

Field and asset abandonment – the legal issues

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Abstract

The New Zealand petroleum industry faces some major decommissioning, abandonment and remediation projects in the mid-term future. Explorers need to be familiar with the relevant laws, and the potential extent of their liability if any issue arises during, or subsequent to, abandonment. An understanding of the legal obligations and liabilities associated with abandonment is a key for any explorer, so as to be able to ensure compliance and forecast costs.

However New Zealand lacks a clearly defined legal policy focused on the abandonment of petroleum operations, identifying a comprehensive set of obligations on abandonment. Instead we have a fragmented framework of statutes that impose obligations and liabilities, with a number of different authorities having jurisdiction over different issues relevant to abandonment. The fact that New Zealand has not seen a major decommissioning or abandonment in the industry in recent history also means there is little precedent evidencing how those authorities will apply the law.

To understand their obligations, explorers will need to be familiar with the relevant laws. At the appropriate time they will also need to consult with the relevant authorities to establish the detailed requirements, and to work through any potential inconsistencies in the requirements of the different authorities.

Even if an explorer complies with all requirements, completes abandonment and surrenders its permit, it will still retain potential liability for issues arising in relation to the operations post abandonment. Explorers need to consider how best to minimise their exposure in this regard.

Introduction

The New Zealand petroleum industry faces some major decommissioning, abandonment and remediation projects in the mid-term future as producing fields reach their end of life, and production and processing facilities become redundant. As field and asset abandonment draws closer, explorers will start to focus on the obligations, costs and liabilities associated with such abandonment.

This paper examines some of the key elements of the legal framework surrounding field and asset abandonment in an effort to understand the scope of those obligations and liabilities.

Why it is important to understand the obligations and liabilities – the cost impacts of abandonment

Abandonment costs will, unless they are contractually off-laid to some third party, be borne by the explorers involved in the venture. Where there is a joint venture, insofar as abandonment of assets forms part of the joint operations, the costs coincident in the abandonment will be borne by the joint venture participants in accordance with their participating interests in the same manner as other joint operations costs¹.

Given that:

- abandonment costs may be significant;
- those costs are incurred at the time when the revenue stream from the assets being abandoned has dried up; and

¹ Assuming of course that the relevant assets were not part of a sole risk development.

- an explorer is reliant on its fellow joint venturers meeting their share of the costs²,

it is important for explorers to understand the extent of their obligations and liabilities, and thus the extent of their costs, well in advance of commencing abandonment so that they can plan adequately³.

The legislative framework

NZ does not have a co-ordinated national policy

In contrast to some overseas countries⁴, New Zealand does not have a clearly defined national legislative policy covering the decommissioning and abandonment of petroleum operations, and the responsibilities and liabilities of explorers. While there have been discussions from time to time within relevant government bodies about the possibility of a national policy, the topic has never been sufficiently high on the priority list to gain traction. Given the relatively recent nature of major operations in New Zealand, and the fact that none of these operations has been decommissioned and abandoned, this is perhaps not surprising.

The fragmented framework

In the absence of a co-ordinated national policy, the legislative framework relating to the decommissioning and abandonment of petroleum operations has developed in a somewhat fragmented manner. Numerous pieces of legislation have evolved (mainly during the last 15 years) which contain provisions relevant to abandonment. However, rather than being focussed specifically on the petroleum industry, these pieces of legislation tend to approach the issues of abandonment from the angles of environmental management or workplace safety, where the petroleum industry is just one of many affected and interested industries.

This fragmented and non-specific approach poses some difficulties for explorers, namely:

- the difficulty in identifying, and ensuring compliance with, all relevant pieces of legislation;

- uncertainty as to how the relevant authorities will approach a major decommissioning/abandonment given the absence of a recent New Zealand historical precedent; and
- the potential conflicts and inconsistencies that exist between the different pieces of legislation and the application of legislative requirements by the different authorities which administer them.

