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Privy Council Appeal No. 59 of 2003

Glenharrow Holdings Limited — *Appellant*

v.

(1) The Attorney General and
(2) Te Runanga O Ngai Tahu — *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd July 2004

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood

*[Delivered by **Lord Rodger of Earlsferry**]*

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1. This appeal concerns a mining licence which the Minister of Energy granted in 1990 by virtue of section 69 of the Mining Act 1971 ("the 1971 Act"). Subsequently, the Crown Minerals Act 1991 ("the 1991 Act") made substantial changes to the mining régime, which involved repealing much of the 1971 Act. Section 107(1)(a) of the 1991 Act provides, however:

> "(1) Except as provided in this Part, every existing privilege shall continue to have effect after the date of commencement of this Act as if the Act which applied to the privilege before that date continued in force, and as if –
>
> (a) ... the holder of the privilege continued to have the same statutory rights as the holder would have had if this Act and the Resource Management Act 1991 had not been enacted. ..."

In 1997 the Ngai Tahu (Pounamu Vesting) Act 1997 ("the 1997 Act") came into operation. Section 3 vested in Te Runanga o Ngai Tahu ("Ngai Tahu"), the second respondent, all the Crown's property in pounamu occurring in its natural condition in the takiwa of Ngai Tahu Whanui. Section 4(1) goes on to provide, however, that

> "Nothing in section 3 affects an existing privilege or the rights or obligations of any holder of an existing privilege and Part 2 of the Crown Minerals Act 1991 continues to apply in relation to that privilege as if this Act had not been passed."

Although many of the relevant provisions have indeed been repealed, since they are none the less said to govern the applications in this case, simply for ease of exposition the Board will refer to them in the present tense.

2. The events with which these proceedings are concerned span the period from 1990 to 2000, during which the legislation was altered in this way. The starting point is 15 November 1990 when, in pursuance of his powers under section 69 of the 1971 Act, the Minister granted the mining licence in question to a Mr Sweetman and a Mr Havill. The licence authorised them to mine for minerals in an area of approximately 107 hectares of Crown land on the tributaries of the Taramakau River on the West Coast of the South Island. The area lies within the takiwa of Ngai Tahu. As set out in the Second Schedule, the licence was to mine for talc, serpentine, bowenite and quartz - serpentine and bowenite being types of pounamu. The Third Schedule attached elaborate conditions to meet the Minister of Energy's requirements. In addition, because the land in question was state forest land, under section 26 of the 1971 Act the Minister could not grant the mining licence without the written consent of the Minister of Conservation. She duly gave that consent, but subject to various conditions, including condition 21, which provided that the term of the licence was to be for 10 years from the date of the grant. These too are to be found in the Third Schedule.

3. Section 77 of the 1971 Act provides:

> "(1) Every mining licence shall remain in force for a period of 42 years after the date on which it was granted, or for such shorter period as the Minister may specify in the licence, and shall then expire.

> (2) The licensee shall have the right in priority over every other person to have granted to him a new mining licence in respect of the land to which the existing licence relates, if he applies for the new licence not later than 30 days before the expiry of the existing licence."

In this case, in conformity with condition 21 of the Minister of Conservation's consent, in terms of section 77(1) the Minister of Energy specified a term of 10 years from the date of issue so that the mining licence was due to expire on 15 November 2000.

4. The original licensees transferred the licence and eventually the appellants, Glenharrow Holdings Ltd ("Glenharrow"), purchased it. On 18 September 1999 they applied to Crown Minerals, a division of the Ministry of Commerce, to vary the conditions of the licence in terms of section 103D(3) of the 1971 Act. Subsection (3) provides in part:

> "... the Minister may, at any time after the grant of a mining privilege, at the request of any person who or body which proposed conditions to be attached to the grant of the appropriate licence, or at the request of the holder of the mining privilege, or of his own accord, vary the conditions subject to which the mining privilege was granted by suspending, cancelling, amending, or adding any condition, and shall thereupon forward to the holder of the mining privilege [a] memorandum of variation accordingly ..."

