financial capabilities to carry out the proposed work programme in its 2017 bid.

[49] The fourth of the experts who completed an affidavit on behalf of Greymouth was Mr Christian Linskaill. He is based in Edinburgh, Scotland, where he has practised as a specialist oil and gas lawyer. Mr Linskaill also has over 25 years of international oilfield experience and is qualified as a petroleum engineer, explorer, project developer and latterly as a consultant. Mr Linskaill also provided expert evidence for Greymouth in an earlier judicial review challenge to a decision of NZP&M that I determined in 2019.[9] Mr Linskaill responded to a request that he comment on the processes and reasoning in NZP&M's decision to decline Greymouth's bid.

[50] Mr Linskaill advances a range of criticisms of NZP&M's analysis of the Greymouth bid. In particular, he considered surprising NZP&M's concern that a two year hiatus between completion of technical work and a commitment to either surrender the permit or proceed with drilling was longer than necessary. In his opinion, the two year period was well justified. Mr Linskaill ranked other concerns of non-compliance as either not being justified or as being minor matters, to an extent that, in his opinion (which he stated to be expressing "unfortunately") he was left with a concern that the objections were not raised in good faith, given the lack of any real substance. He did not consider them to be credible.

[51] Mr Linskaill also undertook a comparative analysis of Greymouth's and Westside's proposed work programmes. He could find little material difference between the work programmes proposed in both bids, and considered that Greymouth's work programme was arguably more expeditious than that proposed by Westside. He questioned the evaluation team's criticism that Greymouth's proposed work programme was not a timely one. Part of the context for Mr Linskaill's criticism

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9 *Greymouth Petroleum Mining Group Ltd v Minister of Energy and Resources* [2019] NZHC 1222.

of the approach adopted by the evaluation team when considering Greymouth's work programme was that overly detailed and prescriptive work programmes "are neither necessary, helpful nor desirable for exploration acreage".

NZP&M deponents

[52] The affidavits for the respondent did not traverse the narrative of events or the grounds for the challenged decision in the same level of detail as the affidavits for Greymouth. Having made concessions that certain aspects of the evaluation report were made on incomplete information, the deponents for the respondent addressed these issues at a somewhat more abstracted level. However, Mr Jeaffreson does explain the sequence of dealings and considerations undertaken by the evaluation team, providing his perspective on the various concerns cited in the reasons for recommending that the bid be declined.

[53] Mr Jeaffreson explains the relative importance to the regulator of the holder of an exploration permit surrendering it without completing a drilling programme,[10] and the regulator's perspective on other matters that were considered by the evaluation team. Mr Jeaffreson acknowledges the errors in the decision-making process that were appreciated by NZP&M after the judicial review proceeding was commenced. He also explains the approach adopted to the Westside bid. Mr Jeaffreson denies that there was any "broader strategy" involved in the considerations leading to the recommendation that the bid be declined. He also denied that the 12 April 2018 ban on offshore PEPs was known in advance by the evaluation team and states that the forthcoming ban did not have any influence on the recommendation that the evaluation team made.

[54] Mr Adams initially filed a relatively short affidavit covering his considerations in reaching the decision on Greymouth's bid. His initial affidavit also responded to Mr Dunphy's recollection of the meeting between them on 10 April 2018, and he denied allegations that the decision to decline the bid had somehow been influenced by a broader strategy.

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[10] This being a primary concern with Greymouth's previous performance.

[55] As a consequence of possible inconsistencies between the timing described in Mr Adams' first affidavit for considering the evaluation team's recommendation, and the documents said to be relied on, Mr Adams was invited to complete a further affidavit clarifying that matter. His second affidavit explained in somewhat more detail the extent of documents provided to him and the timing within which that occurred.

[56] Shortly before the hearing, and as a result of quite coincidental discovery of a further ringbinder containing a draft version of the recommendation memorandum, Mr Adams swore a third affidavit which annexed additional versions of the drafts of the recommendation paper that he had seen.

Greymouth's reply affidavits

[57] Mr Crighton completed a reply affidavit providing relatively detailed responses to aspects of Mr Jeaffreson's reasoning for the recommendations he made. He challenged Mr Jeaffreson's account of previous exploratory work done within the permit area, suggesting a more lenient approach having been adopted to non-performance of permit obligations by other operators in the past.

[58] Mr Willis had not originally completed an affidavit as to his part in the dealings with NZP&M on behalf of Greymouth. However, he did complete an affidavit in reply to contest Mr Jeaffreson's recollection of exchanges between Greymouth representatives and NZP&M in December 2017. He also raised instances of NZP&M's dealings with other permit applicants seen by him to have been treated more leniently than Greymouth.

[59] In addition, Messrs Feeley and Linskaill completed affidavits in reply as experts. Mr Linskaill criticised the approach adopted by Messrs Adams and Jeaffreson to the relative importance of a permit holder carrying out a drilling commitment included in a work programme, without having regard to the extent of information indicating that a proposed well would not advance the state of knowledge about the area being explored sufficiently to justify the expenditure. Mr Linskaill also criticised the relatively low value the evaluation team attributed to seismic re-processing which was an exercise undertaken by Greymouth.

[60] In Mr Feeley's reply affidavit, he was critical of NZP&M's failure to invite Greymouth to improve its bid, which initiative was (in Mr Feeley's opinion) a logical step open to NZP&M under cl 7.7(1)(d) of the MPP. Mr Feeley went so far as to say that it was "incomprehensible" to him that Mr Adams did not exercise that power, given Mr Adams' own acknowledgement that the decision was a finely balanced one. Mr Feeley raised a sequence of other criticisms of the process as described in the affidavits of Messrs Jeaffreson and Adams.

Admissibility objection

[61] NZP&M filed a notice of objection to substantial parts of the evidence of each of the four deponents for Greymouth who were propounded as experts. Each had acknowledged awareness of, and a commitment to comply with, the code for experts in schedule 4 to the High Court Rules 2016. Notwithstanding that, a relatively extensive list of objections was lodged citing specific grounds for individual passages in both their original and reply affidavits.

[62] The evidence of Messrs Feeley and Aliprantis was objected to on the basis that their experience in a predecessor of NZP&M was too old to be relevant, particularly given that it pre-dated the current MPP which has governed the block offer processes since 2013. It was contended for NZP&M that there was insufficient foundation for a number of the criticisms of the evaluation team's work advanced by them. For both Messrs Feeley and Aliprantis, and in particular for Mr Linskaill, an additional ground of challenge was that their trenchant criticisms of the process belied any satisfactory assurance of impartiality. Mr Linskaill was criticised as providing in large measure a sequence of submissions to support the grounds of challenge. Given the absence of any experience with the New Zealand regime, Mr Linskaill was challenged as not having the requisite expertise to opine on the matters he addressed.

[63] Having recorded the scope of those objections, Ms Casey QC did not require me to formally rule on them. Rather, I was invited to bear the grounds for objection in mind when assessing the evidence, on the basis that I should either reject some or all of the challenged passages entirely on the grounds of objection raised, or have those grounds in mind when assessing the weight appropriately given to them.

[64] I have assessed the expert evidence with those objections in mind. There is a measure of justification for NZP&M's concern that Mr Linskaill has approached the matters he was asked to consider from the perspective of an overseas advocate for, or supporter of, businesses involved in petroleum exploration. In some opinions, he appears to expect national regulatory bodies to facilitate exploration permits with a view to optimising the return on the resource, leaving a large measure of autonomy to the explorer who should be trusted to optimise exploratory opportunities. I have not found it necessary to formally exclude any of the evidence, but I am certainly persuaded to lessen the weight given to some of the opinions where they are expressed in what can fairly be described as partisan terms.

[65] I am not persuaded that the age of Messrs Feeley and Aliprantis's experience with the regulator requires their opinions to be disregarded, but again that is a factor going to the weight they can be given. So too are the somewhat trenchant terms in which some of their opinions are expressed.

Confidential information in the affidavits

[66] The affidavits contain information which, by consent, was recognised as confidential to Greymouth. In other respects, the affidavits drew on information that was confidential to third parties and which had been provided to experts subject to confidentiality constraints. It was referred to in their affidavits on that basis. At the outset of the hearing, I confirmed confidentiality orders to preserve the agreed extent of confidentiality of such information. I have been mindful of that in preparing the judgment and it has been issued to counsel only on an embargoed basis for two working days to allow any concerns about inadvertent disclosure of confidential material to be raised with me.

First to third grounds of review: assessment of Greymouth's proposed work programme

[67] The first three grounds of review alleged errors in NZP&M's evaluation of the work programme as proposed by Greymouth in its bid. Greymouth's bid was declined in part because (consistently with the recommendation to him) the decision-maker was not satisfied that Greymouth's proposed work programme was consistent with the

purposes of the Act, the purpose of the proposed permit and good industry practice in respect of the proposed activities.[11] The decision-maker did accord greater weight to concerns about Greymouth's commitment to comply with the work programme,[12] but the content of the proposed work programme was also cited as a reason for declining the bid.

[68] Greymouth alleges that this component of the decision included three reviewable errors:

- first, that the decision-maker made errors of fact in respect of the proposed work programme;
- secondly, that the decision-maker made errors of law in respect of that assessment; and
- thirdly, that the conclusion about it was in breach of a legitimate expectation that if a work programme complied with the minimum requirements in the IFB, then it would constitute "good industry practice".

First ground: error of fact in evaluating Greymouth's proposed work programme

[69] The IFB was relatively prescriptive in requiring all bids to meet the requirements for a minimum work programme as set out in schedule 4 to the IFB. The relevant provision in that schedule required bids within the Taranaki Offshore Release Area to include specific minimum work programme requirements as follows:

TARANAKI OFFSHORE; HAWKE BAY OFFSHORE (12-YEAR PERMIT)	
Timeframe from Commencement date	**Activity (all key deliverables)**
Within 60 months	Commit or surrender point (for drilling by 72 months)
Within 60 months	Relinquish 50% of the permit area[179]
Within 72 months	Drill an exploration well to an approved objective and/or depth
Within 108 months	Relinquish 25% of the original permit area [180]
Within 120 months	Commit or surrender point (for drilling by 138 months)
Within 138 months	Drill an exploration well to an approved objective and/or depth
[179] Except where the original permit area is < 100 km^2, then relinquish 25%, or where the original permit area is < 10km^2, then relinquish 10%.	
[180] Except where the original permit area is < 10km^2, then relinquish 10%.	

11 Crown Minerals Act 1991, s 29A(2)(a).
12 Challenged in the fourth to sixth grounds of review.

[70] After being invited to vary its content, Greymouth submitted a proposed work programme in the following terms:

Timeframe from commencement	Activity Type	Activity
Within 24 months	Committed	*Key Deliverable:* Reprocess 393 sq km 3D seismic within or adjacent to the permit NZ$200,000 *Key Deliverable:* Sequence stratigraphic study, NZ$100,000
Within 48 months	Optional	*Key Deliverable:* Commit to next stage of work programme or surrender the permit
Within 60 months	Optional	*Key Deliverable:* Drill exploration well *Key Deliverable:* Relinquish 50% of permit area
Within 72 months	Optional	*Key Deliverable:* Agree with the Minister a work programme for the remainder of the permit term
Within 108 months	Optional	*Key Deliverable:* Relinquish 25% of permit area
Within 120 months	Optional	*Key Deliverable:* Commit to next stage of work programme or surrender the permit
Within 138 months	Optional	*Key Deliverable:* Drill exploration well to an approved objective and/or depth

[71] In the evaluation report, Mr Jeaffreson stated that the evaluation team was not satisfied that the work programme provided in Greymouth's bid was consistent with the requirements in s 29A(2)(a) of the Act:[13]

> In particular, officials consider that the work programme provided in the bid is not demonstrated by the bidder to be a timely, comprehensive plan to explore the bid area, or be likely to sensibly enable a drilling commitment to be made.
>
> These concerns relate to the details of a proposed committed seismic reprocessing obligation, as well as the scheduling of a commit or surrender obligation two years after the completion of this work.

[72] Mr Bulte, supported by the expert deponents for Greymouth, defended the adequacy of its proposed work programme. He treated the first stage, which involved the reprocessing of 3D seismic data of some 393 square kilometres, plus a sequence stratigraphic study which it would commit to at an indicative cost of $300,000, as prudent and adequate. He also considered that the proposed work programme was consistent with good industry practice.

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13 Evaluation Report at [31].

[73] The evaluation team took a different view of the value of reprocessing existing seismic data. In Mr Jeaffreson's affidavit, he states that the officials considered there was insufficient detail to satisfy the decision-maker that the first two years of work would enable Greymouth to decide whether or not they should commit to drilling an exploration well. They were also unclear as to how the data would be reprocessed. As with other aspects of the adverse opinions formed by the evaluation team, there is scope for concern that components of their recommendation adverse to Greymouth were made on the basis that they did not have enough information to make a positive decision. That gives rise to the process concern that the regulator ought to have requested further information, which the process entitled it to do.

[74] Clause 1.2 of sch 4 of the IFB required a bidder to present sufficient detail in the bid to satisfy the Minister for the purposes of s 29A(2)(a) of the Act and to include sufficient and appropriate technical detail, including the seismic reprocessing to sensibly enable a drilling commitment decision to be made within the requisite time. Imposing that obligation on bidders helped minimise the risk that dialogue between any particular bidder and the officials after submission of a bid might result in a bidder providing additional information that improved the status of the bid when it was competing with others. That constraint on dialogue after a bid has been submitted does not arise where it was "uncompeted" (that is, there was no competing bid for the same permit area). In such cases, the MPP authorised dialogue between officials and the bidder to both clarify and improve the content of the bid.[14]

[75] A second concern raised by the officials at the terms of Greymouth's proposed work programme was that there was an "extended hiatus" of two years between the period in which Greymouth would complete the reprocessing of seismic data and a sequence stratigraphic study before committing to its next stage of work. The evaluation report stated that officials would normally expect a "commit or surrender decision" to be made soon after the completion of the technical work required for such a decision to be made. This concern led to the evaluation team not being satisfied that the commit or surrender obligation within 48 months of the grant of the permit would

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[14] MPP, cls 7.7(1)(b) and (d). See [85]–[88] below as to its interpretation and effect.

represent a timely plan to explore the bid area. The two year hiatus was characterised as a sufficient ground for the bid to be declined.

