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Mr Jonathan Young
Chairperson
Commerce Select Committee
c/o Parliament Buildings
WELLINGTON

Dear Mr Young

Submission on the Crown Minerals (Permitting and Crown Land) Bill – Supplementary Order Paper No 152

BusinessNZ welcomes the opportunity to provide a submission to the Commerce Select Committee on the Crown Minerals (Permitting and Crown Land) Bill Supplementary order Paper No 152 (the 'SoP').[1]

Introduction

A robust and rigorous health and safety regime is vital to the smooth operation of the minerals and petroleum sector (the 'sector') and we acknowledge that the current regime is not, in light of the lessons from Pike River, sufficiently fit-for-purpose. Any harm to employees in the course of work is unacceptable.

Therefore BusinessNZ agrees with the purpose and intent of the SoP. Lifting the prominence of the health and safety requirements especially in light of the Pike River tragedy and the report of the Royal Commission is an understandable and laudable objective.

However, it is not clear that either the changes proposed in the Bill, or now in the SoP, are the best long-term solution for the Crown, the sector, or its employees. BusinessNZ wonders whether the progressive (and now extensive) proposed blurring of the boundary between the Crown Minerals regime (targeted at the efficient extraction of Crown-owned resources) and the health and safety regime (targeted at the prevention of harm to *all* persons at work) is appropriate. Instead, it is likely to contribute to the creation of a confusing and over-lapping patchwork of regulatory requirements that will ultimately prove counterproductive to the objectives of the reforms and the attainment of improved health and safety outcomes.

Other, better avenues to achieve improved health and safety outcomes are available and should be vigorously pursued. This will enhance the possibility of achieving clear, well-focused law while minimising the risk of double-jeopardy and ultimately, avoiding bad law.

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[1] Background information on BusinessNZ is attached to this letter as Appendix One.

Comments

While these introductory remarks are pertinent to the entire SoP, the focus of this submission is specifically on the proposed amendments to clause 21 of the amending Bill (these being clauses 33(1)(aa), 33AA (1) – (3), and 33AB(1)).

BusinessNZ considers that the practical effects of these further amendments to the Bill is to heighten the risk profile of the industry by increasing the degree of uncertainty arising from the failure to apply a single, clear set of health and safety rules, and placing the tenure of permits at risk. They will also create, in effect if not in name, a new health and safety permitting regime giving rise to further duplication with its attendant risks. The following sections canvass these and other issues in greater detail.

<u>One Law to Rule them All</u>

Section 33 of the amending Bill, including the proposed amendment from the SoP (33(1)(aa) in *italics* below), would read as follows:

> "**33 Permit holder responsibilities**
>
> "(1) A permit holder must—
>
> "(a) comply with the conditions of the permit, this Act, and the regulations; and
> *"(aa) comply with the Health and Safety in Employment Act 1992 and regulations made under that Act; and*
> "(b) perform activities under the permit in accordance with good industry practice; and
> "(c)……."

The effect of this amendment is to make compliance with the Health and Safety in Employment Act 1992 and regulations made under that Act a requirement under the Crown Minerals Act. BusinessNZ notes that the SoP also proposes amending the definition of good industry practice to now *include* health and safety matters, thereby also making it a matter about which the Minister must be satisfied before granting a permit and in addition broadening the scope and meaning of 33(1)(b).

The sector has no difficulty with stronger health and safety rules, and at worst, these amendments seem unnecessarily internally duplicative. However, the new 33(1)(aa) now needs to be read in conjunction with new clause 39 from the Bill, which states:

> **"39 Revocation or transfer of permit**
>
> "(1) The Minister may revoke a permit or transfer a permit to the Minister (in replacement for the permit holder)—
>
> "(a) if the Minister is satisfied that a permit holder has contravened a condition of the permit or a condition imposed by this Act or the regulations; or
> "(b) ……."

As this is now a condition imposed by the Crown Minerals Act, the potential effect of a failure to comply with the Health and Safety in Employment Act 1992 is not only that the activity is prevented from continuing but that the permit holder may be stripped of the permit (the permit essentially being the right to carry out the activity). Such a step could represent a massive financial penalty and would be terminal for all but the largest, diversified companies.