Glenharrow's application was in these terms:

> "**Specify Conditions to be varied:** Minister of Conservation Special Condition 21 to be amended to read 'The term of the licence shall be 42 years'. Minister of Energy Condition Term to licence to be amended to read 'The term of the licence shall be 42 years'.
>
> **Reasons why those conditions unsuitable:** Under section 77(1) of the Mining Act 1971 'Every mining licence shall remain in force for a period of 42 years after the date on which it was granted, or for such shorter period as the Minister may specify in the licence and shall then expire.' Because it is a condition imposed on the licence Condition 21 is subject to section 103D of Mining Act 1971 providing statutory authority for this application ..."

Crown Minerals rejected the application on the ground that the term of the licence could not be varied under section 103D(3). In discussion with Crown Minerals Glenharrow advanced their view that by reason of section 77(2), they were, in any event, entitled to obtain a new licence on the expiry of their existing licence.

5. On 23 December 1999 Glenharrow made an application to the High Court for judicial review. The defendant was the Attorney General as representing the relevant Ministries. The proceedings were not served on Ngai Tahu, but it was aware of the case. Apparently because it considered that it would not have sufficient time to prepare for any hearing, Ngai Tahu decided not to seek leave to be joined as a party.

6. On 23 January 2000 Glenharrow made a further application to Crown Minerals for a "renewal of [their] mining licence under section 77(2) of the Mining Act 1971", but this application too was refused on the ground that Glenharrow's right to a new licence under the 1971 Act had not been preserved by the transitional provisions of the 1991 Act.

7. In the judicial review proceedings Glenharrow sought declarations that:

> "(a) the term of the licence is a condition of the licence
>
> (b) the plaintiff has a priority right to have granted to it a mining licence in respect of the land to which its existing licence relates following application being made."

On 6 October 2000 Heron ACJ made both declarations: *Glenharrow Holdings Ltd v Attorney General* [2001] 1 NZLR 578, 589 para 46. The Attorney General took no steps to appeal against the judgment.

8. Glenharrow then submitted fresh applications to have the term of their existing licence varied or, alternatively, to have a new mining licence granted. Crown Minerals wanted the application for a new licence to be dealt with first and indicated that this would involve consulting both the Department of Conservation and Ngai Tahu. In their view Ngai Tahu would have had to consent to the application. In the result Glenharrow's applications did not make any progress and so on 14 November 2000, the day before their existing licence was due to expire, they brought the present proceedings for judicial review and for declaratory orders, against

the Attorney General, as representing the Ministry of Economic Development, the Department of Conservation and the Department of Labour. At its own request Ngai Tahu was joined as second defendant. At first instance, [2003] 1 NZLR 236, Chisholm J held inter alia that the Minister of Energy has present power to consider Glenharrow's application for variation of the licence, including variation as to term; but that the Minister of Energy does not have power to grant a new licence to Glenharrow. The parties appealed and cross-appealed. The Court of Appeal (Blanchard, McGrath and Glazebrook JJ), [2003] 2 NZLR 328, upheld the decision of Chisholm J that the Minister does not have any power to grant a new licence to Glenharrow but allowed the cross-appeal and held that the Minister has no power to vary the term of the licence under section 103D(3). Glenharrow appeal to the Board against both aspects of the decision of the Court of Appeal.

9. While in ordinary course Glenharrow's licence would have expired on 15 November 2000, on 14 November 2000 Goddard J made an order in the High Court that the licence was to continue in force, or to be deemed to have continued in force, until the further order of the court. Similarly, on 23 September 2003 the Court of Appeal made an order, of consent, that the licence remain in force until any right of application or any other related right stemming from the judgment of the Privy Council had been dealt with by the appropriate authorities.

10. The present appeal is not merely of concern to Glenharrow. Under amendments to the 1991 Act introduced by sections 22 and 23 of the Crown Minerals Amendment Act 2003 the decision of the Board is to determine the legal position for all applications under various provisions, including section 77 of the 1971 Act, made before 5 pm on 19 September 2002 and for all applications for an extension of duration of a mining privilege under section 103D of the 1971 Act made before the same time and date.

