

THE LEGAL ENVIRONMENT FOR PETROLEUM EXPLORATION: AN OVERVIEW

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Abstract

The New Zealand legal system is broadly similar to the other common law systems derived from English law, with many local modifications. The rights to explore for and take petroleum have been governed by the Petroleum Act and administrative procedures under that Act. From 1 October 1991 the Crown Minerals Act and the Resource Management Act will replace most of the previous regime.

Explorers and service companies from within New Zealand and overseas have a choice of business structures and organisations, including companies, partnerships and joint ventures. The relevant differences and features are explained, including comments on doing business in New Zealand from overseas.

The commercial legal environment includes regulation of trade practices and competition; Overseas Investment Commission requirements; taxation obligations (including income tax, employee taxes, fringe benefit tax, goods and service tax and contractor withholding taxes); the Accident Compensation regime and operational requirements relating to transport and communication systems. The paper provides an introduction to the business and operational effects of these legal requirements. Recent reforms in areas of law relating to Resource Management and taxation will also be relevant considerations for prospective explorers and overseas companies. Some of these aspects are covered more fully by complementary papers presented to the conference.

Introduction

My aim in this paper is to provide an overview of the New Zealand legal environment as it affects petroleum explorers and their operations in New Zealand. Necessarily, a paper of this nature can only be a summary. But it is intended to identify some of the commonly encountered requirements and restrictions, and some suggestions for avoiding or minimising their effects. As with other aspects of an exploration project, the delay, expenses or uncertainties arising from the legal regime can best be minimised by timely planning and co-ordination of the technical, supply, financial and legal elements of the project.

I include some comments on the regime which applies to overseas companies or investors doing business in New Zealand. These comments should also be helpful for those domiciled within New Zealand in their understanding of some of the problems which may face co-venturers or contractors from overseas.

In keeping with the theme for this conference, 'Meeting Old Challenges With New Perspectives', I include an outline of the new statutes which replace parts of the Petroleum Act, and which will directly affect petroleum operations. I do not deal with the full scope of the Resource Management Act, as that is covered by others, but I do summarise the new permitting arrangements, questions of land access and the new procedures for pipelines.

The paper deals with the following general headings:

(i) An outline of the New Zealand legal system (as it affects petroleum exploration).

(ii) A summary of the types of business structures and organisations recognised under New Zealand law.

(iii) A more detailed consideration of significant legal requirements and restrictions governing petroleum exploration.

(iv) Some comments on the prospects for the future.

New Zealand Legal System

The New Zealand legal system has its origins in the laws of England. It still has a great deal in common with the common law systems of England, the Commonwealth (particularly Australia and Canada) and the United States of America.

Although the system and the broad rules are similar to those of other jurisdictions, naturally there are many matters of detail and local modifications introduced by statute - that is, by Act of the New Zealand Parliament, which consists of the elected representatives of the people.

Subsidiary to the statutes there is more detailed law, contained in Regulations and Orders in Council. These are public, legally binding documents, introduced by the government of the day without parliamentary debate.

At a less formal level, but commonly having the force of law, is a whole range of political and administrative regulatory powers for the grant, and conditions, of licences, consents or approvals.

All of these elements are present in the petroleum exploration regime. The Petroleum Act was first passed in 1937 and has been considerably amended since. From 1

October 1991, and subject to some transitional arrangements, most of the Petroleum Act will be superseded by the Crown Minerals Act 1991 and the Resource Management Act 1991.

Until 1 October, the Petroleum Act determines the ownership of petroleum in a natural reservoir, and certain rights which may be granted to licensees to explore for and mine that petroleum. The Petroleum Regulations 1978 govern in some detail the operational conditions within which exploration must be conducted. The determination of the conditions to be attached to licences, work programmes and Crown participation, and indeed, the determination of whether or not to offer or grant a licence, are political and administrative concerns.

Certain activities may fall within the jurisdiction of one or more specialist Tribunals. These may include a local authority (City, County, District, or Regional Council) or the Planning Tribunal under the Town and Country Planning Act, a local Water Board or the Catchment Authorities under the Water and Soil Conservation Act, or the Arbitration Court under the Labour Relations Act.

From 1 October, the Crown Minerals Act determines the ownership of petroleum and provides the framework for permit allocation and land access. The Resource Management Act regulates the effects of exploration and development activities, and establishes administrative bodies and procedures for land use, the taking of water and the control of discharges. It also introduces a new set of rules for authorising and protecting transmission pipelines.

Business Structures and Organisations

As one might expect, business organisations and arrangements in New Zealand correspond closely to those in similar jurisdictions overseas. There are some particular provisions for regulating the investments and operations of non-New Zealand participants, in New Zealand.

Companies

A company may be incorporated in New Zealand under the Companies Act 1955 with at least 2 shareholders. The liability of the shareholders may be limited to the capital of the company (which need only be nominal). If the company is formed for mining purposes it may be a 'no liability' company, which means that the shareholders cannot be compelled to pay the full value of their shares.

A private company (having 2 to 25 members), need not make public its accounts nor have them audited, unless 25% or more of the voting power is controlled by companies incorporated, or persons normally resident outside New Zealand.

Although companies incorporated before 1983 might be limited in the scope of their powers and objects, the present legislation permits a company to exercise all the powers and functions of a natural person.

There is a major reform of company law at present before Parliament. A Select Committee is considering submissions on the Companies Bill. The form of final legislation is still uncertain. Even if the changes are introduced in 1992 as planned, there is likely to be a 3 year transition period.

