

# THE CROWN MINERALS ACT 1991

G B Wong  
Simpson Grierson Butler White  
Wellington

## Abstract

The Crown Minerals Act 1991, originally Part IX of the Resource Management Bill, was enacted by Parliament on 22 July 1991. The Act will come into force on 1 October 1991. By removing the provisions relating to allocation and use of petroleum from the Resource Management Act and placing them in the Crown Minerals Act, the principle of managing resources with the needs of future generations in mind, do not apply to the allocation and depletion of petroleum resources.

The Crown Minerals Act replaces most of the Petroleum Act 1937. There are many substantial changes in the law relating to the allocation and management of petroleum. The Minister of Energy must provide a minerals programme on petroleum to establish policies and procedures to ensure efficient allocation of rights and the obtaining of a fair financial return to the Crown for the petroleum. The former licensing system is replaced with the grant of three types of permits comprising prospecting, exploration and mining. These permits do not confer on the exploration or mining companies a right of access to land. Entry to land to carry out minimum impact activities requires either the written consent of the owner and occupier, or the giving of special notice. In the case of all other activities, the petroleum explorer or miner must enter into an access arrangement with the landowner and occupier. If an access arrangement and compensation cannot be negotiated, arbitration must be used.

There are other new considerations and processes in the Crown Minerals Act:

- (i) Every person exercising powers under the Act must have regard to the principles of the Treaty of Waitangi.
- (ii) A new strict liability offence is introduced where a person enters land for the purpose of carrying out prospecting, exploration or mining activities without the necessary consent of owners and occupiers.
- (iii) Where a mining permit states that the right to mine only applies to a specified discovery of petroleum, and the holder of the permit makes a further discovery, the permit holder requires a new mining permit. This opens up the possibility of strata titles.

This paper examines the impact of these and other key changes that have been introduced in the Crown Minerals Act.

## Introduction

The Crown Minerals Act is the new legal regime which deals with the allocation of Crown owned minerals. It comes into force on 1 October 1991 and substantially replaces the Petroleum Act 1937. Although the Act establishes procedures for the allocation of other minerals such as gold and coal, this paper focuses on petroleum and the activities of petroleum explorers and developers. It begins with an overview of some key provisions in the Act and adds commentary in areas that depart significantly from the present Petroleum Act.

The key issues for petroleum explorers which have been selected for further elaboration are: land access; strata titles; the Treaty of Waitangi; and offences.

Before embarking on the overview, it is useful to look briefly at the legislative background to the passing of the new Act.

New Zealand's first petroleum legislation was the Petroleum Act 1937. Introduced in a time of international tension, it was clearly intended, as its long title states, to provide for the "encouragement and regulation of mining for petroleum" in New Zealand. It was a "stand alone" statute which provided the security for oil companies to invest in

exploration and mining in New Zealand at a time when supply from the world market was far from guaranteed.

Over the years the Petroleum Act came to operate alongside other major mineral development statutes, in particular the Mining Act 1971, and the Coal Mines Act 1979, which had evolved on a piecemeal basis to accommodate methods particular to hard rock mining.

In addition to these statutes, resource developers had to wade through a sea of legislation in order to secure water rights, land use approval, water and air discharge rights, among others. With the passing of time inconsistencies between statutes became apparent and the timing and procedural overlap in obtaining consents was proving cumbersome. A more consistent and streamlined process was needed, one that would enable a project and its effects to be considered in a coordinated way was needed.

In 1989, almost 50 years after the Petroleum Act was passed, the government unveiled its monument to statutory reform and integration, the Resource Management Bill. Affecting over 50 statutes, the burgeoning Bill endeavoured to integrate laws dealing with town and country planning, water and soil conservation, minerals and energy resources, coastal management, air pollution and noise control. The

cornerstone of the Resource Management Bill was the concept of "sustainable management of natural and physical resources". However, it became apparent that this did not recognise and provide a suitable framework for the development of a non-renewable resource such as petroleum.

After various attempts to balance the competing concerns inherent in such a Bill, it was clear that the issues of regulating environmental impact and the allocation of Crown owned minerals required different decision-making criteria. The government's end solution was to separate the minerals allocation function from environmentally based concerns. The result is two statutes: the Crown Minerals Act 1991, which sets out a system for allocating the rights to explore and mine Crown owned minerals; and the Resource Management Act 1991, which deals with the environmental effects of these activities.