11. Their Lordships note that, prima facie, it is surprising that, when judgment had been given against the Crown in October 2000 and the Crown had not appealed, the relevant Crown body appears none the less to have delayed in proceeding in accordance with that judgment. Before Chisholm J counsel for the Attorney General seems to have been duly conscious of the Crown's predicament and so did not make any submissions of her own on the points that Heron ACJ had decided against the Crown in the first proceedings. Counsel simply supported the submissions for Ngai Tahu on these points. Before the Court of Appeal and before their Lordships'

Board, however, counsel for the Attorney General did indeed make her own independent submissions on these matters. Since counsel for Glenharrow did not object, their Lordships do no more than record the facts that have resulted in this unusual situation. Similarly, Glenharrow did not object to Ngai Tahu reopening the issues which had been decided in the first proceedings, even though Ngai Tahu had been aware of those proceedings and had decided not to apply to be joined as a party. Again, given the stance of Glenharrow, their Lordships do not comment further on this matter.

12. The case raises a number of issues as to Glenharrow's rights under the 1971 Act and as to the preservation of any such rights after the 1991 and 1997 Acts came into force. As Mr Wilson QC very properly acknowledged at the start of his oral submissions on behalf of Glenharrow, however, the questions relating to the 1991 and 1997 Acts do not arise unless Glenharrow have the rights which they claim under the 1971 Act. For that reason their Lordships consider first whether Glenharrow have a right to have the term of the mining licence varied under section 103D(3) of the 1971 Act and, secondly, whether Glenharrow have a right to a new licence by virtue of section 77(2) of that Act.

13. In turning to address these questions, their Lordships bear in mind the general structure of Part IV of the 1971 Act dealing with mining privileges. It begins with sections 44–46 on prospectors' rights; then come sections 47–68 on prospecting licences, followed by sections 69–87 on mining licences. Other licences and certificates are dealt with in sections 88–103, after which there are general provisions relating to applications for mining privileges. Among these general provisions are two, section 103D and section 104A, which are relevant to the first and second issues respectively.

Variation of the Term of the Licence

14. By virtue of section 103D(3) the Minister's power is to "vary the conditions subject to which the mining privilege was granted". So the term of the mining licence can be varied only if it is a condition subject to which the licence was granted.

15. Their Lordships need not set out the provisions of the licence since the judgment of Chisholm J reproduces the form of the front page: [2003] 1 NZLR 236, 241. The following features are relevant. First, the printed form contains a heading "TERM:"

followed by a blank and the words "commencing on the date hereof". The blank has been completed with the typed words "Ten years". The effect is therefore that the licence specifies its "term" as being "Ten years commencing on the date hereof", viz 15 November 1990.

16. The pre-printed text of the licence goes on to say that the Minister grants the exclusive right to occupy for mining purposes the land described in the First Schedule for the purpose of mining for the minerals specified in the Second Schedule in return for the royalty specified in that schedule. The text continues:

> "This licence is granted for the abovementioned term SUBJECT TO payment of rent at the rate and times prescribed and to the terms, conditions, reservations and provisions set out in the said Act and any regulations for the time being in force thereunder and to the additional terms, conditions, reservations and provisions specified in the THIRD SCHEDULE hereto."

17. The Third Schedule contains two sets of conditions which require to be distinguished, as Davison CJ pointed out in somewhat similar circumstances in *Tasman Gold Development Ltd v Minister of Energy* (1985) 5 NZAR 129, 132. The first set of 24 conditions comprises those which the Minister of Energy attached as conditions of the grant of the mining licence in fulfilment of his obligation, under section 104(5) of the 1971 Act, to establish the conditions "(including those established pursuant to sections 26 .... of this Act)" that he considered should be attached to the mining privilege. The second set of conditions in the Third Schedule comprises the 21 conditions which, in exercise of her powers under section 26, the Minister of Conservation attached to her consent to the Minister of Energy's grant of the licence. In *Tasman Gold Development Ltd v Minister of Energy*, referring to similar conditions of the Minister of Forests' consent under section 26, the Chief Justice observed, at p 133:

> "If the Minister of Forests grants consent subject to stated conditions which are relevant and required to be observed by a licensee who is granted a mining privilege, then they must be included by the Minister of Energy whether the Minister of Forests has expressly made it a term of his consent that they be included or not. For the Minister of Energy to fail to do so would be to derogate from the Minister of Forests' consent."

