



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Crown Minerals Amendment Bill

19/06/2018

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1. Introduction

- 1.1. The New Zealand Law Society welcomes the opportunity to comment on the Crown Minerals Amendment Bill (Bill).
- 1.2. This submission sets out the Law Society's recommendations on technical drafting issues arising from clauses 5 and 8, to ensure the proposed amendments to the Crown Minerals Act 1991 (CMA) are clear and workable in practice and achieve the Bill's objectives.
- 1.3. The Law Society does not seek to be heard, but is happy to work with officials advising the committee on drafting changes to those clauses if that would be of assistance.

2. Clause 8: New sections 41AA to 41AF – Change of Control

Background

- 2.1. Clause 8 introduces new sections 41AA to 41AF. Ministerial consent will be required in advance to changes of control of corporate Tier 1 permit operators. Changes in control without prior Ministerial approval may result in the permit being revoked under the new section 41AF. In addition, a change of control without Ministerial consent is to be an offence punishable by a fine of up to \$800,000 if the person knew or ought to have known that control had changed.
- 2.2. The requirement for Ministerial consent appears to bring the provisions governing changes in control of Tier 1 permit operators more into line with the provisions governing changes to permit operators.¹ However, there can be differences between the two situations which make the legislative alignment sought to be achieved potentially problematic.
- 2.3. In the case of a permit transfer to a different operator, it might reasonably be assumed that the holder of a permit will know sufficiently in advance that the permit is to be transferred, to make a requirement for prior consent practicable; and when this is not possible, transfer of the permit can readily be deferred pending the Minister's consent. This is not necessarily the case where a change in control of permit participants is involved. For example, in a contested takeover, it may only be close to or when the change of control has actually occurred, that the participants will know that a change is more than likely. Similarly, in closely held private companies, changes in control might occur consequent on the death of the party previously holding control. In these circumstances, it may be impracticable to obtain Ministerial consent before the change in control.

Late Applications for Ministerial Consent – new section 41AC

- 2.4. New section 41AC(2) provides for situations where there are "*compelling reasons*" why an application for consent to a change in control of a Tier 1 permit, could not be made at least three months before the date on which the proposed change takes effect. In those circumstances, the Minister may receive an application at a later agreed date.

¹ Under section 41C of the CMA "a permit operator may be changed only with the prior consent of the Minister and no change of permit operator has any effect without that consent".

- 2.5. It is unclear why “compelling reasons” are required to justify the exercise of the Ministerial discretion to receive late applications, rather than the standard, well understood test of “*reasonable grounds*”. A test of reasonableness would be more appropriate for the exercise of the section 41AC(2) discretion because it would provide for situations such as those noted in paragraph 2.3 above, where there is not the required degree of certainty in advance of a change in control.
- 2.6. In addition, as discussed below, section 41AC(2) is not framed in a way which obviates the need for the Minister’s prior consent (under new section 41AB(2)). A situation might arise, for instance, where the Minister has received an application for consent by an agreed later date, but because the consent is not granted before a change of control occurs, section 41AB(2) is contravened with the result that (under section 41AB(3)) the permit might still be revoked and an offence has been committed. This is unsatisfactory.

Recommendations:

- 2.7. Amend section 41AC(2) to provide that lack of advance notice and/or certainty that a change in control will occur may be “*reasonable grounds*” for the Minister to exercise discretion to accept a late application for consent.
- 2.8. Amend section 41AC(2) to provide:
- a. For the avoidance of doubt, the later date agreed by the Minister may be after the change of control for the purposes of section 41AA(1); and
 - b. Where the Minister has given consent to the change of control over a Tier 1 permit after the change of control, it is either exempt from compliance with section 41AB(2) or the later consent should be deemed to be “*prior consent*” for the purposes of section 41AB(2).

Inter-relationship with offence provisions – new section 41AB

“Knowledge” about a change of control

- 2.9. The creation of an offence under new section 41AB² – where a person knows, or ought reasonably to know that the person “*has obtained*” the power of control over a permit operator – is also potentially problematic: that knowledge might be acquired too late to seek and obtain Ministerial consent before control changes. That knowledge might even be acquired after a change in control has already occurred (as noted above at paragraph 2.3). Compliance with the section in either of those circumstances may be impossible (it clearly will not be possible in the second case).
- 2.10. A person who obtains the power of control should not risk committing an offence in circumstances where compliance with the legislative requirements is not practically possible. Criminal liability should be qualified; an orthodox qualifier in such circumstances is “*without reasonable excuse*” (or words to similar effect).

² See new section 41AB(2) and (3)(b), and new section 100(2A)(a) [clauses 8 and 18 of the Bill, respectively].

Recommendation:

- 2.11. Make the offences in new section 100(2A) (clause 18 of the Bill) subject to “*without reasonable excuse*”.