The petroleum industry welcomed the separation of the Government's ownership and regulatory functions into the separate Act. It was a positive move on the part of the Government not to attempt to apply the principle of sustainable management to the Crown Minerals Act.

## Overview of the Act

The long title of the Crown Minerals Act is "An Act to restate and reform the law relating to the management of Crown owned minerals". It is a neutral expression which does not offer assistance in understanding the substantive parts of the statute. Unlike the Resource Management Act, there is no "purpose" clause which assists in the interpretation and administration of the Act.

This stands in stark contrast to the long title of the Petroleum Act 1937: "An Act to make better provision for the encouragement and regulation of mining for petroleum, and to provide for matters incidental thereto". The Petroleum Act clearly intended to encourage activities which would result in extracting the petroleum out of the ground.

As with the Petroleum Act regime, the Crown owns all petroleum existing in its natural condition in land (whether the land is Crown land or private land).

However, unlike the Petroleum Act, the entire Crown Minerals Act binds the Crown. The Petroleum Act contains only three provisions which bind the Crown; section 4 (no prospecting or mining is to be done without a licence), Section 33 (notice of entry to be given to occupiers of land), and Section 39 (persons injuriously affected are entitled to compensation).

The Minister of Energy holds the key functions under the Crown Minerals Act. Under Section 5 the Minister has the following functions:

- preparation of minerals programmes;
- granting of minerals permits; and
- monitoring of the effect and implementation of minerals programmes and minerals permits.

These functions (apart from making decisions and recommendations on minerals programmes) may be delegated to the chief executive who may in turn sub-delegate to his or her officials in terms of the State Sector Act 1988.

## Minerals Programmes

The Act introduces special guidelines for the Minister which are set out in minerals programmes. Section 12 requires the

implementation of a minerals programme to establish policies, procedures and provisions which lead to:

- the efficient allocation of rights in respect of Crown owned minerals; and
- a fair financial return to the Crown.

The Minister must consult the relevant minerals programme for guidance in any decisions relating to the issue of permits. If any doubt exists the Minister must have regard to the purpose of the minerals programme.

Section 15 details the information that every minerals programme must specify:

- the mineral to which it applies;
- whether or not or to what extent prospecting, exploring or mining is permitted for a given mineral;
- the policies and procedures to be applied in granting permits and subsequent permits (including work programme approval etc.);
- policies governing financial return to the Crown; and
- The principle reasons for adopting the contents of the minerals programme.

There will only be one minerals programme for petroleum, but it may provide that different policies and procedures apply to different areas within New Zealand.

On the request of a Maori tribe, a minerals programme may provide that certain defined areas of land of particular importance are excluded from the operation of the minerals programme and will not be included in any permit.

Input into the minerals programme for petroleum will be of special importance to petroleum companies. It is expected that a draft minerals programme will be issued by the Minister of Energy soon after the Crown Minerals Act comes into force on 1 October 1991. It will be publicly notified. The public notice will give details of the contents of the draft minerals programme and how submissions may be made.

Any person may make a submission on a draft minerals programme. The Secretary receives submissions and arranges for a report and recommendations to be made to the Minister. The Minister considers the report and recommendations and makes any changes to the draft programme that he or she thinks are necessary. If the draft programme has been amended, the new version will be publicly notified.

Minerals programmes (or changes to a programme) are brought into effect by the Governor General, by Order in Council made on the recommendation of the Minister.

The Minister may at any time produce a draft minerals programme or propose a change to a minerals programme. The Minister must review a minerals programme at least every ten years.

## Mineral Permits

Section 8 is the key provision which places restrictions on prospecting, exploring for, or mining Crown owned minerals. A person must be the holder of a permit to prospect, explore for, or mine, Crown owned minerals in land. In addition, operations must not be undertaken without first obtaining any required land access agreements and giving landowners requisite notice of entry to land. There are substantial penalties for breach of this provision. Permits may be issued for three distinct phases of activities:

**Prospecting**—low impact activities over a large area to identify any smaller zones which may warrant further investigation.

**Exploration**—activities designed to identify a petroleum deposit and to assess the feasibility of mining any deposit found.

