IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-153
[2020] NZHC 704

UNDER	the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act)
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to sections 129 and 131 of the EEZ Act and section 299 of the Resource Management Act 1991
BETWEEN	ENVIRONMENTAL PROTECTION AUTHORITY Appellant
AND	BW OFFSHORE SINGAPORE PTE LTD First Respondent
AND	VIJAYENDRAN MAHINDRAN Second Respondent

Hearing: 6 April 2020

Appearances: I Carter and M Sampson for the Appellant
M Conway and H Harwood for the First Respondent

Judgment: 7 April 2020

JUDGMENT OF COOKE J
(Application for a stay)

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Introduction

[1] By application dated 27 March 2020 the appellant (EPA) seeks a stay of an Environmental Court decision dated 25 March 2020. In that decision the Environment Court itself granted a stay of an abatement notice that the EPA had issued to the respondents (BWO).[1] There is a right of appeal to the Environment Court from decisions of the EPA to issue such notices under s 129 of the Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2012 (the Act). In effect the stay granted by the Environment Court allows BWO to proceed with disconnecting a floating oil production vessel from the connected undersea pipes so that the vessel can leave New Zealand. There is then a further right of appeal to this Court on questions of law from decisions made by the Environment Court under s 131 of the Act and s 299 of the Resource Management Act 1991 (the RMA). The EPA appealed against the Environment Court's decision at the same time as applying for a stay in this Court.

[2] The application was accorded urgency, and following telephone conferences before Grice J in the week of 30 March 2020 it was set down for hearing before me yesterday. The hearing proceeded by way of telephone as a consequence of the level 4 COVID-19 measures implemented under the Epidemic Preparedness Act 2006. Under s 24 of that Act the Court is empowered to modify any rule of court that it thinks necessary in the interests of justice taking into account the effects of COVID-19. The hearing proceeded by way of telephone in those circumstances notwithstanding the normal procedures under the High Court Rules 2016.[2] In addition to counsel appearing by telephone, representatives of the parties were also able to listen in, as was a representative of the media. The hearing lasted for approximately four hours. Such measures allowed the principle of open justice to be served so far as practicable in light of the implications of COVID-19, and the measures taken to control it.

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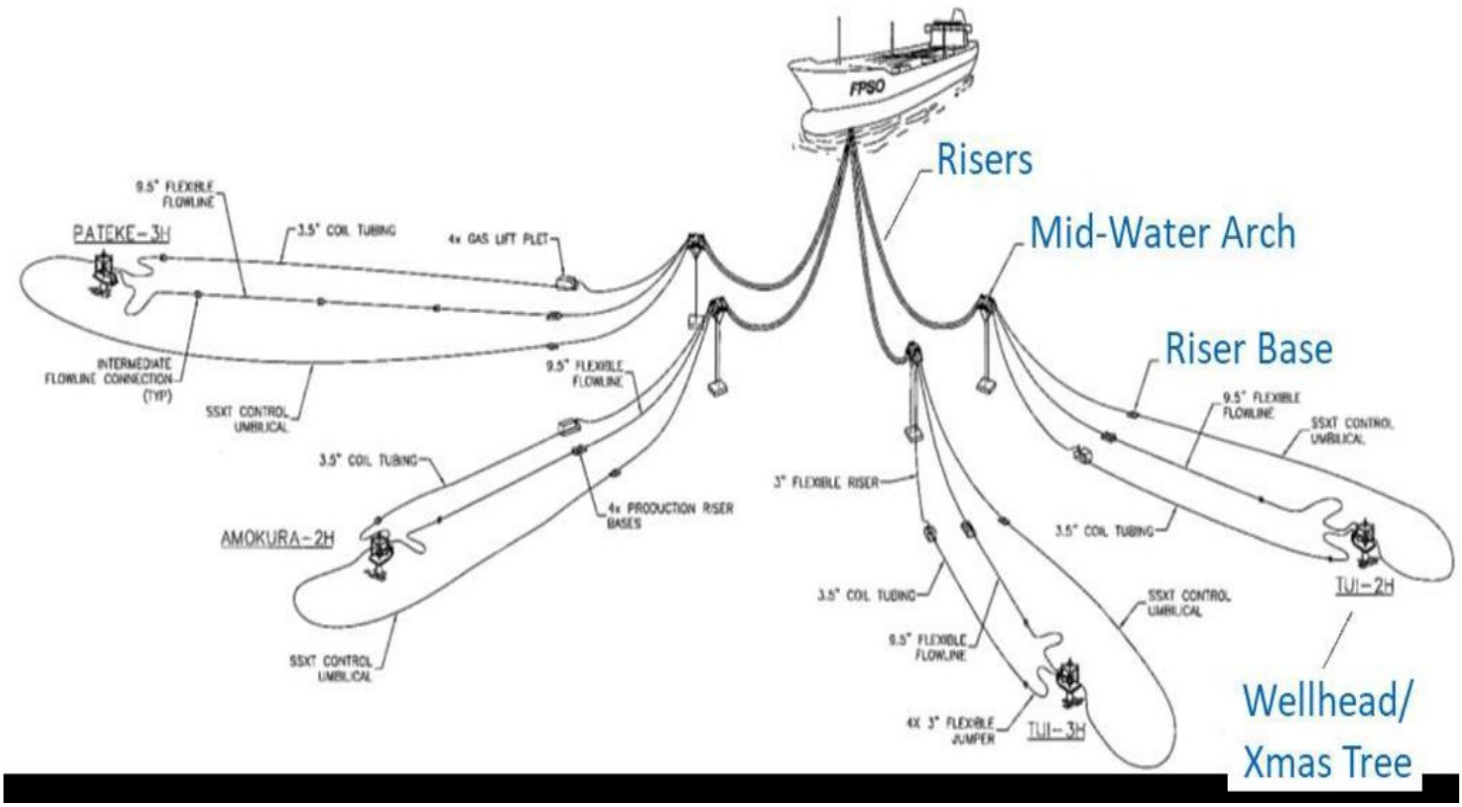
1 *BW Offshore Singapore Pte Ltd v The Environment Protection Authority* [2020] NZEnvC 033.

