NEW ZEALAND MINERALS SECTOR – REGULATORY UPDATE

This publication updates a stock-take we produced in February this year on the New Zealand Government’s efforts to create a regulatory regime for the development of the country’s significant minerals endowment.

The department responsible for managing the Crown’s mineral estate – the New Zealand Ministry of Business, Innovation and Employment (MBIE) – says “the size of the prize could be economy-changing (country making)“.

The key pieces of legislation discussed are:

The Crown Minerals regime – the Crown Minerals Amendment Act 2013 sets up a two tier system which focuses the regulatory effort on those mining activities which are more complex and offer the highest returns to the Government: petroleum (oil and gas), hard rock gold and silver, coal and ironsands, phosphates and sulphides. The Act came into force on 24 May 2013.

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act – the Act, which was passed last year, establishes a broad environmental management regime in New Zealand’s territorial waters and applies to seismic surveying, cable laying, seabed mining, the construction and installation of oil and gas rigs and such possible future uses as deep sea aquaculture.

Emissions trading – New Zealand’s Emissions Trading Scheme (ETS) applies to all key sectors except agriculture. New Zealand was one of the first countries outside Europe to introduce a comprehensive emissions regime, but obligations on emitters have been softened since the scheme’s introduction, due to the difficult economic environment and the Government’s desire to see the country do no more than its "fair share" in combatting climate change.

Resource management – the Resource Management Act 1991 is a well-established piece of environmental legislation, concerning the use of land, air and water in New Zealand. The Act is subject to ongoing reform, following a series of major changes over the past three years.

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STOCK-TAKE

The Crown Minerals regime

The Crown Minerals Amendment Act

The Crown Minerals Amendment Act sets up a two-tier system which concentrates the regulatory effort where the risks are higher and where there is the greatest opportunity to generate revenue for the Government.

Tier One activities – petroleum (oil and gas), hard rock gold and silver, coal and iron sands, phosphates and sulphides – are subject to more hands-on and co-ordinated management. This includes:

- an upfront health, safety and environment (HSE) assessment process which makes exploration and mining permits contingent on a health and safety clearance by the relevant authorities and includes HSE considerations in the definition of ‘good industry practice’
- a more pro-active monitoring system which is meetings-based rather than relying entirely on documentation and form-filling
- more flexibility, but stricter management of both the minerals and petroleum permitting regimes (including longer term permits and more flexible policies for permit allocation but broader permit relinquishment and revocation rights for the Government and tighter control of permit changes), and
- extension of the regime to mining in the Exclusive Economic Zone (EEZ) and Continental Shelf.

Access arrangements in respect of significant mining activities on government land (known as Crown land) or the common marine and coastal area must be publicly notified and jointly approved by the Minister of Energy and Resources and the land-holding Minister (generally, the Minister of Conservation).

The Act also makes it a summary offence intentionally to engage in conduct that results in damage to or interference with any structure, ship or associated equipment and activities used in off-shore mining operations or in the processing, storing or transporting of minerals. In addition, MBIE can designate zones in which police can stop and detain protest boats or from which they can deny protesters entry.

New Minerals Programmes have been developed to support the new legislation. Permit holders can opt into the new regime whenever they wish but must transfer into it upon:

- application to change, surrender or replace a permit
- application to transfer a participating interest in a permit, or for consent to a dealing (including certain supply agreements)
- notification of a change in control of a permit participant, or
- application to change the permit operator.
Royalties

The royalty rates are:

- oil and gas, 7%
- coal, a 2% ad valorem royalty (AVR) on net sales revenues if the accounting profits for the reporting period are $5 million or less and the higher of a 2% AVR or a 10% accounting profit royalty (APR) otherwise
- gold, a 2% AVR on net sales revenues if the accounting profits for the reporting period are $2 million or less and the higher of a 2% AVR or a 10% accounting profit royalty (APR) otherwise
- underground coal gasification, the higher of a 1% AVR or a 10% APR
- silver, platinum group elements, ironsands, phosphates and seafloor massive sulphides (SMS) - the higher of a 2% AVR or a 10% APR. (No thresholds have been set for these minerals as the Government considers that any such mine developments would have to be very large anyway.)

