
Crown Minerals (Decommissioning and Other Matters) Amendment Bill 2021

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1. Introduction

- 1.1 The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Crown Minerals (Decommissioning and Other Matters) Amendment Bill (**Bill**).
- 1.2 The Crown Minerals Act 1991 (**Act**) does not currently provide for the decommissioning responsibilities of petroleum permit and licence holders, and therefore does not specify the length of time for which they are responsible, or the consequences for failing to carry out decommissioning. This Bill introduces new provisions which set out permit and licence holders' obligations in relation to decommissioning activities, as well as civil and criminal penalties for failing to meet these obligations.
- 1.3 The Law Society is concerned about the proposed retrospective application of the Bill, particularly those provisions imposing pecuniary and civil liabilities for existing permit holders. The Law Society also considers that the drafting of certain provisions of the Bill could be improved to aid clarity and consistency.
- 1.4 The Law Society does not seek to be heard.

2. Effect on existing permit/license holders

- 2.1 The Bill imposes new obligations and liabilities on current (and future) permit and licence holders to carry out and fund the decommissioning of operations at the end of a permit's life. The Bill introduces civil pecuniary and criminal liabilities for current permit holders for any failure to comply with these new obligations. These include:
 - (a) Pecuniary penalties of up to \$500,000 (for individuals) and \$10 million (for companies) (new section 89ZZO), and
 - (b) Offences punishable by up to 2 years imprisonment or a fine not exceeding \$10 million or three times the cost of decommissioning (whichever sum is the greater) (new section 89ZZQ).
- 2.2 Legislation should generally have prospective and not retrospective effect.¹ While Parliament has the power to pass such legislation, good reasons are required to justify such a departure in order to avoid infringing the rule of law. Even where new legislation is intended to address future events, it can be retrospective in the sense that it affects existing rights and duties.²
- 2.3 Although there is currently a general statutory requirement³ for permit holders to act in accordance with 'good industry practice', section 30 of the Act more specifically provides that a permit holder has the right to prospect, explore or mine (as the case may be) on the conditions stated in the permit. The Law Society is concerned about the proposed retrospective application of the Bill, in particular the provisions that create civil liabilities and

¹ Legislation Guidelines: 2018 edition, at chapter 4.7, chapter 12; and s 7 of the Interpretation Act 1999.

² Refer also to the examples outlined in Chapter 12 of the Legislation Guidelines.

³ Section 1A(2)(c).

criminal offences for failure to meet obligations that did not exist at the time the licence or permit was sought and obtained.

- 2.4 While there may be an existing requirement to observe ‘good industry practice’, this standard is not fixed or clearly defined, and in any event has not carried with it the civil and criminal liability (including residual liability) proposed by this Bill. Further, it appears that the Bill is seeking to address the difficulties arising from the variance in permit conditions, and inconsistent practice when granting permits. This indicates that there may not be an accepted standard of ‘good industry practice’.

Recommendation

- 2.5 The Law Society recommends that further consideration be given to the application of the Bill to existing licence and permit holders, including whether transitional provisions are appropriate.
- 2.6 If those obligations and penalties are intended to apply, in full, to existing permits and licences, the Law Society recommends that section 30 of the Act be amended to clarify that a permit holder has the right to prospect, explore or mine (as the case may be) *on the conditions stated in the permit and* in accordance with the provisions of the Act.
- 2.7 Alternatively, permits could be deemed to be amended to include the decommissioning provisions of the Bill (excepting retrospective liability) with proposed new section 89C of the Bill making it clear that in the event of any duplication or overlap between the conditions of a permit and the decommissioning provisions in the Act, the Act prevails.

3. Decommissioning definition – section 89E

- 3.1 Proposed new section 89E defines decommissioning, which includes (amongst other matters) ‘*undertaking site restoration when production of a well ceases.*’ However, no guidance is given as to the meaning of “site restoration,” and the extent to which it is required is left to other provisions of the Act, any other enactment, or a regulatory agency. Given the potential costs and issues associated with “restoring” a site, particularly in an offshore environment, further guidance on what is intended, and more explicit criteria would assist.
- 3.2 Proposed new section 89E(3) states that if there is no other relevant legislative or regulatory requirement in place, then infrastructure must be decommissioned by totally removing it. However, this approach does not explicitly account for the potential environmental effects of removal. Where the effects of removal are greater (or potentially greater) than leaving the infrastructure in-situ, then we suggest that leaving the infrastructure in-situ should be an available option. This could be achieved by specifically providing for a process whereby a permit holder applies to the Minister for permission to do so, with the Minister empowered to grant an application if satisfied that the environmental effects of the infrastructure remaining would be less than removal.

4. Liability of current and former permit holders – sections 89K – 89P

- 4.1 Proposed new sections 89K – 89P provide that former permit/licence holders remain jointly and severally liable for decommissioning obligations to the extent that current

permit/licence holders do not carry out the obligations. These provisions are broadly worded and would capture all former permit/licence holders rather than just the immediately prior holder. If this is intended, consideration should also be given to imposing a hierarchy, in that a former holder other than the immediate prior holder can only be pursued to the extent that the obligations have not been met by the immediate prior holder and so forth.