2 That is so notwithstanding the High Court Rules 2016 were enacted by Parliament — see s 147 of the Senior Courts Act 2016. It is apparent that s 24 encompasses procedural requirements and provisions even when imposed by primary legislation.

Background

[3] BWO is a Singaporean company wholly owned by BW Offshore Pte Ltd which is listed on the Oslo Stock Exchange. It has been involved in what can loosely be described as a joint venture with Tamarind Taranaki Ltd (in receivership and liquidation) (TTL) to engage in oil mining of the Tui Oilfield off the coast of Taranaki.[3] TTL owns the relevant oil mining permit for the field as well as the underground pipes connecting the oil well with BWO's vessel. The vessel is known as the Umuroa Floating Production Storage and Offtake installation, or FPSO.

[4] The relevant infrastructure involved in the oil extraction activities are depicted in the following form:



[5] Such activities have taken place in New Zealand's exclusive economic zone (the EEZ), and accordingly the provisions of the Act are engaged.

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[3] I do not understand it to actually be a joint venture in a legal sense, however.

[6] When the Act was enacted in 2012 it addressed existing operations of the kind in issue here. Section 162 provides:

> **162 Existing petroleum mining activities involving structures or pipelines**
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> (1) This section applies to an existing activity that requires a marine consent as a result of this Act coming into force if the activity—
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> (a) involves an existing structure or an existing submarine pipeline; and
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> (b) is associated with mining for petroleum authorised by a petroleum mining permit granted under section 25 of the Crown Minerals Act 1991 before the date on which this Act comes into force or authorised by an existing privilege preserved under clause 12 of Schedule 1 of that Act.
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> (2) However, despite subsection (1), this section does not apply to any of the activities described in subsection (3) where the activity has adverse effects on the environment or existing interests unless the Environmental Protection Authority provides a ruling to the effect that the adverse effects are likely to be minor or less than minor.
>
> (3) The activities referred to in subsection (2) are—
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> (a) any activity that is part of an activity described in subsection (1), such as placing a structure or drilling a well, that had not commenced before this Act comes into force; or
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> (b) any change in the character, intensity, or scale of the activity described in subsection (1) made on or after the date on which this Act comes into force; or
>
> (c) the alteration, extension, removal, or demolition of an existing structure or existing submarine pipeline associated with the activity described in subsection (1).
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> …

[7] On 17 August 2017 TTL made application for a ruling under s 162(2) that disconnecting the FPSO from the submarine pipelines and cables, and from the mooring cables, involved adverse effects that were likely to be minor or less than minor. At that time it was anticipated that a new FPSO would re-attach to the submarine pipelines, cables and moorings the following summer. By ruling dated 3 October the EPA agreed, and duly issued such a ruling.