[76] That view was challenged by Greymouth's deponents. They explained that, in the circumstances of this bid, it was consistent with good industry practice to undertake time-consuming research between having the best available data and deciding on the nature and location of any proposed exploration well. Whilst this part of Greymouth's timetable appeared to have a gap, and without conceding that there was one, Greymouth's submission was that the minimum work programme requirement was for a commit or surrender point to be reached within 60 months, and for an exploration well to be drilled within 72 months. In fact, Greymouth's proposed work programme would achieve that point 12 months earlier, given its proposal was to drill an exploration well within 60 months and relinquish 50 per cent of the permit area by that time.

[77] The explanation for Greymouth's proposed work programme appears reasonable to a lay person and it conforms to the minimum requirements set out in cl 2.2 of sch 4(2) of the IFB. However, that is not determinative of Greymouth's challenge that the decision-maker, arguably adopting the evaluation team's recommendation, committed errors of fact in this regard.

[78] The test for an error of fact in findings by a decision-maker that will be so stark as to amount to an error of law was described by the Supreme Court in *Bryson v Three Foot Six Ltd* in the following terms:[15]

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test.

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15 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 (footnotes omitted).

[79] The conclusions on the value of the seismic reprocessing and other analytical work, and the justification for the "hiatus", reflect opinions within the technical areas required to be addressed by the officials. It cannot be said that there was no evidence to support their conclusions, nor are the opposite conclusions on those points advanced for Greymouth so starkly preferable as to be the only reasonable conclusion on the issues confronting the evaluation team. Greymouth's challenge was to the merits of the decision on these points, rather than there being no factual basis on which to arrive at them.

[80] I am accordingly satisfied that errors of fact on these two considerations of the proposed work programme cannot be made out.

Second ground: error of law in assessing the proposed work programme

[81] The evaluation report which was adopted by the decision-maker expressed the view that Greymouth's bid was not consistent with the purpose of either the Act or PEPs, nor was it consistent with good industry practice. Greymouth's second ground of review contends that this conclusion involved an error of law.

[82] Arguably, reaching that conclusion had to involve a misconstruction of the purpose of the Act and PEPs, and what is good industry practice. That phrase is defined to mean acting in a manner that is technically competent and at a level of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in a similar activity and under similar circumstances. Greymouth's case was that its proposed work programme met that standard, given its content and the standards of Greymouth's previous performance. Greymouth characterised the approach reflected in its proposed work programme as being consistent with the "efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals", which is the legislative purpose set out in s 1A(2)(a).

[83] Greymouth has not identified views expressed in the evaluation report that it argues reflect a positive misconstruction of one of these mandatory considerations in the decision-making process. Rather, Greymouth reasons that because its deponents are satisfied that the content of the work programme was indeed consistent with the purpose of the Act and of PEPs, and that it also reflects good industry practice, it

follows that the conclusions to the contrary in the evaluation report must rely on an error of law in interpreting or applying those purposes. Greymouth supported this argument by reference to the opinions of its experts who supported its characterisation of its bid, and criticised the contrary views expressed in the evaluation report.

[84] The purpose of the Act is to promote exploration for Crown-owned minerals for the benefit of New Zealand. In rejecting the adequacy of Greymouth's proposed work programme, the evaluation report arguably was frustrating, rather than promoting, that statutory purpose. Arguably, this was so because there was no competing bid for the PEP sought by Greymouth, the proposed work programme complied with the specific requirements contemplated as the minimum necessary in sch 4 to the IFB and Greymouth should have been seen as the party most likely to undertake exploratory work.

[85] Greymouth submitted that the error of law in the approach adopted to assessing the proposed work programme was compounded by NZP&M's failure to use "the levers" it had available under cl 7.7(1)(b) and (d) of the MPP to obtain further detail about aspects of the bid, or to request the bidder to improve its bid.[16] Mr Jeaffreson had explained in his affidavit that NZP&M was given "insufficient detail" on what Greymouth intended by its work programme, thereby leaving it unclear as to what was actually being proposed.

[86] Particularly in cases of uncompeted bids where cl 7.7(1)(d) of the MPP frees NZP&M of what is otherwise a constraint not to have one bidder improve its bid, NZP&M had a free hand to ask Greymouth to clarify aspects of its bid under cl 7.7(1)(b). After the initial exchange in which Greymouth did alter the terms of its bid to make it a qualifying one, NZP&M did not take the opportunity to seek any clarification.

[87] On this and other grounds of review, Ms Casey emphasised that the grant of a permit is always discretionary and that no bidder has a right to a permit in any circumstances. The decision-maker is entitled to decline a bid, even if it is not competed for by another. This could be on the basis (in the environment that applied

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[16] Quoted at [24] above.

at the time this decision was made) that it may be better to preserve an area offered for a PEP in anticipation of a better offer in a subsequent year, rather than to allocate an exclusive permit to explore, inevitably for a substantial number of years, on what the decision-maker considers to be less than optimal terms. Greymouth's was not the only bid that was declined in the 2017 block offer.

[88] Accordingly, from the Minister's perspective, the mere fact that on another evaluation of the relative merits of Greymouth's bid it might be seen as being worthy of acceptance because it promoted the purpose of the Act, that did not translate into a finding that the decision-maker had erred as a matter of law in declining it where reasoned grounds existed to treat it as not being sufficiently attractive in advancing the purpose of the Act and the MPP.

[89] I accept the Minister's arguments on this ground. The criticisms advanced depended on a contrary view being reached on the merits of various aspects of the proposed work programme.

[90] As to NZP&M's failure to use cl 7.7(1)(b) and (d) of the MPP during its assessment process, for Greymouth to reach the standard of an error of law on this point would require it to make out an obligation for NZP&M to use those provisions in the circumstances that arose. I am not satisfied that such an error has been made out. I do accept that an applicant in Greymouth's position might reasonably expect that if NZP&M was left unclear as to the work that would be involved in a proposed work programme, the regulator would seek clarification. That adds to a sense of unease as to the quality of treatment Greymouth received, but it cannot reach the level of an error of law.

Third ground: legitimate expectation where minimum work programme requirements met

[91] Greymouth pleaded that it had prepared and submitted its proposed work programme in reliance on the minimum levels of exploratory work set out in the IFB. In doing so, Greymouth claims that where the work programme was subsequently accepted by NZP&M as being compliant with the IFB, Greymouth had a legitimate expectation that such compliance meant that the proposed work programme would be

accepted as consistent with good industry practice. Put in the negative, Greymouth claimed that where its proposed work programme exceeded a specific minimum work programme requirement, it had a legitimate expectation that the bid would not be declined on the basis that it did not constitute good industry practice.

[92] In reliance on the acknowledgement that the proposed work programme met the minimum requirements, Greymouth sought a declaration that the proposed work programme was consistent with good industry practice.

[93] The Minister disputed the existence of any representation or settled practice that an acknowledgement that any proposed work programme met the specific minimum requirements in sch 4(2) to the IFB was sufficient to assure a bidder that it would also be treated as consistent with good industry practice.

[94] The specific minimum work programme requirements in cl 2.2 of the IFB are preceded by the general minimum work programme requirements in cls 1.1 to 1.10 of sch 4(1). Ms Casey submitted that after a bid has been accepted as qualifying for consideration by reference to the specific minimum work programme, it must still be subject to an in-depth evaluation on an individual bid basis on separate considerations such as whether the proposed work programme is consistent with good industry practice.

[95] Accordingly, on the terms of the IFB to which Greymouth was responding, the Minister submitted that there was no scope for the creation of anything in the nature of a legitimate expectation.

[96] NZP&M also denied that as a matter of law any relevant legitimate expectation could arise. Both parties cited the criteria for making out legitimate expectation and relevant breach from the Court of Appeal judgment in *Comptroller of Customs v Terminals (NZ) Ltd*:[17]

> [125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A

[17] *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137.

> promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.
>
> [126] The second is to determine whether the plaintiff's reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.
>
> [127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.

[97] A party claiming a legitimate expectation is not required to establish that it has relied to its detriment on the relevant representation, but the absence of such detrimental reliance can count against the claim. In a subsequent Court of Appeal judgment adopting the approach in *Comptroller of Customs*, the Court observed:[18]

> [14] We accept that success at the first step – establishing the existence and content of the expectation pleaded – might not come in the form of an explicit promise. A promise can be implied from past practice or policy. But where the expectation is in the form of a practice or policy, as alleged here, its existence and content must equally be established to the level of a commitment or undertaking. The existence and content of such a practice or policy must be both unambiguous, and settled in the sense that it is regular and well established.
>
> [15] We also emphasise the importance of the second element – establishing reasonable reliance on the unambiguous and settled policy or practice – to a successful claim of a legitimate expectation. The presence of reliance (that is, reasonable reliance) helps distinguish a legitimate expectation from one which is a mere hope that a course of action will be pursued. It is difficult to see how a party could have a legitimate expectation without relying on the undertaking (whether by a promise or otherwise), given that its foundation is that a public authority should be bound by its undertakings when it "has promised to follow a certain procedure, [because] it is in the interest of good administration that it should act fairly and should implement its promise".

[98] That judgment described the need for establishing an unambiguous and settled commitment by the decision-maker as a "high threshold".[19]

[99] Greymouth pleaded the expectation arose from the terms of the IFB. There was no allegation of a specific representation made on behalf of NZP&M in the course of dealings over the bid at issue in this proceeding. Greymouth's submissions alluded in general terms to reasonable reliance on NZP&M's past practice, but the point was not developed.

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18 *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623 (footnotes omitted).
19 At [31].

[100] Greymouth relied on the opinion expressed by Mr Linskaill in his reply affidavit that a minimum work programme conveys a reasonable expectation that if its criteria are met, then the bid would not be declined on the ground that the proposed work programme is insufficient. Given the factual analysis specific to the communications or course of conduct between the parties that is essential to establishing any representation, I am not assisted in this regard by the opinion of Mr Linskaill when he has no personal involvement in the course of dealings between Greymouth and NZP&M.

[101] Greymouth's claim on this ground of review rests implicitly on the premise that offering a work programme that complies with, or exceeds, the minimum requirements set out in specific terms in the IFB necessarily results in that work programme being accepted as constituting good industry practice. However, Greymouth does not cite any representation made on behalf of NZP&M that equates those two concepts. Any bid must comply not only with the specific requirements set out in cl 2.2 of sch 4 to the IFB, but also the broader considerations under the general requirements in cl 1 of sch 4. That ought to convey to the reader that an assessment of whether a proposed work programme is accepted as being consistent with good industry practice will depend on wider considerations than whether it complies with the specific minimum requirements in cl 2.2 of that schedule.

[102] I accordingly agree with the submission for the Minister that this ground of review claiming a legitimate expectation fails because Greymouth has not made out a representation in clear and unambiguous terms.

Fourth to sixth grounds of review: consideration of the likelihood of Greymouth complying with its proposed work programme

[103] These grounds of review focus on the evaluation by NZP&M as to whether, if granted the permit, Greymouth was likely to comply with the work programme it proposed. This was a mandatory consideration under s 29A(2)(b).[20]

[20] The text of s 29A is set out at [16] above.

[104] Mr Jeaffreson's 13 December 2017 letter responding to Mr Willis's request for particulars of alleged non-compliance with permit conditions listed eight matters. The first two listed were the surrenders of two PEPs by Greymouth companies with outstanding obligations to drill exploration wells.[21] In addition, other matters seen as relating to, or having a bearing on, the type of activities proposed under the bid cited non-compliance between 2014 and 2017 in respect of PMPs (rather than PEPs) granted to Greymouth. These were:

- PMP 38148 (Ngatoro) – flaring without consent (2015–2016); well plugging and abandonment without consent (Ngatoro South-1 (2017);

- PMP 38157 (Radnor) – cessation of continuous production without consent (January 2014 to September 2014);

- PMP 38159 (Surrey) – cessation of continuous production without consent (intermittent between 2016, 2014);

- PMP 38161 (Turangi) – flaring without consent (2016); and

- PMP 50509 (Moturoa) – cessation of continuous production without consent (intermittent between 2014 and 2016).

[105] In a separate appendix to Mr Jeaffreson's 13 December 2017 letter, he responded to Mr Willis's contention that NZP&M had an obligation to raise concerns in respect of non-compliance with a bidder, given the terms of cl 5.3(6) of the MPP. That provides:

> (6) If the Minister may otherwise grant a permit, but has concerns about the applicant's record of compliance with other permits or rights, the Minister will raise these concerns with the applicant and inform the applicant of the matter or matters the Minister considers to be relevant to the granting of the permit. Before making a decision, the Minister will consider any comments that the applicant makes.

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[21] These were PEPs 51154 and 51152 – the circumstances are described at [114]–[131] below.

[106] Mr Jeaffreson advised the view of NZP&M that the obligation to confer with a bidder about matters of non-compliance was only triggered if the Minister may otherwise grant a permit. In the present case, Mr Jeaffreson suggested that the existence of other grounds for declining the bid removed any obligation for NZP&M to raise matters of non-compliance with Greymouth. The correctness of that interpretation of cl 5.3(6) of the MPP is among the issues raised by Greymouth in its fourth to sixth grounds of review. More generally, Greymouth challenges the conclusion that there had been non-compliance, and that any non-compliance that was established was sufficient to justify the conclusion that Greymouth was not likely to comply with the provisions of its proposed work programme. These grounds allege that NZP&M committed errors of both fact and law on this aspect of its evaluation and decision.

