

2 November 2012

Mr Jonathan Young
Chairperson
Commerce Select Committee
c/o Parliament Buildings
Wellington
NEW ZEALAND

Submission on the Crown Minerals (Permitting and Crown Land) Bill

BusinessNZ welcomes the opportunity to provide a submission to the Commerce Select Committee on the Crown Minerals (Permitting and Crown Land) Bill.¹

BusinessNZ welcomes the Bill and supports its overall thrust. However, there still appear to be a number of 'loose strands' that need to be given further consideration before the Bill is reported back into the House. These 'loose strands' are the primary focus of this submission.

Comments

This Bill is the first substantive review of the Crown Minerals Act since its enactment and is long overdue. It is an important element of the Government's overall natural resource-related Business Growth Agenda (the others being the passage of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the second tranche of reforms of the Resource Management Act, 1991 (yet to be announced). It is also a key element in the Government's commitment to promote the environmentally responsible exploration and production of oil, gas and mineral resources.

The Bill contains many good ideas that could, if worked through in detail with business, deliver real gains to the New Zealand economy. In particular, the Bill creates a two-tiered system for permit management so that there is a more hands-on, co-ordinated management and regulatory regime for the more complex, higher-return petroleum and mineral activities. Lower-return industrial rocks, small business and hobby mineral operations will be subject to a simpler and streamlined management regime. This is a welcome initiative.

¹ Background information on BusinessNZ is attached to this letter as Appendix One.

BusinessNZ has had a number of the concerns it raised in the earlier consultation process addressed. For example, the need for:

1. a clear purpose statement (somewhat surprisingly, the current Act does not contain a purpose statement);
2. greater flexibility in determining who falls into which tier and the need to accommodate movement between them; and
3. the transitional arrangements – providing permit holders the ability to decide which regime they should be under – their existing one or the new one.

These have all been accommodated in the Bill, and we welcome that.

However, some concerns remain. While the Bill improves substantially on the existing Act and significantly on the March 2012 discussion paper, with flexibility comes stricter compliance management and broader Ministerial discretion.

Determining where the Crown's Legitimate Interest Lies

At the heart of this concern lies the issue of where the boundary should be drawn regarding the Crown's legitimate interest in the operational aspects of the businesses who seek permits.

It is undisputed (at least by BusinessNZ), that as owner of the resources in question, the Crown *has* a legitimate interest in the efficiency with which the resources are extracted. This particularly speaks to two points being:

1. the desire of the Crown to influence the speed of their extraction (it can be generally assumed that the Crown wishes to see the resources extracted in a way that best balances its needs with the needs of the miner); and
2. the Crown's ability to convert the resource into cash via the royalty regime, and therefore apply it to other, higher priority uses.

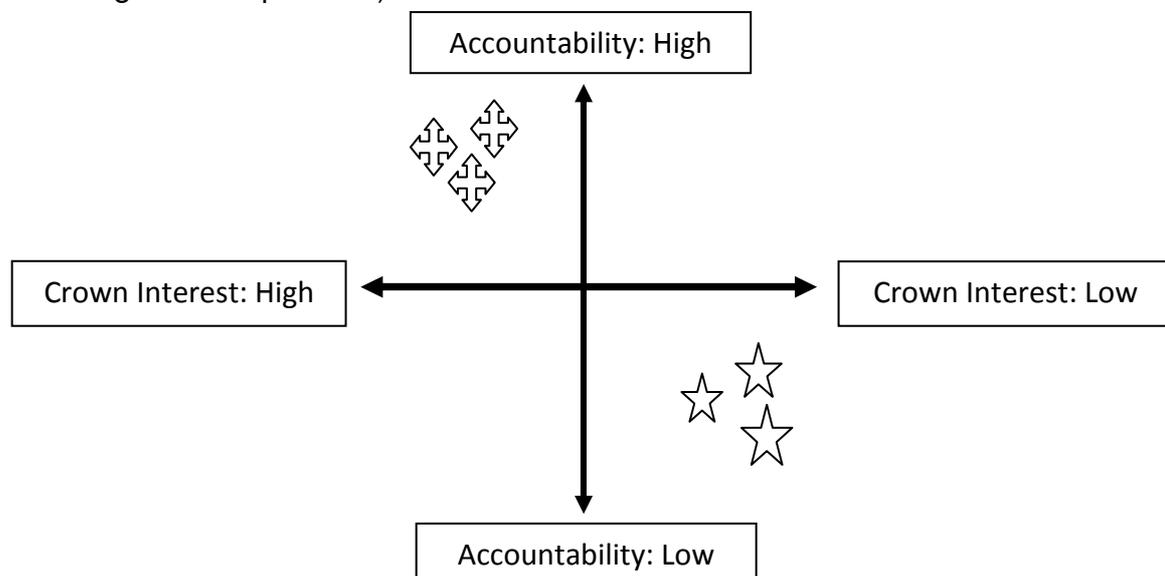
This legitimate interest provides a rationale for the Crown to place technical and financial requirements on permit applicants, but now as manifest in the Bill, appears to underpin a desire to further extend the Crown's reach into applicants' operational business practices. The need for the Minister to be satisfied that tier 1 permit applicants are likely to have the capability and systems that are likely to be required to meet the health, safety and environmental requirements of all specified Acts is a case in point, as is the practical manifestation of the Bill in the Minerals Programme (section 9.3, for example, is extremely prescriptive).

