



COVERSHEET

Minister	Hon Dr Megan Woods	Portfolio	Energy and Resources
Title of Cabinet paper	Regulatory Framework for Decommissioning Petroleum Infrastructure and Enforcement - Strengthening the Crown Minerals Act 1991 Regime	Date to be published	30 July 2020

List of documents that have been proactively released

Date	Title	Author
17 June 2020	<i>Cabinet paper:</i> Regulatory Framework for Decommissioning Petroleum Infrastructure and Enforcement - Strengthening the Crown Minerals Act Regime	Office of the Minister of Energy and Resources
17 June 2020	<i>Cabinet Economic Development Committee Minute of Decision:</i> Regulatory Framework for Decommissioning Petroleum Infrastructure and Enforcement - Strengthening the Crown Minerals Act Regime	Cabinet Office
17 June 2020	<i>Regulatory Impact Assessment:</i> Regulation governing legal and financial responsibility for decommissioning petroleum infrastructure and enforcement tools under the Crown Minerals Act 1991	MBIE

Information redacted

YES / NO

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Some information has been withheld for the reasons of confidentiality of advice to Government, legal professional privilege, free and frank advice, and commercial sensitivity.

In Confidence

Office of the Minister of Energy and Resources

Chair, Cabinet Economic Development Committee

REGULATORY FRAMEWORK FOR DECOMMISSIONING PETROLEUM INFRASTRUCTURE AND ENFORCEMENT: STRENGTHENING THE CROWN MINERALS ACT REGIME

Proposal

- 1 This paper seeks agreement to strengthen legal and financial responsibility for decommissioning petroleum sector infrastructure and expand the current enforcement toolbox under the Crown Minerals Act 1991. The proposals are to:
 - a. impose an explicit statutory obligation on all current and future petroleum permit and licence holders to undertake and fund decommissioning activities, as an integral part of a permit to mine petroleum resources;
 - b. enable the regulator to periodically assess permit and licence holders' financial capability to meet their decommissioning obligations, based on sufficiently detailed and up to date planning and financial information disclosures;
 - c. empower the regulator to require permit and licence holders to establish and provide adequate financial security for decommissioning purposes, based on permit and licence holders' individual circumstances and risk profiles;
 - d. provide the regulator with additional enforcement powers to: accept enforceable undertakings, issue compliance notices, and authorise the development of an infringement offence scheme; and
 - e. make some minor and technical amendments to support effective implementation of the above proposals and improve the general administration of the regulatory regime.
- 2 These proposals would create a framework in the primary legislation, the Crown Minerals Act 1991, with detailed requirements to be provided for in regulations made under that Act. The detailed design of the regulations is currently being developed and will be subject to future Cabinet decisions, informed by further stakeholder consultation, and impact analysis.

Relation to government priorities

- 3 The proposals in this paper relate directly to the Government's long term vision for New Zealand to transition to a low emissions economy. We have set

a low emissions target for 2050, an aspirational target for 100 percent renewable electricity, and there will be no further offshore exploration permits in New Zealand. The proposals in this paper will set the regulatory framework for bolstering the petroleum sector's financial preparedness as this transition occurs, and to ensure the sector contributes to a more productive, sustainable and inclusive economy.

- 4 The proposals are also part of the wider work programme the Government is undertaking in the recently released 10-year Resource Strategy '*Responsibly Delivering Value – A Minerals and Petroleum Resource Strategy for Aotearoa New Zealand: 2019-2029*'. The Strategy is designed to drive a shift towards a 'world leading environmentally and socially responsible petroleum and minerals sector that delivers affordable and secure resources, for the benefit of current and future New Zealanders'.

Executive Summary

- 5 The proposals in this paper arise from Tranche Two of the Crown Minerals Act 1991 (CMA) Review [DEV-19-MIN-0120]. I am progressing these ahead of other potential legislative changes because they require a more urgent and targeted response.
- 6 As the New Zealand petroleum sector infrastructure continues to mature, an increasing number of petroleum fields are nearing the end of their economic lives and will require decommissioning.
- 7 In the event of a petroleum company's financial default, there is a risk that the Crown or other third parties will potentially have to undertake and fund decommissioning. To ensure health and safety and to protect the environment, decommissioning must occur, and the Crown is often the only party that can fund that work.
- 8 This risk has recently materialised in relation to the upcoming decommissioning of the Tui oilfield, which is likely to cost the taxpayer around NZ\$155 million [CBC-20-MIN-0008].
- 9 We need a more strategic and proactive government regulation of the sector's financial preparedness for decommissioning than what is currently provided for in the CMA. The CMA provisions need to be sufficiently robust and fit-for-purpose to mitigate the risk for the Crown and other third parties of potentially having to undertake and fund decommissioning of petroleum fields in the future.
- 10 Accordingly, I am proposing a package of measures designed to provide a robust outcomes-focused risk-based regulatory framework. This framework would impose discipline and strengthen the incentives for petroleum companies to undertake and fund their decommissioning activities.
- 11 The proposed package will affect existing permits and licences, some of which have been in place for a number of decades, Free and frank opinions

- 12 The proposals are not designed to impose more onerous obligations or set new standards for decommissioning than is currently provided for. Instead, they will provide for more effective means of ensuring that existing obligations are discharged to the existing standards¹ by those who conduct the mining and production activities, not the taxpayer or other third parties.

Background

An increasing number of petroleum fields will soon require decommissioning

- 13 The New Zealand petroleum (oil and gas) sector has been built on the back of early exploration and development dating back to the 1950s. As the sector continues to mature an increasing number of petroleum fields are nearing the end of their economic lives and will require decommissioning. Unplanned shutdowns may also increase due to the cyclical nature of the petroleum sector, fluctuations in commodity prices and other changing conditions of the global economy (e.g. the economic impact of the global Covid-19 response).
- 14 Decommissioning is the process of taking petroleum infrastructure² out of service, which may include removing the infrastructure, plugging and abandoning wells, and undertaking necessary site restoration activities, in a safe and environmentally responsible manner, at the end of a petroleum field's economic life or when production ceases. It is an ordinary component of petroleum field mining and production operations. There are significant health and safety, and environmental risks that could arise in the event that decommissioning is not undertaken, or, not undertaken to the required standards. These standards are set by the relevant health and safety and environmental laws.
- 15 The costs of decommissioning activities are substantial, with hundreds of millions of dollars typically required to decommission offshore infrastructure. Importantly, decommissioning costs are incurred at the end of a project's economic life, when there is little or no ongoing or future revenue to directly finance or offset these costs. The current best estimates of the expected decommissioning costs and timeframes for each of the existing permit and licence holders' offshore petroleum fields are outlined in the Appendix.