Certain minimum sales revenue thresholds apply before royalties are payable at all.

Tax treatment

Legislation to rewrite the tax treatment of mining is now before Parliament and is expected to be enacted this year. The changes cover the taxation of gold, silver and ironsands primarily but include 47 other commercial minerals.

Proposals include:

- extending the mining rules so they apply to any person (not just companies) whose principal source of income is mining activities
- removing the ability to deduct mining exploration and development expenditure before it is incurred
- deferring the deduction for expenditure on acquiring land for mining purposes until the land is sold
- recapturing deductions for successful exploration expenditure, if incurred on items subsequently used to operate a mine
- requiring mine development expenditure to be spread over the life of a mine, either on a unit of production basis (for items whose life is tied to that of the mine) or under the depreciation rules
- applying ordinary capital/revenue rules to determine the deductibility of costs incurred in operating a mine – (for example, costs incurred in acquiring a non-permit-specific depreciable asset would be deductible under the ordinary depreciation rules)
• repealing the special rules allowing a corporate shareholder in a mining company a
deduction for losses on loans made to the company, if the loans are used to fund
mining activities.

The Bill departs from the earlier IRD Issues Paper in a number of respects. Most
significantly these are:

• the treatment of reclamation/restoration expenditure. Whereas the Issues Paper
proposed to allow a deduction for such expenditure as incurred, with an earlier
deduction for amounts deposited in a special account with the Revenue, the Bill
proposes to defer deductions for this expenditure until it is paid. Although this seems
an extraordinary and unwarranted departure from general principles, no explanation is
given for it. The Bill does propose a potentially complex refundable credit be allowed
for such expenditure, to deal with the fact that it may be incurred after income has
ceased to be earned

• the treatment of tax losses. The Issues Paper proposed to allow mining losses to be
grouped with income from other activities, in recognition of the fact that the other
proposals removed most of the favourable tax aspects of mining. Again without
explanation, the Government has changed its stance on this, and now proposes to
maintain the loss ring-fencing rules. It also proposes to maintain the rules allowing
permit-specific losses to be carried forward without a requirement for shareholder
continuity

• the treatment of farm-in expenditure. The Issues Paper proposed that farm-in
amounts be treated as taxable to the payee and deductible over time to the payer.
The Bill provides for these amounts to be non-taxable to the payee, and deductible to
the payer in the same way as if they had been incurred by the payee.

Iwi engagement
The Act introduces a new requirement for Tier 1 permit holders to provide annual iwi
engagement reports to the Government. Operational changes relating to how industry and
Māori can work together are in the new Minerals Programmes.

Health and safety
New Zealand’s workplace health and safety regime is being significantly strengthened in
the aftermath of the November 2010 Pike River coal mine tragedy in which 29 miners died.

A specialist High Hazards Unit has been appointed for the extractive industries and tougher
rules are now in force in the oil and gas sector. These require:

• operators of larger, higher risk installations (both onshore and offshore) to prepare a
safety case to be accepted by MBIE before work can commence

• fees of between $70,000 and $100,000 to cover MBIE’s costs for the assessment of
these safety cases, depending on the type of installation. A revised safety case will
cost between $34,000 and $54,000

• operators of smaller scale, lower risk onshore installations to prepare an HSE overview
in lieu of a safety case
• all operators to report ‘near miss’ incidents to ensure that MBIE has sufficient data to inform its regulatory priorities, and

• all operators to implement arrangements for independent and competent persons to examine the design, construction and maintenance of all wells.

The Government is also considering a number of other recommendations to: increase worker participation, strengthen the accountability of company directors and statutory mine managers, improve management training, and provide regulatory supervision for mining qualifications and emergency planning.

These are being implemented through amendments to New Zealand’s general Health and Safety in Employment Act and through further mining specific regulations which will take effect in December 2013 and are designed to bring New Zealand into line with international best practice.

Existing mine operations will have a 12 month transition period for compliance, extendable to 36 months under special circumstances.

**The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act**

The Act extends a variant of the Resource Management Act (RMA) to the EEZ and applies to seismic surveying and cable laying, seabed mining and the construction and installation of oil and gas rigs. It also anticipates possible future uses, including deep sea aquaculture, carbon capture and storage, and marine energy generation.