Here the Minister of Energy fulfilled his obligation to include the conditions which the licensees would require to observe by making his grant of the licence subject to condition 24. It is headed "Ministerial consent" and says:

> "The licensee shall comply with all the terms and conditions imposed by the Ministers of Conservation and Lands, pursuant to Section 26(6) of the Mining Act 1971."

Of course, under section 81 of the 1971 Act:

> "Every mining licence shall be deemed to be granted subject to the condition that the licensee shall –
>
> ...
>
> (d) Comply with all other conditions that are specified in the licence."

So the licensees were bound to comply with condition 24 attached to the licence and hence with all the conditions imposed by the Minister of Conservation pursuant to section 26(6). For present purposes their Lordships need refer to only one of the conditions imposed by the Minister of Conservation. Condition 21 is in these terms:

> "The term of this licence shall be for 10 years from the date of the granting of this licence."

18. The argument for Glenharrow was twofold. First, the term of the licence was to be regarded as a condition of the grant of the licence and could accordingly be varied in terms of section 103D(3). Secondly, the licence was granted subject to the conditions specified in the Third Schedule which included the conditions of the Minister of Conservation's consent to the grant. Among those conditions was condition 21 which provided that the term of the licence was to be 10 years. Therefore the ten-year term was a condition of Glenharrow's mining licence for the purposes of section 103D(3). Heron ACJ accepted an argument to this effect in *Glenharrow Holdings Ltd v Attorney General* [2001] 1 NZLR 578, 586–588, as did Chisholm J in these proceedings: [2003] 1 NZLR 236, 251, lines 20–27, para 43.

19. Their Lordships respectfully agree with the Court of Appeal that Glenharrow's arguments on this point are to be rejected.

20. The requirement that any licence granted by the Minister of Energy should only be for 10 years was undoubtedly a condition of the Minister of Conservation's consent to the Minister of Energy's

grant of any licence at all. Under section 77(1) the Minister could not grant a licence for an indefinite period. It was to remain in force for 42 years or for such shorter period as the Minister might specify in the licence. In other words, it had to be for a fixed period not exceeding 42 years. To comply with the condition of the Minister of Conservation's consent, in this case the Minister of Energy had to specify the shorter period of 10 years, after which the licence was to expire. But, when he did this, the Minister of Energy was not imposing a condition on the grant: he was defining the term of the licence which he was granting and, by reason of section 77(1), a fixed term is one of the essentials of any mining licence granted under the Act. Significantly, section 77(1), which gave the Minister the power to specify the shorter period, is not couched in the language of conditions.

21. The language used in the licence confirms the position. In granting the licence for the period of 10 years, the Minister could, and did, impose conditions on that grant. But the fact that the term itself is not to be regarded as such a condition is made abundantly clear by the very words which the Minister used:

> "This licence is granted for the abovementioned term SUBJECT TO ... the ... conditions ... set out in the said Act and ... to the additional ... conditions ... specified in the THIRD SCHEDULE hereto."

The Minister contrasts the "term" for which the licence is granted and the "conditions" on which it is granted. This is quite inconsistent with Glenharrow's argument that the term of the licence is to be regarded as a condition of the grant.

22. Condition 21 to the Minister of Conservation's consent is drafted in language which might suggest that it is a condition of the licence. As their Lordships have already explained, however, conditions imposed by the Minister of Conservation can take effect as conditions of the licence only through the medium of condition 24 to the Minister of Energy's grant. It is easy to see that condition 24 may have the effect of turning all the other conditions imposed by the Minister of Conservation into conditions of the grant, since they specify steps which the licensees have to take or to refrain from taking. The licensees must comply with these requirements on pain of forfeiture of their licence under section 118. By contrast, condition 21 is not a condition which, in the words of Davison CJ in *Tasman Gold Development Ltd v Minister of Energy*, at p 133, is "required to be observed" by the licensees. It

simply specifies that the term of the licence is to be for 10 years: it contains nothing with which the licensees have to comply and hence nothing which becomes a condition of the grant by virtue of condition 24. Thus, condition 21, which remains merely a condition of the Minister of Conservation's consent, does not operate so as to turn the term of 10 years into a condition of the licence which can be varied by the Minister under section 103D(3).

