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Resource Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

By email: Resource.Markets.Policy@mbie.govt.nz

Re: Review of the Crown Minerals Act 1991 – Discussion Document

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the *Discussion Document: Review of the Crown Minerals Act 1991* (discussion document).

2. This submission sets out the Law Society's responses to several of the questions raised in the discussion document as well as comments on the drafting of some of the proposed technical amendments. The Law Society is happy to work with Ministry of Business, Innovation and Employment (MBIE) officials on drafting changes to those clauses if that would be of assistance.

Consultation questions

Chapter 1: Role and purpose statement

Questions 1 and 2

3. The discussion document proposes that the reform of the CMA could incorporate further non-economic aspects of wellbeing, such as natural, financial, human and social capital. The discussion document notes that these aspects of wellbeing are currently considered under separate parts of the wider regulatory system for Crown Minerals such as human capital under the Health and Safety at Work Act 2015 and natural capital under the Resource Management Act 1991 (RMA) or Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

4. The Law Society is concerned that extending the CMA to allow greater consideration of non-economic aspects of wellbeing may create confusion for permit operators and regulators as to who has responsibility for which aspects of wellbeing and may result in duplicative and potentially conflicting regimes. It may also give rise to a perceived or actual conflict of interest for the Crown since the Crown receives a pecuniary benefit (or royalty) under the CMA. Such an extension would also require an amendment to the purpose of the Act, given the purpose is currently focused on developing the Crown's mineral estate for the benefit of New Zealand.

5. As the discussion document notes, the purpose statement sets out the objective of the legislation and is an important interpretative tool where there is any ambiguity. The discussion document notes that the purpose statement may need to be reviewed as a result of the other changes being proposed and notes that there was both support and opposition to the "promotion" aspect of the purpose statement. While the Law Society considers that

this issue is primarily a policy one for the government, it suggests that if the government considers more neutral wording to be desirable the purpose statement could be amended to "provide for prospecting, exploration and mining". Further consequential changes may also be required to the minimum work programme requirements, given the focus in those requirements on "maximising" the economic recovery of petroleum.

Chapter 2: Balancing the rights, interests and activities of marine users

Questions 3 and 6

6. The current non-interference zone (NIZ) provisions seek to balance various stakeholder rights interests and activities. The purpose of these provisions is twofold – to protect the rights of permit holders to carry out lawful activities, and to manage health, safety and environmental risks which could result from any interference. The discussion document seeks views on whether the current provisions fairly balance the rights of marine users, whether the CMA is the appropriate 'home' for the provisions, and if the provisions are to remain in the CMA, whether any amendments are required.

7. While the Law Society considers that the appropriate balance is a matter of policy for the government, it notes that the current approach appears to be consistent with and supportive of the approach taken in the Maritime Transport Act 1994 (MTA) and Continental Shelf Act 1964 (CSA), as well as the approach taken to eliminating or minimising risks mandated by the Health and Safety at Work Act. The Law Society considers that these regimes are relevant factors for the government to consider in determining how best to balance the rights and interests of marine users, including such rights as may arise under the New Zealand Bill of Rights Act 1990.

8. In terms of the appropriate legislative home for the NIZ provisions, the Law Society considers that the provisions should remain in the CMA. This is because the CMA applies to all minerals activities whether on-land, within the territorial sea or exclusive economic zone, and whether undertaken from a ship, or offshore installation. The MTA and CSA are more limited in their application – with the MTA being limited to ships and the CSA being limited to the continental shelf area.

9. In terms of amendments, the discussion document seeks views on removing the strict liability criminal offence and fine sanctions and potentially replacing with other (non-identified) sanctions. To be effective, sanctions need to be clear, effective and enforceable. The Law Society suggests that further work is needed to determine what (if any) may be appropriate alternative sanctions, and that stakeholders have the opportunity to contribute their views on any alternative sanctions.

