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Resources Policy Group  
Ministry of Economic Development  
PO Box 1473  
WELLINGTON 6140

via e-mail: [CMAReview@med.govt.nz](mailto:CMAReview@med.govt.nz)

## **Review of the Crown Minerals Act 1991 Regime**

BusinessNZ is pleased to have the opportunity to provide a submission to the Ministry of Economic Development on its discussion document entitled 'Review of the Crown Minerals Act 1991 Regime – Discussion paper', dated March 2012.<sup>1</sup>

### **Introduction**

BusinessNZ welcomes the review of the Crown Minerals Act 1991. This is the first substantive review since its enactment and is long overdue. The discussion paper contains many good ideas that could, if worked through in detail with business, deliver real gains to the New Zealand economy. Unfortunately, the review also reflects a series of missed opportunities. The much awaited commencement of a national conversation about the overall costs and benefits to the New Zealand economy of utilising the Crown's resources is notable by its absence. Similarly, the review presented an opportunity to clarify for stakeholders how the Crown approaches regulating for efficient extraction versus that of its more general interest in regulating market behaviour.

Issues such as these may have been considered outside of a more narrowly scoped review of the Act, but are, in fact foundational to it and needed to have been factored into the review. Opacity about these and other issues (such as the absence of a draft legislative purpose statement) have, in places, resulted in the risk of the review losing its sense of 'shape' and some of its proposals, their focus. As a result, the outcome of the review risks being a disjointed set of timid, incremental changes that instead of growing exploration activity, may

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<sup>1</sup> Background information on BusinessNZ is attached in Appendix One.

simply serve to complicate the activity of exploration in new and different ways.

Given these high level concerns, rather than get into the specifics (concerning which there is much positive progress, and on which entities such as PEPANZ and Straterra and their stakeholders are better placed to comment), BusinessNZ has instead sought to outline its approach and outline its implications for the desired direction of any changes that may emerge from the review.

## **Developing a Social Consensus on Exploration Activity**

In the foreword to the discussion paper, the Minister of Energy and Resources says:

“Our oil, gas, and mineral resources are an important source of revenue for the country. Oil alone is New Zealand’s fourth largest commodity export and the government earns over 40 percent of the profit from developing new oil and gas resources. Money earned from royalties and company taxes go towards paying for frontline public services, hospitals, schools, and infrastructure like broadband, rail and roads.

Petroleum and minerals also provide employment, investment and regional development opportunities and they are important inputs across the economy – for example in the dairy and meat processing sectors, and for electricity generation and construction.”

These statements are demonstrative of the need for the community to understand the wider natural resources ‘story’. However, despite being foreshadowed in the foreword, this story is not taken any further in the discussion paper. This is surprising in light of the desire to grow the petroleum and minerals sectors. Indeed, the recent report from the Green Growth Advisory Group noted that:

“There are two key challenges for the nature and extent of future growth of the extractive sectors. The first is how we arrive at decisions over which resources are available for extraction and under what circumstances. Having the necessary discourse will assist in well informed decision-making and greater consensus, but these processes represent a major challenge for New Zealand given the depth of current divisions. The inherent complexity of extractive industries adds to the challenge. The Government has a leadership role in building consensus over the role of these sectors in New Zealand’s economic future. A critical part of this role is for the Government seeing that the national discourse on these issues is as well informed as possible. We believe it will be essential for the Government to demonstrate with a high degree of rigour the nature and extent of public benefits, and of risks and costs.”<sup>2</sup>

and

“Further growth of these sectors will be difficult without the country engaging in discourse with the intention of reaching greater consensus on: what resources are available for extraction and under what circumstances; how the impact of

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<sup>2</sup> ‘Greening New Zealand’s Growth’, Report of the Green Growth Advisory Group, December 2011, page 61, paragraph 5.63.

these activities should be managed and mitigated; and how issues of inter-generational equity should be addressed.”<sup>3</sup>

BusinessNZ agrees with these views. BusinessNZ believes that the New Zealand conversation needs to be better informed on critical aspects of how extractive industries operate today, and on how they might develop and grow in future. By its very nature, this needs to be a uniquely New Zealand conversation, suitable to New Zealand’s distinctly social, cultural and economic circumstances and not one naïvely adopted from other jurisdictions, though lessons are available from Australia, Canada and Scandinavia.

