

9 June 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Crown Minerals (Decommissioning and Other Matters) Bill

Purpose

1. We have considered whether the **Crown Minerals (Decommissioning and Other Matters) Bill** (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22621/5.4). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 21 (right to be secure from unreasonable search and seizure), and section 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The Bill amends the Crown Minerals Act 1991 (the Act) in order to strengthen the legal and financial responsibility for decommissioning the petroleum sector infrastructure and makes other amendments not specific to decommissioning that apply across the Act as a whole. The decommissioning obligations in the Bill apply equally to permit holders under the Act and licence holders under the Petroleum Act 1937.
5. Decommissioning is the process of taking petroleum infrastructure and wells out of service, which may include removing the infrastructure, plugging and abandoning wells, and undertaking necessary site restoration activities. The explanatory note to the Bill explains that New Zealand's petroleum sector is maturing, and an increasing number of petroleum fields are nearing the end of their economic lives and will soon require decommissioning. The costs of decommissioning are described as substantial and the environmental effects and health and safety risks of failing to decommission can be significant.
6. There is currently no explicit statutory obligation to decommission under the Act, which means that there is a lack of clarity about permit and licence holders' responsibilities, the length of time for which they are responsible, and the consequences of failing to decommission.
7. The Bill introduces a number of new provisions to mitigate the risk to the Crown and to other third parties of having to carry out and fund decommissioning. The Bill introduces an explicit statutory obligation for all current and future petroleum permit and licence holders to carry out and meet the financial costs of decommissioning activities and creates a civil pecuniary penalty and criminal penalty for failing to meet this obligation.

8. The Bill creates an obligation for permit and licence holders under the Act to establish and maintain financial security for decommissioning petroleum infrastructure and wells. The Bill also grants necessary powers to the regulator to ensure effective implementation of the decommissioning process.
9. The Bill also includes changes that are not specific to decommissioning and will apply across the whole of the Act. These include amending the requirements for acquiring a permit to effectively give the decision-maker a higher level of confidence that the proposed permit holder will comply with permit conditions and regulatory requirements; providing the regulator with the power to impose enforceable undertakings and issue compliance notices and infringement notices; and make other amendments to improve the administration of the Act.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

10. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.¹
11. A number of clauses within the Bill provide that the Minister of Energy and Resources or the chief executive may require a permit or licence holders, and non-permit holders to disclose certain information.

New sections compelling provision of information

12. New section 89ZA requires persons who hold a permit or licence to explore or mine petroleum to provide information that the Minister considers necessary to monitor the person's financial position while the permit or licence is in force. New section 89ZC requires a permit or licence holder to keep a record of any information prescribed by regulation as necessary to enable a financial capability assessment. New section 89ZD requires a permit or licence holder who is obliged to carry out and meet costs of decommissioning to prepare and submit an asset register to the Minister.
13. There are other new sections that also mandate the standard provision of information by permit or licence holders to either the Minister or chief executive, in a prescribed manner within a prescribed time.
14. These provisions *prima facie* limit the freedom of expression of permit and licence holders under section 14 of the Bill of Rights Act.
15. However, a limit on a right or freedom may be justified if it can be considered reasonably justified under section 5 of the Bill of Rights Act. A limit on a right may be justified where the limit seeks to achieve, and is rationally connected to, a sufficiently important objective, impairs the right or freedom no more than reasonably necessary to achieve the objective, and is otherwise in proportion to the importance of the right.²

¹ See, for example, *Slight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

16. The Bill's objective is to create a statutory obligation for permit and licence holders to take petroleum and infrastructure wells out of service, to ameliorate the ongoing environmental impact of petroleum infrastructure. The Bill also seeks to create a structure around licence conditions to equip the regulator with necessary tools for administering and enforcing the Act, including to mitigate the risk to the Crown of having to bear decommissioning obligations where a permit or licence holder is unable to do so. We consider these to be important objectives.
17. Information gathering powers within the Bill are rationally connected to this objective because the monitoring of the financial capability or financial position of petroleum and licence holders is intended to ensure that they will be able to fulfil their decommissioning obligations.
18. The information required by new sections 89ZA, 89ZC and 89ZD of the Bill does not go beyond what is necessary in order to provide the Minister or the chief executive with the relevant information to enable them to monitor whether a permit or licence holder is able to fulfil their decommissioning obligations and is therefore proportionate to the importance of the right to freedom of expression.
19. For these reasons the limitations placed by these sections on section 14 of the Bill of Rights Act are justifiable with respect to section 5 of that Act.