Key legislation

This paper does not purport to provide a comprehensive list or review of all legislation relevant to abandonment. Instead it focuses on 5 key pieces of legislation, and the impact they have on the obligations and liabilities of explorers. These five pieces of legislation are:

- the Crown Minerals Act 1991 (and the Crown Minerals (Petroleum) Regulations 1999);
- the Resource Management Act 1991;
- the Health and Safety in Employment Act 1992 (and the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999);
- the Maritime Transport Act 1994; and
- the Submarine Cables and Pipelines Protection Act 1996.

The Crown Minerals Act

The focus of the CMA

Despite being the legislation underlying the current-day petroleum exploration and production regime in New Zealand, the Crown Minerals Act 1991 (“CMA”) is largely unconcerned with the abandonment of petroleum operations. The CMA itself does not set out any substantive requirements that would allow an explorer to determine the extent of abandonment and remediation work likely to be required. However it does provide the Minister of Energy with scope to impose abandonment conditions, and it contains a key provision clarifying the liability of explorers for abandoned operations. The Crown Minerals (Petroleum) Regulations 1999 also have relevance in terms of the general obligations imposed on abandonment.

² While a Joint Venture Operating Agreement may provide for the costs to be shared by the explorers, it is important to note that these provisions only apply as between joint venture participants – they have no relevance on liability to third parties. Where there is an unincorporated joint venture, a landowner (for example) will not be restricted from pursuing one JV participant for the total amount of the liability. It will be up to that JV participant to ensure recovery of its colleagues’ contribution.

³ A relatively common JVOA provision is the requirement for participants to contribute to an abandonment fund during the producing life of a field (generally based on a \$ per barrel figure estimated by the operator on the basis of expected abandonment costs and life of field/asset production figures). The requirement for actual monetary contribution can be replaced by the provision of security (eg. third party guarantee or bank bond) for the appropriate amount. This then provides some level of comfort to the participants that its colleagues will be able to meet their share of the costs of abandonment. For this to be effective however, it is important to have reasonably accurate estimates of the cost of abandonment.

⁴ Compare, for example, the UK regime administered by the Department of Trade and Industry.

The imposition of abandonment obligations as conditions of a work programme

The requirement for Ministerial approval of a work programme⁵ provides the Minister of Energy with some scope to impose abandonment obligations. Indeed, among the matters that the Minister will take into account, when considering a work programme, are “*the proposed mining operations in respect of the extraction, production, processing and transport facilities, and abandonment of operations*”⁶.

However, experience suggests it is relatively rare for work programmes to contain any substantive obligations regarding abandonment of operations. In the author’s experience, those work programmes that do refer to abandonment only tend to do so briefly (such as general obligations to comply with applicable legislation and/or good industry practice). This is not surprising – the focus of a work programme tends to be on ensuring the adequacy of exploration or production activities (in line with the underlying policy). Also, at the time that work programmes are approved, the prospect of abandonment is generally a distant one, and the ability to impose detailed abandonment conditions which will remain appropriate for the life of the field is questionable.

Ongoing liability for petroleum operations

From a practical perspective, the more relevant provision in the CMA is probably section 40(6) which provides as follows:

- “(6) The surrender of a permit shall not release the permit holder from any liability in respect of—
- (a) the permit up to the date of the surrender; and
 - (b) any act under the permit up to the date of surrender giving rise to a cause of action.”

This section makes it clear that the surrender of a permit does not provide the explorers with any release of liability for actions (or omissions) carried out during the life of the permit. To the extent that any liability exists (whether in relation to the abandonment itself or to any other aspect of the operations) such liability will survive the cessation and abandonment of operations and the surrender of the permit.

Crown Minerals (Petroleum) Regulations 1999

Consistent with the CMA, the Crown Minerals (Petroleum) Regulations 1999 are also largely unconcerned with abandonment. In contrast to the obligations relating to operational well-drilling and the detailed reporting

requirements relating to operations during the life of the field, the provisions covering abandonment are minimal. Regulation 42 does require the provision of a report following well abandonment, but this does not deal with the substantive obligations of the explorer in relation to such abandonment.

The one provision that, arguably, imposes a substantive obligation on the explorer is regulation 21(3). This provides that “*all well drilling operations must be undertaken in accordance with recognised good exploration and mining practice.*” Unfortunately there is no definition of “well drilling operations” in the Regulations (although the same term is defined in the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999 to include the abandonment of a well and ancillary on-site operations⁷). Even if this obligation applies to abandonment it does little to assist an explorer in determining the detailed extent of its obligations.