[8] In late 2019 BWO began the disconnection of the FPSO from the undersea equipment in accordance with the ruling. There then followed exchanges between the

EPA and BWO in which the EPA advised that BWO should not continue with disconnection in reliance on the 2017 ruling. This ultimately led to the issue of abatement notices by the EPA on 17 March 2020 directed to BWO under s 125 of the Act. In effect the notices required BWO to stop disconnection. The abatement notices stated, inter-alia:

> TTL was provided with a ruling under s 162(2) … on 1 November 2017 which approved the disconnection and subsequent temporary placement of mooring lines and flow lines from the FPSO Umuroa to allow the vessel to leave NZ waters. The factual information and assumptions advanced by TTL on which the 2017 Ruling was based do not now apply and the 2017 Ruling does not authorise the restricted activities proposed to be undertaken by BWO.

[9] The abatement notices themselves do not specify what the change in circumstances were, but the following circumstances have been identified in the materials before this Court and the Environment Court:

(a) In October 2019 the Tamarind Group notified BWO and its associated company that it did not want to extend the oil extraction arrangements beyond 31 December 2019. On 19 December 2019 TTL was then placed into receivership and liquidation. This calls into question TTL's ability to deal with the undersea pipes, connectors and lines proposed to be left on the sea floor which may not now be re-attached to a new FPSO.

(b) The 2017 ruling proceeded on the basis that the disconnection of the FPSO, and the keying of the risers on the sea floor would be temporary until a new FPSO was connected — that is, it was not anticipated that the oil mining operation would cease. But TTL's insolvency, and related circumstances suggest that the whole oil field operation may now need to be decommissioned.

(c) On 19 November 2019 TTL advised EPA of a spill from the Tui field arising from a rupture along the length of the Tui-2H flowline approximately 12 metres long.[4] Later in December the EPA observed anomalies in other lines, namely a blistering of the external casings. On

[4] At the right had side of the depiction at [4] above.

> 17 January TTL provided the EPA with a report which indicated structural integrity issues. Other concerns have been raised about the integrity of the undersea equipment. As the Environment Court said "… there are question marks over the integrity of some assets that would not have been anticipated in the 2017 Ruling".[5]

[10] BWO then appealed the issue of the abatement notices to the Environment Court. At the same time it applied for a stay of the abatement notice, and it was the application for a stay that was the subject of the Environment Court decision now under appeal to this Court.

[11] The Environment Court issued its determination on the papers following a telephone conference convened on 24 March 2020. Its decision was issued the following day. In a thorough and careful judgment the Court sought to address all the relevant circumstances. Amongst the conclusions reached by the Court were:

(a) That BWO's appeal would not be rendered nugatory if a stay was not granted.[6]

(b) In relation to the strength of BWO's appeal, the Court's preliminary view was that what BWO proposed to do was not inconsistent with the 2017 Ruling.[7] I infer that this involved a preliminary view that the BWO's prospects of success on its appeal were potentially high.

(c) That in terms of the public interest that they were in favour of the grant of the stay. The Court held:

> [128] We find that the risks and potential adverse effect of acquiring the FPSO to remain connected to the subsea infrastructure significantly outweighed the risks and potential adverse effects of allowing a stay of the abatement notices. We acknowledge that stay would allow the FPSO to be disconnected.
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> [129] We do not consider that the effect of the stay would be to bypass the EPA's regulatory functions, nor to render lawful the carrying out of restricted activities. We also do not

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5 *BW Offshore Singapore Pte Ltd v The Environmental Protection Authority*, above n 1 at [91].
6 At [116].
7 At [120].

> consider that the effect of staying the appeal will result in the abandonment of the wells and well heads to which reference was made by counsel, because they are not BWO's property. There can be no expectation that the 2017 Ruling requires BWO to decommission the Tui oil field.

(d) That whilst the circumstances had changed since the 2017 decision, whether or not disconnection occurred any leakage from the well heads would need to be stopped which was outside BWO's ability to control as it did not own this infrastructure.[8]

(e) That provided that the rises are lowered so that there was no leakage from them within 12 months of lowering they could be left safely on the seabed in compliance with the 2017 Ruling.[9]

(f) That provided that conditions of a stay were complied with, "the adverse effects of the disconnection works on the environment or existing interests are likely to be minor or less than minor".[10]

[12] The Environment Court said:

> [145] The circumstances in which the case has been brought before the Court are both unusual and unfortunate and deciding the application for a stay does not come without very significant challenges, requiring very careful balancing of competing positions. However, for the reasons set out in paragraphs [107] and [108] we have serious concerns about the risks of preventing urgent disconnection, with the effect that the FPSO will remain at Tui, unmanned and potentially uninsured, over the coming winter. While responsibility for the need for urgency arising could and no doubt will be debated for some time, that will not remove the potential for serious adverse effects to occur as outlined in the above paragraph. The advice has been given by experienced marine specialists working for a very experienced marine operator and nothing has been put before us to challenge their assessment of the risk. We give their advice significant weight.

