In Confidence

OFFICE OF THE MINISTER
OF ENERGY AND RESOURCES

The Chair
Cabinet Business Committee

Crown Minerals Act review: further amendments

Proposal

1 This paper recommends some further amendments to the Crown Minerals Act 1991.

Executive Summary

2 On 25 July 2012, the Cabinet Economic Growth and Infrastructure Committee (EGI) agreed to recommendations to amend the Crown Minerals Act 1991 (the Act) and the related minerals programmes [EGI Min (12) 15/4].

3 The process of drafting the Bill has identified the need for further amendments that are more than minor and technical for which Cabinet approval is sought before I submit the Crown Minerals (Permitting and Crown Land) Bill (the Bill) to the Cabinet Legislation Committee (LEG) later this month. The proposed additional changes are:

a. Simplifying the processes for revoking permits. The simplified procedures limit the current scope that a permit holder has to avoid revocation.

b. Empowering the Minister to revoke a permit if not satisfied, following a change of ownership control of a participant in a permit, that the company remains capable of meeting its obligations in relation to the permit (with respect to work programmes and payment of royalties).

c. Tightening up requirements to comply with the conditions of a permit by removing (i) the current requirement for the permit holder to have "substantially complied" with the conditions of a permit and (ii) the exemption and excusal provisions, before consent can be given to a change of conditions.

d. Requiring Ministerial consent to 'dealings' (sales agreements for petroleum or minerals) only if they are not at arms-length or not on a fair market basis.

e. Making the status of the minerals programmes more consistent with current legislative requirements. The minerals programmes set out how the Minister of Energy and Resources, the Chief Executive of the administering department (Ministry of Business, Innovation and Employment) and New Zealand Petroleum &Minerals (NZP&M) will interpret and apply the Act.

f. Providing for royalty requirements to be set out in regulations rather than minerals programmes.

g. Reversing a previous decision to add an explicit requirement that the Minister must consider international obligations before granting a permit.

4 This paper also discusses further feedback received from the Iwi Leader's Forum on the draft Bill and highlights how these matters are being addressed.

Background

5 On 20 February 2012, Cabinet agreed to the release of a discussion paper titled *Review of the Crown Minerals Act 1991 Regime*[CAB Min (12) 5/7].On 25 July 2012, EGI agreed to recommendations to amend the Act and the related minerals programmes [EGI Min (12) 15/4].

6 Several new or revised policies are proposed for the Bill and the minerals programmes. These have emerged during the Bill drafting process.

7 On 23 August 2012 officials met with selected industry and iwi representatives to discuss the proposed Bill and the matters covered in this paper.[1] Where appropriate, comments by industry representatives have been taken into account in the preparation of this paper. The iwi representative identified substantive concerns with the drafting of the Bill which are commented on in a later section.

Proposed new or amended policy provisions

Revocation

8 The current revocation procedures in section 39 of the Act for breaches of the conditions of prospecting, exploration and mining permits are cumbersome, and resource and time-consuming. The procedures include rights of appeal (merits review) to the High Court, and for the permit to remain in effect pending the outcome of any appeal.

9 These provisions are not fit for purpose under the revised regime which places greater weight on delivery of key work programme elements under permits. The current processes deter revocation proceedings for non-compliance with permit conditions. This can delay freeing-up land for re-allocation to new operators and investors for extended periods. In the last four years, only three permits have been revoked for non-compliance with work programme conditions, of which two were unsuccessfully appealed.

10 The Australian approach to revocation[2] is simpler and more effective and provides stronger incentives for parties to comply with the conditions of permits. I propose that our approach follows the Australian model, as follows:

a. The Act set out the following specific grounds for revocation:

   i. Contravention of a condition of a permit, the Act or the regulations.

   ii. Non-payment of monies owing to the Crown 90 days after the due date.

b. The Minister of Energy and Resources provides a Notice of Intention to revoke the permit with reasons.

c. The permit holder has 20 working days to remedy the breach or to make any comments which it wants the Minister to consider before making a final decision.

d. Revocation by notice if the Minister decides to revoke the permit.