Overseas Companies

Companies incorporated in overseas jurisdictions are generally recognised as legal entities in New Zealand. A

company which is incorporated overseas and wishes to establish a branch or a place of business in New Zealand must register with the Registrar of Companies. It must provide certified copies of its constitutional documents, and details of its directors, secretary and any other officers. It must also provide the name and address of a person resident in New Zealand who will accept the service of notices on behalf of the company. Each year the company must file with the Registrar a full financial statement, and a separate financial statement for its New Zealand activities. The statements must, in general, be audited.

'Overseas Persons'

As determined by the Overseas Investment Act and Overseas Investment Regulations, any person who is not a New Zealand resident, and any company in which 25% or more of the voting capital is held or controlled by persons or companies overseas, will be an 'overseas person'.

Before an overseas person can establish or carry out business in New Zealand, purchase any business in New Zealand, takeover any New Zealand company or take up shares to be issued by any New Zealand company to the extent that the company would itself become an overseas person, the consent of the Minister of Finance must first be obtained. Changes to the Overseas Investment Regulations in 1989 raised the threshold for most consent requirements. These requirements, and those of the Overseas Investment Act, are referred to later.

Partnership

A partnership is 'the relationship which subsists between persons carrying on a business in common with a view to profit.' The consequences of that relationship, for the parties themselves and with respect to persons outside the arrangement, are governed by the Partnership Act 1908.

I mention partnerships because they are a popular business structure. They do sometimes exist when the persons involved do not intend to be in partnership. Considerable care needs to be taken in petroleum exploration projects to ensure that a partnership is not inadvertently created.

The existence of a partnership, and therefore the legal consequences, will be determined not merely by the intention of the parties, but also by the facts, by the way in which the parties conduct themselves, and by whether or not the relationship accords with the definition.

The most important consequences, for present purposes, are:

- (i) The partners are jointly and severally liable for all obligations of the partnership. (That is, their obligations are not limited to a percentage interest in the enterprise, but are unlimited).
- (ii) Any partner may bind all of the other partners in obligations to outsiders, even though between the partners there is no authority to do so.
- (iii) A partnership is recognised as an entity for taxation purposes. It is not required to pay income tax, but is required to file tax returns showing the net taxable income of the partnership and the distribution of it to the individual partners.

Joint Venture

The expression 'joint venture' is widely used to describe the contractual arrangements which are commonly entered into by participants in a petroleum exploration or mining project.

In New Zealand most of the joint venture agreements are based upon the British National Oil Company model used in the North Sea, although a number of other models have been influential.

Notwithstanding their popularity, and the perceptions of those in the petroleum industry and in other businesses about the nature of a joint venture, the concept itself is not explicitly recognised as a legal entity or as a standard legal relationship.

Because it is not governed by an existing set of legal rules, unlike a partnership or a company, the terms of a joint venture are undefined, except to the extent that the parties choose to define them. That is the purpose, of course, of the joint venture agreement.

This paper does not deal in depth with joint ventures. The topic is more fully covered in a paper which I delivered to the 1989 New Zealand Oil Exploration Conference. That paper includes other references. For purposes of this overview a few of the main points are mentioned.

Some important characteristics of a joint venture include:

- (i) The arrangement is not intended to be a partnership, because the parties generally wish to avoid the consequences of being in partnership (i.e., joint and several liability, the apparent capacity of any one partner to bind all partners, the need for detailed taxation accounts which implies identical arrangements for claiming expenses).
- (ii) The parties generally participate in defined proportions, and agree to hold assets and bear liabilities as tenants in common in those proportions.
- (iii) The collective enterprise is not intended to merely produce a profit, but to produce a specific asset (petroleum) which then becomes the property of the participants in shares.
- (iv) The participants should not be described, and more importantly should not be held out to others, as 'partners'. Instead, it should be made clear to contractors that, although there are several participants, the relationship between them is not a partnership.

The expression 'joint venture' is found in several statutes, including the Ministry of Energy Act 1977, the Commerce Act 1986 and the Goods and Services Tax Act 1986. However, none of those statutes is explicit about the meaning of the term.

Licenses

I refer briefly to the status of named licensees to whom a prospecting or mining licence is granted, because it appears that the legal position of the licensees is not always correctly reflected by the way in which the interests are referred to.

Under the Petroleum Act the licensees are jointly and severally liable for all obligations under the licence. This means that each licensee may be held fully responsible for those obligations. The same applies under the Crown Minerals Act, except that the licence will be called a 'permit'. The licensees usually agree between themselves that they will bear those obligations in defined shares. However, in the absence of some agreement between the licensees, the suggestion that the licence and the obligations under it are held in percentage interests, has no foundation.

Even if agreement is reached between the licensees that they hold specified percentage interests in the rights and obligations under the joint venture, and in any petroleum produced, this agreement does not prevail over the Act as to the licence obligations. The respective percentage interests

of licensees—which can be seen in the press, the Ministry's own records and publications, and even on the licence itself—have no basis under the Petroleum Act or Crown Minerals Act, and are merely adopted as a matter of convenience to reflect the arrangements reached between the parties.

Significant Legal Requirements and Restrictions Governing Petroleum Exploration

Petroleum exploration has been primarily governed by the Petroleum Act and by Regulations and administrative decisions relating to that Act. Most of that regime will be replaced by the Crown Minerals Act, and associated legislation and administrative procedures. However, those participating in exploration are also governed by the law of New Zealand as it affects their particular activities. Without attempting to deal with every issue, it should be helpful to indicate some which experience suggests are likely to be most relevant.