[13] The Court accordingly imposed a stay on certain conditions, including that BWO would conduct a visual survey of the rises 12 months after laydown.

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8 At [141]–[142].
9 At [143].
10 At [144].

Approach on appeal

[14] As indicated there is an appeal to the High Court of decisions of the Environment Court on a question of law. The High Court itself has a power to stay the lower Court decision expressed in broad terms under r 20.10 of the High Court Rules 2016.[11]

[15] The fact that I have been asked to deal with the question of a stay, rather than the appeal from the Environment Court's decision to issue a stay causes a degree confusion. What is accordingly involved is an application to stay the stay. And given that the stay entered by the Environment Court stopped the abatement notices having effect, and that the abatement notices prevented BWO relying on the 2017 Ruling, it can be said that the application involves a stay of a stay of a stay. It may be that the position has become unnecessarily convoluted. In balancing the considerations under r 20.10 I have put primary weight on whether it appears that the Environment Court erred in law in issuing the stay, and if that is so considered what the appropriate orders in the current circumstances should be.

[16] I will not lengthen this judgment by setting out the written and oral submissions of counsel for the parties. A number of quite difficult issues arise and were addressed. I will endeavour to address the key propositions advanced by the parties in the course of providing the reasons for my decision.

Analysis

[17] The Environment Court noted that it had not been assisted by the large volume of documents submitted by the EPA with only limited guidance as to what particular sections of the documents to be considered.[12] It also observed that deciding the application came with very significant challenges.[13] I agree with those observations — it has not been easy to identify the truly important matters. To the extent that I differ from the findings made by the Environment Court it should not be taken as any

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11 The relevant approach to the stay power was set out in *Yan v Mainzeal Property and Construction Ltd* (in rec and liq) [2014] NZCA 86, (2014) 22 PRNZ 296.

12 At [50].

13 At [145].

criticism of that Court which provided a very detailed and carefully reasoned decision in a short space of time in very difficult circumstances.

[18] I nevertheless disagree with some aspects of the decision. There are errors of law, or arguable errors of law, which make it appropriate for this Court to reassess the basis for any stay.

When would an abatement notice be appropriate following a s 162(2) ruling?

[19] At the heart of the contest between BWO and EPA is BWO's contention that it has the benefit of the October 2017 Ruling issued by the EPA and is entitled to proceed with disconnection. The EPA's response to that contention is to say that matters have significantly changed since that ruling was issued.

[20] At no point did the parties, or the Environment Court, articulate the relevant legal principle that is to be applied in relation to this argument. At what point does a change in circumstances following a ruling under s 162(2) allow the EPA to exercise new powers, such as the power to issue an abatement notice, and say that the ruling no longer applies? At a number of points in the Environment Court's decision the Court concludes that what BWO is doing appears consistent with the 2017 Ruling, and it stated that the fate of BWO's substantive appeal to that Court would inevitably test the activities currently proposed against the 2017 Ruling.[14] At [62] the Court indicated that one of the questions the Court was required to answer was "can the decommissioning the FPSO proceed in the circumstances that exist today and comply with the 2017 Ruling, taking into account the basis upon which that Ruling was made?

[21] In my view the issue is not limited to compliance with the 2017 Ruling. It seems to me of considerable significance to identify whether, and when, the EPA can exercise further powers because of a change in circumstances since such a ruling. The parties agreed that there was no specific provision in the Act that dealt with this issue. That contrasts with the RMA. Section 325 of the RMA regulates appeals to the Environment Court against abatement notices issued under the RMA. Section 325 relevantly provides:

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[14] See [105], [120], [130].

325 Appeals

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(5) Except as provided in subsection (6), the Environment Court must not confirm an abatement notice that is the subject of an appeal if—

(a) the person served with the abatement notice was acting in accordance with—

(i) a rule in a plan; or

(ii) a resource consent; or

(iii) a designation; and

(b) the adverse effects in respect of which the notice was served were expressly recognised by the person who approved the plan, or notified the proposed plan, or granted the resource consent, or approved the designation, at the time of the approval, notification, or granting, as the case may be.

(6) The Environment Court may confirm an abatement notice, that is the subject of an appeal, if the court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval, notification, or granting, as the case may be.

[22] As can be seen s 325(5) and (6) address changes in circumstances. An abatement notice may be given by a relevant authority notwithstanding an earlier approval if circumstances have changed and adverse effects have not been expressly recognised in the earlier approval. Whilst these provisions relate only to an appeal, they can be taken to implicitly identify when abatement notices can be given under the RMA notwithstanding previous rules, consents or designations.