Chapter 4: Community participation

Questions 9 and 10

10. Public participation, and the rights of members of the public to have their say on proposals which may affect them, are fundamental tenets of the RMA and environmental regulatory regimes in New Zealand. Those regimes are specifically designed to enable that participation and require decision makers to take effects on peoples (social, cultural, and economic) wellbeing and interests into account. The CMA serves a very different purpose. It involves the allocation of rights to develop the Crown's mineral estate. It neither obviates nor alters the requirement for a permit holder to obtain such environmental (or other) approvals as may be required to carry out the minerals activity.

11. Providing for public participation, such as through a formal submission process, would add time and cost to the permitting process for not only the applicant, but the regulatory authority and members of the public. It could result in duplicative consultation processes with the same issues being raised in both processes and potentially consultation fatigue (where certain members do not engage due to the sheer number of processes).

12. If the government does consider it appropriate to provide for some form of public participation, it is suggested that clear guidance be provided as to what form that participation will take, when it will be enabled (for all permits or just tier 1 or ones proposed in significant natural areas), and what matters are relevant for the Minister to consider (i.e. noting that there will be separate environmental regulatory processes to come).

Chapter 5: Māori engagement and involvement in Crown minerals

Questions 11 to 14

13. The discussion document sets out a series of proposals that are intended to improve engagement with Māori and provide a clearer process for Māori to seek protection of land.

14. Proposal 1 is to make no changes to the CMA but to evaluate the engagement condition imposed in Block Offer 2018. This condition requires "permit holders to engage with iwi and hapū on an ongoing basis and in a positive, fair and constructive manner, with a strong preference for kanohi te kanohi (face to face) interactions." The purpose of the condition appears to be to encourage engagement as opposed to mere notification. However, the condition goes further than encouraging and actually requires engagement. If an iwi or hapū elects not to engage for whatever reason, then a permit holder would not be in compliance with this condition. To avoid this issue, if the government decided to adopt proposal 1 it may be better to amend the condition to require the consent holder to "seek to engage with iwi and hapū on an ongoing basis…". This still imposes a requirement on the permit holder, but does not penalise them, if despite their best efforts, no engagement results.

15. Proposal 2 is to create and make available a clearer process for iwi and hapū to request (under s 14(2)(c) of the CMA) that defined areas of land of particular importance to them are excluded from the minerals programme and any permit. This proposal would provide greater clarity not only to iwi and hapū but also to the Minister and the applicant for the permit. The list of matters proposed appears to generally be appropriate and includes the matters raised by iwi and hapū, any customary marine title or protected customary rights, existing protections under other legislation, the size of the area and value of the potential resource affected, and the impact on the viability of undertaking work under a permit. Given in many areas throughout New Zealand there are overlapping iwi and/or hapū interests, it may also be appropriate to clarify that the Minister is also required to consider the views of other iwi and hapū on the request and how these views are to be ascertained. For example, by requiring the iwi or hapū that made the request to notify other iwi/hapū of the request or consult on it prior to lodgement.

16. Proposal 3 is to stipulate the content required in annual iwi/hapū engagement reports, such as when and how they contacted iwi/hapū, the outcome of that contact and any meetings. This proposal would provide clarity to permit holders as to what is required and having a consistent format for the report would enable key issues or trends emerging overtime to be identified. It may also enable MBIE to identify where permit holders may benefit from additional guidance in relation to engagement. However, as noted above, it is important that in prescribing the content of the reports, the requirements are matters within the permit

holder's control (i.e. it can seek to engage, but it cannot actually engage if the other party is not willing).

17. Further guidance for permit holders on engagement with Māori may also be of assistance, particularly where permit holders have their headquarters overseas.

Chapter 6: Compliance and enforcement

Questions 16 to 21

18. The discussion document proposes the introduction of three new regulatory powers – compliance notices, enforceable undertakings, and infringement fines.