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[1] The industry bodies represented were Straterra, Petroleum Exploration and Production Association of New Zealand (PEPANZ) and the New Zealand Minerals Industry Association (MIA). A technical advisor to the Iwi Leaders Forum was also present.

[2] Set out in the Offshore Petroleum and Greenhouse Gas Storage Act 2006. Decisions are taken jointly by the Federal and relevant State ministers (called the Joint Authority).

11 The Australian regime does not provide any right of appeal to a court on the Minister's decision, although judicial review is available. Judicial review provides a remedy (normally requiring the decisions to be made again) if the Minister incorrectly interprets or applies the law, e.g. by taking into account irrelevant considerations, not taking into account relevant considerations or not following correct procedures.

12 However, I do not think that we should go as far as the Australian regime by not providing for any appeal rights. In my view, it would be more appropriate to continue to provide appeal rights but limit them to appeals on points of law. This is consistent with the provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill which limits appeals on decisions by the Environmental Protection Authority to points of law. Limiting appeal rights to points of law will be opposed by industry.

13 Removing merits appeals reduces the scope for permit holders to delay revocation and tie up minerals acreage. Principles of natural justice would be retained by ensuring permit holders have the right to set out their views before a revocation decision is made.

14 Revocation would remain a last resort. The Minister and NZP&M will continue to prefer to work with the permit holder to ensure it complies with its permit conditions (particularly work programmes). However, more effective revocation processes will improve incentives for permit holders to comply with the conditions of their permits.

Criteria for changes to conditions of permits

15 As set out in the discussion paper, it is proposed that compliance with the conditions of permits be more actively managed (e.g. through annual work programme meetings) and that processes and criteria for changes to permit conditions be tightened and made more explicit. This is particularly important where exploration permits have been allocated by competitive tender on the basis of stage work programme bids. The integrity of the bidding process is undermined if winning bidders can subsequently obtain a change to their committed work programmes in other than exceptional circumstances.

16 At present, when considering changes to permits, the Minister needs to be satisfied that the permit holder has "substantially complied" with the conditions of the permit when granting approval for the change. This provides undue scope for dispute and is no longer appropriate in the new regime.

17 I propose that the current requirement for the permit holder to have "substantially complied" with the conditions of a permit in section 38 of the Act, along with the exemption and excusal provisions in section 2(3), be deleted. Instead, the Bill will describe the procedural steps involved in submitting and considering changes to conditions, with detailed criteria for consenting to changes in permit conditions set out in the minerals programmes. These criteria will include matters such as force majeure events, inability to obtain a drilling rig despite best efforts, and delays in obtaining consents under other legislation where the delay is not due to failure or default on the part of the permit holder.

Transfers and dealings

18 Section 41 of the Act currently requires the Minister of Energy and Resources to give consent to transfers of an interest in a permit to another person. The purpose of this is to ensure that the transferee has the financial and/or technical capability to meet the obligations of the permit (e.g. to meet work programme commitments and pay fees and royalties). Under section 41, the transfer has no legal effect unless the Minister consents to it.

19 Similar considerations need to apply to a 'change of ownership control' of a company that holds an interest in a permit (or of a parent company providing a financial guarantee) to ensure that the company continues to have the financial capability to meet the obligations of the company under the permit. I propose that if the Minister is not satisfied that the company, under new ownership, continues to have the capability to meet the obligations set out in the permit, the Minister may revoke the permit.

20 Section 41 also requires the Minister to consent to 'dealings' (sales agreements for petroleum or minerals) which affect the proceeds of production, because of the potential effect on royalty liabilities.

21 I previously proposed that for certain classes of agreements, consent will be deemed to be granted unless the Minister advises the permit holder otherwise. Based on further consideration and industry consultation, I propose that the provision is streamlined to require the Minister's consent only to 'dealings' which are not at arms-length or not on a fair market basis. This significantly reduces the volume of dealings that will need to be considered whilst ensuring those which are directly relevant to Crown's revenue continue to be captured.

