

THE ROLE OF THE CROWN IN PETROLEUM EXPLORATION

D S Johnston
Russell McVeagh McKenzie Bartleet & Co
Wellington

Abstract

A range of issues affect decisions to invest in petroleum exploration in New Zealand. This paper discusses the role which the Crown and Ministers of the Crown play in petroleum exploration and how their actions can affect decisions to invest. The paper considers four ways in which the Crown influences the decision making environment:

- A policy making role
- A regulatory role
- A participatory role
- A recipient of financial returns

Ministers of the Crown have considerable flexibility in exercising the above roles. The paper discusses in detail selected matters over which Ministers have a decision making role and the affect uncertainty in these areas has on investment decisions.

Introduction

If there is one overwhelming objective on the part of participants in the petroleum exploration sector, at the present time, it is to see that the process of establishing a certain, stable and attractive investment environment for the New Zealand petroleum sector is completed as soon as possible. Some progress in this regard has already been made with the recent enactment of the Resource Management Act 1991 and the Crown Minerals Act 1991.

Within the next 20 years, on the basis of known reserves, New Zealand is facing a drop in its oil and gas self-sufficiency from approximately 55% to 0%. The lead times for development of major offshore discoveries are necessarily measured in years. Several major international petroleum explorers have withdrawn from New Zealand in recent years. If New Zealand wishes to ensure a reasonable level of continued liquid fuel self-sufficiency beyond 2012, it is critical that the New Zealand investment environment for petroleum exploration is attractive to both local, and more importantly, international oil exploration companies.

Moreover, investment in the petroleum exploration sector should be encouraged immediately rather than at the end of this decade or early next decade when New Zealand's petroleum reserves are rapidly diminishing. This was acknowledged by the Energy and Resources Division of the Ministry of Commerce in its briefing paper to the incoming government, prepared in October 1990 which stated:

"Petroleum Security

Lower oil prices and increased levels of self-sufficiency in oil and gas production since the oil shocks of 1973-74 and 1979-80 have instilled a sense of complacency, as to the security of supply of strategic energy resources. In spite of some new small finds, the long term domestic supply of liquid resources is by no means assured. Known domestic

reserves of oil, gas and condensate diminish rapidly from 2005. Given the long lead times for the development of discoveries, the replacement of these reserves should be being explored for and discovered now."¹

A range of issues affect decisions to invest in petroleum exploration in New Zealand. These include, the state of the economy, and the New Zealand investment environment generally, perceived prospectivity of New Zealand acreage, the anticipated costs of development and commercialisation of a discovery, and the taxation and regulatory regimes in place. It must never be overlooked that New Zealand is competing with a number of other countries for the explorer's dollar.

There is one other area which will also affect decisions by explorers as to whether to invest in the New Zealand petroleum exploration sector. This is the role which the Crown, and Ministers of the Crown, play in petroleum exploration. It is timely, given the recent passage of the Resource Management Act 1991 and the Crown Minerals Act 1991, to review the role of the Crown and Ministers of the Crown in petroleum exploration under the new legislation, with a view to determining whether those roles are optimal for the attraction of investment into the New Zealand oil and gas sector.

It is not the intention of this paper to re-open the very extensive debate on the resource management legislation which preceded its enactment, but rather, to focus on ways in which the legislation can be implemented by the Crown in a manner which creates certainty and, accordingly, has positive implications for investment in the New Zealand petroleum sector. In order to address this issue, a broad overview of the respective roles of the Crown, and the Ministers of the Crown, in relation to petroleum exploration is required.

The Respective Roles of the Crown and Ministers of the Crown in Petroleum Exploration

At the risk of over-simplification, it can be said that the roles of the Crown and Ministers of the Crown with regard to petroleum exploration, fall into four categories:

- A policy making role
- A regulatory role
- A participatory role
- A recipient of financial returns

Each of these respective roles will be examined in turn, and then consideration will be given to their implications for investment decisions in the petroleum sector.

The Policy Making Role

The ability of petroleum explorers to conduct any exploration or development programme, and the manner in which the programme is conducted, will be influenced, and often determined, by the policy set, from time to time, by at least two, if not three or more, Ministers of the Crown in their respective policy making roles. The importance of government policy is highlighted by the prominence given to various policy statements in the Crown Minerals Act 1991 and the Resource Management Act 1991.

