Regulatory Impact Statement for Proposed Additional Changes to the Crown Minerals Act 1991

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Business, Innovation and Employment. It provides an analysis of an issue which was not covered in an earlier Cabinet Paper and RIS considered by the Economic Growth and Infrastructure Committee (EGI) on 25 July 2012 describing a range of proposals for changes to the Crown Minerals Act 1991 regime (CMA regime).

This regulatory proposal is judged unlikely to impose additional costs on the business sector overall. Any costs that result will be negligible when compared to the substantial reduction in administrative costs the proposal seeks to achieve. The proposal is also judged unlikely to impair private property rights, market competition, or the incentives for businesses to innovate and invest; or override fundamental common law principles. Consequently, the Ministry views the proposal as consistent with Government commitments on regulatory reform.

Simon Lawrence, Acting Manager, Ministry of Business, Innovation and Employment

Status Quo and Problem Definition

1. The earlier Cabinet Paper and RIS considered by the Economic Growth and Infrastructure Committee (EGI) on 25 July 2012 sought agreement to a suite of proposals to the Crown Minerals regime following public consultation on a discussion paper. This further RIS focuses on a particular proposal in the further Cabinet Paper seeking additional amendments to the Act, which will be considered by the Cabinet Business Committee on 3 September 2012.

2. The proposal seeks to address the processes and triggers for revoking prospecting, exploration and mining permits awarded under the CMA regime. The current revocation procedures are set out in section 39 of the Act and involve:

    a. A report from the Chief Executive of the Ministry of Business, Innovation and Employment to the Minister of Energy and Resources describing the grounds for the proposed revocation.

    b. A notice from the Minister to the permit holder setting out the alleged contravention giving 20 working days to make reasonable efforts to remedy the breach, or show reasonable cause for the breach.

    c. If satisfied that the permit holder has failed to meet requirements, a second notice from the Minister stating that the permit will be revoked after 20 working days.

    d. Rights of appeal on merits to the High Court, with the permit remaining live pending the outcome of any appeal.

3. Whilst the statutory timeframe is relatively short (around 3 months) in practice, these procedures are cumbersome, resource and time-consuming, and provide opportunities for gaming. The *reasonable efforts* provision provides significant scope for dispute and appeal on merits of decisions.

4. The overall effect of these provisions is that officials are reluctant to recommend revocation – in the last four years only three permits have been revoked for non-compliance with work programme conditions[1] – two of those three revocations were unsuccessfully appealed after 8 and 20 months following the issue of the first notice. The permit remains live pending the outcome of any appeal which can see acreage tied up for lengthy periods.

5. A consequence of these procedures is that permit holders can use the change of conditions process to erode work programme obligations without seriously risking revocation.

Expected outcome in the absence of government intervention

6. Under current policy settings, permit holders may breach work programme obligations and obtain consent to changes to conditions in permits more easily than is desirable. Non-compliance with, or changes to, agreed work programmes is not in the national interest as they have the potential to slow exploration and appraisal activity. Any reduction in the level of activity under work programmes has a direct impact the return on Crown owned-resources through royalty payments and tax revenue.

Objectives

7. The overall objective is to further encourage compliance with permit conditions, and resolve issues when they are not met in a timely fashion. This maximises realisation of the economic return on Crown-owned mineral resources.

[1] There are currently over 1,000 live prospecting, exploration and mining permits.

Regulatory Impact Analysis of Key Proposals in the Cabinet Paper

8. This Regulatory Impact Analysis focuses on simplification and strengthening of revocation procedures for non-compliance with legislation and permit obligations.

9. The tightening of the criteria and rules around revocation complement the broader changes to work programme management that are being put in place as part of the review of the CMA regime. At present, work programmes can contain a large number of obligations, many of which are of limited importance to realising the value of the Crown's mineral estate, e.g. intermediate deadlines within broad exploration tasks or desktop studies. New Zealand Petroleum & Minerals (NZP&M) consequently spends a significant amount of time managing compliance with these obligations.