Only zero harm to employees during the course of work is an acceptable target and renewed effort is needed to assist the sector in reaching it. However, stronger health and safety rules must be accompanied by clarity. There are two dimensions to this:

1. the requirements of the rules themselves must be easily understood; and

2. the law should be able to be found in one place and applied once.

In this case, there is no explanation of what circumstances might be considered a sufficient enough breach to warrant a permit being revoked. It may be policy-makers intention to exercise this power with due caution. However, this simply leaves permit holders to at the goodwill of policy-makers of the day.

As drafted, new section 39 provides for some flexibility when considering permit revocation (the Minister "*may*"), but as noted in our submission on the Bill, we said:

> "New section 39 now has no allowance or ability to recognise minor breaches or substantial compliance, giving rise to the risk of permits being taken off otherwise good operators with implications for applications for subsequent permits. These provisions may be intended to firm up on the Crown's ability to exercise its legitimate rights with respect to its resources, but do so at the expense of creating investment uncertainty and by definition, the creation of 'softer' property rights than are currently the case;"[2]

BusinessNZ continues to advocate for the inclusion of such conditionality into section 39 regardless of whether the changes set out in the SoP are ultimately incorporated.

However, this risks associated with the rules not being easily understood are moderate in comparison to the legislative and compliance risks associated with the same issue (in this case health and safety) being covered in multiple pieces of legislation. Section 9 of the Crown Minerals Act previously addressed this risk by stating:

> **"9 Other legal requirements not affected**
>
> Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law."

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[2] BusinessNZ submission to the Commerce Select Committee entitled 'Submission on the Crown Minerals (Permitting and Crown Land) Bill', dated 2 November 2012.

In doing so, policy-makers made clear that, for example, that the sector had other legal obligations with which it had to comply. This approach is the orthodox means of addressing the risk of duplication, and the legislative pitfalls associated with it.

As could be expected, the Health and Safety in Employment Act, 1992 contains substantial compliance remedies with non-compliance subject to enforcement action and penalties. As was recently seen with the temporary closure of Solid Energy's Spring Creek Mine, such powers include the ability for an inspector to shut down an activity with a prohibition notice. This is a severe sanction.

Not only is the risk on having a permit revoked an unusually severe and heavy-handed response to a highly uncertain, unspecified risk of non-compliance, but the inclusion of such rules in the Crown Minerals Act effectively undermines the primacy of the Health and Safety in Employment Act 1992 as the source of health and safety rules that cover all workers.

In addition, sector participants will now face the risk of double-jeopardy – that is, being sanctioned twice under different pieces of legislation, for the same infringement. This will add costs to the sector as it seeks to minimise this risk.

Such risks as outlined above created by the uncertainty derived from such changes to the industry's regulatory regime are not fatal, but instead are cumulative and will contribute to an overall heightened perception of the riskiness (relative to other jurisdictions) of operating in New Zealand. This is not only likely to have an unnecessarily chilling effect on investment and run counter to the purpose of the review, but due to the inevitable confusion is unlikely to have the desired health and safety outcomes.

This is not to say the sector does not welcome improvements in its health and safety regulatory regime rather that embedding such requirements into an act not hitherto used to enforce improvements in health and safety practices is not the preferred path. Instead, BusinessNZ considers that where improvements are required, these should be undertaken in the overall context of the health and safety regulatory regime.

Examples of other avenues in which to pursue such opportunities to improve the health and safety regime already exist, such as the:

1. Health and Safety Review Taskforce (due to report back to the Minister of Labour 30 April, 2013);
2. review of the Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations;
3. development of a Code of Practice for Health and Safety Representatives in the upstream petroleum sector; and
4. the work of the Pike River Implementation Team.

The changes contained in the SoP appear to cut across these avenues, pre-empting their outcomes.

In light of this, BusinessNZ does not support the inclusion of clause 33(1)(aa) into the amending Bill.

The Introduction of a New Permit?