Minerals Programme

Under the Crown Minerals Act, the Minister of Energy is obliged to prepare minerals programmes, each of which specifies:

- Whether prospecting or exploration for or mining of particular minerals is to be permitted
- The policies and procedures to be applied in granting permits under the Act in respect of the relevant minerals
- The policies relating to the financial return to be obtained by the Crown in respect of such minerals (Crown Minerals Act S12, 13, 14, 15)

All subsequent decision making by the Minister is required to be consistent with the then current minerals programme except for decisions concerning existing permits or the grant of replacement permits which must be consistent with the minerals programme current at the time the original permit was granted (Crown Minerals Act S 22(1)).

National Policy Statements

The Minister for the Environment is empowered under the Resource Management Act (RMA) to promulgate National Policy Statements. The purpose of such statements is to state policies on matters of national significance that are relevant to achieving the purpose of the Resource Management Act (RMA S 45, 52).

It is to be remembered that the purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources. "Sustainable management", in the context of minerals, means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while:

- Safeguarding the life supporting capacity of air, water, soil and eco-systems
- Avoiding, remedying or mitigating any adverse effects of activities on the environment (RMA S 5)

In determining whether it is desirable to prepare a National Policy Statement, the Minister for the Environment may have regard to a range of factors including:

- The actual or potential effects of the use, development and protection of natural and physical resources
- New Zealand's interests and obligations in maintaining and enhancing aspects of the national and global environment
- Anything which, because of its scale or the nature or degree of change to the community or to natural and physical resources, may have an impact on or a significance to New Zealand
- Anything which is of significance in terms of Section 8 (Treaty of Waitangi) (RMA S 45(2))

Local Authorities (regional and district councils) are required to ensure that National Policy Statements are recognised in their own policy statements and plans (RMA S 55).

Under the resource management legislation, the Government may make regulations called "National Environmental Standards", prescribing technical standards relating to the use, development and protection of natural and physical resources, including standards relating to: noise; contaminants; water quality, level or flow; air quality; and soil quality in relation to the discharge of contaminants (RMA S 43).

National Environmental Standards will play an important role in the future, in determining the manner in which petroleum exploration and development programmes are conducted.

Coastal Policy Statements

The introduction of a New Zealand Coastal Policy Statement by the Minister of Conservation is compulsory. Its purpose is to state policies in order to achieve the purpose of the Resource Management Act in relation to the coastal environment, being the area out to the 12 mile limit (RMA S 56, 57(1)).

A New Zealand Coastal Policy Statement may state policies on a range of matters; some of which include:

- National priorities for the preservation of the natural character of the coastal environment of New Zealand, including protection from inappropriate subdivision, use and development
- The protection of the characteristics of the coastal environment of special value to the Tangata Whenua
- Activities involving the subdivision, use or development of areas of the coastal environment
- The Crown's interest in Crown land in the coastal marine area
- The matters to be included in any or all regional coastal plans in regard to the preservation of the natural character of the coastal environment, including the specific circumstances in which the Minister of Conservation will decide resource consent applications, relating to:
 - (a) Types of activities which have, or are likely to have, a significant or irreversible adverse effect on the coastal marine area.
 - (b) Areas in the coastal marine area that have significant conservation value (RMA S 58).

Regional coastal plans must not be inconsistent with the New Zealand Coastal Policy Statement and must be approved by the Minister of Conservation (RMA S 64, 67).

In order to conduct any exploration or development activity within the coastal environment, a coastal permit will almost inevitably be required under the Resource Management Act. A coastal permit cannot be granted in respect of any activity prohibited by a regional coastal plan, and can only be granted in respect of an activity which does not comply with the regional coastal plan if the effect on the environment will be minor, or the granting of the consent will not be contrary to the objectives and the policies of the regional coastal plan (RMA S 87, 119(3)).

Given the centrality of regional coastal plans to activities within the coastal environment, and that regional coastal plans may not be inconsistent with the New Zealand Coastal Policy Statement, this statement will be extremely important in establishing the extent to which, and the manner in which, petroleum exploration is conducted in the coastal environment of New Zealand in the future.