As also noted in the discussion paper’s foreword, progress in this regard is underway across a number of workstreams, including the Resource Management Act, and the exclusive economic zone. However, substantive progress in successfully unlocking minerals and petroleum to a greater extent is unlikely to be made without a well-informed national conversation over which resources are available for extraction and under what circumstances.

As a result, BusinessNZ had an expectation the review of the Crown Minerals Act regime would play a role in advancing this dialogue. While BusinessNZ didn’t see the review as the sole vehicle for this dialogue it seemed to be a useful and logical ‘pinch-point’ before the following, more detailed, conversation about the ‘how’. In other words, we believe it is essential for the Government to demonstrate with a high degree of rigour the nature and extent of the public benefits, the risks and costs, and who will face them. This would appear to be an important precursor to the more detailed, operational aspects of how the Crown should exercise its legitimate interest in the utilisation of its mineral and petroleum resources, and the extent to which there are gaps between that interest and the current regime.

### **It’s Getting the Objective Right that Counts**

Experience suggests that the greater the extent of clarity that can be brought to bear concerning a review’s objective, the more likely it is that clear options will emerge that are capable of delivering on it. In this regard, BusinessNZ notes the three review objectives set out on page 9 of the discussion document (followed, in turn, by six principles and four propositions [of which propositions one, two and three appear variants of the same theme]). While the analytical framework presented is of a fairly orthodox characterisation, BusinessNZ has some reservations as to its detail. These reservations are pertinent to the eventual choice of the best set of solutions, and are:

1. the high potential for confused outcomes from the presence of multiple and potentially conflicting objectives. If indeed the real or primary objective of the review is to increase the development of Crown-owned minerals, then the following two statements listed as objectives (to streamline and simplify, and to ensure better co-ordination) are better characterised as strategies designed to deliver on the primary

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<sup>3</sup> Report of the Green Growth Advisory Group, *op cit*, page 58, paragraph 5.52.

objective. In other words, these strategies and the solutions that arise from them need to be measured against their contribution to the primate objective – that of greater development – rather than being seen as objectives in their own right;

2. the absence of a draft purpose statement. BusinessNZ is surprised that consideration of a purpose statement is relegated to pages 77 and 78 of the discussion paper and that a draft one is not proposed for consultation. This should be fundamental to the overall shape and direction of the review, and flow from consideration of its objective. Consistent with the view stated immediately above regarding the need to avoid the confusion of multiple and potentially conflicting objectives, BusinessNZ's view is that a purpose statement should be brief and to the point. Pertinent examples are those of the Commerce Act, 1986:

“The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.”

or, more recently, the objective statement of the Electricity Authority established under the Electricity Industry Act, 2010:

“The objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.”

BusinessNZ proposes the following draft statement:

“The purpose of this Act is the efficient extraction of Crown owned minerals such that the Crown receives a fair return.”

BusinessNZ considers that this draft statement recognises the Crown's legitimate interest in the extraction of the minerals it owns and its right in gaining a fair financial return from its extraction. The efficiency criteria also speaks to its extraction at least cost, its allocation to the highest value use (or the user who places the highest value on its use) and to the dynamic benefits from investment in its extraction. Other objectives, such as environmental and social, while important, should be dealt with via other more appropriate mechanisms (such as via the Resource Management Act or the Health and Safety in Employment Act), rather than blurring the purpose of the Crown Minerals Act. This approach is consistent with the changes made by the National-led Government in 2009 to amend the objective statement for the Electricity Commission in the then Electricity Act, 1992 from the following:

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- (1) The principal objectives of the Commission in relation to electricity are—
  - (a) to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable, and environmentally sustainable manner; and
  - (b) to promote and facilitate the efficient use of electricity.

.....to the statement set out above. BusinessNZ considers that a clear purpose statement, as proposed above, is critical for the efficient operation of New Zealand Petroleum and Minerals (and indeed, for its physical location – for more on this point see below);

