The History and Development of Petroleum Law and Policy in New Zealand

David P. Grinlinton*

A. Introduction

The stages of human development are traditionally classified by reference to the "stone-bronze-iron age" sequence. The current stage of industrial development, which future archaeologists will no doubt classify as the "petroleum age", was triggered in 1855 when a Yale University professor, acting as a consultant to private interests, succeeded in distilling "rock oil" obtained from surface seepages in Pennsylvania into several hydrocarbon fractions.[1] One of these fractions was a high quality illuminating oil later given the name of "kerosene". Although kerosene had been refined earlier in Eastern Europe, it was initially this development and subsequent American investment and technology which precipitated widespread exploration and development of the resource.

It was only ten years later that work commenced on the first oil well in New Zealand at Taranaki.[2] Early exploration activity was intermittent, reflecting international fluctuations in supply and demand as kerosene came to be displaced by electricity in the latter part of the nineteenth century, followed by the rapid increase in the use of oil and gasoline in the shipping and transportation sectors. The decision of the Royal Navy to switch from coal to oil to power its capital ships in 1914, followed by the rapid mechanisation of the battlefield during the First World War, led to further periods of intense exploration activity within the British sphere of influence.[3]

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* Lecturer in Law, The University of Auckland.

1 On 16 April 1855 Professor Silliman of Yale University produced a privately commissioned report (for which he received $US526.08) which contained the results of his chemical analysis of "rock oil". He had brought the substance to different levels of boiling, and succeeded in distilling the oil into several hydrocarbon fractions including "kerosene": see Yergin,D., *The Prize*, (1991) at 18-34 for a comprehensive account of the early development of the oil industry.

2 The "Alpha" well was commenced in late 1865 by Messrs Carter, Scott, Smith, & Ross on the foreshore at New Plymouth in Taranaki where traces of oil had been seen floating on the sea and collecting on the foreshore. See generally NZ Govt., *New Zealand Mining Handbook*, 1906 at 525-536 which contains a history of petroleum exploration in Taranaki from 1865-1904, and Henry, J.D., *Oilfields of New Zealand* (1911) esp at 10-13.

3 See Yergin *supra*, note 1 at 150-164 where he traces the British Admiralty's risky decision to abandon coal (of which it had ample indigenous supplies) in favour of oil (of which it had none) as its primary form of motive power for the Royal Navy's capital ships. Exploration activity was most intense during the period immediately following the First World War as motor vehicles and oil powered marine transport rapidly increased, and in the period preceding the Second World War as security of supply became a paramount consideration: see Yergin esp at 167-183, 207-220 & 269-279.

After the Second World War, petroleum exploration activity continued at a low level until the latter 1950s. Driven again by external strategic and market forces, and more recently by a desire for greater energy self-sufficiency, New Zealand experienced a sustained and largely successful period of exploration and development from the mid-1960s.[4]

The history of petroleum law demonstrates a progression from an early reliance upon private property rights as the basis for managing exploration and development, to a period of state regulation of, and later participation in, all aspects of the petroleum industry, through to the present environment of de-regulation and withdrawal of the state from commercial involvement. The changing role of the state reflects the political, social and economic development of New Zealand from a colonial outpost of the British Empire to an independent nation state pursuing its own social and economic policies.

In addition to these more general social and political influences, this article will examine the effect of the retrospective resumption by the Crown in 1937[5] of ownership in petroleum without compensation to surface owners. Strong representations were made at the time, not only by private landowner and farming lobby groups, but also by Maori arguing that the taking of the resource was a breach of the Treaty of Waitangi.[6] While some promises were made by the government of the day to investigate the possibility of compensation, nothing eventuated largely because of the view that the resumption took nothing away from Maori that it was not also taking away from other landowners. This approach arguably overlooks the specific guarantees of land and resources contained in the Treaty itself[7] which, while not enforceable except to the extent

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4 In only the last two decades New Zealand has moved from a high dependence on imported oil to a position of much greater self-sufficiency. Imported oil as a percentage of primary energy fell from 57% in 1975 to 22% in 1990 (Source: NZ Govt., *New Zealand Official Yearbook 1992* at 306, Table 17.1). In 1992 New Zealand crude oil and condensate production accounted for 35% of total supply with 18% of this total being exported. One third of New Zealand's net petrol needs are derived from the synthetic petrol plant at Motunui which uses natural gas from the offshore Maui field. Most of the balance is supplied by New Zealand's Marsden Point oil refinery with 30-40% of its gas condensate and crude oil feedstock supplied from indigenous sources (source: NZ Govt., *New Zealand Official Yearbook 1994* at 393). Overall New Zealand's indigenous oil and synthetic fuel currently meets around 60% of the country's oil demand. See NZ Govt, Ministry of Commerce, *Energy Data File*, (July 1994).

5 Section 3 of the Petroleum Act 1937 declared all petroleum in New Zealand to be the property of the Crown regardless of when the land was originally alienated from the Crown.

6 On the Treaty of Waitangi generally see Ringer, J.B., *An Introduction to New Zealand Government* (1991) at chapter 3 and references therein. See also Orange, C., *The Treaty of Waitangi*, (1987), Kawharu, I.H.,(Ed), *Waitangi - Maori and Pakeha Perspectives of the Treaty of Waitangi*, (1989), and McHugh, P.J., *The Maori Magna Carta*, (1991).

7 Article the Second of the English version of the Treaty guarantees Maori "... the full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties...". The Maori version (arguably the primary reference as it was signed by over 500 chiefs, whereas the English version was signed by only 39) guarantees Maori "... the unqualified exercise of their chieftainship over their lands, villages and all their treasures...". For the full text of the Treaty in both forms see NZ Govt., *Principles for Crown Action on the Treaty of Waitangi*, (1989) at 4-6.

that its provisions are contained in municipal law,[8] is nevertheless regarded by some as the founding constitutional document of New Zealand.[9] Given the current political climate and the government's committment to settling Maori grievances and Treaty claims, it is likely that such a resumption would today attract considerable opposition and result in the likely payment of compensation or a share in the bounty of the resource.[10]

B. Early Development: 1865-1918

With most early petroleum developments, the location of deposits was initially indicated by surface seepages of oil which were often the source of myth and legend.[11] In Taranaki, oil had been noticed floating on the surface of the water and accumulations found on the foreshore long before the arrival of European settlers.[12]

1. Early Leases for Petroleum Exploration and Recovery

During the early colonial period there were no statutory provisions concerning petroleum exploration and recovery in New Zealand. Government agencies, statutory authorities, or private individuals simply granted leases of land for petroleum exploration and recovery. The first grant for these purposes was made by the Taranaki Provincial Council to Messrs Carter, Scott, Smith and Ross on 22 December 1865 for the purposes of boring for and recovering petroleum. Little oil was recovered and the *Alpha* well was eventually purchased in 1887 by the Taranaki Petroleum Company[13].

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8 *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 603 per MacKay J (CA). See also *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

9 See references *supra*, note 6, and in particular, Brookfield, F.M., "The New Zealand Constitution: the Search for Legitimacy", and McHugh, P.G., "Constitutional Theory and Maori Claims", both in Kawharu *supra* note 6 at 1 and 25 respectively.

10 See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 656 per Cooke P. (general principle not to act inconsistently with the Treaty). See also specifically on energy resources, Edmunds, D., "Maori Claims to Energy Resources", paper presented at the *Seminar on Maori Claims and Rights to Natural Resources*, (16 October 1991, Wellington), Boast, R.P., "The Treaty of Waitangi - A Framework for Resource Management Law", (1989) 19 *VUWLR Monograph* 1, and Boast, R.P., "Indigenous Claims to Petroleum Resources", in Ministry of Commerce, Energy & Resources Division, *1991 New Zealand Oil Exploration Conference Proceedings*, (1992) at 472.

11 See Yergin *supra*, note 1 at 23-24, and Forbes, R.J., *Bitumen and Petroleum in Antiquity*, (1936) esp at 11-21 & 57.

12 NZ Govt., *The New Zealand Mining Handbook*, (1906) at 525-526.

13 *Ibid.*, at 525-536 which contains a history of petroleum exploration in Taranaki from 1865-1904. The lease was for an initial term of two years free of any royalty or charge if oil should be found but conditional on certain depths being obtained. The Council formally adopted the terms of the lease on 20 February 1856. See also Henry, *supra* note 2.

Other ventures followed with the Peoples Petroleum Company commencing operations on 24 May 1866 and the Taranaki Petroleum Company towards the end of June of that year. These companies were granted leases by the Taranaki Provincial Council on similar terms to the Carter *et al* lease. Any oil recovered required refining to produce the commercially valuable product of kerosene. Therefore most oil recovered in commercial quantities at that time was sold by the barrel for export in the absence of any commercial refinery facility in New Zealand.

2. Early Legislative Intervention

Equipment failure, lack of technology to bore to depth, and dissapointing results led to a cessation of exploration activity in 1868. The next period of activity began 20 years later with a favourable report on oil in Taranaki by a Mr Henry A Gordon, Inspecting Engineer to the Mines Department who noted:

> "... there is sufficient evidence to show that a belt or basin of oil bearing country exists, and that it is only a question of discovering the source."[14]

A resurgence of exploration activity followed with, amongst others, Sir Julius Vogel, (Premier of New Zealand from 1873 - 1876) and a Mr Oliver Samuel forming a company in the United Kingdom and commencing operations at Taranaki in 1889.[15] Oil was found with an estimated output of 160 gallons a day but the boring equipment was lost in the bore and it was eventually abandoned.[16] While other ventures were similarly unsuccessful, this resurgence in interest caused the first steps to be taken towards a state controlled licensing regime for petroleum activity on Crown lands. The Mining Amendment Act 1892 added the following definition to the principal Act:

> "In respect of mineral licenses and leases: ....
>
> (c) the word "mineral" in relation to mining purposes shall be deemed to include petroleum and all other mineral oils."[17]

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14 Henry *ibid.*, at 20-22.

15 The New Zealand Petroleum and Iron Syndicate Ltd was formed in 1889 to work a lease over 230 acres of coastal land granted for a term of 21 years from 1888 by the New Plymouth Harbour Board. See Henry *ibid.*, at 27-32. See also *supra* note 12 at 534-535.

16 Henry *ibid.*, at 30-38.

17 Mining Amendment Act 1892 s 3(3).

This definition was continued in the subsequent consolidating Mining Acts of 1898, 1905 and 1908 incorporating petroleum exploration and recovery into the same licensing regime as hard minerals.[18]

Undercapitalisation, technical difficulties[19] and, perhaps more importantly, the effect of the rapidly developing use of electricity for lighting,[20] led to a further cessation of activity in the mid-1890s. However, new developments such as the internal combustion engine powered by gasoline, and the increasing use of heavy fuel oil for naval and mercantile marine propulsion in the early twentieth century provided a new demand for other hydrocarbon fractions in the oil refining process.[21] In particular the Royal Navy's increasing use of oil was of considerable significance to British colonies of the time. Britain's continued global naval dominance would become dependent upon abundant and secure sources of high quality fuel oil throughout the Empire.[22]

Following renewed exploration activity in the early years of the twentieth century, a commercial strike of some significance occurred in 1906 at the Taranaki Petroleum Company's "Birthday" well at Moturoa.[23] News of the apparent success precipitated a period of wild speculation in Taranaki Petroleum Company shares, intense international scrutiny of New Zealand's petroleum prospects, the flotation of several new prospecting companies, and speculation that J D Rockefeller's great Standard Oil Trust would seek to take control of the newly discovered resource to the detriment of local interests. The Royal Navy, in the process of converting many of its smaller ships to oil, approached the Taranaki company in March 1907 regarding a regular supply of oil for naval purposes.[24]

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18 The various enactments in force between 1891 and 1908 differed in specific detail but generally provided for the issue of prospecting licences and mining leases with the latter giving the exclusive right to mine for a specified mineral over a limited area of land . A royalty was payable on production of between 1-4% "at the pit's mouth" depending on which enactment was applicable. The legislation did not however extend to private land.

19 Henry *supra* note 2 at 25-69 provides a comprehensive account of the period 1888-1896 in Taranaki.

20 Yergin *supra* note 1 esp at 78-80.

21 *Ibid.*, and also at 150-183, & 207-211.

