Energy Resources Aotearoa
POWERING A BETTER NEW ZEALAND TOGETHER

energyresources.org.nz
energyskills.org.nz
energymix.co.nz
PO Box 25259, Wellington 6140

23 January 2023

Committee Secretariat
Economic Development, Science, and Innovation Committee
By email: edsi@parliament.govt.nz

Submission on Crown Minerals Amendment Bill 198-1

Introduction

1. Energy Resources Aotearoa is New Zealand's peak energy advocacy organisation. We enable constructive collaboration across the energy sector through and beyond New Zealand's transition to net zero carbon emissions in 2050.

2. This represents our submission on the Crown Minerals Amendment Bill 198-1 (the Bill) and should be read in conjunction with the relevant parts (pages 7 – 10) of our January 2020 submission on the consultation document for the reform of the Crown Minerals Act 19191 (the Act) available at: https://www.energyresources.org.nz/dmsdocument/128

3. We wish to appear before the Select Committee to present our submission.

Key points

- Energy Resources does not support the changes to the Crown Minerals Act proposed in Part 1 of this Bill.
- The current purpose statement of the Crown Minerals Act is fit for purpose and already provides sufficient flexibility to manage the Crown's minerals estate.
- Changing the purpose statement's focus from an economically focused "efficient allocation" to a passive, administratively focused "efficient processing" represents a fundamental change in the purpose of the Act that has not been adequately addressed. We do not support this change.
- We support the intent of improving the overall quality of engagement between permit holders and iwi. However, we consider the Petroleum Programme 2013 provides sufficient guidance on Crown's expectations for quality iwi engagement. The proposed changes seek to shed more of the Crown's responsibilities as treaty partner on to permit holders.

- We do not support Clause 11. This gives decision makers the flexibility to apply a new cultural competency test when assessing permit applications. This test will be, by its nature highly subjective.

- We support the intent of Clause 13 which introduces an annual iwi engagement meeting. However, the proposed legislation requires redrafting to reflect the treaty relationship being between the Crown and iwi, and that an iwi's rohe may contain multiple permits, so more than one operator may be required to attend a review meeting.

Submission

In the following "permit holder" should also be read to apply to licenses issued under the Petroleum Act 1937.

Overarching points

Concerns about the policy development and consultation process

4. We appreciate consultation on these matters was first undertaken in January 2020 in the "*Review of the Crown Minerals Act 1991"* discussion document.[1] However, in relation to this review, we are concerned these important changes were introduced to the House under urgency just prior to Christmas. It is unclear why these matters require such urgent attention with an unnecessarily truncated consultation period.

5. Further, it is difficult to meaningfully engage with many of the issues in the Bill with no reference or discussion to the crucial details that must be delivered through regulations amendments and the critically important Petroleum Programme.

6. The Legislation Design and Advisory Committee's Legislation Guidelines recommend that amendments to legislation include consideration of secondary and tertiary legislative design and content, unless there is good reason not to.

Crown Minerals regime sits in a wider regulatory ecosystem

7. Energy Resources supports a Crown Minerals regime under which the Crown seeks for its petroleum estate to be developed, to realise an economic return on its assets through royalty payments with the co-benefits of economic development, energy security and supply of minerals.

8. The fundamental role of the Crown Minerals Act 1991 ("CMA") is to provide the institutional framework to efficiently allocate permits to competent commercial

---

1 *"Discussion document - Review of the Crown Minerals Act 1991"* available at: https://www.mbie.govt.nz/dmsdocument/7320-discussion-document-review-of-the-crown-minerals-act-1991

operators, and to look after the Crown's rightful interest in its resources being efficiently developed. Other regimes in the broader regulatory system are better suited to (and already do) manage externalities and provide for non-market objectives.

9. Indeed, the view that the CMA sits within a wider ecosystem of legislation was confirmed in a recent High Court decision declining an application for a judicial review on the issuing of new exploration permits based on climate change considerations.[2] Justice Cooke declined the application on the basis that such considerations were irrelevant in the decision to grant the permits and to consider broader implications, such as climate change, would have been to act unlawfully.

10. We recognise the pressure of climate change issues globally but believe an effective CMA regime can and should retain its role in allocating permit rights, while sitting alongside a range of other measures to manage environmental effects.

Part 1: Amendments to Parts 1 and 1A of principal Act

11. We oppose the changes proposed by Part 1 of the Bill as the current purpose statement is fit-for-purpose.

12. We also note the CMA is intended to work across all Crown owned minerals. We consider changing the purpose of the Act to reflect a narrow, carbon emissions focused purpose, is inappropriate in this context.

The purpose of the Crown Minerals Act remains unchanged

13. The Crown Minerals Amendment Act 2013 added the current purpose statement. This addition was entirely consistent with the original purpose and objectives of the legislation as envisaged in 1989.