[23] In my view it is strongly arguable that this provision applies to decisions under the present Act, at least by analogy. Section 129(3) provides that Part 11 of the RMA applies "as if the appeal were lodged under Part 12 of that Act". Section 325 is in Part 12 rather than Part 11.[15] But the effect of s 129(3) is that the appeal proceeds as if it were an appeal under s 325 — s 325 is the provision that deals with appeals from abatement notices under Part 12.

[24] If this section did not apply there would be no statutory provision under the present Act that regulates material changes of position. It is necessary to interpret the

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[15] And section 131 directly applies s 299 to 308, and does not include s 325.

provisions in a way that allows the Act work as Parliament must have intended.[16] To do otherwise would be inconsistent with the purposes of the Act as set out in s 10, and particularly s 10(1)(b) requiring the environment to be protected from the effects of maritime pollution. If there has been a significant change in circumstances following an earlier ruling, it cannot be the case that the EPA's hands are tied and it must allow adverse effects to take place.

[25] Section 325 may not expressly apply, but it can be referred to by way of analogy to identify the metes and bounds of the exercise of decision-making powers by the EPA under the Act. So a decision under s 162(2) does not create an indefeasible right — if it is subject to implied limitations identified by an assessment of the scheme and purpose of the Act overall.

[26] Mr Conway for BWO did not disagree with the proposition that s 325 applied by analogy. Mr Carter for the EPA argued that s 325 did not apply given the terms of s 129(3). To some extent that seems surprising. In part this stance seems to have been because of the argument that the Environment Court should not interfere with EPA decisions on appeal on the basis set out in s 325.[17] But Mr Carter was unable to identify how the Act would otherwise deal with a significant change in circumstances following a s 162(2) ruling. So I do not accept his argument, and proceed on the basis that s 325 applies, at least by analogy, and that the EPA can issue an abatement notice to respond to significantly changed circumstances. This means that the appropriateness of such an abatement notice, and the test for any appeal against that abatement notice should be along the lines set out in s 325(5) and (6).

[27] In my view the Environment Court erred in failing to clearly identify that it was permissible as a matter of principle for the EPA to issue an abatement notice notwithstanding the 2017 Ruling if there had been a material change in circumstances. Although there is some ambiguity in relation to the Court's findings on the relevance of the changed circumstances, at least part of its analysis appeared to confine the question to an argument about the meaning and effect of the 2017 Ruling. That is, of

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16 *Northern Milk Vendors Assoc v Northern Milk Ltd* [1988] 1 NZLR 530 at 538 (CA).

17 If that argument were correct, there would be nothing that identified the test that should be applied by the Environment Court on appeal.

course, understandable as the parties did not identify any other principle to be applied by the Court.

Suggested limits of BWO's responsibilities

[28] In my view the Environment Court erred in another way by accepting BWO's arguments that there were clear limits over what it could be expected to do in relation to the decommissioning of the oil mining activities overall.

[29] The Court correctly indicated that it was required to consider the oil field operation as an integrated whole.[18] That seems to me to be consistent with the scheme and purpose of the Act. But the Court nevertheless identified that there were limits to BWO's responsibilities, and indicated that it was "the meat in the sandwich".[19] After identifying the recent information that suggests there is an issue about the integrity of the undersea pipes, and noting TTL's insolvency the Court held:

> [106] It is for others to determine how any issues related to the integrity of the valves and the longer-term integrity of the rises are addressed as these issues affect assets over which BWO has no control.

[30] Similar findings were made elsewhere, including that there could be "no expectation that the 2017 Ruling requires BWO to decommission the Tui oil field",[20] and that "… the sub-sea infrastructure of which counsel speaks is not owned or under the control of BWO".[21] The Court also held:

> [142] We are satisfied that whether the disconnection occurs or does not occur, any leakage from the well heads will need to be stopped but that is outside BWO's ability to implement.

[31] For a number of related reasons, in my view that proceeds on a misunderstanding of the scheme of the Act, and involves asking the wrong question. The right question was whether the new circumstances meant that it was now appropriate for the EPA to consider disconnection as part of the wider circumstances, including potential decommissioning of the whole operation, and address all the potential implications for the environment and existing interests that arise.

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18 At [63].
19 At [63].
20 At [129].
21 At [130].