22 *Ibid.*, at 150-164. See also Henry *supra* note 2 at 78-85 and also "Notes on Colonial Oil" at 323-337, and see generally: Henry, J.D., *Oil Fields of the Empire* (1908).

23 NZ Govt, *Papers and Reports Relating to Minerals and Mining*, (1905) at 8 and (1906) at 6. See also Henry *supra* note 2 at 68-78. Initial estimates indicated a steady production flow rate of 100 barrels per day.

24 Henry *ibid.*, at 72-94, 100. The Royal Navy had maintained an Australian Squadron to protect shipping in Australasian waters since very early in the colonial period. This arrangement had become more formalised as New Zealand and Australia started to contribute financially to the continuation of a Naval presence: see the Australian Naval Defence Act 1887, the Australian and New Zealand Defence Act 1903, and the Naval Subsidy Act 1908. New Zealand also purchased a warship for the Royal Navy in 1909. See the speech by the Prime Minister Sir Joseph Ward to the House of Representatives - 146 *New Zealand Parliamentary Debates* ("NZPD") 197-199 (1909). The Royal Navy maintained a formal 'New Zealand Division' at Devonport Naval Base from 1921 (see The Naval Defence Regulations 1921) until 1942 when the Royal New Zealand Navy was established on 1 October 1941 pursuant to the *Royal New Zealand Navy Order* (NZ Govt., *Gazette*, 2/10/41).

The Taranaki Petroleum Co Ltd later donated 25 barrels of crude oil to the British Admiralty for test purposes with a view to providing regular supplies.[25]

Along with the increasing use of heavy oil for marine and locomotive propulsion, the development of both diesel and petrol internal combustion engines provided yet further markets for different hydrocarbon fractions of the refining process.[26] The potential benefits to New Zealand of a domestic oil refinery industry were apparent to industry and government leaders of the time with the Taranaki company setting up a miniature refinery and also supplying 100 barrels to the Minister of Railways for testing on New Zealand railways.[27]

The government also introduced an incentive bonus of £2,500 for the first 250,000 gallons of mineral oil produced.[28] By 3rd May 1911, 270,000 gallons of high-grade crude mineral oil had been obtained from three wells sunk at Moturoa by the company. This won the Company the bonus which was continued at the same rate for further production.[29] By 1915 they had produced 1,000,000 gallons of high-grade crude oil receiving £10,000 in bonuses.[30]

3. *A Quasi-Separate Petroleum Regime: Mining Amendment Act 1911*

Renewed activity in the gold mining sector had precipitated further incremental *ad hoc* amendment to the already complex and confused mining legislation. One commentator of the time described the 1905 Mining Act as:

> "... the most ill-organised, inexplicit, incomprehensible mining law to be found in Australasia."[31]

Increased activity at Taranaki and the inappropriateness of hard rock mining legislation to petroleum mining activity led to calls for specific petroleum regulation.[32] Limited reform took place in 1911 with the removal of "petroleum and mineral oils" from the definition of "mineral" in the Mining Act 1908 and

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25 Taranaki Petroleum Co Ltd, *Director's Report* (1910).

26 Yergin *supra* note 1 at 78-80. See also Henry *supra* note 2 chapter XI, Henry, J.D., *Oil Fuel and the Empire* (1908), and Brewer, N.H., *The Benzine Era - Spectacular Days in New Zealand History 1900-1926* (1993).

27 Taranaki Petroleum Co Ltd *supra* note 25. The purpose of the mini-refinery was to produce samples of refined oil and promote public perception of the benefits of the industry.

28 NZ Govt, *Gazette* (December 1910) No 33 at 1167.

29 NZ Govt, *Report of the Department of Mines on the Goldfields of New Zealand*, (1910) at 12.

30 NZ Govt, *New Zealand Official Yearbook*, (1916) at 491.

31 Veatch,A.C., "Mining Laws of Australia and New Zealand", in (1911) 505 *United States Geological Survey Bulletin* at 147.

32 See *e.g.* NZ Govt, *Papers and Reports Relating to Minerals and Mining*, (1904) at 7.

the introduction of a specific regime under the Act for petroleum.[33] This marked the beginning of a quasi-separate regime for petroleum exploration and recovery. Amongst provisions of the Mining Act 1908 made applicable to petroleum activities by Orders-in-Council were those sections pertaining to "mineral prospecting warrants", "mineral leases" and royalties.[34]

With war breaking out in Europe in August 1914, the Government was aware of the need for secure supplies of petroleum. It made £9,000 available to encourage the production and refining of petroleum in New Zealand.[35] The Mining Act 1908 was also amended to impose a condition in all future petroleum mining licenses giving the New Zealand government (or the British government) the right to purchase all production at market rates and the power to take over the working and management of production, storage or refining facilities.[36]

C. The Inter-War Years and the Decline of Empire

The First World War, and in particular the conversion of the Royal Navy from coal to oil, gave further impetus to locate reliable and abundant sources of oil in British spheres of influence. British representatives at the Imperial War Conference held in 1918 had urged further developments of existing oil fields in British territories, and the acquisition of new fields under British commercial influence or control. It was suggested that prospecting and production should be subject to government license and such rights should not be granted to "foreigners".[37]

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33 Section 2(1) of the Mining Amendment Act 1911 enabled the declaration by Order-in-Council that certain provisions of the Mining Act 1908 and regulations made thereunder would apply to prospecting, mining for, and storage of petroleum. These Orders-in-Council were also to define the districts in which they were to take effect. This approach endured under the Mining Act 1926. See *e..g.* Order-in-Council dated 10 July 1933 in NZ Govt., *Gazette*, (20 July 1933) at 1921-23.

34 See Mining Act 1908 *(as amended)* ss 76- 81. The hard rock mining genesis of the petroleum regime is illustrated by the royalty provisions which provided:
"The royalty payable under a mineral lease shall be one twenty-fifth of the value of the mineral ***at the pit's mouth***, and such value shall be fixed before a lease is issued."
(Mining Regulations 1907, Reg 17. This was increased to 5% by the Mining Regulations 1915).

35 Appropriation Act 1914 s 26. For a similar provision in respect of other industry see the Iron & Steel Industry Act 1914 s 2 (bounty to be paid for indigenous production of iron and steel).

36 Mining Amendment Act 1914, s 31.

37 In a letter dated 30 July 1927 from A.H. Kimball, Secretary of Mines to Hon.Minister of Mines, reference is made *inter alia* to a confidential Memorandum written by Lord Harcourt at the Imperial War Conference of 1918 concerning the vulnerability of the United Kingdom due to its dependence on the United States for most of its oil supplies and the need to secure suplies within the British sphere of influence: NZ National Archives, *Mines Dept Files* (MD 1). See also Keith, A.B., (Ed), *Speeches and Documents on the British Dominions 1918-1931*, (1938) at 3-11.

In a speech at the Imperial Conference of 1921 the importance of the Empire and the perceived dependence of the Dominions upon Britain was reflected in the Australian representative's speech:

> "Dangers to the Empire or to any part of it are to be met surely by unity of action. That is at once the principle upon which the Empire rests, and upon which its security depends. The Dominions could not exist if it were not for the British Navy. We must not forget this. We are a united Empire or we are nothing."[38]

1. The Extension of the Petroleum Regime to Private Land

Prompted by concerns of regional security and the need for greater control over such a strategically important resource as petroleum, the government in 1919 extended the petroleum regime to private land by making it unlawful to undertake prospecting or production activities unless an appropriate licence had been obtained from the Minister of Mines.[39]

The burgeoning use of motor vehicles and aircraft and improvements in marine applications for oil led again to renewed interest in New Zealand petroleum exploration prospects. In 1925, Sir Robert Waley Cohen, Managing Director of Shell Transport and Trading, wrote to the Minister concerning Shell's interest in large scale oil exploration in New Zealand. He made it clear that Crown resumption of all oil rights, and an option on exploration rights over the entire country for 3-5 years, with the right to select around 100,000 acres of the most promising areas at the end of that time would be necessary to justify Shell's involvement in the search in New Zealand.[40]

In January 1926 a similar approach was made by the Anglo-Persian Oil Co Ltd (later to become British Petroleum). Similar criteria to those proposed by Shell were specified as the necessary ingredients for Anglo-Persian's involvement. The Company, with a 51% UK government shareholding, emphasised the strategic importance of alignment with a "British" company:

> "It is unnecessary to urge you, Sir, the national and imperial importance of this matter (*sic*). ....
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> From the imperial, and infinitely the more vital and important side, - upon a developed oil-supply, with secure harbours for the air - and sea-craft of the white race in the Western Pacific, may yet depend the continued existence of the people of Australia and New Zealand as a British race. ....
>
> The "Anglo-Persian" is the sole British-owned and British-controlled Oil Company sufficiently strong and organized to withstand any danger of foreign absorption; its staff and ownership are British from top to bottom. Its geological staff and other resources are second to none in the world. The more important side of the Company, in the view of those who control it, is the imperial rather than the

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38 Speech of the Rt. Hon W.M. Hughes (June 20 1921) in Keith *ibid* at 53.

39 Mining Amendment Act 1919 s 15.

40 Letter dated 3 March 1925 from Sir R.W. Cohen to the Minister of Mines: NZ National Archives, *Mines Department Files* (MD 1).

commercial; and it is for this reason particularly that the Company is anxious (in view of the changing conditions and possible menace of the Pacific) to thoroughly test the oil possibilities of the Dominion and to develop them if feasible at all speed."[41]

2. *The Dominion Mining Conference of 1926*

The Dominion Mining Conference held in Dunedin in 1926 called for the consolidation of the Mining Act 1908, and for a Bill dealing specifically with petroleum. A unanimous resolution of the conference asked that:

> "The Government be urged in the national interests to prepare and pass special legislation reserving to the Crown the sole right to grant licenses to search for, and win petroleum from any land or lease in the Dominion, ... "

and later stated;

> "That this conference believes that any oil rights granted should be under strictly British ownership and control, both as to exploration and to working."[42]

The political and economic motivations which lay behind this new initiative were set out in a confidential report from the then Under-Secretary of Mines, to the Minister of Mines.[43] In this report Mr Kimball spelt out the need for new petroleum legislation to attract serious commercial interest in petroleum exploration in New Zealand and also referred to the strategic considerations raised at the Imperial War Conference eight years earlier:

> "According to a memorandum by Lord Harcourt at the Imperial War Conference, which was held in the year 1918, it was then stated that the United Kingdom was dependant on the United States for about 80% of its supplies, and that it was obvious that the United States had the power to place Great Britain in an impossible position should they desire to be unfriendly. It was pointed out that the position as regards the quantity of oil produced within the British Empire was one of very great concern, when it is realised what an absolutely vital part oil plays in modern

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41 Letter dated 11 January 1926 from Mr G L Tacon of Anglo-Persian Oil Co Ltd to the Minister of Mines: NZ National Archives, *Mines Department Files* (MD 1). The "white race" reference in the letter reflects the "White New Zealand" policy of the times. The Immigration Restriction Amendment Act 1920 restricted persons who were not "... of British birth and parentage..." from entering New Zealand without a permit. Naturalized British subjects or aboriginal natives of other Dominions or colonies were specifically excluded from entry without a permit (see s 5).

42 Park, Prof. J., & Waters, Prof. D.B., (Hon. Eds.), *Proceedings, Papers, Remits and Discussions of the Dominion Mining Conference held at Dunedin*, (3-6 February 1926) at 367.

43 AH Kimball, *Re Prospecting and Development of the Petroliferous Areas in New Zealand*, (Report dated 24 February 1926 from the Under-Secretary of Mines, Mr A.H. Kimball to Hon. Minister of Mines) in NZ National Archives, *Mines Department files* (MD 1).

> industrial economy on land as well as in the activities of the British Navy and mercantile marine. It was urged by Lord Harcourt that every effort must be made not only to develop existing oil fields in British territories or spheres of influence, but to acquire new fields that would be from the outset under British commercial influence and under British control, and that it was of first rate importance that no foreign influence, under any guise, shall be permitted in British territories."[44]

He concluded that legislation was necessary to give the Crown sole rights to grant prospecting and mining licences while preserving the rights of the owners of the petroleum and surface estate to receive rents, royalties and compensation. He also recommended that the Anglo-Persian company should be invited to visit the Minister with a view to initiating a comprehensive exploration programme.