14. When developed in 1989 the primary objective of the Crown Minerals Act was to "maximise the contribution of energy and mineral resources to the long-term welfare of New Zealand". The current purpose statement, which refers to promoting the prospecting for, exploration for, and mining of Crown owned minerals "for the benefit of New Zealand", remains entirely consistent with this original intent.

15. Importantly the words "for the benefit of New Zealand" are interpreted in the Petroleum and Minerals Programmes as best achieved by increasing New Zealand's economic wealth through maximising the economic recovery of Crown

---

[2] See Students for climate solutions incorporated versus the Minister of energy and resources, available at: https://forms.justice.govt.nz/search/Documents/pdf/jdo/20/alfresco/service/api/node/content/workspace/SpacesStore/5680ced2-032e-4ed9-b3a0-e4e8fa4e1436/5680ced2-032e-4ed9-b3a0-e4e8fa4e1436.pdf

owned minerals. Other important components of "the benefit of New Zealand", including environmental considerations, are covered in other legislation.

16. Therefore, it should be recognised the CMA sits within a legislative ecosystem where the allocation of rights for the exploration and development of Crown owned minerals is only one part of the exploration and mining process. To introduce additional considerations already covered by other legislation further undermines the overall integrity of the system.

The Crown has sufficient flexibility with the current purpose statement

17. Clause 4 of the Bill seeks to remove the obligation on the Minister to promote the exploration and development of the Crown's minerals estate, replacing it with a passive role in managing the estate.

18. Promotion in this context is to attract inward investment to explore and develop the Crown's Mineral estate. Key to this is ensuring suitable acreage is available for potential investors who are incentivised to allocate capital to maximise returns. Capital allocation decisions necessarily consider a range of market and other factors, including environmental protections. It is important these signals, such as commodity prices and the NZ ETS provide sufficient incentives for potential investors to make informed decisions.

19. The purpose statement applies equally to both petroleum and minerals elements of the CMA. The evidently different approaches the Crown takes in promoting its mineral estate, as compared to petroleum, provides ample evidence the purpose statement, as currently written, already provides sufficient flexibility for the Minister "…to promote prospecting for, exploration for, and mining of Crown owned minerals…" without the need for change.

20. How the Crown promotes the development of its mineral estate is a choice. There are many legitimate means for the Crown to meet its promotional obligations. We note that at the time of the 2018 offshore exploration acreage ban Minister Woods said in an interview with Stuff; *"There is nowhere in the Act that defines how often that acreage has to be offered up. There's nowhere in the Act that defines whether it has to be onshore or offshore."*[3] Clearly the Minister held the view the CMA had sufficient flexibility for the Crown to promote exploration and mining on its own terms.

The efficient allocation of rights is a fundamental purpose of the CMA

21. Functionally the CMA is not merely about granting permits quickly and cheaply, but about having an allocative regime that best achieves economic efficiency for the benefit of all New Zealand. It is important this functionality be respected and retained.

---

3 Available at : https://www.stuff.co.nz/business/104497638/energy-minister-says-onshore-block-offer-is-enough-to-fend-off-legal-threat-from-oil-industry

22. However, Clause 4.2 seeks to alter section 1A(2) from "the **efficient allocation** of rights to prospect for, explore for, and mine Crown owned minerals" to "the **efficient processing and consideration** of applications for rights to prospect for, explore for, and mine Crown owned minerals" (emphasis added). The Petroleum Programme is clear on how the "efficient allocation of rights" is to be interpreted, which is to ensure an economically efficient allocation of its resources. We note efficient allocation of resources is one of the principles guiding the development of allocation methods for freshwater in the Natural and Built Environment Bill currently under consideration by select committee, so this is not without parallel in other legislation.[4]

23. We are concerned this change is a fundamental change to the CMA that mischaracterises a desired economic efficiency and outcomes as an administrative efficiency. Indeed, efficient allocation is a highly desirable outcome all resources across the entire economy. The proposed changes do not recognise the significance of this economic concept.

24. Nationalised minerals are not subject to a pure market for the allocation of rights. Neither is there a capital market to signal whether markets consider government is managing its resource efficiently. Therefore, a permit regime that promotes competition and efficient allocation is important if the efficiency of market allocation is to be mimicked.