23. Looking at the matter from a wider perspective, like the Court of Appeal, their Lordships are by no means surprised to have reached the conclusion that the ten-year term is not a condition of the licence for the purposes of variation under section 103D(3). As the facts giving rise to these proceedings show, a variation of the term of a mining licence from 10 to 42 years would, in substance, amount to the grant of a new licence for 32 years from November 2000. Since Parliament enacted section 69 to prescribe the mechanism for the grant of new licences, it would be strange if it had also intended that the equivalent of a new licence could be obtained by the procedure of variation - but without the need for the Minister to have regard to the matters listed in section 69(1A) to which, as will be seen below, he must have regard before granting a licence under that section.

Right to Grant of a New Licence

24. Their Lordships turn to examine Mr Wilson's other argument for Glenharrow, viz, that they have a right to the grant of a new licence by virtue of section 77(2) of the 1971 Act.

25. Glenharrow's argument depends on the wording of section 77(2) of the 1971 Act. Mr Wilson submitted that section 77(2) contains two elements: it provides that the licensee "shall have the right ... to have granted to him a new mining licence in respect of the land to which the existing licence relates" and that he is to have that right "in priority over every other person", provided he applies for the new licence not later than 30 days before the expiry of the existing licence. When the provision was analysed in this way, it became clear, Mr Wilson said, that it did indeed give the holder of a mining licence a right to have a new mining licence granted to him. Since the Act did not spell out the terms on which the new licence was to be granted, they would be a matter for the Minister, subject to review by the courts, where appropriate.

26. Before examining Mr Wilson's argument on the wording of the provision, their Lordships find it helpful to place section 77(2)

in the context both of the development of the mining licensing legislation and, more narrowly, of Part IV of the 1971 Act.

27. The relevant mining licensing legislation begins with section 185 of the Mining Act 1886. Section 185 provided that, if the licensee had satisfactorily complied with the conditions of the previous licence, with the consent of the Governor the Warden might "grant to any licensee a renewal of his licence on the expiration thereof" for a term not exceeding 21 years. The renewal could be in respect of the whole or any part of the land held under the expired licence. Any such renewed licence might itself be further renewed from time to time for any period not exceeding 21 years at each renewal. The Act went on to provide that the renewed licence was to be at the rent which was then chargeable for that kind of licence and it was to be subject to the covenants and conditions prescribed by the relevant regulations in force at the time, or to such other covenants and conditions as to the Governor might seem fit.

28. Later legislation displays the same pattern: provision for renewal, accompanied by provisions identifying the conditions or the source of the conditions on which the renewed licence was to be granted. Their Lordships refer to, but do not set out, section 136 of the Mining Act 1891, section 138(5)-(9) of the Mining Act 1898, section 170(e)–(h) of the Mining Act 1905, section 170(e)–(h) of the Mining Act 1908 (Consolidated Statutes), section 2(1)(b) of the Mining Amendment Act 1915 (amending section 170 by removing the right to renewal in certain circumstances) and section 176(e)–(h) of the Mining Act 1926.

29. The Mining Amendment Act 1948 broke this pattern of more than sixty years. Section 3(1) amended section 176 of the Mining Act 1926 by providing inter alia:

> "A licence other than a business-site licence or a residence-site licence shall not be renewed, but if the holder so desires he may make a fresh application on the expiry of the licence and on the expiry of each successive licence. Every such application made on the expiry of the original licence (but not of any successive licence) shall have priority over all other applications in respect of the same area if
>
> (i) The applicant has given notice in writing, not less than three days before the expiry of his licence, of his intention to apply for a new licence;

(ii) The application is made not later than fourteen days after the expiry of the licence, and the land comprised therein has within that period been identified or marked out in such manner (if any) as may be required; and

(iii) The Warden is satisfied that the applicant has satisfactorily carried out the terms and conditions of the expired licence."

The effect of this amendment was that mining licences granted after the 1948 Act came into force could not be renewed. The licence holder was entitled to make a fresh application and, on the first occasion, that application was to have priority over all other applications in respect of the same area, provided the correct procedure had been followed. That remained the position until 1971 when the Mining Act of that year repealed the 1926 and 1948 Acts.

30. Mr Wilson accepted that, although section 77(2) refers to a right to have a "new" mining licence granted, on Glenharrow's interpretation the holder of a mining licence would, to all intents and purposes, have a right to have the existing licence renewed on the expiry of each term, if he applied not later than thirty days before the expiry date.