**Mining**—the extraction or mining of petroleum existing in its natural state from the land.

The Minister must carry out his functions and powers in a manner that is consistent with the policies, procedures and provisions in the petroleum minerals programme. Note, however, that there are other Ministers (e.g., the Minister for the Environment and the Minister of Conservation) who exercise functions and powers relating to mineral development and are not bound by the minerals programme.

Any person may apply for a permit whether or not there is a mineral programme for the mineral. In addition, the Minister may offer permits for allocation by public tender (Sections 23 & 24).

Subject to the provisions of the Act, the Minister may grant a permit on such conditions as he or she thinks fit. The Crown is entitled to participate in prospecting, exploration or mining under the permit.

If more than one application is made for a permit in respect of the same land and mineral, and there is no minerals programme, the applicant whose application is first received by the Secretary has a right of priority over other applicants to the permit, subject to certain provisos (Section 26).

When granting a permit the Minister must be satisfied that the applicant will comply with the conditions of the permit. Before the permit is granted, the applicant must lodge a monetary deposit or bond with the Secretary as security for compliance with the conditions of the permit. This is the position under the present Petroleum Act.

Where the Minister does not believe that any proposed prospecting is likely to add materially to the existing knowledge of petroleum in certain land, or there is substantial interest in exploring for or mining petroleum in that land, Section 28 directs the Minister not to grant a prospecting permit unless special circumstances apply.

Prospecting, exploration and mining permits identify rights relating to petroleum over a particular area. Additional resource consents (granted under the Resource Management Act) for land, water and air use will also be required from local authorities for most operations. As discussed in more detail later in the paper, land access will also need to be determined.

### Conditions of Permits

Section 30 of the Act details the rights to prospect, explore, or mine petroleum. The holder of a current prospecting permit has the right to prospect for petroleum "in the land" on the conditions stated in the permit. "In the land" means on or under the surface of land. Under a prospecting permit, the permitholder may carry out an activity for the purpose of identifying land likely to contain petroleum, including geological, geochemical, geophysical and aerial surveys.

The holder of an exploration permit has the same rights as the holder of a prospecting permit and, in addition, the right to explore for petroleum. Under an exploration permit, the permitholder may carry out any activity to identify petroleum deposits including drilling. In practical terms, it is questionable whether a distinction between petroleum prospecting and exploration is needed - the activities could be combined under a single exploration permit.

A mining permit may state that the right to mine only applies to a specified discovery of petroleum. In such a case if a further discovery is made, the permit holder must notify the Minister in writing of the discovery and express its interest in applying for a permit to mine the discovery.

The term "to mine" means to extract, by whatever means, petroleum existing in its natural state, but does not include prospecting or exploration. Compare this to the Petroleum Act which provides that the licensee may also prospect for petroleum under a mining licence.

The rights to prospect, explore, or mine are exclusive to the permitholder. Another permit purporting to give the same rights can only be issued with the consent of the current permitholder. The permit holder owns all the petroleum lawfully obtained in the course of activities authorised by the permit.

Every permit holder must comply with the conditions of the permit and with the Act. Where a permit is held by two or more persons, those persons are jointly and severally liable to comply with and perform the obligations of the permitholder (Section 33).

### Right to Subsequent Permits

Section 32 sets out the rights available to permit holders to subsequent permits. If the holder of a prospecting permit satisfies the Minister that the results of prospecting justifies the grant of an exploration permit, the permit holder will have the right to surrender the permit in exchange for an exploration permit.

Likewise if the holder of an exploration permit satisfies the Minister that petroleum has been discovered, the permitholder will have the right to surrender the permit in exchange for a mining permit.

The right to the next class of permit is subject to the Minister applying the policies and provisions of the petroleum minerals programme. The permitholder must also satisfy the Minister that it will comply with the conditions of the permit and the Minister must approve the work programme.

Note also that the initial permit may place restrictions on the issue of a subsequent permit. This is a dilution of the entitlement which a prospecting licensee presently has under the Petroleum Act. Section 11 of the Petroleum Act confers a statutory right on the holder of a prospecting licence to receive a mining licence over any discovery in the land comprised in the prospecting licence.

### Financial Return to the Crown

The Minister may require in return for any permit granted, the payment of money to the Crown. The permit may include a condition requiring payments to the Crown by the permitholder for the rights given by the permit and any minerals obtained by the permitholder (Section 34).