Access to Land under Control of the Crown

Under the Crown Minerals Act, minerals permits are required in relation to the prospecting and exploration for, and mining of, petroleum. Except in relation to minimum impact activities, a minerals permit does not give the permit holder a right of access to the land which is the subject of the permit to prospect, explore or mine for minerals. Accordingly, either an access arrangement or a determination by an arbitrator granting access in relation to that land will be required in order for a petroleum explorer to conduct operations on that land.

However, there is an absolute right of veto vested in the Minister of Conservation in relation to access to any land held and managed under the Conservation Act 1987 or any other Act specified in the first schedule to the Conservation Act 1987. Clearly, this right of veto has important implications for the petroleum industry.

There is also provision in the resource management legislation for the Governor-General, by Order in Council, made on the recommendation of the Minister of Energy and the Minister responsible for administering the land concerned, to prohibit access in respect of any Crown land. Where any Crown land is placed "off limits" in this manner, even the conduct of minimum impact activities is prohibited. Again, the manner in which this power is exercised may well have implications for the petroleum industry.

The Crown Minerals Act retains the discretion which was vested in the Minister of Energy under the Petroleum Act to require, in the national interest, that petroleum be refined in New Zealand, and to give a number of consequential directions.

There are also a wide range of other policy issues, decisions on which either generally or specifically, with regard to the petroleum industry, will have implications for investment in the petroleum sector. Perhaps the best example at the present time is taxation. The industry presently faces a taxation regime which is perceived by the industry as being a disincentive to investment in petroleum exploration and which the present government has vowed to repeal. However, little, if any, indication has yet been given by the Government as to the likely shape of the tax regime which it will introduce.

The Regulatory Role

Under the Crown Minerals Act, the Minister of Energy, as the licensing and regulatory authority, performs, as he did

under the Petroleum Act, a role which was described by the Privy Council in *D J Butcher v Petrocorp Exploration Limited & others* as "an independent statutory function involving in many circumstances the exercise of a discretion which must be governed only by considerations of national policy and the national interest in the broadest sense". It is to be hoped that, to a large extent, considerations of national policy and the national interest will, in the future, be set out in the minerals programme in place from time to time. Consequently, the Minister's discretion in performing his licensing and regulatory functions, can be expected to be exercised in a manner consistent with the policy determination set out in the relevant minerals programme.

There are, however, a number of powers vested in the Minister of Energy, in his regulatory capacity, under the Crown Minerals Act, which are worthy of note.

Offer of Permits

While in recent times it has been the practice of the Minister to offer, by tender, new blocks available for exploration, there remains no statutory obligation on the Minister to do so. A new block may be disposed of by the Minister by private treaty if he or she so wishes.

Imposition of Conditions

Any permit may be granted by the Minister on such conditions as he or she sees fit. These conditions cannot, however, be inconsistent with the provisions in the relevant minerals programme promulgated by the Minister. In particular, there are specific provisions entitling the Minister to impose, as a condition of a permit, the terms upon which the Minister, or any other person acting on behalf of the Crown, shall be entitled to participate in prospecting, exploration or mining under the permit, or under any subsequent permit.

Limitation of Mining Permits to Specified Discoveries

Provision is made in the Crown Minerals Act enabling the Minister, on the grant of a mining permit, to limit the permit so that the right to mine is limited to a specified discovery. Should the holder of a permit, which is limited in this manner, make a further discovery in the relevant permit area, the permit holder's entitlement to receive a mining permit for that further discovery is dependent upon notice being given to the Minister, within 12 months of the making of that further discovery, that the permit holder is interested in applying for a permit to mine that discovery. The time for which such permit holder then has priority to a mining permit for that further discovery is limited to a period determined by the Minister, which the Minister considers reasonable to allow for:

- The carrying out of the necessary appraisal work in respect of that development
- The preparation of a development work programme for that discovery
- The consideration and granting of an application for a permit to mine the discovery

Approval of Work Programmes

While work programmes continue to require the approval of the Minister, the Minister may only withhold approval of a programme in relation to a replacement permit if he considers that it is contrary to recognised good exploration or mining practice, or, if to approve the programme would be inconsistent with the relevant minerals programme. Should

the Minister decline approval of a work programme or a modified work programme, the matter may be referred to arbitration for final determination.