There is a risk that the Crown or other third parties will potentially have to undertake and fund the decommissioning of petroleum infrastructure


- 16 In the event of a petroleum company's financial default, there is a risk that the Crown or other third parties (such as private land owners and Regional Councils) will potentially have to undertake and fund decommissioning of petroleum infrastructure. To ensure health and safety and to protect the environment, decommissioning must occur, and the Crown is often the only party that can fund that work.

¹ These standards are set by the relevant health and safety and environmental laws. The proposed changes will be drafted in a way that ensures consistency across various regulatory regimes responsible for aspects of decommissioning, such as health and safety and environmental standards.

² Petroleum infrastructure includes platform installations and other structures, equipment, pipelines and cables.

17 The risk has recently materialised in relation to the first full field petroleum sector decommissioning project in New Zealand. In late 2019, Tamarind Taranaki Ltd (Tamarind), the operator of the Tui oil field (Tui), went into receivership and liquidation. With Tamarind's liabilities far exceeding the value of its assets, it and the other Tui participants are not able to meet any part of the decommissioning costs. To protect the marine environment, the Crown is stepping-in as the provider of last resort to decommission the Tui infrastructure. This is estimated to cost the taxpayer around NZ\$155 million [CBC-20-MIN-0008].

18 Legal professional privilege



19 I will keep Cabinet informed on Tamarind-related developments and report back by December 2020 on other decommissioning workstreams currently underway. These include: developing a plan to manage the Crown's future petroleum liabilities associated with tax and royalty rebates for existing permit and licence holders' decommissioning of petroleum installations; the plugging and abandonment of historic and orphaned wells; and wider petroleum decommissioning risks to the Crown [CBC-20-MIN-0008].

This risk has been identified and considered as part of Tranche Two of the Crown Minerals Act 1991 Review

20 The need to strengthen the Crown Minerals Act 1991 (CMA) regulatory settings in relation to petroleum sector's decommissioning activities has been identified and actively considered as part of Tranche Two of the CMA Review. In June 2019, the Cabinet Economic Development Committee agreed the terms of reference for the Review [DEV-19-MIN-0120], and in November 2019, approved the release of a discussion document for public consultation [DEV-19-MIN-0295].

21 The Review seeks to ensure the CMA's settings contribute to resource development that responsibly balances environmental, social and economic considerations to meet the evolving needs of New Zealand's society.

22 Work is currently underway to consider, refine and analyse the wide range of issues and options canvassed by the Review. These include: the role and purpose statement of the CMA; balancing the rights, interests and activities of marine users; ensuring offshore petroleum permits contribute to a managed transition; community participation; and Māori engagement. However, I consider that the need to mitigate the risk of potential future cost transfers to the Crown and other third parties, highlighted by the liquidation of Tamarind, call for a more urgent and targeted response.

Legislative change is required

Changes in industry dynamics increase the risk for the Crown and other third parties

- 23 To date, company policies, rather than government regulation, have been the primary driver for ensuring that sufficient financial means are set aside, or otherwise provided for, to undertake and fund decommissioning activities in New Zealand.
- 24 There are commercial incentives for petroleum companies to do so, as it helps secure social licence to operate and preserve options for future exploration and mining projects, and is expected international best practice as part of the overall project. These are important commercial drivers, particularly during the sector's growth phase. Furthermore, petroleum assets have historically been owned by consortiums of large multinational publicly listed entities. Such firms normally have the ability to access sufficiently large and liquid funds for decommissioning purposes.
- 25 However, as the sector continues to mature and starts to confront the reality of having to transition to cleaner low emissions technologies, its incentives to undertake and fund decommissioning of their existing infrastructure may weaken.
- 26 Furthermore, recent experience in New Zealand and overseas has been that the ownership of late-life petroleum assets has consolidated to fewer permit participants, with some being acquired by smaller companies, without joint venture partners, funded by private equity and debt. Such firms are often less well-resourced, and therefore less able to access sufficiently large and liquid funds for decommissioning purposes, at the time decommissioning needs to take place.
- 27 As demonstrated by the Tamarind situation at Tui, the incentives and ability of smaller private equity companies to undertake and fund the decommissioning activities can no longer be relied on as the primary source of assurance that decommissioning activities will be undertaken to the required standards, or at all. Weakening global commodity prices and limited additional exploration activities are expected to put further financial stress on the incumbent petroleum companies. This further increases the risk of financial default, and therefore the risk that the Crown or other third parties will potentially have to undertake and fund decommissioning in the future.
- 28 Given these changes in industry dynamics, and prior to future decommissioning activities needing to be undertaken, I consider there is a strong case for strategic and proactive government regulation of the petroleum sector's financial preparedness for decommissioning.