The next two sections of this paper give a brief overview of the main issues, concerning those covered until now under the Petroleum Act, some of which are now in the new Acts, and other statutes and legal requirements of particular importance.

The Petroleum Legislation

Introduction

The Petroleum Act 1937, the Petroleum Regulations 1978 and the Petroleum Pipeline Regulations 1984 together provide a code for petroleum exploration and development, including the installation of transmission pipelines. The code does not exclude the application of other legal requirements such as compliance with the laws relating to town planning, water, clean air and noise.

This existing code provides for mechanisms to deal with:

- (i) The allocation of licences, the setting of work programmes and the regulation of dealings with licences.
- (ii) Crown royalties, Crown powers to modify work programmes, to direct the refining of products, to hold licence interests and to direct unitisation arrangements.
- (iii) Rights in respect of land access, compensation for land access or damage, and the taking of land (with the mechanism in the Public Works Act).
- (iv) The role of petroleum inspectors, and regulation of mining practices to ensure safety.
- (v) The preparation of reports, the maintenance of geological records, and the provision of reports, samples and statistical information.
- (vi) Authorisation for pipelines, for pipeline easements, and for access and taking of land.
- (vii) Legal protection for pipelines.

When the Resource Management Act and the Crown Minerals Act come into force on 1 October 1991, different parts of the existing code will be affected in different ways. In particular parts of the existing code will remain unchanged, parts of the existing code will remain for a transitional period only and other parts will be revoked and superseded by the new statutory provisions.

Remaining Parts of the Petroleum Act and Regulations

The Petroleum Act will remain in effect, but with several substantial omissions. Sections 41 to 47C, which set out the role of the Chief Inspector of Petroleum, will remain in

effect. Also, Parts 3 and 4 of the Petroleum Regulations 1978, which relate to well drilling and general operational and safety matters, will continue to have effect. The Chief Inspector of Petroleum has a number of functions under those regulations.

Sections 47E (Records and Reports to be Kept by Licensees), 47G (Service of Notices), 47L (Offences and Penalties) and Parts of 47M (Regulations) will continue to remain in effect for the purposes of the Petroleum Act. Similar provisions appear in the new legislation in respect of the separate Acts.

Part II of the Petroleum Act provides for the authorisation of pipelines and for the necessary land access and ancillary matters. That Part is also revoked, except for residual provisions in respect of offences and regulations.

Many of the provisions in the Petroleum Pipeline Regulations remain in effect. Only those regulations which relate to the processing of pipeline authorisations and to the form of easements are revoked. The operative provisions relating to pipeline operations, to notices to public and land owners, and to the monitoring done by the Chief Inspector remain in effect.

Transitional Provisions

Although the Crown Minerals Act provides a new framework for the grant of petroleum licences, every 'existing privilege' will continue to have effect (subject to a small number of exceptions) as if the legislation had remained unchanged.

In this context, 'existing privileges' include petroleum prospecting licences, petroleum mining licences and pipeline authorisations granted under the Petroleum Act.

The effect is that, generally, the holders of those existing privileges continue to have the same rights and obligations as before. Other persons having functions, powers or duties relating to the existing privilege will continue to have those functions, powers and duties.

The exception to that general statement arises under section 108 of the Crown Minerals Act (as amended by the Crown Minerals Amendment Act, which Parliament is expected to pass shortly). Powers and duties that would have been exercisable by the Minister of Energy, and which now fall within the functions of the local authority under sections 30 or 31 of the Resource Management Act 1991, will be exercisable by the relevant consent authority in accordance with the Resource Management Act. The sections mentioned relate to environmental supervision, something which has until now been carried out by the Minister of Energy in respect of non-petroleum minerals. In respect of petroleum, the exception is not a major change.

In addition, the bond held by the Secretary of Energy in respect of each licence may be claimed, in case of breach, by the appropriate consent authority (with priority as to one half) and by the Minister (with priority as to the other half).

If a prospecting licence has been issued under the Petroleum Act and the holder applies for a mining licence after 1 October, the application for a mining licence will be treated as an application for a mining permit under the Crown Minerals Act, and not an application under the Petroleum Act.

There are also transitional provisions relating to applications made, but not determined or withdrawn, before 1 October 1991. In those cases the applicant may advise the Minister before 1 December 1991 that the application should

be processed under the Crown Minerals Act. If there is no such advice then the application will be dealt with under the Petroleum Act. If a licence is issued, it will have the same status as an 'existing privilege', except that for the purpose of land access the provisions of the Crown Minerals Act, and not the Petroleum Act, will apply.

Similarly, an application for pipeline authorisation will be processed as if made under the Petroleum Act, unless the applicant seeks to have it treated as an application for approval under the Resource Management Act.

As an interim measure, until a minerals programme is issued for petroleum, the Minister may not grant a petroleum permit without first offering the permit for allocation by public tender, and without seeking applications under section 24.

The Crown Minerals Act: Some New Perspectives

Many of the provisions of the Petroleum Act and Petroleum Regulations have counterparts in the Crown Minerals Act or the Resource Management Act. Much of the new legislation is based closely on the Petroleum Act, so that the changes imposed in respect of petroleum are generally less severe than those proposed for other minerals.

The major change is that the Act now applies in respect of all Crown owned minerals. With minor exceptions, no person may prospect, seek or mine Crown owned minerals without the necessary permit, or without authority given by the holder of a permit. Compliance with the Crown Minerals Act does not remove the need to comply with all other relevant legal requirements.