3. the inclusion of 'competitiveness' as a principle, and the way that it is defined (as a specific means of allocation). This is at odds with the more orthodox use of principles as generic 'touch-stones' or general characteristics against which a range of options can be assessed (where this assessment, is in turn, subordinate to an assessment of the options against the over-arching objective). Competition is a means to an end, not an end in itself and it is presumptuous, without analysis, to assume that it is most likely to result in the effective and efficient exploration and development of the resource. It may not and its use as a principle implies a pre-determined outcome. Instead, a purpose statement (as proposed) that requires the Crown to exercise all of its powers and functions towards the efficient extraction of its resources would be likely to capture the benefits of competition (to the extent that competition yields the most efficient outcome) and the efficient entry and exit from the sector. More specifically in terms of the principles, in order to capture an international flavour, BusinessNZ would prefer that a principle more generally associated with the competitiveness of the New Zealand minerals regime with overseas comparators is more appropriate than the one proposed;
4. the absence of a principle about property rights. In an industry which is fundamentally based on the allocation (by whichever means) of property rights, this is a significant oversight. As is often remarked, uncertainty is the enemy of investment. While we appreciate that the Crown rightly wishes to see its assets monetised in a reasonable timeframe, to minimise risk – real or perceived – the rules of engagement must be clear, consistent and enduring;
5. further to the specific points above about the objectives and the competitiveness principle, it is unclear how the Ministry of Economic Development proposes to apply them in a practical sense. For example, does it intend to apply some form of weighting or some other method of ranking? As a final general point, statements of objectives and principles are only interesting to the extent that the proposals are linked back to them. The presumption made in the discussion paper is that the Ministry of Economic Development's proposals are the best at meeting its stated objectives and principles. It would have been informative (and a good regulatory discipline) to have seen the Ministry of Economic Development's assessment of this.

## Blurring the Boundaries

It is undisputed (at least by BusinessNZ), that as owner of the resources in question, the Crown has a legitimate interest in the efficiency with which the resources are extracted. This particularly speaks to two points being:

1. the desire of the Crown to influence the speed of their extraction (it can be generally assumed that the Crown wishes to see the resources extracted in a way that best balances its needs with the needs of the miner); and
2. the Crown's ability to convert the resource into cash via the royalty regime, and therefore apply it to other, higher priority uses.

This legitimate interest provides a rationale for the Crown to place technical and financial requirements on permit applicants and now appears to underpin a desire to further extend the Crown's reach into applicants' operational business practices with respect to their health and safety, and environmental suitability. This is over and above the standard requirements of the Health and Safety in Employment Act, 1992, and the Resource Management Act, 1991.

While these aspects are unequivocally important to both the sector and the wider community, BusinessNZ would have thought that a review as substantive as that of the Crown Minerals Act regime would have provided the opportunity for officials to at least question whether it is:

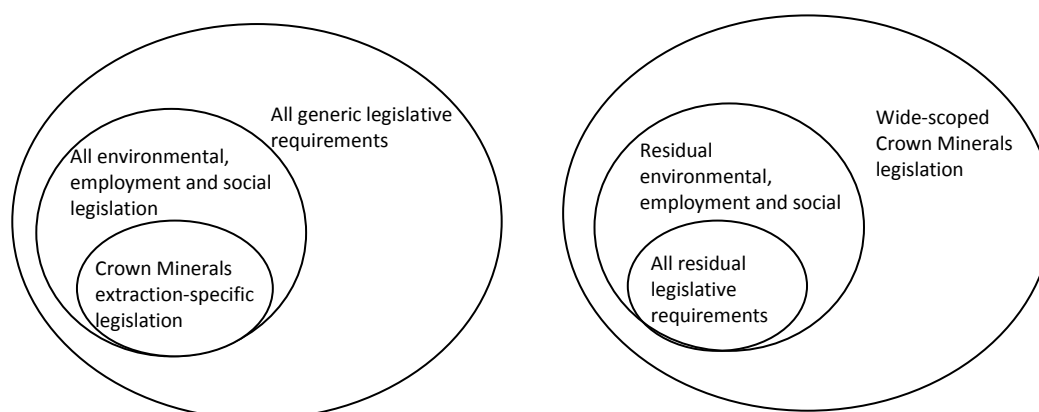
1. in the Crown's interest to get involved in the operational detail of the applicants *at all*, and if so to what extent (that is, is *stretching* its involvement in its interests); and
2. necessary to do this (that is, get involved in operational detail) to ensure that it gets its fair financial return.

However, the status quo is simply assumed and the extension deemed to be appropriate. Having listed the additional measures that have recently been, or are being, progressed (page 20, paragraph 28), the discussion paper fails to ask the question of whether the current intrusion into applicant's operational practices is required to protect the Crown's legitimate interests, or whether *any* additional regulation in the areas of health and safety and environmental matters is required. These are important and legitimate questions particularly in light of the already burgeoning roles and responsibilities of New Zealand Petroleum and Minerals ('NZPAM') and the evidence inter-agency co-ordination difficulties.