The CMA lacks a clear strategic regulatory framework to govern legal and financial responsibility for decommissioning

- 29 There is currently no explicit statutory obligation on holders of petroleum permits to undertake and fund decommissioning, as part of a permit to mine petroleum resources. As a result, the CMA is silent on such critical policy and regulatory design matters, such as:
- a. who is legally and financially responsible for decommissioning;
 - b. the extent to which they are responsible;
 - c. the length of time for which they are responsible;
 - d. when the obligation arises (and can therefore be enforced);
 - e. when and how decommissioning is planned and provided for; and
 - f. the consequences for potential non-compliance.
- 30 Instead, the CMA relies on a generic statutory requirement for permit holders to act *“in accordance with good industry practice”* and allows for decommissioning requirements to be considered on a case-by-case basis at the permit granting stage as a secondary, rather than integral part, of the decision.
- 31 Acting *“in accordance with good industry practice”* means *“acting in a manner that is technically competent and at a level of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in a similar activity and under similar circumstances”*. While it is generally understood and accepted that acting in this manner would include legal and financial responsibility for decommissioning activities, this implicit obligation has not been tested in court.
- 32 Reliance on permit conditions to establish a decommissioning obligation, absent a clear statutory guidance or mandate, makes it difficult to ensure that obligations are applied consistently across permit holders and time. The regulator is also open to legal challenge, as there is no explicit legislative backing in the primary legislation.
- 33 Further inconsistencies also arise from the legacy provisions of the Petroleum Act 1937 (the Petroleum Act), which was superseded by the CMA, but continues to have effect in relation to licences issued under the Petroleum Act. In contrast to the CMA, the Petroleum Act contains an explicit requirement for licence holders to undertake decommissioning (referred to as abandonment in the Petroleum Act) activities.
- 34 Furthermore, the regulator lacks statutory powers to undertake periodic financial capability assessments, access to sufficiently detailed and up to date planning and financial information, or require permit and licence holders to establish and provide adequate financial security for decommissioning purposes (based on individual company risk profiles).

35 This limits the regulator's ability to identify current and emerging risks or take effective and proportionate preventative measures to ensure that decommissioning is being adequately provided for, both at the permit granting stage and on the ongoing basis during the life of a permit.

The CMA enforcement toolbox is limited and some other administrative improvements are needed

36 The CMA currently provides for a limited enforcement toolbox. The toolbox is effective for responding to either relatively serious breaches that warrant prosecution or relatively low-level breaches that can be dealt with through less formal compliance tools, such as requests to comply.

37 However, it does not allow the regulator to effectively respond to mid-level breaches, which require sufficiently serious sanctions to deter non-compliant behaviour but do not warrant court action. These limitations apply equally to decommissioning-related breaches as well as other breaches of the CMA provisions.

38 There are also some minor and technical issues that need addressing to support an effective implementation of the proposals in this paper and improve the general administration of the CMA regime.

Proposals are designed to work as a package

39 In light of the issues outlined above, I consider it timely to strengthen the CMA regulatory provisions to ensure that they are sufficiently robust to help mitigate the risk for the Crown and other third parties of potentially having to undertake and fund decommissioning in the future.

40 Each of the specific proposals are set out in detail further below. However, there are high levels of interdependency and complementarity between the proposals, which requires consideration as a package.

41 The proposals aim to create a solid legislative base for a robust regulatory framework that imposes discipline and strengthens the incentives for petroleum companies to undertake and fund their decommissioning activities.

42 This will be achieved by ensuring that the overarching statutory obligation to undertake and fund decommissioning activities is supported by sufficient regulatory flexibility to impose specific requirements that are proportionate, and can be applied to individual circumstances across a range of business models and practices.

43 Recognising that this level of flexibility may reduce regulatory certainty and impact investment decisions, additional regulation-making powers will be provided to enable the provision of further guidance on how such flexibility will be applied in practice. The detailed design of the regulations is currently being developed and will be subject to future Cabinet decisions.

44 The proposals will also complement the workings of the other regulatory regimes responsible for managing different aspects of the decommissioning activities, such as the decommissioning planning process under the Exclusive

Economic Zone and Continental Shelf (Environmental Effects) Act 2012. Thus, further strengthening the overall regulatory system for decommissioning in New Zealand.

Proposals will affect existing permits and licences

- 45 The risk that the Crown or other third parties will potentially have to undertake and fund decommissioning is the highest in relation to existing permit and licence holders. It is the existing, rather than future, oil fields that will soon require decommissioning.
- 46 The proposed package will therefore affect existing permits and licences, some of which have been in place for a number of decades, Free and frank opinions
- 47 The proposals are not designed to impose more onerous obligations or set new standards for decommissioning than is currently provided for. Instead, they will provide for more effective means of ensuring that existing obligations are discharged to the existing standards by those who undertake the mining and production activities, not the taxpayer or other third parties.
- 48 The proposals will also bring New Zealand more in line with comparable overseas jurisdictions. Countries such as Australia, the UK, Canada, the US, and Norway have over the years been increasing their ability to more effectively manage the risks to the taxpayer and other third parties of potentially having to fund decommissioning.
- 49 Nevertheless, there is a risk of unintended consequences. The proposals will need to be implemented in a way that does not precipitate or exacerbate the very financial problems that they are designed to safeguard against. This risk will be mitigated through careful development and design of regulations, and the risk-based implementation approach.

Proposal 1: Establish an explicit statutory obligation to decommission

Imposing an explicit statutory obligation under the CMA for all current and future petroleum permit and licence holders

- 50 I propose to impose an explicit statutory obligation in the CMA that would apply to all current and future petroleum permit and licence holders to:
- a. carry out decommissioning activities in accordance with good industry practice and the applicable health and safety and environmental requirements in other legislation; and
 - b. meet the financial costs of the decommissioning activities, as an integral part of a permit to mine petroleum resources.
- 51 I propose that the legal and financial responsibility for decommissioning rests with all current permit and licence holders, and as such supersedes any existing decommissioning obligations set out in the CMA permit conditions and the Petroleum Act.

- 52 This would ensure clarity and consistency of application for all permit and licence holders and address the greatest risk that arises from the existing, rather than future, oil fields that will soon require decommissioning.

Applying the obligation jointly and severally

- 53 In the case of a permit or licence with multiple participants, the legal and financial responsibility for decommissioning would apply jointly and severally to all current participants in the permit or licence. This means that each permit or licence participant could be held liable for ensuring that decommissioning obligations are met, including responsibility for meeting the total costs of decommissioning.
- 54 As with other joint and several liability regimes, the individual shares of financial responsibility would be a commercial matter and would be determined and arranged for among permit participants as they see fit.
- 55 Furthermore, permit and licence holders would be required to undertake and fund their decommissioning activities prior to permit expiry, surrender or revocation. If the permit were to be revoked or surrendered, the permit holder would not be released from its obligation to undertake and fund decommissioning even if that obligation was not yet due under the permit work programme.