Under the Petroleum Act, the Minister was entitled to decline approval of a work programme on the ground that to produce petroleum of the types and in the quantities proposed in the production programme would be contrary to the national interest, and his or her decision on this ground was not subject to arbitration. This unchallengeable power is not continued in the Crown Minerals Act.

A minerals programme promulgated by the Minister must now specify the basis, if any, on which approval of work programmes and modified work programmes will be withheld. Accordingly, should the Minister purport to decline approval of a work programme on a ground not specified in the relevant minerals programmes as a basis for withholding approval, it would seem that the decision of the Minister may, in some circumstances, be capable of challenge in a subsequent arbitration on the ground that if he or she were to approve the programme, the Minister would not be acting contrary to the Act (which requires him to act consistently with the relevant minerals programme).

Entitlement to Information

The Crown Minerals Act contains similar broad record keeping and reporting obligations to those contained in the Petroleum Act, and continues the non-disclosure requirement in respect of information contained in such reports until five years after the information was obtained by the permit holder or until expiry, surrender (other than upon the grant of a replacement permit) or revocation of the relevant permit, whichever is the earlier.

Participatory Role

As a matter of policy, the Minister of Energy has, for several years, granted to himself an 11% interest in all new petroleum prospecting licences issued. This 11% interest is "free carried" until a decision is taken by the Minister as to whether to participate in the development of a discovery in the relevant licence area. That is to say the interest does not bear any of the costs associated with exploration in the licence area unless, and until, the Minister elects to participate in the development of a discovery. By virtue of having this "free carried" interest, the Minister is a participant in all petroleum exploration joint ventures. As noted above, the Crown Minerals Act provides that the Minister of Energy may specify, as a condition of the permit, the terms upon which the Minister, or any other party acting on behalf of the Minister, is entitled to participate in prospecting, exploration or mining activities under the permit.

The relationship between the Minister as a participant and other commercial joint venturers has been an evolving one. It is also one with inherent tensions arising from the different roles occupied by the Minister. By way of example, in joint venture operating agreements it has been common for the commercial joint venture partners to provide that if the Minister, in his regulatory capacity, declines approval of a work programme or makes some other decision or takes some other action contrary to their interests, they will take all measures available to them consistent with their commercial interests to attain their commercial objectives. On account of his dual role, the Minister, in his participatory capacity,

has, for obvious reasons, not felt able to enter into this covenant with the other joint venture partners.

Similarly, in his participatory role the Minister will often be privy to information to which he is not entitled in his regulatory role, notwithstanding the broad reporting requirements of the legislation.

While the relationship between the Minister as a participant and other commercial joint venture partners has been evolving, and a degree of understanding has been reached between industry participants and Ministry representatives on a number of aspects concerning the rights and responsibilities of the Minister in his participatory role, there are still some fundamental issues which remain unresolved between the industry and the Minister concerning the basis of the Minister's participation in joint ventures. These include the following:

Transferability of Minister's Free Carried 11% Interest

While there is no dispute as to the entitlement of the Minister to dispose of his 11% interest in a mining licence after a commitment has been made by the Minister to participate in a development of the discovery, in recent negotiations Ministry officials have endeavoured to preserve a right for the Minister to dispose of his 11% interest, with the benefit of the free carry intact, to non Crown interests prior to that time. Clearly, there is an aversion on the part of petroleum exploration companies to being placed in a position where they may be obliged to carry another commercial participant which is capable of paying its own way, when they have received no consideration from that participant for the provision of that carry.

If it is the intention of Ministry officials, when seeking to preserve a right for the Minister to dispose of his 11% interest prior to election to participate in a development, to ensure that the Minister has the ability to undertake a global disposition of all his 11% interests in petroleum prospecting licences, this is a matter which could be addressed at the time with industry participants, and which one could confidently predict would be welcomed by industry members and, accordingly, resolved in a co-operative manner.