Status of minerals programmes

22 Minerals programmes are extensively used and referred to by the industry, NZP&M and other interested parties. However, they are a unique instrument: they have legal force; are issued by the Governor-General by Order in Council on the recommendation of the Minister; are binding on the Minister; and contain some provisions (such as requirements to pay royalties) that more conventionally appear in primary legislation or regulations.

23 The following is proposed to ensure the minerals programmes are more compatible with the provisions of the Legislation Bill:

a. The royalty provisions of the current minerals programmes will be made into regulations (with appropriate empowering provisions in the Act).

b. New minerals programmes and changes to minerals programmes will be issued by the Minister.

c. The minerals programmes will be a regulation for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989.[3]

International obligations

24 Many international obligations address health and safety and environmental (HSE) matters and are already picked up in existing legislation (for example the Maritime Transport Act 1994). In order to take due account of further relevant international obligations (while not duplicating the HSE related obligations) it was previously agreed the Act be amended to require a narrow consideration of relevant international obligations when the Minister is granting a permit.

[3]If the minerals programmes were subject to the Acts and Regulations Publication Act 1989, the Parliamentary Counsel Office would need to draft them. This is not considered appropriate given the dual nature of minerals programmes, which set out how the Minister will interpret and apply the provisions in the Act and act as a prospectus for Crown minerals. The minerals programmes are not currently subject to the Acts and Regulations Publication Act 1989.

25 Further consideration has now been given to this issue. My view is that instead of considering international obligations when granting permits, the relevant obligations should be given effect where most appropriate, e.g. at the block selection stage, or when making decisions on exclusion of protected land. For example, international obligations relating to outer continental shelf revenues are best dealt with before deciding to proceed with an outer shelf block offer. This more targeted approach ensures obligations are considered where they can be best given effect.

26 [Legally privileged]

Iwi requests for further amendments to the draft Bill

27 Through the consultation process, iwi advisors have reiterated a number of key issues remain outstanding which require further engagement. These include Crown ownership of minerals; the Crown's right to be decision-maker; and the right of the Crown to collect royalties. As previously stated, these matters are outside the scope of the review.

28 Technical advisors working on behalf of the Iwi Leader's Forum have expressed their disappointment that the Bill does not include legislative requirements for iwi involvement in a number of processes.

29 These matters were canvassed in the previous Cabinet paper and my view remains that they are in essence about improving how the Crown implements the Act and minerals programmes, rather than the Act itself. As such, these can be addressed through actions the Crown can take at an operational level, and in improving how engagement with industry is facilitated.

30 The areas where the Iwi Leader's Forum suggests changes to the Bill, and comments in relation to each, are described below:

a. Iwi involvement in the Health and Safety and Environmental assessment of permit applicants.

> *The primary considerations in permit award are technical and financial capability of the applicant to deliver a high quality work programme and pay royalties to the Crown. Officials will also consider applicants' health and safety and environmental capability, drawing on expertise across government. Such assessment is best undertaken by those with specific technical expertise.*
>
> *Given the importance of positive local relationships, when awarding permits I expect NZP&M to broker initial engagement between permits holders and local iwi. The Ministry of Business, Innovation and Employment is also working with the industry and iwi to establish best practice guidelines for iwi/industry engagement.*

b. Iwi involvement in the annual work programme meetings between regulators and permit holders.

> *I do not believe that it is appropriate or practical for iwi to participate in the annual work programme meetings. I expect NZP&M to meet regularly with iwi whose rohe overlap allocated permits in order to actively monitor how engagement by permit holders and iwi is progressing. This will also help build more robust relationships between NZP&M and iwi.*

c. Iwi involvement in annual reporting by permit holders to the Crown on iwi engagement.

Cabinet has approved a requirement under the Act for Tier 1[4] permit holders to report annually on the engagement that they have undertaken with iwi. This is reflected in the draft Bill. I intend to make it clear in the minerals programmes that I expect this information to be shared with iwi.

