New Zealand Law Society
Te Kāhui Ture o Aotearoa

Crown Minerals Amendment Bill

23/01/2023

Crown Minerals Amendment Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Crown Minerals Amendment Bill (**Bill**).

1.2 The Bill seeks to clarify the role of the Crown Minerals Act 1991 (**CMA**) as an allocation and management framework, and enable flexibility in the management of Crown-owned minerals.[1]

1.3 This submission, which has been prepared with input from the Law Society's Public & Administrative Law Committee,[2] considers some issues regarding retrospectivity and consultation on further policy changes.

1.4 The Law Society does not wish to be heard in relation to this submission.

2 Retrospective effect of transitional provisions

2.1 Schedule 1 of the Bill contains transitional provisions which apply the provisions of the Bill with immediate effect (once enacted) to any pending application or any current permit or licence.[3] In particular, the Bill applies new sections 29C and 33CA, and the amendments to sections 29A and 33C, to each existing privilege as if the existing privilege were a permit and the holder of the privilege a permit holder.[4] As a result:

(a) The Minister must now be satisfied that an applicant for a permit (**applicant**) is highly likely to satisfy their decommissioning and post-decommissioning obligations under the CMA, before granting the permit.[5]

(b) Permit holders are now required to provide draft iwi engagement reports to relevant iwi or hapū, and give them a reasonable opportunity to comment, before providing the final report to the Minister.[6] The final report must include any comments provided by those iwi or hapū on the draft annual report.[7]

(c) Applicants are now required to attend annual review meetings to discuss iwi engagement reports, or draft reports, if the relevant iwi or hapū requests such meetings.[8]

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1 Regulatory Impact Statement: Enabling flexibility in the management of Crown minerals development under the Crown Minerals Act 1991.

2 See the Law Society's website for more information about this Committee: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-and-administrative-law-committee/.

3 Explanatory Note of the Bill.

4 New clauses 39 and 40 in the Schedule of the Bill.

5 New subsection 29A(2)(e) in clause 10.

6 New sections 33C(2A) and 33C(2B) in clause 12.

7 New section 33C(2B)(b) in clause 12.

8 New section 33CA in clause 13.

(d) Where an applicant is (or was) required to submit an iwi engagement report, the Minister may now have regard to feedback about the quality of the applicant's previous engagement with iwi or hapū, before granting a permit.[9]

2.2 The Bill also clarifies that the amendments to sections 29A and 33C of the CMA, discussed at paragraphs 2.1(a) and (b) above, apply to every existing permit and licence.[10]

2.3 The Departmental Disclosure Statement for the Bill states that these provisions do not affect rights, freedoms, or impose obligations, retrospectively because "conduct under the CMA prior to the amendments coming into force will not be subject to the proposed amendments".[11]

2.4 We do not agree with this assessment. Even where new legislation is intended to address future events, it can be retrospective in the sense that it affects existing rights and duties, or expectations formed on the basis of existing law and practice. In our view, privilege-holders and applicants will have a legitimate expectation that existing applications for permits and licences that have already been lodged, but not finally dealt with, will be determined according to the law in force at the time the applications were lodged.[12] The transitional provisions are inconsistent with this expectation.

2.5 Retrospective legislation is not always objectionable.[13] However, the rule of law requires good reasons to justify a departure from the presumption against retrospective legislation. We are concerned that the supporting material to the Bill does not explicitly set out such reasons, nor is it apparent whether they have been considered anywhere (presumably because the drafters concluded these provisions do not have retrospective effect).

2.6 The provisions in the Bill are designed to make it harder to mine Crown-owned minerals, and therefore reduce the value of existing privileges. That is not of itself objectionable, and the use of retrospective provisions may be justified in these circumstances. We invite the select committee to seek advice from officials regarding the retrospective provisions contained in the Bill, and whether the retrospective application of those provisions is in fact justified.

3 Further changes at select committee stage

3.1 The Explanatory Note of the Bill states that the Bill progresses changes to align the CMA with wider Government policy, and further changes may be raised at select committee. We are concerned that these further changes may include further *policy* changes, without the benefit of public consultation and input (including from affected stakeholders).

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9 New section 29C in clause 11.

10 New clause 41 in the Schedule of the Bill.

11 Departmental Disclosure Statement, page 11.

12 New clause 42 in the Schedule states that any application that is lodged or submitted, but not determined, before the provisions in the Bill are enacted are to be determined as if those provisions have been enacted.

13 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, 2021) at 812-815.

3.2 If further policy changes are required, we recommend progressing those changes by way of a separate amendment bill, so interested parties and stakeholders have the opportunity to consider the changes and provide feedback (noting there is likely no urgency around making additional policy changes, given this reform programme has been underway for several years).[14] This would provide some assurance to the public and to interested parties that any changes to the CMA policy framework are made following a democratic and transparent legislative process.

David Campbell
Vice-President

[14] The reforms relating to Crown-owned minerals have been underway since 2018, when the Government introduced the Crown Minerals (Petroleum) Amendment Bill. Submissions on that Bill prompted the Government to commence a broader review of the CMA to ensure the regulatory regime remained fit for purpose – see *Discussion document: Review of the Crown Minerals Act 1991* (Ministry of Business, Innovation & Employment, November 2019) at 7.