In a later more comprehensive memorandum[45] the Under-Secretary of Mines expressed a clear preference for the British company:

> ".... the matter of adequately and efficiently proving our oil resources is one of great importance to the British Empire, and this being so, it is the bounden duty of the Government to pass a law with the object of enabling a company like the Anglo-Persian Oil Company Ltd to become interested in our resources."

Following the Conference, the Mining Act 1908 and all amendments were consolidated in the Mining Act 1926. Pending the expected enactment of specific petroleum legislation, this Act continued for the time being the same regime *vis-a-vis* petroleum, with Orders-in-Council applying certain provisions of the *Mining Act* and Regulations to petroleum activities. The royalty regime continued unchanged.

3. The Petroleum Bill 1927

This arrangement was clearly intended to be temporary, with the promised Petroleum Bill being drafted in late 1926, and introduced in 1927. The Bill included a prohibition against prospecting or mining for petroleum on Crown land or private land without a licence; payment of compensation for injury to land; payment of a royalty at the rate of 10% to the owner of the petroleum; and the imposition of a common carrier obligation on pipeline operators. The Bill also continued the power of the Crown to take the production, management and operation of oil wells and refineries in times of emergency.[46]

While allowing exploration and production of petroleum on private land, the Bill left ownership of the resource in the surface landowner and provided for a royalty of 10% payable to the owner. Nevertheless it was opposed by certain interests including settlers groups and the holders of pastoral leases who claimed

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44 *Ibid* at 2.

45 Confidential memorandum dated 20 July 1927 from the Under-Secretary of Mines to the Hon. Minister of Mines: NZ National Archives, *Mines Department files* (MD 1) at 3.

46 The Petroleum Bill as reported from the Lands Committee of the House of Representatives on 20 October 1927.

the Bill should be altered to give them an entitlement to royalties on petroleum under their leasehold estates - a right they would not be entitled to at common law.[47] Nor did the Bill find favour with the major oil companies. Anglo-Persian objected *inter alia* to the drilling obligations, the emergency and wartime powers of the Government, and the "common carrier" obligations for pipeline operators provided for in the Bill.[48]

Partially as a result of these objections, but also due to the onset of the Great Depression in 1929 and a worldwide glut of oil resulting from reduced demand, increased supply and improved refining techniques,[49] interest in oil exploration waned. The Bill was ultimately abandoned with petroleum development remaining subject to the applicable provisions of the Mining Act 1926. It was not until the late-1930's that a new Petroleum Bill in substantially different form to the 1927 Bill emerged.

D. State Resumption Of Ownership In Petroleum

1. War Clouds on the Horizon

In the early 1930's the United States introduced economic recovery measures designed to end the great depression, and imposed regulation on domestic production and tariffs on imported oil.[50] This led to a period of relative stability of supply and demand, and consequently of price. Ominous signs of Japanese military excursions in Asia and the Pacific, and the phenomenon of Hitler leading

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47 See record of meeting dated 3 November 1927 between the Minister of Mines and representatives of the settlers of Whangamomona County. See also the Memorandum dated 30 August 1929 from the Under-Secretary of Mines to Minister of Mines. Both are in the NZ National Archives, *Mines Department Files* (MD 1).

48 Letter dated 11 January 1928 from the head of Anglo-Persian Oil Co Ltd, Sir John Cadman to the Prime Minister of New Zealand, the Rt Hon. J.G. Coates: NZ National Archives, *Mines Department files* (MD 1).

49 Yergin *supra* note 1 at 223-252. One of the major factors in the increased supply of oil at this time was the opening up of the "Arabian Concessions". Ironically it was New Zealand born Major Frank Holmes, (given the appellation "Abu Naft" - the "father of oil" - by local arabs), who was largely responsible for persevering with the Arabian prospects when many of the large corporations were uninterested. See Yergin at 280-302.

50 The National Industrial Recovery Act ("NIRA") was enacted in 1933. It was later largely overturned by the US Supreme Court as unconstitutional in *Schechter Poultry Corp. v United States* 295 US 495; 79 L.Ed. 1570 (1935). Later an *Oil Code* established under the NIRA gave the US Secretary of the Interior the power to set mandatory quotas for state production of oil. NIRA also enabled the prevention of unauthorized interstate trade in oil produced in excess of state levels although this element of the NIRA was later overturned by the Supreme Court in *Panama Refining Co. v Ryan* 293 US 388 at 414-19; 79 L.ed. 446 at 456-58 (1935). The US Federal Government responded with the Connally "Hot Oil" Act in 1935 which provided police powers to curtail interstate trade in contraband oil: § 1 *et seq* 15 USCA § 715 *et seq*. This Act was declared constitutional in *Griswold v The President of the United States* 82 F. 2d 922 at 923 (1936). See also *Hurley v Federal Tender Board No 1* 108 F. 2d 574 (1939), & *Genecov v Federal*

an economically and militarily revitalised Germany to European domination once again underlined the strategic and economic importance of the oil search. Britain had taken the step of retrospectively resuming Crown ownership of petroleum in 1934.[51] The Australian states of Victoria and Western Australia had followed suit in 1935 and 1936 respectively.[52]

2. Regional Security and the Continued Supply of Oil

Pressure again came from industry groups who saw the resumption of complete government control over the resource as a necessary prerequisite to large scale exploration for oil in New Zealand. In 1937 Sir Colin Fraser, a principal of Taranaki (NZ) Oil Fields NL, and also connected with several companies forming the Broken Hill silver-lead-zinc industry in Australia, suggested the possibility of the formation of a new company, the New Zealand Oil Co Ltd, to undertake a large scale exploration programme in New Zealand. Shareholding would be divided between the Australian companies (including the Taranaki company) as to one-third, and the large American Standard-Vacuum Company Inc. (later to become Mobil) as to the remainder. In his letter Fraser echoed the concerns of local industry dependent upon distant sources of oil threatened by global political instability:

> "As you are aware, the Broken Hill Silver-Lead-Zinc industry, with which I am actively associated, is dependent upon oil as its source of power. It is therefore desirable from the standpoint of security, particularly in times of National emergency, that a source of supply nearer than the Dutch Archipelago and Persian Gulf should be located and developed, if at all possible. For this reason, the Broken Hill interests named have invited the Vacuum Oil Company Pty Limited to participate with it and Taranaki in further testing and exploring the oil resources of the Dominion."

Essential terms for such a search for oil in New Zealand included the retrospective resumption of petroleum ownership by the Crown, the grant of prospecting licences and/or leases over approximately 2,000 square miles, priority in application for rights for companies such as Taranaki and Vacuum which had already expended considerable investment in exploration in New Zealand, automatic grant of production leases for areas of up to 125 square miles for terms of 42 years, ground rent of £5 per annum per square mile, and a royalty of only 5% on all petroleum and natural gas produced.[53]

Petroleum Board 146 F. 2d 596 (1944). A tariff of 21c per barrel on crude and fuel oil and $1.05 per barrel on gasoline was also passed through Congress and signed into law in 1932. See Yergin *ibid* at 258.

51 Petroleum (Production) Act 1934, s 1 (as originally enacted).

52 Mines (Petroleum) Act 1935 (Vic) and Petroleum Act 1936 (WA). Queensland had resumed ownership in petroleum much earlier in the Petroleum Act 1915 (Qd).

53 Letter dated 7 May 1937 from Sir Colin Fraser to the Minister of Mines: NZ National Archives, *Mines Department files* (MD 1).

3. The Petroleum Bill 1937

The influence of Fraser's letter, and subsequent discussions with the Company on the government's law reform proposals, was reflected in public comments by the Minister,[54] and ultimately the introduction of a Petroleum Bill in Parliament only a few months later.[55] The Bill incorporated virtually all of the Taranaki company's requirements except the right of priority in application based on past investment and the fixed 5% royalty rate.[56] The apparent encouragement by the Government of a systematic large scale Australian / American led search for oil reflected to some extent an inter-war movement by New Zealand from dependence upon Britain for national and regional security, to a more regionally based co-operative relationship with Australia and the United States. This new order of regional security would be cemented in place by America's crucial role in the Pacific in the Second World War and subsequent security agreements such as "ANZUS".[57]

The Petroleum Bill declared all petroleum in its natural condition "to be the property of the Crown" regardless of whether the land had already been alienated from the Crown or not.[58] This retrospective expropriation of surface landowners' "ownership" of oil beneath their land immediately raised a storm of protest from both private and Maori landholders alike.[59]

Following its introduction the Bill was substantially amended by the Select Committee but not significantly altered with respect to the provisions relating to expropriation of petroleum rights and the payment of royalties. Debate in the House spanned several days from 7 - 9 December 1937 and centred on two questions. The first was whether surface landowners should be entitled to any

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54 In a reply to an address by the Mayor of New Plymouth on 7 August 1937 during a visit to Taranaki, the Minister of Mines, the Hon PC Webb suggested that a new era of oil exploration was approaching and the Government itself would consider investing £500,000 in the search for oil if the private sector did not make a serious attempt: NZ National Archives, *Mines Department files* (MD 1).

55 The Petroleum Bill was introduced on 16 November 1937.

56 The Bill did however contain a clause directing the Minister of Mines to take such pioneering efforts into account when considering the grant of prospecting licences. See Memorandum dated 18 May 1937 from Under-Secretary of Mines to the Minister of Mines, and letter dated 25 August 1937 from the Minister of Mines to Sir Colin Fraser in NZ National Archives, *Mines Department files* (MD 1). See also Petroleum Act 1937 s 5(5) (as enacted). As to royalties see s 12(1) & (3) which respectively provide that the royalty is as specified in the prospecting or mining license, and that such royalty shall not be less than 5%.

57 See *infra* notes 88 and 89 and accompanying text.

58 Petroleum Bill *1937* cl 3(1).

59 In its sub-leader of 18 November 1937, the *Dominion* stated:
"[The Petroleum Bill] really nationalises an unborn industry and raises the question whether this is not a stepping stone to the nationalisation of all wealth that can be won from beneath the ground. ....
[In the Bill] it would seem that powers are to be retained by the Minister which place him in a dictatorial position; from which there is no appeal. Before the measure passes it is desirable that amendments should be made to fully safeguard the interests of those who take the prospecting risks and also to ensure equitable compensation to land-owners affected."

compensation for the arguable loss of their "property rights" in oil below their lands. The second was whether Maori land holders could or should be entitled to a royalty for production of oil from underneath their land by virtue of the various "guarantees" to lands and properties contained in the Treaty of Waitangi.[60]

4. The "Taking" of Petroleum Rights Without Compensation

The assertion that the resumption of Crown ownership in the resource was a "taking" of private property requiring compensation, was met by the argument that petroleum was a migratory resource in the nature of natural water which could not be claimed by the surface owner until recovered. Therefore, petroleum *in situ*, unlike hard minerals, could not be said to be "owned" by the surface owner pursuant to the maxim *cujus est solum ejus est usque ad coelum et ad inferos*.[61]

These arguments had been raised earlier in the United Kingdom in the second reading of the Petroleum (Production) Act 1934 (UK):

> ".... imagine that [an oil company] finds oil. To whom does that oil belong? Does it belong simply to the freeholder on whose surface the drill first made its penetration, or does it belong to all the landowners who have oil under their properties? At the present time no one is able to say ....
>
> The Government .... have come to the conclusion that there is no possibility of assessing these innumerable rights, if they exist. In the first place we hold the view that these rights, if they exist at all, are purely imaginary and have no practical value and never have had any practical value. The only method by which these multifarious rights can be brought into some sort of businesslike uniformity is by vesting the rights in the Crown."[62]

This point was debated in the New Zealand Parliament at some length. The Hon Mr Denham referred to a decision of the US Supreme Court which took this approach.[63] In *Ohio Oil Co v Indiana*, Justice White had variously stated:

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60 *Supra* notes 6-10 and accompanying text.

61 "To whomsoever the soil belongs, he owns also to the sky and to the depths". See *Black's Law Dictionary* , (6th ed, 1990), at 378.