Fourth ground: breach of procedural fairness in evaluation of compliance history

[107] Greymouth pleaded that it was unaware of NZP&M's views on alleged prior non-compliance in respect of work programme commitments and permit conditions until receipt of NZP&M's 13 December 2017 letter. Consequences arising from Greymouth only being advised of the eight alleged non-compliances at that time included the absence of a material opportunity to demonstrate to NZP&M that the Ngatoro abandonment allegation and the Radnor production allegation were both factually incorrect, and that Greymouth had not been afforded any proper opportunity to respond to others of those allegations. Greymouth claimed that NZP&M's process in this regard was unfair and breached natural justice. Any such alleged material non-compliance ought to have been raised with Greymouth at the earliest opportunity and, at the latest, at the first annual review meeting (ARM) that was convened between the regulator and Greymouth after the alleged non-compliance was said to have occurred.

[108] Greymouth pleaded that if it had been afforded the opportunity to address the eight alleged non-compliances fairly, it would have had a meaningful opportunity to ensure factual errors were corrected, and been able to address the remaining issues when preparing its bid. On the basis of these allegations, Greymouth sought a declaration that it was unfair and in breach of natural justice for any of the instances of non-compliance to be taken into account when its bid was assessed.

[109] NZP&M admitted there had been factual errors, and in particular that it was wrong to treat the Ngatoro abandonment allegation and the Radnor production allegation as examples of non-compliance. It further admitted that its process was inadequate, as a consequence of which it consented to the quashing of the decision and a direction that the bid be reconsidered. Beyond those matters, NZP&M did not admit other aspects of the allegations of procedural inadequacies and it opposed any additional relief.

[110] NZP&M relied on the terms of the IFB as alerting bidders to the relevance of past compliance in the evaluation of bids, and as providing explicit requirements for disclosure of all such matters in bids. Schedule 6 to the IFB required information to be provided on a bidder's compliance history. Compliance with previous or current permit or licence obligations over the previous 10 years was to be provided where it was material and related to, or had a bearing on, the type of activities proposed under the bid. An inclusive list of such matters included:[22]

> …
>
> c. details of any petroleum permits or licences, minerals permits or licences held by the Bid participant (or a related company) in New Zealand or internationally that have been surrendered with outstanding obligations at the date of the surrender. If so, provide details of those obligations (in particular, obligations to drill exploration wells or complete seismic survey work) and reasons for the surrender and outstanding obligation.

[111] This obligation on a bidder was subject to it reasonably assessing the materiality of any previous non-compliance. It was not suggested for NZP&M that the obligations on a bidder to make disclosure of previous instances of non-compliance is a complete answer to the criticisms levelled of an inadequate process.

[112] It remains relevant, at least to relief, to review the divergent positions of the parties on the materiality of the remaining instances of alleged non-compliance that were taken into account by NZP&M. This is because these instances were material to NZP&M forming the view that the extent of non-compliance justified the decision-

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[22] IFB, sch 6(4), cl 4.2(1).

maker taking the position that Greymouth would be unlikely to comply with the terms of the proposed work programme.

[113] Some detail is required of the circumstances in which Greymouth surrendered PEPs 51154 and 51152.

The surrenders of PEP 51154 and 51152

[114] These two PEPs had been granted for onshore Taranaki areas, originally in 2008. Mr Crighton's evidence traversed a relatively detailed history of the work Greymouth had undertaken within each of those permit areas. Initial drilling commitments had been met, and when Greymouth still had time to make decisions whether to "drill or drop",[23] Greymouth identified an apparently more positive prospect, the exploration of which required a further well to be drilled in the optimum position that was somewhat outside the boundary of PEP 51152.

[115] Greymouth shared its analysis leading to that point with NZP&M, and made application for an extension of land (EOL) to extend the boundary of PEP 51152. After dialogue with officials, including reducing the extent of the additional area sought and adjusting proposed work programmes for the areas, the EOL was granted in October 2016.

[116] Greymouth personnel perceived NZP&M officials to share their excitement about this new "play", and to be supportive of Greymouth's proposal to drill in the extended area as the means of best advancing the state of knowledge of those permit areas. The Ngatoro South-1 well was duly drilled but no commercial hydrocarbons were discovered. In January 2017, Greymouth advised NZP&M of that, and that the well was being abandoned. However, at least in the view of Mr Crighton, it had generated significant information and insight for the Crown's benefit to better understand its potential resources in the Taranaki basin.

[117] At the ARM between officials and representatives of Greymouth on 25 May 2017, Mr Crighton and other Greymouth representatives discussed with the officials

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[23] That is, relinquish the areas by surrendering the permits or commit to further drilling activity.

the abandonment of the Ngatoro South-1 well in terms they perceived as being accepted and agreed to by the officials. In discussions at that time, Mr Crighton indicated they were likely to surrender the whole of PEP 51152 as they saw no potential in it.

[118] In June 2017, Mr Crighton wrote to NZP&M to surrender PEP 51154. He stated that Greymouth was surrendering the permit on the basis that it did not consider the remaining prospectivity in the surrounding area was commercially viable in the current economic environment. The application to surrender was the subject of a memorandum from a junior geologist at NZP&M to Mr Adams, the delegated decision-maker in respect of it, dated 11 July 2017. The questions to be addressed in such a report included consideration of whether it would be in the interests of the Crown for the Minister to acquire the permit. The only reference to non-compliance was to the effect that the officials considered the permit "has been surrendered in a state of non-compliance due to the failure to complete the committed work programme obligation stage three, 5(a) by the due date of 23 June 2017". The conclusion in the report was that officials considered everything was in order and therefore the application must be accepted. The report did not include any acknowledgement of reasons for non-compliance.

[119] Mr Adams advised Mr Crighton by letter dated 18 July 2017 that the application for a full surrender of PEP 51154 had been granted. There was no reference to any concern about non-compliance with the terms of the permit, or that the request for surrender was likely to have adverse effects for Greymouth in the future.[24]

[120] Greymouth undertook further analysis to evaluate the basin in which PEP 51152 was located. It was unable to identify any targets and in November 2017 Mr Crighton applied to surrender it. Greymouth indicated that the only well-defined prospect had been tested unsuccessfully at Ngatoro South-1 and no further prospectivity was recognised within the permit at that time. In the report from the same junior geologist at NZP&M to Mr Adams, it was noted that the outstanding

[24] Email from Mr Adams to Mr Crighton, 18 July 2017.

drilling obligation had existed prior to the grant of the EOL, with the EOL bringing an obligation to drill a second well. The memorandum commented:

> It is likely that the permit holder only intended to drill the second well in the success case of the first [sic].

[121] The memorandum stated that all other general and work programme conditions had been met, with the exception of the outstanding drilling obligation and recorded:

> Officials consider the permit has been surrendered in poor standing due to the failure to complete the committed work programme obligation 5(a), before applying to surrender the permit.

That resulted in the recommendation from officials that the surrender "should be granted with the permit surrendered in poor standing".

[122] Despite the terms of that recommendation, the formal advice to Greymouth conveyed on 24 November 2017 made no reference to any adverse view formed by NZP&M arising out of the non-compliance with the work programme.

[123] When Greymouth received Mr Jeaffreson's 13 December 2017 letter, it learnt that surrendering PEPs 51154 and 51152 with outstanding drilling commitments was the primary basis for NZP&M's view that Greymouth was likely not to comply with the terms of the work programme it had proposed. Thereafter, Greymouth advanced arguments to refute the view adopted by NZP&M, inviting reflection on the extent of resources Greymouth had committed to work programmes in both of the PEPs, and the reasonableness of the views it had come to that drilling further wells could not be justified on the updated state of the knowledge of the areas following analysis of the data obtained from drilling the Ngatoro South-1 well.

[124] Part of Greymouth's process complaint was that NZP&M ought only to take into account aspects of non-compliance that had been raised with it at an ARM, when assessing the likelihood that Greymouth would comply with a proposed work programme for a current bid. As the sequence of events about the surrender of PEPs 51154 and 51152 shows, such complaint could not avail Greymouth in respect of these matters as there had not been an ARM between the surrenders occurring and NZP&M evaluating the bid that is currently in issue.

[125] Officials maintained their view that non-compliance with the drilling obligations under PEPs 51154 and 51152 justified their recommendation that the decision-maker could not be satisfied that Greymouth was likely to comply with its proposed work programme in the 2017 bid.

[126] Both Messrs Adams and Jeaffreson deposed that surrendering a PEP without complying with a committed drilling requirement is a serious matter. They considered that Greymouth personnel would have appreciated that at the time they applied to surrender PEPs 51154 and 51152, without needing to be told of the risk of adverse consequences by NZP&M. Mr Jeaffreson treats Greymouth's justifications for surrendering those permits with outstanding drilling commitments as an indication that Greymouth fails to recognise the prospect of alternatives available to it that would have eliminated or reduced the extent of non-compliance when permits were surrendered. The final evaluation report presented to the decision-maker responded to Greymouth's arguments explaining why further wells were not drilled, implicitly dismissing the prospect that drilling Ngatoro South-1 well could be seen as a substitute for either of the pre-existing commitments to drill in PEPs 51154 and 51152. The results of the unsuccessful Ngatoro South-1 well may have provided data that justified the view that further drilling in both permits would be unproductive and could not be justified. However, that was not a sufficient rationale where drilling commitments were often made with prospects of success no better than 20 per cent.

[127] A further example of Mr Jeaffreson's view on the materiality of Greymouth's non-compliance with the drilling requirements under PEPs 51154 and 51152 is contained in his more recent 13 March 2020 memorandum to the Minister, reporting on the evaluation of Greymouth's bid in the 2018 block offer for an onshore Taranaki block. The differences of view about Greymouth's claimed justification for surrendering those permits with drilling obligations outstanding had been thoroughly aired by the time of his March 2020 memorandum. In it, Mr Jeaffreson made the following comments:

> - The committed exploration well drilling obligations that were not completed on these permits were key deliverables – activities crucial to the success of these permits … As such, officials considered that the surrenders of PEP 51152 and PEP 51154 would count against the granting of a permit to the bidder.

- That Greymouth's compliance with work programmes in numerous exploration permits had generally been good.

- That no further relevant issues have arisen on exploration permits since the surrender of PEPs 51152 and 51154.

[128] In rejecting Greymouth's explanation that the results of Ngatoro South-1 meant they could not justify any further drilling, Mr Jeaffreson commented:[25]

> However, it is characteristic of petroleum exploration that there is a low probability of success when drilling a well, especially when the well tests a new petroleum play. It is of concern to officials that the commitment to drill Ngatoro South-1, required in order to be granted an EOL application, was apparently made in the knowledge that the drilling of the other two committed wells was contingent on the (statistically unlikely) success of Ngatoro South 1. However, the decision to grant the EOL was made on the understanding that these pre-existing obligations would be honoured, irrespective of the result of Ngatoro South-1.

[129] Under the heading of "The Bidder's likely future behaviour", the March 2020 memorandum commented:[26]

> By raising these matters with the Bidder during the evaluation of the Bid, the Bidder may be encouraged to give more consideration to the completion of commitments in future. However, the Bidder appears to consider that the surrender of PEPs 51152 and 51154 without completing committed wells was justified.
>
> …
>
> In summary, the Bidder has not provided sufficient assurance to satisfy officials that similar decisions would not likely be made by the Bidder in relation to the current permit sought.

[130] The first of Mr Jeaffreson's comments in the preceding paragraph provide some basis for the implication that officials considered declining Greymouth's bid was appropriate to encourage them to comply more fully in the future. In his affidavit commenting on Greymouth's explanations for having surrendered PEPs 51154 and 51152 without completing drilling commitments, Mr Jeaffreson stated:

> [Greymouth's] response on this issue was concerning because there was no acknowledgement that it ought to have done anything differently. This suggested to us that Greymouth would make the same decision again if it made commercial sense to Greymouth. We continued to have concerns as to

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25 Memorandum of Mr Jeaffreson to the Minister of Energy and Resources, 13 March 2020 at 9.4.14.
26 At 9.4.14.

> whether [Greymouth] was likely to comply with the proposed work programme in its bid.

[131] There is certainly scope for the contrary implication, namely that once Greymouth appreciated the attitude NZP&M would take to non-compliance, it would assess more cautiously the circumstances in which it proposed to surrender permits.

The course of dealings with Mr Jeaffreson

[132] In advancing its concerns that the evaluation team would not deal with the issues with an open mind on any reconsideration, Greymouth focused on Mr Jeaffreson's conduct. This included the circumstances in which six other aspects of alleged non-compliance were noted, following Greymouth's request for details of Mr Jeaffreson's recommendation that the decision-maker should not be satisfied that Greymouth would likely comply with the provisions of its proposed work programme. In Mr Jeaffreson's affidavit, he introduced that expanded list by deposing:

> We also noted other instances of perceived non-compliance, but in our view these were relatively immaterial and only had a relatively minor additional effect on top of the surrendering of PEP 51152 and PEP 51154.

[133] In a footnote added at that point in his affidavit, he stated:

> A lot of these instances of non-compliance only came to the fore when [Greymouth] asked for a list of the non-compliance we relied on when forming our recommendation. At that point it was necessary to ensure we had a complete list and these came out.

[134] That evidence raises the prospect that, in engaging with Greymouth at that point in the assessment of the bid, Mr Jeaffreson considered it appropriate to bolster the basis for an opinion adverse to Greymouth by citing instances of alleged non-compliance that would not otherwise have featured in the evaluation team's assessment. That is a step beyond communicating to a bidder the provisional basis for assessment of its bid, as matters stood at the time.