10. The approach advocated under the new regime would see greater focus on key work programme deliverables and decision points, such as whether to proceed to more detailed seismic investigation, or to drill a well. These will be agreed up front with the permit holder and managed actively through annual work programme meetings with NZP&M. This will result in a small number of clear obligations and fewer binding permit conditions. It is also expected to result in fewer instances of non-compliance as expectations will be clearer and scope for dispute reduced.

11. This approach is particularly important where exploration permits are allocated by competitive tender on the basis of staged work programme bids. The integrity of the bidding process is undermined if winning bidders can subsequently obtain a change to their committed work programmes (other than in exceptional circumstances).

12. As work programme management will focus on a small number of mutually agreed obligations, it is considered appropriate to strengthen and streamline the process to invoke revocation when non-compliance arises.

Options

13. It is proposed to follow more closely the Australian model which has a streamlined process for revocation following non-compliance, and restricts appeal rights.

14. The options considered for the revocation process are:

    a. *Status quo:* Retain 2 notices from the Minister of Energy and Resources and retain the *reasonable efforts* provision.

    b. *Streamline the procedure and remove the reasonable efforts provision.* This would involve:

        i. The Act setting out the following grounds for revocation:
            - Contravention of a condition of a permit, the Act or the regulations.
            - Non-payment of monies owing to the Crown 90 days after the due date.
        ii. The Minister providing a Notice of Intention to revoke the permit with reasons.
        iii. The permit holder given 20 working days to remedy the breach or to make any comments which it wants the Minister to consider before making a final decision.
        iv. Revocation by notice if the Minister decides to revoke the permit.

15. The Ministry regards the continuation of the status quo (option a) as unattractive when considered in the context of the proposed approach to work programme management, which places significant emphasis on ongoing engagement between permit holders and NZP&M on

work programme delivery. Retaining flexibility in the revocation procedure is considered unnecessary and inappropriate as in the rare instances of non-compliance with work programme obligations, the reasons will be well understood and rapid movement towards revocation will be appropriate.

16. Adopting elements of the Australian procedure was also considered (i.e. either streamlining the process or removing the reasonable efforts provision), but deemed too weak in light of the broader changes to work programme management described above.

17. The Australian regime does not provide any right of appeal to a court on the Minister's decision, although judicial review is available. Three options have been considered in this RIS:

    a. *Retain full rights of appeal.* This approach allows a full appeal of the decision for any errors or law or fact.

    b. *Allow judicial review only, and remove the current right of appeal.* Judicial review provides for a review of a decision in relatively limited circumstances where there has been an incorrect interpretation and application of the law (including taking into account irrelevant considerations and not taking into account relevant considerations). The remedy for judicial review generally involves a direction back to the decision-maker to reconsider the decision in accordance with the proper legal process. This would provide for consistency of approach with Australia for parties operating in this region.

    c. *Retain a right of appeal, but limiting it to points of law only.* This approach allows a full appeal of the decision where the decision has been made on the basis of an incorrect interpretation of the law. The remedies for appeal are not as limited as they are for judicial review – the court can potentially make a range of orders. This approach has been taken for appeals against certain decisions by the Environmental Protection Authority under the EEZ and Continental Shelf (Environmental Effects) Act.

18. Merits appeal processes have proved time-consuming and have prevented for extended periods the opportunity for other operators and investors to access areas where permit-holders have failed to comply with agreed work programmes.

19. Whilst permit holders are likely to advocate retaining merits appeal rights as it provides the most scope to pursue action against revocation, principles of natural justice can be maintained by ensuring permit holders have their views considered before a revocation decision is made. Further, with ongoing engagement between permit holders and NZP&M throughout the life of permits, the reasons for initiating revocation will be well understood by each party and the scope of any merits appeal significantly reduced.

20. The Ministry regards the continuation of the current position (option a) as unattractive given the potential for delay, and unnecessary given the greater emphasis on setting clear expectations with permit holders. Option b probably tilts the balance too far away from protection of the rights of permit holders to natural justice.