62 291 H.C. Deb. at 215-217 (19 June 1934) per the President of the Board of Trade. See the speech by the Marquess of Hartington opposing the measure in 291 H.C. Deb. at 227-243. Land owned by her family contained oil but the land had been specifically exempted from the Bill. See also the sub-leader in *The Dominion*, 18 November 1937 which reviewed the Home Government's view in passing the 1934 Act, that the land-owner "....suffers no loss by the State's assumption of the ownership of what exists only problematically, and assuming he will be fully compensated for any surrender of surface rights."

> "No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. ....
>
> Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. ...."[64]

The Judge referred with approval to *Jones v Forest Oil Co* where the Judge in that case had reviewed the same authorities and decided:

> "From these cases we conclude that the property of the owner of the lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface."[65]

The situation in the United States, however, was more complex than this case suggests. Then, as indeed now, different states took a variety of different approaches to the ownership of petroleum. Some States such as Texas have traditionally treated petroleum in the same way as hard minerals with ownership vested in the surface owner. Others, such as Pennsylvania and California, gave the surface landowner a right akin to a *profit a prendre* with ownership becoming absolute when the petroleum is brought to the surface. Yet others, such as Oklahoma and Indiana, treated petroleum as incapable of ownership *in situ*. In all jurisdictions, however, the so-called "rule of capture" was applied allowing drilling operations on adjoining land which tap a common reservoir.[66]

This uncertainty left open the counter-argument that the *cujus est solum ejus est usque ad coelum et ad inferos* principle should also *prima facie* apply to petroleum in New Zealand. The Leader of the Opposition the Rt Hon Coates adopted this view and argued that ownership disputes arising between neighbouring surface landowners under whose land petroleum extended were for the courts to resolve and should not be used as a justification for denying all surface landowners property in petroleum beneath their land.[67]

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63 249 NZPD 1036 at 1053 (6 December 1937).

64 177 US 190 at 202-208; 44 L.ed. 729 at 736-39 (1900). See also*Walls v Midland Carbon Co* 254 US 300 at 323; 65 L.ed. 276 (1920) and the comments of the Privy Council in *Borys v Canadian Pacific Railway Co* [1953] AC 217 esp at 228-29 which doubted the applicability of the *cujus est solum* ... principle to petroleum *in situ; contra*: *Trinidad Asphalt v Ambard* [1899]AC 594 at 600-602 (PC) which arguably supports the "absolute ownership" theory.

65 194 Pa. 379; 44 Atl. 1074 (1900), referred to in the *Ohio* case *ibid* at 205.

66 The current approaches of the various states are described in Daintith, T., & Hill, A., *Daintith and Willoughby's United Kingdom Oil and Gas Law*, (2d ed, 1984) at 3004. There has been little change since 1937.

67 *Supra* note 63 at 1061-67 & esp at 1064 .

5. Maori Land and the Treaty of Waitangi

The expropriation of petroleum under Maori land was also highly controversial and precipitated strong opposition from Maori.[68] Prior to its introduction the Bill had been referred several times to Parliamentary Select Committees.[69] The Government had also sought the advice of the Solicitor-General's Office and the Native Department as to whether the Bill breached the provisions of the Treaty of Waitangi. The Solicitor-General had stated:

> "I am ... clearly of the opinion that the legislative provision referred to does not transgress the Treaty of Waitangi in that it proposes to take from the native landowner no more than from the European. The legislation is comprehensive and treats equally all subjects of His Majesty."[70]

The Native Department however, had come to the opposite conclusion that the expropriation was contrary to the spirit and letter of the Treaty of Waitangi and whether the Treaty is to be observed to the full is a matter of Government policy:

> "By the Treaty of Waitangi the Native race was guaranteed the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties so long as they might desire to retain them. The Natives were guaranteed possession of their lands: The Crown secured the exclusive right of extinguishing such title by purchase.
>
> It is unnecessary to discuss the binding effect of the Treaty of Waitangi upon the Crown - it is now so well established that it cannot be disregarded. In our legal system the Crown is the only absolute owner of land recognised - but the Crown guaranteed the title of the Natives by the Treaty and the proposal to declare any ingredient of that land to be the property of the Crown without payment is contrary to the spirit and the letter of the Treaty."[71]

In the Native Affairs Committee various amendments to the Bill had been proposed. These included the deletion of "native land" from the definition of

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68 When Government Ministers visited East Coast marae to explain the measures in 1937 they were confronted with a specially composed "petroleum haka" by local Maori. See the *Auckland Star*, (15 June 1938).

69 See NZ Govt., *Minutes of a Meeting of the Goldfields and Mines Committee*, (2 December 1937) and NZ Govt., *Minutes of a Meeting of the Native Affairs Committee*, (24 November 1937): NZ National Archives, *Mines Department files* (MD 1).

70 Letter dated 16 November 1937 from Solicitor-General to Hon. Minister of Mines. This view was supported by a later more comprehensive document in the form of a Memorandum dated 26 November 1937 from the Solicitor General to the Minister of Mines: NZ National Archives, *Mines Department files* (MD 1).

71 Memorandum dated 28 October 1937 from Mr Shepherd of the Native Department to the Under-Secretary of the Native Department: NZ National Archives, *Mines Department files* (MD 1). See also letter dated 9 November 1937 from Under-Secretary of Native Affairs to Under-Secretary of Mines: NZ National Archives, *Mines Department files* (MD 1).

land in clause 2 of the Bill, the exclusion of native land from the retrospective expropriation of petroleum ownership by the Crown in clause 3 of the Bill, and the amendment of clause 12 (royalties) to give owners of native land 50% of the royalties from oil production payable to the Crown. All of these proposals were defeated.[72]

The arguments for special consideration for Maori on the basis of the Treaty were put by several members.[73] Sir Apirana Ngata, a lawyer and Maori Member of the House accepted the legal competence of the Legislature to pass the measure. However he questioned both its morality in the context of the Treaty, and the argument that equality required Maori and non-Maori be treated equally in the expropriation of property rights stating:

> " .... there are, side by side with the powers of the Parliament of New Zealand, historical and psychological appeals to sympathy which, in the minds of the Pakeha dominating the Legislature entitle the Maori to special consideration.
>
> .... I challenge [the Minister of Mines] and the Acting Native Minister to deny that, if this was a question between the Government and the Maori race only, the rights of the Maori race would be conceded. But the Government is afraid of the Pakeha landowner. It is afraid that if the Maoris got this concession the Pakeha landowners would demand it too." [74]

Addressing the argument that, as the existence of petroleum under their land was unknown to Maori in 1840, it could not be included as part of the "properties" guaranteed protection under the Treaty, he said:

> "I think it was the Attorney-General who asked this question: "Did the Maori know that there was oil under their lands when they signed the Treaty of Waitangi in 1840?" No. Nor did they know that there was gold under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the Pakeha, he is to have no benefit or advantage from them to-day? If so, it will not hold water."[75]

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72 NZ Parlt., *Minutes of a Meeting of the Native Affairs Committee*, (24 November 1937): NZ National Archives, *Mines Department files* (MD 1).

73 These included Sir Apirana Ngata, and the Hon. Messrs Tirikatene, Bodkin, Broadfoot and Coates.

74 *Supra* note 63 at 1043-44.

75 *Ibid.*, at 1044. The principle of the "right to development" of indigenous people is now widely recognised. See comments in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 673 per Richardson J. and at 692 per Somers J., and *Ngai Tahu Maori Trust Board* v *Director-General of Conservation* (unreported, C.A. 18/95, 22 September 1995), per Cooke P. at p11. See also Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, (WAI: 27, 1992) at 253:
"It is by now a truism that Maori Treaty rights are not frozen as at 1840. All lay in the future and there would be developments that could not have been foreseen or predicted at that time."

The opposition was also supported by Mr Tirikatene, a Government Maori Member of Parliament. He likened the Treaty to *Magna Carta* in respect of Maori people, and suggested that under it Maori had a prior claim to land not sold or disposed of by them. Although unclear, this suggested a "prior claim" more fundamental than the legal title acquired by settlers, thus justifying special consideration to Maori in respect of royalties for petroleum.[76] While not fully developed, this argument reflects a view which has gained currency in some quarters in recent years, that Maori did not cede full "sovereignty" to the Crown, but rather, merely "governorship" with Maori retaining a limited "sovereignty" or "chieftainship" over their lands, resources and culture.[77] On this view, except for land legitimately purchased by the Crown, Maori retained sovereign title. This would exclude the concept of "eminent domain" used as the justification for expropriating property in petroleum in the "national interest".[78]

An amendment providing for a 50/50 share between Government and Maori of the royalty payable on petroleum found beneath Maori land was proposed but later withdrawn to allow the Bill to be enacted before the House rose for the Christmas vacation period. The opposition had agreed to withdraw the amendment on condition that Parliament would discuss fully the division of royalties betwen the Crown and Maori before the end of the Parliamentary session.

Following further extended debate in the Legislative Council on Maori rights and claims to royalties based on the Treaty of Waitangi the Bill was finally passed into law on 10 December 1937.[79]

The promised debate on the division of royalties did take place in March 1938.[80] However, the view that it would be inequitable to give Maori landowners a share of the royalty and other landowners nothing, prevailed, and Parliament ultimately resolved that the Crown should retain the right to all royalties from petroleum.[81]

6. *Enactment*

The Act effectively took back to the Crown all petroleum in its natural state under land without compensation, and in this sense was a major expropriation of private property rights. However, it did include transitional provisions for those people who held existing petroleum exploration and recovery rights under

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76 *Supra* note 63 at 1070-1072.

77 See for instance Orange supra note 6 at 40-42. See also Kelsey, J., *A Question of Honour, Labour and the Treaty*, (1990) on the conflict between the Maori concept of Te Tino Rangatiratanga (similar to 'independence' or 'absolute authority') guaranteed under the Maori version of the Treaty, and Crown "sovereignty".

78 The concept of eminent domain was relied upon by the Solicitor-General in his advice to the Minister of Mines. See *supra* note 70 and accompanying text.

79 See 249 NZPD 1174-1236 (10 December 1937) for the Legislative Council debate.

80 See 250 NZPD 58 (3-4 March 1938).

81 *Ibid.*, at 125-26 per Hon P.C. Webb, Minister of Mines.

the pre-existing Mining Act regime, or rights obtained by private leases or other arrangements.[82]

The passage of the Bill led to a considerable amount of new exploration. By the end of 1938 the Minister had granted 52 licences covering an aggregate area of 9,236 square miles.[83] By 1941 the major companies had expended almost one million pounds in exploration.[84] Despite this flurry of activity the hoped for petroleum boom did not eventuate and exploration in New Zealand languished with the local market taking advantage of cheap oil in a period of surplus production following the Second World War.[85]

E. The Modern Era Of Exploration

1. The Immediate Post-war Period

Following the Second World War, improved technology and the accelerated development of Mexican gas and Middle Eastern crude reserves resulted in a further period of surplus production. As demand also increased the geo-political balance of supply and proven reserves shifted dramatically from Europe and the Americas to the Middle East.[86] A new world order for energy was emerging which would see the developed world become increasingly dependent upon crude supplies from this politically unstable region, and reliant upon fragile sea

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82 See Petroleum Act 1937 ss 46-47 as originally enacted. This was apparently in response to a letter dated 30 November 1937 from A. Hanna, a lawyer acting for an oil company to the Minister of Mines. Mr Hanna noted that his client had acquired registered Land Transfer Act title to oil, gas and other petroleum products in, on or under certain parcels of land in Taranaki. It was argued that to take away these existing rights would undermine the indefeasibility principle of the Torrens system of title to land, and that it would also be unjust as money had already been expended on the interests. The letter was referred to in the debate on the Bill in Parliament by Mr Endean. See *supra* note 63 at 1056-1057.

83 NZ Govt., *New Zealand Mines Statement* (1938). Most exploration took place in Taranaki, but prospecting licences over 800 square miles in the Gisborne district had been very rapidly granted to the New Zealand Petroleum Company Ltd which had a shareholding which included the Taranaki (NZ) Oil Fields NL and Vacuum Oil Company Pty Ltd. See the press statement by the Minister for Mines dated 7 April 1938: NZ National Archives, *Mines Dept files* (MD 1).