The Act, which came into force on 28 June, establishes a broad environmental management jurisdiction in the EEZ and Continental Shelf, then excludes those activities (such as fishing and shipping) which are already covered by existing legislation.

Important departures from the RMA model are:

• the decision-maker is the Environmental Protection Agency (EPA) rather than local government (local government’s mandate stops at the 12 nautical mile limit)

• the EPA is required only to “take into account” environmental values in its decision-making as opposed to the stronger RMA requirement to “recognise and provide for” these values

• appeal rights are to the High Court rather than to the Environment Court and are limited to points of law rather than the substance of the decision, and

• all marine consents need to be publicly notified. This will have significant cost and process implications compared to the RMA which requires public notification only where the adverse environmental effects of the proposed activity are likely to be “more than minor”. Fewer than 5% of applications under the RMA are publicly notified.
The Bill as originally drafted attracted strong criticism from Opposition parties and from the environmental lobby for being too focussed on economic development and not sufficiently protective of the environment.

It was amended to address these concerns with the result that the Act now identifies nine factors which should drive the EPA’s decision-making. Several of these reflect environmental or biodiversity values but they also include the economic benefit to New Zealand and the efficient use and development of New Zealand’s mineral resource. Given the obvious scope for tension among these competing criteria, there may be significant uncertainty in the first years of the new regime regarding how the EPA will exercise its broad discretion.

Other amendments imported the RMA concept of sustainable management into the Act and increased the maximum penalty for breach of a marine consent to $10 million (up from $600,000).

But business also made some gains through provisions setting a six-month time limit for the marine consenting process and through a clarification that the transitional period for planned petroleum activities will cover the 2013/14 drilling season.

**The regulations**

The regulations, which will be very important as they will provide all of the operational and technical detail behind the Act, were put out for public submission in June 2012 and have been further developed in consultation with directly affected companies.

Activities are classed as permitted (requiring no consent), discretionary (requiring consent) and prohibited. No activities have been identified for prohibition at this stage.

Permitted activities for oil and gas and seabed mining include: shallow core and spot sampling, seismic surveying, use of submersible vehicles, rock dredging, submarine cabling and marine scientific research. All other mining-related activities will require consent.

**Phase II Resource Management Act reforms**

The Resource Management Reform Bill, introduced to the House in December, is the first stage of the Government’s Phase II RMA reforms and seeks to further streamline the resource consent regime, improve the quality of local decision-making and generally improve the workability of the RMA.

The Bill was reported back to Parliament on 11 June 2013.

Phase I set a nine-month timeframe for consenting projects of national significance. The new Bill sets a six-month limit for medium-sized projects (those that are publicly notified), and provides for the direct referral of regional projects to the Environment Court that meet or exceed an investment threshold to be set in regulations.

These changes would provide greater certainty of process for mining-related activities (which are likely to be publicly notified or fall within the investment threshold), but no greater certainty of outcome.
The second part of the Phase II reforms will likely include changes to district and regional plans, fresh water management, urban planning, and to the consideration of sections 6 and 7 in the Act. Mining should benefit from amendments to sections 6 and 7 of the Act proposed by a Technical Advisory Group (TAG).

The TAG recommends:

- amending these provisions to more clearly identify those landscapes, areas of indigenous biodiversity, habitats, and historic places which are valued (rather than such an assessment being carried out on a project-by-project basis)
- clarifying through a new definition of “mitigation” that, while consent authorities may require measures to mitigate, avoid or remedy any adverse environmental effects, they may not require “any form of environmental or financial compensation or similar measure”. Should any such offers be made voluntarily, they must have “regard” to them
- adding “the significant benefits to be derived from the use and development of natural and physical resources” to the list of principles which RMA decision-makers must recognise and provide for, and
- aligning section 6 with current judicial practice by explicitly recognising the “overall broad judgement” approach to decision-making to achieve sustainable management.

At the time of writing, the Government had yet to respond to the recommendations. A further Bill is likely to be introduced to Parliament in the third quarter of 2013.

**The Emissions Trading Scheme (ETS)**

The Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012 further softens the scheme’s implementation to avoid imposing increased costs on business in the current difficult economic environment.