Extending the obligation to former permit holders in the case of a transfer

- 56 I further propose that the legal and financial responsibility for decommissioning extends to a former permit holder, in the case of a transfer, as is the case in the UK. This would mean that a former permit holder will continue to be held jointly and severally liable for decommissioning notwithstanding that they have transferred their permit interest to another entity.
- 57 Recognising that it would not be appropriate to hold the former permit holder responsible for decommissioning infrastructure that they have neither installed nor used, their liability will be limited to decommissioning infrastructure installed before the transfer has taken place. The obligation on the former permit holder would apply only to the extent that the current permit holder (the transferee) fails to undertake and fund decommissioning.
- 58 The UK approach is designed to prevent situations where a permit holder transfers its interests to another entity to avoid decommissioning obligations and/or costs, with no consideration or concern as to whether the transferee has financial capacity to ensure that decommissioning is carried out. I consider this to be an important risk mitigation measure, and note that the value of the risk to the former permit holder would be capitalised into the purchase price of the transfer. This will help mitigate the impact on the former permit holders.

Including a new CMA offence provision to support the explicit obligation

- 59 I further propose that the statutory obligation to undertake and fund decommissioning be accompanied by an offence provision under the CMA, with the appropriate defence provisions being developed during drafting of the legislation. Failure to comply with the statutory obligation to undertake and fund decommissioning would attract civil pecuniary penalties of up to \$500,000 for individuals and up to \$10 million for a body corporate. This is consistent with the penalty framework for breach of Part 2 of the Commerce Act 1986 and the amendments to the Overseas Investment Act 2005.

Proposal 2: Provide for effective monitoring and informed regulatory oversight

Enabling periodic financial capability assessments to take place

- 60 I propose to empower the regulator to conduct periodic financial capability assessments over the life of a permit. This would enable the regulator to identify current or emerging risks to decommissioning not being adequately provided for by permit and licence holders. Having identified such risks, the regulator would then be in position to consider taking preventative measures (e.g. by requiring financial security to be established for decommissioning purposes) as outlined further below.
- 61 Ongoing monitoring and regulatory oversight would also strengthen permit and licence holders' commercial incentives to provide for decommissioning at early stages of project development and to reassess their decommissioning options and cost estimates on an ongoing basis, including as part of the overall field development plans.
- 62 To be effective, assessments need to be based on reliable information and conducted at a frequency sufficient to provide a reasonable assurance of permit and licence holders' ability to undertake and fund decommissioning. Regulation making powers will stipulate the scope of information requirements, along with the frequency of periodic financial capability assessments.

Ensuring reliable information base to inform financial capability assessments

- 63 My preferred approach is for the regulations to stipulate the minimum necessary requirements, supported by further information gathering powers and guidance for permit holders.
- 64 Setting minimum requirements in regulations would keep the compliance costs down for the majority of permit and licence holders for whom this information will be sufficient to enable the regulator to undertake the assessments. In circumstances where the minimum information requirements do not provide an adequate information base, further more targeted information can be gathered to fill the gap.
- 65 The onus would be on the permit holders to demonstrate, and for the regulator to assess the validity of, their ability to meet the decommissioning obligations satisfactorily.

Establishing the frequency of the periodic financial capability assessments

- 66 I propose that the regulations stipulate the indicative time-bound intervals (e.g. every three or four years) for periodic financial capability assessments. However, the regulator would have the flexibility to conduct out-of-cycle assessments (e.g. annually) or defer a regular assessment (e.g. by a year or two) depending on the project size, timeframes and levels of risk and complexity associated with individual decommissioning activities.
- 67 This would provide for a risk-based approach to monitoring and enable the regulator to establish an adequate case-by-case monitoring scheme, whereby higher risk projects would be subjected to higher levels and more frequent monitoring and regulatory oversight.
- 68 If, when assessed, it was found that a permit or licence holder did not have sufficient capability to carry out and fund its decommissioning obligations, a range of compliance and enforcement actions would be available (including requiring financial security to be established or increased, as set out in below).

Proposal 3: Ensure adequate financial security is provided for decommissioning

Requiring financial security to be established by permit or licence holders

- 69 I propose that the regulator be empowered to require permit and licence holders to establish and provide for adequate financial security to discharge their decommissioning obligations, if and when and of a type and financial value as the regulator deems necessary.
- 70 I propose that financial security be sought from the permit or licence holder as a whole, rather than any individual participants in a permit or licence, and would stay with the permit or licence in case of a transfer of a permit or licence participant.
- 71 This is consistent with the joint and several liability approach, and would mean that the value of the financial security is incorporated into the value of the permit. It could therefore be recovered by the transferor from the transferee as part of the purchase price for the permit, and shared appropriately among the permit participants based on their commercial arrangements.
- 72 The financial security requirement would be determined (and could be updated periodically throughout the life of the permit) by the regulator to reflect the current and emerging risks to permit and licence holders' ability to undertake and fund their decommissioning obligations when they fall due. The regulator would have the flexibility to also take into account other matters, such as the permit holder's financial strength and compliance history.
- 73 Non-compliance with the financial security requirements would be grounds for the regulator to take enforcement action, including using the additional enforcement tools as outlined below.

Determining the type of financial security required

- 74 Types of financial security, often required in other comparable jurisdictions and sectors, tend to include, but are not limited to: insurance, bank or another financial institution's guarantees, escrow accounts or deposits as security with a financial institution, on-demand performance bonds, an indemnity or other surety, a letter of credit from a financial institution, or a mortgage.
- 75 These types of financial security instruments tend to be sufficiently liquid, allowing permit and licence holders to draw on their financial assurance at the time that costs, expenses or liabilities are likely to arise. Some can also provide for the security to be payable to the Crown on demand in the event or high risk of company default.
- 76 To guide the regulator's exercise of the discretionary power, regulations will stipulate the relevant decision-making criteria, range of potential financial security instruments that may be employed, and the key processes and procedures that would need to be followed to determine the specific case-by-case requirements.

