

Understanding our Trans-Tasman neighbours: New Zealand and Australian requirements – a comparison

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Abstract

Many petroleum explorers who are active in, or are looking at exploring in, New Zealand, are also active in Australia, or have Australian explorers in their New Zealand joint ventures. This presentation is for all those explorers who get frustrated by the joint venture parties continually “talking past” each other, even relating to the simplest things.

We will investigate why Australian and New Zealand explorers (or their lawyers) demand different wording in documents, require procedures which are (or seem to be) unnecessary or incomprehensible and insist on obtaining comfort on matters which their trans-Tasman JV parties think are irrelevant.

We will compare the requirements and generally accepted procedures for applications and assignments, highlighting the differences between the New Zealand and Australian procedures.

Introduction

This paper looks at the New Zealand and Australian requirements for petroleum explorers in those jurisdictions. It is not a detailed economic comparison of the two regimes; but more a view of the practical requirements, which any petroleum explorer will encounter when working in the two jurisdictions.

Whether the explorer is a New Zealander in Australia, an Australian in a New Zealand joint venture or from any other jurisdiction working in both Australia and New Zealand, the common perception is that the regimes and the requirements are the same. In fact, the systems and requirements are very similar, both as to general business requirements and the specific petroleum exploration regimes. However they are not the same – there are minor (and therefore unexpected) differences between the two regimes.

The specific legislative can be different, the wording of the legislation may be different (so as to give a slightly different interpretation), interpretation of the legislation by the Courts may be different, and the culture and expectations of the industries in the two countries will also give a different “gloss” to each joint venture participant’s expectations. This can lead to participants demanding information, procedures, particular agreement wording or other minor requirements, which seem unnecessary or irrelevant to other participants, leading then to unnecessary tensions and misunderstandings within the joint venture.

Business structures

Both countries use the structures that most petroleum explorers will be familiar with: partnerships, companies and

joint ventures. In particular, joint ventures are most commonly used in the petroleum exploration sector. However, the “standard” joint venture operating agreements circulating in each country are different, and the interpretation and practical application of those agreements will be different. However, joint venture agreements are creatures of contract, not of legislation, and the contracting laws in the two regimes are basically the same. Therefore it is possible for a joint venture agreement which one participant is familiar with to be transplanted from one jurisdiction to the other. All joint venture participants will need to be aware of what the other participants might otherwise expect. They need to have sufficient time to read and understand the document. Any information that the proposing participant can give about how they expect it to work and be interpreted will be useful. Encouraging plain language use within the document will allow all participants and their lawyers to come to grips with the document more quickly and more comfortably.

The requirements for company and partnership structures are slightly different so each joint venture participant will need to be clear as to which structure they will use, and the particular requirements. Differences include, in Australia, at least one director must be an Australian resident, shares have a nominal value, all documents in the company’s name must include the company’s registered number, and the use of a company seal is common for formal execution of documents. None of these requirements apply in New Zealand.

Both jurisdictions do require any overseas company which is “doing business” in the relevant jurisdiction to register. That may be done by incorporation of a subsidiary in the relevant jurisdiction, or registration of the overseas company

itself, as a “branch” in the relevant jurisdiction. The exact definition of “doing business” is slightly different, so may conceivably apply to activities in one country but not in the other.

In general, if one joint venture participant asks for a particular structure, information or requirement, and other participants do not understand why, they should ask! It is not necessarily mistrust or pedantry. Alternatively, if the operator or other participant is not doing things in the way other participants believe is required, the issue should be raised as an educative matter. One participant may merely be transplanting their own requirements to the other jurisdiction unnecessarily, or they may not be doing it correctly.

Foreign investment

As well as the requirement for an overseas company doing business in the jurisdiction to register under the company’s legislation, investment by any overseas person does require approval in certain circumstances, in both jurisdictions.

The definition of an overseas person is slightly different but generally applies to parent company ownership of subsidiaries, even if the subsidiary is incorporated in the relevant jurisdiction. Nominees or trustees are generally ignored in determining parent company ownership.

Investment includes both the acquisition of any business or property or the establishment of a new business. Interests in land tend to be treated more strictly than acquisitions of other property.

In New Zealand any acquisition of a business or establishment of a new business over a threshold of NZ\$50million expenditure will come within the Overseas Investment Commission’s regime. This threshold does not apply to sensitive (usually rural or offshore islands) land. Petroleum permits, whether for exploration or mining, are not interests in land, as provided in the Crown Minerals Act. Therefore the general threshold of NZ\$50million will apply to petroleum exploration work.