The legislation does not specify a phase-out date for the transitional arrangements, the ‘one for two’ surrender obligation and the fixed price option, meaning that they will remain in place until at least the next ETS review in 2015.

On the negative side, the status quo is, in effect, maintained regarding the treatment of liquid fossil fuels and fugitive emissions for mining companies. This means that exported product from mining (e.g. coal, gold) will include emissions costs with no ability to access free allocation of units.

Other changes relevant to the mining and energy sectors include:

- extending the “opt-in” provisions for liquid fossil fuels to all obligation liquid fuels (instead of just jet fuels) to allow large purchasers of fuel to take responsibility themselves for the emissions from the fuel they purchase, rather than having that cost built into the price they pay the fuel supplier
• updating global warming potential (GWP) values, including increasing the GWP of methane (and therefore increasing surrender obligations for underground coal miners), and

• placing an ETS obligation on the combustion of crude oil or oil products by a miner.

Continued unlimited access to international units (subject only to a ban on units from certain industrial gas and large-scale hydro projects) and plans to increase the domestic supply via the auctioning of NZUs should ensure that businesses can still acquire relatively cheap carbon credits for the time being.

New Zealand will not be signing up to a second commitment period under the Kyoto Protocol and will instead operate under the UN Framework Convention. New Zealand’s first Kyoto commitment period obligations remain and New Zealand businesses will continue to have access to existing Kyoto markets until 2015.

Also on the Government’s agenda

Other work streams include:

• legislation to replace and modernise the intent of the Historic Places Act. The Heritage New Zealand Pouhere Taonga Bill seeks to improve the regulatory framework for archaeological heritage and to better calibrate the balance between heritage interests, private ownership interests and economic development objectives. This Bill has been reported back from select committee and is now awaiting its second and third reading.

• a review by the Ministry of Transport into the minimum insurance requirements for offshore oil rigs in the territorial sea and EEZ.
OTHER DEVELOPMENTS

Fracking investigation

The Parliamentary Commissioner for the Environment has rejected calls for a moratorium on fracking, saying that she does not think that it is justified.

However she is expected to recommend a tougher regulatory regime when she delivers her final recommendations to Parliament, due later this year. This is clear from her interim report which concludes that:

- the risks associated with fracking can be managed effectively by the implementation of operational best practice, enforced through government regulation, but
- the current New Zealand framework is fragmented and may not be adequate to the task.

Fracking has been in use in New Zealand since 1989 but largely confined to the Taranaki Basin. However oil and gas exploration permits have now been granted in other parts of the country, particularly in the East Coast of the North Island, where fracking techniques may be required for extraction. The geology of this area is very different to the Taranaki Basin, having a greater mix of rock types, including shales, and much higher seismicity.

Specific regulatory gaps which the Commissioner has identified are:

- once a company has been granted a permit, it seems to be free to decide where to drill within the permitted area without any input from either central or local government
- although the operator must take “all practicable steps” to notify the High Hazards Unit 20 days before drilling begins, the actual drilling plans do not require the approval of the Unit
- it is not clear who is responsible for well integrity – the High Hazards Unit or regional councils
- in the absence of New Zealand standards for well design and construction, companies are tending to follow the specifications applying in their home jurisdiction
- New Zealand’s HSE regulation is completely separate from its environmental regulation
- there is no central guidance to councils on fracking (the Commissioner suggests that the EPA may be the appropriate body to provide this, given the expertise it will need to develop to perform its regulatory responsibilities in relation to off-shore drilling), and
- even where operators are required to provide (often highly technical) data to councils, MBIE, New Zealand Petroleum & Minerals and to the High Hazards Unit, there is “no guarantee that the information is always being understood and used to enforce best practice – or even good practice”. 
The Commissioner is an independent officer of Parliament but her recommendations will be influential and the Government has asked MBIE to provide a detailed response to her interim report so that this can inform her final advice.

An analysis by Taranaki’s regional development agency and economic consultants BERL found that fracking has the potential to deliver almost NZ$800 million in annual GDP and over 7,000 jobs under a “growth” scenario and that a moratorium would cost NZ$215 million a year and up to 2,000 jobs in lost opportunity.