[135] This is not a situation where officials are attempting to improve the grounds for a formal decision after it has been made, as was the subject of comment by the

Court of Appeal in *Taylor v Chief Executive of the Department of Corrections*.[27] However, there is some basis for the concern expressed by Mr Feeley that where perceived non-compliance was not material enough to be raised at the ARM after the conduct occurred, then a reasonable implication arises that NZP&M acquiesced in the conduct at the time. Caution should be applied in giving them any greater significance where raised as justification for deciding to decline a bid.

[136] Greymouth supported its concerns about Mr Jeaffreson's objectivity by reference to my judgment on an earlier judicial review proceeding brought by Greymouth to challenge the lawfulness of NZP&M's imposition of a condition of a work programme in a PMP requiring that part of the permit area be surrendered.[28] In that case, there had been some focus on a letter written by Mr Jeaffreson to Greymouth in the course of a vigorous exchange of positions. I commented:

> [167] Although communications in this context might understandably be somewhat testy, some of Mr Jeaffreson's language could be criticised for being potentially threatening. For example, Mr Jeaffreson stated that if the area outside the polygon were surrendered before 16 March 2017, any non-compliance would not be taken into account in assessing any future applications. Given the seriousness of non-compliance, raising it in this manner could be seen as an implicit threat. …

[137] In Mr Jeaffreson's 8 December 2017 letter to Greymouth warning that the evaluation team intended to recommend to the decision-maker that the bid be declined, he referred to that being "in consideration of the matters listed under s 29A(2)(a) and (b)(iii) of the [Act]". His letter advised that a final decision was likely by 14 December 2017, and there was no suggestion that Greymouth would be afforded an opportunity to make submissions to NZP&M about matters that might be taken into account against Greymouth in relation to its likely compliance.

[138] Mr Willis's 11 December 2017 response to Mr Jeaffreson cited cl 5.3(6) of the MPP, which specifies that where the Minister has concerns about an applicant's record of compliance, those concerns are to be raised with the applicant and, before making a decision, the Minister will consider any comments the applicant makes about its

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27 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [33].

28 *Greymouth Petroleum Mining Group Ltd v Minister of Energy and Resources*, above n 9.

record of compliance. Ultimately, NZP&M did afford Greymouth further time to make submissions about its record of compliance and the decision on the permit was deferred from the proposed date of 14 December 2017 until 6 March 2018. However, it is a fair inference that, but for Mr Willis's protest, Mr Jeaffreson would have been comfortable having the evaluation process and decision made without affording Greymouth an opportunity to put its case as to the adequacy of its compliance record.

[139] Mr Jeaffreson took the view that cl 5.3(6) of the MPP did not apply to assessment of Greymouth's bid because it is prefaced by the words "if the Minister may otherwise grant a permit". He argued that was not the case here given additional concerns under s 29A(2)(a) of the Act (that is, whether the proposed work programme was consistent with the Act and other instruments). Given the relative weighting of concerns about the likelihood of Greymouth complying with the work programme, and the more minor concerns about the adequacy of that work programme, that is a difficult interpretation to sustain and there was no attempt by Ms Casey to defend it.

[140] Mr Jeaffreson deposed that the relevant assessment was a purely forward-looking one and there was no way a bid would be declined to punish the bidder for past non-compliance. Mr Willis disputed that in his affidavit in reply, citing a conversation with Mr Adams in which he recalled the latter using phrases such as "in the dog box" or "in the naughty corner" where non-compliance would result in no further bids being accepted for a period.

[141] There was no opportunity for a rejoinder to Mr Willis's evidence on this point and I put the contention to one side.

[142] Reviewing the course of dealings between Mr Jeaffreson and Greymouth representatives reveals a combative relationship. Greymouth was assertive and potentially aggressive: Mr Willis's 11 December 2017 letter included "we now demand;" (followed by a list of information demanded urgently) and "the permit applicant demands that you particularise". On 12 February 2018, when Mr Dunphy replied substantively to the concerns NZP&M identified, he responded not merely to the national manager of petroleum at NZP&M, but also to the general manager of NZP&M, to the Minister and to the Minister for Economic Development.

[143] In reflecting on his frequent dealings with Greymouth whilst he was in a senior position at the regulator, Mr Feeley described Greymouth as:

> An often-challenging permit holder who did not always enjoy good relationships with other members of the industry, and who frequently challenged Crown Minerals' views on legislation, policy and industry practices.

[144] It would be understandable for an official in Mr Jeaffreson's position to respond defensively to such pressure. From the perspective of an official in his position, it might be said that Greymouth's tactics had brought that on themselves. Another perspective is that the exercise of statutory powers requires even-handed objectivity consistent with good faith.

[145] The process was inarguably inadequate. The consequences of the breaches of natural justice are likely to be idiosyncratic and fact-specific. Depending on later steps in the process, it may well be that at least a partial cure for the procedural deficiencies is provided by later steps in any particular bid evaluation process. A broader concern that a reconsideration might not be dealt with objectively on its merits is a matter that becomes relevant in dealing with the justification for any additional relief.[29]

Fifth ground– error of fact in respect of compliance history

[146] Greymouth pleaded that the decision-maker erred in fact by proceeding on the basis that any of the eight alleged non-compliances taken into account in reaching the decision to decline its bid were true, accurate and relevant. The Minister did not plead to the individual allegations in the second amended statement of claim about the extent to which the evaluation reports were factually wrong about alleged non-compliance. Instead, the statement of defence admitted inadequacies in the process of evaluating the bid, sufficient to warrant the decision being quashed and a reconsideration being required.

[147] NZP&M admitted that the Ngatoro abandonment allegation and the Radnor production allegation were both wrong. There was no refutation of the explanations given by Mr Crighton as to why a number of the other alleged items of non-compliance

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[29] I summarise my decision on additional relief at [275]–[276] below.

were not justified. For instance, the allegations that there had been unconsented flaring at Ngatoro and Turangi failed to acknowledge that the relevant regulations permitted flaring without consent in certain circumstances, which Greymouth claimed had been relevant in both those cases. The existence of flaring had been deduced by officials from production reports, which did not provide for permit holders to explain the circumstances in which flaring had occurred.

[148] The non-compliance where there had been cessation of continuous production at Moturoa without consent was alleged to have been intermittent between 2014 and 2016. Mr Crighton's explanation was that lapses in production between 1 January 2014 and 30 August 2014, and then between 23 October 2015 and 31 December 2016, had been discussed with officials during the periods they occurred and none of those instances had been raised by officials as a source of concern during the ARMs in 2015, 2016 and 2017. The explanation for the cessation of continuous production was such that Greymouth disputed that it had any possible relevance to an assessment of the likelihood of it complying with its work programme on its 2017 bid.

[149] In his reply affidavit, Mr Crighton expresses concern at the manner in which the six more minor instances of non-compliance had been raised only when Greymouth questioned the recommendations that its bid be declined. I have addressed that at [133] to [136] above. I accept Mr Crighton's implication that these instances of non-compliance were not relevant to NZP&M's assessment until it was asked by Greymouth to justify the opinion that it was likely Greymouth would not comply with commitments made in its proposed work programme. That raises the spectre of an ex post facto justification for the recommendation, which does little to provide an assurance of the integrity of the process.

[150] Greymouth has made out material errors of fact that go beyond the limited admissions made by NZP&M.

Sixth ground: error of law, failure to take all relevant considerations into account on Greymouth's compliance history

[151] This ground cited the matters required to be considered under s 29A(2)(b) of the Act, and alleged that any information about an applicant's failure to comply with

a permit needed to be true and accurate. Also, such information had to reflect circumstances where the failure to comply had a tendency to inform how the applicant for a permit would conduct itself in the future. Greymouth also pleaded that the assessment needed to be a balanced one, taking into account the extent of an applicant's history of compliance. On the facts here, Greymouth pleaded that there was no forward-looking assessment of likelihood of compliance, that the decision was made without identifying and assessing all relevant information and that irrelevant information was taken into account, including errors of fact.

[152] Greymouth contended there were two errors in the legal approach adopted by the evaluation team and the decision-maker to the determination required under s 29A(2)(b) of the Act. First, their evaluation allegedly focused on the negative aspects of Greymouth's past record when Greymouth's interpretation of the section required an holistic and forward-looking analysis. Secondly, the standard applied was allegedly inconsistent with the likelihood that Greymouth would comply with, and give proper effect to, the proposed work programme.

No balancing of positive compliance

[153] As to the first aspect of these criticisms, the extent of an applicant's past failure to comply with the terms of the permit is made relevant by the terms of s 29A(2)(b)(iii). Whilst there is a filter that it is only information that is relevant to a failure to comply, it is unsurprising that past performance is treated by the statute as a potentially relevant indicator to the likelihood of future compliance. However, it is logical that a reasonable decision-maker would not focus solely on occurrences of past non-compliance, without balancing that against the extent of the applicant's record of compliance.

[154] Greymouth's argument on this aspect was driven by its belief in the high quality of the record of its own past performance. Not only did Mr Dunphy and other deponents consider that there were adequate justifications for not drilling the wells Greymouth had been committed to before surrendering PEPs 51154 and 51152, but those aspects of non-compliance were substantially outweighed by the far greater extent of compliant performance under a significant number of other PEPs and PMPs.

Greymouth's criticism that NZP&M had given undue weight to its non-compliance with the obligation to complete drilling of two wells depended on the relative weight an assessor ought arguably to give to the positive aspects of its record.

[155] There is no evidence of a balanced comparison by the evaluation team of the extent of Greymouth's compliance with other permits, against the relative significance of its non-compliance with drilling obligations in PEPs 51154 and 51152. This criticism is a valid one in a broader assessment of the quality of the decision-making, but the decision-maker was empowered to attribute the relevant weight he considered appropriate to positive and negative factors in this evaluation. I cannot be satisfied that Mr Adams failed entirely to have regard to the positive aspects of Greymouth's history of compliance.[30] His decision rests either on the premise that the positive aspects deserved only scant attention or that they were heavily outweighed by the relevance of significant non-compliance with the drilling commitments under PEPs 51154 and 51152. I am not persuaded that it reaches the threshold for an error of law.

Wrong standard on likelihood of compliance

[156] The second aspect is that NZP&M had applied too high a standard of proof in requiring Greymouth to establish that it was likely it would comply with, and give proper effect to, the proposed work programme.

[157] The approach adopted by the evaluation team in the final version of the evaluation report focused on the non-compliance in surrendering PEPs 51154 and 51152 without completing drilling commitments. The report also reviewed the other instances of non-compliance, but there was no reference to balancing them against the extent of Greymouth's compliance over the years.[31] The matter was left on these terms:[32]

> Officials do not necessarily consider that non-compliance with the work programme of Bid 60403 will occur. Rather, officials are simply not satisfied that the bidder's compliance with the proposed work programme in Bid 60403 can be said to be likely.

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30 His note, quoted at [165] below, acknowledged Greymouth's positive record.
31 Evaluation report at [37]–[39; Appendix 4 of Evaluation report at 21-29.
32 At 29.

[158] In addition, Ms Cuncannon, who presented this aspect of Greymouth's submissions, focused on the terms in which Mr Jeaffreson had described the compliance assessment undertaken by the evaluation team in his affidavit. He stated:[33]

> … the main reason why we care about compliance is tied in to the general judgement call as to whether the Crown's interests are best served by the land being permitted to the bidder or not. It will only be in the Crown's best interests for a permit to be granted if we are confident the promised work will actually be carried out. Otherwise the land could be permitted without being actively explored, which would mean little or no data would be produced and no hydrocarbons found.

[159] Ms Cuncannon focused on the words Mr Jeaffreson had used in the second sentence of that explanation. She argued that if Mr Jeaffreson had applied the test required by the statute, he would have expressed himself in terms that the permit would be granted if "we are *satisfied* the promised work *is likely to* be carried out". Arguably, it was materially more difficult for Greymouth to establish to NZP&M's satisfaction that the regulator could be confident the work would actually be carried out, than if NZP&M had only to be satisfied that the promised work was likely to be carried out.

[160] Ms Casey dismissed the perceived differences as a matter of semantics. In any event, if Mr Jeaffreson had been other than entirely precise in the language he chose in his affidavit, that could not create an error in the standard applied by the evaluation team in its report, or by the decision-maker.

[161] Counsel for both parties invited analogy with the interpretation of the word "likely" in other statutory contexts. With respect, the differences between them were more apparent than real. In *McGrath v Accident Compensation Corporation*, the Supreme Court had to consider whether a claimant was likely to achieve vocational independence, in the context of accident compensation legislation.[34] "Likely" in that context was seen as being an outcome reasonably in prospect.[35] In the context of the test under s 67(3) of the Commerce Act 1986 of likely future benefits and detriments of a proposed transaction, the Court of Appeal in *NZME Ltd v Commerce Commission*

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33 Affidavit of D H S Jeaffreson, 3 July 2020, at [62].
34 *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733.
35 At [33].

considered an effect to be likely if there is a "real and substantial risk" or a "real chance" that it will occur.[36]

[162] In *Talleys Fisheries Ltd v Cullen*, Ronald Young J addressed whether it was likely that future benefits of overseas investment in fishing quota had been made out.[37] He characterised "likely" in this context as meaning both a distinct possibility, and then – treating it as the same thing – more than a mere possibility.

[163] I hesitate to accrete another layer on the various attempts to distil in different statutory contexts any more useful test than that provided by Parliament in the Act. Accretion can readily become encrustation, unnecessarily weighing down the words of the statute with multiple qualifiers. The onus on the decision-maker is a positive one to be satisfied that compliance is an outcome that is reasonably in prospect, that being an outcome that is a distinct possibility. It is not by any means a high onus to make out.