The new Act introduces several new rules and requirements. They include:

- (i) An obligation for all persons exercising functions and powers under the Act to '... have regard to the principles of the Treaty of Waitangi ...'
- (ii) The requirement for the Minister to issue a minerals programme, following a procedure which includes giving public notice, providing drafts for public comment and receiving submissions. The minerals programme is intended to establish policies, procedures and provisions for management of the respective Crown minerals, including provision for the allocation of permits, and for a fair financial return to the Crown. The Minister may initiate proposed changes to the programme at any time, and must review the programme as a whole at least every ten years.
- (iii) Permits must conform with the minerals programme (if there is one) which is current at the time the permit is issued.
- (iv) New labels for the categories of permits and corresponding activities allowed under them - prospecting, exploration and mining. The rights associated with each and their respective durations are summarised below.
- (v) Provisions for the Minister to revoke a permit for non-compliance, and for a permit holder to surrender a permit. Also introduced are mechanisms for transfers and other dealings with permits. Increased accountability is required on the part of the Minister, and less discretion is exercisable.
- (vi) Provisions for work programmes to be approved by the Minister as a prerequisite for granting a permit (common practice in the petroleum industry, but not necessarily with regard to other minerals). The Minister is given some new duties, such as to consider the applicant's position and give reasons if a work programme is declined.
- (vii) Powers for the Minister to require that petroleum be refined in New Zealand and to direct unit developments, in

terms similar (but not identical) to those of the Petroleum Act.

(viii) New provisions regulating access to land (explained further below), with explicit provisions for compensation to land owners or occupiers, which are rather more extensive than those under the Petroleum Act.

(ix) Provisions for permit holders to maintain, and submit to the Secretary of Commerce, records and reports of activities conducted under the permit. These provisions are similar, but not identical, to those of the Petroleum Act.

Mineral Permits

Mineral permits may be granted by the Minister either in accordance with a minerals programme; or on the basis of allocations for public tender; or in response to an unsolicited application (in which the first applicant will have right of priority for consideration, unless there is another mechanism published before the application is made).

There are now three categories of permit. They are:

(i) A prospecting permit, which may be issued for two years and may be extended but only to a total of four years.

(ii) An exploration permit, which may be issued initially for five years and may be extended over half of the original land area to a total of ten years. It may be further extended over sufficient land, for sufficient period, to enable appraisal of a discovery.

(iii) A mining permit, which may be issued in respect of an identified discovery, initially for 40 years but extendable only if necessary to allow economic depletion of the resource.

Prospecting is defined to mean 'any activity undertaken for the purpose of identifying land likely to contain exploitable mineral deposits or occurrences' and includes geological, geochemical and geophysical surveys.

Exploration means 'any activity undertaken for the purpose of identifying mineral deposits or occurrences and evaluating the feasibility of mining particular deposits or occurrences ...', and includes drilling.

Mining means '... to extract, by whatever means, a mineral existing in its natural state in land ...', but does not include prospecting or exploration. However, the holder of an exploration permit has a right to prospect and the holder of a mining permit has a right to explore or prospect within the licence area.

The Act includes rights for a prospecting permit holder to be granted an exploration permit, if the results of prospecting justify it, the proposed work programme is acceptable and the applicant has generally complied with the Act and the existing permit.

Similarly, the holder of an exploration permit will be entitled to a mining permit in respect of any discovery, if the work programme is satisfactory and the requirements of the Act have been met.

In granting a permit, the Minister may specify terms on which the Crown will be either entitled to participate in the permit (section 25); or entitled to payments for the issue of the permit, the rights granted under the permit or the minerals (section 34).

The powers of Crown participation will certainly enable a continuation of the existing policy of the Crown, retaining an 11% carried interest through exploration as well as a 12% royalty on production.

Access to Land

The Crown Minerals Act represents a significant departure from the previous rights given to the holders of mineral licences to obtain access to those minerals, even over private land. No permit gives a right of access to land, except for some minimum impact activities. Any existing statutory rights of access for minerals, reserved to the Crown, are now cancelled.

The rules for land access now depend on the class of land involved, the class of activity involved, and the mineral for which the permit is issued (the rules for petroleum are slightly different from those for other minerals).

In brief, the 'special classes' of land are conservation land or reserves, land under crop, land within 30 metres of a building, other signs of civilisation or indigenous forest, and land having an area of 4.05 hectares or less.

In addition, special provisions apply to Maori land. No entry is permitted on to special classes of land, or Maori land regarded as waahi tapu, without the consent of the owners. Special efforts must be made to notify and consult with the owners of other Maori land and notify the local iwi authority.

Apart from the special classes of land, entry is permitted for minimum impact activity. Notice of the date of intended entry, the nature of the work and a contact telephone number must be given to the owner and every occupier.

Minimum impact activities are defined in a very limited way. Geological, geochemical and geophysical surveys are permitted, but not those including the use of explosives.

For other activities, the holder of a petroleum permit has no right of access except in accordance with an access agreement which is either agreed between the permit holder and each owner and occupier of the land, or determined by an arbitrator in accordance with the Act (section 53).

For the special classes of land, an access arrangement cannot be determined by an arbitrator unless the landowner and the permit holder agree or an Order in Council is made under section 66 declaring that the arbitrator may determine the access arrangement.

In respect of Crown land, the relevant minister may enter into an access arrangement. Offshore, that will be the Minister of Conservation within the territorial sea and the Minister of Transport (under the Continental Shelf Act 1964) outside the 12 mile limit. However, the Minister must in general consider the objects of the Act under which the land is administered and other matters mostly related to the Crown's holding of the land. Thus, the intentions behind the Crown Minerals Act and the minerals programmes will be of limited relevance. In addition, there is provision for access to be completely prohibited in respect of particular Crown land by Regulation or Order in Council (sections 62 and 105(n)).