Cumulative Liability

- 2.12. It should also be noted that section 41AB creates *two* offences. A person may be criminally liable both for the initial change of control without prior Ministerial consent, **and** for the failure to report the initial contravention:
- a. a transfer of the control without prior Ministerial consent: section 41AB(2) and section 100(2A)(a) – the maximum penalty for which is a fine not exceeding \$800,000 under new section 101(2A)(a); and
 - b. a failure to notify the Minister of an unlawful change of control: section 41AB(4) and section 100(2A)(b) – an offence punishable under the new section 101(2A)(b) by a fine not exceeding \$200,000.
- 2.13. Such cumulative criminal liability is unusual and should be clearly justified.

Recommendation:

- 2.14. Consider whether cumulative criminal liability under new section 41AB is justified.

Interpretation difficulties – the drafting of section 41AB

- 2.15. As a final point, the drafting of section 41AB needs to be reconsidered.
- 2.16. The full wording of the section is set out in Appendix A. The intention appears to be that changes in control of corporate Tier 1 permit operators without prior Ministerial consent may result in an offence punishable by a fine of up to \$800,000 if the person knew or ought to have known that control had changed. As will be apparent, however, the offence provision is convoluted: there is a complex interplay between subsections (2) and (3), in relation to the elements (the act, and the requisite knowledge) that constitute a contravention and the resulting offence. This is likely to result in interpretation difficulties in practice.

Recommendation:

- 2.17. The Law Society recommends that the committee obtain advice from officials about options for redrafting section 41AB in a clearer way.

When Minister may consent to Change of Control of Permit Operator – new section 41AE

- 2.18. New section 41AE(1)(b) imposes a test related to the health and safety capabilities of a permit operator that is framed in similar (but not identical) terms as those that apply to the initial grant of a permit under section 29A of the CMA. The provisions of section 41C(3)(b)(i),³ as they relate to health and safety capabilities, are different again; the latter is framed in more general terms and does not refer to legislation operating in parallel with the Health and Safety At Work Act 2015 (such as the Maritime Transport Act 1994).

³ Section 41C(3)(b)(i) covers the health and safety requirements if the change of operator relates to a Tier 1 permit for exploration or mining.

- 2.19. There is no obvious reason why the health and safety requirements that arise when a permit is initially granted (section 29A), or the control of a permit operator for a Tier 1 permit changes (section 41C(3)(b)(i), should be different to the requirements that arise when a permit operator changes as proposed by section 41AE. The subtle differences in wording between existing section 29A, proposed new section 41AE, and existing section 41C allow room for argument as to whether there is a substantive difference in the requirements in each of these situations.

Recommendation

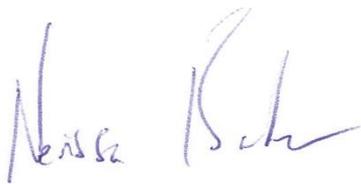
- 2.20. Align the language of sections 29A, 41C and 41AE in relation to health and safety requirements.

3. Clause 5: Amended section 19 – Issue of Minerals Programmes

- 3.1. Clause 5 proposes to amend section 19(3) by stating that a minerals programme is not a legislative instrument for the purposes of the Legislation Act 2012 and is not to be drafted by the Parliamentary Counsel Office.
- 3.2. New section 19(3)(b) cross-references section 20 of the CMA. Section 20 relates to the notification of minerals programmes to persons who made submissions on draft minerals programmes and to the public.
- 3.3. It is not apparent what the connection between these two sections is and therefore what the cross-reference means. If there is no relevant connection between the two sections, it is recommended the reference to section 20 be deleted.

Recommendation:

- 3.4. Delete the cross-reference to section 20 (of the CMA) in section 19(3)(b).



Nerissa Barber
Vice President
19 June 2018

Appendix A: section 41AB

Appendix A

41AB Change of control of permit operator of Tier 1 permit

- (1) **This section applies *if*** a corporate body that is a permit operator of a Tier 1 permit undergoes a change of control.
- (2) Every person who obtains the power referred to in section 41AA(1) **contravenes** this subsection ***if the change of control is made without the prior consent of the Minister*** (see sections 41AC to 41AE, which relate to obtaining that consent).
- (3) **A contravention of subsection (2)** by a person may result in either or both of the following:
 - (a) the revocation of the permit under section 41AF:
 - (b) **an offence under section 100(2A) *if* the person knows, or ought reasonably to know, that the person has obtained the power** [of control] referred to in section 41AA(1).
- (4) The permit operator must notify the Minister in accordance with subsection (5) ***if—***
 - (a) subsection (2) is **contravened**; and
 - (b) the permit operator **knows, or ought reasonably to know**, that it has undergone a change of control.
- (5) For the purposes of subsection (4), the notification must—
 - (a) be given as soon as is reasonably practicable, but in any event not later than 3 months after the permit operator **becomes aware, or ought reasonably to have become aware**, that it has undergone a change of control; and
 - (b) be accompanied by a copy of any agreement or other document that specifies the change of control.

[emphasis added]