84 By 30 April 1941 a total of £985,245 had been spent as follows: New Zealand Petroleum Co Ltd (Vacuum, later Mobil) - £716,694; Superior Oil Co of New Zealand Ltd - £151,609; New Zealand Oil Exploration Ltd (Shell) - £63,045; New Zealand Oil Concessions Ltd (Superior & NZ Coy) - £36,504; and Northern Oilfields Ltd - £17,393. See the Memorandum dated 12 May 1941 from Under Secretary of Mines to Minister of Mines: NZ National Archives, *Mines Dept files* (MD 1).

85 Yergin *supra* note 1 at 409-430.

86 *Ibid.*, at 499-501.

transport routes to and from those areas.[87]

A significant shift in New Zealand's foreign policy occurred during and after the Second World War with the development of a more regionally oriented approach to defence.[88] New Zealand moved away from a militarily weakened Britain, and looked to the United States as the central focus for collective security in the Pacific and Indian Oceans.[89] In 1939 the Governor-General had ceased to represent the British Government, representing instead the Crown in right of New Zealand, and on 25 November 1947 New Zealand finally adopted the Statute of Westminster formally ending the sovereignty of the Westminster Parliament.[90]

There were also important post-war technical developments in the petroleum industry including the ability to explore and drill to considerable depth off-shore for sub-sea hydrocarbon resources. It would be through the use of this technology that New Zealand's major hydrocarbon reserves would eventually be discovered.[91]

Meanwhile New Zealand's oil production continued at a steady but modest rate from the Motoroa field in Taranaki. However by 1959, after three decades of continuous output, New Zealand's total cumulative production amounted to only 178,734 barrels produced from a few wells in Taranaki.[92] International interest in New Zealand remained at a low level until the mid-1950s.[93]

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87 The strategic importance of the Suez canal and Arabian Gulf is illustrated by such events as the "Suez crisis" of 1956 when Egypt expropriated the canal, the closure of the canal in 1967 during the "six day war", and the intermittent danger to shipping in the Gulf by mining and hostile actions during the Iran/Iraq war from 1980-88 and during the 1992 Gulf War.

88 *E.g.* the "Canberra Pact" of defence cooperation between New Zealand and Australia signed on 21 January 1944. See the speech of the Hon Peter Fraser, Prime Minister to the House of Representatives in 264 NZPD 194-5, 798 (29 March 1944).

89 The "Collective Defence Treaty between Australia, New Zealand and the United States" ("ANZUS") was made in San Francisco on 1 September 1951. See NZ Parlt., *Appendices to the Journals of the House of Representatives* ("AJHR") (1954) A-12, 3-7. The ANZUS pact reflected the decline of British naval influence in the southern hemisphere and the identification of New Zealand with Australian and United States interests in the Pacific and Indian Oceans. Subsequent participation in the Korean and Vietnam conflicts was part of this process of maturation from 'British Dominion' to sovereign nation.

90 Statute of Westminster Adoption Act 1947.

91 For a brief review of these developments see the NZ Government, *White Paper on the Development of the Maui Gas Field*, AJHR (October, 1973) D 5A at 25-27.

92 Early production rates of around 93,915 gallons in 1941 increased steadily to 189,000 gallons in 1959 by which time only 6,255,683 imperial gallons (178,734 barrels) had been produced. See the NZ Govt., Mines Department, *Statistics Relating to Mining in New Zealand for the Year Ended 31/12/59*, AJHR (1960).

93 Only 34 wells were drilled from 1940-59. See the Ministry of Commerce, Energy and Resources Division, "The Search for Petroleum in New Zealand", *Petroleum News*, (January 1995) 28 at 31.

2. The 'New Wave' of Exploration

With the rise in dependence on Middle Eastern oil, the nationalisation of Anglo-Iranian in Iran, and the lessons of the Suez crisis in 1956,[94] politically stable countries such as Australia and New Zealand became more attractive to exploration companies. Following significant discoveries in Australia in 1953[95] renewed interest was shown in acquiring prospective acreage in New Zealand by both local and overseas concerns.[96]

Amendments to the Petroleum Act in 1955 resulted in a more attractive exploration regime including the provision for renewal of prospecting licences for an aggregate period of up to 10 years; the modification of the obligation to commence prospecting within three months of the granting of the licence; and the specification of conditions to be included in subsequent mining and prospecting licences. The amendment also gave the Minister the power to direct that crude petroleum be refined in New Zealand and repealed sections providing for the retrospective operation on existing licences of any subsequent amendments.[97]

In 1955 the Shell Group, British Petroleum and Todd Brothers Ltd of Wellington took advantage of the reforms forming a consortium ("Shell-BP-Todd") to undertake a comprehensive programme of exploration in Taranaki. This marked the beginning of a new era of large scale exploration and discovery which has largely been sustained to the present day.[98]

3. The Kapuni and Maui Discoveries

In 1959 the Kapuni onshore gas / condensate field was discovered by the Shell-BP-Todd consortium.[99] Lack of developed markets, and transmission and reticulation infrastructure delayed production until the early 1970s. In 1962 comprehensive provisions for pipe-line authorisations, easements from land owners, and compulsory entry and taking of land for pipe-lines were

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94 Yergin *supra* note 1 chapters 23 and 24.

95 NZ Govt., *Mines Statement*, AJHR (1954) C2 at 4.

96 Mines department files for the period 1955-1960 show a number of requests for information from New Zealand, Australian and American exploration companies: NZ National Archives, *Mines Department files* (MD 1).

97 Petroleum Amendment Act 1955 , see esp. s 3(1).

98 From 1955 to the present over 200 wells have been drilled in Taranaki. See the Ministry of Commerce, Energy and Resources Division *supra* note 93 at 31-32.

99 The field was modest with initial estimates of a 25 year life on existing and projected industrial and residential reticulation at optimum extraction. See *New Zealand Official Yearbook 1970* at 469. Remaining reserves as at 31 December 1992 were 535,000 million cubic feet of gas and 15.4 million barrels of oil and condensate according to the *New Zealand Official Yearbook 1994* at 392-393.

introduced.[100] A gas purchase agreement was concluded with Government in 1967,[101] and, in 1970, a petroleum mining licence for the Kapuni field for a term of 42 years was granted to the consortium.[102] Royalty was payable at the rate of 5% of the selling value at the wellhead of crude petroleum, condensate and natural gas produced.[103]

The development of offshore drilling technology also raised the question of jurisdiction over the continental shelf adjacent to states but beyond the internationally accepted 12 mile territorial limit.[104] In 1958 New Zealand was a signatory to the *Geneva Convention on the Continental Shelf* which recognised state control over access to sub-sea resources on and under the continental shelf adjacent to territorial waters. The Continental Shelf Act 1964 implemented the Geneva Convention in New Zealand, vesting the rights to "explore for and exploit" minerals on the sea-bed or under the continental shelf of New Zealand in the Crown. The Act also applied the relevant provisions of the Petroleum Act 1937 to any petroleum in the sea-bed and sub-soil of the continental shelf.[105]

Seven prospecting licences for areas on the continental shelf were granted in 1965,[106] and Shell-BP-Todd extended their exploration programme offshore in the Taranaki Basin discovering the giant Maui gas/condensate field in 1969.[107] Following assessment of the discovery and its possible use, a mining licence

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[100] See the Petroleum Amendment Act 1962. A later amendment authorized the Governor-General on the advice of the Minister to issue "middle line proclamations" for pipelines of national importance and applying the provisions of the *Public Works Act* as to the compulsory taking of land. The amendment provided for the holders of pipeline authorizations to exercise the powers that the then Minister of Works and Development had in relation to the taking of land for railways. See the Petroleum Amendment Act 1974, s 2 adding s 70A to the principal Act. See also the *Petroleum Pipeline Regulations of 1964* and *1984*.

[101] Agreement was reached between the Crown and Shell-BP-Todd in 1967 whereby the Crown agreed to purchase most of the gas for processing, distribution and sale to domestic and commercial consumers. See the *Gas Purchase Contract between Shell (Petroleum Mining) Co Ltd, BP (Oil Exploration) Co of New Zealand Ltd, Todd Petroleum Mining Co Ltd and the Minister of Mines,* AJHR (1967) C 2A.

[102] Petroleum Mining Licence 839.

[103] *Ibid.*, cl 2 Second Schedule.

[104] Territorial Sea and Exclusive Economic Zone Act 1977 ss 3 and 7.

[105] Continental Shelf Act 1964 ss 3 and 4.

[106] *Mines Statement,* AJHR (1966) C 2 at 5. By 1971 33 such licences had been granted. See the *Mines Statement,* AJHR (1972) C 2 at 5.

[107] Initial assessments were that the Maui structure contained recoverable reserves of some 5,324 billion cubic feet of gas and 75 million barrels of oil and condensate making it one of the largest gas fields of the time. By 1979 "best" estimates had increased to 6,880 billion cubic feet of gas and 188 million barrels of oil & condensate. See Fried, P., Handy, F.J., & Seccombe, P., *The Story of Maui,* (1980) at 23 and 246. As at 31 December 1992 remaining recoverable reserves were estimated at 2,182 billion cubic feet of gas and, with the development of the Maui "B" platform, 77.9 million barrels of oil and condensate according to the *New Zealand Official Yearbook 1994* at 392-93.

was issued over 302.7 square miles off the Taranaki coast for a term of 42 years from 28 June 1973.[108]

Both the Kapuni and Maui licences provided for the assessment of royalties on "the selling value at the wellhead". This provision has caused some disagreement between the Consortium and the Crown. The royalty provisions in both licences are expressed as "[S]ubject to the provisions of section 12 of the Petroleum Act 1937". Section 12 provides as follows:

> ".... [t]he licensee under a mining licence or a prospecting licence shall pay to the Crown a royalty computed at the rate specified on the licence on the selling value of all crude petroleum, casinghead spirit, and natural gas that is produced from the land comprised in the licence".

Section 12 was subsequently amended to give the Minister the discretion to decide the point of valuation for royalty purposes.[109] However those amendments were not retrospective and section 12 as originally enacted remains applicable to the Kapuni and Maui mining licences.[110] The Crown, until recently, argued that the point of valuation for royalty purposes should be downstream at the "point of separation" rather than at the physical "wellhead" at the offshore production facility. This interpretation would have resulted in a higher royalty as the value of the gas and condensate increases as it progresses through the pipe line, production and separation processes. However, the evidence suggests that the intention of the drafters of section 12 of the Petroleum Act as originally introduced and enacted in 1937, was that the "well head" was to be the point of valuation for royalty purposes. The section was consistently interpreted this way by the Mines Department and the various Ministers from 1937 until at least the mid-1960s.[111]

The *Petroleum Act* was amended in 1975 and again in 1980.[112] The 1975

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[108] Petroleum Mining Licence No 1012. As with the Kapuni licence an annual fee of $20 per square mile and a royalty at the rate of 5% on oil, condensate and gas produced was provided for, see cl 2, Second Schedule.

[109] See Petroleum Amendment Act *(No 2) 1980* s 5 (amending s 18 as inserted by the Petroleum Amendment Act *1975* s 3).

[110] Petroleum Amendment Act *1975* s 8(3).

[111] See *e.g.* Memorandum dated 28 February 1938 from Under-Secretary of Mines to Minister of Mines where he states:
"It was the intention when the Petroleum Act was being drafted, that the royalty should be calculated at the wellhead, and although such intention is not clearly stated, I think it must be taken by inference. Furthermore, there does not appear to be any other practical way of computing royalty. Royalty on oil produced at Motoroa is calculated either on a quantity basis or on a percentage of the selling value at the bore mouth, whichever is the greater".
(NZ National Archives, *Mines Department files* (MD 1)).
Various letters to mining companies from the Mines Department between 1938 and 1960 set out the conditions applicable to mining licences and invariably specified that royalties were payable at 5% on the value of petroleum produced "at the wellhead": NZ National Archives, *Mines Department files* (MD 1).