Obviously, if it is necessary to go to arbitration for securing access arrangements the whole process can become very time consuming. Land owners and occupiers must be found and notified that the permit holder desires access. Only after 60 days (or in the case of a geophysical survey, 30 days), if there is no agreed access arrangement, can the permit holder seek to go to arbitration. There is a further 30 days while they agree on the appointment of an arbitrator, then either of them can apply to the Secretary of Energy. After that the Secretary is required to appoint an arbitrator, and then it will be necessary to organise and conduct the hearing.

When the access agreement has been settled, if it is of more than 6 months duration, the applicant must lodge it with the District Land Registrar for entry on the land transfer register.

Pipelines

Although the provisions for operation and safety of pipelines have mostly been left in the Petroleum Regulations, the regime under Part 2 of the Petroleum Act has been revoked. That regime provided for suitable pipelines to be 'authorised pipelines' on application, the owners of authorised pipelines to be empowered to acquire pipeline easements, with assistance from the Minister if agreement was not possible, and for persons other than the holders of a pipeline authorisation to be permitted to have conveyed products which the pipeline could convey ('common carrier' provisions).

The operator of a transmission pipeline will now be regarded as a 'network utility operator' under Part VIII of the Resource Management Act. The operator may apply to the Minister for approval as a 'requiring authority' for a particular project.

If the Minister is satisfied that the work is necessary and is in the public interest and that the applicant is capable and responsible, the applicant may be approved as a requiring authority.

The requiring authority may give notice to the relevant territorial authorities of its requirements for a designation in respect of land required for the pipeline, with supplementary information. Following a public hearing, the territorial authority can recommend that the requiring authority either confirms the requirement (with or without modifications) or withdraws the requirement. The requiring authority may then reject the recommendation (i.e., keep to its original requirement) or modify the requirement (consistent with the recommendation).

The territorial authority must include the final form of the requirement (subject to the outcome of appeal to the Planning Tribunal) in its district plan. The regional plan must also be modified to accommodate the requirement.

When the designation is in place, the requiring authority may proceed to acquire the necessary interest in the land. If it cannot achieve that by negotiation, it may apply to the Minister of Lands to have the land acquired under the Public Works Act and vested in the network utility operator. Obviously, any compensation payable by the Minister will be recoverable, with expenses, from the network utility operator.

The owner of any interest in land over which a designation has been made may require the network utility operator to acquire that land and give compensation.

The 'common carrier' provisions have not been reproduced. The government apparently intends section 36 of the Commerce Act 1986, prohibiting the abuse of a dominant position in a market, to provide adequate rights to those wishing to use pipelines belonging to others.

In summary, and subject to practical experience, it seems that the mechanisms relating to pipelines may be very different from those which operated under the Petroleum Act, in addition to the more general effects of the Resource Management Act on all projects. In particular, the numerous steps to get approval, followed by the various consultations with consent authorities and the need for notified public

hearings, seem to be certain to extend the time frames between discovery of petroleum and operation of the pipeline.

Registers and Records

Under section 90 of the Crown Minerals Act, every permit holder must keep records and provide reports and information to the Secretary of Energy. The Secretary may call for a certified copy of any report made by or for the permit holder, in respect of activities under the permit.

The new Act seems to provide a better level of protection of information in the hands of the Secretary of Energy. The information may not be made available until the earlier of either five years after the information was obtained by the permit holder; or the expiry or surrender of the permit (but not in respect of granting a subsequent permit).

While the information is on closed file, the Minister may use it for exercising any power or performing any function 'conferred on the Minister under the [Crown Minerals] Act', but not for any other purpose without the consent of the permit holder.

Other Significant Legal Requirements Physical and Social Environment

In recent years the legislative frame-work for the protection of New Zealand's unique flora and fauna, its relatively pollution-free environment and features of cultural and historical value to both the relatively recent European immigrants and the much older Maori civilisation have been subject to considerable scrutiny and revision. Participants in an exploration project, and more so in a development project, must be prepared to expend considerable resources in time and funds to understand the environment in which operations will be conducted, and to ensure that all of the necessary consents are sought and conditions met. This paper merely touches on these topics as they are being covered more fully by others.

Until 1 October 1991 the physical environment will be protected by the Water and Soil Conservation Act (rights to take, use or discharge into natural water), Maritime Pollution Act (discharges and pollution in sea), Clean Air Act (air pollution), several statutes relating to noise, historic places, archaeological sites and reserves and a miscellany of statutes and local regulations relating to such matters as waste disposals, toxic substances, reserves both maritime and on land, foreshores, fisheries and protected trees. From 1 October, the Resource Management Act replaces most of those separate statutes and procedures.

The cultural and spiritual values and traditions of the Maori people are receiving increasing statutory and political recognition. The principles of the Treaty of Waitangi, entered into between representatives of the Maori people and of the British Sovereign in 1840, have in relatively recent times been given statutory significance. Those principles are now recognised in the Treaty of Waitangi Act 1975, the State Owned Enterprises Act 1986, the Conservation Act 1987, the Environment Act 1987, the Resource Management Act 1991, the Crown Minerals Act 1991 and others.

Many petroleum explorers have in the past made a practice of consulting the interested Maori groups to ensure that their interests were not transgressed, to seek their advice on the naming of wells and to lift the 'tapu' (or spiritual prohibition on interference) from the area of operations.