Exploring options for establishing a dedicated decommissioning fund

- 77 I would like to seek guidance from Cabinet on whether we should explore options for establishing a dedicated decommissioning fund, as is currently being considered in Australia, to further manage the fiscal risk for the Crown.
- 78 A decommissioning fund, which accumulates permit and licence holders' compulsory monetary contributions over time, would compel permit and licence holders to periodically contribute funds, in proportion to their permits' estimated decommissioning costs, risks and timing, to a KiwiSaver-type fund. Access to the fund would be allowed only as a decommissioning phase approaches, and only to cover decommissioning costs. The Crown would also be able to access the fund to undertake the decommission work if the permit holder defaults on its obligations.
- 79 Alternatively, rather than a dedicated decommissioning fund for each permit or licence, an industry-wide levy-funded, ACC-type, decommissioning fund could be established to cover the costs of decommissioning in the event of individual permit holders' default.
- 80 Both options would necessarily involve an element of compulsion and represent a departure from the risk-based approach to requiring financial security to be established only if and when necessary. They will require careful design considerations, impact analysis and further industry consultation. This work could take place while other amendments are being drafted, and potentially added to the package of proposals ahead of seeking Cabinet's approval for introduction.

Proposal 4: Expand the current enforcement toolbox

81 I propose to introduce additional enforcement powers by enabling the regulator to accept enforceable undertakings and issue enforceable compliance notices. These will be accompanied by the relevant offence and penalties provisions, with the appropriate defence mechanisms being developed during drafting of the legislation. I also propose to include an authority to develop an infringement offence scheme in regulations. These tools will be available to the regulator to use across all types of potential breaches of the CMA provisions, including decommissioning-related ones.

Accepting enforceable undertakings

82 The power to accept an enforceable undertaking, following a contravention of the CMA requirements, provides an alternative to prosecution, as it allows a permit holder to voluntarily enter into a binding agreement with the regulator. Enforceable undertakings allow the parties to agree actions that are wider and more tailored than those that a court might impose, thus allowing bespoke solutions that address breaches in a proportionate manner.

83 Breaches of the terms of enforceable undertakings are directly enforceable by application to the court. The maximum penalty would be set at \$200,000, which is broadly in line with the maximum penalties provided for other breaches of the CMA, and other legislation. I consider that this level of penalty strikes the right balance between the deterrent value of the penalty and the incentives on a permit holder to bear the risk of the cost of proceedings.

Issuing compliance notices

84 A compliance notice is a formal notification from a regulator that states that the regulator has reasonable grounds to believe that there is a level of non-compliance, specifies exact requirements that the regulator believes are not being met, stipulates specific actions to address the non-compliance, and sets firm deadlines by which these actions must be completed. The court is able to direct the content of the compliance notice to be either complied with, overturned, or modified as the courts see fit.

85 Failure to comply with a compliance notice would be made an offence under the CMA and attract a maximum penalty of \$200,000, by application to the court. As with the proposed maximum penalty for breaches of enforceable undertakings, this is broadly in line with the maximum penalties provided for other breaches of the CMA, and other legislation.

86 Ability to issue compliance notices would allow greater flexibility for the regulator to address mid-level non-compliance, improve incentives to comply, and allow for a more cost-effective regulatory response.

Authorising an infringement offence scheme to be developed in regulations

87 An infringement offence scheme provides an administratively efficient method of encouraging compliance with the law by imposing a set financial penalty

following relatively minor breaches of the law. It effectively enables the enforcement officer to issue infringement fees where there are reasonable grounds to believe that there has been a clear, relatively low-level, breach (such as the failure to file an annual royalty return or annual summary report by the due date).

- 88 I propose to set the maximum fee to \$1,000 for an individual and \$3,000 for a body corporate, per infringement. The detailed design of an infringement offence scheme would be set in regulations, as is the case with other regulatory regimes, and in line with guidance issued by the Ministry of Justice. The regulations would specify such provisions as the form of the infringement notice, the specific action or omission constituting an infringement offence, and the specific penalty levels for each infringement offence.

Proposal 5: Provide for minor and technical improvements

- 89 I propose to make a number of minor and technical improvements to support an effective implementation of the main proposals in this paper and further strengthen the enforcement and transparency provisions. These proposals include: introducing an additional offence and penalty provision, clarifying the record keeping requirements, and enabling proactive release of records and reports.
- 90 I also propose additional amendments to improve the general administration and operational efficiency of the CMA regime, thus enabling the regulator to channel its resources to their highest value use. These proposals include: removing the requirement to annually re-assess the tier status of mineral permits, and classifying all minerals prospecting permits as Tier 2.

Introducing an additional offence and penalty provision

- 91 I propose to strengthen the incentives for non-permit holders (such as ex-permit holders or other affected parties) to comply with the regulator's information requests by making non-compliance an offence under the CMA.
- 92 The regulator is currently able to require information from any person for the purposes of administering the CMA. However, while it is an offence (with a corresponding financial penalty) for a permit holder not to comply with such requirement, a failure to comply by non-permit holders is not an offence. This means there can be little to no incentive for non-permit holders to supply relevant information and no ability for the regulator to enforce compliance.
- 93 The information gap can be significant and may at times inhibit the regulator's ability to detect, investigate and incentivise compliance, e.g. where a non-permit holder may hold information relevant to an investigation of a permit holder, or where a person has never been a permit holder and is illegally mining Crown-owned minerals.

- 94 Failure to respond to an information request is often a low-level breach, and does not generally represent serious or reckless offending. I therefore propose to set the maximum penalty at \$20,000, or \$2,000 per day for an ongoing offence, which is in line with similar penalties in the CMA.
- 95 I note that this is the maximum penalty level, which provides an upper limit for the courts to determine the level of actual penalty based on the individual circumstances.