19. The proposed compliance notice regime requires that MBIE has reasonable grounds to believe that a permit holder has been extracting minerals outside their permit area. It is important that any compliance notice specifies the particular grounds (rather than just noting that such grounds exist), so that a permit holder is able to understand the reasons for the notice and respond appropriately. Any challenge to the issue of a compliance notice is proposed to be through a court process. Given the cost and time involved in court proceedings, the Law Society considers that it may be appropriate to provide an objections process in the first instance, whereby the permit holder could raise any objection or issues with the compliance holder directly with MBIE, and MBIE would be required to consider that information before confirming, amending or withdrawing the compliance notice. If the compliance notice was confirmed, the permit holder could still then seek to challenge through the court process if it considered necessary. Such a process is similar to that provided for certain decisions under the RMA and assists in reducing the number of disputes ending up in Court.

20. The proposal to introduce enforceable undertakings and infringement offences as alternatives to prosecution has merit. Such measures are likely to be more cost-effective and less time-intensive than prosecution and would allow MBIE to select an option that may be more commensurate with the level of breach. The proposal to consult with stakeholders prior to introducing any regulations imposing an infringement notice regime is also appropriate.

21. The discussion document proposes expanding MBIE's power to compel the provision of information from former permit holders and non-permit holders. As proposed, there does not appear to be any limitation on this power. The Law Society considers that the power to compel the provision of information from persons who are not current permit holders should be subject to some limitations. In particular, a requirement that MBIE has reasonable grounds to believe that the person holds information which is necessary for MBIE to carry out its functions and administer the CMA.

22. The proposals to clarify and standardise the record-keeping requirements for permit holders will increase certainty for permit holders as to what is required of them, and will streamline compliance monitoring for MBIE.

23. The proposal that the specific record-keeping requirements will be consulted on through a future regulatory process is sensible. This will enable those most affected by the proposals, MBIE and the permit holders, to expressly consider the scope and format of information which should be kept. This should ensure consistency with other legislative requirements (such as section 22 of the Tax Administration Act) so that double-up costs and inefficiencies do not occur or are minimised.

Chapter 7: Improving petroleum sector regulation

Questions 22 to 25

24. The discussion document proposes introducing a number of measures associated with end-of-field-life issues – including decommissioning, plugging and abandonment of wells, requiring approval to cease production, financial capability assessments, and new regulatory powers to reduce the risk of the Crown or third parties having to bear the cost of end-of-life issues.

25. In terms of decommissioning, the proposal is that the CMA include a specific legislative obligation requiring permit holders to decommission petroleum infrastructure and meet the costs of decommissioning. The decommissioning would be required to be undertaken in accordance with good industry practice and the applicable health and safety and environment requirements in other legislation. As well as the requirements in other legislation, the decommissioning should be required to be undertaken in accordance with the conditions of consents or approvals granted under that legislation, as often resource or marine costs have specific decommissioning conditions. Further consideration should also be given to how any conflicts between decommissioning requirements under the separate regimes are addressed.

26. The Law Society supports the proposal to include a definition of decommissioning in the CMA but considers some amendments are required to its wording. The proposed definition provides that decommissioning is "to permanently take out of service petroleum infrastructure before a permit or licence can be surrendered, relinquished, revoked or before it expires." A definition should describe an activity rather than seek to impose restrictions on when the activity should occur. In seeking to do so, the Law Society considers the definition could have unintended consequences. For example, if a Minister decides to revoke a permit due to a breach of a permit holder's obligation, can the Minister revoke the permit in advance of decommissioning? Similarly, if a permit holder goes into liquidation and is unable to fulfil its obligations under the permit, such that the permit is deemed to be relinquished or surrendered, would that mean any activities taken to 'close up shop' would fall outside the meaning of decommissioning?