5. Financial capability assessments – sections 89ZB and 89ZC

- 5.1 Proposed new section 89ZB provides that the Minister “may” assess the financial capability of a permit/licence holder to meet decommissioning costs. It is not clear whether the power provided to the Minister under this clause is intended to be discretionary or mandatory. If ‘may’ is used to provide a discretion, the Law Society considers it would be useful for criteria to be provided which would guide the Minister (and permit/licence holders) as to when it is appropriate for the Minister to require an assessment. Such criteria could also provide guidance as to when it is appropriate for a re-assessment of financial capability to occur. At present, the clause does not specifically address re-assessments, but as the clause states the Minister may carry out an assessment “*at any time while the relevant permit or licence is in force*”, a permit/licence holder could theoretically be subject to rolling assessments.
- 5.2 Proposed new section 89ZC requires permit and licence holders to provide supporting information to the Minister for the purposes of a financial capability assessment, and subsection (4) provides the Minister with an extremely broad power to require any information that the Minister “considers necessary”. The Law Society suggests some qualification is appropriate, given the breadth of the power. Options may be “reasonably necessary” or “relevant and reasonably necessary to assess financial capability”. An alternative may be to cross reference to the information specified in proposed new section 89ZB(4).
- 5.3 The new sections requiring the provision of financial information (for example proposed new section 89ZF) do not address how commercially sensitive information will be addressed. While the provisions of the Official Information Act 1982 will apply to information held by the Minister, it may be useful to provide some guidance to permit/licence holders as to how their information will be stored and used.

6. Post decommissioning obligations – Subpart 3

- 6.1 Proposed new subpart 3 (proposed new section 89ZL) sets out post-decommissioning obligations and requires a permit/licence holder to pay the Chief Executive an amount sufficient to meet the cost of any post-decommissioning work (i.e., activities to remediate any petroleum infrastructure, wells left in-situ, and any environmental damage or health and safety risks caused by a decommissioning failure).
- 6.2 It would be helpful for the Bill to expressly provide for the permit/licence holder to undertake the remediation work themselves in lieu of payment, or for the permit/licence holder to insure against any such risks. While the Minister has a general power of exemption (proposed new section 89ZT), the Law Society suggests that if Parliament wishes to consider these alternative mechanisms, it may be useful to expressly provide for them, rather than rely on the exemption process.

7. Compliance notices – sections 89ZZD – 89ZZG

- 7.1 Proposed new section 89ZZD provides the Chief Executive or an enforcement officer with the power to issue a compliance notice in certain circumstances. The circumstance under proposed subsection (3)(a) is if the contravention/likely contravention is “sufficiently serious” to justify the issue of a compliance notice. No criteria is given as to what might amount to a sufficiently serious contravention. Further guidance on this matter will assist.
- 7.2 Proposed new section 89ZZE addresses the content of compliance notices. Proposed subsection (1) refers to the Chief Executive or enforcement officer believing that a person has or is likely to contravene the Act/regulations. For consistency with proposed section 89ZZD it may be appropriate to amend this subsection to refer to “reasonably believes” or “has reasonable grounds to believe”.
- 7.3 Proposed new section 89ZZG gives the Chief Executive or enforcement officer power to extend the compliance period but only if the compliance period has not ended. The Law Society considers this clause should be amended to allow for an extension if a request is made by the permit/licence holder for an extension within the compliance period, but for whatever reason the Chief Executive or enforcement officer has not made a decision on the application within the compliance period.
- 7.4 Proposed section 89ZZH(2) refers to a notice being able to be addressed to any person under the person’s “legal name or usual business name or style”. It is unclear what the word “style” is referring to in this context. If this word is to remain, further guidance is required.
- 7.5 Proposed section 89ZZM(3) empowers a Court to make an order requiring compliance with a compliance notice (proposed subsection (1)(a)) or restraining a person from contravening a compliance notice (proposed subsection (1)(b)) “*whether or not the compliance period for the compliance notice has expired*”. It is not clear what useful purpose would be served by allowing a Court to make an order restraining contravention of a compliance notice where the compliance period has expired. It may be more appropriate for a declaration of past contravention (or the like) to be made in such circumstances. The Law Society recommends that the relationship between proposed subsections (3) and (1) be reviewed in this light.
- 7.6 Proposed section 89ZZN of the Bill establishes a defence of reasonable mistake in pecuniary penalty proceedings. Part of the defence requires a person to compensate or offer to compensate any person who has suffered loss or damage by the breach. The defence requirements do not appear to anticipate a situation where no loss or damage occurs, since the requirements for the defence require all three elements in proposed section 89ZZN(1) – (3) to be proved. While in practice a breach may generally result in some loss or damage, the Law Society questions whether a situation of no loss or damage needs to be addressed.
- 7.7 Proposed section 89ZZO relates to pecuniary penalties and outlines the situations in which a person may be liable to a pecuniary penalty. The wording of this clause is broad and for some of the categories it is unclear how it will be determined that the category applies. For example, proposed subsection (1)(e) captures any person that has in any way been directly or indirectly knowingly concerned in or party to the contravention. The words “concerned in” appear to cast the net more broadly than “party to” and could capture advisers or

employees who knew about the potential contravention even where they had advised/voted against it.

8. Records and reports – clause 19

- 8.1 Clause 19 of the Bill proposes to amend section 90 of the Act, which relates to permit holder records and reports. The proposed changes include records and reports relating to financial, commercial, scientific, technical, and other records. Proposed new subsection 8A gives the Chief Executive a discretion to publish any of this information on an internet site. No direction is provided as to how the Chief Executive should exercise this discretion and what factors such as commercial sensitivity should be considered before electing to publish. The Law Society recommends further guidance be provided in relation to this point.



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