[112] See the Petroleum Amendment Act 1975 and the Petroleum Amendment (No 2) Act 1980.

amendment repealed and replaced in its entirety Part I of the *Petroleum Act*. It introduced more extensive provisions governing both prospecting and mining licences. This included a more specific requirement for an applicant for a mining licence to satisfy the Minister that recoverable reserves that can be worked at a profit have in fact been found, and that the licensee be capable of exploiting the reserves in accordance with good oil field practice.[113] The royalty provision was exhaustively re-written although interestingly referred to the wellhead as the point of valuation.[114] In 1980 the royalty provisions were again amended giving the Minister sole power to determine the point of valuation although this amendment was not given retrospective effect on existing licences.[115]

The 1980 amendment also changed the mining licence term of 40 years provided for in the 1975 amendment, to a two tier structure consisting of an "initial term" of up to four years, followed by a "specified term" of up to 40 years. During the initial term a work programme for production and depletion of the resource, transmission pipe-lines, processing and storage facilities was required to be prepared and approved by the Minister.[116] The amendment also gave the Minister power to postpone development of discoveries and to reduce areas or revoke licences for failure to develop a discovery.[117]

F. State Participation In The Oil Industry

When the Petroleum Act 1937 was originally enacted the Government envisaged that, if private industry was not prepared to undertake large scale exploration, the Crown would make the investment itself.[118] However, prior to the Maui discovery, apart from offering grants and bonuses for exploration, production, and downstream processing,[119] the State had remained relatively aloof from direct participation in the commercial side of the oil industry.

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113 Petroleum Act 1937 s 11 (as inserted by Petroleum Amendment Act 1975 s 3).

114 *Ibid.*, s 18(1) (as inserted by s 3 Petroleum Amendment Act 1975). However, the section further defined the wellhead as being "such valve station as agreed between the licensee and the Minister" or by arbitration failing agreement (s 18(3)).

115 See the Petroleum Act 1937 s 18(2) (as amended by s 5 Petroleum Amendment Act (No 2) 1980). However, as the Petroleum Amendment Act 1975 s 8(3) survived the 1980 Amendment and was expressed to be subject to any prior agreements between the licensee and the Crown, it follows that the Maui and Kapuni licences are to be interpreted in accordance with the statutory regime as it existed at the time those licences were granted.

116 Petroleum Act 1937 s 14A (as inserted by Petroleum Amendment Act (No 2) 1980 s 4).

117 *Ibid.*, ss 14B and C.

118 At a civic reception in New Plymouth on 7 August 1937, the Minister of Mines stated: "I have told the very large companies, that unless they are prepared to search for oil with the most up-to-date appliances in the world, I would not hesitate about asking the Government, not for £100,000, but I would take the risk with a half million of money, and believe it would be money well spent in searching for a commodity of that kind."
(*Press Statement*, Ministry of Labour, 11 August 1937).

119 *Supra* notes 28-30, and 35 and accompanying text.

1. Maui and the "Think Big" Era: 1975-1984

The Maui discovery[120] occurred at a time when the New Zealand government was becoming increasingly aware of the need for greater energy self-sufficiency following the oil shocks of 1967 and 1973.[121] This led to the Crown's participation in a 50/50 joint venture agreement with Shell-BP-Todd to ensure development of the field.[122] The proposed arrangements included a "take or pay" gas purchase contract between the Crown and the joint venture parties which was intended to provide security for the industry participants.[123] However, such an arrangement, which is still in force, arguably results in the Crown utilising the resource in less than optimally efficient industrial uses such as thermal energy production.[124] The Maui joint-venture agreement represented the first large scale direct state involvement in the petroleum industry in New Zealand and was a foundation element in what came to be known as the "think big" era.[125]

During the period 1975-1984, the National government promoted and invested in many large scale energy projects including the initiation of further large scale hydro development in the South Island,[126] the reticulation and use of gas for the generation of thermal energy production,[127] and the use of gas condensate for methonal, ammonia urea and synthetic fuel production.[128] An anticipated surplus in electricity production from the new hydro-electric projects in the South Island, and the increased use of gas for thermal power production in the North

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120 *Supra* note 107 and accompanying text.

121 The "six day war" of 1967 and the "Yom Kippur war" and Arab oil embargo of 1973 are often referred to as the 3rd and 4th postwar oil crises, the first being the nationalisation of Anglo-Iranian in Iran in 1951, and the second, the Suez crisis of 1956. See Yergin *supra* note 1 at 789-91 for a chronology of events in the oil industry from 1853-1991.

122 See the *White Paper on the Development of the Maui Gas Field*, AJHR (October, 1973) D 5A which contains the background to the development, a discussion of the political and technical issues, and contains the various agreements including the joint Venture Agreement and the Gas Purchase Contract between the Crown and the oil companies. See also Fisher, D.E., Maui Gas Depletion Law and Policy", [1986] *NZLJ* 52, and Fisher, D.E., "Law and Policy for Accelerating Petroleum Exploration and Development in New Zealand", (1986) 16 *VUWLR* 11.

123 See the *White Paper ibid.*, at 40-47 and 211-316.

124 *Ibid.*, at 14-15.

125 The "think big" era is normally used to describe the period from 1975-1984 when a number of large scale energy and industrial initiatives were promoted by the National Government. See generally Gould, J., *The Muldoon Years*, (1984), Franklin, H., *Cul de sac: The Question of New Zealand's Future*, (1985), & Bayliss, L. *Prosperity Mislaid*, (1994) at 13-20.

126 See the Clutha Development (Clyde Dam) Empowering Act 1982.

127 Construction of the 1000 MW Huntly thermal power station began in 1973. Designed to run on gas or coal it has been a major user of Maui gas since 1981.

128 Many of the downstream gas industries were in fact implemented. See Ministry of Commerce, Energy and Resources Division, "The Downstream Petroleum Industry in New Zealand", *Petroleum News*, (January 1995) at 34-38.

129 An example was the proposed construction of a new aluminum refinery at Aramoana

Island, was intended to encourage further large scale energy intensive industry in New Zealand.[129]

2. The State Moves "Upstream": The Petroleum Corporation of New Zealand ("Petrocorp")

Following the Maui joint-venture agreement, the Crown became more involved in the exploration side of the petroleum industry. The *Ministry of Energy Act 1977* gave the Minister the power to "carry on any business relating to exploration for the discovery, production, processing, supply, distribution, uses of conservation of energy, sources of energy, products from energy or sources of energy, minerals and mineral products."[130] Further, section 36 of the Petroleum Act gave the Minister the power to grant licences to himself, and, by himself, or jointly with other people, purchase or otherwise acquire other licences or interests, and carry on mining operations. The Act also gave the Crown the right to participate in developments undertaken by other developers.[131]

Relying on these powers the Minister granted six prospecting licences to himself in 1977.[132] The following year the Petroleum Corporation of New Zealand Ltd. ("Petrocorp") was incorporated with shares held by the Minister of Finance and the Minister of Energy. The licences held by the Minister were transferred to Petrocorp which also took over the 50% interest held by the Crown in the Maui joint venture.[133]

An extensive exploration programme was undertaken by Petrocorp, often in conjunction with private sector participants. This programme resulted in several new discoveries including the McKee oil field, the Tariki and Ahuroa condensate fields, the Waihapa oil/condensate reservoir, and the geologically significant hydrocarbon discoveries within the Tariki sandstone and Tikorangi limestone formations.[134]

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in the South Island. Due to strong opposition by environmental and local interest groups, and the weakness of the international market for alumina this initiative was eventually 'canned'.

130 Section 15(1). Section 2 defined "energy" as including petroleum as a source.

131 *Petroleum Act 1937* s 5(2) and 12(2) (as amended by the Petroleum Amendment Act 1975 s 3) also gives the Minister the right to specify, in prospecting or mining licences, as a matter of discretion, Crown participation in the development. On Crown participation generally see Fisher, D.E., "Energy Law and Energy Planning in New Zealand", (1984) 14 *VUWLR* 3, Fisher, D.E., Energy Development in New Zealand - Public Regulation", [1984]*NZLJ* 75. See also both of Fisher's articles referred to *supra* in note 122.

132 *Mines Statement*, AJHR (1978) C 2 at 4. These licences were granted pursuant to s 36 Petroleum Act 1937 (as inserted by the Petroleum Amendment Act 1975 s 3).

133 *Ministry of Energy Report*, AJHR (1979) D 6 at 28. See also Fisher, D.E., "Law and Policy for Accelerating Petroleum Exploration and Development in New Zealand", (1986) 16 *VUWLR* 11 which gives an account of the role of Petrocorp in petroleum development at this time.

134 Ministry of Commerce, Energy and Resources Division *supra* note 93 at 32.

135 See Haughey, E.J. & Gunderson, B.N., "Energy Law in New Zealand", (1984) 2 *JENRL*

3. A Conflict of Interest: The Crown as Statutory Regulator of, and as Participant in, the Petroleum Industry

Petrocorp continued to act as the agent of the Crown in petroleum development until 1984 when the Minister of Energy decided to hold the licences directly. Prior to 1985 the Crown through Petrocorp contributed up to 40% of the costs of an approved exploration programme, and in return took a 51% interest in subsequently developed discoveries.[135] From 1985 to 1986 the policy of government was to take an 11% non-contributory interest in all prospecting licences, and an 11% contributory interest in all mining licences following a commercial discovery. An additional contributory interest of up to 15% could also be acquired provided this right was exercised when the prospecting licence was granted.[136] However, pursuant to its programme of economic reform and reduced participation in commercial undertakings,[137] the Government announced on 19 May 1986 that it would not invest in any new mining activity and would sell its existing interests as soon as possible.[138] Following closely on these announcements, Petrocorp was sold to Fletcher Challenge, a New Zealand public company, for $801.1 million.[139]

4. The Petrocorp Case

The tension inherent in the dual roles of the Minister of Energy as both regulator of and commercial participant in the petroleum industry, had been one justification for forming Petrocorp. As well as providing a bureaucratic separation of the commercial function from the regulatory one, the corporate structure was intended to apply a commercial discipline to the Crown's involvement in the industry. However, as the Minister was invariably named as a licensee, sometimes alone, sometimes with Petrocorp, this tension remained.

These issues were squarely raised in *Petrocorp v Minister of Energy*.[140] Petrocorp had entered into a joint venture agreement in 1986 with several private sector

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117 at 125.

136 These interests were usually held by Petrocorp acting as agent of the Minister of Energy. For a summary of the regime from 1985 see Ministry of Commerce, Energy and Resources Division, *Prospectus for Petroleum Exploration in New Zealand*, (1990) at 35-36. See also Fisher's articles *supra* in notes 122, 131 and 133.

137 See *infra* notes 153-155 and accompanying text.

138 NZ Govt., *Minister of Finance, Statement on Government Expenditure Reform*, (1986) at 13-14.

139 See Duncan, I., and Bollard, A., *Corporatization and Privatization: Lessons from New Zealand*, (1992) at 36. Other elements of the petroleum industry with which the Crown was involved, including its interests in New Zealand Liquid Fuel Investments, Maui Gas, and the Synfuel plant, were sold to Fletcher Challenge and others in 1990 for $80.2 million. *Ibid.*, at 37 and references quoted therein.

140 [1991] 1 NZLR 1 (HC & CA), and 641 (PC).

141 For a full history of the facts of the case see the judgement of Greig J. in the High

participants.[141] The joint-venture was to enable intensive exploration over an area covered by a Petroleum Prospecting licence ("PPL") initially granted to the Crown in 1977 but assigned to Petrocorp on its incorporation the following year.[142] The venture was successful. In addition to an earlier discovery in 1985 of gas condensate at Waihapa, further significant finds were made at Tariki and Ahuroa. Petroleum Mining licences ("PMLs") were issued for these three areas in 1987.[143] Although Petrocorp was finally sold to private interests in March 1988, the Crown retained its interests in the PMLs. In February 1988 the joint-venture partners, while carrying out further tests at the original Waihapa well, discovered extensive oil deposits located in a shallower and quite distinct horizon from the earlier gas/condensate discovery.[144] The new discovery was part of a reservoir which extended northwards far beyond the boundaries of the existing Waihapa licence. Petrocorp, now a privately owned corporation, made an application on behalf of the joint-venture for an extension of the existing Waihapa PML to cover the new field. Petrocorp also made application on behalf of the other joint-venture partners, but excluding the Crown, for a prospecting licence over the area. Several other interests made similar applications. In May 1988 the Minister rejected all prospecting licence bids and the application to extend the Waihapa licence, and granted a new licence ("Ngaere") to himself on behalf of the Crown.