27. If the government seeks to ensure that decommissioning takes place prior to a permit or licence being surrendered, relinquished, revoked or expiring, then a requirement to that effect should be provided for elsewhere in the CMA, rather than in the definition of decommissioning. Further, if the intention is to impose the decommissioning obligation only on petroleum permit holders (as opposed to all permit holders), it may be appropriate for the activity to be referred to as 'petroleum decommissioning', since decommissioning is an activity that may also be a relevant activity for non-petroleum permit holders. Accordingly, the Law Society suggests that the definition of decommissioning be amended as follows:

> ***Petroleum decommissioning*** *means to permanently take out of service petroleum infrastructure ~~before a permit or licence can be surrendered, relinquished, revoked or before it expires.~~*

28. The discussion document also proposes a definition of the term 'petroleum infrastructure' Inserting a definition is appropriate, but the proposed definition appears overly broad and may capture aspects which were not intended. The Law Society suggests that the definition of petroleum infrastructure be amended as follows:

Petroleum infrastructure *includes, ~~but is not limited to,~~ offshore and onshore installations, platforms, structures, cables, facilities and pipelines ~~concerned with~~ used in the exploration for, or production of, petroleum products ~~reasonably associated with~~ pursuant to a Crown Minerals permit or licence.*

29. In terms of cessation of petroleum production, the discussion document proposes that cessation should not occur without prior Ministerial approval. This is in order to ensure that production does not end earlier than the Crown considers ideal and that there is a formalised process in place for ending production. It is unclear how such a requirement to continue with production would be enforced – particularly where, for example, a permit holder decides it is uneconomic to continue production or goes into liquidation. There are already requirements for decommissioning and plugging and abandoning of wells proposed as part of the discussion document, so it is not clear what additional protection this requirement would add. If the intention is to act as a signal to address end of life issues, then notice to MBIE of a permit holder's intention to cease production may be sufficient.

Questions 29 to 30

30. The discussion document proposes that the CMA include a specific legislative power to enable MBIE to perform periodic capability assessments of permit/licence holders as well as regulations setting out the requirements of those reviews.

31. The power to require such assessments should not be unlimited, e.g. a continual rolling review, and a clear indication should be provided in the legislation or regulations as to the circumstances when such assessments can be required. The costs associated with undertaking the reviews are not addressed. If the intention is that the permit holder meet the costs of any such assessment/review, that should be clearly signalled and also form part of the proposal to consult with stakeholders on these matters through a future regulatory process.

Question 32

32. The discussion document proposes the introduction of a new power in the CMA to enable MBIE to make regulations to ensure permit/licence holders are able to meet their obligations to decommission and plug and abandon wells. The regulations would enable the imposition of a range of financial security mechanisms where MBIE considered that to be appropriate. Any financial security would follow a risk-based assessment and would take account of all other security demonstrated or provided by the permit/licence holder.

33. The Law Society considers that it would aid both MBIE and permit/licence holders if there were criteria or grounds set out in the legislation to guide determining when a risk-based assessment is warranted, and also what financial security mechanisms may be appropriate. The proposal to consult extensively with stakeholders on these matters will assist.

Chapter 8: Technical amendments

Question 36

34. The discussion document proposes to update and embed the process for serving notices and documentation within the CMA. This will provide greater certainty to all parties as to how notices and other documents can be served. It is noted that provision is not made for service by facsimile; while faxes are rarely used, there are still some offices that do use them. It is also noted that service by facsimile is still provided for as a method of service under some other legislation – for example the RMA.

35. It may also be useful to provide some clarification about the timing of service for methods that are not instantaneous e.g. post. While the general rule of thumb used to be that post was assumed received within 2 working days of being posted, with the changes to the postal service which have resulted in post being collected and therefore delivered less often, that no longer holds true.

Question 39

36. A change is proposed to enable the Minister to consider the capability and systems of new operators of Tier 1 permits. At present the capability of an operator is assessed prior to a Tier 1 permit being granted, but there is no requirement for a reassessment if the permit is transferred to another operator. The Law Society considers that the changes would be consistent with other existing provisions of the CMA, such as the change in control provisions of a Tier 1 operator, which came into effect in February this year.

Conclusion

37. This submission has been prepared by the Law Society's Environmental Law Committee. If further discussion would assist, please do not hesitate to contact the committee convenor, Bronwyn Carruthers, via the Law Society's Law Reform Adviser, Emily Sutton (emily.sutton@lawsociety.org.nz)

Yours faithfully

Andrew Logan