In Australia the Foreign Investment Review Board is required to approve any acquisition or takeover of an Australian business over a threshold of A\$50million, or the establishment of a new business with expenditure over A\$10million. However, where the investment is a direct farm in or acquisition of a minerals exploration right, approval is not required to be sought. This means that direct investment by the overseas explorer by farm in or acquisition or a minerals exploration right (although this will usually not go over the threshold amount anyway) bypasses the FIRB requirements, but the takeover or setting up of a new business in Australia will be subject to FIRB examination if over the relevant threshold.

Taxes

This is not a detailed paper in any way related to tax issues. However there are some “standard” types of taxes which may

or may not be relevant in the particular jurisdiction. For example, in both countries, residents will be taxed on all income earned; non-residents will be taxed on income derived in the relevant country. The test for residency is fairly similar in both countries, but should be carefully studied for each explorer’s particular circumstances.

Stamp duty is a tax required in Australia, but no longer collected in New Zealand, for transactions involving the transfer of shares or interests in land.

Goods and Services Tax, similar in concept to VAT in the United Kingdom, has applied in New Zealand since 1986. It is being introduced in Australia from 1 July 2000. Although the concept is similar in the two countries, its application, and the particular rates applying, are different (and more complex) in Australia from those currently in place in New Zealand.

Capital Gains Tax applies in Australia. This is not generally a consideration in structuring New Zealand businesses, but does in fact apply in the petroleum sector. This is due to the petroleum mining company taxing regime applied in New Zealand.

Specialist tax advice should be taken on all of these and other tax matters in structuring, and operating, any petroleum exploration business in either country.

Petroleum exploration - legislative regime

The most obvious difference between the two countries is the federal system which applies in Australia. Both State and Commonwealth Governments have some jurisdiction to legislate in the relevant states. The State Government has jurisdiction onshore and within the three nautical mile limit. The Commonwealth Government has jurisdiction offshore (i.e. outside three nautical miles). Each State Government has its own requirements. In New Zealand there is one piece of legislation and one agency – the Crown Minerals Act and Crown Minerals, Ministry of Economic Development.

New Zealand regime - Crown Minerals Act 1991 (“CMA”)

The CMA is the central legislation governing mineral exploration and extraction in New Zealand.

- (a) All petroleum in its natural condition in land shall be the property of the Crown (section 10).
- (b) The CMA establishes Mineral programmes to establish policies, procedures and provisions to be applied regarding management of any petroleum resources. Mineral programmes contain detailed guidelines for potential investors. They advise on the procedures for applying for any permits required for prospecting and exploring for and mining of petroleum in New Zealand. Minerals programmes are linked to the key policies of the CMA; to provide for efficient allocation of rights in

respect of Crown-owned minerals; and for the Crown to obtain a fair financial return from “its” minerals (section 12).

- (c) The CMA also directs the Minister “to have regard to” the principles of the Treaty of Waitangi in exercising their powers under the CMA.

The Minerals Programme for Petroleum

The Minerals Programme for Petroleum (“Programme”) prohibits specified land areas from being subject to a petroleum permit. These prohibitions are either in recognition of Maori values or the Protocol on Environmental Protection to the Antarctic Treaty. Further, the Sugar Loaf Islands Marine Protected Area CMA 1991 restricts petroleum mining operations and the issue of permits over a further specified area.

Petroleum permits

- (a) Under the CMA, a person must hold a valid permit of the correct type before they may prospect or explore for, or mine, Crown owned minerals in land.
- (b) Permit categories include:
- i Prospecting
 - ii Exploration
 - iii Mining
- (c) These categories may be further defined:
- i Petroleum prospecting permits are granted for the purpose of conducting reconnaissance geophysical surveys and/or reconnaissance geochemical surveys and/or general investigative studies or surveys with the purpose of providing information for further petroleum exploration.
 - ii Petroleum exploration permits are granted for the purpose of undertaking work to identify petroleum deposits and evaluating the feasibility of mining any discoveries made. Exploration activities include geological, geochemical and geophysical surveying, exploration and appraisal drilling and testing of petroleum discoveries.
 - iii Petroleum mining permits are granted to enable the development of a petroleum field with the purpose of extracting and producing petroleum. In most cases an exploration permit would precede the consideration and grant of a mining permit.
- (d) If a person holds a particular permit, they have a right to exercise the permit in accordance with the permit conditions (section 30). Any person may apply for a petroleum permit (section 23). Each permit application is considered in accordance with principles and policies of the Programme.
- (e) Unless a relevant Programme specifies otherwise, the Minister of Energy (“Minister”) may offer permits for allocation by public tender (section 24).