Clearly both local and overseas contractors will need to plan early, take care and seek suitable guidance on these matters in the future.

Industrial relations is another matter on which local guidance needs to be sought. There is a legal framework which provides for such matters as the minimum levels of manning on vessels in New Zealand waters and the numbers and qualifications of personnel in a range of occupations. The enactment of the Employment Contracts Act 1991 has brought all employment contracts under its wing. The removal of compulsory union membership and the statutory right of unions to conduct personal grievances and represent employees will undoubtedly create new nuances in this area. The distinction between employees and independent contractors will also be significant. All employment contract disputes will now be under the jurisdiction of the Labour Courts, while independent contracts will be subject to the common law of contract. In respect of these formal requirements and the other informal but detailed codes of practice, operators which do not have extensive local experience are best to seek special guidance in this area.

Other New Zealand resources, particularly in construction industries relevant to a development, may be promoted for economic or social reasons. Generally, there is no difficulty importing resources which are not available in New Zealand, but it may be necessary to investigate the local market so that the need for imports can be demonstrated.

Overseas Investment Commission Requirements

Any 'overseas person' as that term has already been described, must obtain consent from the Overseas Investment Commission before it can either establish or carry on a business in New Zealand where total establishment and operating costs are expected to exceed \$10 million; or acquire 25 % or more of a New Zealand company, where the consideration for the share transfer or the value of the offeree's assets exceed \$10 million, or acquire assets in New Zealand where the total consideration payable is more than \$10 million.

Consent is also required for any investment which results in the overseas person controlling 25 % or more of the entity which is to carry out business in, and any acquisition of assets for use in, 'sensitive' sectors (broadcasting, commercial fishing or on rural land). The \$10 million threshold does not apply.

There is no specific limit on the percentage of overseas investment which will be permitted in an exploration project. The policy may vary from time to time, but at present permits an almost unrestricted participation in exploration by overseas explorers who can demonstrate an acceptable level of technical and financial competence. In most cases the original consent will only extend to development if the applicant can show that the extension is justified. Even New Zealand explorers should understand that if they wish to farm-out licence interests or contract operational work to overseas persons those persons will not be entitled to carry on business in New Zealand without the necessary consents.

It is open to argument that the mere ownership of an interest in a PPL is not 'carrying out business', so that consent for merely owning a licence interest may not be required. However, the pragmatic view is that, since the consent is not normally difficult to obtain and is likely to be a prerequisite to participation in any development, then the consent should be applied for at an early stage.

Trade Practices and Competition

In the last few years, New Zealand legislation relating to competition law and restricted trade practices has been amended and much new material introduced. The regime is now very similar to that in Australia, and thus has a lot in common with North America. The main statutes are the Commerce Act 1986 (significantly amended in 1990) and the Fair Trading Act 1986. The Commerce Commission is a specialist investigating authority and tribunal charged with a range of administrative and enforcement functions under both Acts.

The Commerce Act prohibits the entering into or giving effect to contracts, arrangements or understandings which substantially lessen competition in a market. Exclusionary provisions in contracts, arrangements or understandings (generally collective boycotts by traders or suppliers directed at other traders or groups of traders) are also prohibited.

Collective price fixing arrangements are deemed to substantially lessen competition, and are thus prohibited under the more general provisions. There are exceptions for prices fixed within a joint venture or a joint buying and production arrangement.

These practices can be authorised by the Commerce Commission if a countervailing public benefit is shown. However, resale price maintenance is also prohibited and cannot be authorised.

The Commerce Act also prohibits a company, which has a dominant position in the market, from using that position for the purpose of restricting entry into a market, or deterring competition in a market, and eliminating persons from a market.

The Commerce Act places a significant limitation on any merger or takeover proposal. Until the amendment in 1990, it was a breach of the Act to fail to lodge a notice seeking clearance of a merger or takeover proposal that fell within the definition of that term and also within the asset value thresholds set out in the First Schedule of that Act (generally \$100 million).

The Act now provides that it is a breach of law to: 'acquire assets of a business or shares if, as a result of the acquisition that person or another person would be, or would be likely to be, in a dominant position in a market; or that person's or another person's dominant position in a market would be, or would be likely to be, strengthened'.

The initial responsibility of determining whether or not an acquisition will create or strengthen dominance has shifted from the Commission to the party concerned. The monetary penalties are significant and a wrong assessment of the effect of the acquisition could be extremely costly. The Act provides for monetary penalties of up to \$5 million for a company and \$500,000.00 for an individual.

The Commission may grant an authorisation if a dominant position would be created or strengthened, but with 'such a benefit to the public that it should be permitted.'

The Act extends to business dealings carried on outside New Zealand, to the extent that they involve a New Zealand resident or person carrying on a business in New Zealand and affect a market in New Zealand. Last year's amendment has also extended the Act's application to any person residing or carrying on business in Australia, to the extent that the conduct affects a market in New Zealand (other than a market exclusively for services).

The Fair Trading Act 1986 consolidated and revised the law on misleading advertising. It also prohibits misleading or deceptive conduct and false or misleading representations about goods or services. In addition, certain specific unfair trade practices are identified and prohibited, such as 'bait' advertising, where goods advertised are not available for supply, and use of physical force or coercion in the supply of goods and services.

Most breaches of the Fair Trading Act do not require an intention to deceive or mislead - the fact or likelihood of doing so will be a breach. Remedies may be sought by consumers or other traders, or initiated by the Commerce Commission.

Taxation

Taxation of course is everywhere. The income tax regime is dealt with more fully elsewhere, and seems to be perpetually under review. However, there are other aspects of taxation which justify a few brief comments on what are essentially operational rather than commercial matters.