### Duration of Permit

Normally a prospecting permit will last two years, an exploration permit five years, and a mining permit 40 years. An earlier expiry date, may, however, be specified in the permit. There are also provisions that enable a prospecting permitholder to apply for an extension to a maximum term of four years, and an exploration permitholder to a maximum extension of ten years. A mining permit may be extended where a discovery cannot be economically depleted before the end of the term.

### **Revocation of Permit**

If the Minister believes that a permit holder is not complying with the Act, the Minister may serve notice requiring, within 20 working days, remedy for the contravention or the permit holder must show reasonable cause for non-compliance (Section 39). If the permit holder fails to comply with the requirements of the notice, the permit may be revoked or become the property of the Minister. If a permit becomes the property of the Minister, he or she may exercise the rights granted by the permit or offer it, or any share in it, for sale by public tender.

### **Surrender of Permit**

A permit holder may surrender a permit or any part of it under Section 40 by lodging with the Secretary a notice of surrender, together with any prescribed fee. The permit holder is then entitled to a proportionate refund of payments made. The surrender of the permit does not release the permit holder from any liability up to the date of the surrender. On surrender, the Minister may acquire the permit for reallocation or other use.

### **Transfers and Other Dealings with Permits**

No permit holder may enter into an agreement (except by way of mortgage or other charge) which:

- transfers a permit;
- creates any interest in any existing or future permit;
- transfers or otherwise deals with any interest in any existing or future permit;
- imposes any obligation on the permit holder which relates to or affects the production of petroleum or the proceeds of such production—

unless the agreement is entered into subject to the consent of the Minister and an application for such consent is made within three months after the date of the agreement (Section 41).

The Minister must then consent to the agreement and he or she may impose conditions unless special circumstances exist. All conditions of the Minister's consent are deemed to be conditions of the permit concerned. An agreement which is subject to the Minister's consent will not have any effect without Ministerial approval.

A transfer or lease of a petroleum permit will not have any force or effect until a notice, in the prescribed form, of the transfer or lease has been lodged with the Secretary and the Minister has consented to the transfer of the permit or lease.

### **Work Programmes in Respect of Subsequent Permits**

Subsequent permits will not be issued unless the Minister has approved the work programme for the permit or waived the requirement for a work programme (Section 43).

Within six months after receiving the proposed work programme, the Minister may approve it or withhold approval if it is contrary to recognised good exploration or mining practice, or there is conflict with the minerals programme. If approval is withheld, the applicant is entitled to submit a modified work programme within a reasonable period.

The Minister must not withhold approval of any work programme (or modified work programme) without first advising the applicant of the reasons and affording the applicant a reasonable opportunity to make representations. If necessary, the matter may be referred to arbitration under

Section 9 of the Act. The arbitrator has the power to reverse the Minister's withholding of approval where the work programme is not contrary to recognised good exploration or mining practice and where it does not conflict with the minerals programme.

### **Land Access**

Except for entry on to land for minimum impact activities, the grant of a permit does not give the permit holder a right of access to any land. Entry on to land for minimum impact activities requires the written consent of the owner and occupier. Alternatively, the permit holder may enter land without consent for minimum impact activity by giving at least ten working days' notice to every owner and occupier of land.

A permit holder and any employees, agents and contractors of a permit holder may enter land to carry out any of the following minimum impact activities:

- geological, geochemical, and geophysical surveying;
- taking samples by hand;
- aerial surveying;
- land surveying; and
- any activity prescribed by law as a minimum impact activity.

Seismic surveys are expressly excluded from the definition of "minimum impact activity" (Section 2) even though, by their nature, seismic operations are of minimum impact (e.g., drilling small holes and discharging small explosive charges to measure vibrations; or vibroseis involving vehicles which vibrate the ground using flat metal pads). Also, the access provisions for minimum impact activities do not appear to be available for preliminary investigations and surveys for gas or oil pipelines.

No access is permitted without the consent of the landowner for land under intensive use such as crops or buildings, for example. In the case of Crown land, the Minister of Energy and the Minister administering the land concerned may prohibit access.

In the case of Maori land, reasonable efforts must be made to consult the owners identified by the Registrar of the Maori Land Court; and ten working days' notice must be given to the local iwi authority. If the Maori people regard Maori land as sacred, the consent of the owners of the land may be required before entry for minimum impact activity.