[164] I accept that there would be a material difference between a test of whether a decision-maker could be satisfied that work committed to in a work programme was likely to be carried out, when contrasted with a higher onus required to enable the decision-maker to be confident that the work would actually be carried out.

[165] Mr Adams' contemporaneous handwritten notes of his assessment of this aspect of the test recorded:

> - Compliance → not OK but on balance over 15 years would probably be accepted as OK re WP delivery in terms of ability to find petroleum and pay royalties.
>
> o Dropped 2 committed wells in 2017. But drilled the only exploration well in NZ that year – potential play opener.

[166] That suggests a more balanced evaluation, taking into account the positive performance by Greymouth over 15 years and the rest of its performance in the year in which it failed to drill committed wells. In his principal affidavit, Mr Adams acknowledged that the decision to decline the bid was not a decision that he made

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36 *NZME Ltd v Commerce Commission* [2018] NZCA 389, [2018] 3 NZLR 715 at [83]–[89].
37 *Talleys Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 at 43 and 56.

lightly, that he found it a difficult judgement call and wavered a couple of times before settling on a view adopting the recommendation of the evaluation team. He deposed that he had publicly stated the importance of Greymouth's Turangi field discovery at a petroleum conference in Wellington in 2018 and acknowledged a significant amount of respect for their achievement. In the end, he endorsed the evaluation team's view that he could not be satisfied that compliance with the proposed work programme was likely.

[167] I consider that the evaluation report reflected the application of a higher onus being required of Greymouth than the wording of s 29A(2)(b) contemplated. That is borne out by the terms in which Mr Jeaffreson explained his analysis. Had that been the final decision it would have reflected an error of law in this regard. However, whilst a risk of error by the decision-maker remains, I am not satisfied that the same standard was applied by Mr Adams in his decision. The notes made at the time and terms of his affidavit reflect a more balanced assessment with what he saw as a difficult line call decision.

[168] I make the same finding in respect of the allegation of failure to take into account all relevant considerations. There was no acknowledgement in the evaluation report balancing the specific instances of non-compliance against the history of Greymouth's compliance over a substantial number of years. The failure to undertake that aspect of the evaluation amounts to the omission to have regard to a relevant consideration. However, when the evaluation team's recommendation was being considered by Mr Adams, the notes suggest that he did have regard to the extent of substantial compliance by Greymouth. I infer this is why the ultimate decision under this criterion was one that he wavered on, whereas the focus on negative aspects led to a firmer conclusion against Greymouth in the evaluation report.

Seventh ground of review: unlawful abdication of authority

[169] There were two parts to this ground for review. First, Greymouth attributed responsibility to Mr Adams for the inaccuracies in the evaluation report on which he relied. Secondly, that the records allegedly showed that Mr Adams failed to exercise independent judgement or apply a statutory discretion, but rather adopted the decision

that had effectively been made by the evaluation team in their report. Greymouth pleaded that this constituted an unlawful abdication or sub-delegation of Mr Adams' decision-making responsibilities.

[170] The first of these propositions was conceded. As the Court of Appeal acknowledged in *Daganayasi v Minister of Immigration*, where a statutory decision-maker instructs a referee to ascertain facts for him and report, the decision-maker bears responsibility for a misleading or inadequate report.[38] In conceding that the evaluation report contained material inaccuracies, providing part of the justification for quashing the decision and requiring a reconsideration, the Minister has conceded this first aspect of this ground.

[171] However, Ms Casey firmly refuted any suggestion that that concession necessarily meant that the second aspect of this ground was made out. Her submission was that Mr Adams' handwritten notes clearly showed that he had read all the correspondence, spoken to the evaluation team and to the NZP&M legal adviser, and provided ample evidence of his independent thinking. On the matters I reviewed at [165] above, I accept that is the effect of the evidence for which there is no effective rebuttal by Greymouth. I accordingly find that the allegation of sub-delegation of the decision-making responsibility cannot be made out.

Eighth ground of review: unreasonableness

[172] Greymouth pleaded that the decision to decline its bid was unreasonable given that it complied in all material respects with the requirements of the Act and the IFB. Further, because it was the only bid in respect of the relevant blocks, there was no prospect of another bidder being able to complete the necessary technical work and commit to drilling a well before Greymouth would be able to do so. Greymouth further claimed it was unreasonable to decline its bid as it was a New Zealand applicant with a proven positive track record in exploration and production activities that was providing significant returns to the Crown.

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[38] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 149, and *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139.

[173] In addition, Greymouth alleged that the decision to decline its bid was unreasonable by virtue of its inconsistency with the treatment accorded by NZP&M to Westside, whose bid in the same block offer was accepted. On all of these grounds, Greymouth alleged that no reasonable decision-maker could have declined its bid.

[174] The Minister made limited admissions in respect of Greymouth's bid being an uncompeted one and as to its history in the industry, but otherwise denied the allegations. This included a denial that the circumstances of assessment of the Westside bid were relevant to the reasonableness of the decision made in respect of Greymouth's bid.

[175] On the basis of matters raised in Greymouth's affidavits in reply, its submissions included additional criticisms of inconsistency by comparing Greymouth's treatment with that of a bid made in the 2018 block offer by Todd Exploration Services Limited (Todd), plus alleged different standards applied by NZP&M in considering two applications for the different type of PMPs sought by Tag Oil (NZ) Limited and its subsidiary, Cheal.

[176] Ms Casey objected to any argument inviting comparison with NZP&M's treatment of Todd or Tag Oil and Cheal. There had been no pleading raising such inconsistencies, and the factual basis for them had been advanced only in reply affidavits so NZP&M had no opportunity to respond to alleged inconsistencies.

[177] I can understand why Greymouth's deponents, having learned of certain details in respect of NZP&M's dealings with the other bidders it sought to put in issue, added the apparent inconsistencies as perceived from Greymouth's perspective to its claim that the decision in respect of its bid was unreasonable in the administrative law sense. Greymouth argued they were legitimately raised in reply because Mr Jeaffreson's explanation for the evaluation adverted to consistency of approach to all bids.

[178] However, I accept the validity of the Minister's objection to the alleged inconsistencies being taken into account when they were not a matter of pleading and were only raised in an unanswerable form in the reply affidavits for Greymouth. Given the timing and scale of other issues, I do not accept that it would have been reasonable

to expect the Minister to seek leave to reply to those points so as to render them admissible as an aspect of the unreasonableness ground of review.

[179] The classic test for administrative law unreasonableness or, as generally known, *Wednesbury* unreasonableness, is that the courts will interfere where it is established that a decision-maker has arrived at a decision which a reasonable decision-maker, properly directed as to the law and on a full understanding of the facts, could not have come to.[39] The circumstances of the present challenge do not require consideration of authorities which contemplate a graduated scale of the levels of review, such as whether a "hard look" is warranted. I respectfully agree with the approach of Duffy J in *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* that regulatory decisions do not require anything in the nature of a "hard look", and the classic *Wednesbury* unreasonableness is the appropriate standard.[40] As urged by Mr Farmer QC, I treat as appropriate in this case the citations Duffy J relied on, including from Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* to the effect:[41]

> … it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

[180] Duffy J's own construction from that observation and those in *Padfield v Minister of Agriculture, Fisheries and Food* was that the approach to judicial review of decisions on unreasonableness can:[42]

> … meld into a single principle: namely, that no reasonable decision-maker would act in a way that would frustrate the policy and objects of the Act under which he or she was exercising authority.

[181] The acknowledgements that the decision was made in reliance on factually inaccurate information and following an inadequate process, plus further findings to that effect, to an extent justifying quashing the decision and requiring it to be reconsidered, do not of themselves establish that the decision was unreasonable in the

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39 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233 (CA) at 229.

40 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293.

41 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

42 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority*, above n 40, at [58], relying on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

administrative law sense. I took the competing submissions on unreasonableness to implicitly rest on the counterfactual situation that disregarded the factual inaccuracies. In essence, NZP&M's position was that had it ignored the factually inaccurate references to matters of non-compliance, and afforded Greymouth an adequate opportunity to explain its position, then it would still have been open to the decision-maker to decline the bid in circumstances that would not render it an unreasonable decision.

[182] Greymouth contended that the decision was contrary to or frustrated the purpose of the Act to promote exploration for Crown-owned minerals for the benefit of New Zealand. Greymouth's was an uncompeted bid and, on its view of its own attributes, it was entitled to positive findings under each of the criteria required to be considered under s 29A. Given that Greymouth's bid was a qualifying one in that it met the specific minimum requirements, and given Greymouth's largely positive track record in exploration and mining for hydrocarbons, declining the bid frustrated the statutory purpose.

[183] In responding at this abstracted level, Ms Casey submitted that no bidder had any right to a permit, and the Minister is not obliged to accept any particular bid in any circumstances. Judgements are required in applying the expertise of those who evaluate the bids to ensure, in terms of s 1A(2), that there is efficient allocation of such rights, with the best prospects for effective management in the exercise of those rights by applicants who will carry out their activities in accordance with good industry practice. In essence, the scope of those statutory responsibilities means that it cannot be unreasonable in the administrative law sense to decline any particular uncompeted bid where it might comply with the specific minimum requirements stipulated in an IFB.

[184] At the time of the evaluation of Greymouth's bid, it was legitimate for those evaluating it to contemplate that a better offer might be made to explore the relevant block in a subsequent year's block offer. Greymouth questions the reasonableness of that approach when there had been no bid at all for this block in the previous year's block offer. Greymouth had submitted a compliant bid which would result in a decision to drill an exploratory well or surrender the permit within a shorter time frame

than that contemplated in the minimum work programme requirements. However, it remained a matter of judgement for the decision-maker to decline the bid against the prospect of a more attractive bid in a later year.

[185] The consideration under s 29A(2)(a) was whether the proposed work programme was consistent with the purpose of the Act, the purpose of the proposed permit and whether it represented good industry practice in respect of the proposed activities. The recommendation was that there was insufficient detail on the scope and likely output of the reprocessing 3D seismic data, leading to a doubt that it would generate sufficient good quality data to test the bidder's understanding of the prospects of the block. In addition, the recommendation was that a commitment to either drill or surrender within 48 months did not represent a timely plan to explore the potential petroleum resources and was inconsistent with the condition that the bidder make all reasonable efforts to explore the block in a proactive and efficient manner.

[186] Greymouth's deponents, including its expert witnesses, strongly contested those judgements. They considered that the evaluation team's concern about an hiatus between completion of the seismic data reprocessing and a decision on commitment to an exploratory well was unrealistic and wrong. They were also emphatic that the scale of reprocessing would produce a materially enhanced level of understanding of the potential resource that would have real utility both for Greymouth and for the Crown.

[187] The consideration under s 29A(2)(b) was whether the decision-maker could be satisfied that Greymouth was likely to comply with, and give proper effect to, the proposed work programme. Greymouth's technical and financial capabilities would enable it to comply. However, as previously reviewed, the evaluation team considered that previous instances of non-compliance with permits, principally the surrender of PEPs 51154 and 51152 with outstanding drilling commitments, meant that the decision-maker could not be satisfied that Greymouth was likely to comply with its proposed work programme.

[188] I take the Minister's defence of this aspect of the decision to be on the basis that if the less material aspects of alleged non-compliance were ignored, that would

still leave the two instances of surrender of PEPs with outstanding drilling commitments. Arguably, they were sufficiently material for the range of options available to the decision-maker to include such non-compliance meaning that the decision-maker could not be satisfied that Greymouth was likely to comply with its proposed work programme.

[189] As discussed above, a concerning aspect of NZP&M's analysis as to the likelihood of Greymouth complying with the commitments made in its work programme is that there was no recognition that Greymouth surrendered PEPs 51154 and 51152 without being advised at the time that it would be held against Greymouth on subsequent permit applications. Greymouth was therefore not warned that its conduct in those surrenders would or could cause it to be deemed in poor standing.

[190] NZP&M rejects the need to give Greymouth notice that it took that view, on the basis that it would be abundantly clear to Greymouth that that was the case. It referred to the inclusion of failure to comply with permits in s 29A(2)(b)(iii), and to the requirements in the IFB for every bidder to make full disclosure of any previous non-compliance, as making the point so obvious that it was unnecessary for any advice to be conveyed, and not reasonable for Greymouth to expect it would be so advised.

[191] Mr Adams agreed with Mr Jeaffreson that advice to Greymouth of the adverse consequences of surrendering permits with outstanding drilling commitments was unnecessary. He stated that Greymouth:[43]

> … are well aware that dropping a committed well is serious and given that occurred twice around the same time as Block Offer 2017 they ought to have known there was a risk that [Greymouth's] bid might not be successful as a result.

[192] On a review of all the evidence, I am not satisfied that this stance on behalf of the regulator is a sufficient answer. There had been extensive dialogue about Greymouth's work in PEP 51152 leading to the arrangements made with the eventual concurrence of the regulator to drill the Ngatoro South-1 well. Thereafter there appears to have been a sensible progression in Greymouth's analysis of the remaining

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[43] First affidavit of Mr Adams, 2 July 2020, at [16.4].

prospects in both permits, after the unsuccessful completion of that well. I am not satisfied on the evidence that Greymouth ought to have appreciated that NZP&M would treat it as having surrendered PEPs 51154 and 51152. Relevant circumstances included its commitment to the Ngatoro South-1 well, its analysis of the negative data provided and concerns at the justification for further major expenditure at a time of reduced prices for hydrocarbons, and the terms of dialogue with NZP&M leading to acceptance of those surrenders without any warning that it put Greymouth in poor standing.

[193] I do find on all the evidence that Greymouth personnel dealing with the regulator believed that the circumstances in which they surrendered those permits were sufficient to avoid a finding that they were in poor standing, at least until they were given a clear warning of that consequence.