The Resource Management Act

The environmentally focused Resource Management Act 1991 (“RMA”) formed part of the same package of legislation as the CMA, and the two were intended to work in tandem. Given the potential impact of petroleum operations on the environment (both real and perceived), the RMA obviously has a potentially major impact on the liabilities of explorers in relation to abandoned sites and assets.

Jurisdictional scope of the RMA

It is important to note at the outset that the RMA jurisdiction is not limited to land-based operations. The RMA also has relevance for any activities carried out within or impacting on the coastal marine environment, which is managed on behalf of the Minister of Conservation by regional councils⁸.

The imposition of obligations for the decommissioning, abandonment and remediation process under resource consents

Resource consents have the ability to be relevant to abandonment in two respects:

- Where the operations (or part of the operations) were sited or carried out under a resource consent, it is possible that such resource consent will include conditions relating to the decommissioning and abandonment of those operations. To the extent that conditions are set out in a resource consent, this will be helpful to an explorer in determining abandonment

⁵ This requirement is imposed by section 43 of the CMA. An exploration permit or a mining permit will not be granted unless the Minister of Energy has approved the work programme submitted by the applicant for that permit. It is also standard practice for permits to be issued on the condition that a further work programme be submitted on completion of the existing programme and/or by a set deadline.

⁶ Refer section 5.4.10 of the Minerals Programme for Petroleum.

⁷ Refer regulation 2 of the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999.

⁸ The coastal marine area extends approximately from the coastline to the limits of the territorial sea (12 nautical miles).

requirements in advance, but an explorer should be conscious that such conditions are may not be exhaustive. If a local authority subsequently considers that there are aspects relating to the environmental effects of the decommissioning or abandonment that the resource consent does not cover, it may potentially seek to use the enforcement provisions of the RMA to address actual or potential effects not covered by the consent conditions.

- Depending on the activities involved in the abandonment, it also may be necessary to obtain new resource consents in order to carry out a proper abandonment (e.g. a land use consent or a coastal permit may be required for the disturbance to the site caused by decommissioning and remediation, or in respect of disposal of contaminated material). Indeed such consents may even be needed to give effect to the abandonment requirements imposed by other legislation⁹. A requirement to obtain new consents could provide the local authority with a further element of control over abandonment, and although (in theory at least) it would have the ability to withhold such consent, it may be more likely to impose conditions on a consent which go further than the other applicable statutory abandonment requirements in addressing environmental effects and/or risks.

The practical steps – local authority involvement in abandonment

If consents are not required then, subject to the comments made below in relation to enforcement orders, the RMA does not provide for the imposition of specific abandonment obligations. However, it would be prudent for an explorer to involve the relevant local authorities in its abandonment plans and operations.

Given the role of the local authorities in the enforcement process under the RMA, and given their obligations to monitor the local environment and take “appropriate” action¹⁰, failure to achieve “buy-in” from a local authority on the nature and extent of planned abandonment and remediation could potentially result in RMA enforcement action against an explorer. Accordingly it appears sensible for explorers to consult with relevant local authorities and seek their input into the abandonment and remediation plans.

Consultation itself raises issues for an explorer. Three of the key issues are as follows:

⁹ For example, if the Director of Maritime Safety required removal of a platform or pipeline (under the Maritime Transport Act 1994) from a site within the coastal marine zone, the disturbance of the seabed involved may require an explorer to obtain a resource consent from the relevant local authority.

¹⁰ Refer section 35 of the RMA.

¹¹ For onshore operations, many of the issues will be similar to those faced by other major industrial or contaminated sites and there may be useful precedents from outside the petroleum sector that provide a useful gauge of likely local authority views.

¹² If a local authority subsequently became dissatisfied with the extent of the remediation, or an environmental issue arose, the fact that it had been involved in the planning of remediation actions would not in itself prevent it from applying for an enforcement order (although this factor would weigh against the Environment Court exercising its discretion to make an order). Also, local authority “approval” will not provide a bar to any third party applying for an enforcement order, but would be an important discretionary factor for the Environment Court to consider.