### **Access to Land Other than for Minimum Impact Activity**

In the case of activities which are not minimum impact activities, access arrangements are made by agreement between the permit holder and the owner and occupier of land. If agreement cannot be reached, access is determined by an arbitrator. Arbitration is not available for land under intensive use or for conservation land without agreement of the landowner.

No access arrangement is necessary for any prospecting, exploration or mining carried out below the surface of any land if the operation does not cause damage to the surface or have any prejudicial effect on the use and enjoyment of the land by the owner or occupier. An example of this situation is horizontal drilling.

Notice must be given to every affected owner or occupier that the permit holder intends to obtain an access arrangement. The notice must specify:

- (i) The land affected.
- (ii) The purpose for which the right of access is required.
- (iii) The proposed work programme and the likely adverse effect on the land or the owner or occupier of the land.
- (iv) The compensation and safeguards against any likely adverse affects.
- (v) The type of permit held.

If these requirements are not strictly complied with, an access arrangement which has been obtained by way of agreement has no force or effect unless the non-compliance is waived in writing by the owner or occupier.

An access arrangement may make provision for:

- the periods during which the permit holder is to be permitted access;
- the parts of the land on which the permit holder may explore, prospect or mine and the means of gaining access to those parts of the land;
- the kinds of prospecting, exploration or mining operations that may be carried out;
- conditions to be observed by the permit holder;
- things which the permitholder needs to do to protect the environment;
- compensation to be paid to any owner or occupier;
- the manner of resolving any disputes; and
- the manner of varying the arrangement.

#### **Access Arrangements in Respect of Crown Land**

The appropriate Minister may, by agreement, enter into an access arrangement in respect of Crown land. In considering whether to grant access, the appropriate Minister must have regard to:

- the objectives of any Act under which the land is administered;
- the purpose for which the land is held by the Crown.
- any policy statement or management plan of the Crown in relation to the land; and
- safeguards against any potential adverse effects of carrying out the proposed work programme.

#### **Arbitration**

Sections 63-75 of the Act provide for arbitration where the parties cannot agree on an access arrangement. The parties may agree to the appointment of any person as arbitrator. Failing agreement on the appointment of an arbitrator, any one of the parties may apply to the Secretary of Commerce for the appointment of an arbitrator. The Secretary will then, as soon as practicable, appoint an arbitrator.

An arbitrator must use his or her best endeavours to bring the parties to a settlement acceptable to all parties. As soon as practicable after conducting a hearing, the arbitrator must determine an access arrangement giving the permit holder access to the land on reasonable conditions. The arbitrator must also specify the compensation to which each owner or occupier is entitled.

#### **Compensation for Owners and Occupiers**

Where the owner and occupier of land are entitled to compensation from the permitholder for loss or damage, the compensation will include the following:

- (i) Reimbursement of all reasonable costs incurred by the owner or occupier in negotiations with the permit holder and all reasonable legal and valuation fees in determining an access arrangement.
- (ii) Reimbursement for loss of income.

- (iii) A lump sum for loss of privacy and amenities.
- (iv) Reimbursement of all reasonable costs in ensuring compliance with the access arrangement.

#### **Land Access Issues**

One of the major issues for oil developers under the Crown Minerals Act will undoubtedly be that of land access. Apart from "minimum impact activities" the granting of a permit does not give the holder a dependable scheme for ensuring access to land.

In the case of private land, the permit holder faces a daunting arbitration procedure if an access agreement cannot be reached with the landowner and occupier. The problem could be compounded if multiple agreements are required. Furthermore, the person seeking access must pay the costs of each landowner and occupier (legal, valuation and arbitrator's fees) incurred in reaching an agreement. This may encourage landowners and occupiers to seek arbitration if they perceive that they have nothing to lose by being arbitrary or unreasonable in the negotiations.

This situation is a major departure from the Petroleum Act where licensees have an automatic right of access to most private land (except land under intensive use) if certain conditions are met. Under the Petroleum Act the licence holder simply gives notice to the landowner if private land or Crown land is to be entered, and before the licence holder can enter the land, an agreement for compensation is reached with the owner, or failing agreement, compensation is calculated under the statute.

In respect of Crown land, arbitration will not be available under the new Act for land held and managed under the Conservation Act 1987, the Reserves Act 1977 or the Queen Elizabeth the Second National Trust Act 1977 unless the landowner (the Department of Conservation) agrees to such arbitration. In effect, the Minister of Conservation has a complete power of veto over lands administered by his or her department.