While these aspects are unequivocally important to both the sector and the wider community, BusinessNZ thought that the previous consultation process provided a good opportunity for officials to at least question whether it is:

1. in the Crown's interest to get involved in the operational detail of the applicants *at all*, and if so to what extent (that is, is *increasing* its involvement in the Crown's interests); and
2. necessary to do this (that is, get involved in operational detail) to ensure that it gets its fair financial return.

Such thinking, if undertaken, does not appear to be reflected in the Bill. BusinessNZ acknowledges that where to draw the boundary is ultimately a matter of judgement, and appreciates that such requirements as set out in the Bill are not intended to be onerous. However, neither voids the failure to have asked the question of whether the current intrusion into applicant's operational practices is required to protect the Crown's legitimate interests, or whether *any* additional regulation in the areas of health and safety and environmental matters is required on a risk management basis. These are important and legitimate questions particularly in light of the already burgeoning roles and responsibilities of New Zealand Petroleum and Minerals ('NZPAM') and the evidence inter-agency co-ordination difficulties.

Our sense of the Bill, as drafted, is that many of the issues considered by policy makers are simply assumed to require high accountability (i.e. Ministerial accountability) and are thought to speak directly to the Crown's legitimate interest in the efficiency with which the resources are extracted (as reflected in the following schematic by the crosses in the upper left-hand quadrant). However, our assessment is that a closer, less impassioned assessment of these issues would be likely to see the possibility for a lower accountability (i.e. Departmental Chief Executive) able to be applied in lieu of the application of powers by the Minister and a lower level of Crown interest in getting involved in the day-to-day operational detail of those companies seeking permits (as reflected in the following schematic by the stars in the lower right-hand quadrant).



Thinking about the issues in these terms suggests that the Select Committee should carefully review those areas that are currently slated as requiring Ministerial action (such as new section 29A), as well as those issues where the Crown's interest are thought to have expanded in order to protect the Crown's legitimate interest in the efficiency with which the resources are extracted.

Reconsidering the Purpose Statement

BusinessNZ welcomes the inclusion of a purpose statement in the Bill.

The explanatory note states that the Bill is a key element to both the Business Growth Agenda and the Petroleum Action Plan. The various amendments made by this Bill have the aims of:

- encouraging the development of Crown owned minerals so that they contribute more to New Zealand's economic development; and
- streamlining and simplifying the permitting regime where appropriate, making it better able to deal with future developments; and
- ensuring that better co-ordination of regulatory agencies can contribute to stringent health, safety, and environmental standards in exploration and production activities.

In light of this, it is suggested that the stated purpose of the Bill is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand, by providing for:

- the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and
- the effective management and regulation of the exercise of those rights; and
- a fair financial return to the Crown for its minerals.

Experience suggests that the greater the extent of brevity and clarity that can be brought to bear concerning a Bill's purpose, the more likely it is that clear actions will emerge that are capable of delivering on it. However, in the case of the proposed purpose statement, BusinessNZ considers that it mixes the '*what*' (the efficient extraction) with the '*how*' (effective management and fair financial return).