Litigation ensued with Petrocorp on behalf of the joint-venture partners seeking judicial review of the Minister's decision primarily on the grounds that the Minister, under the joint-venture agreement, had a legal obligation to further the interests of the joint-venture which could not be set aside for predominantly commercial reasons.[145] The High Court held that the Minister's decision was not illegal or *ultra vires* and was not subject to review.[146] That decision was reversed on appeal with the Court of Appeal effectively holding that the Minister's contractual and fiduciary obligations to the joint venture overrode his statutory functions.[147]

Court. *Ibid.*, at 5-10.

142 PPL 38034. The licence covered a very large area of some 2310 square kilometres in the province of Taranaki. A brief chronology of events is set out in the Privy Council judgment *supra* note 140 at 643-644.

143 PML 38138 (Tariki), 38139 (Ahuroa) & 38140 (Waihapa) were granted on 17 November 1987 taking effect from 21 July 1987 (the final expiry date of PPL 38034).

144 The earlier discovery was at 4,600 metres true vertical sub-sea ("TVSS") whereas the later oil discovery was made at 2,700 TVSS. See *supra* note 140 at 644.

145 Clause 2.0.1(b) of the *Joint Venture Operating Agreement* stated that " .... all activities and decisions of each joint-venturer in connection with the joint venture , including the licence, any mining licence or the licence area, shall be directed to secure the maximum commercial advantage of the joint venture ....". See *supra* note 140 at 650-651.

146 *Supra* note 140 at 16 per Greig J.

147 *Ibid.*, esp at 38 per Cooke P. where he stated:
" ... the Minister was not free to grant himself a sole licence with a view to sale (*sic*) to the joint venture and contrary to his obligations as a joint venturer."
And, as a further ground:
".... the procedure of witholding information of the existence of the plan to grant a licence to the Minister only was unfair, in that it was contrary to natural justice and the legitimate expectations of reasonable business people in the position of the joint venturers."

148 *Ibid.*, at 652-53.

On further appeal the decision was again reversed with the Privy Council adopting the dissenting judgement of Richardson J in the Court of Appeal. Lord Bridge of Harwich, delivering the judgment of the Board, stated:

> "In the result their Lordships conclude that the Minister was right to take the view, which seems initially to have been shared by all the other parties, that the contractual obligations of the Crown under the JVOA were of no relevance to the decisions he made in refusing the joint venturers' application for the extension of the Waihapa licence and in granting the Ngaere licence to himself on behalf of the Crown. Their Lordships have felt it necessary to address the contractual issue at some length, but they can hardly hope to improve on the dissenting judgement of Richardson J. which sums the matter up effectively and concisely in the following passage at p 48:
>
> > 'The short answer is that decisions made by the Minister under ss 20 and 36 were his statutory assessments as to where the national interest lay. The decision by the Minister to grant himself a mining licence was not one made 'in connection with the joint venture' at all. It was made in the exercise of a statutory power expressly reposed in the Minister. So, too, the decision under s 20 not to extend the Waihapa licence was a discretionary decision taken in the national interest under that statutory power. And the expressions ' the licence, any mining licence or the licence area' in s 2.0.1(b) were all then confined as to area to the lateral boundaries of the Waihapa licence. The new licence which the Minister granted to himself was the product of his decision under s 36: it was never part of the joint venture.'"[148]

On the basis that the contractual obligations of the Minister in the JVOA were irrelevant to his exercise of his statutory powers, the Board held that the application for judicial review was misconceived.[149] A further argument that the Minister, as a result of his position as a joint venturer, was obliged to hold the Ngaere licence as a constructive trustee for the joint-venturers, was also unsuccessful.[150]

Unfortunately as a result of the narrowing of the issues and the formulation of the judgment in the Privy Council, two related questions remain unanswered.[151] Firstly, does a PML for a particular petroleum discovery at one

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149 *Ibid.*, at 655. The Board again quoted from a passage of Richardson J's dissenting judgment in the Court of Appeal at 46-47.

150 *Ibid.*, at 652.

151 It is arguable, and the issue was raised in the High Court, that the existing mining licences only covered the gas/condensate fields for which they were issued. Thus a new discovery in a different strata may well require a further mining licence. See [1991]1 NZLR 1 at 16-19 per Greig J. However, the Court of Appeal appeared to take the view that the existing licences also included the right to mine for petroleum at any depth within the lateral surface boundaries of the land. See [1991]1 NZLR 1 at 39-42 per Cooke P. However, this issue was not part of the appeal to the Privy Council, the parties apparently accepting that the Ahuroa and Waihapa PML's also gave the holders the right to mine the shallower oil deposits that were later discovered within the confines of their licences. See [1991]1 NZLR 641 at 645 per Lord Bridge of Harwich.

152 *Supra* note 140 at 39-42 per Cooke P., see also at 50 per Hardie Boys J, and at 51 per

sub-surface horizon include mining rights over other geologically distinct petroleum discoveries in different horizons? Secondly, if the answer to that question is in the negative, could the Minister exercise his statutory discretion in section 36 and issue a licence to himself for that different strata, but within the existing licence boundaries? As the first issue was not taken on appeal to the Privy Council, it would seem that the view of Cooke P in the Court of Appeal, that the existing licences also included the right to mine for petroleum at any depth within the lateral surface boundaries of the land described in the licences, prevails by default.[152] This would exclude the issue of a further licence to the Crown or any other person without first cancelling or partly cancelling the earlier licence. The case provides further justification for the Crown withdrawal from direct commercial involvement in the petroleum industry.

G. State Withdrawal From Participation In The Petroleum Industry: 1984 - Present

1. De-regulation and 'New Right' Economic Theory

Elected on a platform of economic, social and environmental reform, the Fourth Labour Government pursued a vigorous programme of economic restructuring based on market led economic reform and reduced government involvement in business.[153] Having spent the previous decade becoming heavily involved in a commercial capacity in large scale energy and resource development, the last decade has seen the Labour government, and then, to a lesser extent, the National government follow a relentless programme of corporatisation, and in many cases privatisation, of state agencies and enterprises.[154] Along with major economic restructuring, the Labour government very early embarked on a programme of administrative restructuring, and environmental and resource management law reform.[155]

2. Government Administrative Reforms

Recommendations of an environmental forum and a subsequent government working party on environmental administration in 1985[156] led to the creation of a new Ministry for the Environment with a primary role of policy-making and

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Heron J.

153 See Duncan & Bollard, *supra* note 139, esp chapter 1.

154 *Ibid.* in toto. See also State Owned Enterprises Act 1986 which had a primary objective of promoting improved performance in respect of government trading activities with state enterprises being required to operate as successful businesses. See esp Preamble to the Act and s 4.

155 See Grinlinton, D., "Natural Resources Law Reform In New Zealand - Integrating Law, Policy And Sustainability", (1995) 2 *AJNRLP* 1, and Fisher, D., "The New Environmental Management Regime in New Zealand", (1987)4 *EPLJ* 33.

156 NZ Govt., Working Party on Environmental Administration, *Environment 1986: Report of the Post-Environment Forum Working Party*, (June, 1985).

157 Environment Act 1986 Part II.

advice to the Minister and government.[157] The Environment Act 1986 also created a Parliamentary Commissioner for the Environment as an independent environmental watch-dog and adviser to government and Parliament.[158] A year later the Department of Conservation was set up with the purpose of promoting conservation of New Zealand's natural and historic resources.[159]

The Ministry of Works and Development, which had hitherto been the central government agency responsible for implementing many of the "think big" projects, was abolished in 1988.[160] Following the corporatisation of the state owned Electricity Corporation of New Zealand ("Electricorp") and the Coal Corporation of New Zealand ("Coalcorp"), and the privatisation of Petrocorp already referred to,[161] the Ministry of Energy was similarly abolished in 1989.[162] Its functions were transferred to a newly created "Energy and Resources" division of the Ministry of Commerce although the title of Minister of Energy was retained for administrative purposes.

3. Resource Management Law Reform

In 1988 the Minister for the Environment, Geoffrey Palmer, initiated the reform of the complex and disparate legislation relating to town and country planning, environmental protection and natural resource management.[163] The Resource Management Bill was introduced in 1989 with the central purpose of promoting the "sustainable management of natural and physical resources".[164] The measure was intended to provide an integrated planning and protection regime for the use of land, air and water and the control of environmental pollution in these mediums. Existing mining and petroleum legislation was to be incorporated into the new Act and hard rock mining activities were to become subject to planning and resource consent processes.[165] The Bill also provided a right of veto for the surface land owner to prevent mining activities on their land. In late

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158 *Ibid.*, in Part I esp ss 4 and 6. As an officer of Parliament, the Parliamentary Commissioner has an autonomy which the Ministry does not. Nevertheless, the effectiveness of the Commissioner is directly dependent on the annual appropriation from Parliament, which in turn depends upon the views of the majority Parliamentary party which has traditionally formed the Government.

159 Conservation Act 1987, see 'Preamble' and s 2 (definition of "environment").

160 Public Works Amendment Act 1988 s 5.

161 *Supra* note 139 and accompanying text.

162 Ministry of Energy (Abolition) Act 1989.

163 See Palmer, the Hon Sir Geoffrey, "Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts", in *Resources - the Newsletter of the Canadian Institute of Resources Law, No 34*, (Spring, 1991) at 1-10. See also Grinlinton *supra* note 155, and Palmer, K.A., *Local Government Law in New Zealand*, (1993) at 564-568.

164 See cl 4 of the Resource Management Bill as originally introduced in 1989.

165 Under the Mining Act 1971 and the Coal Mines Act 1979 (and their predecessors) hard rock mining activities had not hitherto been subject to land use planning approval under the Town and Country Planning Act 1977. See Mining Act 1971 s 4A, and *Stewart v Grey County Council*[1978]2 NZLR 577. Water permits for takings and discharges were, however, required under the Water and Soil Conservation Act 1967.

166 *Report of the Review Group on the Resource Management Bill* (February, 1991).

1990, prior to the Bill being passed, the incoming National Government appointed a review group to examine certain provisions of the Bill. Its recommendations included:[166]

- The complete redefinition of the purposes and principles contained in Part II of the Bill including the definition of the "sustainable management" purpose of the legislation to incorporate stronger principles for environmental protection;
- Separation of the allocation of and access to Crown-owned minerals into a separate Bill not subject to the sustainability purpose;
- Retention but modification of the surface land-owners' right of veto over mining activities.

Ultimately the minerals part of the Bill was separated out and passed as the *Crown Minerals Act 1991* at the same time as the *Resource Management Act 1991* was enacted.[167]

4. The New Petroleum Regime

Almost 100 years after petroleum activities were first incorporated into the hard rock mining legislation of the day the legislation had travelled full circle. From having been defined as a "mineral" under the hard rock mining legislation of 1892, to having been the subject of a quasi-separate regime from 1911, to having had its own specific legislative regime from 1937, petroleum was again included in the definition of "mineral" in the Crown Minerals Act 1991.[168]

Under the new regime there are three distinct elements in mineral exploitation and development:

- Allocation of the resource;
- Access to the resource; and
- Acquisition of land use, water and discharge consents for the environmental externalities of the mining activity.

The relevant provisions of the Crown Minerals Act now apply to the Continental Shelf Act 1964 in respect of petroleum under the continental shelf of New Zealand beyond the 12 mile territorial limit.[169]

Although again subject to the same legislation as hard minerals, allocation and access to petroleum is treated differently from other minerals within the Act. Access rights are not implied by the issue of a 'minerals permit' and must

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[167] Both acts came into force on 1 October 1991 but with extensive transitional provisions allowing, in most cases, existing licences and consents to run their full course under the pre-existing legislation.

[168] Crown Minerals Act 1991 s 2.

[169] *Ibid.*, Third Schedule, Part I.