21. Allowing a right of appeal on points of law is the approach commonly taken in New Zealand for decisions by industry administrators and regulators (e.g. the Telecommunications Commissioner, Electricity Authority, Environmental Protection Authority) in recognition of the specific expertise held by the decision-maker, and scope for significant delay from appeal procedures. This intermediate option (c) is preferred as it protects against incorrect interpretation of the law by the Minister whilst allowing for a wider range of remedies than under judicial review.

Costs and benefits

22. Under the proposed changes to work programme management, there should be many fewer occasions where cases of non-compliance arise. Annual meetings with NZP&M and clearer processes to agree work programmes will see greater clarity and understanding between permit-holders and the regulator. By coupling the proposals around revocation procedures with more active interaction between the Crown and permit holders, it is expected that the incidence of non-compliance, and the consequent need to initiate revocation procedures, would be reduced.

23. The greater stringency that will result from these proposals could be seen as affecting the certainty of rights once permits have been awarded, and hence the attractiveness of New Zealand as a petroleum investment destination.

24. The Ministry does not believe that the changes will be of concern to operators and investors who are subject to such regimes elsewhere. The vast majority of permit-holders will remain compliant and be unaffected by the proposed changes. For those that do not comply with work programme obligations, the reasons will be well understood, and rapid movement towards revocation will be appropriate. As described above, the complementary changes to work programme management can be expected to reduce the overall level of non-compliance.

25. Revocation is a last resort. The Minister and NZP&M will seek to agree a small number of key work programme obligations with the permit holder and manage these actively to ensure compliance. A credible threat of revocation is important leverage for the rare instances where, despite these controls, non-compliance with material obligations arises.

26. Ultimately, more effective management of the Crown's mineral estate will translate to a greater rate of exploration, maximise the rate of production, and increase the Crown's royalty and tax take. Fewer instance of non-compliance with work programme obligations will also allow NZP&M to better focus on promotional activities and positive interaction with compliant permit holders.

Consultation

27. On 20 February 2012 Cabinet agreed to the release of the discussion document, Review of the Crown Minerals Act 1991 Regime [CAB Min (12) 5/7]. The discussion document, setting out a number of proposals to reform the CMA regime, was released for public submissions in March and April 2012.

28. These proposals have been discussed in general terms with industry representatives who were invited to review a draft of the Amending Bill on 24 August. Industry representatives were concerned that tighter revocation processes be used appropriately and suggested that the minerals programmes clarify how this would operate in practice. The Ministry agrees and intends to set out in more detail how this power will be applied (e.g. the types of breaches where revocation would be considered would be described) in the minerals programmes.

29. Permit holders and prospective investors will be able to see the proposals for changes to the Act as well as the draft minerals programmes and associated regulations as the amending bill proceeds through the House.

30. The following agencies were consulted on the proposals of the Cabinet paper: the Treasury, Ministry for the Environment, Environmental Protection Authority, Ministry of Transport, Maritime New Zealand, Department of Labour, Department of Internal Affairs, Inland Revenue Department, Ministry of Justice, Office of Treaty Settlements, Ministry of Foreign Affairs and

Trade Department of Conservation and Te Puni Kokiri. The Department of Prime Minister and Cabinet has been informed of the proposals.

Implementation

31. There are a number of processes and reforms that need to be managed simultaneously to ensure the proposals can be effectively implemented. These include the legislative timetable, future consultation, transitional arrangements and the mitigation of implementation risks.

32. The legislative timetable must be coordinated. A bill amending the Crown Minerals Act 1991 is intended for introduction in September 2012, with new legislation coming into force by December 2012. The majority of proposals in the discussion document will require amendments to the minerals programmes and regulations in addition to the necessary amendments to the Act. It is intended that Cabinet approval will be sought to consult on amended programmes in September 2012.

Monitoring, evaluation and review

33. NZP&M will monitor the effects of changes to key processes of interaction with operators as these are introduced. It is planned to review these aspects of the proposals two years after their introduction – in early 2015.

34. Proposals relating to changes to management of permits can be expected to have an effect only after some time, but benefits would be identified through more rapid resolution of disputes and renewal of activity if revocation should occur.

35. It is planned to undertake a full evaluation of the impact of these proposals five years after their introduction – in 2018.