- The local authority views on the extent of remediation work required will likely not be known until relatively close to the time of abandonment or perhaps following technical investigations of the environment. Earlier consultation may help to provide an understanding of the local authorities’ views at that time, but those views may have changed by the time of abandonment or as a result of investigations. This would not help an explorer plan during the life of the field, although adherence to a comprehensive operational risk management and compliance programme is likely reduce risks at the time of abandonment. Compounding this is the fact that, in terms of offshore operations, there are (at present) no useful precedents to provide guidelines¹¹.

- There is always the risk that, once involved, the local authority may seek an abandonment and remediation programme in excess of that required by other applicable laws, or desired by the explorer. Explorers would be well advised to have sufficient technical information available in order to persuade a local authority that the extent of remediation work sought is unnecessary.

- Except to the extent that it may grant resource consents where such are needed, local authorities do not have any statutory ability under the RMA to “approve” abandonment and remediation plans. Accordingly, the involvement of the local authority (including the “approval” of planned operations and agreement that operations have been completed in accordance with such plan) would not necessarily provide an explorer with absolute protection against the possibility of future enforcement action¹². It may however provide a degree of practical comfort, in that:

- the incentive for a local authority to commence enforcement proceedings will likely be diminished where it considers it has been consulted or had adequate involvement in the abandonment plans and operations; and

- the Environment Court would be inclined to look less favourably on an application for an enforcement order by a local authority (or a third party) where the actions or issue complained of were within the ambit of any plans sanctioned by the local authority (albeit in an unofficial capacity).

The enforcement process

Part XII of the RMA gives the Environment Court the ability to consider applications by any person for it issue enforcement orders in relation to unauthorized activities or activities having adverse effects on the environment. This would potentially include the environmental effects of abandonment operations. The wide-reaching scope of such orders includes the power to require any person:

- to cease doing something that contravenes the RMA (or regulations, or a district plan or resource consent), or is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or
- to do something needed to ensure compliance with the RMA (or regulations, or a district plan or resource consent) or to avoid remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person;

Applications for an enforcement order can be made by any person (refer section 316 of the RMA), although they are more typically instigated by applications from local authorities. The granting of enforcement orders is a discretionary power of the Environment Court, and the Court will need to be convinced that the making of orders against a party is necessary. Furthermore, the Court has no jurisdiction to make orders relating to effects or activities which occurred prior to the passage of the RMA in 1991.

A key point to note is there does not have to be a breach of the RMA (or subordinate regulation, rules or consents) for the enforcement process to apply. The fact that there is, or is likely to be, an adverse effect on the environment may be sufficient in itself, although there would need to be sufficient evidence linking the activities of the explorer with the adverse effect (and that the activities giving rise to the effects took place after 1991). In this regard, abandonment or remediation plans that could be seen to not adequately address adverse effects on the environment might be subject to challenge through the enforcement order process, and the potential imposition of additional environmental obligations by the Environment Court.

The potential for ongoing liability

Even if an explorer complies fully with the requirements of the RMA in seeking resource consents for abandonment and remediation, or seeks and obtains local authority “buy-in” to its abandonment plan, and carries out that abandonment plan, there is still the potential for some residual future liability under the RMA. As noted earlier, operating in accordance with a comprehensive risk management and

compliance programme during the lifetime of the operation is likely to reduce unforeseen future liability.

Under the RMA, if an environmental issue arose or was identified subsequent to abandonment (such as the discovery of pre-existing site contamination, or the “leaking” of a capped well) and there was sufficient evidence to link that issue to the explorer, the enforcement process might be used to require the explorer to remediate the issue. Such an enforcement order could be granted notwithstanding the fact that the explorer has surrendered the permit and ceased to have any direct relationship with the land affected¹³. This could mean that explorers continue to carry risk for an undefined future period, well after they might traditionally have considered that their involvement in, and risk associated with, an operation has ended. The issues encountered with the Blenheim Wells in New Plymouth in 2002/3 provided a timely reminder in this regard. If the original explorers had still been in existence, it is arguable that they may have retained liability for the issue and an enforcement order could potentially have been sought by the local authorities concerned in order to ensure remediation of the wells¹⁴.

