
The global context of New Zealand’s mining legislation

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The issues that mining and oil and gas raise are not unique to New Zealand, and the extractive industries are very international in character; so it can be illuminating to put New Zealand issues and law into a broader global context.

Mining and petroleum are a huge part of successful economies in countries such as Australia, Canada, and Norway, and, if one looks back further, the United States and the United Kingdom. On the other hand, many countries have a history of poor outcomes from mining and petroleum extraction. The “resource

curse” has afflicted many developing countries, because resource rents can be harmful to democracy (P Collier *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford University Press, New York, 2007)). Mining has sometimes led to poor results in countries not far from us, such as Papua New Guinea and the Solomon Islands. In contrast, New Zealand has strong rule of law, little corruption, and many restraints on power in the political system, so it is relatively secure from such harms. This paper considers New Zealand’s mining, oil and gas legislation in a broader global

context to see what lessons can be learnt from other jurisdictions.

The state has a complex role in mining, oil and gas, in many countries being the legislator, resource owner, environmental manager, regional economic developer, and industry participant all at once. In *Petrocorp Exploration Ltd v Ministry of Energy* [1991] 1 NZLR 641 (PC) the courts struggled to agree whether the case was in private law, between co-venturers, or in public law, concerning the exercise of statutory powers. The New Zealand government no longer plays a commercial role in mining or oil and gas, but complexity remains in its different legislative, regulatory, promotional, and royalty-extracting roles. Internationally, minerals are often declared to be the patrimony of the nation, subject purely to the permanent sovereignty of the state. There is a long history of tension between such economic nationalism or state control, with the free play of market forces, international capital flows, and laissez-faire approaches in mining legislation, embodied in the “Washington Consensus”. Mexico has recently opened up its oil sector, long under the state monopoly of Pemex. Other countries like Venezuela and Bolivia remain opposed to foreign involvement.

As well as a tension between state control and the market, there is a tension between national and local levels within a country (J Williams “Global Trends and Tribulations in Mining Regulation” (2012) 30 JERL 391). Resources industries are highly transnational, but they are fundamentally local as well. In some countries, local communities complain that they receive only the adverse effects of mineral operations in their district, and none of the positive benefits which are instead reaped in the capital city or overseas. These complaints are especially prevalent in countries such as the Democratic Republic of Congo, where state institutions are ineffectual, and where central government has a long record of doing nothing positive for its people. However, claims for regional or community benefits from resources projects are spreading and are no longer found only in the developing world or in isolated hinterland regions. One example is Local Government New Zealand’s proposal in the 2014 general election that mineral royalties be shared with local communities. Such new emphasis on localism and sharing benefits with communities has become widespread. It is associated with ideas of social licence to mine and corporate social responsibility. A leading example of the determination to make mining an instrument for positive social change is South Africa’s Mineral

and Petroleum Resources Development Act 2002. A broad-based socio-economic empowerment Charter was promulgated under it in order to promote the entry of historically-disadvantaged South Africans into the mining industry.

Aboriginal interests are bringing about changes to mining legislation in some countries. In Canada one important challenge has been to the free entry system where a miner can stake a claim on land open to staking, and obtain mineral title, without first seeking government permission. This legacy of the gold rushes of the 19th century was held in 2012 to be incompatible with the duty of the Crown to consult and accommodate (*Ross River Dena Council v Government of Yukon* 2012 YKCA 14). In Ontario, substantial changes to the Mining Act RSO 1990 c M14 were made in 2009 to give greater recognition to Aboriginal interests, and the new Far North Act SO 2010 c 18 put Aboriginal communities in a leading position in land use in the province’s north. However, an overall pattern of legal change is only gradually emerging.