31 In addition, the Ministry will continue to improve its in-house engagement practices. The Ministry will be:

a. Proactively engaging with affected iwi on the planning of blocks for competitive tenders.

b. Engaging with iwi whose rohe overlap with existing permits to hear their views on how activities are progressing.

c. Engaging with the technical advisors from the Oil and Minerals Group under the Iwi Leaders Forum on the preparation of the new minerals programmes.

d. Consulting with iwi on the new minerals programmes.

e. Giving greater weight to Crown Minerals Protocols and other relationship arrangements developed as part of Treaty Settlements when engaging with relevant groups.

f. Working more closely with the Office of Treaty Settlements.

32 Whilst I am confident that these changes have the potential to significantly improve the relationships between the Crown, iwi, and permit holders, the Iwi Leader's Forum consider changes to the Bill the cover the issues described in paragraph 29 above "an absolute minimum" and are therefore likely to remain disappointed with the Bill in its current form.

33 In its report on Wai 796 (Petroleum Claims)[5], the Waitangi Tribunal found there to be systemic breaches of the principles of the Treaty of Waitangi through the entire management regime for petroleum. More specifically, the Tribunal identified significant gaps in the Crown's consultation and engagement processes for Crown minerals.

34 I am confident that the new minerals programmes will improve how the Crown engages with iwi on Crown minerals, without requiring further changes to the Bill or establishing additional processes outside the regime, e.g. establishing a Maori Advisory Committee to provide advice and Maori perspectives directly to the Minister of Energy and Resources in making policy and permitting decisions.

Other matters

35 The Petroleum Exploration and Production Association of New Zealand (PEPANZ)has recently raised a concern about the lack of protection from disruptive actions that is available for seismic survey vessels. PEPANZ notes that this issue has been raised by a number of their members.

[4] Tier 1 operations are high risk high return operations that will be subject to more active permit management. Tier 1 includes all petroleum and coal operations, and any other operations above specified thresholds.
[5] 'The Report on the Management of the Petroleum Resource', Waitangi Tribunal Report 2011.

36 The Continental Shelf Act allows exclusion zones to be designated around fixed structures and associated mobile facilities. It is an offence to enter the exclusion zone. This is likely to be adequate protection for offshore petroleum drilling and production activities. However, such provision does not currently exist for vessels undertaking seismic surveys. The Maritime Protection Legislation Bill might be an appropriate mechanism to add provisions for exclusion zones around seismic survey vessels.

37 I agree that this is an issue worth considering further. I therefore suggest further work be undertaken on this issue by the Minister of Transport and reported back to Cabinet on opportunities to address this issue in the Marine Protection Legislation Bill.

Consultation

38 The following agencies have been consulted on this paper: The Treasury, Ministry for the Environment, Environmental Protection Authority, Ministry of Transport, Maritime New Zealand, Department of Internal Affairs, Inland Revenue Department, Ministry of Justice, Office of Treaty Settlements, Ministry of Foreign Affairs and Trade, Department of Conservation, Ministry for Primary Industries, Te Puni Kōkiri, Crown Law (on international obligations) and the Department of Prime Minister and Cabinet.

Financial Implications

39 There are no financial implications.

Human Rights

40 The Bill will be reviewed by the Ministry of Justice for consistency with the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

Legislative Implications

41 The proposals for new and amended policies in this paper will be incorporated into the Crown Minerals (Permitting and Crown Land) Bill which I intend to submit to the Cabinet Legislation Committee for approval for introduction in September 2012.

Regulatory Impact Analysis

42 Regulatory impact analysis requirements apply to the proposals for simplification and strengthening of revocation procedures.

43 A regulatory impact statement on this matter has been prepared and is attached to this Cabinet paper.

Quality of the Impact Analysis

44 The Ministry's Regulatory Impact Assessment Panel has reviewed the Regulatory Impact Statement (RIS) and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria. The costs and benefits have been assessed, but this is based on qualitative judgements due to the limited empirical information available on the effect of the proposed changes to appeal rights.