- (f) Permits will not be issued where:
- i the applicant intends to block prospecting, exploration or mining; or
 - ii the applicant intends to trade the permit.
- (g) Assignment of the permits interest is permitted to allow for risk sharing, and for the transfer of permits as part of commercial transactions between companies. Consent of Minister of Energy is required for the latter scenario (section 41).
- (h) Permit holders are required to comply with the CMA and relevant regulations, including payment of fees and lodgment of data to the Secretary of Commerce (section 90).
- (i) Failure to comply with the permit or CMA may lead to the Minister revoking the permit.

Conditions of permit allocation

- (a) The Minister may grant permits on conditions as the Minister thinks fit (section 25). Wide discretion is available here.
- (b) The Minister may only grant a permit where they are satisfied that the applicant will comply with, and give proper effect to, the permit.
- (c) All permits granted shall state that the permit holder shall make all reasonable efforts to comply with the permit with good exploration and mining practice.
- (d) Unless the Minister decides otherwise, a defined programme of work shall be a condition of petroleum permits. The work programme will be specified as part of the permit application.
- (e) All production facilities must be properly abandoned.

Prospecting Permits

- (a) Prospecting Permits:
- i are of 2 years duration;
 - ii confer no automatic right to a subsequent petroleum exploration or petroleum mining permit, but if the holder satisfies the Minister that the results of their prospecting justifies the granting of an exploration permit, the permit holder has the right, upon applying, to surrender their prospecting permit in exchange for an exploration permit;
 - iii may be granted on a non-exclusive basis;
 - iv will not be granted over land which is at the time held under a petroleum exploration or mining permit;
 - v may be declined on the grounds that the proposed prospecting is unlikely to add to the existing knowledge of the mineral in all or part of the land to which the application relates or because these exists, at the time of application, substantial interest in exploring for or mining the mineral in all or part of the land to which the application relates.

Exclusive Exploration Permits

- (a) Exploration Permits:
- i are of 5 years duration but may be extended to 10 years;
 - ii are generally obtained through process of stayed work programmed bidding. This is a competitive tender allocation process which involves a Petroleum Exploration Permit Block Offer being advertised and bids being received and allocated accordingly;
 - iii may be allocated on a cash bonus bidding system where a strong competitive interest exists in areas of high prospectivity.
- (b) Explorers may prompt consideration of an area for a Petroleum Exploration Permit Block Offer formally by making a Notification of Interest.
- (c) Under the explorative permit it provides otherwise, if a holder of an exploration permit satisfies the Minister that they have discovered a deposit, the permit holder shall have the right, upon applying, to surrender their exploration permit in exchange for a mining permit.
- (d) Applications for subsequent exploration of mining permits (under section 32) can only be granted where the Minister has approved the work programme for the permit or is satisfied that a work programme is not required (section 43).

Mining Permits

- (a) Mining Permits:
- i may be granted for up to 40 years;
 - ii are usually but not necessarily, made by holders of exploration permits (i.e. under section 32);
 - iii provide exclusive rights to mine the minerals defined in the permit.
- (b) When evaluating a mining permit application, the Minister must be satisfied a petroleum field has been discovered and the works programme meets the requirements of good exploration and mining practice.
- (c) In limiting circumstances, applications for mining permits may be made under section 23 of the CMA over land that is:
- i not already under a petroleum permit (or licence under the Petroleum Act 1937);
 - ii not the subject of a Petroleum Exploration Permit Block Offer;
 - iii not the subject of an application for a petroleum permit which has not been dealt with;
 - iv available for petroleum permits.

These applications are determined upon the discretion of the Minister and relate primarily to smaller scale mining of shallow petroleum discoveries.

Royalty payments

- (a) All petroleum permits issued in accordance with the Minerals Programme are subject to a royalty regime. It is a hybrid scheme comprising a 5% ad valorem royalty component and a 20% accounting profit royalty component.
- (b) The ad valorem royalty is 5% of the net sales revenues. The CMA contains specifics for calculating this royalty.
- (c) The accounting profit royalty comprises the excess of net sales revenue over the total of allowable APR deductions. These APR deductions include production costs, capital costs, indirect costs, abandonment costs, operating and capital overhead allowance, operating losses and capital costs carried forward and abandonment costs carried back.