The SoP proposes to insert after new section 33 the following clauses:

> **"33AA Exercise of Tier 1 or petroleum exploration permit conditional on clearance from Health and Safety Regulator**
>
> "(1) This section applies in relation to—
>
> "(a) Tier 1 mining permits; and
> "(b) petroleum exploration permits.
>
> "(2) If any requirements of the Health and Safety in Employment Act 1992 or regulations made under that Act must be met before an activity can be commenced under a permit to which this section applies, the activity must not be commenced until—
>
> "(a) the Health and Safety Regulator is satisfied that the requirements of that Act and those regulations that must be met before that activity can commence have been met; and
> "(b) the Health and Safety Regulator has advised the chief executive that it is so satisfied; and
> "(c) the chief executive has notified the permit holder of the regulator's advice.
>
> "(3) This section applies to activities commenced or recommenced under a permit after the commencement of this section.

This is in addition to the requirement, set out in new section 29A, whereby:

> "**29A Process for considering application**
>
> "(1) ……..
> "(2) Before granting a permit, the Minister must be satisfied that—
> "(a) the proposed work programme provided by the applicant is consistent with—
> "(i) the purpose of this Act; and
> "(ii) the purpose of the proposed permit; and
> "(iii) *good industry practice* in respect of the proposed activities; and
> "(3)….."
>
> (emphasis added)

As noted above the definition of good industry practice now includes health and safety matters. This would appear to make section 33AA(2) unnecessary and subject to some of the same pitfalls as outlined above.

While it is unclear as to whether it is intentional, the practical effect of section 33AA(2) also appears to introduce a new permit requirement – for health and safety matters. This is additional to the existing permitting processes for land access, heritage matters and resource consents.

However, it is unclear what such a permitting regime will entail, or how it will be processed as it does not have an existing basis in the health and safety regime. It is therefore extremely difficult to judge the implications for the sector of this new requirement. It is also unclear how well resourced the regulator will be. In particular, in light of previous experience, it is also difficult to judge the future risk of regulatory failure as the requirements being placed on the health and safety regulator appear to be significant. If under-resourced, or alternatively, over-bureaucratic, this could hinder the commencement of mining activity much in the same way as resource-consenting currently does. It could also undermine the health and safety regulator's ability to effectively administer health and safety law.

In light of this, BusinessNZ does not support the inclusion of clause 33AA into the amending Bill.

"Reasonable Grounds"

New proposed clause 33AB(1) states that:

> **"33AB Health and Safety Regulator to notify chief executive of breaches of legislation**
>
> "(1) If the Health and Safety Regulator has *reasonable grounds* to suspect that a permit holder has contravened or failed to comply with the Health and Safety in Employment Act 1992….."
>
> (emphasis added)

It is unclear what would constitute "reasonable grounds" and the implications were reasonable grounds to be found by the regulator. Its position in the Bill suggests that it would be used as an input into the annual review. However, it is unclear, for example, if there are reasonable grounds found, whether this would constitute the basis of the Minister, under section 39, being satisfied that a permit holder has contravened a condition of the permit or a condition imposed by this Act or the regulations.

These issues should be given further consideration before the inclusion of 33AB into the Bill.

Coverage

Finally, while potentially stating the obvious, the Crown Mineral Act only covers Crown-owned minerals. As a result of this, not all coal mines are covered, and require permits under the Act. Those mines (such as East Mine, Huntly) not covered by the Act are therefore only covered by the requirements of the Health and Safety in Employment Act. The inclusion of greater health and safety requirements into the Crown Mineral Act creates a two-tiered health and safety system which is undesirable.

Summary

BusinessNZ understands the desire to implement the recommendations of the Report of the Royal Commission of Inquiry into the Pike River tragedy that

seek to better integrate health and safety matters into the permit allocation and management provisions of the Act.

On its part, the sector welcomes the need to have high health and safety standards. Many already exceed industry best practice. It also welcomes a conversation about how to improve these standards.

But we are not convinced that better integration is in fact the best solution to deliver the objective of improved health and safety. More specifically, the practical implications of the SoP do not appear to have been fully thought through either with respect to internal consistency or the adverse risks associated with its implementation, such as the creation of overlapping regulatory responsibilities.

As a result, the changes outlined in the SoP appear to not be either strategically aligned with the purpose of the Act (to the extent that it is unclear if the changes are *necessary* to achieving the purpose of the Act) or with other Government initiatives already underway in the health and safety sphere.

BusinessNZ considers that further consideration should be given to these issues before the SoP is included into the Bill.

Yours sincerely

John A Carnegie
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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.