Application of Pre-emptive Rights upon Disposition of Minister's Interest

There is generally no question between commercial joint venture parties that some form of pre-emptive rights regime should apply upon disposition of their respective interests. The only issue for discussion is the terms of the regime (for example, the time frames to apply and rights of approval of assignees). In recent negotiations, Ministry officials have asserted that the Minister's interest should not be encumbered by pre-emptive rights as this may impede the process of sale of the Minister's interest. It is difficult to see how the Minister's position differs in any respect from that of other joint venture participants that may wish to sell their interests. Moreover, companies which have contributed substantial sums to the discovery and development of a reserve have a legitimate commercial interest in having the opportunity, at very least, to match the price which the Minister can obtain elsewhere for his interest.

Voting Rights

The right of the Minister to vote at meetings of joint venture operating committees during the period when the Minister is

not contributing to operations has also been an area of some contention between the Ministry and industry representatives. The general principle of "no pay, no say" (that is to say, no voting rights during the period while the Minister is not contributing to operations) now seems to have been accepted by Ministry officials.

There are still some areas, however, where clear understanding has not been reached between the Crown and industry representatives as to the Minister's voting rights. For instance, Ministry officials in recent negotiations have taken the position that the Minister should be entitled to vote on the question of whether the joint venture should apply for a mining licence. Given that the Minister's vote could be critical in determining whether a mining licence is sought or not, and that at the time a decision is made to apply for a mining licence the other joint venture partners will not generally know whether or not the Minister will elect to participate in the development, members of the industry have opposed the Minister having a right to vote on this issue. There is also some debate as to whether the Crown should have an entitlement to vote on a development work programme to be submitted to the Minister for approval, when the Minister has not yet elected to participate in that development.

Status of Crown in Permit following Decision not to Participate in a Development

Joint venture operating agreements commonly provide that if a party elects not to participate in the development of a discovery, it will withdraw from the mining licence and assign its interest to the remaining parties.

In recent negotiations, Ministry officials have proposed that should the Crown elect not to participate in the development of a discovery, the Crown should nevertheless be entitled to retain an interest in the relevant permit so that should there be a further discovery in the relevant permit area, the Crown would be entitled to a further election as to whether or not to participate in the development of that further discovery. The reason given by Ministry officials for justifying the retention of an interest in the permit by the Minister, with a right to make a subsequent decision as to participation on further developments, is that the Crown is owner of the resource and is entitled to a return from that resource.

Members of the industry have rejected this proposal by the Crown as they are of the view that the Crown has an election as to whether or not to participate in a development programme and the consequential, and on occasion, unforeseen, benefits which flow from that programme. They do not consider there is any justification for the Crown electing not to participate in a development, but then remaining on the sideline so as to share in the fruits of any windfall benefits which may result from the development programme.

The Crown as a Recipient of Financial Returns

There is no debate that the Crown, as the owner of the petroleum resource, is entitled to a reasonable return for that resource. The form which that return should take is, however, a matter of some debate.

The Crown's return from its petroleum resource presently comes from two sources:

- A royalty at a rate determined by the Minister (generally 12.5%) on the selling value of all petroleum produced at a point of valuation in the production facilities determined by the Minister
- A return from its 11% interest in the mining licence. This will generally take the form of the proceeds of disposition of the Crown's interest in the mining licence. While the Crown's return could conceivably come from the net profits earned by the Crown from its share of the petroleum from the permit area, after an election by the Crown to participate in the development, the sale of licence interests at the point of development, rather than continuing as a development party, is understood to be present Government policy

The Crown's 11% interest in petroleum prospecting and mining licences, and the 12.5% royalty rate are both creatures of Government policy and have no express recognition in either the Petroleum Act or the Crown Minerals Act. There is ongoing concern, at least in some quarters of the industry, as to the desirability of the Crown continuing to seek some of its financial return by participation in petroleum and mining permits issued by the Crown, given the inherent conflicts between the Crown's regulatory and participatory roles, and the practical difficulties which have been encountered in defining the Crown's rights as a joint venturer.