Australian regime - state and federal position

As noted above any consideration of the regime in Australia has to take account of the Federal System of government in Australia. There are seven distinct state or territory regimes administered by those separate administrations. In addition, the national (Commonwealth) government is responsible for licence areas more than 3 miles from the coast.

Given the number of regimes that apply in Australia, our paper is not able to consider them in the same detail as we have for New Zealand. We have also adopted a little geographical bias (given the location of the Conference).

As we consider the position in Australia below, we also contrast the position in NZ.

Comparison of regimes

The terminology applied to exploration rights is similar between the states. Some differences exist in the period for which such licences are granted. The following is a simple table:

State	Name of right granted	Term
New South Wales	Exploration Permit	Not more than 6 years
South Australia	Petroleum Exploration Licence	5 years
Northern Territory	Exploration Permit	2-5 years
Tasmania	Exploration Permit	Discretionary period
Victoria	Exploration Permit	2 years
Western Australia	Exploration Permit	6 years
Queensland	Petroleum Permit	2 years + discretion to extend more
New Zealand	Petroleum Exploration Permit	5 years

Application process

There are different regimes in Australia for the making of applications for exploration rights. In Western Australia, applications can only be made in response to an advertisement whereas in New South Wales some advertising may occur. The general position is that persons can apply for a licence in any area provided it is not already subject to a licence or permit.

In New Zealand, the Government operates an offer system that involves competitive bidding for licence areas. These areas are either selected by the Government, or can be prompted by interest expressed by a party. New Zealand also operates an Acceptable Frontier Offer system where certain parts of the territory are designated as being capable of separate bid by a party, without the requirement for a competitive process.

Unique to Western Australia and South Australia is the concept of a Retention Licence/Lease under which a party is able to secure rights to a prospective area that at that time is not considered economic to develop. The other jurisdictions require parties to hold prospecting or mining rights and agree a work programme or development programme that is not onerous.

Renewals

Renewals of prospecting rights are available as of right in Northern Territory, South Australia, Western Australia and Tasmania. In other areas, this is discretionary.

The area covered by the licence is reduced on renewal (except in Queensland and Victoria). The most significant reduction is required in Western Australia and Northern Territory (by 50%) whereas New South Wales and South Australia require a 25% (or like) reduction.

In New Zealand, a renewal requires a 50% reduction.

Native Title

Native title issues are not intended to impact on the holder of the prospecting right. If they exist, they are a matter for the Federal or State Government.

Native title claims can be relevant when resource consent issues are being considered. In Australia, this will be relevant when the licence is being granted whereas in New Zealand, resource consent matters are usually considered separately to the grant and are the responsibility of the licence holder.

Transfer and dealings

This is an area where it is vital to understand the differences in approach between the territories.

In Northern Territory and Tasmania, you cannot create an interest in or transfer a licence without obtaining the consent of the relevant Minister before the transaction becomes effective. In Western Australia, the dealing must be approved by the Minister. In all of these areas, a breach of the requirement invalidates the licence. It is therefore vital not to offend the relevant requirements.

In New South Wales, the dealing is of no effect until it is approved and registered.

In Queensland, South Australia, and Victoria, the dealing must be approved by the Minister but a breach of this requirement only invalidates the transfer. New Zealand follows this regime.

Future direction

The regimes that apply to petroleum prospecting in Australia and New Zealand are similar but important differences do exist.

While these differences can be used by one territory over another to attract prospectors, they also add complication to the administration of a party's interests in the Pacific basin.

As Australia and New Zealand continue along the path of harmonisation of their laws, consideration will have to be given to further aligning the regimes. Benefits can be gained by each territory considering the approach adopted by the others and drawing "best practice" from them. For example, South Australia is in the process of passing new legislation to provide additional flexibility to its licensing regime and New Zealand and other territories could usefully consider the adoption of a retention licence system or the like.

The prospecting regimes adopted by each territory will continue to come under scrutiny as the number of parties prospecting and discovering petroleum falls away from the requirements perceived by governments. This is good. However, throughout any consideration of change, the process must be undertaken in a way that provides certainty to prospecting parties.

References

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