BusinessNZ considers that a purpose statement should primarily focus on what the Bill is trying to achieve, and suggests the following as an alternate:

"The purpose of this Act is to promote the efficient extraction of Crown owned minerals for the benefit of New Zealand."

BusinessNZ considers that this draft statement recognises the Crown's legitimate interest in the extraction of the minerals it owns. In doing so, it

reflects the ability of the Crown to determine how best to extract the minerals and the conditions under which it might do so.

The efficiency criteria also speaks to its extraction at least cost, its allocation to the highest value use (or the user who places the highest value on its use), and the dynamic benefits from investment in its extraction. Other objectives, such as environmental and social, while important, are appropriately dealt with via other mechanisms (such as via the Resource Management Act or the Health and Safety in Employment Act), rather than blurring the purpose of the Crown Minerals Act. This approach is broadly consistent with the changes made by the National-led Government in other areas.

Other Issues

There are five other issues on which BusinessNZ wishes to comment, these being:

- the blanket coverage of all petroleum permits by Tier 1 status. While broadly appropriate for petroleum permits to be Tier 1, the allocation of resource to tier according to resource type seems to be a rather blunt approach. On the face of it, distinguishing between location, geology and environmental impact might also be appropriate (noting that this could allow for a distinction to be made between onshore, shallow water offshore, and deep water offshore instances of the same activity);
- alignment with other consenting processes. BusinessNZ understands, as set out in new section 29B, why the granting of a tier 1 permit does not limit or have any bearing on any other permit that is required to be held (such as a resource consent). We also note the intention of new section 90D to help facilitate the exchange of information that may assist other regulatory agencies. However, the potential for misalignment to stifle commitments to invest remains. BusinessNZ considers that some signal of priority of the action required by the other regulatory agencies would be appropriate, and suggest that the following be inserted in new section 90D (1) and (2) as a new (c):

“(c) considers may assist with the assignment of an appropriate priority to be applied.

- stricter management. BusinessNZ appreciates that with greater flexibility comes stricter compliance management. But the Bill proposes tighter controls and greater Ministerial discretion than was indicated in the discussion paper. These provisions could compromise a permit holder’s security of tenure and therefore investment certainty. For example, new section 37 now contains some vague conditions under which permit conditions can be modified, while permit revocation is made easier. New section 39 now has no allowance or ability to recognise minor breaches or substantial compliance, giving rise to the risk of permits being taken of otherwise good operators with implications for applications for subsequent permits. These provisions

may be intended to firm up on the Crown's ability to exercise its legitimate rights with respect to its resources, but do so at the expense of creating investment uncertainty and by definition, the creation of 'softer' property rights than are currently the case;

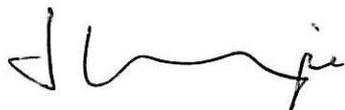
- new section 105A enables regulations relating to royalties to be made. While this is of itself, of no particular moment, the current approach (via the Minerals Programme) requires a consultation process while the approach set out in new section 105A does not. Given the significance of the potential implications of changes to royalties, an obligation to consult should be placed into the Bill; and
- uncertainty over the broader application of the Bill. While it is reasonably clear that with regard to minerals programmes, the minerals programme in place at the time a permit is issued is the relevant minerals programme (new section 115B) unless the holder decides to opt-in to the new minerals programme, the broader application of the Bill itself is less clear. In other words, regardless of new section 115B, the question arises as to whether the new provisions of the Bill will automatically over-ride all other conditions relating to *existing* as well as new permits. This issue needs to be clarified.

Summary

This Bill is a considerable advance on the current legislation and BusinessNZ supports it. In BusinessNZ's view, the Bill represents a more positive statement of the direction the Crown wishes to apply to its petroleum and minerals estate.

However, further improvements can be made that better reflect the importance of the contribution that the Crown's petroleum and minerals estate can make to New Zealanders' standard of living. These improvements are intended to contribute towards the overall theme of a more flexible and pragmatic mining regime that ensures that New Zealand is able to maximise the gains from the responsible development of its resources. This is important in light of the intense competition New Zealand faces from other jurisdictions for the exploration investment dollar.

Yours sincerely



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BusinessNZ

APPENDIX ONE: ABOUT BUSINESSNZ

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), BusinessNZ is New Zealand's largest business advocacy body. Together with its 80 strong Major Companies Group, and the 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.