25. To achieve a market-led allocation, the Crown should leave acreage open to nominations for offers or direct applications from commercial operators. This contrasts to the proposed government-directed planning model whereby the Crown decides when and where acreage is to be made available for applications.[5]

Concerns over the allocation of future permits

26. We do not support the proposed change to s5(a) of the CMA.

27. Clause 5 amends the functions of Minster from attracting applications for permit to a somewhat bland function of "…from time to time offer permits for application by public tender". While consistent with removing the Minister's obligation to promote the development of Crown owned minerals, this amendment provides no predictability for entities wishing to apply for new permits in the future. This statement also displays a lack of understanding of petroleum exploration and development risks and timelines (often taking up to

---

4 See page 4 of the Bill's explanatory note, available at: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_129831/natural-and-built-environment-bill

5 We recognise that as resource owner the Crown may, for non-economic reasons, choose to not allocate its resources but where this occurs it should be transparent about the decision-making process and the economic costs of this.

ten years from exploration discovery to production). It is also inconsistent in that it fails to recognise the ongoing role of natural gas in New Zealand's energy mix.[6]

28. Finally, we are not clear how the proposed change to s5(a) relates to the political commitment to review the allocation process exploration acreage after the 2020 block offer has concluded. This change seems to obviate the need for a review, or at least pre-empt the outcome and therefore seems inconsistent with prior Government commitments.

29. This legislative change appears to be undertaken with undue haste. We agree it makes sense to align a review of future block offers with the gas transition plan (GTP) being worked up by MBIE and the GIC. However, to pre-empt the outcome of the review by making the proposed changes to s5(a) is not consistent with due regulatory process. We recommend any changes s5(a) should be considered at the conclusion of an appropriate review and consultation process.

Public consultation is an essential component of our legislative process

30. We do not support the amendment to s16(3) proposed by Clause 6.

31. We are surprised and disappointed with the provision in Clause 6 which removes the requirement for public consultation when updating the minerals programmes to reflect amendments proposed by this Bill.

32. Public consultation is an essential part of the legislative process and should not be set aside for the convenience. The Bill proposes a number of fundamental changes to the CMA, and it is fair and reasonable to expect the Crown to seek wider views on how these changes are to be interpreted. To not do so is to risk valuable insights and perspectives being overlooked.

Part 2 amendments to other provisions of principal Act

33. Part two proposes a range of changes to the principal Act. Broadly the proposed changes fall into two categories; strengthening iwi and hapū engagement and a suite of more technical amendments to reflect the proposed changes in Part 1. Our submission focuses on the former.

Strengthening iwi and hapū engagement

34. We support the intent of the Bill in improving the overall quality of engagement between permit holders and iwi. However, the proposed changes appear as an attempt to legislate a (subjective) quality of engagement between iwi, hapū and permit holders, which we submit is misguided.

---

[6] Advice from the Climate Change Commission, while noting the need to transition to lower carbon energy sources, acknowledges the ongoing importance of natural (fossil) gas in a net-zero carbon economy. The CCC advice to Government is available at: https://www.climatecommission.govt.nz/public/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa.pdf

35. We also note the explanatory note and RIS accompanying the Bill outline the premise for strengthening engagement with iwi and hapū is because expectations are unclear. We consider Section 2.11 of the Petroleum Programme 2013 provides sufficient and fulsome guidance on Crown's expectations for quality iwi engagement.

36. Our members report high levels of engagement with iwi and hapū in the regions they operate in. The amendments proposed inherently assume it is the fault of permit holders as the cause of poor-quality engagement. As a result, the potential consequences fall unevenly.

37. A far better outcome would be for the Crown, as resource owner and administrator on behalf of all New Zealanders, to take a more proactive approach in managing the Crown-Māori relationship.

38. A more proactive approach to the Crown-Māori relationship by the regulator would better meet the requirements of Section 14 of the Public Service Act 2020. Section 14 places an obligation on the public service to develop and maintain the capability "to engage with Māori and to understand Māori perspectives". The proposed appear to shed some of this responsibility onto permit holders.

Clause 11 - new section 29C – having regard to feedback from iwi and hapū

39. We do not support inserting a new s29C into the CMA.

40. Cultural competency has not been a criterion for assessing the competency of a permit holder and their likelihood to give effect to the permit. The changes proposed by Clause 11 are a vaguely worded represent a significant shift in the process of assessing an application.

41. Legislation needs to be practical and enforceable and parties subject to legislation should have reasonable certainty as to "what the rules are". The proposed amendments look to introduce ambiguous, after the fact assessment criteria on a permit holder's dealings with non-Crown actors.

42. There is an inherent incompatibility in the way the CMA is designed, which is to anchor the rights and obligations of holders to a specific permit (or license), and the Crown's expectations on permit holders to engage with iwi and hapū. This amendment seeks to navigate this incompatibility by taking a portfolio approach to permit holder's engagement, while at the same time anchoring on specific obligations for holders of permits. Essentially the Crown seeks to regulate at both specific permit level and a portfolio, which is inconsistent in how other parts of the CMA are applied.

43. Should the quality of previous engagement with iwi and hapū be a factor the Minister considers, the applicant must have the opportunity to review and comment on any feedback from iwi and hapū relevant to the decision. To not do so would be to circumvent the applicant's right to natural justice.