[32] The Act is not concerned with legal ownership. It is only concerned with activities, and the effect of those activities on the environment and existing interests. The fact that environment effects, or potential environmental effects, arise from physical equipment that is owned by different parties is not relevant to the particular assessment required by the Act. The Environment Court recognised this, but nevertheless went on to hold that the impacts in relation to equipment outside BWO's ownership was beyond BWO's responsibility. But BWO's control of the equipment it owns is always subject to the Act, and the Act's requirements can be imposed whether or not equipment which gives rise to environment risks is owned by a particular entity or not.

[33] As the Court of Appeal recently emphasised in its decision released last Friday in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* the purposes of the Act under s 10 are of decisive importance.[22] This includes the purpose set out in s 10(1)(b) of the Act, namely:

> …
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> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.
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> …

[34] Protecting the environment from pollution is, at least in the sense described by the Court, a "bottom line".[23] The approach that there might be further environmental effects, but that this will be the responsibility of other parties because they own the relevant equipment is not consistent with the focus on activities that trigger a consideration of these purposes.

[35] The EPA's function under s 162(2) to rule that the adverse effects of activities are likely to be minor or less than minor is an important decision under the Act. It is a decision that excludes the more extensive decision-making processes otherwise

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22 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [86]–[90] and [109].

23 At [89].

required under the Act for decisions involving the EEZ. It excludes participation of interested parties such as Māori, and bodies such as Greenpeace, Kiwis Against Mining, and Royal Forest and Bird.[24] As the Court of Appeal emphasised in *Trans-Tasman Resources Ltd*, those decision-making processes not only involve the environmental concerns reflected in s 10 of the Act, but also wider considerations, such as the effects on Māori.[25] The approach to such decisions is at least analogous with the decisions not to notify resource consents under the RMA, and accordingly the approach emphasised by the Supreme Court in *Westfield (New Zealand) Ltd v North Shore District Council*.[26] It is a gatekeeping decision that excludes the participation of other interests in the decision-making process, and accordingly requires very clear evidence and justification before such decisions can be made.[27]

[36] Given the new circumstances that were not apparent in 2017 what is now involved is a significant step in potentially bringing the oil mining activities within the EEZ to a close. If so there are significant issues involved in ensuring that the potential end of those activities is implemented in a way that is consistent with the purposes of the Act. In that respect the decisions under the Act may now need to address "the integrity of the whole Tui oil field infrastructure system" contrary to the Environment Court's conclusions.[28] A more limited, or piecemeal assessment, may no longer be appropriate.

[37] The 2017 Ruling is significant because it gave permission for disconnection, and the subsequent laying down of equipment on the sea floor, which is only part of what is required for decommissioning the whole field. When the decision was made in 2017 the decommissioning of the whole activity was not contemplated. Rather what was anticipated was that the FPSO would be disconnected, the risers lowered to the sea floor, and they would stay there until the next summer when a new FPSO would be connected. So it seems to me that what is now involved involves a significant change in circumstances. It seems to me the new circumstances mean that before the EPA could decide that the effects of activities were likely to be minor or less than

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24 All of whom were participants in the decision-making processes involved in the Trans-Tasman Resources case.

25 At [40]–[41] and [166]–[167].

26 *Westfield (New Zealand) Ltd v North Shore District Council* [2005] NZSC 17; [2005] 2 NZLR 597.

27 See Keith J at [53]–[54] and Blanchard J at [105].

28 *BW Offshore Singapore Pte Ltd v The Environment Protection Authority*, above n 1, at [100].

minor it would need to know what the overall plan for bringing those activities to an end was (if that is what is contemplated).

[38] The fact that BWO does not own the remaining assets is not of decisive significance under the requirements of the Act. TTL is insolvent. It does not have the ability to attend to dealing with the financial cost of dealing with the infrastructure that will be left on the seabed. BWO is, literally, interconnected with TTL, not only commercially, but more importantly environmentally. All corporate entities associated with oil mining activities involved in such ventures do so understanding that the relevant legislation regulates what they do. Parties engaged in significant oil mining activities need to ensure that those activities are appropriately brought to an end from an environmental point of view (as well as the point of view of the other existing interests contemplated by the Act) before departing the scene. That is saying no more than people must tidy up any activity before they leave.

[39] Neither is it an answer to say that, on TTL's insolvency, the Crown will likely assume the responsibilities under the mining licence, and thereby the responsibilities in relation to the infrastructure left on the sea floor. That is a conceivable backup scenario, but that does not mean that the EPA is prevented from assessing the steps required for concluding the activities in a complete way.

