

# Terms of Reference for review of how the non-interference provisions of the Crown Minerals Act are effected

As at 27 February 2019

## PURPOSE

1. This document sets out the parameters for a Review of how the non-interference provisions set out in section 101B of the Crown Minerals Act (the Act) are effected, including the appropriate roles of various agencies for the enforcement of those provisions.
2. The purpose of the review is to recommend an approach as to how MBIE and other agencies might utilise those provisions, and if necessary and relevant, support their enforcement, so that:
  - the provisions of the Act are properly given effect and
  - State Sector entities operate in a manner that is consistent with good regulatory practice, including the guidelines recently released by the SSC on Information Gathering and Public Trust.
3. In particular, the review will focus on recommending an appropriate governance arrangement (including membership) for overseeing the work of MBIE and other agencies related to operationalising and enforcing the non-interference provisions.

## BACKGROUND

### Reason for the review

4. In December 2018, SSC released the report of the *Inquiry into the use of external security consultants by government agencies*. This found that interactions between MBIE (specifically New Zealand Petroleum and Minerals – NZP&M) and Thompson and Clark lacked the necessary objectivity and professional distance. Of relevance to this review, the inquiry noted that:

*“...MBIE’s leadership of ‘Operation Exploration’, a key interagency governance mechanism, did not sufficiently ensure that Thompson and Clark, who were acting on behalf of the oil and gas industry, were kept at an appropriate arm’s length from the operational and planning processes of the government’s enforcement of the Crown Minerals Act 1991. MBIE uncritically adopted the construct of ‘issue motivated groups’ to guide the design of its enforcement function, and this was problematic... This mechanism enabled Thompson and Clark to embed itself as a crucial participant within the regulatory and enforcement function, despite the fact they represented private economic interests. This risked creating at least a perception of conflict of interest and was poor regulatory practice.”*

5. The CE of MBIE has undertaken to review the way in which MBIE is planning and operationalising its responsibilities in relation to the non-interference provisions in the Crown Minerals Act. The review is to include consideration of the governance and membership of “Operation Exploration” (more formally known as the *National Plan for Implementation of the Non-Interference Provisions in the Crown Minerals Act 1991*) and the Mineral Exploration Joint Intelligence Group, which is part of that.

### Non-interference provisions

6. The non-interference provisions (sections 101A-101C) were introduced into the Crown Minerals Act by legislative amendment in May 2013. The provisions allow the CE of MBIE to

specify a zone of up to 500m around a ship, equipment it is towing, or a structure, related to offshore petroleum activity, known as a non-interference zone. It is a potential offence for any ship or person to enter into a non-interference zone. Enforcement officers under the provisions are able to take action both when an offence occurs, and to prevent an offence from occurring if they have reasonable cause to suspect that a person is attempting an offence.

7. At the same time, the purpose of the Act was changed, to be "...to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand." The purpose of the Act states that other provisions (including non-interference provisions) are provided for "to that end".
8. The changes to the Act in 2013 were made after protests by those opposed to oil and gas mining activities, including off the East Cape in 2011 and in the deep water Taranaki Basin in 2013. Offshore petroleum operations carry significant health and safety risks due to the nature of petroleum, the use of heavy equipment and the complexity of operating in the marine environment. MBIE understood that the non-interference provisions were introduced to balance the rights of individuals to protest lawfully while protecting the ability of petroleum permit holders to operate. This included allowing the permit holders to complete the work programme obligations required of them under the Crown Minerals Act.
9. While MBIE is responsible for administering the Crown Minerals Act, it is not the sole agency with a statutory role related to the non-interference provisions. For instance, an enforcement officer for the purposes of the non-interference provisions is a constable, or the person in charge of a NZ Defence Force ship (or acting under that person's command).

### **Operation Exploration**

10. Following introduction of the non-interference provisions, a national plan for the implementation of the provisions was developed. This was intended to ensure MBIE and other agencies were well placed to utilise and enforce the new legislative provisions ahead of the 2013/14 summer prospecting period. The actions required to implement the plan were referred to as "Operation Exploration". This has become a standing term used amongst agencies for preparing for upcoming offshore petroleum activities (including some activities not directly related to the non-interference provisions).

### **SCOPE**

11. The review report is expected to be primarily forward looking, focused on recommending how relevant agencies including MBIE should organise in the future to operationalise and enforce the non-interference provisions. For clarity, the following matters are out of scope of the review:
  - Other aspects of the Crown Minerals Act, for instance the block offer process
  - The appropriateness of the decision to establish Operation Exploration, or undertake any of its previous activities
  - Any impact of Operation Exploration on Ministerial decision making.

### **INTERDEPENDENCIES**

12. In undertaking the review, the reviewer will be cognisant of the following interdependencies:
  - Work underway within MBIE to ensure the SSC Model Standards for Information Gathering are adhered to
  - Policy work underway to review the Crown Minerals Act
  - Other regulatory initiatives belonging to the Regulatory Governance Board

- The need for arrangements to support staff acting in a manner that is consistent, at all times, with MBIE's internal policies, and the Code of Conduct for the State Services (as issued by SSC).

## **ROLES & RESPONSIBILITIES**

13. The Review will be carried out by Simon Murdoch reporting to Carolyn Tremain, Chief Executive of MBIE.
14. A steering group for the review will be established, consisting of: Chris Bunny, (Deputy Chief Executive for Building, Resources and Markets, MBIE; Melleny Black, Head of the Office of the CE, MBIE; Superintendent John Rivers, Police; Lieutenant Colonel Anthony Blythen, Deputy Director Strategic Commitments – Domestic, NZ Defence Force; and Nigel Clifford, Deputy Director Safety & Response Systems, Maritime NZ. Additional members may be added as required.
15. The reviewer will keep the Steering Group informed of progress, and consult with them on the draft review report and findings. The steering group will support the reviewer accessing information from within MBIE, and other relevant agencies, as required.

### **Review process and reporting**

16. The reviewer will determine how they wish to take to undertake the review, and consult with the Steering Group on the proposed approach.
17. MBIE will provide the reviewer at the outset with key documents relevant to the review, including the *National Plan for Implementation of the Non-Interference Provisions in the Crown Minerals Act 1991 (the National Plan)* and the SSC guidelines on *Information Gathering and Public Trust*.
18. Agencies involved in the review are expected to make all documents, and staff required for interview, available to the reviewer.
19. It is expected that the reviewer will enquire into why the choice of governance arrangements contained in the National Plan were put in place, how they operated in practice, and why Thompson and Clarke Ltd was able to embed itself within the structure in the manner outlined in the Inquiry.
20. The reviewers report will focus on the changes that need to be made to the National Plan in order to ensure that an appropriate governance, and if necessary other, arrangements are put in place such that similar issues should not arise again in the future. All recommendations must be consistent with the SSC guidelines on *Information Gathering and Public Trust*, and accepted good regulatory practice.
21. A draft report will be provided by mid-March 2019. A final report will be provided by late March 2019.

### **Confidentiality and public comment**

22. All material provided to the reviewer is to be treated as, and remain, confidential.
23. Given the public interest in ensuring that MBIE is addressing the issues raised by the Inquiry into use of external security consultants, the expectation is that the report will be made public after it has been received and considered by the CE of MBIE. The CE of MBIE will be the spokesperson in regards to the review process and findings and any requests for public comment should be directed to her office.