While the Petroleum Act had a specific regime in relation to the payment of royalties, this has been omitted from the Crown Minerals Act and replaced with a general provision entitling the Minister to:

- Require, in return for the grant of any permit, the payment of money to the Crown
- Include, as a condition of a permit, a requirement for payments to the Crown by the permit holder, for the rights given by the permit and under the Act, and any minerals obtained by the permit holder under the permit

This regime clearly gives the Minister far greater flexibility as to the form which the return to the Crown for its petroleum resource may take. In particular, it may provide the opportunity for that portion of the Crown's financial return which has in the past come from disposal of its licence interests to be obtained in some other form which gives rise to less difficulties. However, this power to define the form of the Crown's financial return will have to be exercised by the Minister in accordance with the provisions concerning the Crown's financial return contained in the relevant minerals programme issued by the Minister.

Implications of the Roles of the Crown and Government for the Attraction of Investment to the Petroleum Sector

If one examines the new regime for petroleum exploration and mining resulting from the passage of the Crown Minerals Act and Resource Management Act, both objectively and critically, as any investor in the petroleum exploration sector must necessarily do, there are a number of positive features. There are, however, also some areas which will necessarily be of concern to potential investors. In almost all instances, these possible areas of concern can be readily overcome if addressed openly by the Crown in a positive and helpful manner.

When analysing this legislation it is important to recognise that such legislation is of necessity something of a compromise

in balancing the competing interests of different sectors of the community.

The factors in the new regime which are likely to be of particular concern to potential investors are discussed in turn:

The regime is marked by a strong emphasis on policy considerations. In one sense the regime marks a step forward, as the very significant role which policy considerations play in resource allocation decision making is openly acknowledged and the policy is made widely available in the form of minerals programmes and national policy statements.

However, of particular concern is the breadth of matters left to policy determination. For example, the Petroleum Act started from the fundamental premise that petroleum was a mineral in respect of which prospecting and mining activities would be undertaken. The Crown Minerals Act, on the other hand, starts from a neutral position by virtue of which it is a policy decision for the Minister of Energy from time to time, as set out in the then current minerals programme, to determine whether petroleum exploration is to be permitted. Similarly, other fundamental issues, including where exploration can be conducted, the constraints on the manner in which exploration and development is conducted, and the financial return to the Crown for resources, are all left for policy decision making under the legislation.

Decisions affecting an exploration permit and subsequent mining permits in relation to an area are generally governed by the minerals programme in force at the time when the initial permit is issued. Consequently, an investor has some certainty when he obtains a permit as to the policy which will govern activities in relation to that permit area. However, the investor has no assurance that policy will not change between the time when it acquires its first permit interest and the time it is granted its second interest. Investment decisions are usually taken on the basis of a medium to long term presence in a country. Foreign investors generally expect some certainty as to the investment regime applicable in the medium to long term, rather than merely certainty as to the policy governing decision making in relation to the permit to be acquired on the commencement of operations in New Zealand. The lack of certainty in the new regime may well prove to be a disincentive to foreign investment in the petroleum sector in the short to medium term, at least until the new regime is well established.

It is accordingly important that once various policy statements are issued by the responsible Ministers, they are not changed on a regular basis. In particular, it would be of concern if the policies underlying such statements were to become "political footballs" which resulted in a material change in the policy, and, consequently, the policy statements, at the time of each general election or even more frequently.

Policy decision making affecting petroleum exploration activities will be undertaken by at least three Ministers advised by their respective Ministries. As the various Ministries have different policy objectives these can be expected to be reflected in the policy statements issued by the various Ministers. Consequently, the new regime risks a lack of coherent policy concerning petroleum exploration as a result of conflicting policy objectives in the policy statements issued by the Minister of Energy, the Minister of Conservation and the Minister for the Environment respectively unless there is a degree of consultation between these Ministers in tailoring their respective policy statements. It is to be hoped that this will occur.

The potential difficulties with access to land under the control of the Department of Conservation and the possibility that the Crown could at any time declare Crown land "off limits" for petroleum exploration and mining activities may also prove to be a factor which makes New Zealand a less attractive environment for petroleum exploration investment. A clear statement by the Minister of Conservation and the Minister of Energy, at an early date, as to the approach to be taken with regard to allowing access to Crown land and land held under the Conservation Act, for petroleum exploration and mining, will go a long way to alleviating concerns of potential investors.