Every employer in New Zealand must deduct from wages paid to employees a proper amount of tax and forward the amount to the Inland Revenue Department. If the employee claims not to be liable to tax in New Zealand, then that should be verified.

Payments to overseas contractors providing services in New Zealand will be subject to overseas contractors' withholding tax. The person paying the contractor must withhold 15 % of the contract payment and forward it to the Inland Revenue Department. It should be understood that this is not a final tax, and in very many cases is far in excess of the overseas contractor's tax liability in New Zealand. It is held by the Inland Revenue Department as a credit against the contractor's ultimate tax liability, and if that liability is less than the amount held, the contractor can claim the excess back. Most contractors can in fact procure exemption certificates from the Inland Revenue Department and those engaging them should endeavour to ensure that this procedure is adopted. There is certainly no justification, as some contractors would suggest, for simply adding 15 % onto the contract charges as if that were a final tax.

In recent years the introduction of a withholding tax on contract payments to resident contractors has been mooted. However, implementation of this proposal has been delayed for further consideration of the method of administration. It is not certain that such a tax would be administered in the same way as the non-resident contractors withholding tax.

Goods & Services Tax (GST) at 12.5 % is payable on the supply of goods or services within New Zealand. It is a relatively uncomplicated value added tax, and business tax payers can claim back the GST content of their purchases of goods and services. The supply in New Zealand of almost all goods and services, except wages, salaries, certain financial services, and certain zero-rated services, is subject to GST at the standard rate of 12.5 %. In the nature of things, most exploration participants purchase more in the way of goods and services than they sell. Thus it will generally be in their interests, if expenditures are at all significant, to register early (before the expenditure is incurred) with a monthly (the shortest) return period, in order to maximise the cash flow benefits to be obtained out of the refunds.

GST is payable on goods imported into New Zealand, at the time of import, unless the importer participates in the

deferred payment scheme operated by the Customs Department. This permits payment of GST on imports to be deferred for several weeks, so that if the timing is well managed, the payment may not be due to Customs until the refund from the Inland Revenue Department is available.

For joint venture operations, the Inland Revenue Department currently takes the view that most petroleum industry joint ventures are not registrable as separate 'registered persons' for GST purposes. The explanation is that the joint venture does not, and does not expect to, supply goods or services. If any petroleum found is owned by the participants, and traded by them separately, then the joint venture is not selling or supplying petroleum. Each participant must register for GST purposes and the Operator, as their agent, accounts for the GST component of income and expenditure to the participants. They are then free to apply for refunds in their own way and must account to the IRD for any GST collected on their behalf by the Operator.

Stamp duty is payable on conveyances of certain property. Assignments of interests in petroleum licences attract duty of 40 cents per \$100.00 of consideration or value of the property transferred.

Changes announced in the recent budget, some of which have been enacted, include:

- (i) A new regime to allow groups of companies with 100% common ownership to consolidate for tax purposes.
- (ii) Removal of the intercompany income tax exemption from 1 April 1992, subject to a number of exceptions and variations.
- (iii) Alterations to the loss carry forward and grouping rules for the period from 30 July 1991.
- (iv) A new alternative regime for loans made into New Zealand by foreigners that effectively replaces non-resident withholding tax on interest. The borrower on borrowings from 1 August 1991 can apply to the Commissioner to have the debt registered, and upon registration will pay an 'approved issuer levy' equivalent to 2 % of the interest. The interest on the registered debt will be zero-rated for non-resident withholding tax purposes to the extent that approved issuer levy has been paid on that interest.

There are also proposed reviews of the Controlled Foreign Corporation and Foreign Investment Fund regimes, double taxation agreements, transfer pricing rules, depreciation rates and whether thin-capitalisation rules should be introduced.

Accident Compensation

The Accident Compensation Scheme which operates in New Zealand is something of a novelty for overseas explorers and contractors. No action can be brought within New Zealand for death or personal injury arising out of an accident. Compensation is paid to accident victims and medical and support expenses paid. Employers are required to participate by providing details to the Accident Compensation Corporation of their employees and by paying levies into the fund.

It must be appreciated that the Accident Compensation Act applies only within New Zealand. If an accident victim can bring a suit in some other jurisdiction and persuade the Courts in that jurisdiction that some other law should apply, then the domestic legislation in New Zealand would not necessarily bar the claim. That is really not a matter of New Zealand law but a warning against cancelling all workers

compensation insurances on the reputation of our Accident Compensation Scheme.

Other Operational Requirements

In undertaking exploration operations there are a range of other legal requirements to be met. The requirements of the Petroleum Act and Regulations and the Crown Minerals Act can be summarised as an obligation to keep the Ministry informed and get its consent for proposed operations. In addition the following matters come to mind:

- (i) Permits from Telecom Corporation for the use of communication facilities.
- (ii) Consent of the Ministry of Transport for shipping movements.
- (iii) Consent of the Airways Corporation of NZ Limited (formerly Civil Aviation Division, Ministry of Transport) for helicopter movements and landing pads.
- (iv) Notice to the Fisheries Division of Ministry of Agriculture and Fisheries, for movements in the vicinity of fishing grounds.
- (v) Import licensing and customs arrangements for the importation of supplies.
- (vi) Immigration formalities for bringing in expatriate workers.