31. There are several objections to that construction. Perhaps least importantly, the construction is problematical in view of the fact that in section 50(2) Parliament expressly provided that the holder of a prospecting licence might be granted "a renewal" of that licence for a period not exceeding the period during which the existing licence was in force. This suggests that, if Parliament had intended to provide for a right of renewal for holders of mining licences, it would have done so expressly. Perhaps the most obvious objection to the proposed construction is, however, that it makes nonsense of section 77(1) which requires that licences be for fixed periods of no more than 42 years. What point would these fixed periods serve if the holder had what amounted to an automatic right to renew the licence each time it was due to expire? This is a particularly cogent consideration when Glenharrow's construction would mean that Parliament originally provided for a system of renewals, then abolished it in 1948, only in effect to reinstate it in 1971. That seems an unlikely sequence of events since the reasons - such as the difficulty of regulating and controlling mining satisfactorily if licence holders have an

unchallengeable right to renew their licences - which must have persuaded Parliament in 1948 to end the system of renewals, would have remained just as valid in 1971. Mr Wilson suggested that section 77(2) might have been designed to give certainty and stability and so to encourage long-term investment. The need to encourage such investment would, however, have been a relevant factor in 1948 too and Mr Wilson could point to nothing which suggested that, for this or for any other reason, there had been a deliberate change back to the old policy in 1971. Finally, it is noteworthy that the pre-1948 renewal provisions all dealt specifically with the term and the conditions which were to apply to the renewed licence. By contrast, on Glenharrow's construction of section 77(2), Parliament in effect provided for the licence to be renewed, but failed to deal with the term or conditions of the licence which the Minister had to grant. These wider implications have to be borne in mind when considering the more detailed arguments on the wording of section 77(2).

32. The Board must also bear in mind the structure of Part IV of the Act, to which reference has already been made. Near the start of the group of sections on prospecting licences, section 48 confers on the Minister a discretionary power to grant a prospecting licence. That is the key provision which governs the grant of such licences. At the start of the group of sections on mining licences, a similar key provision, section 69, confers on the Minister a discretionary power to grant mining licences. As amended by section 20 of the Mining Amendment Act 1981, section 69(1)-(2) provides:

> "(1) The Minister may, in his discretion and subject to such conditions as he thinks fit to specify in the licence, grant to any person a mining licence in respect of any land that is open for mining.
>
> (1A) Before granting a mining licence under this section, the Minister shall have regard to –
>
> (a) The nature and extent of the mineral resource on or under the land and its relationship to other resources and industries in the area; and
>
> (b) The best and most efficient utilisation of that resource; and
>
> (c) Any environmental and social factors involved in the development of that resource; and

(d) The wise use and management of New Zealand's mineral resources.

(2) Any person may be granted more than one mining licence."

Except in so far as the legislature provides otherwise, it is to sections 48 and 69 respectively that the reader must turn to discover the Minister's powers to grant the two kinds of licence. For reasons that will become immediately apparent, it is important to notice that one area in which Parliament made different provision was in connexion with the right of the holder of a prospecting licence to exchange it for one mining licence under section 57(1).

33. With these preliminary remarks, their Lordships can turn to counsel's detailed submissions.

34. Mr Wilson submitted that the Board was better placed than the Court of Appeal to interpret section 77(2). Before the Court of Appeal, counsel for Glenharrow had not been able to advance any satisfactory explanation for the need to give the holder of the mining licence priority over everyone else. But, Mr Wilson argued, the position became clear if section 57(1) was taken into account. Section 57 provides:

"(1) Subject to section 58 and subsection (3) of section 69 of this Act and subject to any condition imposed under subsection (7) of section 26 of this Act, the holder of a prospecting licence shall, while it continues in force, have the right to have granted to him one mining licence in respect of any one part of the land to which the prospecting licence relates.

(2) Subsections (4), (5), (6) and (7) of section 104 of this Act shall not apply in respect of any application for a mining licence made under subsection (1) of this section, and it shall not be necessary for the applicant to obtain the consent of any person to the grant of the licence.