[40] For those reasons it seems to me that the EPA has a strong argument that the Environment Court was wrong in law in its approach. The changed circumstances likely mean that a complete re-assessment is required. The abatement notice seems to me to be the appropriate mechanism by which the EPA preserves the situation until a new and complete assessment of the current circumstances can occur. For those reasons not only do I conclude that the EPA has a strong argument to advance on appeal to this Court, but also that it has a strong argument to resist BWO's appeal to the Environment Court in relation to the original abatement notices.

Is disconnecting the FPSO risk-neutral?

[41] The above considerations do not mean, however, that the EPA should be granted a stay so that its abatement notice will apply. That is so for two reasons.

[42] First Mr Conway for BWO emphasised that the disconnection of the FPSO is essentially neutral when it comes to the issues that will arise from decommissioning the remainder of the oil mining activities on the sea floor. Indeed he argued that any decommissioning of this equipment would necessarily first involve the FPSO being disconnected. It is a necessary step in any wider decommissioning plan. Nothing positive is achieved by requiring the FPSO to remain attached. For that reason the assessment made in the 2017 Ruling of the potential adverse effects remains unaffected. Those adverse effects, which were assessed as being minor or less than minor, remain applicable. Put another way the change of circumstances makes no difference to the environmental issues involved in disconnecting the FPSO, and laying the risers on the sea floor.

[43] The Environment Court effectively accepted that submission. Its ultimate conclusion was that the greater complications that have arisen involve matters beyond the disconnection activity subject to the 2017 Ruling, and that the potential effects of carrying that ruling into effect were still minor or less than minor.

[44] I accept that these are potentially strong factors in BWO's favour, and that its appeal could succeed on this basis. But I am ultimately not persuaded that either this Court, or the Environment Court, can safely proceed on this basis when it is able to fully understand and assess all the technical matters that could be relevant to such assessments. The Act provides a detailed set of procedures and requirements for such assessments, and s 162(2) is applied by the EPA against that background. The EPA is the expert body established by the Act. The Environment Court would need to be certain that there was no prospect that the changed circumstances could affect the overall assessment.

[45] The point is illustrated by the issue concerning flushing. Flushing involves pumping liquids through the pipelines to remove any residual oil or other debris contained within the risers and associated lines. Based on BWO's evidence, over 98 per cent of the contents of the pipes will be water, and not crude oil or other such substances. But there will be some residual oil and related materials within the lines.

[46] There has been an argument about whether flushing of the pipes was required by the 2017 Ruling, and whether it should now take place before disconnection. If it

does not take place the pipes will remain on the seabed containing this material. The EPA can point to some material provided for the 2017 ruling suggesting that flushing would take place, although flushing is not set out as a condition in the ruling itself. BWO's present position, as recorded by the Environment Court, is that flushing should not occur because to do so will involve the pipes being pressurised, and given that the integrity of the pipelines is now in issue, that flushing fluids would escape into the water column via the tear in the flow line.[29]

[47] This seems to me to be an environmental concern that is not addressed by the 2017 Ruling. If the pipelines are not to be flushed to deal with the residual liquids within them, how is that issue to be managed? It may not be appropriate to simply conclude that flushing should not now be done, and that this will now need to be addressed by others. Disconnection can only occur if all the environmental and other effects contemplated by the Act are appropriately addressed to the point that any adverse effects are minor, or less than minor.

[48] Mr Conway made reference to the evidence of Mr Giles Distin filed in the Environment Court to the effect that even if all of the content of the risers leaked in their entirety, the relevant discharge would be less than what was authorised and assessed by the EPA as producing negligible effects every month during the production at the Tui oil field. But that evidence seems to me to include some assumptions, and it is very difficult for the Court to make definitive factual findings on this kind of matter. Even if this is true, the fact that that level of discharge was permitted during oil mining may not mean that it has a less than minor impact as a discharge arising from disconnection. It is difficult for the High Court to make conclusions in relation to such matters when they have not been assessed under the decision-making processes contemplated by the Act. Moreover this is only one aspect, albeit an important one, arising from the current circumstances that were not before the EPA in 2017.

[49] Similarly an issue arises in relation to the lowering of the risers and other equipment onto the sea floor. At the time of the 2017 Ruling this was anticipated to be a temporary step only, and that a new FPSO would later pick this equipment up. But the failure of TTL now means there is a risk that the equipment will remain on the

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[29] At [96].

sea floor unless remedial action is taken. This is a new scenario that needs to be addressed under s 162(2) in light of the Act's purposes.