Access arrangements relating to Crown land are dependent on the objectives of any Act under which the land is administered; the purpose for which the land is held by the Crown; any policy statement or management plan of the Crown in relation to the land; and the safeguards against any potential adverse effects of carrying out the work programme (Section 61).

To illustrate the criteria now applicable, it is useful to take the example of conservation land. Under Section 7 of the Conservation Act, the Minister manages land held under the Act for "conservation purposes". "Conservation" is defined to mean "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations".

The Department of Conservation holds 33% of New Zealand's land. Their Minister manages land under a single issue mandate to "conserve and preserve". By applying the Section 61 criteria their Minister can effectively disregard important economic considerations.

Arguably, not all of this land is of such high conservation value that all other alternative uses of the land should be automatically precluded, especially petroleum development which has minimal surface impact. It remains to be seen how the Minister of Conservation will use these extensive powers.

## Strata Titles

In brief, "strata title" means that rights to prospect, explore or mine for a particular mineral are granted for a specified stratum which is defined between two depths or subsurface boundaries as opposed to all the way from the land's surface to the earth's core. The Crown Minerals Act brings the concept of strata titles into New Zealand legislation for the first time. Strata titles are not available under the Petroleum Act. In the case of *Petrocorp v Butcher* [1991] 1 NZLR 1 the Crown had successfully argued in the High Court that strata titles were permissible, however, this was reversed on appeal. The Court of Appeal found that the Petroleum Act does not authorise strata titles; mining rights extend to the whole of the area from the surface of the land to the depths of the earth's crust, or, as far as science and engineering can penetrate.

Now that the Act permits the Minister to issue permits over particular stratum, there are a number of disadvantages for petroleum mining companies. For example, strata titles raise uncertainty surrounding tenure over possible future discoveries. There are questions about increased surface impact since more than one licensee can hold mineral rights underlying the same piece of land. There will also be issues concerning mineral trespass and uncertainties surrounding vertical unitisation procedures.

Requirements for these types of operations include:

- a system of prior notice to other permittees in the area of the proposed well location;
- procedures for sealing production wells and plugging abandoned wells where they penetrate other permitted strata; and
- a possible prohibition on multiple completion wells. (A multiple completion well makes it possible to produce from more than one zone through a single mechanical installation—a technique well-suited to New Zealand conditions):

### Crown Minerals Act Guidelines for Strata Title

The Crown Minerals Act is deficient in its detail as to when strata titles are appropriate and what conditions ought to be attached to the various permits concerned. It is important that the Crown sets out guidelines for strata titles in the petroleum minerals programme. These should include:

- formulation of basic rules defining strata titles (in order that two permittees are not draining the same reservoir from different depths);
- rules governing surface land rights as between the various permit holders;
- rules setting out operational requirements; and
- Procedures for vertical unitisation.

## Offences and Legal Proceedings

Under the new regime there are basically two types of offence:

- those which breach Section 8 (a wide-reaching provision imposing duties and restrictions relating to minerals) where a conviction could result in imprisonment; and
- offences breaching a more minor collection of forbidden activities such as permit and land access conditions.

The most serious offence is prospecting, exploring for, or mining Crown minerals without a permit. A person who commits this offence is liable on conviction to imprisonment for a term of up to two years or a fine of up to \$200,000.

It is a less serious offence to:

- (i) Contravene any permit conditions or provisions of the Act.
- (ii) Enter land ostensibly to carry out a minimum impact activity, but carry out some other activity.
- (iii) Contravene the conditions of a right of access under an access agreement.
- (iv) Hold a pecuniary interest in a mining permit while administering the Act.

A person who commits any of these offences is liable on conviction to a fine of up to \$10,000.

### Consequences of Breach

The ramifications of these provisions should be understood by all persons conducting activities under this legislation. It is vital that all employees, managers, and directors of petroleum mining companies are aware of the criminal sanctions that could attach to activities under the Crown Minerals Act.

By comparison to the Petroleum Act, the penalties are harsh and there are few available defences. The maximum fine for most offences under the Petroleum Act is \$500 and \$10 for every day that the offence continues.

It needs to be stressed that there are penalties for those who enter land for a minimum impact activity without first obtaining the consent of the landowner and occupier or giving the required notice. Caution is especially required in situations where there are absent landowners and an uninformed decision to proceed may be made.