(3) If the holder of a prospecting licence applies for more than one mining licence in respect of the land to which the prospecting licence relates, the granting of mining licences in excess of one shall be at the discretion of the Minister, but the applicant shall, while the prospecting licence continues in

force, have the right in priority over any other person to have the additional mining licences granted to him.

(4) Subject to subsection (3) of this section, all the provisions of this Act relating to mining licences shall apply in respect of every mining licence applied for under that subsection."

Mr Wilson argued that, since the holder of a prospecting licence had the right to have granted to him one mining licence in respect of the land under section 57(1), the purpose of the priority provision in section 77(2) was to make clear that, in the event of a competition for the grant of a new licence between the holder of an existing mining licence and the holder of a prospecting licence for the same area - each of whom had a right to be granted a mining licence - the holder of the existing mining licence was to have priority.

35. Their Lordships can deal with this argument quite shortly. As Mr Walker QC showed on behalf of Ngai Tahu, the basis of the argument is flawed. Section 87 of the 1971 Act defines what the holder of a mining privilege, such as a mining licence, is authorised to do. It provides:

"(1) Subject to the provisions of this Act, a mining licence shall authorise its holders and his agents and employees on his behalf to –

(a) Work and mine the land in respect of which the licence was granted for the minerals that are specified in the licence and any minerals that he has been authorised to mine under section 80 of this Act;

(b) Take and remove from the land all such minerals and dispose of them; and

(c) Do all acts and things that are necessary to effectually carry out mining operations on or under the land.

(2) Subject to the provisions of this Act, the holder of a mining licence shall –

(a) Be entitled to use, occupy, and enjoy the land in respect of which the licence was granted for mining purposes; and

(b) Be the owner of all minerals lawfully mined from the land under the licence.

(3) The rights conferred by this section shall be exclusive rights for mining purposes in relation to the land in respect of which the mining licence was granted."

In terms of the section the holder of a mining licence is entitled to do all acts and things that are necessary to effectually carry out "mining operations" on or under the land. By reason of the relevant definition in section 5 these operations include prospecting. Section 87(3) provides that the rights thus conferred by the section are to be exclusive rights "for mining purposes in relation to the land in respect of which the mining licence was granted". Again, in terms of section 5, "mining purposes" mean purposes in connection with "mining" – including prospecting - for any mineral. So the rights conferred on the holder of a mining licence by section 87. are exclusive rights for all mining purposes, including prospecting. It follows that where someone, such as Glenharrow, held a mining licence under the 1971 Act, there could not be anyone else who held a prospecting licence in respect of the same area. Hence, contrary to Mr Wilson's submission, the purpose of the words of priority in section 77(2) cannot have been to cater for a possible contest between the holder of a mining licence and the holder of a prospecting licence in respect of the same area.

36. Once Glenharrow's purported explanation falls away, their construction of section 77(2) faces an insurmountable difficulty. On their argument, subsection (2) gives them, as the holders of an existing mining licence, an absolute right to be granted a new licence. If that were so, they would have that right, irrespective of anyone else - and so in priority to anyone else and irrespective of the objections of anyone else. The Minister would be obliged to grant the new licence to them as the existing licence holders and could not grant it to anyone else. So there would be no need for Parliament to provide that they were to have that right "in priority over every other person": these words would be mere surplusage. In this respect their Lordships respectfully adopt the reasoning of Blanchard J giving the judgment of the Court of Appeal, [2003] 2 NZLR 328, 333, para 20.

37. Glenharrow point to the similarity of the language of section 57(1), "the holder of a prospecting licence shall, while it continues in force, have the right to have granted to him one mining licence",

and of section 77(2), "the licensee shall have the right in priority over every other person to have granted to him a new mining licence". If section 57(1) gives a right to the grant of a licence, they argue, so equally must section 77(2).

38. Their Lordships accept that section 57(1) is indeed intended to give the holder of a prospecting licence a right to have one mining licence granted to him. There is no question of the Minister exercising any discretion in making that grant. This is clear from the fact that section 57(1) is subject only to subsection (3), and not to the remainder of section 69, especially subsections (1) and (1A) which give the Minister a discretion and list various factors to which he must have regard before granting a licence. Moreover, Parliament shaped the provisions in other ways so as to cater for this particular situation. So section 57(2) disapplies the notice provisions in section 104 since they have no relevance if the persons concerned could not object to the grant of the licence. Equally, and conversely, even in the case of an application under section 57(1), section 58(1)–(3) are to apply so as to place certain restrictions on the grant, including the need to obtain any consents under section 26.