[194] This gap in understanding between the parties is relevant. If Greymouth was fixed with knowledge that any surrender of a permit with a material work commitment outstanding (regardless of the strength of mitigating circumstances) would result in a finding of poor standing, and that this factor would lead to the regulator declining subsequent bids, then Greymouth would be materially motivated to take sufficient steps to avoid such a finding. All witnesses addressing the point agreed that it is important for a company in Greymouth's position to maintain its reputation as an explorer of good standing. Once on notice that the circumstances of its surrender of PEPs 51154 and 51152 resulted in its being held in poor standing – notwithstanding its vigorous defence of the justification for doing so – Greymouth would be motivated to discharge sufficient obligations to avoid any repetition. It would also have had an improved opportunity to cast its bid in terms doing more to persuade the decision-maker that it could discharge the onus under s 29A(2)(b)(iii) than if it laboured under a misapprehension that the non-completion of the drilling commitments was tolerated.

[195] The regulator's approach gives no credence to the reasonableness of Greymouth's belief that the circumstances in which it decided to surrender PEPs 51154 and 51152 with drilling commitments outstanding justified its decision to do so, without adverse consequences with the regulator. The absence of recognition of that factor is material. I am satisfied that a proper appreciation of it, if added to the

other balancing considerations undertaken by Mr Adams may have been sufficient to reverse the most telling aspect of the reasons for the bid being declined.

Inconsistency as an indication of unreasonableness

[196] It was acknowledged for Greymouth that the Court is reluctant to delve into the competing merits of applications in a judicial review such as this.[44] Notwithstanding that reluctance and the need to recognise the specialist expertise of the evaluation team and the decision-maker, Greymouth submitted that there were such stark differences between the level of scrutiny of Greymouth's bid and Westside's bid that it could make out that like aspects of the applications were being treated unalike.

[197] Greymouth cited an observation of Arnold J, writing for himself and Elias CJ, in *Ririnui v Landcorp Farming Ltd*, to the effect that rule of law considerations and the need for rationality in public decisions mean that consistency of treatment has a role to play in judicial review when issues of arbitrariness or unreasonableness are raised.[45] That general observation arose in the context of intervention by the Minister for State-Owned Enterprises in contractual dealings by a state-owned enterprise in selling farm lands, where the Minister's considerations were affected by a perception as to which among a group of potential purchasers of the land were iwi interests that had settled their Treaty of Waitangi claims.

[198] In relation to comparisons at a more focused level, Greymouth also cited Lord Hoffman's observation in *Pratt Contractors Ltd v Transit New Zealand* that all tenderers had to be treated equally and one could not be given a higher mark than another if relevant attributes were the same.[46] Submissions for NZP&M cited the observation of Allan J in *PP &G Basra Ltd v Rangitoto College Board of Trustees* that for inconsistency of treatment to give rise to a finding of unreasonableness or irrationality:[47]

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44 Citing *NZI Financial Corp Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 (HC) at 175.

45 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [95].

46 *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433 at [47].

47 *PP & G Basra Ltd v Rangitoto College Board of Trustees* [2010] NZAR 372 (HC) at 383.

> … it would need to be shown that this case produced an utterly abnormal result compared with a broad selection of truly comparable cases.

[199] That observation was made in the context of decisions regarding the trading hours authorised for off-licence premises.

[200] Greymouth submitted that a comparison of two aspects of the respective assessments of Greymouth's and Westside's bids demonstrated that different standards had been applied. First, in relation to the adequacy of their proposed work programmes, NZP&M was critical of Greymouth and held against it the two year hiatus between completing the technical reprocessing of data and reaching a decision on drilling. NZP&M considered that period to be longer than was warranted.

[201] In contrast, a more relaxed approach to timing of commitments appeared to be adopted in analysing Westside's bid. The evaluation report for Westside's bid recorded that while a prospect within the area Westside was bidding for:

> … may be argued to be drill ready, significant technical risk remains (eg in regards to the imaging of the structure of this sub-thrust prospect). A compelling economic case to justify drilling is therefore required. As such, the bidder's measured, portfolio approach to the exploration of the bid area is considered to be consistent for the purpose of the proposed permit …

[202] Also in Westside's bid, it proposed completion of a survey within 72 months and a subsequent exploration drilling commitment date within 120 months. That lapse of 48 months was acknowledged as a "minor concern" but was not the subject of an adverse finding, with the evaluation team treating Westside's work programme as taking into account certain contingencies so that it was "as realistic as possible". The contingencies identified included the particulars of a contemplated survey and later obligations in a work programme becoming compressed through "unavoidable delay". Arguably no such tolerances on timing commitments were made when assessing Greymouth's bid.

[203] Greymouth also contrasted what it treated as a much more relaxed analysis of the adequacy of Westside's financial capacity than the rigorous standards it claimed had been applied to all aspects of its bid. Mr Dent's expert analysis suggested that the limited assets of the Westside New Zealand company that was bidding, and the less

than full guarantees of its performance provided by its parent company, ought to have given cause for concern in the financial capacity analysis when there was no suggestion that had occurred.

[204] I accept these concerns raised by Greymouth as understandable. Their deponents credibly sketch grounds for seeing unfairness and an inconsistency in the standards applied. There are grounds to be uneasy about NZP&M's response alluding to different circumstances applying to different blocks on offer, and the characteristics of different applicants, without identifying such differences or explaining why they make a difference.

[205] However, this is not an area in which the Court can make a determination of inconsistency when there is inadequate detail of the full circumstances surrounding the officials' assessment of the Westside bid. As a lay person in this regard I am not confident to identify an inconsistency in respects where I would necessarily have to be satisfied that the officials were treating like cases unalike.

[206] I can also understand why the differences perceived by Greymouth deponents between the standards applied in its case, and the apparently different standards applied in NZP&M's dealings with Todd, Tag Oil and Cheal, gave rise to further complaints of inconsistency. Again however, assessing the justification for apparent differences is not a matter within the Court's competence. In this regard, I uphold the objection that such additional criticisms were raised too late to be taken into account. Whilst criticisms of inconsistency of treatment cannot avail Greymouth in arguing that the decision was unreasonable, I will reflect on these concerns in the different context when considering forms of relief.

Conclusion on unreasonableness

[207] Greymouth's argument on the alleged unreasonableness of the decision bolster its submissions on the cause for concern at the process by which the decision was made. However, in the context in which the decision was made, I am not satisfied that the test for unreasonableness, given its high threshold, can be made out. The component aspects of the adverse decision, and the overall outcome, cannot be characterised as decisions that the decision-maker could not reasonably arrive at. The

bases for the decision may, however, be characterised differently when considering relief.

Relief on the first to eighth grounds of review

[208] Greymouth's second preference for relief (beyond the admitted orders quashing the original decision and directing a reconsideration) was for orders requiring the reconsideration to occur on certain terms. The proposed terms varied according to the nature of the error alleged by Greymouth in various of its grounds for review. The constraints on the decision-maker's reconsideration sought in the various prayers for relief were implicitly on the basis that, to the extent Greymouth made out the grounds of review, the existence of such errors on the original assessment should preclude the decision-maker from undertaking that aspect of the assessment when carrying out the reconsideration.

[209] The specific terms upon which Greymouth sought reconsideration were as follows:

- the decision must be made in accordance with the legal requirements, processes, rules and policies properly applicable to Block Offer 2017 as at 6 March 2018 (grounds 1-8);

- Greymouth's proposed work programme is consistent with the purpose of the Act, the purpose of a PEP, and good industry practice (grounds 1-3);

- only non-compliances that have been sufficiently material to have been previously raised at an ARM are to be considered (ground 4);

- the decision-maker must take into account Greymouth's full record of compliance, including its long and substantial history of safe, compliant and successful exploration and production (ground 4);

- the eight alleged non-compliances are not true, accurate or relevant and must not be considered (ground 5).

[210] The first, and a modified version of the fourth, of these directions were not opposed. On the latter, NZP&M accepted that the prospects of non-compliance should be assessed in light of all of Greymouth's history as an explorer for and producer of hydrocarbons. Beyond that, the Minister opposed any constraints being imposed on the terms on which the reconsideration should occur.

The test for substantive relief

[211] Greymouth's first preference for relief was not to go through a reconsideration on any terms, but instead to have the Court direct the decision-maker to grant Greymouth the permit it bid for, on appropriate terms. Such substantive relief in judicial review is a relative rarity, as the courts are reluctant to substitute the Court's own view on the merits of the challenged decision for that of the decision-maker. This is not merely a matter of deference to the expertise of the decision-maker, but acknowledges that judicial review is an exercise of the Court's supervisory jurisdiction as to the lawfulness of the process by which decisions made in exercise of statutory powers are arrived at.[48] It contrasts with an appeal where the merits of the challenged decision are in dispute.[49]

[212] Exceptions where the Court is persuaded to substitute its own decision for that of the decision-maker whose conduct is challenged rely primarily on the approach of the Court of Appeal in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*.[50] In that case, the Minister had declined to grant a licence for a game packing house where a positive duty to issue a licence existed under the Game Regulations 1975 once the Minister was satisfied as to five matters specified in the regulations. The Court inferred that the decision to decline the application was made out of concern for the reduction in turnover or profit of other game packing businesses, which was not a relevant consideration. There had been a considerable delay since the application for a licence had been declined and the Court of Appeal accepted that there was no evidence on which the Minister could reasonably or properly determine that he was not satisfied of the matters prescribed in the relevant regulation. The Court granted the appellant a declaration that, subject to certain upgrading of the packing

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48 *Kent v Valuer-General* HC Wellington CP57/90, 27 July 1993 at 4.
49 For example, *Taylor v Chief Executive of the Department of Corrections* , above n 27, at [91].
50 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).

house premises in accordance with plans and specifications that had been submitted, it was entitled to the licence that had been declined by the Minister.

[213] The reasoning in *Fiordland Venison* is treated as justifying the Court substituting its own view where the statutory decision-maker could not, on application of the correct tests, have reached any other decision.[51] Greymouth submits that it can make out the case for substantive relief, given that this is such an exceptional or clear case.

[214] Ms Casey distinguished *Fiordland Venison* because the regulations in that case mandatorily required the Minister to grant the licence if satisfied of certain matters. The decision-making did not involve the exercise of any discretion or an evaluation beyond the presence or absence of the stipulated matters. In contrast, in the present case there were numerous aspects of nuanced evaluation and a discretionary decision that legitimately reflected value judgements in the application of expertise by the decision-maker.

[215] Further, the Minister opposed any relief beyond a direction for reconsideration because Greymouth's affidavits foreshadowed an intention to apply any positive decision that it be granted the permit to require reversal of the subsequent decision made to decline its 2018 bid. Such parity of reasoning was foreshadowed on the basis that the primary ground for declining both applications was the same, namely the findings by (different) decision-makers that they were not satisfied that Greymouth was likely to comply with the terms of its proposed work programmes.

[216] The essence of this ground of opposition is that this is not a case in which the Court can be satisfied that there would be no decision on reconsideration by a new delegated decision-maker other than the granting of the permit. Arguably there was still scope for legitimate decisions finding that the decision-maker could not be satisfied Greymouth was likely to comply with the work programme, and that the periods proposed for the taking of various steps in the work programme extended over longer periods than were reasonable for a work programme that reflected good

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[51] For example, *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111 (HC) at 127; *Edwards v Attorney-General* [2017] NZHC 3180 at [118].

industry practice and was consistent with the purposes of the Act. There is no suggestion that there would be new factors, adverse to Greymouth, likely to be taken into account on a reconsideration.

[217] A possible analogy with circumstances in which the Court has found administrative law error but declined to grant substantive relief is *Professional Promotions & Services Ltd v Attorney-General*.[52] In that case, relevant error was made out in a decision to decline a licence to operate a radio frequency and the applicant for review sought an order directing the decision-maker to grant the licence. The High Court declined to do so, instead requiring reconsideration on terms directing the correct legal position. Jeffries J observed:[53]

> The Court will go no further because the availability of frequencies might have a bearing and it is a highly technical issue upon which the Court should not embark, at least on the state of the evidence before it. The Court is certainly not brought to the decision that the Departmental officers are making mistakes of fact on the number of available frequencies. Moreover, there are appeals before the High Court against decisions of the Broadcasting Tribunal …

[218] In the present case, there are a number of idiosyncratic factors that are relevant to the evaluation of whether the delegated decision-maker, properly directed on a reconsideration of the bid, could not reach any decision other than to accept the bid.

[219] First, on a reconsideration there would be no basis for evaluating the merits of Greymouth's bid relative to the prospects of a more attractive bid being made in a following year's block offer. The bid was uncompeted and is now to be assessed in absolute, rather than relative, terms because the subsequent change of law removes the prospect of any later bids for PEPs in offshore areas.

[220] The approach to evaluating the bid consistent with the purpose in s 1A of the Act requires the decision-maker to promote exploration, relevantly in the area offered in the IFB to which the Greymouth bid responded. The decision has to be whether to promote exploration for petroleum by accepting the bid, or to deny an opportunity for such exploration.

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52 *Professional Promotions & Services Ltd v Attorney-General* [1990] 1 NZLR 501 (HC).
53 At 512.

[221] On the original evaluation of the attributes of Greymouth's proposed work programme, it complied with the minimum requirements once it was on terms accepted by NZP&M as a qualifying bid. The concern that Greymouth proposed taking longer between completion of the reprocessing of seismic data, and making a decision on drilling, was based on the prospect of a bid in a subsequent year achieving that milestone more promptly. That prospect no longer exists. Further, with the passage of time and change in focus of administration of the Act, it does not seem reasonable that the lapse in time between the relevant milestones in Greymouth's proposed work programme could assume materiality in forming an adverse view to Greymouth's proposed work programme.

[222] There do not appear to be any different considerations that would apply on Greymouth's financial capability and its technical capacities, which were considered to be acceptable on the original consideration of the bid. If it could be relevant, there is no evidence suggesting a material change since that time.