Clarifying existing record keeping requirements

- 96 I propose to clarify existing record keeping requirements in the CMA by providing for a specific definition of the term “records” as it applies to permit holders’ record keeping requirements. I also propose to introduce a new regulation-making power to further specify the details of the record keeping requirements in regulations, if necessary.
- 97 There is currently a requirement for permit holders to keep “detailed records and reports” for a number of years. However, there is uncertainty about the scope and measures of adequacy in relation to these record keeping requirements. This has in the past prevented the regulator from obtaining access to financial information (such as financial records), as well as the documents and calculations that feed into creating this information.
- 98 I propose to clarify the CMA’s record keeping requirements by drawing on the provisions in the Tax Administration Act 1994 and building in some sector specific requirements, including decommissioning-related information.
- 99 In addition to these generic record keeping requirements, further specific financial information requirements would be added, drawing on the provisions of the Financial Reporting Act 1993, to support the regulator’s ability to conduct informed financial capability assessments.

Enabling proactive release of records and reports

- 100 Under the current CMA provisions, the regulator must make certain information (collected from permit holders) available upon request, provided the stipulated non-disclosure periods have passed. The information includes reports on exploration activities undertaken during the permit duration, lithological and analytical data, and feasibility studies.
- 101 I propose to amend the CMA to specifically allow proactive release of this information (even in the absence of a request), once the relevant non-disclosure periods have passed. This will enhance the public’s ability to access this information.

Removing the requirement to annually re-assess the tier status of minerals permits

- 102 The CMA currently provides for a two-tier system for all permits. Tier 1 is assigned to high-value or high-risk permits, which include all petroleum permits, underground operations and offshore minerals permits. Tier 2 is for relatively low-value or low-risk permits, which include small business and

hobby minerals operations. Tier 2 permits are managed in a pragmatic streamlined process incurring less time, cost and effort for all parties.

- 103 The tier status of a mineral permit can be determined at any time, but at least annually. This places a disproportional administrative burden, for a relatively low-risk activity. There are currently 854 minerals permits, all of which must have their permit tier status reviewed annually.
- 104 I propose to remove the requirement in the CMA for the tier status of the mineral permits to be determined annually. This will mean that the tier status of a mineral permit will be determined when an application is made for a change in conditions of a permit, or at any other time as determined by the regulator.

Classifying all minerals prospecting permits as Tier 2

- 105 Minerals prospecting permits allow the permit holder to undertake minimum impact activities such as geological mapping, geophysical surveys and hand sampling to identify areas of potential mineral deposits for further exploration. Minerals prospecting permits for gold, silver, coal, iron sand, metallic minerals and platinum group metals are currently classified in the CMA as Tier 1 permits. The remainder, including alluvial gold prospecting permits, are classified as Tier 2 permits.
- 106 I propose to amend the CMA to classify all minerals prospecting permits as Tier 2 permits, regardless of which minerals they are for. Activities under all minerals prospecting permits are minimum impact in nature, and because of that none of the Tier 1 monitoring and reporting requirements can be applied in practice. The proposed reclassification is a minor amendment that will improve the administrative efficiency of the CMA regime, by freeing up the regulator's time and resources to focus on more complex Tier 1 exploration and mining permits that warrant closer scrutiny.

Financial Implications

- 107 Decommissioning costs can be substantial, with hundreds of millions of dollars typically required to decommission offshore infrastructure. These costs are an ordinary component of petroleum field exploration and mining activities, and are expected to be provided for as part of good industry practice.
- 108 The proposals in this paper may impose additional costs on petroleum companies that do not currently follow good industry practice and do not provide for an adequate discharge of their decommissioning obligations. The proposal to extend the decommissioning obligation to former permit and licence holders in the case of a transfer may also increase the cost of transferring late-life assets, potentially pricing out end-of-field-life specialists and resulting in a petroleum field being decommissioned prematurely. In addition, the proposals may result in some increase in compliance costs for all petroleum companies (including those who already follow good industry practice), depending on their existing business systems and practices.

- 109 Petroleum companies may ultimately pass some of the additional costs to the Crown (through reduced royalties and taxes) and/or regional economies (through reduced investment and employment). The extent of these potential flow-on impacts is difficult to estimate. It would depend on whether the alternative uses of permit and licence holders' funds (e.g. reinvestment in business operations, repayment of debt, or distributions to shareholders) could generate higher rates of return; and therefore, requiring those funds to be set aside for decommissioning purposes could lead to opportunity costs.
- 110 Estimating these opportunity costs would require complex future scenario modelling. There are high levels of uncertainty associated with the many international and domestic factors that drive petroleum companies' short and long term rates of return. These include the cyclical nature of the oil and gas industries, fluctuations in global and domestic commodity prices, and other changing conditions of the world economy, such as the economic impact of the global Covid-19 response. When considered in combination, these factors may compound or offset each other. Given these levels of uncertainty, scenario modelling is unlikely to provide reliable insights into how the petroleum sector as a whole, and permit and licence holders individually, may perform in the future.
- 111 MBIE, as the regulator, will incur additional administration, monitoring, enforcement, and litigation costs. The scope of MBIE's new functions will be developed as part of the future design of the supporting regulations. It is therefore difficult to accurately estimate the cost of these proposals at this stage. Confidential advice to Government

[Redacted text block]

- 112 Confidential advice to Government
- [Redacted text block]

Legislative Implications

- 113 The policy decisions in this paper will require legislative change to be progressed through a Bill to amend the Crown Minerals Act 1991. Confidential Confidential advice to Government the 2020 Legislation Programme.

Impact Analysis

Regulatory Impact Statement

- 114 The regulatory impact analysis requirements apply to the proposals in this paper and a Regulatory Impact Assessment ('RIA') has been prepared and is attached.
- 115 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Climate Implications of Policy Assessment

- 116 The Ministry for the Environment has been consulted and confirms that the CIPA requirements do not apply to this proposal as the direct emissions impact does not exceed the threshold for significance.

Population Implications

- 117 There are no population implications arising from the proposals in this paper.