**Investigation into commercial use of the conservation estate**

The Commissioner is also investigating conditions on the use of public conservation land by commercial operators. She has consistently stated that mining companies are paying too little for access to the conservation estate – a view the industry disputes. She will issue a report on stewardship land in August. This is a subset of the wider investigation, which is on-going.

**Overseas investment regime clarified**

The New Zealand Court of Appeal’s “Crafar farms” decision, released last year, confirms that, if overseas investors meet the statutory criteria, the responsible Minister(s) must give consent to the investment.

Although the bid by Chinese investors, Shanghai Pengxin to buy the 16 New Zealand dairy farms (known as the Crafar farms) had been approved by the Government, it was the subject of several legal challenges by a New Zealand rival bidder.

The result of the case is that, where previously Ministers and the Overseas Investment Office (OIO) had applied a ‘before and after’ assessment to the “substantial and identifiable” benefits to New Zealand which the overseas buyer must establish will result from the purchase, the OIO must now apply a “with or without” test — meaning that the applicant needs to be able to demonstrate that the benefits conferred would not arise in the absence of the overseas investment.

Once satisfied that the statutory tests have been met, including the good character requirement, and that the necessary incremental benefits will result, the Ministers must approve the transaction.

The rival bidders appealed to New Zealand’s highest court, the Supreme Court, but last October it declined to hear the case, clearing the way for Shanghai Pengxin to go ahead with the purchase.

**A win for mining in the Buller Coal case**

An Environment Court ruling that the climate change impacts from burning coal are outside the ambit of the RMA consenting process, having been upheld by the High Court, has now been referred directly to the Supreme Court (bypassing the Court of Appeal) and was heard on 12 and 13 March. The parties are waiting for a decision.
The appeal has been taken by environmental group West Coast ENT supported by the Royal Forest & Bird Protection Society in an attempt to overturn planning consents granted to Buller Coal and Solid Energy for proposed coal mines on the West Coast.

The High Court agreed with the Environment Court that the "unambiguous policy" behind the 2004 RMA Amendments was to remove the power from regional councils to consider the effects on climate change of greenhouse gas emissions, except in accordance with a national environmental standard established by central government.

Both Courts considered that the intended division of responsibility was that regional government deal with the consequential effects of climate change (such as a potential increase in flood risk or sea level rise) but not the causative effects of particular activities on climate change, which are matters for national policy.

The High Court has now also heard the two appeals by Forest & Bird against alleged errors of law in the Environment Court's judgment where it indicated it is likely to grant resource consents for the Escarpment Mine. In one appeal, the judge dismissed three of the five alleged errors of law in their entirety. For the remaining two, the High Court has asked the Environment Court to keep separate its consideration of mitigation and offsets in its final decision and decide whether it should have regard to possible future mining of the wider Denniston Plateau when imposing conditions. The Environment Court is yet to issue a final decision. The judge dismissed the other High Court appeal in its entirety. An application by Forest & Bird for leave to appeal this decision to the Court of Appeal has also been rejected.

Chapman Tripp has been representing Buller Coal in the climate change appeal and the Environment Court case (and subsequent appeals) against the Escarpment Mine.

**Block offer tender process**

The 2013 competitive tender for oil and gas exploration permits was issued in April with tenders due in September and permits awarded by year end. The areas being considered this year include five onshore blocks (three in Taranaki and two on the East Coast) and three offshore areas.

Companies will be able to submit a permit bid up to a limit of 10,000 square kilometres in frontier areas and up to 2,500 square kilometres in the offshore Taranaki Basin.

Evaluation criteria will include capability to meet expected health, safety and environmental requirements and to engage with indigenous communities.

Ten new permits were issued to domestic and overseas tenderers in December following the 2012 block offer of 23 onshore and offshore areas, including two permits in the previously unexplored Pegasus Basin (south of the North Island) and one in the large, prospective and little-explored Great South Basin (south-east of the South Island).
ABOUT CHAPMAN TRIPP

Chapman Tripp is New Zealand’s leading full service law firm, with an impressive history of helping clients achieve their business goals, spanning over 135 years. We have offices in Auckland (the commercial and economic centre of New Zealand), Wellington (the centre of government) and Christchurch (the South Island’s business hub).

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