[223] That leaves the major adverse factor in the original decision, namely the relative likelihood of Greymouth complying with its proposed work programme, if the bid was accepted. Greymouth's case was that the officials who would evaluate the bid are likely to bring a closed mind to this relative likelihood, exposing Greymouth to the risk that a new delegated decision-maker would be persuaded to accept the evaluation team's opinion that Greymouth could not satisfy the decision-maker that it was likely to comply with its proposed work programme.

[224] Greymouth does not allege anything in the nature of bad faith. It cites the consistency of approach reflected in Mr Jeaffreson's subsequent report on Greymouth's 2018 bid, where Mr Jeaffreson approached the assessment of the likelihood of compliance consistently with the analysis in his report on the 2017 bid, despite exchanges with Greymouth about its arguments seeking to justify surrender of PEPs 51154 and 51152 with drilling obligations outstanding. In short, Mr Jeaffreson maintains his original view on the relative seriousness of Greymouth's failure to carry out those drilling commitments, and treats them as sufficient to outweigh all other factors that Greymouth can call on to provide an assurance that it will honour the commitments it has made to the proposed work programme. Mr Jeaffreson took the

view that Greymouth's attempts to justify the adequacy of its work on PEPs 51154 and 51152 by reference to the drilling of Ngatoro South-1 and subsequent analysis of the data obtained constituted an attempt by Greymouth to deny fault on its part. He treated that as indicative of a risk that Greymouth would do so again in the future.

[225] I have found that, prior to applying to surrender PEPs 51154 and 51152, Greymouth was not explicitly on notice that the consequence of doing so would result in its being held in poor standing, and that this factor might well be determinative in declining one or more future bids. I have not been persuaded that NZP&M's stance on this is a complete answer, namely that such consequences were so blindingly obvious to an experienced operator such as Greymouth that it did not need any warning of them.

[226] Nor am I convinced by Greymouth's rejoinder that had it been warned of the adverse consequences of surrendering those PEPs with drilling commitments outstanding, it would have "drilled post holes". That is, it would have undertaken the minimum work necessary by way of perfunctory drilling to discharge the commitment, irrespective of its analysis that the prospects did not justify that expenditure. The point is that Greymouth proceeded to surrender those permits without being on notice that it should consider alternatives that might lessen the prejudice to their subsequent bids.

[227] It would be artificial, and in my view wrong, to consider how the reconsideration of the 2017 bid would occur, without having regard to the subsequent history. Relevantly, the circumstances of Greymouth's surrender of PEPs 51154 and 51152 without completing drilling commitments has now been found not once, but twice by NZP&M as the primary ground for recommendations that the decision-maker should not be satisfied that Greymouth is likely to comply with its proposed work programme. That consequence is very obvious to Greymouth in a working relationship that is critical to the future of its business. Having had the opportunity to persuade officials that the circumstances of non-compliance are not as serious as they were ranked when considering its 2017 bid, Greymouth is now certainly on notice that any repetition will be held against it.

[228] I am satisfied that on a reconsideration in the current circumstances, but applying the law as it stood at the time of the original decision, the extent of the focus on the adverse consequences of not complying with a work programme means that the economically rational course of conduct would be for Greymouth to comply. The relative likelihood of that course of conduct ensuing clearly meets the relatively low threshold for the decision-maker to be satisfied that compliance is likely.

[229] I have accepted Ms Casey's objection to considering examples of NZP&M's dealings with other applicants, which were put in issue belatedly by Greymouth to advance its arguments of inconsistency of treatment, as an aspect of its claim to make out *Wednesbury* unreasonableness. Nonetheless, and appreciating the significant differences of the identity of the applicant and the context being an application for a mining permit rather than an exploration permit, it is instructive to cite a different approach to an applicant having surrendered a permit with unfulfilled drilling obligations:[54]

> 10.3.3. The surrender of exploration permits with unfulfilled key committed drilling obligations is considered serious non-compliance, and it is questionable that a company would be considered likely to comply with similar obligations if granted further exploration permits. However this non-compliance took place as a result of budget constraints in a low oil price environment, in respect of commitments that might be considered discretionary by a cash-strapped board. In the context of a mining permit application, the applicant has a subsequent right to apply for a permit and is incentivised to responsibly develop a project that is considered to have a high chance of providing revenue.
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> 10.3.4. Officials consider that, despite the non-compliance on previous exploration permits, the Mining permit application should be granted.

[230] In Mr Willis's affidavit filed in reply, he cited the circumstances of another instance of NZP&M being understanding of another operator having relinquished a PEP without completing work that it had committed to as a condition of that permit. Whilst the point does not avail Greymouth in making out unreasonableness, the circumstances provide a modest measure of assurance that officials can validly take a somewhat more generous approach to the prospects of compliance than has been the case with Greymouth in its 2017 and 2018 bids.

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54 Internal NZP&M memorandum, 16 October 2018.

[231] The instance Mr Willis cited was of a bidder that had a majority interest in, and was the operator of, a PEP where the permit was surrendered without a key deliverable of a prescribed minimum of 3D seismic data having been produced. The terms of cl 5.3(5)(c) of the MPP appear to put failures to complete seismic survey work on the same level as failure to carry out committed drilling, when a bidder has to report such failures to comply in the details submitted with a bid. In Mr Jeaffreson's memorandum to the Minister recommending acceptance of the other bid instanced by Mr Willis, he commented that officials considered the non-completion of the seismic data commitment to be an "isolated incident" that was seen as having limited bearing on the likelihood of the bidder complying with the proposed work programme. Reasons for that view were withheld and the report continued:[55]

> 9.4.2. Officials have reviewed the work programme compliance record of the Bidder, and one item of material non-compliance has been noted. However, the circumstances leading to this non-compliance are not expected to arise again for a permit granted pursuant to this Bid.

[232] I readily accept that officials might view the performance history of the bidder being considered in that case more favourably on the basis of longer standing and more extensive involvement. However, it demonstrates a reasonable and open approach, rather than a blanket or non-negotiable stance that the surrender of another permit with commitments outstanding will necessarily cause the decision-maker to not be satisfied that the bidder is likely to comply with the terms of its proposed work programme.

[233] In the course of dialogue about its 2018 bid, on 28 November 2019 Greymouth offered to discuss with officials appropriate terms to be included in permit conditions to provide further assurance of its commitment to comply with its proposed work programme.[56] NZP&M did not engage on that offer. In the context of an uncompeted bid, it was permissible for NZP&M under cl 7.7(1)(d) of the MPP to do so. That same offer is a component of Greymouth's proposal as to the terms on which its claims for relief should be considered. No details of the terms or effect of such an offer were addressed in submissions. Mr Farmer did acknowledge that the terms on which Greymouth's bid could be accepted may include "some tweaking". It raises the

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55 Briefing to Hon Megan Woods, Recommendations on bids received under block offer 2018, 13 March 2020. .

56 Letter from Greymouth to NZP&M, 28 November 2019. .

prospect of some variant on the forms of relief Greymouth seeks, subject to resolution of the level of detail that would generally follow from an indicative acceptance of such a bid, including negotiation between the parties on the terms for such further assurances of compliance.

[234] The tenor of the evidence on this topic from Greymouth's experts is generally persuasive that a reasonable decision-maker taking a balanced view of Greymouth's history and the circumstances of the non-compliance on the surrender of PEPs 51154 and 51152 would approach the future prospects of compliance more positively. They illustrate potentially credible views that would result in a positive conclusion on this issue. However, to the extent that they reflect advocacy for Greymouth's cause, I have not been prepared to rely on those opinions to find that the recommendation made in the evaluation report, and the decision-maker's decision on the likelihood of compliance, had to be wrong.

[235] The evaluation looks materially different when assessing the terms on which a reconsideration of Greymouth's bid should take place. On the basis of the various factors I have reviewed in considering the prospect of substantive relief, I am satisfied that it would no longer be reasonable for the decision-maker to decline the bid on the basis of an opinion that Greymouth is likely not to comply with the commitments in the proposed work programme. In reaching this view, I acknowledge a risk to Greymouth that Mr Jeaffreson could bring a closed mind to a third consideration by him of this topic. Failures by the evaluation team, led by Mr Jeaffreson, to have regard to the positive aspects of Greymouth's record of performance ([155] above) and the potential application of a higher onus on whether there would be compliance ([167] above) were both saved by Mr Adams' approach. He would not be the decision-maker on a reconsideration.

[236] Given all of the findings in this judicial review, I am satisfied that the risk of a closed mind by senior officials is not one to which Greymouth should be exposed. This does not impugn Mr Jeaffreson's good faith and I have endeavoured to acknowledge the tensions involved for officials in his position in dealing with such matters with a bidder adopting the approach that Greymouth has. Although it should be obvious, and as observed at [219]–[220] above, the reconsideration is also to occur

on the basis of an absolute assessment of the adequacy of Greymouth's proposed work programme, rather than a relative one measuring it against the prospect of a more attractive bid being made for the block in a subsequent year.

[237] Given the justification for orders in these terms to apply to the reconsideration, it follows that I either accept, or am extremely close to accepting, that this is a reconsideration where a reasonable decision-maker could not reach a conclusion other than to grant the permit. However, I am not persuaded that this more positive form of substantive relief is warranted, because I am mindful of the extent of technical detail that the parties ought reasonably be required to resolve as conditions of the permit, once a decision in principle that the bid is to be accepted has been made.

[238] In addition, the evidence was not sufficient to eliminate the prospect that, on a reconsideration, other matters may assume relevance and reasonably be required to be taken into account by the decision-maker.

[239] I accordingly decline Greymouth's application for an order directing that the permit is to issue. Instead, I direct that reconsideration is to occur, subject to conditions as described in the preceding paragraphs, and the terms of which I formalise in the orders at the end of this judgment.

[240] For the avoidance of doubt, I reject the validity of any analogy Greymouth may seek to make in reasoning that the relief granted in respect of the present challenge should apply to the circumstances of Greymouth's unsuccessful 2018 bid. Whilst the ground relied on for declining that bid appears the same, the decision is made in the context of a different year's bid for a different area. That bid was for an area onshore in Taranaki, which is obviously not affected by the ban, so that relatively more attractive bids are in contemplation in subsequent years. In addition, officials were concerned at Greymouth making that bid where it covered much of the same land as had been surrendered in PEPs 51154 and 51152. Those material differences preclude my decision on relief in the present case having any application in respect of Greymouth's unsuccessful 2018 bid.

[241] For the further avoidance of doubt, and recording what I took to be the position agreed between counsel during the hearing, I address the circumstances if the permit does issue and in due course leads to an application by Greymouth for a PMP on the basis of discoveries made within the permit area. In that event, NZP&M is to assess any such further applications, grounds for which derive from the permit in issue in this proceeding, on the basis of the law as it stood on 6 March 2018, the date of the original decision on this permit.

Ninth ground of review: ban an invalid change in government policy and/or suspended operation of the Act

[242] The first to eighth grounds of review challenged the lawfulness of the Minister's decision to decline Greymouth's 2017 bid. The subject of the ninth ground of review is the discrete issue as to whether the Executive took steps which depended for their validity on the provisions in the Act, but were inconsistent with the Act in the period between the 12 April 2018 announcement of the ban and 13 November 2018 when the Crown Minerals (Petroleum) Amendment Act 2018 (the amendment Act), came into force. After dealing with objections that the arguments raised for Greymouth went beyond the scope of the pleading on this point (which I deal with below), Ms Casey met the merits of this argument on terms which reduce the need for extensive analysis on points of constitutional law.

[243] The essence of Greymouth's complaint is that a government cannot operate by Executive fiat and must exercise powers consistently with the terms and purpose of relevant statutes. The exercise of powers derived from statute must be consistent with the empowering provision.[57] When a government introduces a change in policy, the pronouncement by the Executive of that change is not effective to authorise it to act inconsistently with the relevant empowering legislation and it must procure the imprimatur of Parliament by appropriate amendments to the relevant law.

[244] Greymouth also argued that the rationale for the change in policy was for a purpose that was extraneous to the purposes of the Act, namely to advance climate

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[57] *Fitzgerald v Muldoon*, above n 1, at [622].

change concerns, when a division of Executive responsibilities explicitly required such concerns to be managed elsewhere.

[245] For Greymouth, Mr Farmer accepted that had the amendment Act come into force before any of the steps taken between 12 April 2018 and its enactment, then the terms of the amendment Act would legitimise all those actions. For the Minister, Ms Casey accepted that had any steps that required the exercise of a statutory power been taken before the amendment Act came into force, then (barring retrospective authorisation in the amendment Act) they would have been unlawful on the ground that they were inconsistent with the Act in its unamended form.

[246] Accordingly, the essence of the ninth ground is whether the announcement of the policy change and the contemporaneous announcement by the Minister as to steps towards the terms on which the 2018 block offer would be made, or anything done between then and the amendment Act coming into force, constituted actions that were required to be authorised by the Act. Alternatively, whether there were actions inconsistent with, in the sense of suspending the operation of, the Act between 12 April 2018 and 13 November 2018.

Unpleaded complaints?

[247] Ms Casey took the point that the criticism of the 12 April 2018 announcement of the ban was pleaded as an additional ground for challenging the decision to decline Greymouth's 2017 bid. Given that the Minister had conceded that the decision to decline should be quashed and a reconsideration take place, and having acknowledged that a reconsideration would occur disregarding the ban and applying the law as it stood before it had any effect,[58] the pleaded response was that the status of the announcement was not justiciable and that the point was moot.

[248] Ms Casey noted a concern expressed by Mr Dunphy in his affidavit that officials would have been aware of the government policy to promote the ban, and in anticipation of its announcement the prospect of the ban had improperly influenced the decision to decline Greymouth's 2017 bid. That suggestion was rejected in

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[58] This saving was included in cl 28, sch 1 to the amendment Act.

unqualified terms by Messrs Adams and Jeaffreson, so the status of the policy announcement could not be made relevant to Greymouth's challenges to the decision to decline its 2017 bid.