[170] *Ibid.*, s 8(1)(b). However, if mining activities can be undertaken in such a way that

be obtained by negotiation or arbitration with the surface land owner.[170] In the case of petroleum a compulsorily arbitrated access arrangement can be imposed if agreement is not reached with the surface land-owner.[171]

In terms of allocation, the Act makes it an offence to prospect or mine without a 'minerals permit'[172] and also provides for a comprehensive planning and management regulatory regime for minerals by requiring the Minister of Energy to prepare "minerals programmes".[173] The purpose of minerals programmes is to establish policies and procedures to be applied to the management of Crown-owned minerals. In particular they must provide for:

- the efficient allocation of rights in respect of Crown-owned minerals; and
- a fair financial return to the Crown (resource rentals or royalties).

A *Minerals Programme for Petroleum* came into force on 1 January 1995 and set out the government's policies in respect of exploration and mining. In particular it covers the process and priorities for allocation, the royalty regime, conditions to be included in permits, the permit holder's rights and obligations,and the circumstances in which the Minister may alter or revoke a permit.[174]

The *Minerals Programme* as finally promulgated, however, takes a fairly narrow approach to the question of allocatory efficiency. One of the statutory purposes of a minerals programme is to "provide for the efficient allocation of rights".[175] It can be argued that "efficiency" in this context should have a wider meaning than simply financial economic efficiency. Environmental efficiency in terms of the effects of mineral extraction and consumption on both the host and receiving environments, strategic efficiency in considering the use of cheaper imported resources before using indigenous minerals, and efficiency in maximising the end use energy output of hydrocarbon based minerals are all elements of a broader concept of "efficiency". These arguments have some force given the absence of a requirement to consider sustainability of mineral use under the RMA consenting process,[176] and the failure to implement economic instruments at the national level or to use National Policy Statements to address these issues.

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there is no damage to the surface of the land, or loss or damage to the owner or occupier or there is no prejudicial effect on present or future use, then an access arrangement is not necessary. *Ibid.*, at ss 53(1), 54(1) & 57.

171 *Ibid.*, ss 53(2)(b) and 55(1).

172 *Ibid.*, s 8(1)(a).

173 *Ibid.*, ss 5, 12-21 and 117.

174 NZ Govt., *Minerals Programme for Petroleum*, (1995). Minerals Programmes are issued by the Governor-General by Order-in-Council on the advice of the Minister, and take effect as "delegated legislation". They must be renewed within 10 years. See Crown Minerals Act 1991 ss 18(1) and 20(1).

175 Crown Minerals Act 1991 s 12.

176 The definition of "sustainable management" in the "purpose" section (s 5) of the Resource Management Act 1991, specifically excludes minerals from the requirement to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.

177 *Minerals Programme for Petroleum supra* note 174 at 4, cl 2.10.

In the *Minerals Programme* the government has interpreted "efficient allocation of rights" as:

> .... refer[ring] to the process of efficiently allocating rights to permit holders, rather than the concept of economically efficient extraction of the resource.[177]

In reducing the "efficient allocation" requirement to a question only of administrative procedure, it may be argued that the Government has abdicated its responsibilities to reduce atmospheric pollution through the imposition of policies of conservation and efficiency in hydrocarbon extraction and downstream use.[178]

"Fair financial return" was interpreted by the Government as:

> .... requir[ing] a balance to be found between royalty payments required by the Crown for extracting its petroleum resource and the regime's capacity to attract continuing investment. This balancing includes recognising the risks and potential gains to investors from petroleum exploration and mining. A regime which is unduly concessionary will result in the Crown not receiving a fair financial return on its petroleum resource, while an unduly harsh regime is likely to result in declining or no investment.[179]

The royalty regime eventually settled on by the Crown was a hybrid system comprising a 5% "ad valorem" royalty on net sales revenues, or an "accounting profits" royalty at the rate of 20%, whichever is the higher in a reporting period.[180]

In other respects the petroleum licensing regime is very similar to the pre-existing regime under the Petroleum Act 1937. The Minister has retained the right to participate in petroleum development.[181] "Work programmes" must be

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178 New Zealand has been a signatory to a number of international undertakings, particularly as an active participant in the *United Nations Conference on Environment and Development* in Rio in 1992, and as a signatory to the *Rio Declaration* and the *Framework Convention on Climate Change*. See Ministry of External Relations and Trade and Ministry for the Environment, *United Nations Conference on Environment and Development 3-14 June 1992 Rio de Janeiro, Brazil: Outcomes of the Conference* (1992) which contains these various documents.

179 *Minerals Programme for Petroleum supra* note 174 at 4-5, cl 2.13.

180 "Net sales revenues" are the sum of total gross sales of petroleum, plus the value of petroleum not sold but on which royalty is payable, minus any allowable netbacks (or plus any net forwards). "Accounting profits" are the excess of net sales revenues over the total of allowable deductions. Allowable deductions include production costs, capital costs, indirect costs, abandonment costs and operating losses. See *Minerals Programme for Petroleum ibid.*, at 72-77, cll 7.8-7.19 & 7.20-7.24. Where net sales revenues have never exceeded $1 million in a reporting period, only the 5% ad valorem royalty applies. *Ibid.*, at 81, cll 7.45-7.47.

181 Crown Minerals Act 1991 s 25(2).

182 *Ibid.*, ss 43-46.

prepared and approved by the Minister, who also retains the power to direct that petroleum be refined and processed in New Zealand.[182] Unlike the earlier mining legislation, planning permission was always required for on-shore petroleum development under the Petroleum Act 1937. For PPL's and PML's granted before the Crown Minerals Act 1991 and Resource Management Act 1991 came into force, those licences and any access arrangements, land use consents, water permits, other permissions and conditions generally continue in force under the transitional provisions of both Acts.[183] However, it is clear that a more precise regime has been implemented with regard to licensing, and a more extensive and integrated environmental planning and protection regime is applicable to new developments. Enforcement provisions in both Acts impose much higher fines and the possibility of imprisonment for more serious breaches of the statutory duties and responsibilities.[184]

Interestingly the Crown Minerals Act also requires that:

> All persons exercising functions and powers under this Act shall have regard to the principles of The Treaty of Waitangi (Te Tiriti O Waitangi).[185]

The meaning of this provision is unclear but seems to require as a minimum consultation with interested Maori and the consideration of Maori cultural and spiritual sensibilities in the preparation of "minerals programmes", the exercise of the Minister's permitting function, and the negotiation and arbitration process for securing access to land under the Act.[186]

Conclusions

In terms of the allocation and management of property rights the development of the petroleum regime illustrates the difficulty of applying common law property concepts to migratory natural resources. The initial conveyance of petroleum rights under Crown land by the use of leases proved unsatisfactory when the nature and extent of petroleum reservoirs was appreciated, and, in particular, where a reservoir extended under a number of privately owned properties. Expropriation by the Crown was seen as the only practical way of

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183 See Resource Management Act 1991 ss 383-401 and Crown Minerals Act 1991 ss 106-111 and 115.

184 See the Resource Management Act 1991 ss 338-341 and Crown Minerals Act 1991 ss 100-103. Both Acts provide for fines of up to $200,000 and $10,000 a day for continuing offences or imprisonment for up to two years (*RMA* s 339, *CMA* s 101), strict liability (*RMA* s 341, *CMA* s 103), and vicarious corporate liability (*RMA* s 340, *CMA* s 102).

185 Crown Minerals Act 1991 s 4.

186 For the duty of consultation for those exercising functions under the Resource Management Act 1991 see *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 269 at 275. On the general duty of consultation see*New Zealand Maori Council v Attorney-General* [1987]1 NZLR 641 at 683 per Richardson J (CA), and *New Zealand Maori Council v Attorney-General*[1989]2 NZLR 142 at 152 per Cooke P.

187 The US Constitution, Fifth Amendment prevents the state taking property without

ensuring developers could conveniently acquire inviolable proprietory interests in the resource, thus encouraging exploration and development. If it is accepted that ownership of the surface estate traditionally includes, at least, a pro-rated property right in petroleum beneath it, this resumption was one of the most significant expropriations of property without compensation by the state in New Zealand's history.[187]

The resumption of ownership in petroleum is of particular significance when considering its effect on indigenous claims to land and resources. Given that the common law recognises the principle of customary title to land,[188] the "taking" again offends the principle of compensation in respect of Maori land. Perhaps of more topical interest is the extent to which the taking undermined the specific guarantees made to Maori under the Treaty of Waitangi in 1840 in respect of the protection of their lands and resources. The question arises whether the principle of "eminent domain" or in fact the national interest should override Maori claims based on ownership which preceded, and, on one argument, survived the transfer of sovereignty. Such a resumption today may well have resulted in compensation given the development of contemporary Treaty jurisprudence. The arguments raised in Parliament against expropriation of petroleum under Maori land are also instructive in the context of contemporary conflicts concerning migratory resources such as geothermal energy.

At a broader level the development of petroleum law reflects New Zealand's political development from a colony dependent upon Britain for economic and regional security, to a minor, but politically and economically independent participant in world affairs and regional security. Early petroleum activity was linked to some extent to the quest within British colonies for secure supplies of oil for Britain and the Royal Navy. With the Second World War the need for secure supplies of oil for local industry became a paramount consideration. As Britain's global influence diminished New Zealand also moved towards an increasing regional security interdependence with Australia and the United States. Petroleum legislation and government policy reflected these considerations with the resumption of ownership in the Crown in 1937, and the specific encouragement of an Australian-United States exploration initiative for which the legislation was considered a prerequisite.

New Zealand's increasing dependence on petroleum from the politically unstable Middle-East led to a high level of renewed domestic exploration in the 1960s-70s. The offshore Maui field gas/condensate discovery in 1969, and a period of large scale state participation in both the upstream and downstream

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just compensation. There is no such constitutional right to compensation in the UK or Commonwealth countries with compensation usually relying on statutory provision. There is, however, a principle that statutes should not be held to take away property rights without compensation unless the power is "expressed in clear and unambiguous terms". See *e.g. Central Control Board (Liquor Traffic) Cannon Brewery Company Ltd* [1919] AC 744 at 752 (H.L.) per Lord Atkinson; *Colonial Sugar Refinery Co Ltd v Melbourne Harbour Trust Commissioners* [1927]AC 343 at 359 (PC), and *Clifford v Ashburton Borough Council* [1969] NZLR 927 at 943 (CA).

188 See *e.g. Mabo v State of Queensland* (1992)66 ALJR 408 esp at 429 per Brennan J.

189 A conflict of interest arises where the Crown is participant in a joint venture through

sectors, has resulted in New Zealand attaining a greatly enhanced level of hydrocarbon self-sufficiency in recent years.

This new independence is, however, something of a "two-edged sword". The extensive economic reforms based on market driven economic theory and de-regulation over the last 10 years has led to an almost complete withdrawal of the state as a participant in the petroleum industry. New Zealand's gas reserves, upon which much of the country's hydrocarbon self-sufficiency and a great deal of industry depends, are now declining rapidly with little evidence of private investment in large scale exploration for replacement reserves. It is clear from the brief account given in this paper that much of New Zealand's energy self-sufficiency has been achieved through direct government participation and investment in the petroleum sector. The lessons of history suggest that the search for new indigenous hydrocarbon reserves to replace the dwindling existing fields is unlikely to occur quickly enough if left to the market alone. The required level of exploration may again require direct state investment and possibly participation contrary to the current ethos of market-led economic development, notwithstanding the attendant risks to private sector participants where the Crown subordinates commercial undertakings to the "national interest".[189]

Postscript

The last word must go to the lawyer acting for an aspiring oil "mogul" in a letter to the Under-Secretary of Mines in 1955:

> Dear Sir,
>
> Mines 5/4/80 - Re: Coatesville Stores Limited
>
> We thank you for your letter of the 26 January, but although petroleum was found in a well on the within property it eventuates that the petroleum originated overseas, having reached its present location through a leak in the storage tank in an adjacent bowzer. Our client company will therefore not be proceeding with the application for prospecting rights.[190]

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the appropriate Minister who must also exercise statutory powers in the 'national interest'. The problems arising from the exercise of these powers to the detriment of a joint-venture was illustrated in the *Petrocorp* case and may well discourage private industry from participating directly with government. See *supra* notes 140-152 and accompanying text.

190 Letter dated 1 February 1955 from Messrs Elliot Grant, Solicitors to Under-Secretary of Mines: National Archives, *Mines Department files* (MD 1).