The defences to this offence are limited. In general it will be up to the defendant to prove that entry without permission or proper notice was necessary to reasonably protect life or health or prevent serious damage to property. It may also be a defence if the defendant can prove that breach was due to circumstances beyond the defendant's control, e.g., natural disaster, and could not have been reasonably foreseen.

The maximum penalty for a breach of this category of offence (under Section 100(1) of the Act) is two years imprisonment or fines not exceeding \$200,000; and, if the offence is a continuing one, a further fine of \$10,000 a day for every day or part of a day that the offence continues.

The penalties for breaching section 100(2), the less severe group of offences, are less (fines of up to \$10,000 and \$1,000 a day for continuing offences), however the liability appears to be absolute, i.e., no defences are available.

Under Section 102 directors and managers of a company may also be held personally liable for offences committed by employees. In these cases, it may be a good defence if the defendant proves that they or the company did not know or could not reasonably have known the offence was going to be committed or all reasonable steps were taken to prevent the commission of the offence.

Generally, in cases other than an emergency, activities should only be carried out under an appropriate permit with written consent of the landowner and occupier to enter the land or written evidence that the required notice was given prior to entry.

## Treaty of Waitangi

Every person exercising functions and powers under the Act must have regard to the principles of the Treaty of Waitangi. This is a new development for petroleum decision-makers. There was no mention of the Treaty in the Petroleum Act.

It should be noted that the Treaty considerations under the Crown Minerals Act's "sister statute", the Resource Management Act, are different. It is significant that people exercising functions and powers under that legislation must **take into account** the Treaty's principles. This obligation appears to be more onerous than the Crown Minerals Act provision. Under the minerals legislation the Minister and others exercising functions under the Act, must, at the very least, not ignore the principles of the Treaty.

Since its signing in 1840, the New Zealand legal system has not accorded the Treaty status in its own right. However, in recent years, reference to the Treaty has become increasingly common in legislation. In these situations the principles of the Treaty will have effect according to the terms of each statute.

The following are some examples of the treatment of the Treaty in legislation. Section 9 of the State Owned Enterprises Act 1986 says "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". Parliament has made the principles of the Treaty a paramount obligation for the Crown in the discharge of its responsibilities under the Act. In this instance the test to be applied is one of "consistency". It does not say that the Crown has to act in such a way as to give effect to the Treaty, but if the Treaty inhibits what the Crown is proposing to do that is sufficient.

The terms of the Conservation Act 1987 go further. This Act provides for the management of Crown lands set aside under the Act to be managed for conservation purposes. In effect it is a statutory restraint upon the way Crown lands are administered. Section 4 says "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi". This is clearly a positive obligation. Quite simply the statute must be administered by the Crown to give effect to the principles of the Treaty.

The Resource Management Act 1991 takes a different approach. Section 8 places a duty upon all decision-makers affected by the Act to "take into account" the principles of the Treaty of Waitangi. Essentially this is a direction to decision-makers that the principles of the Treaty are a relevant factor in the decision-making process and representations by the Maori people must be considered. It is not a direction to always directly apply the principles. On the face of it this direction affects a whole range of agencies of central and local government. All environmental managers affected by the Resource Management Act now seem to come under a duty to consider the Treaty. For this reason it is worthy of special attention.

Section 4 of the Crown Minerals Act places a duty upon decision-makers to "have regard" to the principles of the Treaty of Waitangi. It says:

"All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

On the face of it, this provision is directing officials to take notice of, or bring their attention to the Treaty in the decision-making process. This appears to be less stringent than the direction to take account of, or actively consider, the Treaty as in the Resource Management Act.

It is also noteworthy that the persons who will exercise functions and powers under the Crown Minerals Act are basically Crown authorities as opposed to the wider spectrum of authorities in the Resource Management Act. In view of

the trend set by the Conservation Act to a higher accountability for the Crown, this reference to the Treaty seems less stringent than one might have initially expected.

In having regard to the principles of the Treaty, the Minister, government officials and others with responsibilities under the Act will most likely be guided by the determinations of the Waitangi Tribunal and the decisions of the High Court and the Court of Appeal. As we look at existing decisions we see a number of principles emerging, e.g., the principle of partnership; the principle of reciprocal obligations; the principle of active protection (implying a duty to consult); the principle of mutual benefit; the principle of options; and the principle of consent etc. On a case by case basis some of these principles may apply and others may arise. How much primacy they will receive will depend upon the purpose of the Act and the particular circumstances of each case.