New offence of failure to provide information

20. Clause 22 of the Bill amends section 100 of the Act to create a new offence of contravening or permitting a contravention of section 99F of the Act. Every person who commits an offence against this section is liable to a fine not exceeding \$20,000, and, if the offence is a continuing one, to a further fine not exceeding \$2,000 for every day or part of a day during which the offence continues.
21. Under s 99F, the Minister, the chief executive, or any enforcement officer may, by written notice, require any person to provide any information that the person giving the notice considers is necessary for any purpose relating to that person's functions, duties, or powers under the Act or for the administration or enforcement of the Act.
22. This provision creates a new offence provision meaning that someone is liable to a criminal conviction for the failure to provide information and therefore *prima facie* limits section 14 of the Bill of Rights Act. We have therefore considered whether this *prima facie* inconsistency can be justified under s 5 of the Bill of Rights Act.
23. We understand that while it is an offence for a permit holder not to comply with a requirement to provide information, a failure to comply by non-permit holders is not an offence. Accordingly, we understand that the purpose of the new offence provision is to encourage compliance with the Act and to ensure that the regulator has relevant information for the enforcement and administration of the Act.
24. The power to require information is limited by s 99F. Information may only be requested where the requestor considers it is necessary for any purpose relating to that person's functions, duties, or powers under the Act or the administration or enforcement of the Act. The power to request information should only be exercised for purposes connected to the operation of the Act and the power must be exercised in compliance with the Bill of Rights Act. The Bill does not limit the application of section 60 of the Evidence Act

2006 and therefore a person from whom information is requested retains a privilege against self-incrimination.

25. The criminal offence provision for failure to provide information is rationally connected to the objective of obtaining necessary and relevant information to enable the operation of the Act and can be considered a proportionate response.
26. For completeness, we consider that the power to require information can also be considered a search and the new offence provision for the failure to provide information may also engage section 21 of the Bill of Rights Act, which protects against unreasonable search and seizure.
27. For the reasons above, we consider that any limits placed by clause 22 of the Bill on the right to freedom of expression and the right to be secure against unreasonable search and seizure are justifiable with regard to section 5 of the Bill of Rights Act.

Section 25(c) – Right to be presumed innocent until proven guilty according to law

28. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.³
29. In order to give full recognition to this right, which is also a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.
30. The Bill creates strict liability offences for contraventions of enforceable undertakings and compliance notices. Strict liability offences *prima facie* limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.
31. Strict liability offences have been considered more justifiable where, as is the case here:
 - a. the offence is in the nature of a public welfare regulatory offence in order to protect the public;
 - b. the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
32. The Crown Minerals Act governs a heavily regulated environment in which parties are well aware of the risks and expectations of the system. The Bill provides a wide range of enforcement tools to improve the administration of the Act. Proper regulation of the sector is necessary in the public interest as it will reduce or prevent environmental harm, health and safety risks as well as costs to the Crown of funding and conducting decommissioning.

³ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

33. In light of the environment in which the strict liability offences are to operate, we have considered whether they place a justifiable limitation on the right to be presumed innocent under section 5 of the Bill of Rights Act.

Contravention of an enforceable undertaking

34. New section 89ZZ creates a strict liability offence when a person who has given an enforceable undertaking, contravenes that enforceable undertaking while it is in force. Every person who commits an offence against this section is liable to a fine not exceeding \$200,000. An enforceable undertaking is a mechanism that enables regulators to get a commitment from parties within a regulated environment to make an effort to remedy a wrong or improve conduct. An enforceable undertaking allows a person to correct the wrong conduct, where prosecution would otherwise occur.
35. In the context of the Crown Minerals regulatory space, a person who gives an enforceable undertaking does so in a public welfare regulatory environment with which they are familiar. Additionally, a person has to voluntarily enter an enforceable undertaking in relation to a contravention or alleged contravention of the Act. In these circumstances, the defendant is likely to be in the best position to justify their apparent failure to comply with the law. We also note that the potential penalty is solely financial in nature and no term of imprisonment is possible. For these reasons we consider that the new section 89ZZ places a justified limitation on the right in section 25(c) of the Bill of Rights Act.

Contravention of a compliance notice

36. New section 89ZZD allows the chief executive or an enforcement officer to issue a compliance notice in relation to a contravention or likely contravention of the Act. New section 89ZZF creates a strict liability offence for the failure to comply with a compliance notice within the time frame specified in that notice. This also *prima facie* places a limit on the right under section 25(c) of the Bill of Rights Act as it reverses the normal burden of proof and places it on the defendant. We have considered whether the limit is justified under section 5 of that Act.
37. The offences in the Act apply in a public welfare regulatory environment which is commercial in nature and with which regulated persons are familiar. We note that there are a wide range of potential contraventions of the Act and not all contraventions may be of equal seriousness or amount to harm to the environment or the public. However, we consider that the new section 89ZZD provides necessary safeguards to ensure that the chief executive or enforcement officer only issues a compliance notice in situations where they are satisfied that the contravention of the compliance notice is serious, repetitious, or done intentionally, recklessly or involving negligence.
38. New section 89ZZF(3) provides the defendant with a defence of reasonable excuse (which must be proven by the defendant on a balance of probabilities). This defence is broader than the common law defence of total absence of fault. In circumstances where a person is charged under section 89ZZF(2), it is likely that the defendant would be in a better position than the prosecution to justify their apparent failure to comply with the compliance notice within the specified time.
39. The penalty for the offence is financial in nature (it carries a fine of up to \$200,000) and does not involve imprisonment. We consider financial penalties are appropriate in a heavily regulated environment of a commercial nature to ensure that parties comply with

the Act and regulations and thereby meet the Bill's objective of improving the administration of the Act.

40. For the reasons set out above, we have concluded that the proposed new sections 89ZZD and 89ZZF are justified under section 5 of the Bill of Rights Act.

Conclusion

41. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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