Consistency with Government Statement on Regulation

45 I have considered the analysis and advice of my officials, as summarised in the attached Regulatory Impact Statement and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

a. Are required in the public interest

b. Will deliver the highest net benefits of the practical options available, and

c. Are consistent with our commitments in the Government Statement on Regulation.

Publicity

46 I do not propose to make specific announcements on the matters in this Cabinet paper. I will make a general public announcement on the contents of the Bill when it is introduced.

47 There will be a high level of public interest in proposed changes to the Crown Minerals Act regime and associated decisions. I therefore propose to proactively release at an appropriate time:

a. This paper and associated Cabinet decisions.

b. All the submissions received on the discussion paper.

48 Key messages and FAQs will be prepared by the Ministry in support of this release. The release will be subject to consideration of any information that would be withheld if the information had been requested under the Official Information Act 1982.

Recommendations

The Minister of Energy and Resources recommends that the Committee:

1 **note** that on 25 July 2012 the Cabinet Economic Growth and Infrastructure Committee made decisions on proposed amendments to the Crown Minerals Act 1991 and the associated minerals programmes [EGI Min(12) 15/4];

2 **note** that the Crown Minerals (Permitting and Crown Land) Bill is expected to be submitted to the Cabinet Legislation Committee for approval for introduction in September 2012;

Further policy amendments

3 **note** that several further amendments to the Crown Minerals Act 1991 and the minerals programmes are proposed as a consequence of drafting processes;

4 **note** that the Technical Advisors working on behalf of the Iwi Leader's Forum have expressed their disappointment with the draft Crown Minerals (Permitting and Crown Land) Amendment Bill;

5 **note** the concerns expressed by Technical Advisors working on behalf of the Iwi Leader's Forum can be addressed through actions the Crown can take at an operational level, and in improving how engagement with industry is facilitated;

6 **agree** that revocation procedures for permits be simplified, in line with Australian provisions, to:

6.1 allow revocation for contravention of a condition of a permit, the Act or the regulations or non-payment of monies owing to the Crown 90 days after the due date;

6.2 require the Minister of Energy and Resources to provide a notice of intention to revoke to a permit holder, with reasons;

6.3 provide 20 working days for a permit holder to remedy the breach or to make any comments which it wants the Minister of Energy and Resources to consider before making a final decision;

7 **note** that the Australian regime for offshore petroleum does not provide appeal rights against a decision by Ministers to revoke a permit;

8 **agree** that appeal rights on revocation decisions be limited to points of law, in line with the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill;

9 **agree** that a permit may be revoked where the Minister of Energy and Resources is not satisfied that a company with an interest in a permit remains capable of meeting its obligations under the permit following a change of ownership control of the company or of a parent company providing a financial guarantee to the company;

10 **agree** that, as part of a general tightening up of criteria for consenting toa change of conditions to a permit, the following provisions in the Crown Minerals Act 1991 be deleted:

10.1 section 38, which requires a permit holder to have “substantially complied” with the conditions of a permit before consent can be given to a change of conditions;

10.2 section 2(3), which provides exemption and excusal provisions to section 38;

11 **agree** that the Minister of Energy and Resources will only need to consent to ‘dealings’ (sales agreements for petroleum and minerals) which are not at arms-length or not at fair market prices;

12 **agree** that minerals programmes be:

12.1 regulations for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989;

12.2 issued by the Minister of Energy and Resources;

13 **agree** that royalty provisions, which are currently set out in minerals programmes, be made into regulations, with appropriate empowering provisions in the Crown Minerals Act 1991;

14 **agree** that a specific requirement for the Minister of Energy and Resources to consider international obligations before granting a permit is not required;

15 **invite** the Minister of Transport to report back to Cabinet on measures that could be taken to ensure adequate protection from disruptive actions for seismic survey vessels.

Hon Phil Heatley
Minister of Energy and Resources

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