Other than noting that pre-qualification of health and safety and environmental matters is done in other jurisdictions, the case to potentially add into the Crown Minerals Act regime a further layer of complexity (as distinct from the health and safety and environmental regimes that apply to other high risk industries) is simply not made. It is extremely unclear that these concerns

cannot be (or indeed have not already been) addressed under their generic legislative regimes.

BusinessNZ acknowledges that in order to fully contribute to the future economic prosperity of New Zealand, it is important that companies operating in the sector do so under a regime that is environmentally responsible, and contributes to the Government's economic growth aspirations. However, it appears that the review is blurring the boundaries between the need for regulation in the interests of the Crown's efficient extraction with that of the Crown's more general interest with the regulation of markets, *per se*. In doing so, it effectively reverses (intentionally or not) a trend since the 1980s of avoiding bespoke industry legislation to the maximum extent possible. The differences in approaches can be broadly characterised as follows:



BusinessNZ's preference is to avoid the risk of the development of a bespoke regime that will almost inevitably become either difficult and costly to enforce, or confusing.

If despite this feedback, the Ministry of Economic Development is determined to pursue a health and safety, and environmental pre-qualification system, then BusinessNZ recommends that it:

1. apply it once, at the outset of the permitting process (Option 1) as a supplement to later resource management regime requirements;
2. be a high-level statement of fitness-for purpose;
3. based on Director certification, that is, a self-audit system, similar to that used in the tax and emissions trading scheme compliance regimes, as these tend to be least cost and based on the company's own assessment of the risks of non-compliance. They place the onus on the business to attest to the presence of the requirements and not on officials to prove that the requirements have not been met; and
4. developed in close consultation with the sector participants.

As an aside, having apparently not hesitated to propose the extension of the Crown's regulatory reach into health and safety, and environmental matters

based upon the Crown's interest in the extraction of its resources, BusinessNZ is puzzled as to the basis of how the Ministry of Economic Development cast its net. For example, it can be argued that land access, the Resource Management Act and foreign direct investment are also extremely important to the effective operation of the Crown Minerals regime (and therefore, to the Crown's legitimate interest in the extraction of its resource), yet there is no consideration of these matters at all in the discussion paper. The adoption rate of new technology and skills and development are yet others.<sup>4</sup>

## **The Tiered System**

BusinessNZ strongly welcomes the Ministry of Economic Development's desire to match the extent of the Crown-owned mineral regime to that of the nature of the activity being undertaken. A tiered system is an extremely positive step forward. However, BusinessNZ is not convinced that the tiered system, as outlined, is the best approach. BusinessNZ has the following suggestions:

1. the basis on which resources are allocated into Tier 1 or Tier 2 are unclear and need improving. Table 1 on page 11 essentially allocates the resources according to resource type. Propositions 1 and 2 refer to a focus on technical and geological complexity and size of royalties. Other references are made to high, or low risk (presumably based on health and safety, and environmental factors). Each of these could result in a different categorisation. On the face of it, the size of royalty does not appear to be a good criterion for distinguishing between Tier 1 and Tier 2, instead scale, location, geology and environmental impact do (noting that this could allow for a distinction to be made between onshore, shallow water offshore, and deep water offshore instances of the same activity);
2. while the sector would undoubtedly welcome certainty as to which tier its mining activity would fall under, this needs to be balanced with the benefits (if any) from a flexible system that presumes (irrespective of activity) that the activity is Tier 2, unless certain criteria or thresholds are reached. Such an approach is consistent with the principle of flexibility, and the idea that in light of the Crown's ownership interest, there should be a minimum management level for all activities even if this minimum level differs according to the type of resource. In other words, subject to administrative costs, the system should be flexible enough to accommodate activities migrating from Tier 2 to Tier 1, or the reverse; and
3. the Ministry of Economic Development needs to be careful not to create additional, sub-tiers, by default. The proposal to target the

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<sup>4</sup> BusinessNZ is not advocating for these latter issues to be included in the reach of the review, rather simply highlighting the range of issues that potentially could have legitimately been canvassed as a part of the review but for reasons that are unclear, have not.



health and safety, and environmental assessments within Tier 1 would if implemented, create a sub-tier, adding further complexity.

BusinessNZ considers that while a good start, further thought needs to be given to how a tiered system would work in practice, and that this should be done in close consultation with the sector.