[50] It may well be that any s 162(2) assessment now needs to be one that addresses all matters in a comprehensive way, and that the more restricted assessment of activity in that Ruling is no longer appropriate because it fails to consider whether the adverse effects are minor in the fuller circumstances that now arise. I have no doubt that, had the present circumstances been in existence in 2017 any ruling would have been different. These circumstances would have required careful consideration by the EPA. The fact that one of the undersea pipes had ruptured causing pollutants to be released into the environment would have been highly material to any consideration over whether the disconnection would be permitted on the basis that its effects were likely to be minor or less than minor. That would also have been the case with the evidence concerning the compromised status of some of the other equipment. In addition, had it been apparent that TTL had failed, or would likely fail, it would also have been necessary to address how all the undersea equipment (which could contain pollutants, as well as a rupture) was to be addressed. These are clearly material considerations to any decision under s 162(2). It seems clear to me that there is considerable potential for a different decision under s 162(2) in the circumstances.

[51] I accept that there is an appeal to the Environment Court, and accordingly the Environment Court is expected to itself assess these matters. But as the Court itself acknowledged in its decision, there are limitations on its ability to fully understand the reasonably complex factual matters.[30] The primary decision-making function, and the primary expertise, is presumed to lie within the EPA as the decision-making body under the Act. Once what appears to be very material changes in circumstances have emerged, it seems to me that the Environment Court should only overturn the EPA if it is sure the appropriate decision would remain unchanged. I accept that the Environment Court did conclude that the activities subject to the 2017 Ruling would still only have a minor, or less than minor effect. But that was only on the assumptions referred to earlier — including that the underlying problems with damaged and compromised equipment containing potential pollutants were matters over which

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30 See, for example, [91] and [98].

BWO could have no responsibility. That was an erroneous restriction given what was required to be considered by the EPA under the Act.

[52] The key point is that no evaluation in the context of the new circumstances has been undertaken. The present circumstances were not evaluated by the EPA in 2017. They need to be properly evaluated for the scheme of the Act to operate as intended. The EPA has now served an abatement notice which stops any action proceeding pending further consideration. In accordance with the scheme of the Act, that seems to be the appropriate step.

The risks of the FPSO being required to stay

[53] The second feature emphasised by the Environment Court was that the risks associated with requiring the EPSO to remain in New Zealand waters over the winter greatly outweighed the environmental risks associated with disconnection.

[54] I have already concluded that the Environment Court erred in underestimating the assessment of environmental risks by focusing purely on the risks associated with the disconnection activities themselves, and not proceeding on the basis that the EPA would need to take into account the risks associated with the pipelines and other equipment remaining on the sea floor without any concrete plans for their removal. But the Court's concerns about the FPSO remaining in the ocean unmanned and potentially uninsured over the winter were also of importance to the Environment Court.

[55] These matters were addressed in affidavits of Dr Freeth and Mr Mahindran filed in this Court in relation to the stay. To some extent I accept the EPA's argument that these concerns might have been overstated by the Environment Court. In my view a well-established operator like BWO would be able to make safe the FPSO over the winter months. I accept that the difficulties with this are relevant considerations, and there may be challenges involved. There are related relevant factors, such as the fact that the mooring lines are close to the end of their scheduled life. But these factors are not sufficiently strong to displace the importance of the scheme of the Act.

[56] I also accept that requiring the FPSO to stay will come at a considerable cost to BWO, and that there may also be an issue about whether the FPSO can be insured for that period given that it will no longer be generating income. Were it not for those significant costs, and the fact that the EPA duly issued its 2017 Ruling allowing BWO to disconnect, I would regard this matter as reasonably straightforward. I see the matter as finely balanced given these considerations, and very much more finely balanced than the Environment Court, particularly given the overriding importance of s 10 of the Act.[31]

Result

[57] In the end it seems to me that the scheme and purpose of the Act must prevail in difficult cases of this kind. There is a current problem arising from the state of equipment associated with the oil field, and what may now be involved is a decommissioning of the oil mining activities given the failure of TTL. The Act provides a comprehensive code for addressing the relevant issues. It requires decisions to be made in accordance with the purposes of the Act, having regard to the interests that it is protecting. There has been no decision addressing the current circumstances apart from that made by the EPA in association with the giving of the abatement notice, which in itself simply stops further activity pending a more comprehensive reconsideration. That seems to me to be the appropriate response contemplated by the Act.

[58] Accordingly the stay sought by the EPA is granted. The effect is that the abatement notices issued by the EPA remain in effect.

Cooke J

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[31] I also note that, had a stay been granted it would likely have been a case where it would have been a requirement that BWO, or its parent, provide an undertaking to pay any amount later ordered by the Court to address any remedial costs if BWO's appeal failed, and the abatement notice should have remained in effect.