The ability for the Minister to impose, as a condition of the grant of a permit, the terms upon which the Minister, or any person acting on behalf of the Crown, is entitled to participate in the permit may also prove to be of concern to foreign investors. While this power can not be exercised in a manner inconsistent with the relevant minerals programme (which must specify the policies relating to the financial return to be obtained by the Crown), there remains the possibility that the Minister, at the time of granting a mining licence, may impose additional terms in relation to the Crown's participation which, while not inconsistent with the relevant minerals programme or with the conditions of the previous exploration permit, may be contrary to the investor's interests. Again, some clear indication from the Minister at an early stage as to the circumstances in which additional conditions might be imposed at the time of granting a mining permit, and the likely nature of such conditions, would also assist investment in the sector.

Potential investors in the petroleum sector are also likely to have some concern about the provisions in the Crown Minerals Act which allow the Minister to limit a mining permit to a specified discovery. While the holders of a mining permit who have another discovery have 12 months in which to notify the Minister that they may be interested in developing it, they are thereafter in the Minister's hands as to the time imposed for completing appraisal of that discovery, preparing a development work programme and obtaining a mining licence. There is no provision for the Minister to extend the time if the time frames, initially imposed by him or her, prove to be too short. Moreover, the imposition of time frames by the Minister may mean that the joint venture partners have to re-organise their development schedule, in relation to their first discovery, to accommodate the Minister's timetable for the further discovery, notwithstanding that this is not consistent with the parties' commercial objectives.

There would seem to be few, if any, immediately apparent justifications for the exercise by the Minister of a power to limit a mining permit to a specified discovery. It is, accordingly, hoped that this is a power which will be exercised sparingly by the Minister. As this is likely to be an issue of concern to potential investors, a statement by the Minister as to the circumstances in which he intends to exercise this power would clearly be desirable.

To the extent that issues remain unresolved between the petroleum industry and the Ministry of Energy concerning the Minister's participation in petroleum exploration joint ventures, this too will detract from New Zealand's status as an attractive environment for petroleum exploration and investment. Accordingly, these issues need to be resolved without delay, particularly if it is likely that the Crown will continue to seek some portion of its return for its resources.

In analysing the potential commercial benefits from petroleum exploration and development activities in New Zealand, a potential investor always has to take account of the possibility that the Minister might require petroleum to be refined in New Zealand. A requirement that petroleum be refined in New Zealand may not necessarily be consistent with an investor's assessment of how a potential discovery can most profitably be commercialised.

This is of particular concern to both Japanese investors and also major American companies which have refining and marketing operations. In both cases, investment is driven by the objective of ensuring access to product rather than potential financial returns from product sales. Consequently, for so long as the Minister retains a discretion to order product to be refined in New Zealand, this is likely to operate as a material disincentive to investment in the petroleum exploration sector by these groups of potentially significant investors.

The power to require petroleum to be refined in New Zealand is one which is likely to be perceived as being increasingly more likely to be invoked as New Zealand's existing, albeit limited, resources are depleted.

Therefore, it is important that a clear indication is also given by the Minister of Energy in the near future as to the circumstances in which he is likely to exercise his power to require petroleum to be refined in New Zealand.

Conclusion

The Resource Management Act and the Crown Minerals Act mark a significant step forward in so far as they will ensure that government policy on a wide range of issues central to decision making affecting the petroleum exploration industry is made publicly available. This will clearly assist in the transparency of government decision making on issues affecting the industry.

There are, however, a number of areas in which the Crown can assist in enhancing the attractiveness of the New Zealand petroleum sector for investment by creating certainty as to the manner in which the Minister's powers under the legislation will be applied. It is to be hoped that this opportunity will be taken as part of the process of establishment of a definitive, stable and attractive investment regime for the New Zealand petroleum sector as soon as possible.

References

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Author

DEREK JOHNSTON was admitted to the Bar in 1979. He has also undertaken postgraduate studies at the University of Toronto. Derek practises in the general corporate and commercial field, with an emphasis on mergers and acquisitions, mining and petroleum law and trade practices law. Derek came to Wellington in February 1988 to help set up and develop the Wellington office of Russell McVeagh McKenzie Bartleet & Co.