44. We also remind decision makers that a permit holder is a distinct entity, often presenting as an unincorporated joint-venture, where the permit participants and the operator may vary. Care needs to be exercised to ensure any changes to legislation reflect company structures and ensure permit participants are not unfairly treated in respect of previous iwi engagement by other participants.

Clause 12 - Proposed changes to Section 33C (iwi engagement reports)

45. We do not support the proposed amendments to s33C.

46. The Crown has a responsibility to engage with both the permit holder (in the capacity as beneficiary, legislator, resource owner and regulator of activities) and relevant iwi and hapū (as treaty partner). While we support the current requirement for permit holders to report their engagement with iwi and hapū and support the intent of proposed new Section 33CA (discussed below), we do not support seeking feedback on a report prior to submission. To do so creates unreasonable expectations and may lead to unnecessary tensions with the permit holder over perceived differences in the relationship.

47. We submit it is the Crown's responsibility to engage with affected iwi and hapū without shedding this responsibility to permit holders. The Crown should actively and positively engage with iwi once all engagement reports have been received and feedback from permit holders has been collated and assessed. Essentially, we argue the proposed amendment seems to require the permit holder to engage on behalf of the Crown as treaty partner, which they are not able to do.

48. The explanatory note does not elaborate on what the minimum content of an iwi engagement report maybe. In the absence of any such detail we are concerned these changes may require permit holders (operators in particular) to breach confidentiality agreements that may be in place.

49. We do not support minimum prescribed content for iwi and hapū engagement reports. This requirement appears to target specific permit holders and is not proportionate for others who provide greater detail in their annual report. Indeed, it is the very lack of detail in the report that should provide an important signal for the Crown in managing its iwi relationships.

Clause 13 - New section 33CA inserted (Annual review meeting about iwi engagement)

50. We support the intent of the proposed amendment allowing the Chief Executive to require an annual review meeting about iwi engagement reports.

51. However, we recommend new Section 33CA be redrafted to better reflect the treaty relationship is between the Crown and iwi, and that an iwi's rohe may contain multiple permits.

52. The chief executive may then require at least one representative of the permit operator to attend a meeting with iwi relating to their specific engagement

reporting. This approach is consistent with the Crown's broader obligations as treaty partner and provides the flexibility to invite more than one permit holder to attend as needed.

53. However, we consider that the insertion of s33CA(3)(b), whereby the Minister may invite 'any regulatory agency' that the Minister 'thinks is likely to have regulatory oversight of activities under the permit' is highly inappropriate. For the Minister to invite other regulatory agencies, especially without due consideration and discussion with the permit operator, again raises the issue of natural justice.

Clause 14 – Section 41 amended (Transfer of interest in permit)

54. The proposed drafting of s41(6)(b) incorrectly refers to subpart 3 of Part 1B of the CMA. Subpart 3 does not appear in the current version of the CMA.

Clause 18 – Section 89D amended (Interpretation)

55. The proposed amendments in s89D are unclear in their meaning and intent.

56. The language for the amendment is confusing and does not make clear how this should be interpreted in relation to other sections of the CMA. Our interpretation is these amendments are intended to give the Minister power to specify financial security arrangements where consent is sought to transfer an interest to a new, presumably less financially and technically capable, party.

57. It is unclear why these amendments are necessary. Section 89L(3) requires that prior to consent being grant a transferee must comply with the directions of the Minister to either enter a financial security arrangement with other permit participants or become a party to existing financial security arrangements.

58. We submit the vague drafting of s89D(2) and (3) will create further barriers to efficient permit transactions by increasing regulatory uncertainty.

Clause 19 – minimum prescribed content of iwi engagement reports

59. We do not support amending Section 105 to provide for regulations to prescribe the minimum content of an iwi engagement report.

60. Our overarching comment in the case for strengthening iwi engagement also applies in this case. It is difficult to see what public policy issue this proposed amendment is looking to address. Engagement between two (or more) parties is complex. To prescribe minimum content presumes to know the purpose and content of any interaction. It seems this change may be intending to address concerns with specific permit holders and is not reflective of the sector at large.

61. We are also concerned minimum content requirements, when considered with the proposed changes to Section 33 by Clause 12, may put permit holders in an

untenable position of having to meet minimum regulatory requirements while maintaining key relationships.

Summary

62. Energy Resources does not support the amendments to the CMA proposed in this Bill. These amendments represent a further and unnecessary blurring of the purpose and intent of an Act with a clear regulatory purpose that sits within a broader complementary set of legislation.

63. The proposed amendments send a concerning signal to potential investors in New Zealand's petroleum and minerals sector at a time when cost of living and security of supply issues are becoming increasingly important. It is our view the CMA already provides sufficient flexibility and remains fit for purpose. These amendments will further erode investor confidence in the sector at a time where ongoing investment is needed to support our transition to a low carbon economy.