## **Other Issues**

In addition to the substantive issues above, there are a number of other outstanding issues which also, in BusinessNZ's view, warrant attention as a part of the review. These are:

1. providing a 'seamless' interface between government agencies and the sector. While proposals to achieve better co-ordination between regulatory agencies and the sector are welcome, the bureaucracy is vast and boundaries will inevitably exist – it is neither possible, nor feasible to address these by internalising functions into a single agency. However, it is the duty of government, in acting in a whole of government manner, to ensure that the transaction costs faced by business when dealing with the various branches of the bureaucracy are minimised, and that the government's approach across the various boundaries on any given topic (in this case mining) is consistent and 'joined-up'. The review of the royalty regime and the Inland Revenue tax review for specified minerals is a case in point;
2. resource consenting. Natural resources is listed as one of the Government's six key areas in the business growth agenda. In light of this focus, BusinessNZ proposes that Ministry of Economic Development give consideration to the application of Part 6AA of the Resource Management Act (Proposals of National Significance) to the activity of mining. Doing so would be consistent with the Government's approach to infrastructure in its first term;
3. the location of New Zealand Petroleum & Minerals (NZPAM). The proposition that the review be focused on the achievement of a single, clear objective has implications for NZPAM and the agency to which it is best associated. Consistent with the views outlined above, BusinessNZ does not consider the co-location of NZPAM and the health and safety function under a single agency to be necessary to the efficient extraction of the Crown's resources. In fact, a strong case can be made that its separation is vital – to retain its focus on a single objective –of increasing the level of investment in mining. To this end, BusinessNZ proposes that consideration be given to the re-location of NZPAM to the new Ministry for Primary Industries;
4. incentivising a lift in the performance of NZPAM. Consistent with the theme of uncertainty being unhelpful to investment, BusinessNZ considers that further effort be focused on improving NZPAMs core administrative processes associated with work programmes and

timetable extensions. Pre-qualification requirements would add more roles and functions to an organisation that is already stretched in carrying out its current functions. BusinessNZ proposes that a system similar to that recently introduced for local authorities processing of resource consents be introduced, whereby mandatory time limits and financial penalties be introduced;

5. the absence from the discussion document of cost-benefit information. While BusinessNZ appreciates that a full cost-benefit analysis will be undertaken once a decision has been taken to proceed with the proposal, greater effort to provide a quantitative assessment of the costs and benefits of the proposals would have helped submitters form their view. At a minimum, BusinessNZ expected an estimate of the net economic benefit to be provided. The Government has recently agreed to proceed with a Regulatory Responsibility Bill. The likely purpose of such a Bill will be to establish a set of principles of responsible regulation, or good law-making. It might also be expected to provide for any incompatibility with the principles to be justified. BusinessNZ acknowledges that this is early-days in the regulatory process but nonetheless BusinessNZ considers the dearth of cost-benefit information would likely fall foul of the requirements of any future Regulatory Responsibility Bill. The rigors of the Bill provide a good discipline from the very outset of a regulatory proposal.

## **Summary**

New Zealand's petroleum and mineral endowment is almost certainly the nation's single most valuable tangible asset. The Crown, as owner, rightfully needs to take a strategic and growth focused approach to managing that asset. The key test is, however, how this is implemented.

Critical to this is the need for the Government to carefully explain how its initiatives in the minerals and petroleum sector fit more generally within the Government's broader strategic approach to New Zealand's productive capacity and the greening of the economy. More can be done in this regard.

Initiatives that demonstrate a better understanding and management of risks rather than a system based purely on whether the Crown owns the resources, is also welcome. The targeted application of the regulatory regime is strongly supported but without greater clarity in defining the purpose of the review the elements of it risk becoming nothing more than an assorted mix of regulatory proposals that serve to simply regulate the sector differently, rather than in a more effective and efficient manner. The review has missed an opportunity to look more closely at what the Crown's legitimate interest in the extraction of its resources actually means and BusinessNZ's submission seeks to shed some light on this issue.

Fundamentally, Government and business need to work co-operatively together to unlock New Zealand's productive capacity in a way that carefully balances the various commercial interests (including those of the tourism

industry) with the environmental interests in a way that delivers an overall increase in economic activity. Only by doing this will the review deliver a set of long-term, durable changes that delivers an overall increase in activity.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John A Carnegie', with a stylized, flowing script.

John A Carnegie  
Manager, Energy, Environment and Infrastructure  
BusinessNZ

## **APPENDIX ONE: ABOUT BUSINESSNZ**

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' Chamber of Commerce Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), BusinessNZ is New Zealand's largest business advocacy body. Together with its 80 strong Major Companies Group, and the 70-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.