39. Section 77(2) is markedly different in these respects. First, it makes no reference to section 69 and does not qualify its operation in any way. The necessary inference is that, where the holder of a mining licence applies for a new licence, section 69 governs the application and the Minister has the same discretion and must have regard to the same factors as with other applicants. Secondly, section 77(2) contains no equivalent of section 57(2) to remove the need to give the notices required by section 104. This is another indication that, so far as the need for the Minister's consent is concerned, the application falls to be treated like any other application. Next, if section 77(2) gave the holder of a mining licence a right to be granted a new licence, there would be no mechanism for ensuring that the legitimate concerns of the other relevant ministers were taken into account. Again, it is difficult, if not impossible, to see why, on Glenharrow's construction, Parliament would have expressly provided for the consents of these ministers to be obtained in cases under section 57(1) but not in cases under section 77(2).

40. In fact, the closer parallel is not with the language of section 57(1) but with the language of section 57(3). There too the legislature speaks of a right to the grant of a licence or licences, but in a context where the grant of the licence or licences in question is

at the discretion of the minister. Section 57(3) contains two elements. First, it says that, if the holder of a prospecting licence applies for more than one mining licence, the grant of more than one such licence is to be at the Minister's discretion. This specific provision, which is tailored to these particular circumstances, makes it clear that the Minister has a discretion whether or not to grant such additional licences. Despite this, the subsection then goes on to provide that, in such cases "the applicant shall, while the prospecting licence continues in force, have the right in priority over any other person to have the additional mining licences granted to him". This second part is intended to fix the priority which is to be applied if the Minister decides to grant more than one mining licence. In other words, it is in the discretion of the Minister whether to grant more than one mining licence but, if he does, then the holder of the prospecting licence is to be awarded the additional licence in priority to anyone else. Since the grant of additional licences is at the discretion of the Minister, section 57(4) duly provides, in contrast with subsection (2), that all the provisions for notifications etc apply in such cases.

41. Section 77(2) operates in the same way. The difference is that, whereas section 57(3) deals specifically with the discretionary power of the Minister to grant additional mining licences to the holder of a prospecting licence, section 77(2) proceeds on the basis that the Minister deals with the existing mining licence holder's application under section 69 which gives him a discretion whether to grant it. Section 77(2) therefore corresponds to the second part of section 57(3). If, in the exercise of his discretion, the Minister decides to grant a mining licence for the land in question, then that licence must be granted to the existing licence holder in priority to any other person. In other words, section 77(2) is simply a priority provision and its language must be construed accordingly.

42. Without repeating the argument, their Lordships note that the 1971 Act deals in the same way with applications by the holder of an exploration licence for the grant of a prospecting licence. The application is governed by section 48 which gives the Minister a discretion but under section 68, if a licence is to be granted, the holder of the exploration licence has the right to be granted that licence in priority to any other person. Section 68 too is simply a priority provision.

43. Finally, Glenharrow's arguments as to the effect of section 77(2) are impossible to reconcile with section 104A which was inserted by section 27 of the Mining Amendment Act 1981.

Section 104A is headed "Minister may decline application" and provided:

> "The Minister may at any time decline any application for a mining privilege and, notwithstanding anything in this Act, any objections under this Act to the granting of that application shall thereupon lapse and be of no effect."

Counsel simply said that, standing the terms of section 77(2), section 104A could not have been intended to apply to an application under that provision. Once it is realised, however, that applications by existing holders for a new mining licence are in fact to be dealt with under section 69, it is plain that section 104A would apply just as much to such applications as to any other. For this reason also, Glenharrow's construction of section 77(2) must be rejected.

44. For all these reasons, which are largely the same as the Court of Appeal's reasons, their Lordships hold that Glenharrow do not have the rights that they claim under section 103D or section 77(2) of the 1971 Act. They are therefore not entitled to the declarations which they seek in these proceedings. It follows that the Board does not need to consider the impact of the 1991 and 1997 Acts on these aspects of the 1971 Act.

45. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of both respondents before the Board.