Much of the detail of mining legislation anywhere is directed at the balance between security of tenure and regulatory flexibility. Security of tenure is important to mining and petroleum companies, who make large capital investments that will pay off over a long period, and that cannot be moved from one place to another. They face considerable geological and market risk, and are uneasy about political and regulatory risk. Internationally, there is an ample history of horror stories of expropriation or corrupt changes to the rules once a company has committed itself to a host jurisdiction. New Zealand offers few such worries; changes to taxes or environmental requirements — the sort of changes that a company may expect to encounter here — are scarcely expropriation. But we see the concern with security of tenure displayed in the Crown Minerals Act 1991 (CMA), in s 32, which effectively guarantees that if the holder of an exploration permit makes a discovery, then it will be able to obtain a production permit for it. In some countries, stabilisation clauses and bilateral investment treaties are important means of increasing security of tenure. In New Zealand, the much-awaited Trans-Pacific Partnership Agreement is likely to be important for investment disputes.

At the same time, regulatory flexibility is evidenced in the CMA. The methods of allocation of exploration and production permits are essentially discretionary ones, even though the minerals programmes made under the Act go a considerable way to restrict and explain how various specific discretionary powers

will be exercised. Discretionary modes of allocation of permits, including competitive bidding rounds for oil and gas, are good practice internationally. The free entry system is now effectively confined to the United States and Canada. In some countries, including parts of Australia, state agreements are specially negotiated for each project and ratified by the legislature if necessary. However the procedure is one that is vulnerable to special interests, opaque in its balancing of different values and is therefore not a good example for New Zealand. The “use it or lose it” principle that is embodied in the CMA’s requirements for work programmes and forfeiture is common elsewhere, and acts to prevent speculation in mineral rights by parties who do not carry out actual exploration and development work. Restrictions on transfer, such as those contained in s 41 of the CMA, are also common. They are often accompanied by restrictions on foreign ownership, although none of them are to be found in the New Zealand Act.

The 2013 amendments to the CMA introduced a number of interesting mechanisms but few of them stand out from an international or comparative point of view. The division of permits into Tier 1 and Tier 2 permits depending on their complexity is unusual. Some countries have separate legislation for quarries, which disposes of some of the simpler projects, and enact separate petroleum legislation, which deals with many of the more complex ones. The annual meetings and coordination with health and safety and environmental regulators, which the 2013 amendments introduced, are also unusual, but they are likely to be regarded internationally as good practice.

New Zealand has more privately-owned minerals than many other countries (gold, silver, and petroleum, of course, are always vested in the Crown). The global trend over time is to move towards state ownership or control of all minerals. This is because complicated patterns of ownership tend to discourage mineral activity, especially in

the early stages of the exploration sequence where a company has a small budget and a large area of land to appraise. It is not worthwhile to invest in negotiations with multiple mineral owners when the chances of finding anything on their land is slim. Some countries have addressed this problem by simply vesting minerals in the state; others (including some Australian states) have made private minerals subject to the statutory regime as if they were Crown minerals; and some Canadian provinces have imposed mineral land taxes to encourage inactive mineral owners to transfer their rights to the Crown. There may be a case for such measures in New Zealand.

It is common internationally for environmental management to be carried out separately from the mining or petroleum legislation, but it is more common for it to be in the hands of national or provincial level agencies rather than agencies like New Zealand’s regional and local councils. There is work to do for regional councils to address the after-effects of mining and petroleum operations. Petroleum needs effective environmental regulation to ensure the proper plugging and abandonment of wells, and mining needs more attention to be given to the cost of rehabilitation of mine sites. Anecdotal evidence suggests that the bonds or other financial assurance taken for rehabilitation are rarely set at a level that will really supply the full sum required to rehabilitate a site in the event of financial incapacity on the part of the operator. Good legislation and practices elsewhere could offer paths forward: for example, M Hawkins “Rest Assured? A Critical Assessment of Ontario’s Mine Closure Financial Assurance Scheme” (2008) 26 JERL 499.

Some of the concerns that arise in mining and petroleum law globally are therefore apparent in New Zealand’s law, while other problems are thankfully distant. It is useful to put our law in the wider context and to identify opportunities for learning from comparative analysis.