[249] Greymouth's written submissions were criticised as advancing a new ground of challenge in relation to the ban in that NZP&M had given effect to the ban in and from April 2018, including making a decision on the terms of the 2018 block offer, which, on Greymouth's analysis, was unlawful as being contrary to the Act. It was also argued to have been made unlawfully because it was based on concerns relating to climate change when the terms of the Act and MPP made clear that the Executive was to advance policy on such matters by exercise of powers under other statutes, and that such considerations were outside those relevant to the exercise of powers under the Act.

[250] Ms Casey submitted that the Minister would be prejudiced in having to answer these new arguments because, had they been pleaded, a response to them would have included evidence to establish that no decision was made on the 2018 block offer, nor were there any other exercises of statutory power in relation to the ban prior to the amendment Act coming into force which authorised such steps.

[251] Ms Casey's concern that the terms of Greymouth's complaint about the ban moved on from its pleading is a valid one. Indeed, in his reply submissions at the end of the hearing, Mr Farmer was still recasting the terms on which Greymouth sought to justify a declaration of invalidity of steps said to be taken pursuant to the ban before the amendment Act came into force. He sought to invoke both provisions in the Bill of Rights 1688 and the common law as grounds for finding invalidity for what he characterised as steps taken to govern by executive fiat.

[252] However, the challenge raises a point of some significance and whilst it is to be considered independently of the complaints in respect of the decision to decline Greymouth's 2017 bid, I consider it ought to be addressed. That can only be on terms that take into account the absence of the opportunity for the Minister to respond by way of evidence addressing whether steps taken consistently with the ban prior to the amendment Act coming into force constituted steps that depended on powers under

the Act with which they would be inconsistent. The evidentiary onus to establish that such steps had occurred was for Greymouth to discharge.

Factual circumstances of the ban

[253] The planning for the 2018 block offer began in June 2017. In a memorandum recommending initial terms on which the block offer might be made, NZP&M officials acknowledged that the onshore and offshore environments in the Taranaki basin continued to be the only producing basin and that, while recent industry investment had been low, the fundamental prospectivity continued to draw interest.[59] When the government was mooting a change in policy to ban offshore exploration, officials provided a briefing paper issued in the name of the head of NZP&M that identified certain legal risks and implications for the change in policy. The officials' concerns included:

- the increased risk to the security of the future gas supply;
- increased prices for consumers;
- increased uncertainty for major users in the industrial sector;
- the perception of increase in sovereign risk following what officials saw as a major policy shift;
- negligible impact in reducing domestic greenhouse gases and a likely increase in global greenhouse gas emissions;
- a detrimental economic impact on the Taranaki region; and
- an increase in Crown liabilities arising from accelerating decommissioning time frames.

[59] Block offer 2018, Steering Group memorandum, 14 June 2017.

[254] Understandably, in that and other papers the terms of legal advice have been withheld as legally privileged. However, in a briefing paper dated 19 April 2018 on changes to the Act, MBIE recorded its view that immediate legislative changes were desirable to give effect to the recent policy announcement, considering that changes were likely to be necessary both to the Act and to the MPP. Greymouth focused on a statement referring to the possibility that "the block offer 2018 decision could be challenged" as a recognition by officials that that decision had already been made. Consistently with it, Greymouth pointed to a comment that to fully minimise the risk of legal challenge, some of the changes "would likely need to be made retrospective back to (at least) April 2018".[60]

[255] On the same day as the Prime Minister announced the ban, the Minister announced the start of consultation with iwi and hapū on the proposed 2018 block offer release area. Her announcement stated that the proposed release area was restricted to onshore Taranaki basin areas. The purpose of consultation with iwi and hapū was to identify areas of sensitivity or significance within those proposed for release. The press statement indicated that the final area for the tender was expected to be announced in August 2018.[61] However, the contemplated consultation did not commence until 28 November 2018, with submissions scheduled to close on 12 March 2019.[62]

Character of steps taken between 12 April and 13 November 2018

[256] Greymouth's argument was that under s 22 of the Act, all conduct not only had to be consistent with the purpose in s 1A of the Act but also in accordance with the MPP. The announcement of the ban, and an indication of the intention to confine the 2018 block offer to onshore areas in Taranaki, were arguably contrary to ss 1A and 22 of the Act and contrary to the MPP, and were therefore unlawful. The ban and its implementation were inconsistent with, or contrary to, the purpose of promoting (inter alia) exploration for petroleum for the benefit of New Zealand. I took Mr Farmer's

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60 Briefing paper concerning progressing changes to the Crown Minerals Act 1991: Options for consideration, 19 April 2018 at 3, 5.

61 Press release of Hon Megan Woods, "Consultation opens on Block Offer 2018", 12 April 2018. .

62 The terms of the announcement were not in evidence but were annexed to the Minister's submissions, and no objection was taken to my receiving them informally.

final position to be that the Minister's 12 April 2018 announcement was the decision on the scope of the 2018 block offer, and that such decision was unlawful because it was contrary to those provisions, which could only be countered by legislative amendment. Alternatively, that the ban suspended the effect of the law, which rendered it unlawful.

[257] The Minister's response to this challenge is that the statements on 12 April 2018 were no more than foreshadowing a policy: an indication of a limited scope for the 2018 block offer was not a commitment to that course and it remained open for NZP&M to subsequently invite bids for larger or different areas. Ms Casey distinguished the reasoning in *Fitzgerald v Muldoon* because in that case the Executive had acted on the proposed policy change in terminating the existing superannuation scheme by directing that payments would cease to be made when there was still a legislative obligation for them to be made. In contrast, the conduct being challenged here did not include any committed step that was inconsistent with the Act. Rather, it was limited to indications of the effect of changes in government policy about permitting exploration for hydrocarbons. Ms Casey invited me to infer that the Executive paused on taking matters any further until it had legislative authority because of concerns of the type raised by NZP&M about the prospect of challenge to any steps taken inconsistently with the Act, prior to an authorising amendment.

[258] There are a number of decisions that have considered responses to a change in government policy which have occurred before changes have been made to the relevant empowering provisions.

[259] Greymouth cited the approach of the Supreme Court in *Unison Networks Ltd v Commerce Commission*:[63]

> A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act". …

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63 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53] citing *Padfield v Minister of Agriculture, Fisheries and Food*, above n 42, at 1030 per Lord Reid.

[260] In terms of inconsistency between an existing policy reflected in the statute and a new policy initiative, Greymouth also cited the Court of Appeal's decision in *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries*.[64] That involved a challenge to the criteria applied when the director-general of the Ministry of Fisheries granted permits to take types of shellfish not brought under a management system. The challenged decisions had been made in accordance with a series of policy guidelines and an issue was whether the terms of the policy constrained the discretion exercised by the chief executive inconsistently with the Act. The Court of Appeal observed:[65]

> A policy might well state a presumption, or even a strong presumption, against new permits. We are not saying that a policy has to be open ended. But the policy cannot deny the power which the law has conferred.

[261] Greymouth argued that the 12 April 2018 announcement of the ban, the Minister's simultaneous announcement and all steps thereafter had the same character as the steps found to be unlawful in the decisions just cited. In effect, thereafter the application of the policy was inexorable and could only result in one thing – the exclusion of any permits offered for offshore Taranaki areas. Such an approach was unlawful because it thwarted the policy and objects of the Act until they were modified by the amendment Act.

[262] I took Greymouth's position to be that the Minister's announcement on 12 April 2018 initiated the allocation of permits by commencing an offer for permits by public tender, being an action pursuant to s 24 of the Act. It was taken inconsistently with the Act and was therefore unlawful. Alternatively, invoking the provisions of s 1 of the Bill of Rights 1688, the ban amounted to a step by the Executive that suspended the law or the execution of laws contrary to that provision, which is still a part of the law of New Zealand.

[263] The scope of s 1 has recently been considered by a Full Court of the High Court in *Borrowdale v Director-General of Health*.[66] That case challenged the lawfulness of orders given to implement the initial stages of the COVID-19 lockdown.

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64 *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158 (CA).
65 At [48].
66 *Borrowdale v Director-General of Health* [2020] NZHC 2090.

Mr Borrowdale argued that the restrictive measures unlawfully suspended s 5 of the New Zealand Bill of Rights Act 1990. In responding to Mr Borrowdale's argument that restrictive measures offended against s 1 of the Bill of Rights 1688 because they purported to promulgate a law without legislative authority, the Full Court commented:[67]

> [239] In our view, however, that is not what this part of s 1 is about. The words "pretended power of suspending" qualify both "laws" and "the execution of laws". And suspending the "execution" of laws involves suspending the operation of laws – by leaving them intact but rendering them impotent. This seems to us quite clear when the "no dispensing" provision is read together with the "late dispensing" provision (as set out at [228] above), where the "pretended power of dispensing" plainly refers both to "laws" and "the execution of laws". …

[264] This aspect of Greymouth's case is therefore whether announcement of the ban left the Act intact, but rendered it impotent.

[265] Ms Casey submitted that nothing done prior to the coming into force of the amendment Act rendered any relevant provisions in the Act "impotent", nor did they have the effect of suspending the Act. Rather, they were no more than pronouncements of a change in government policy about the extent to which it would promote exploration for petroleum.

[266] Ms Casey invited analogy with the steps that were challenged by way of judicial review in *Criminal Bar Association of New Zealand Inc v Attorney-General*.[68] In that case, the Secretary for Justice decided to implement a new scheme for payment for criminal legal aid work. One of the criticisms of that decision was that the Secretary had wrongly considered himself bound by prior cabinet decisions to introduce a regime of fixed fees when the statute required him to make such decisions independently of government policy. On a similar point to Greymouth's complaint that a government policy was acted upon prior to legislation authorising it, Simon France J observed:[69]

> … Nor, to respond to another submission, do I consider it matters that the government policy was set prior to the Act coming into force. The comparison

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67 Footnote omitted.

68 *Criminal Bar Association of New Zealand Inc v Attorney-General* [2012] NZHC 1572.

69 At [67] (footnotes omitted).

> the plaintiff draws with *Fitzgerald v Muldoon* is not valid. Although here the decision was prior to the new Act coming into force, the challenged policy was not put into place until after that time. …

[267] I accept Ms Casey's submission that there is no evidence of any step taken until the amendment Act was in force which could not have been reversed, if parliamentary approval of the change had not been procured by the passing of the amendment Act. The initial stage of consultation with iwi and hapū interests was not undertaken until the amendment Act was in force. In any event, such consultation is a preliminary step and the MPP in cl 7.3(2) stipulates that consultation, including that to be undertaken with iwi and hapū, is to occur "before decisions are made about the timing and location of blocks on offer". Consistently with that, the provisions of cls 2.2 and 2.4 of the MPP clearly contemplate that such consultation will occur prior to the step under s 24 of the Act of inviting bids for a block offer round.

[268] Neither the Prime Minister's policy announcement nor the Minister's announcement the same day depended on the powers in the Act. Rather, they foreshadowed administrative action that was to ensue later.

[269] The second aspect of Greymouth's challenge to the ban can be dealt with shortly. It was argued that the purposes and policy of the Act were to be advanced only consistently with the purpose and that if other government policies, such as addressing concerns at climate change, were to arise, they would be dealt with separately from initiatives taken under the Act. It is tolerably clear that the ban on offshore prospecting was motivated in large part to address climate change policies, quite discretely from the management of Crown minerals. The status of that policy aspiration was not a matter to which the government could be committed prospectively: subject to not governing by executive fiat, separation of policies on the management of Crown minerals from matters such as climate change policy was a matter that could be revisited and for which the government would answer, if at all, at the ballot box. The alleged inconsistency with the policy of advancing matters such as climate change by exercising powers other than under the Act cannot add anything to this ground of challenge.

[270] Accordingly, I do not find the steps taken prior to the amendment Act to be contrary to the Act so as to justify a declaration of the type sought by Greymouth under its ninth ground of review.

Costs

[271] The Minister had conceded that Greymouth would be entitled to costs up to the point in the proceedings at which Greymouth's entitlement to have the decision quashed was admitted.

[272] Reviewing all aspects of this relatively complex judicial review in light of the outcome, I am satisfied that Greymouth is entitled to costs for all steps in the proceeding on a 2B basis. On the one hand, Greymouth pursued a number of arguments that were unsuccessful, and in the context of this judicial review that can be reflected in it not being awarded costs at a higher band.

[273] On the other hand, Greymouth has been vindicated in not accepting the extent of relief conceded for the Minister so should be entitled to the appropriate level of recovery for all those steps. I certify for second counsel, and for disbursements which, if necessary, are to be fixed by the Registrar.

Summary

[274] By consent, the decision is quashed.

[275] I direct that Greymouth's bid in the 2017 block offer is to be reconsidered on the basis of an absolute assessment of the adequacy of Greymouth's proposed work programme, rather than a relative one measuring it against the prospect of a more attractive bid being made for the block in a subsequent year.

[276] In the re-assessment of the bid, the parties are to negotiate in good faith on the addition of terms of the type contemplated by Greymouth in its letter of 29 November 2019 (in respect of its 2018 bid), which would provide further assurances of Greymouth's commitment to carry out the work proposed in its work programme. Irrespective of the terms negotiated in good faith for such assurances, the bid is to be

assessed on the basis that the decision-maker is satisfied that Greymouth is likely to comply with the terms of its proposed work programme.

[277] Greymouth's challenge to the lawfulness of the ban on offshore exploration activity, as announced in April 2018, is dismissed.

[278] Greymouth is entitled to costs and disbursements on a 2B basis.

Dobson J

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