## Miscellaneous

### Existing Privileges to Continue

Transitional provisions are contained in Sections 107 to 111. Existing petroleum licences which are current at the date on which the Crown Minerals Act commences (1 October 1991) will continue to have effect as if the Petroleum Act was in force. The transition period for each existing licence will terminate on the expiry of that licence, and any subsequent application for a new licence will be treated as an application for a permit under the Crown Minerals Act.

### Bonds and Monetary Deposits

The Secretary will continue to hold the monetary deposits or bonds. However, the consent authority (e.g., a local authority whose resource consent is required to carry out an activity) is entitled to one half the amount of the deposit or bond for the purpose of restoring or protecting any property affected or endangered through breach of any terms and conditions of the licence. The Minister is entitled to the other half of the deposit or bond if there is any money payable to the Crown (Section 109).

### Minister may Direct that Petroleum be Refined and Processed in New Zealand

If, after consultation with the permit holder and having regard to the national interest, the Minister is satisfied that products are able to be manufactured in New Zealand from the petroleum produced under the permit, the Minister may direct that the petroleum be refined or processed in New Zealand. The Minister may also prohibit the export of any petroleum that must be refined or processed in New Zealand (Section 45). The Act gives no guidelines as to what may or may not be in the national interest.

The Minister has a further power, after consultation with all interested parties, to direct the owner of any refinery or processing plant capable of refining or processing the petroleum, to refine or process the petroleum. If the permit holder and the owner of the refinery or processing plant cannot agree on the terms and conditions of this arrangement, they will be determined by the Minister.

### Unit Development

If the Minister is satisfied that:

- (i) There is a single oilfield in land covered by two or more permits.
- (ii) Working the oilfield as one unit will prevent waste,

avoid unnecessary drilling and secure the maximum ultimate recovery of petroleum.

The Minister may require all the permit holders to co-operate in working and developing an oilfield as a unit (Section 46).

### Registers and Records

There is an obligation on the permit holder to keep detailed records and reports of all prospecting, exploration and mining activities. The records and reports must be kept in a form that is readily accessible by the Secretary or any agent of the Secretary.

The permit holder must provide to the Secretary copies of records and reports. The Secretary sends this information to the DSIR on the expiry of five years from the date the information was obtained by the permit holder, or expiry or surrender of the licence, whichever first occurs. At the expiry of that confidentiality period, the information becomes publicly available.

During the confidentiality period, the Minister may use the information in the exercise of any power or function conferred on the Minister under the Act, but not for any other purpose without the prior consent of the permit holder.

The Act specifically empowers the Minister, on behalf of the Crown, to participate in prospecting, exploration and mining. Arguably, the valuable geological information that must be provided under this section is not protected from disclosure to, and use by, the Minister in his or her commercial role as opposed to the limited administrative and regulatory roles.

## Conclusion

Petroleum is a resource which is of strategic importance to the economic wellbeing of the country. The economic benefit generated from the development of oil and gas resources is significant and this was recognised in the Petroleum Act.

The Crown Minerals Act shares some of the features of the Act that it replaces - Crown ownership of all petroleum existing in its natural condition in any land; Crown regulation of the licensing system; and the exercise by the Minister of proprietary and commercial roles as well as a regulatory role. However, the new Act departs significantly from many of the effective provisions of the Petroleum Act which gave petroleum explorers and miners clear statutory rights. Rights of access to private and Crown land, unequivocal rights to convert an exploration licence to a mining licence and rights to take discoveries in a licence area to full development are provisions in the Petroleum Act which have been altered in the Crown Minerals Act.

It is too early to make predictions about how effectively the new legislation will serve the interests of the industry and the New Zealand public. A great deal depends on the policies and goodwill of the various Government departments which will have influence over petroleum development. The most important indicator for the industry will be the petroleum minerals programme which is due to be released in draft form soon.

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### Author

GORDON WONG is a partner with Simpson Grierson Butler White. He has been practising as a barrister and solicitor since 1984. He graduated from Victoria University with a LL.B. in 1981 and completed a LL.M. with honours in 1984.

Gordon's primary fields of law are corporate and energy with a special emphasis on petroleum mining law and government corporatisation in this country.