The Health and Safety in Employment Act 1992

With the introduction of the Health and Safety in Employment Act 1992 (“HSEA”), the Petroleum Act 1937 was repealed and the HSEA introduced inspectors who took over the role previously performed by inspectors under the Petroleum Act 1937. While the primary focus of the HSEA is workplace safety, a strong technical involvement in petroleum operations has been retained. This is reflected in the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999 (“HSE Petroleum Regulations”)

Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999

In terms of the detailed legislative obligations imposed on explorers for the abandonment of petroleum operations, the HSE Petroleum Regulations is the single most relevant piece of legislation.

HSE Petroleum Regulations apply to “employers”

The relevant provisions of the HSE Petroleum Regulations apply generally to “employers”. However explorers should not make the mistake of believing that these provisions only apply to an operator. The definition of employer¹⁵ is certainly

¹³ As noted above, an enforcement order can be sought against to the person who caused the adverse environmental impact. That person does not need to be the legal occupier or owner of the land on which the issue arose.

¹⁴ Note however that there is a question of the extent of the jurisdiction of the RMA in relation to activities carried out prior to introduction of the RMA – if the issue arose prior to 1991, it may be possible for an explorer to argue that it is outside of the RMA jurisdiction.

¹⁵ “Refer regulation 3(1) of the HSE Petroleum regulations – “employer” includes “(a) a person who controls a place of work; and (b) a principal who controls the place of work at which a contractor or subcontractor works.”

wide enough to catch explorers, even though they may not be involved in the day to day operational matters.

Four key provisions

There are four key obligations under the HSE Petroleum Regulations relating to abandonment – these are contained in regulations 12, 14, 20 and 22.

Regulation 12 – the requirement for petroleum operations to comply with industry standards

Regulation 12 requires employers to take all practicable steps to ensure that a petroleum operation is designed, constructed, operated, maintained, suspended or abandoned (as the case may be):

- in accordance with the appropriate part or parts of:
 - (a) The Institute of Petroleum Model Code of Safe Practice in the Petroleum Industry; or
 - (b) The International Maritime Organisation Code for the Construction and Equipment of Mobile Offshore Drilling Units 1989; or
 - (c) The International Maritime Organisation International Convention for the Safety of Life at Sea 1974; or
- to the extent that the above documents are not applicable, in accordance with generally accepted and appropriate industry practice.

“Petroleum Operation” is widely defined to mean “any operation in connection with mining or exploration for petroleum” and accordingly regulation 12 does not apply solely to wells¹⁶. It can capture the other production and processing facilities. The definition leaves unanswered the question as to the point at which operations become sufficiently distant from the well to fall outside of the ambit of regulation 12. The extent to which the regulation applies to the removal of pipelines and connected processing facilities is therefore uncertain.

Explorers will therefore need to consider carefully the application of the two codes and the convention referred to in regulation 12 to ensure compliance with any applicable provisions. To the extent the health and safety based codes do not apply, a general obligation to follow generally accepted and appropriate industry practice will apply.

Regulation 20 – requirements relating to the abandonment of wells

Regulation 20 sets out specific requirements relating to the abandonment of wells.

¹⁶ Specifically included within the definition of “petroleum operations” are (a) the extraction, transport, treatment, processing, or separation of petroleum at, or in the near vicinity of, the well; (b) any well-drilling operation; and (c) the construction, maintenance, and operation of any works, structures, or other land improvements, or any plant or equipment, connected with any such operation.

¹⁷ e.g. – by cutting the legs of the platform at a depth sufficient to ensure the remaining structure does not pose a hazard to marine traffic, as has happened with some overseas offshore platforms.

Subclause (1) deals mainly with the detailed requirements for the placement and extent of cement plugs. Subclause (2) has more far reaching obligations and requires an “employer to ensure that:

“(b) If an offshore well is to be abandoned, all seabed equipment is removed and all unrecovered casing is cut not less than 2 m beneath the seabed and removed so the well is left in a safe condition; and

(c) The area of the abandoned well at the surface or the seabed is cleared of all equipment and debris and left in a safe condition.”