Human Rights

- 118 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

- 119 The following departments were consulted on this paper: the Treasury, the Department of Conservation, Ministry for the Environment, Ministry of Foreign Affairs and Trade, Ministry of Transport, Ministry of Justice, Ministry for Primary Industries, Office for Māori Crown Relations - Te Arawhiti, Land Information New Zealand, Environmental Protection Authority, Maritime New Zealand, and WorkSafe New Zealand. The Department of Prime Minister and Cabinet has been informed. The Parliamentary Counsel Office has also been consulted on the legislative implications of the policy proposals.

Legal professional privilege



Ministry of Justice comment

- 123 The Ministry of Justice guides against the use of continuing penalties as they carry the potential for large, indeterminate fines as there is no set maximum. Such penalties could lead to disproportionately high penalties for the conduct that the offence captures. Further, these penalties are undesirable as they undermine certainty and clarity of law in that an individual or entity is not clear as to what they may be liable to.

- 124 The Ministry of Justice notes that the use of a continuing penalty in the proposal to strengthen the incentives for non-permit holders to comply with the regulator's information requests is attached to a criminal offence that carries a conviction and a fine is attached to a criminal offence that carries a conviction and a fine. Criminal offences carrying conviction can have a serious impact on individuals, and so the use of continuing penalties as part of this offence is considered disproportionate.
- 125 I consider that continuing penalties can serve an important purpose, namely providing an additional incentive to correct non-compliant behaviour in a timely manner. However, I acknowledge the Ministry of Justice's concerns and propose to direct officials to explore other enforcement tools that could be used to provide such additional incentives, during the legislative drafting stage. In particular, I consider that giving the courts the ability to grant injunctions could provide for similar, if not better, enforcement outcomes. An injunction is a court order that restrains a party from doing a certain act (or, more rarely, which requires them to do a certain act), which the court may grant on application by the regulator or any other person. Injunction powers are common in other regimes regulating commercial practices, such as the Financial Markets Conduct Act 2013 and the Commerce Act 1986, and could be a useful addition to the CMA enforcement toolbox.

Public consultation

- 126 The high-level proposals in this paper were subject to a public discussion document, on which 167 written submissions were received. Submitters included petroleum and minerals companies, industry groups and associations, environmental groups, iwi and hapū, local government agencies, research institutes, and the general public.
- 127 There was general support for the high-level proposals, including from iwi and hapū. Officials have further tested the proposals with an industry association, and all stakeholders will have an opportunity to provide input on detailed design considerations through the upcoming legislative change process. The regulation making process will also provide another opportunity for industry, iwi, and general public engagement, regulatory impact analysis, and Cabinet decision making.

Communications

- 128 I intend to publicly announce decisions on this paper and issue a press release alongside this announcement, in the week following Cabinet approval.

Proactive Release

- 129 Following public announcements on policy decisions, I intend to release this paper proactively, subject to redaction as appropriate consistent with the Official Information Act 1982.

Recommendations

The Minister of Energy and Resources recommends that the Committee:

- 1 **note** that in November 2019, the Cabinet Economic Development Committee agreed to the release of the discussion document *Review of the Crown Minerals Act 1991* [DEV-19-MIN-0295], which (among other things) identified the need to strengthen the regulation of petroleum sector's financial preparedness for the upcoming decommissioning activities and to expand the current enforcement toolbox under the Crown Minerals Act 1991;
- 2 **note** that in February 2020, the Cabinet Business Committee agreed to fund the decommissioning of the Tui oilfield infrastructure, as the operator of the Tui oilfield, Tamarind Taranaki Ltd, has gone into receivership and liquidation and lacks the assets necessary to meet the decommissioning costs [CBC-20-MIN-0008];
- 3 **note** that it is timely to strengthen the provisions of the Crown Minerals Act 1991 to ensure that they are sufficiently robust to help mitigate the risk for the Crown and other third parties of potentially having to undertake and fund decommissioning in the future, and to expand its current enforcement toolbox;
- 4 **note** that the proposals in recommendations 9 to 31 below are designed to work as a package to create a robust outcomes-focused risk-based regulatory framework that would impose discipline and strengthen the incentives for petroleum companies to undertake and fund their decommissioning activities, in a consistent and proportionate manner;
- 5 **note** that the proposals will complement the workings of the other regulatory regimes, responsible for managing different aspects of decommissioning activities, such as the decommissioning planning process under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, thus further strengthening the overall regulatory system for decommissioning in New Zealand;
- 6 **note** that the proposals form an enabling legislative basis for more detailed requirements to be provided for in regulations, the detailed design of which will be subject to future Cabinet decisions, informed by further consultation with stakeholders, and regulatory impact analysis;
- 7 **note** that implementation of the proposals in recommendations 9 to 31 below will require MBIE to perform new regulatory functions, the scope, cost and funding sources for which will be considered as part of the policy development process for the supporting regulations, subject to future Cabinet decisions;
- 8 **note** that the remaining areas of the Crown Minerals Act 1991 Review are being progressed in parallel and will be reported back to Cabinet in due course;

Establishing an explicit statutory obligation to decommission

- 9 **note** that there is currently no explicit statutory obligation on permit holders to undertake and fund decommissioning activities under the Crown Minerals Act 1991, and therefore little statutory guidance, principles or a clear mandate to convey the Crown's expectations in relation to decommissioning requirements that can be stipulated in permit or licence conditions;
- 10 **note** that the Petroleum Act 1937, which was superseded by the Crown Minerals Act 1991, did contain an explicit decommissioning obligation and continues to have an effect in relation to licences issued under the Petroleum Act 1937;
- 11 **agree** to amend the Crown Minerals Act 1991 to introduce an explicit statutory obligation for all current and future petroleum permit and licence holders to:
- 11.1 carry out decommissioning activities in accordance with good industry practice and the applicable health and safety and environmental requirements in other legislation; and
 - 11.2 meet the financial costs of the decommissioning activities, as an integral part of their mining permit;
- 12 **agree** that the statutory obligation to undertake and fund decommissioning will supersede any existing decommissioning obligations set out in permit conditions and the Petroleum Act 1937;
- 13 **agree** that, in a case of the permit or licence with multiple participants, the statutory obligation to undertake and fund decommissioning will apply jointly and severally to all current participants in the permit or licence;
- 14 **agree** that, in a case of a permit transfer, a former permit holder (the transferor) will continue to be held jointly and severally liable for undertaking and funding decommissioning of petroleum infrastructure installed before a transfer has taken place, but only to the extent that the current permit holder (the transferee) fails to undertake and fund decommissioning of that infrastructure;
- 15 **agree** that failure to comply with the statutory obligation to undertake and fund decommissioning could result in a civil pecuniary penalty of up to \$500,000 for an individual and up to \$10 million for a body corporate;