Comment: Meeting Old Challenges With New Perspectives

In recent years explorers in New Zealand have been subject to considerable uncertainty as to the previous and new government's intentions in several major areas, namely:

- (i) The tax regime as it applied to petroleum mining and exploration was 'under review' for almost the whole period of the Labour Government (1984-1989). After the consultative document in January 1987 and several subsequent proposals, a number of reforms to the petroleum taxation regime preceded the 1990 general election. Since then, the government has indicated that some of the worst features of the new regime would be corrected, but nothing substantive seems to have been done.*
- (ii) After nearly five years of discussion documents, committees, submissions and lobbying, the Resource Management Law reform proposals have now been passed into the Crown Minerals Act and the Resource Management Act. Of course, we expect the Crown Minerals Amendment Act to be passed in the next few weeks.
- (iii) The next step in this evolving process will be the publication of the minerals programme, which should follow the process of public consultation set out in the Crown Minerals Act. The industry will be waiting with interest to see how this process, and the substance of the proposals, will evolve.
- (iv) The proposals on Resource Allocation and Rent Recovery were published by the Ministry of Energy in 1989. They were written in terms apparently applying to petroleum but of doubtful relevance to the industry in this country. They are a further source of uncertainty, and we are waiting to see whether they will reappear in the minerals programmes.
- (v) There is uncertainty as to the direction, extent and timing of the proposed deregulation of the gas industry. The government intends to introduce the Energy Sector Reform

* On 16 December 1991 the Government announced changes to the petroleum taxation legislation, intending to achieve broad

Bill later this year which will probably deal with the removal of franchises and price control as well as a number of safety and related technical reforms.

(vi) The deregulation of the electricity industry is also of current interest, with the Minister of Energy only recently announcing revised proposals which include floating shares of the corporatised electricity supply authorities and splitting up the generation and transmission functions of Electricorp. The generation opportunities that may flow from the deregulation will no doubt create interest throughout industry sectors, but again no one can predict the final form that these reforms will take.

(vii) The evolution of CER and last year's pact into full free trade in goods has been one of the relatively few success stories during the current recession. However, the New Zealand government may well take the next stages of the development of CER more cautiously. Such concepts as common currency and level playing fields could dramatically affect the economy and industry in New Zealand.

In view of the long lead times and considerable sums of capital involved in petroleum exploration and mining, it seems an unnecessary discouragement, to those with the resources to undertake further work, that they cannot rely on the certainty of a consistent legal and taxation regime for the duration of an exploration programme.

The Crown's ability to exercise its rights under the Petroleum Act to participate in any licence and its converse statutory function as a licensing and regulating authority, has recently been the subject of much debate and controversy. The Privy Council decision on the Ngaere Mining Licence may have addressed and finalised the legal issues, but in doing so has created a degree of commercial uncertainty, in respect of the way the Minister will exercise discretion in the future, even under the Crown Minerals Act.

The final form of the tax regime is still uncertain. The new government's pre-election suggestion that it would reverse some of the Labour government reforms to the petroleum taxation regime was reaffirmed after the election, although the timing and specifics for this is not certain.

There is also a high degree of uncertainty about the effect of the Resource Management Act and other rules relating to environmental matters. It is clear, whatever the scope of existing and future rules, that any operations will be open to scrutiny by a range of interest groups with the potential to subject a project to lengthy and expensive litigation and delays.

There is no doubt at all that the concerns expressed by many of the special interest groups are well founded and that reforms such as the Resource Management Act should provide needed improvements in the quality of consideration of environmental and cultural concerns. There is equally no doubt that these concerns will continue to have a significant effect on the implementation of any project in the future. That effect can best be minimised by considering, early in the planning process, the physical and social consequences of the project and the legal and practical steps that are available to the explorer to keep the project proceeding in an acceptable form.

The cost of petroleum exploration in New Zealand seems unlikely to diminish. The so-called 'user pays' principle,

international comparability of taxation treatment of petroleum exploration and development expenditure. Ed.

which is given extra impetus by the powers to levy charges under the Resource Management Act, will result in central and local governments and ad hoc bodies levying special charges against exploration and development projects, ostensibly to meet the cost of supporting the project. Some of the levies already charged seem to bear a rather tenuous link with the projects and to be levied in circumstances where the facilities would otherwise be provided (if necessary), by central or local government funding. These levies are of course additional to the royalties provided for under the licence, the significant licence fees payable under the Petroleum Act and the taxes payable to central Government.

Conclusion

There is a wide range of legal requirements which regulate the petroleum exploration industry in New Zealand at present, and these will undergo a continuous process of change. Some of these requirements give rise to delays, uncertainties and expense, and others serve primarily to regulate the industry and facilitate the safe and efficient investigation of New

Zealand's petroleum resources. In general these requirements have been implemented with the intention of reflecting the social and economic policies of successive governments and the current level of knowledge and technology. These will also change over time. Although it is only conjecture to suggest what those changes will bring, the trend seems to be for a greater degree of social control and a higher level of taxation.

It is not clear whether the legal regime in New Zealand is any more difficult than elsewhere, although the difficulties arise in different ways. The most effective means for explorers or contractors to minimise the adverse effect upon exploration of the legal requirements is to ensure that they have current information available to the organisation - whether internally, through experience, or externally, by employing advisors or contractors who are familiar with the industry and with local conditions. These include not only the 'professional' advisers, but those in fields such as industrial relations and employment, customs and suppliers of a range of goods and services.

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GAVIN ADLAM is a partner with Rudd Watts & Stone. He specialises in and is legal adviser with respect to licence applications and licensing procedures, farm-outs, royalties, joint venture operating agreements, drilling and service agreements, GST and other tax issues. He is actively involved in PEANZ, in particular relating to proposals for resource management law and tax reform.