This has potentially major implications for offshore wells. While “seabed equipment” is not defined, it appears on its face that this provision may require the removal of the entire platform, down to the seabed. This is in conflict with the perception expressed by some members of the industry that it may be possible to leave offshore platform structures partially in place¹⁷ or to topple them in-situ, provided they do not create any marine or environmental hazard. Insofar as “seabed equipment” could extend to pipelines, it also appears to conflict with the intent of the Submarine Cables and Pipeline Protection Act 1996 (discussed below).

Regulations 14 and 22 – notification requirements

Regulations 14 and 22 impose notification obligations:

Regulation 14 requires an employer to provide notification to the Petroleum Inspector before commencing any “notifiable operation” (which includes the suspension of any well-drilling operation or the abandonment of any well). Schedule 1 of the HSEA Regulations sets out the information that must be notified, which, in the case of abandonment, must include:

- a detailed summary of the reasons for abandonment;
- a detailed programme of abandonment indicating the sequence of operations, the positions of cement or bridge plugs, the method of emplacing and testing the integrity of plugs, the details of any intention to recover casing, tubing, surface or down-hole equipment, the details of any debris to be left in the hole, and the plans for surface or seabed restoration; AND
- any codes complied with under regulation 12.

Regulation 22 requires the provision of a safety case to the Petroleum Inspector in a number of circumstances, including prior to the abandonment of an offshore platform. The safety case must contain the information required under schedule 4, including a “*programme of works, to demonstrate that the proposed arrangements, methods, and procedures for—*

- (a) *Dealing, by way of abandonment or otherwise, with any wells to which the installation is connected; and*
- (b) *Decommissioning the installation; and*
- (c) *Demolishing or dismantling the installation—*
take adequate account of the design and method of construction of the installation, its plant and equipment, and minimise hazards.”

Under both regulations 14 and 22 the employer is required to take all practicable steps to ensure that the work is carried out in a manner that is consistent with the notified details.

Intriguingly, neither regulation 14 or 22 provide that the plans put forward by the employer must be approved by the Petroleum Inspector. While common practice may be to liaise with the Inspector, and address any concerns the Inspector has regarding proposed work on petroleum operations, it appears the Inspector’s legal control over the operations is limited. If the Inspector is not satisfied with the proposed abandonment plans (and the relevant explorers are unwilling to modify the plans to meet the Inspector’s concerns), the Inspector’s remedy would appear to be to issue an improvement notice or prohibition notice under the HSEA. This remedy has its limitations, as such notices can only be issued in terms of a breach of the HSEA itself. Accordingly, unless the issue is a matter of safety, is covered by a code issued under the HSEA, or is covered by one of the specific obligations set out in regulations 12 or 20, the Inspector’s ability to impose obligations on an explorer may be limited.

Maritime Transport Act 1994

The requirements for the abandonment of offshore operations is, to a large extent, a significant unknown in New Zealand.

Common overseas scenarios for the abandonment of offshore operations include:

- the removal of the superstructure and of the platform supports to a “safe” level below the sea surface; and
- the potential sinking of significant parts of the platform in deep water.

The extent to which the work in decommissioning and abandoning an offshore platform can be minimised will have a significant impact on the costs involved with the abandonment. The scenarios above reflect this focus on cost minimisation. However, in New Zealand it is by no means certain that these scenarios exist.

We have already seen that the RMA and the HSE Petroleum Regulations may impact on the abandonment of offshore operations. In addition, the requirements of the Maritime Transport Act 1994 (MTA) must be considered.

¹⁸ Refer section 247 of the MTA.

¹⁹ Refer section 249 of the MTA.

²⁰ This policy is also generally implemented by local authorities in relation to the coastal marine area.

The MTA and its provisions relating to the discharge of harmful substances into the sea are well recognised in terms of the operational aspect of an offshore platform. Such provisions may also be extremely relevant to any abandonment, as the very process of decommissioning and dismantling an offshore platform involves risk of discharge of hazardous substances.

In relation to abandonment of offshore structures, the MTA is also relevant in two other respects - the powers vested in the Director of Maritime Safety in relation to “hazardous structures” and in relation to the sinking of structures at sea.