Providing for effective monitoring and informed regulatory oversight

- 16 **note** that the regulator lacks statutory powers to undertake periodic financial capability assessments and access sufficiently detailed and up to date planning and financial information, which limits the regulator's ability to identify current and emerging risks to decommissioning not being adequately provided for by the permit and licence holders;

- 17 **agree** to amend the Crown Minerals Act 1991 to empower the regulator to conduct periodic financial capability assessments over the life of a petroleum permit or licence;
- 18 **agree** that the regulation making powers will stipulate the scope of information requirements to be set in regulations along with the frequency of periodic financial capability assessments;
- 19 **agree** that the development of regulations will be guided by the principle of ensuring sufficient flexibility and proportionately, rather than being overly prescriptive;

Ensure adequate financial security is provided for decommissioning purposes

- 20 **note** that the regulator lacks statutory powers to require permit and licence holders to maintain adequate financial security for decommissioning purposes, which limits the regulator's ability to take preventative measures to help mitigate against potential lack of financial preparedness for the upcoming decommissioning activities by permit and licence holders;
- 21 **agree** to empower the regulator to require petroleum permit and licence holders to establish and maintain adequate financial security to discharge their decommissioning obligations, if and when and of a type and a financial value the regulator deems necessary, based on individual circumstances and risk profiles;
- 22 **agree** that, consistent with the joint and several liability approach in recommendation 13 above, financial security will be assigned to the permit as a whole, rather than any individual participants in a permit;
- 23 **agree** that regulations will stipulate the decision-making criteria, range of potential financial security mechanisms, and other relevant processes and procedures for requiring financial security to be established and maintained for decommissioning purposes, subject to future Cabinet decisions;
- 24 **note** that options to establish a dedicated decommissioning fund could be explored, but they would represent a departure from the risk-based approach to requiring financial security to be established and maintained only if and when necessary;

Either:

- 25 **agree** to direct officials to explore options for establishing a dedicated decommissioning fund, with a view to potentially adding the preferred option to this package of policy proposals ahead of seeking Cabinet's approval for introduction;

OR

- 26 **agree** not to explore options for establishing a dedicated decommissioning fund at this stage;

Expanding the current enforcement toolbox

- 27 **note** that the effectiveness of the regulator's current enforcement tools is limited, and additional enforcement tools are needed to ensure that timely and proportionate enforcement action can be taken, if and when necessary, for decommissioning related and other types of breaches under the Crown Minerals Act 1991;
- 28 **agree** to expand the regulator's enforcement toolbox under the Crown Minerals Act 1991, in relation to all types of breaches, including decommissioning related ones, by:
- 28.1 enabling the regulator to accept enforceable undertakings and to seek court orders in response to a breach of an undertaking;
 - 28.2 introducing a pecuniary penalty for a breach of an enforceable undertaking, with the maximum penalty level set at \$200,000 per breach;
 - 28.3 enabling the regulator to issue compliance notices and to seek court orders in response to a breach of the terms of a notice;
 - 28.4 introducing a pecuniary penalty for a breach of a compliance notice, with the maximum penalty level set at \$200,000 per breach;
 - 28.5 enabling an infringement offence scheme to be developed in regulations and specify such provisions as the form of the infringement notice, the specific action or omission constituting an infringement offence, and the specific penalty levels for each infringement offence; and
 - 28.6 setting the maximum infringement fee to \$1,000 for an individual and \$3,000 for a body corporate, per infringement;

Providing for minor and technical improvements

- 29 **note** that a number of minor and technical amendments are needed to support an effective implementation of the recommendations above and to improve the general administration of the Crown Minerals Act 1991;
- 30 **agree** to make minor and technical changes by:
- 30.1 making it an offence for non-permit holders not to comply with the regulator's requests for information, which non-permit holders are required to provide under the Crown Minerals Act 1991;
 - 30.2 introducing the maximum penalty for non-permit holders' non-compliance with the regulator's information requests at \$20,000 per offence or \$2,000 per day for an ongoing offence;
 - 30.3 clarifying existing record keeping requirements by specifying their scope and building on the relevant definitions of 'records' in the Tax

Administration Act 1994 and the Financial Reporting Act 1993, and enabling regulations to be made in provide for further specificity, if necessary;

- 30.4 specifically permitting proactive release of records and reports required under sections 90(1) to 90(3) of the Crown Minerals Act 1991;
 - 30.5 removing the requirement to re-assess the tier status of minerals permits annually; and
 - 30.6 classifying all minerals prospecting permits as Tier 2;
- 31 **agree** to direct officials to explore the option of introducing general injunction powers into the Crown Minerals Act 1991, with a view to adding these powers to the package of policy proposals ahead of seeking Cabinet's approval for introduction;

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Legislative drafting

- 36 **note** that the recommendations above will be given effect through the Crown Minerals Amendment Bill, Confidential advice to Government
- 37 **invite** the Minister of Energy and Resources to issue drafting instructions to the Parliamentary Counsel Office to give effect to the recommendations above; and
- 38 **authorise** the Minister of Energy and Resources to make decisions consistent with the recommendations above and on any minor or technical matters that may arise during the legislative drafting process.

Authorised for lodgement

Hon Dr Megan Woods

Minister of Energy and Resources

Appendix: High-level estimates of costs and timeframes for existing permit and licence holders' decommissioning of existing offshore petroleum fields

New Zealand currently has five offshore petroleum mining operations operated by existing permit and licence holders, with varying estimated decommissioning costs and timeframes. Commercial Information

[Redacted]

Commercial Information

[Redacted]