Hazardous structures

A “Hazardous structure” is an offshore installation or pipeline that is discharging, or is likely to discharge, a harmful substance into New Zealand continental waters or the seabed below them¹⁸. If the Director considers a structure to be hazardous, the Director’s powers include¹⁹ requiring:

- the removal of the structure; or
- the sinking or destruction of the structure.

The Director’s powers are however constrained under section 250 in that the Director may only exercise such powers if it “*appears necessary to the Director to avoid, reduce, or remedy pollution, or a significant risk of pollution, by a harmful substance that is causing, will cause, or will be likely to cause serious harmful consequences to the marine environment or marine interests.*”

The sinking of structures

The Director has jurisdiction over the sinking of structures at sea, (including both the exclusive economic zone and the continental shelf beyond such zone). Under section 261(5) of the MTA the dumping of offshore installations is prohibited unless the Director has issued a permit for such dumping. The issue of such a permit is subject to the relevant Marine Protection Rule (Marine Protection Rule 180) which incorporates the New Zealand Guidelines for Sea Disposal of Waste²⁰. The key policies of this document include the policy that disposal of waste at sea is generally to be avoided unless there is no reasonable and practicable alternative disposal method on land which would have less effects on the environment.

The need for consultation

As with the RMA, while there is no formal consultation obligation in the MTA, where abandonment concerns offshore operations it will be critical to consult with the Director of Maritime Safety to determine his or her views on abandonment plans, including the sufficiency of those plans

from a maritime safety perspective and the likelihood of obtaining consents if the plan involves the sinking of any part of the structure.

Submarine Cables and Pipelines Protection Act 1996

The Submarine Cables and Pipelines Protection Act 1996 (“SCPPA”) will also be relevant for the abandonment of offshore operations.

A submarine pipeline is “*a pipeline that lies beneath the high seas or the territorial sea of New Zealand or the internal waters of New Zealand*”, and this definition essentially covers all pipelines laid under any part of New Zealand’s sea.

Under the SCPPA there is no automatic presumption that a submarine pipeline must be removed once it is no longer used – the presumption under the SCPPA is that the pipeline may remain in place.

However there is provision under section 10 of the SCPPA for the District Court to order, following application by the Minister of Transport, the removal of all or part of a submarine pipeline (at the expense of the owner) where the Court considers that the pipeline:

- is unlikely to be used again; and
- constitutes a hazard to fishing operations or the anchoring of ships.

In addition, section 9 of the SCPPA requires the owner of a submarine pipeline to notify the Minister of Transport immediately after the use of the submarine pipeline has ceased.

Conclusions on the legislative framework

As can be seen from the above, an explorer faces considerable difficulties determining what the extent of its abandonment obligations will be. The specific requirements are not set out legislatively and, depending upon the location of the asset or infrastructure, consultation with a number of different authorities will be required to establish the likely extent of such obligations and to maximise the likelihood that the requirements of the different authorities will, at least, be consistent.

The contractual framework – requirements under an Access Agreement

Added to the potential requirements under legislation are any requirements that may be imposed contractually, including any Access Agreement.

To the extent that the relevant explorer does not own the land on which petroleum operations are sited, an Access Agreement will be required with the relevant landowners. This Access Agreement can then become a critical document

in terms of specifying the obligations of the explorer on abandonment, and in respect of ongoing liability.

With the exception of activities that cause little impact on the land (and little inconvenience to the landowner) the likelihood of securing an Access Agreement that does not contain clear remediation provisions must (in today’s climate) be considered slim. Landowners (and their solicitors) are much more cognisant of the landowner’s rights, and the risks to the landowner, relating to petroleum operations conducted on their land.

It is not clear however how much thought landowners have given to the issue of long term liability. While remediation obligations on termination may be specified, and landowners will be much more cautious about providing explorers with any release of liability, it is not clear that Access Agreements are clearly providing for the potential of residual issues that may arise after the explorer has ceased operations. The writer queries whether this issue is likely to be recognised in Access Agreements in the near future.

The prospect of ongoing liability

At the end of the day, assuming an explorer has complied with all of the regulatory and contractual requirements relating to the wind-up of operations, what legal comfort does the explorer have that it cannot be successfully pursued at a future date for any issue subsequently arising from the abandoned operations? From a strict legal perspective, the answer unfortunately is “very little”. As noted earlier, there are however a number of practical measures that can be followed during the life of an operation, and throughout the abandonment phase, to reduce such risks.

As noted earlier in this paper, the surrender of a permit does not provide an explorer with a release from liability for its actions (or omissions) during the life of the permit. In addition, much of the relevant legislation (e.g. the RMA and the MTA) does not recognise the abandonment of operations as providing any legal barrier to the pursuit of the explorer in the event that an environmental issue arises subsequent to abandonment. Accordingly, to the extent that any issue arises subsequent to the abandonment of the operations, the explorer may well retain liability.

So how does an explorer limit its ongoing liability?

Given the continuing risks, what options are available to an explorer to limit the extent of its liability?

Rigorous abandonment procedures

The most obvious safeguard is to be rigorous in the abandonment procedures and remediation operations. Formulation of and adherence to a comprehensive risk management and compliance programme during the life of the operation is likely to contribute significantly to a smoother transition into the abandonment phase and reduce

potential liability risks. As soon as abandonment becomes a likelihood, explorers would be well advised to begin planning an abandonment programme in advance.

Ensure “buy-in” of relevant authorities

While the approval by any of the relevant authorities of any abandonment plans may not legally prevent that authority from pursuing an explorer at a later date, full consultation with, and involvement of, the relevant authorities may provide a significant practical level of comfort. In addition, the fact that an explorer has consulted and obtained approval from the relevant authorities may provide significant assistance in rebutting any third party RMA enforcement action against an explorer or a civil claim based on negligence.

Contractual limitation of liability

Where the explorer is party to a contract with any other person who may seek to pursue the explorer at a later stage, it is theoretically possible to impose limits on that liability in the contract. The obvious example is an Access Agreement. As the person most directly affected by any issue arising on or subsequent to abandonment, a landowner is one of the parties most likely to pursue an explorer, and any contractual limitation of the landowner’s rights to pursue the explorer would provide significant comfort.

With this in mind, the explorer can seek to limit its liability through a carefully constructed Access Agreement. However, with issues such as the Blenheim Wells making considerable news, the likelihood of incorporating a significant release must have diminished.

Insurance

Joint Venture Operating Agreements often require operators to effect considerable insurance in respect of operations, including in respect of well control and environmental issues. The problem with such provisions is that they are (not surprisingly) generally focused on insurance cover during the period that operations take place. This will provide little protection against insurance issues that arise subsequent to abandonment.

It is of course possible to obtain insurance that will continue even after abandonment (such as “plugged and abandoned”

well cover). Explorers would need to compare the costs of such insurance against the risk of issues arising subsequent to abandonment. In this regard, large explorers who have global insurance policies covering all of their operations may have an advantage (in that they retain insurance post abandonment due to involvement in other fields, at a minimal incremental cost).

Provision for the costs associated with abandonment and residual issues

While JVOAs often provide for an abandonment fund to be established during the production life of a field, this is focussed on covering the costs of the abandonment itself, and not on the costs associated with any residual liability.

If explorers are concerned about the potential for residual liability after abandonment, they may wish to consider including provision in the JVOA itself to ensure that, in the event of any such liability arising, they have comfort that their fellow joint venturers will also be in a position to contribute their share of that liability.

Conclusions

The legal requirements involved in the decommissioning and abandonment of assets, and the remediation of sites, are not clear-cut in New Zealand.

The fragmented legislative framework, lack of a co-ordinated national policy, and the fact that there have not been any significant precedents to learn from, leaves explorers in a difficult situation when trying to assess the likely extent of their obligations.

The one matter that is clear-cut is that explorers retain residual liability after abandonment, regardless of compliance with any regulatory or contractual requirements at the time of abandonment.

With the likelihood of a major abandonment getting closer all the time, explorers and policy makers may need to start turning their mind to this issue to ensure that they can put plans in place to better define the extent of their detailed obligations, and to allow them to take steps to minimise their potential liability.

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